



# Guarantees for the Protection of Constitutional Justice in Algeria: From the Constitutional Council to the Constitutional Court in a Comparative Perspective

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## ABSTRACT

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Constitutional justice in many countries faces multiple challenges that affect the effectiveness of constitutional oversight institutions and the extent to which the rule of law and democracy are enshrined. In this context, Algeria, influenced by the Arab Spring revolutions and following the example of some comparable constitutional systems, has sought to develop its system of constitutional justice through successive constitutional reforms. The most recent of these was the 2020 Constitution, which approved the transformation of the Constitutional Council into a Constitutional Court, to strengthen guarantees for the protection of the Constitution and expand the scope of constitutional oversight.

Despite the importance of this transformation, it was not without problems that still raise questions about its effectiveness in achieving independent and effective constitutional justice, especially in light of the continuing dominance of the executive branch and the contradictions between the consti-

tutional and regulatory provisions governing the Constitutional Court's work. Based on this, this study aims to analyse the most prominent challenges facing constitutional justice in Algeria under the new constitution, using comparative constitutional systems that have been directly or indirectly affected by the Arab Spring, to highlight similarities and differences, and assess the adequacy of the guarantees adopted. The study also seeks to present a set of practical recommendations aimed at capitalising on this constitutional gain by avoiding the criticisms previously levelled at the Constitutional Council and closing the legal loopholes that may hinder the achievement of constitutional justice in line with the requirements of the rule of law.

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## INTRODUCTION

Under the hierarchy of legal rules, the constitution is considered the pinnacle of the state's legal structure, as all public authorities, whether legislative, executive, or judicial, are subject to its provisions. Based on this, the importance of the bodies responsible for achieving constitutional justice is highlighted, as they are the fundamental guarantor of the supremacy of the constitutional document and are entrusted with regulating the work of constitutional institutions, establishing controls to prevent their abuse, maintaining the balance between powers, and protecting the fundamental rights and freedoms of individuals.<sup>1</sup> This pivotal role has led to constitutional justice being given a central place in various contemporary constitutional systems. However, the models for its organisation and mechanisms for its exercise differ from one country to another.

While some comparative constitutional experiences have tended to assign the task of reviewing the constitutionality of laws to the courts of general jurisdiction, through a mech-

anism of pleading unconstitutionality and making the Supreme Court or Constitutional Court the final authority in determining the constitutionality of laws,<sup>2</sup> other experiences have adopted the model of the Constitutional Council, as was the case in Algeria and several countries with French influence. In contrast, many constitutional systems have adopted the model of an independent constitutional court with expanded powers, considering it more appropriate for strengthening the independence of the constitutional judiciary and enshrining the protection of rights and freedoms, an approach enshrined in the 2020 Constitution of the Republic of Algeria.<sup>3</sup>

This shift has resulted in the upgrading of the constitutional judiciary in Algeria from a constitutional council to a constitutional court. This development is not limited to formal or terminological aspects, but also extends to the expansion of the constitutional body's powers, as its role is no longer confined to reviewing the constitutionality of laws, but also includes

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1 Cardenas Gonzales, J. R. (2025). The Legislative Function of The Constitutional Court in Relation to the Omission of the Constituent. *Constitutional Review*, Vol. 11, Number 1, pp. 63-64. <https://doi.org/10.31078/consrev1113>.

2 Epstein, L., Shvetsova, O., and Knight, J. (2024). The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government. *Law & Society Review*, Vol. 35, Issue 1, p. 118. <https://doi.org/10.2307/3185388>.

3 Khane, F., Mecheri, D. (2025). The constitutional court of Algeria between necessity and tradition. *Russian Law Journal*, Vol. 13 No. 01, p. 1503.

constitutional control and advisory functions, similar to practices in some comparative constitutional systems. However, despite their positive implications, the new provisions governing the Constitutional Court are not without certain shortcomings, which raise questions about its actual ability to achieve constitutional justice in Algeria.

On this basis, this study raises several fundamental questions, most notably whether the legal provisions established to regulate the Constitutional Court under the 2020 amendment constitute guarantees for the protection of constitutional justice, and the extent to which the constitutional founder has responded to the criticisms levelled at the Constitutional Council system in the 2016 Constitution, in light of some comparative constitutional experiences.

This study is critical because it deals with a pivotal constitutional institution to which the constitutional founder devoted an entire chapter in Title IV, entitled 'Oversight Institutions', dedicated to defining the Constitutional Court, explaining its structure, working mechanisms and powers, which requires providing adequate guarantees for its independence and enabling it to fulfil its role in protecting constitutional justice and consolidating the rule of law. In this context, this research paper seeks to identify the most critical challenges facing the Constitutional Court in Algeria under the current constitution and to analyse their implications for the effectiveness of the constitutional justice system, drawing on relevant comparative experiences.

## METHODOLOGY

This study is based primarily on a descriptive and analytical approach, describing and analysing the constitutional and legal framework of the constitutional justice system in Algeria through two main stages: the Constitutional Council stage and the Constitutional Court stage, with a description of the powers of each, their composition, their working mecha-

nisms, and the extent to which this contributes to the consolidation and protection of constitutional justice.

The study also employs a historical approach by tracing the emergence and development of the constitutional justice system in Algeria and examining the various constitutional stages it has gone through, from the establishment of the Constitutional Council in previous constitutions to the creation of the Constitutional Court in the 2020 Constitution. The aim is to understand the political and constitutional background that led to this transformation and to explain its justifications and implications.

The study also makes partial and supporting use of the comparative approach, referring to some comparative constitutional experiences in several countries with similar political environments, to highlight similarities and differences and to clarify the extent to which Algerian constitutional legislators were influenced by or benefited from these experiences, without seeking to make a comprehensive comparison between constitutional systems.

Finally, the study relies on a deductive approach in analysing jurisprudential opinions and jurisprudence related to constitutional justice, to draw general conclusions and assess the effectiveness of the guarantees adopted to protect constitutional justice in Algeria.

## 1. CHALLENGES TO CONSTITUTIONAL JUSTICE LINKED TO EXECUTIVE BRANCH DOMINANCE

The achievement of effective constitutional justice remains closely linked to respect for the principle of separation of powers,<sup>4</sup> which is often challenged by the growing pre-eminence of the executive branch over the legislative and

4 Abdellaoui, S., Zouagri, T. et al. (2025). The oversight role of the constitutional court in Algeria. *Lex localis – Journal of Local Self-Government*, Vol. 23 No. 11, p. 1710. Doi:10.52152/sb70y652.

judicial branches.<sup>5</sup> In Algeria, the 2020 Constitution reflects a desire to move towards greater judicial oversight, in a context marked by the Hirak citizens' protests and the search for more transparent governance. The Constitutional Court, enshrined in Article 185 and presented as an independent institution under the control bodies, is part of this dynamic. However, a key question remains: is this proclaimed independence truly and effectively reflected in practice?

### 1.1 Organic autonomy of the Constitutional Control Authority

During the 2016 constitutional revision, the Constitution's drafters established a hybrid composition for the Constitutional Council, combining appointment and election. This body comprised twelve members: four appointed by the President of the Republic (including the President and Vice-President of the Council), two elected from among the members of the Supreme Court, two from among the members of the Council of State, two from among

the members of the Council of the Nation, and two from among the members of the National People's Assembly.<sup>6</sup> However, as the members of the Supreme Court and the Council of State were themselves magistrates appointed by the President of the Republic, this meant that eight members were directly or indirectly appointed by the President, compared with only four elected members. Furthermore, there was no guarantee that the elected members had proven expertise in constitutional law, raising questions about the technical competence and specialisation required to perform such sensitive functions.

Conversely, although the 2020 Constitution maintained the number of members of the Constitutional Court at twelve,<sup>7</sup> it introduced a new composition based on a combination of appointment and election. Four members are appointed by the President of the Republic, including the President of the Court, for a single six-year term. One member is elected from among the judges of the Supreme Court and another from among the members of the Council of State, who are initially magistrates appointed by the President.<sup>8</sup> The remaining six members, representing half of the Court's composition, are elected by universal suffrage from among professors of constitutional law.

Thus, the number of members directly or indirectly appointed by the President has been reduced from eight to six, while six other elected members specialise in constitutional law. This development constitutes a significant step forward for the constituent assembly, favour-

5 The current Algerian Constitution pays particular attention to the executive branch, to which it devotes two separate chapters: one relating to the President of the Republic and the other to the Government. This structure is a departure from previous constitutions, in which the three branches of government were grouped together in a single chapter, with each branch receiving specific treatment within that chapter. This formal imbalance between the branches of government is also reflected in substantive terms: the executive branch appears to be largely privileged, particularly with regard to the prerogatives of the President of the Republic. The latter is granted numerous powers affecting the legislative and judicial spheres, including: the power to legislate by decree, the possibility of dissolving the National People's Assembly and appointing one third of the members of the Council of the Nation, the right to raise objections to laws and request a second reading, and the appointment of the Chief Justice of the Supreme Court and the President of the Council of State. In addition, he serves as President of the High Council of the Judiciary and has other important prerogatives, reflecting a considerable strengthening of the executive branch at the expense of the other branches of government.

6 Article 183 of the 2016 constitutional amendment, published pursuant to the Algerian law No. 16-01 of March 6, 2016 (Official Gazette No. 14 of March 7, 2016).

7 Algeria 2020 Constitution, adopted by popular referendum on 1 November 2020 (Official Gazette of Algeria No. 82 of 30 December 2020), Article 186.

8 The article 92 of Algeria 2020 Constitution above mentioned, as well as Algerian internal regulation of the Council of State (Official Gazette of Algeria No. 66 of 27 October 2019) and the Algerian internal regulation of the Supreme Court (Official Gazette of Algeria No. 34 of 16 June 2014), determine how these judges are appointed and elected.

ing the consolidation of constitutional justice. However, it is not sufficient to exclude all influence from the executive branch, raising the question of the Court's organic independence, especially since its decisions are taken by a majority of the members present and, in the event of a tie, the President . appointed by the Head of State . has the casting vote,<sup>9</sup> except in matters of organic laws.

To enshrine the independence of this Court, as provided for in Article 185 of the 2020 constitutional revision, Article 187 emphasises that its members must not belong to any political party. However, the legislator has not specified the nature of this affiliation or its terms and conditions. It would therefore be more appropriate to apply, by analogy, the provisions relating to members of the Independent National Electoral Authority,<sup>10</sup> which require them to have had no political affiliation for a minimum period of five years.<sup>11</sup>

It should also be noted that the position of vice-president, established during the 2016 constitutional revision, has been abolished, as it has not been filled during the entire period of activity of the Constitutional Council.<sup>12</sup> Similarly, the participation of representatives of the National People's Assembly and the Council of the Nation (two members from each chamber) has been abandoned to preserve the Court's independence from political influence and to

avoid any situation in which it would find itself both judge and party.<sup>13</sup>

Among the elements considered favourable to constitutional justice and indicative of a political will to endow the Constitutional Court with genuine independence is the election of six of its members from among professors of constitutional law.<sup>14</sup> These professors must be highly qualified, a requirement that also applies to members appointed by the President of the Republic, and must have training in constitutional law . the nature and duration of which are not specified . as well as at least 20 years of legal experience, compared to 15 years previously.<sup>15</sup> Nevertheless, it appears that this training requirement mainly concerns the four members appointed by the President, as professors of constitutional law are not subject to it. Presidential Decree No. 21-304<sup>16</sup> requires the latter to have been professors specialising in constitutional law for at least five years, to hold the rank of full professor, and to have made a significant scientific contribution in this field.

This situation highlights an inequality in the application of the conditions of competence between elected professors and appointed members, with a distinction being made between simple legal training and teaching and research activities, especially since the presence of ambiguous and sometimes contradictory constitutional provisions makes the interpretation of the constitutional text particularly complex. Finally, although these professors enjoy independence in principle due to

9 Algeria 2020 Constitution, Article 197.

10 Mardassi, M., Saleh, A. N. (2023). The composition of the Constitutional Court between independence and subordination. *Numeros Academic Journal*, 04(01), p. 119.

11 Algerian organic law No. 19-07 of 14 September 2019 on the Independent National Electoral Authority (Official Gazette of Algeria No. 55 of 15 September 2019), Article 19.

12 In the event of the resignation, death, or permanent incapacity of the President of the Constitutional Court, the Court convenes under the chairmanship of its most senior member to fill the vacancy. The President of the Republic is immediately informed, and a replacement is appointed within fifteen days preceding the end of the term. See Articles 6 and 7 of the Algerian internal regulation of the Constitutional Council (Official Gazette of Algeria No. 75 of 13 November 2022).

13 Lasledj, N. (2024). From the Constitutional Council to the Constitutional Court in Algeria: A Change in Names or the Establishment of an Effective Constitutional Model? *Arab Organization for Constitutional Law*, Eighth Session, 2024, pp. 8-9.

14 Akrou, M. (2022). University Professors as Members of the Constitutional Court, *Professor Researcher Journal for Legal Studies*, 07(02), p. 1942.

15 Algeria 2020 Constitutional, above mentioned, Article 187 (para. 2).

16 Algerian Presidential Decree 21-304 of 4 August 2021, specifying the conditions and procedures for the election of professors of constitutional law as members of the Constitutional Court (Official Gazette No. 60 of 5 August 2021).

the way they are appointed. they are elected by their peers within public law faculties. the fact that the decree setting the conditions for their election is issued by the executive branch, represented by the President of the Republic, raises questions about the effectiveness of this independence.<sup>17</sup>

## 1.2 Proof of Impeachment and Vacancy in the Office of the Presidium of the Republic

Article 102 of the 2016 constitutional revision, relating to the role of the Constitutional Council in determining the incapacity and vacancy of the Presidency of the Republic, has been strongly criticised, particularly during the crisis that Algeria experienced during the illness of former President Abdelaziz Bouteflika. This criticism intensified at the end of his fourth term, when certain parties attempted to exploit the situation to allow him to run for a fifth term despite his obvious incapacity. Without the intervention of the popular movement, the former president would probably have continued to exercise his functions for a new term, exposing the country to a deep and dangerous political crisis.<sup>18</sup>

Admittedly, this article stipulates that the Constitutional Council must meet when the President is unable to perform his duties due to serious and lasting illness, verify this incapacity by all appropriate means, and unanimously propose to Parliament that it be recognised. Parliament, meeting in joint session, must then declare the incapacity by a two-thirds majority and instruct the President of the Council of the

Nation to act as interim president for a period of 45 days. However, despite the president's state of health, his prolonged absence from public life, and the exploitation of his position by certain political actors, the Constitutional Council has been unable to meet. The authorities remained inflexible, despite insistent calls from the popular movement, the opposition, the media, and several political groups.

In the current Constitution, the content of the article has been retained,<sup>19</sup> but certain editorial and procedural changes have been introduced. Thus, the phrase 'the meeting is mandatory' has been replaced by the expression 'the Constitutional Court shall meet automatically and without delay', while the required voting percentage has been changed as follows: 'on the proposal of the Court, adopted by a three-quarters majority of its members, Parliament must declare the impediment'. However, these new provisions do not appear to substantially alter the situation, as the Court can only meet when convened by its president, who is himself appointed, de facto, by the President of the Republic. Out of loyalty, or at least reserve, the latter may be reluctant to initiate a meeting to examine such a question.

It would therefore have been appropriate to remove this obstacle by granting the bodies responsible for notification. in particular the members of the opposition within the National People's Assembly. the right to refer the matter to the Court by means of a letter containing a decision or finding relating to the President's state of health or the occurrence of an impediment preventing him from exercising his functions. Furthermore, the wording of the provision could be improved to provide that the Court shall meet either automatically by virtue of the law or upon notification by the competent bodies. Such wording would cover all situations that may require the Court's intervention in this area.

17 Ziani, K., Drid, K. (2022). The Composition of the Constitutional Court between Independence and Subordination. *Al-Bahith Journal for Academic Studies*, 07(02), University of Hadj Lakhdar, Batna, Algeria, p. 619.

18 Boumediene, M. (2022). The Methodology of the 2020 Algerian Constitution in Organizing the Constitutional Court and its Shortcomings. *Al-Haqiqa Journal for Social and Human Sciences*, 22(02), University of Hadj Lakhdar, Batna, Algeria, p. 616.

19 Algeria 2020 Constitution, above mentioned, Article 94.

### 1.3 Pre-eminence of the President's power in matters of compulsory referral

There is no doubt that the Algerian Constitutional Council, established by the 2016 constitutional reform, was largely modelled on the French system. Like the French Constitutional Council, it was granted broad powers and a wide range of competences.<sup>20</sup> However, this expansion of powers was accompanied by a strengthening of the role of referral by the President of the Republic, to the detriment of other authorised bodies. Indeed, the Constitutional Court only exercises its powers following a mandatory referral by the President of the Republic, both in the context of compliance review and mandatory review. The latter remains the constitutionally competent body to refer matters to the Court concerning organic laws<sup>21</sup> and the conformity of the internal regulations of the two chambers of Parliament.<sup>22</sup> Furthermore, the 2020 Constitution requires the President of the Republic to submit to the Constitutional Court, at the end of a state of emergency, the ordinances issued during parliamentary recesses or in the event of a vacancy in the National People's Assembly,<sup>23</sup> as well as those adopted during the state of emergency,<sup>24</sup> it being understood that the extension of the state of emergency can only take place with the approval of a majority of the members of both houses of Parliament meeting together.<sup>25</sup>

Regarding other authorities empowered to refer cases to the Court, discretionary referral

rights have been granted to the President of the National People's Assembly, the President of the Council of the Nation, the Prime Minister or the Head of Government, as applicable. It is also granted to forty members of the Chamber of Deputies or twenty-five members of the Council of the Nation<sup>26</sup> instead of fifty members of the Chamber of Deputies and thirty members of the Council of the Nation in the 2016 constitutional revision<sup>27</sup> for disputes that may arise between constitutional authorities or for the interpretation of the provisions of the Constitution, when the Court is called upon to give an opinion on them. It should be noted that the President of the Republic also has the power to refer matters to the Court in these areas.

There is no doubt that the openness of the drafters of the Algerian Constitution to the rights of the parliamentary opposition since the 2016 constitutional revision, reinforced by the 2020 constitution, which recognises the right of parliamentarians in particular those in the opposition to refer matters to the Constitutional Court,<sup>28</sup> constitutes a significant step towards consolidating the principles of a genuine democracy based on the recognition of the rights of political minorities.<sup>29</sup> This development is also likely to improve relations between the majority and the opposition. However, in practice, in the three years following the creation of the Constitutional Court (2021–2023), the power of referral exercised by the President of the Republic has largely prevailed over others in terms of monitoring and enforcing the Constitution, accounting for more than 70% of referrals, com-

20 Ben Ali, Z. (2021). The creation of the Constitutional Court instead of the Constitutional Council in Algeria. *Algerian Journal of Legal and Political Sciences*, 58 (04), p. 311.

21 Algeria 2016 Constitutional Amendment, above mentioned, Article 186 (para. 1), Algeria 2020 Constitution, above mentioned, Article 190 (para. 2).

22 Algeria 2016 Constitutional Amendment, above mentioned, Article 186 (para. 3), Algeria 2020 Constitution, above mentioned, Article 190 (para. 6).

23 Algeria 2020 Constitution, above mentioned, Article 142.

24 Ibid., Article 98 (para. 07).

25 Ibid., Article 98.

26 Ibid., Article 193.

27 Algeria 2016 Constitutional Amendment, above mentioned, Article 187 (para. 2).

28 Algeria 2016 Constitutional Amendment, above mentioned, Article 116 (para. 5).

29 The parliamentary opposition has the right to refer matters to the Constitutional Court, but the conditions attached to this right make it difficult to exercise, particularly with regard to obtaining the quorum required to initiate a notification procedure and the time limit, which must be a maximum of 30 days before publication. Furthermore, there are few cases in which parliamentarians can exercise this right.

pared to 27% for those from parliamentarians.<sup>30</sup> In any event, whether mandatory or optional, referral remains a prerequisite for the Court to intervene, as it does not exercise its powers automatically by self-referral, unlike the former Constitutional Council, which is a point often criticised by legal scholars.

#### 1.4 Establishment and amendment of the regulation governing the functioning of the Constitutional Court

One key question about the independence of the constitutional review body is how its rules of procedure are made and who's in charge of doing that. On this point, the last paragraph of Article 185 of the 2020 Constitution gives the Constitutional Court the power to set its own rules of procedure. However, no quorum has been provided for the meeting of the Court responsible for drafting them, no specific voting rules have been defined, and their adoption is not subject to any particular conditions of form or substance. The Court thus enjoys almost absolute freedom in this regard. This legal loophole allowed the former Constitutional Council to draw up its rules of procedure in order to comply with the new constitutional revision,<sup>31</sup> even before its membership reached the required number.<sup>32</sup> It adopted the rules when it

had only nine members, even though the new rules of procedure require at least ten members to be present for a meeting to be valid.

Regarding the power to amend, Article 99 of the Regulation governing the functioning of the Constitutional Court<sup>33</sup> stipulates that amendments to the provisions relating to the functioning of the Court may be proposed either by its President or at the request of a majority of its members. However, the fact that the President of the Court is appointed by the President of the Republic and not elected by his peers may suggest a pre-eminence of the executive branch, which could influence the Court and prevent it to propose amendments to its rules in a manner favourable to its own interests. On the other hand, the power granted to the majority of the Court's members to also propose amendments constitutes an element of institutional balance, even if the lack of precision regarding the nature of this majority may also reflect a desire for procedural flexibility. In any case, no amendments have been made to the rules of procedure of the Constitutional Council to date.<sup>34</sup>

## 2 . OTHER LIMITATIONS AND OBSTACLES HINDERING THE DEVELOPMENT OF GENUINE CONSTITUTIONAL JUSTICE

Constitutions, as the supreme legal norms of the state, are much more complex to draft than ordinary legislative texts, which gives the body responsible for drafting them a special responsibility. Consequently, the method of constitutional drafting must be based on fundamental rules such as clarity, precision, and consistency, to avoid any form of contradiction, conflict of interpretation, or unnecessary repetition. However, these requirements have not always been

30 Statistics of the Constitutional Court. <https://cour-constitutionnelle.dz/ar/%d8%a7%d9%84% d8% b1%d8%a6%d9%8a%d8%b3%d9%8a%d8%a9> (Last access: 16.12.2025).

31 The composition of the Constitutional Council was finalized in July 2016 under Algerian presidential decree No. 16-210 of 27 July 2016 on the publication of the nominal composition of the Constitutional Council (Official Gazette of Algeria No. 45, dated 31 July 2016).

32 It should be noted that the Constitutional Council did not rely on the provisions of the first paragraph of Article 214 of Algerian presidential decree No. 16-210 above mentioned, on the publication of the nominal composition of the aforementioned Constitutional Council, which stipulates that "the Constitutional Council continues with its current representation in the exercise of the powers conferred upon it by the Constitution...".

33 Algerian regulation governing the functioning of the Constitutional Court (Official Gazette of Algeria No.04 of 22 January 2023).

34 Algerian regulation governing the functioning of the Constitutional Council (Official Gazette of Algeria No. 42 of 30 June 2019), Article 102.

fully respected by the Constituent Assembly, which has given rise to extensive doctrinal and jurisprudential debates on many constitutional provisions.

## 2.1 Dualism in the Constitutional Court regulation

Although all previous Algerian constitutions affirmed the Constitutional Council's right to establish its own internal regulation, the 2020 constitution conferred on the Constitutional Court, in addition to the power to establish its own regulation determining the rules governing its functioning<sup>35</sup> – a power not granted to any other constitutional branch<sup>36</sup> – the power to establish its own internal regulation.<sup>37</sup> So what is the difference between the internal regulation of the Constitutional Court and the regulation that determines the rules governing its functioning?

Clearly, the issue raised by the 2020 constitutional reform lies in the dual interpretation of the rules: one concerning the rules of procedure of the Constitutional Court and the other concerning its rules that set its rules. Therefore, while it is legally logical for the Constitution to confer on the Court the right to establish

its own rules of procedure. So is it legally logical to confer on it the power to establish legal rules? That is, to replace Parliament in defining all matters within its jurisdiction towards other constitutional authorities and institutions? And to unilaterally establish legal rules that necessarily affect other authorities and institutions?

This undoubtedly constitutes a clear contradiction with the principle of the division of powers between constitutional authorities and institutions. The Constitutional Council itself has often emphasised this point in its opinions and decisions. For example, in its opinion issued at the end of 2018 on the constitutionality of the organic law establishing the Algerian Academy of the Amazigh Language, it stated that 'while the Academy may specify, in its internal regulations, other procedures necessary for its functioning, it must, when drafting this text, refrain from including matters requiring the intervention of other institutions and falling within the scope of the organic law, in accordance with the constitutional principle of the division of powers'.<sup>38</sup> Thus, it appears that the committee responsible for drafting the Constitution, perhaps inadvertently, inserted the issue of the Court's internal regulations, while forgetting that it had retained, as in previous constitutions, the provision relating to its functioning regulation.

Legal methodology does not allow the combination of the two, as they are two similar internal regulations. If the regulation governing the rules of the court is considered to be a law, this is another error committed by the committee. Legislation is the domain of Parliament, in the form of ordinary or organic law, and it is the latter that the committee should have adopted, stipulating a reference from the Constitution in Article 185 so that an organic law determines the rules of procedure of the Constitutional Court, or that this organic law is merged with the organic law stipulated in Article 196 relating

35 Algeria 2020 Constitution, above mentioned, Article 185 (para. 3).

36 Even Parliament, representing the will of the people, is required to submit internal regulation of each chamber to the Constitutional Court for a ruling on their constitutionality. Furthermore, any amendment to these regulations, even if it concerns only a single article, must be submitted to the Constitutional Court for verification of its constitutionality. This is a rigorous control process, distinct in both form and substance from constitutional review. For more details, see: Boumediene, M. (2020). Notification as a key formal criterion for distinguishing between conformity review, constitutional review and review of constitutionality exceptions under the 2016 constitutional reform. *Revue des sciences juridiques et sociales*, Ziane Achour University of Djelfa, vol. 5, no. 2, pp. 113-138.

37 Algeria 2020 Constitution above mentioned, refers to the Court's internal regulation, in accordance with Articles 188 and 189, concerning the organisation of the partial renewal of the members of the Constitutional Court and the lifting of their immunity.

38 Opinion No. 04 of the Constitutional Court, issued on 2 August 2018, concerning the review of the constitutionality of the organic law relating to the Algerian Academy of the Amazigh Language (Official Gazette of Algeria No. 54 of 5 September 2018).

to procedures and methods of notification and referral, given the inadequacy of the latter to form a single organic law bringing together all these provisions.<sup>39</sup>

## 2.2 Legal classification of the regulation governing the functioning of the Constitutional Court

In light of the provisions of the Court's internal regulation and regulations governing its functioning, it appears that the latter is nothing more than an internal regulation whose rules and provisions apply not only to its members, but also to the Court itself in the exercise of its constitutional powers.<sup>40</sup> Whether in matters of reviewing the constitutionality of laws, ruling on appeals, proclaiming the final results of presidential and legislative elections and referendums, or in certain specific cases, this system incorporates most of the provisions of Organic law No. 22-19,<sup>41</sup> as well as the Court's powers in electoral and referendum matters set out in Ordinance No. 21-01 relating to the Organic Law on the Electoral System,<sup>42</sup> in addition to certain provisions of its own internal regulation.

However, this regulation has been criticised because, instead of interpreting or detailing the constitutional text in the event of a contradiction with another text, it has limited itself to summarising its provisions. This can be explained by the fear of making a mistake or

coming into conflict with the constitutional text, especially since the latter contains certain contradictions, particularly concerning the effect of the review of ordinances: Article 198 of the constitutional reform subjects them to a posteriori review, while Article 142 subjects them to prior review. Thus, the wording of Article 4 of the system defining the rules of operation of this Court remains general and merely summarises, in a single article, all the legal texts subject to constitutional review.

In addition, this regulation has several shortcomings, such as the Constitutional Court's non-compliance with the methodology followed in Organic law No. 22-19 during its drafting, which led to several errors in its provisions. These include the lack of distinction between constitutional review and compliance review, which constitutes a violation of the Constitution itself, as well as the lack of distinction between the Court's sessions relating to compliance review, constitutional review, dispute resolution, and interpretation of the Constitution, and those relating to exceptions of unconstitutionality, which require publicity and the guarantees of judicial procedure.

## 2.3 Nature of the control exercised over the legislative ordinances of the President of the Republic

The constitutionality review of ordinances is governed by Articles 98, 142, and 198 of the 2020 Constitution. However, these articles contain numerous contradictions, particularly with regard to the nature of the review to which these ordinances are subject. Article 198 of the Constitution, which forms the legal basis for the effect of Constitutional Court rulings on the constitutionality of laws, states that the review of ordinances is retrospective, as indicated in the following sentence: 'If the Constitutional Court declares an ordinance or regulation unconstitutional, that text shall cease to have effect from the date of the Constitutional Court's rul-

39 Boumediene, M. (2023). The Constitutional and Legal Basis of the Legal Texts Regulating the Algerian Constitutional Court. *African Journal of Legal and Political Studies*, Ahmed Draia University of Adrar, Algeria, 07(01), pp. 28-29.

40 Boumediene, M. (2023). The Methodology of the Algerian Constitution of 2020 in Organizing the Constitutional Court and its Shortcomings, *op.cit.*, p. 604.

41 Algerian organic law No. 22-19 of 25 July 2022 establishing the procedures for notification and referral to the Constitutional Court (Official Gazette of Algeria No. 51 of 31 July 2022).

42 Algerian law No. 21-01 of 10 March 2021 amending and supplementing the Organic Law on the electoral system (Official Gazette of Algeria No. 17 of 10 March 2021).

ing', Article 142 of the Constitution refers to the right of the President of the Republic to issue decrees in urgent cases when the National People's Assembly is not in session or during parliamentary recesses, provided that he informs the Constitutional Court. Although it mentions the review to which these decrees are subject by the Court, it does not explicitly specify the nature of this review. However, this is likely to be a prior review, given that this article stipulates that such a review is carried out by mandatory referral to the President of the Republic and that the Constitutional Court must render its decision within a maximum of 10 days. This confirms that it is indeed a prior review.

Article 98 of the Constitution establishes a posteriori constitutional review when the President of the Republic submits his ordinances to the Constitutional Court for its opinion.<sup>43</sup> It is clear from this provision that ordinances issued during a state of emergency are subject to such review, as the constitutional text is explicit on this point. Indeed, the article specifies that "the President of the Republic, after the lifting of the state of emergency, shall submit to the Constitutional Court the ordinances issued during it for its opinion". Consequently, ordinances adopted during a state of emergency are subject to a posteriori constitutional review, in the same manner as those adopted under normal circumstances.

This practice has moreover been confirmed when, on July 26, 2022, the President of the Republic referred the ordinance enacting the supplementary budget law for 2022 to the Constitutional Court. In its decision rendered on July 28, the Court declared these provisions constitutional.<sup>44</sup> Therefore, the persistent contradiction regarding the nature of the control applicable to legislative orders necessitates clarifying the

terminology used, harmonizing the organization of the texts, and ensuring greater consistency between constitutional provisions, in order to facilitate their understanding for both members of the Court and the citizen.

## 2.4 The binding nature of decisions, opinions, and declarations issued by the Constitutional Court

The legal redaction of the Constitution is vitally important, insofar as the terms used constitute the body of the legal text, while their linguistic meaning represents its soul, the source of its normative force and effectiveness.<sup>45</sup> Therefore, rigorous constitutional redaction requires solid linguistic mastery, in-depth legal specialisation, and serious practice. However, the text of the 2020 Constitution has several shortcomings. The wording adopted in the Algerian constitutional revisions often remains vague and imprecise, contrary to the principle of legal certainty expressly enshrined in the current Constitution in its preamble and reaffirmed in Article 34. This imprecision also compromises the stability of institutions and society and reveals a failure to consider the lessons learned from previous constitutional experiences. The 1989<sup>46</sup> and 1996<sup>47</sup> Constitutions, as well as the 2016 constitutional revision, clearly distinguished between opinions and decisions, based on the difference between prior review

43 Although Article 98 of Algeria 2020 Constitution above mentioned, refers to them as 'decisions', it is intended to refer to 'ordinances', which is considered a mistake in wording.

44 Decision No. 05 issued on July 28, 2022, concerning the constitutional review of the order containing the supplementary finance law for the year 2022 (Official Gazette of Algeria, No. 53, dated August 4, 2022).

45 Ramdani, F. Z. (2020). The Algerian Constitutional Amendment Project for the Year 2020. *Kuwait International Law School Journal*, 08(04), p. 572.

46 Algeria 1989 Constitution, adopted by referendum on 23 February 1989 (Official Gazette of Algeria No. 9 of 1 March 1989).

47 Algeria 1996 Constitution, adopted by referendum on 28 November 1996 (Official Gazette of Algeria No. 76 of 8 December 1996), amended by Law No. 02-03 of 10 April 2002 (Official Gazette of Algeria No. 25 of 14 April 2002), Law No. 08-19 of 15 November 2008 (Official Journal No. 16 of 16 November 2008) and Law No. 16-01 of 6 March 2016 (Official Gazette of Algeria No. 14 of 7 March 2016) and Algerian law No. 16-01, above mentioned.

exercised through opinions and ex post review exercised through decisions, while specifying, in Article 191 of the 2016 Constitution, the binding and definitive nature of both opinions and decisions. In these circumstances, on what basis did the drafting committee for the 2020 Constitution introduce a distinction between opinions, decisions, and declarations, even though decisions remain the norm in most Constitutional Court rulings, with no clear distinction between prior review and ex post review? If the Court rules on the compatibility of laws and regulations with treaties, on the conformity of the internal regulations of the two chambers of Parliament<sup>48</sup> with the Constitution, while giving an opinion on the interpretation of one or more constitutional provisions<sup>49</sup> and proclaiming the final results of presidential, legislative and referendum elections,<sup>50</sup> does this mean that the decision is binding, that the opinion is merely an opinion, and that the declaration has no binding effect?

The last paragraph of Article 198 of the Constitution expressly stipulates that 'the decisions of the Constitutional Court are final and binding on all public, administrative and judicial authorities', without, however, mentioning its opinions and declarations. This omission must be corrected during a future constitutional revision. How can an article that constitutes the constitutional basis for the enforcement of the Court's judgments be limited to enshrining the binding nature of decisions alone, without mentioning the scope of the opinions and declarations of the Constitutional Court?<sup>51</sup> It would indeed be illogical for the final and binding nature to be restricted exclusively to decisions, without also including opinions and declarations. Consequently, this article must be amended to specify that the decisions, opinions, and declarations of the Constitutional Court are final

and binding on all public authorities, especially since they emanate from a court and not from a mere advisory body. Furthermore, it would be desirable to standardise the acts of the Constitutional Court in the form of decisions and, consequently, to revise all relevant provisions so that the Court only issues decisions.

### 3. GUARANTEES FOR THE PROTECTION OF CONSTITUTIONAL JUSTICE IN LIGHT OF THE TRANSITION FROM CONSTITUTIONAL COUNCILS TO CONSTITUTIONAL COURTS IN CERTAIN COMPARATIVE CONSTITUTIONAL SYSTEMS

The political transformations in the Middle East and North Africa since 2011 have marked a decisive turning point in the rebuilding of constitutional systems.<sup>52</sup> The wave of widespread protests that accompanied what has come to be known as the 'Arab Spring'<sup>53</sup> prompted several countries, such as Tunisia, Morocco, and Algeria, as mentioned above, to adopt far-reaching constitutional reforms aimed primarily at strengthening the rule of law.

In this context, there has been a trend towards restructuring constitutional oversight institutions by moving from a constitutional council model to a constitutional court model, which is considered a more advanced mechanism for ensuring the supremacy of the constitution. However, this shift raises a fundamental question: Does this transition reflect a genuine shift towards strengthening constitutional justice, or is it merely an institutional adjustment that has

48 Algeria 2020 Constitution, above mentioned, Article 190.

49 Ibid., Article 192.

50 Ibid., Article 191.

51 Boumediene, M. (2022). The Methodology of the Algerian Constitution of 2020 in Organizing the Constitutional Court and its Shortcomings, op.cit, p. 610.

52 Turner, C. (2015). Transitional constitutionalism and the case of the arab spring. *International & Comparative Law Quarterly*, Vol. 64 , Issue 2, p. 267. <<https://doi.org/10.1017/S0020589315000020>>.

53 Kirchoff-Foster, D. (2021). Constitutional Court Landscape Post-Arab Spring: A Survey of Design. *Indiana Journal of Constitutional Design*: Vol. 8, Article 2. <<https://www.repository.law.indiana.edu/ijcd/vol8/iss1/2>> (Last access: 02.02.2025).

not been accompanied by real progress in guaranteeing independence and effectiveness?

After discussing the Algerian experience, the Moroccan and Tunisian experiences emerge as important models for studying the limits and potential of this transition.

### 3.1 Morocco

In the wake of the Arab Spring, Morocco embarked on a comprehensive constitutional reform aimed at strengthening human rights, establishing the principle of separation of powers, and consolidating the rule of law. King Mohammed VI's 9 March 2011 speech, in which he announced the constitutional amendment, paved the way for a new constitutional system that reconciles tradition and modernity. The constitution adopted on 29 July 2011 represents a genuine transformation of the legal and political system, announcing a comprehensive set of reforms. About the Moroccan model of constitutional justice, Morocco has not deviated from the long evolutionary process experienced by most countries that were colonised or placed under a French protectorate, through the gradual establishment of the institution of constitutional justice, which began with the 1908 draft constitution.

#### *3.1.1 Before the Arab Spring revolution of 2011: Limited oversight and weak safeguards*

The first draft of the constitution in 1908 referred to the need for oversight of laws exercised by the Council of Elders,<sup>54</sup> which was transferred to the 1962 constitution<sup>55</sup> and initially took the form of a provisional constitutional committee before becoming the Constitutional Chamber of the Supreme Council, established in 1957, which was concerned only with "constitutional oversight of regulatory texts and the

internal rules of the chambers, and in particular with examining electoral disputes and referendum processes.

However, due to its weak position<sup>56</sup> and the legal mechanisms available to the Constitutional Chamber, and consequently the absence of decisive and influential decisions, this institution appeared cautious and peaceful.<sup>57</sup> Such difficulties and problems accompanying the work of the 'chamber', such as its lack of jurisdiction at this stage to monitor ordinary laws, will prompt the Constitution 1992 to abolish it and replace it with the 'Constitutional Council', which is similar in jurisdiction to the French Constitutional Council.<sup>58</sup> Thus, after being confirmed in the 1996 Constitution, the Moroccan Constitutional Council,<sup>59</sup> occupies 'fourth place in the hierarchy of constitutional institutions', as an 'independent body' from the ordinary judiciary, enjoying, in addition to the previous powers of the Chamber, for the first time, 'the power of constitutional oversight of ordinary laws', which is considered a key power of any constitutional judiciary.<sup>60</sup> This independence is reflected in the Constitution itself, which devotes a separate

54 Bernoussi, N. (2017). The 2011 Constitution and the Constitutional Judge under the direction of international studies. *The 2011 Moroccan Constitution: Analyses and Comments*: L.G.D.J/ Extensio edition, p. 210.

55 Chapter 10, Article 100 of the Moroccan 1962 Constitution.

56 The Constitutional Chamber is mentioned in Chapter 10, Title X of the Constitution. Its late appearance in the constitutional architecture is symbolic of the place assigned to this institution within the Moroccan political system, compared to the position of bodies responsible for reviewing the constitutionality of laws in democratic constitutions.

57 There are no guarantees of independence in its work, as it lacks independence at the administrative, organisational, and financial levels. It is linked to the judiciary (the Supreme Council) and is one of its chambers. It also lacks adequate guarantees of the independence of its members, given that its president is the president of the Supreme Council, and that its members' terms are short and renewable, which leads to fears that members may act according to the whims of the executive branch, which has the power to influence their continued membership.

58 Menouni, A. L. (1999). *The Experience of the Moroccan Constitutional Council. The Constitutions of Arab Countries*, Proceedings of the 1998 Beirut Symposium, Brussels, Bruylant, p. 273.

59 Article 78 and seq. of the Morocco 1996 Constitution.

60 Brown, N. J., Waller, J. G. (2016). Constitutional courts and political uncertainty: Constitutional ruptures and the rule of judges. *International Journal of Constitutional Law*, Volume 14, Issue 4, p. 818.

section to constitutional justice, distinct from the section devoted to ordinary justice. On the one hand, this independence is also reflected at the administrative and financial level of the Council, where we find that “the administrative interests and powers of the Council are determined by a decision of the President of the Constitutional Council<sup>61</sup> and that ‘the President of the Council is the authorising officer and may appoint the Secretary-General as authorising officer in accordance with the procedures and conditions laid down in the laws and regulations in force in this area’.<sup>62</sup> The independence of the Constitutional Council has been further enhanced by the fact that the authority of its decisions has become ‘clearly and explicitly expressed’, so that, pursuant to Article 81 of the Constitution, they have taken on the character of being ‘definitive and final’.

However, this new institution did not live up to the expectations set for it at the time of its establishment, as the process of ‘constitutional oversight’ during this phase was characterised by a ‘slow and cautious’ and “conservative” approach,<sup>63</sup> with the Constitutional Council hiding behind the idea of ‘lack of jurisdiction’ in a large number of its decisions,<sup>64</sup> which not only reflects the weakness of the Constitutional Council’s status and the legal mechanisms available to it,

but also restricts its oversight function, which is supposed to complement the legal rules set out in the constitutional document. Here, we primarily refer to the role and function of the constitutional judge in legal jurisprudence and creativity. On another level, referring to statistics up to 2010, i.e., approximately 16 years of the Constitutional Council’s existence as an independent institution, we find that “of the 780 decisions taken by the Constitutional Council, 622 relate to electoral disputes, 2 referendums, 22 regulatory laws, 12 internal laws, and 10 ordinary laws”.<sup>65</sup> If constitutional oversight of “ordinary laws” is “the cornerstone of any constitutional judiciary”,<sup>66</sup> then the fact that only 10 of the 780 decisions relate to ordinary laws gives an idea of the ‘weakness of constitutional review of ordinary laws’ and is therefore a clear indication of the weakness and limitations of the Constitutional Council’s working mechanisms and mechanisms.<sup>67</sup> In terms of the nature of the decisions taken by the Constitutional Council, we note a complete absence of issues relating to the protection of fundamental individual rights and freedoms, as well as of questions relating to constitutional law that allow for the understanding, explanation, and completion of the constitution’s meaning. About the right of individuals to appeal, we note that all Moroccan constitutions from 1962 to 1996 agreed that individuals cannot litigate before the Constitutional Chamber or the Constitutional Council, nor before the courts, and that no judicial body was authorised to rule on the constitutionality of a law when considering a dispute brought before it. Thus, it was not possible to apply the principle of *ex post facto* judicial review of the constitutionality of laws.

61 Article 38 of Moroccan organic law No. 24-93 on the Constitutional Council, promulgated on 20 February 1994, as amended and supplemented, and Article 80 of Morocco 1996 Constitution.

62 Article 40 of Moroccan organic law No. 24-93 on the Constitutional Council, above mentioned.

63 Alamri, M. (2025). Constitutional Courts and the Protection of Constitutional Rights: A Comparative Analysis of Institutional Authority in Indonesia and Morocco. *International Journal of Constitutional and Administrative Law*, Vol. 1 No. 2, p. 118.

64 For example:  
Decision No. 406-2000 of the Moroccan Constitutional Council, issued on 18 July 2000;  
Decision No. 535-2003 of the Moroccan Constitutional Council, issued on 9 September 2003;  
Decision No. 628-2006 of the Moroccan Constitutional Council, issued on 30 August 2006;  
Decision No. 629-2007 of the Moroccan Constitutional Council, issued on 10 January 2007;  
Decision No. 826-12 of the Moroccan Constitutional Council, issued on 17 January 2012.

65 Bernoussi, N. (2017), *op. cit.*, p. 211.

66 Agüero-San-Juan, S., Paredes-Paredes, F. (2025). The Relevance of Facts in Assessing the Constitutionality of Legislation. *An Analysis Based on Abstract Review Mechanisms*. *Ius et Praxis*, Vol. 31, no. 1, p. 4. <<https://doi.org/10.4067/s0718-00122025000100003>>.

67 Francesco, A. (2015). The Moroccan Constitutional Transition: The Method of Contextualization and Mutual Interaction. *Religion & Human Rights* 10, no. 1, p. 78. <<https://doi.org/10.1163/18710328-12341282>>.

### 3.1.2 After the Arab Spring revolution of 2011: Institutional strengthening in facing structural challenges

Under the new Constitution of 2011, Chapter 129 explicitly establishes a Constitutional Court to replace the Constitutional Council, with a new composition and additional powers to ensure the independence of constitutional justice. This court is composed of 12 members who are subject to integrity requirements.<sup>68</sup> Six of them are appointed by the King, and the remaining six are elected by the House of Representatives and the House of Councillors for a non-renewable term of nine years. The president of the court is appointed by the King, which enshrines the dominance of the executive branch in Morocco, as is the case in Algeria.

In terms of jurisdiction, this court exercises the same powers as the former Constitutional Council, including the verification of the validity of the election of members of parliament, referendums, and the prior review of laws, among other things. However, what is new for this court is that it has been granted the right to review laws a posteriori by challenging their constitutionality.<sup>69</sup>

Nevertheless, despite the reforms brought about by the 2011 Constitution and the establishment of the Constitutional Court, the constitutional justice system in Morocco faces many challenges regarding the effectiveness of constitutional safeguards and individuals' access to them. Among the most prominent of these criticisms are those made by international and local organisations regarding the draft law on challenging the constitutionality of laws in Morocco, which was considered a missed opportunity to facilitate individuals' access to the Constitutional Court, as the mechanism for challenging constitutionality remains linked to raising it within the context of an existing legal dispute. This means that it is not directly open to individuals, unlike some comparative experiences that grant direct access, which raises

questions about the court's ability to protect constitutional rights and freedoms effectively.

Thus, the Moroccan experience reflects an important institutional transition, but one that has not yet reached the level of complete structural transformation.

## 3.2 Tunisia

Constitutional institutions in Tunisia have undergone remarkable developments, leading to changes in the institutional system to keep pace with the wave of democratic transition the country experienced after the Jasmine Revolution in 2011. This has led to a series of changes in relation to the protection of constitutional justice, which can be summarised as follows:

### 3.2.1 Before the Arab Spring revolution of 2011: Formal oversight under the presidential system

Scholars can summarise the Tunisian experience in the field of constitutional justice in three words: silence, rejection, and failure. The founding legislator remained silent on the subject of constitutional oversight, even though the idea was not new,<sup>70</sup> as the 1861 Constitution established the so-called Grand Council, which was responsible for overseeing laws under Article 60. As for rejection, it is exemplified by the failure to accept an initiative submitted by a group of deputies to the Chamber of Deputies on 3 February 1971 to establish a constitutional council. The failure lies in the fact that, after the Constitutional Council was established,<sup>71</sup> it remained merely an advisory body to the President of the Republic and did not attain the level required of it. The pre-2011 constitution in Tunisia included an institution called 'Constitutional Council', which was established in 1990 as a symbolic step among the reforms introduced

68 Article 8 of the Moroccan organic law No. 24-93 on the Constitutional Council, above mentioned.

69 Article 133 of the Morocco 2011 Constitution.

70 Lamont, C. K., Pannwitz, H. (2016). Transitional Justice as Elite Justice? Compromise Justice and Transition in Tunisia, *Global Policy*, Vol. 7, Issue 2, p. 279. <<https://doi.org/10.1111/1758-5899.12291>>.

71 Chapter 72 of the Tunisian 1959 Constitution.

by the one-party system led by the late Zine El Abidine Ben Ali, who had recently come to power. This council was responsible for reviewing the constitutionality of draft laws submitted to it. Still, it was closely linked to the powers of the president, who was the centre of the political system at that time. In addition to reviewing draft laws, the President of the Republic may refer any matters he deems relevant to the organisation and functioning of institutions to the Constitutional Council. Among the powers vested in the Constitutional Council is the authority to rule on appeals relating to the election of members of the Chamber of Deputies and the Chamber of Councillors. It also monitors the validity of referendums and announces their results. However, there were no references to powers related to electoral disputes arising from presidential elections.

### 3.2.2 After the Arab Spring revolution of 2011: Constitutional ambition collides with political reality

This is referred to as the post-revolution phase, during which a constitutional court<sup>72</sup> was established under the 2014 constitution. As the guarantor of the constitution's application, Tunisian President Kais Saied believed that the constitution required the court to be established within a year of the 2014 legislative elections. This placed the governing institutions in an impossible situation. However, in addition to this interpretation, President Saied did not hide his reservations about the parliament's move and its haste in establishing the Constitutional Court at that particular time after years of stagnation, which he described as an 'innocent move'. After he dissolved parliament in July 2021, repealed the 2014 constitution, and established a new constitution with a strengthened presidential system in 2022, the establishment

72 A temporary body was established to oversee the constitutionality of draft laws until the establishment of the Constitutional Court, in accordance with paragraph 07 of Chapter 148 of the Tunisian 2014 Constitution and Tunisian organic law No. 14 of 2014 dated 18 April 2014 on the Provisional Authority for the Review of the Constitutionality of Draft Laws.

of the Constitutional Court was once again delayed until 2025.<sup>73</sup>

Under the 2022 Constitution, the Constitutional Court consists of nine members appointed by order of the President of the Republic,<sup>74</sup> which enshrines the complete dominance of the executive branch over this court, unlike in Morocco and Algeria, where this control is partial. In addition, these members belong to either ordinary or administrative courts, which makes this court different from those in Algeria and Morocco, where members of the Constitutional Court are required to be both legal academics and practising judges in the field of public and constitutional law, specifically, so that the composition is comprehensive in terms of experience and expertise.<sup>75</sup>

In terms of its powers, it has the power to review draft laws and the constitutionality of treaties, which it can only exercise upon referral

73 Bassam Hamdi, a political analyst working for media and international institutions in Tunisia, confirmed that "those who came to power did not want to establish the court, given its pivotal role, particularly in relation to monitoring legislation and the powers of the President of the Republic and the Speaker of Parliament. There was a desire to control the government without a court to act as a judge in cases of abuse of power or violation of the Constitution. Therefore, there is no doubt that the presidents of the republic in Tunisia and the political class missed an opportunity at the beginning of the democratic transition to complete the new institutions by establishing the Constitutional Court, which could have spared the political system the upheavals and risk of collapse in 2021". See: Al-Qizani, T., *Suspended since 2014: Why do Tunisia's rulers fear the Constitutional Court?* <<https://www.dw.com/ar/%D9%85%D8%B9%D8%B7%D9%84%D8%A9-%D9%85%D9%86%D8%B0-2014-%D9%84%D9%85%D8%A7%D8%B0%D8%A7-%D9%8A%D8%AE%D8%B4%D9%89-%D8%AD%D9%83%D8%A7%D9%85-%D8%AA%D9%88%D9%86%D8%B3-%D8%A7%D9%84%D9%85%D8%AD%D9%83%D9%85%D8%A9-%D8%A7%D9%84%D8%AF%D8%B3%D8%AA%D9%88%D8%B1%D9%8A%D8%A9/a-72487910>> Last access: 01.02.2026.

74 Article 125 of the Tunisian 2022 Constitution.

75 Vanberg, G. (2015). *Constitutional Courts in Comparative Perspective: A Theoretical Assessment*. *Annual Review of Political Science* Volume 18, 2015, p. 168. <<https://doi.org/10.1146/annurev-polisci-040113-161150>>.

by the President of the Republic, thirty members of the People's Assembly, or half of the members of the Council of Regions and Provinces. This is criticised because it leaves this review subject to the will of the aforementioned bodies. Furthermore, gathering thirty deputies, or half of the members of the Council of Regions and Provinces, within seven days and preparing a petition challenging the constitutionality of a bill is virtually impossible, thereby preventing the legislative authorities from exercising their right to challenge the constitutionality of a bill.<sup>76</sup> As for *ex post facto* oversight, it is the most important gain for constitutional justice in Tunisia under the 2014 Constitution, which was confirmed by the 2022 Constitution, and remains linked, as in Algeria and Morocco, to the existence of a dispute before the courts.

Thus, the Tunisian experience appears to be an example of the gap between constitutional ambition and institutional implementation.

## CONCLUSION

The analysis of Algeria's institutional framework for constitutional justice, as established by the 2020 Constitution, and in light of the comparative study of Tunisia and Morocco, reveals a clear political will to strengthen the rule of law through the transition from a Constitutional Council to a Constitutional Court with expanded powers. However, this development also highlights a problematic duality: on the one hand, a clear ambition to consolidate the independence and effectiveness of constitutional justice; on the other hand, the maintenance of a strong predominance of executive power, combined with numerous imbalances and drafting shortcomings, as well as the hybrid nature of certain texts governing the functioning of the Constitutional Court.

Undeniably, this Constitution represents a significant normative advance, insofar as it replaces a predominantly political institution with a judicial court. In theory, the Court now has broader powers than those provided for in the previous Constitution, while the strengthening of legal specialisation . notably through the integration of academics specialising in constitutional law . contributes to increasing its professionalism and scientific credibility.

However, given its relatively recent establishment, the Court faces several obstacles and challenges, including an implicit dependence attributable to the strengthening of the executive branch's influence, particularly with regard to the appointment of its members. Furthermore, the executive's control over the mechanisms for determining the incapacity of the President of the Republic and the vacancy of the presidency increases the risk of institutional paralysis in times of political crisis. In addition, the scope of presidential powers in matters of referral limits, in practice, reduces democratic access to constitutional justice and reduces the effectiveness of oversight.

Formally, the wording of the Constitution remains somewhat vague, similar to that observed in previous texts, and requires greater clarity and rigour in order to avoid any legal ambiguity. Consequently. As in Algeria, analysis of the Moroccan and Tunisian experiences shows that the transition from a constitutional council to a constitutional court represents a crucial institutional step in the process of enshrining the supremacy of the constitution. However, the effectiveness of this transition remains contingent on the availability of genuine guarantees of independence and effective access for individuals. The establishment of a constitutional court does not necessarily mean the establishment of a comprehensive constitutional justice system, as the reform may turn into mere organisational reengineering if political domination continues or appeal mechanisms become complicated. And in light of the above, the following recommendations can be made:

- Transition from 'institutional' constitu-

76 Tamburini, F. (2021). The Ghost of the Constitutional Review in Tunisia: Authoritarianism, Transition to Democracy and Rule of Law. *Journal of Asian and African Studies*, Vol. 57, Issue 4. <<https://doi.org/10.1177/00219096211037039>>.

tional justice to 'societal' constitutional justice, where experience in the countries under comparison reveals the continuing institutional nature of constitutional justice, where access to it remains governed by the will of political actors or the existence of a legal dispute. However, recent trends in constitutional justice have brought it closer to society by expanding the right to appeal, particularly through direct individual appeal mechanisms or by easing the conditions for challenging constitutionality. The broader the scope of access, the stronger the court's rights function becomes, transforming it from a guardian of the constitutional order into an effective guarantor of rights;

- Reconsidering the composition of the Constitutional Court in the countries under comparison by eliminating the subordination of the President of the Court to the executive authority by electing members of the Constitutional Court, instead of appointing them by the President of the Republic;
- Improving the quality of Algerian constitutional drafting by emphasising clarity, precision of terminology, and internal consistency to prevent any ambiguity of interpretation;
- Eliminate the overlap between the internal rules of procedure and the rules governing the functioning of the Court by unifying the two normative systems within a single, coherent, and clearly hierarchical legal framework;
- Amending the last paragraph of Article 198 of the Algerian constitution to specify that the decisions, opinions, and statements of the Constitutional Court are final and binding on all authorities. Ideally, all statements by the Constitutional Court should be standardised in the form of decisions;
- Establishing a notification mechanism for the occurrence of an impediment or vacancy in the office of the Algerian

President of the Republic to prevent any political crisis;

- Moving beyond the traditional concept of independence based solely on constitutional provisions, towards adopting the concept of composite independence, which combines independence of appointment, functional independence, and financial independence. Comparative experience shows that the most serious manifestations of political influence do not occur through texts but through appointment mechanisms. Therefore, it is advisable to adopt a pluralistic appointment model that distributes the power to select among several constitutional institutions, thereby preventing a single political actor from monopolizing the power to form the court.

Finally, the real challenge facing contemporary constitutional systems is no longer choosing an oversight institutional model, but rather ensuring its effectiveness. The difference between a constitutional council and a constitutional court may be more a matter of nomenclature than substance if the institution lacks guarantees of independence and openness. Accordingly, the future of constitutional justice in comparative experiences seems to depend on the transition from constitutionalising the institution to constitutionalising the practice, i.e., from establishing bodies to enabling them to perform their role as a countervailing power that guarantees the supremacy of the constitution and limits the encroachment of power.

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erendum on 28 November 1996 (Official Gazette of Algeria No. 76 of 8 December 1996), amended by Algerian law No. 02-03 of 10 April 2002 (Official Gazette of Algeria No. 25 of 14 April 2002), Algerian law No. 08-19 of 15 November 2008 (Official Journal No. 16 of 16 November 2008) and Algerian law No. 16-01 of 6 March 2016 (Official Gazette of Algeria No. 14 of 7 March 2016);

Algeria 2020 Constitution, adopted by popular referendum on 1 November 2020 (Official Gazette of Algeria No. 82 of 30 December 2020);

Algerian internal regulation of the Constitutional Council (Official Gazette of Algeria No. 75 of 13 November 2022);

Algerian internal regulation of the Council of State (Official Gazette of Algeria No. 66 of 27 October 2019);

Algerian internal regulation of the Supreme Court (Official Gazette of Algeria No. 34 of 16 June 2014);

Algerian law No. 21-01 of 10 March 2021 amending and supplementing the Organic Law on the electoral system (Official Gazette of Algeria No. 17 of 10 March 2021);

Algerian organic law No. 19-07 of 14 September 2019 on the Independent National Electoral Authority (Official Gazette of Algeria No. 55 of 15 September 2019);

Algerian organic law No. 22-19 of 25 July 2022 establishing the procedures for notification and referral to the Constitutional Court (Official Gazette of Algeria No. 51 of 31 July 2022);

Algerian Presidential Decree 21-304 of 4 August 2021, specifying the conditions and procedures for the election of professors of constitutional law as members of the Constitutional Court (Official Gazette No. 60 of 5 August 2021);

Algerian presidential decree No. 16-210 of 27 July 2016 on the publication of the nominal composition of the Constitutional Council (Official Gazette of Algeria No. 45, dated 31 July 2016);

Algerian regulation governing the functioning of the Constitutional Council (Official Gazette of Algeria No. 42 of 30 June 2019);

Algerian regulation governing the functioning of the Constitutional Court (Official Gazette of Algeria No.04 of 22 January 2023);

Moroccan Organic Law No. 24-93 on the Constitutional Council, promulgated on 20 February 1994, as amended and supplemented;

Morocco 1962 Constitution;

Morocco 2011 Constitution;

Tunisia 1959 Constitution;

Tunisia 1961 Constitution;

Tunisia 2014 Constitution;

Tunisia 2022 Constitution;

Tunisian Organic Law No. 14 of 2014 dated 18 April 2014 on the Provisional Authority for the Review of the Constitutionality of Draft Laws.

### **Constitutional Court decision:**

Decision No. 535-2003 of the Moroccan constitutional Council, issued on 9 September 2003;

Decision No. 628-2006 of the Moroccan constitutional Council, issued on 30 August 2006;

Decision No. 629-2007 of the Moroccan constitutional Council, issued on 10 January 2007;

Decision No. 826-12 of the Moroccan constitutional Council, issued on 17 January 2012;

Opinion No. 04 of the Constitutional Court, issued on 2 August 2018, concerning the review of the constitutionality of the organic law relating to the Algerian Academy of the Amazigh Language (Official Gazette of Algeria No. 54 of 5 September 2018);

Decision No. 05 issued on July 28, 2022, concerning the constitutional review of

the order containing the supplementary finance law for the year 2022 (Official Gazette of Algeria, No. 53, dated August 4, 2022).

### **Supplementary Materials:**

Statistics of the Constitutional Court. <https://cour-constitutionnelle.dz/ar/%d8%a7%d9%84% d8%b1%d8%a6 %d9%8a%d8%b3%d9%8a%d8%a9>

Al-Qizani, T., Suspended since 2014: Why do Tunisia's rulers fear the Constitutional Court? <https://www.dw.com/ar/%D9%85%D8%B9%D8%B7%D9%84%D8%A9-%D9%85%D9%86%D8%B0-2014>