Part II:
Constitutional Review Procedures

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Constitutional Review in Algeria Following the 2016 Reform: With Particular Reference to the "Exception of Unconstitutionality"

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Abstract
The constitutional reform adopted in Algeria in February 2016 has introduced – *inter alia* – major innovations in the field of constitutional review. The most important novelty concerns a procedural gateway to the Constitutional Council, namely the "exception of unconstitutionality", which vests the ordinary courts (and in particular the Supreme Court and the Council of State) with the power to challenge the constitutionality of legislative acts before the Constitutional Council. This chapter aims to set out some preliminary remarks on this new procedural gateway, discussing its major characteristics, as well as its main strengths and weaknesses. It will also show that Algerian lawmakers have relied considerably on the system of concrete constitutional review introduced in France in 2008, namely the *question prioritaire de constitutionnalité*. In order to better understand the relevance and scope of the exception of unconstitutionality mechanism, this chapter also examines the origins, developments and weaknesses of constitutional review in Algeria, then going on to analyze the most important novelties introduced by the 2016 reform in the field of constitutional review.

1. Introduction[1]

The constitutional reform adopted in Algeria in February 2016 has introduced – *inter alia* – major innovations in the field of constitutional review. The Constitutional Council – which is an "independent institution responsible for monitoring the observance of the Constitution" (*Constitution*, art. 182) – has been strengthened in terms of its status and powers, whilst ac-

1 I would like to express my gratitude to Islam Mohammed for his invaluable suggestions and comments on previous drafts of this chapter. The usual disclaimers apply.

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cess to the Council has been significantly broadened. The most important novelty concerns a procedural gateway to this body, namely the "exception of unconstitutionality" (*exception d'inconstitutionnalité*), which vests the ordinary courts (and in particular the Supreme Court and the Council of State) with the power to challenge the constitutionality of legislative acts before the Constitutional Council. This new mechanism came into effect only recently, i.e. following the entry into force, on March 7, 2019, of Organic Law 18-16 on the Exception of Unconstitutionality.

This chapter aims to set out some preliminary remarks on this new procedural gateway to the Constitutional Council, discussing its major characteristics, as well as its main strengths and weaknesses. It will also show that Algerian lawmakers have relied considerably on the system of concrete constitutional review introduced in France in 2008, namely the *question prioritaire de constitutionnalité*. In order to better understand the relevance and scope of the exception of unconstitutionality mechanism, this chapter examines the origins, developments and weaknesses of constitutional review in Algeria. Based on this, the most important novelties introduced by the 2016 reform in the field of constitutional review will be analyzed.

2. *Constitutional review of legislation in Algeria: Origins, developments and weaknesses*

Constitutional review of legislation dates back to the first post-colonial Algerian Constitution, namely the Constitution of 1963, which provided for a Constitutional Council with responsibility for verifying the constitutionality of laws and legislative ordinances upon request of the President of the Republic and the Speaker of the National Assembly (art. 64). This body was composed of the First President of the Supreme Court, the presidents of the Civil and Administrative Chambers of the Supreme Court, three deputies selected by the National Assembly and one member appointed by the President of the Republic (art. 63). However, the Constitutional Council was never established as the 1963 Constitution was suspended less than one month after its promulgation, and was subsequently repealed in 1965 following the *coup d'état* led by Hourari Boumédiène.

The second post-colonial Algerian Constitution, i.e. the Constitution of 1976, continued to be inspired (like the previous 1963 Constitution) by Socialist principles and was modeled around the idea of the concentration of powers (see Brown 2002: 72-74). Indeed, the Socialist model was defined as an "irreversible option" (art. 10), and the single-party system

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was confirmed (arts. 94–95). There was no scope within this constitutional framework for the constitutional review of legislation. Article 186 of the Constitution only provided for "political control" by the "governing bodies of the Party and of the State," which was carried out "in accordance with the National Charter and the provisions of the Constitution."

The introduction of a constitutional review mechanism was discussed in December 1983 during the fifth Congress of the National Liberation Front, the single party that ruled over the country until 1989 when a multi-party system was established. It called for the creation of a "supreme body under the authority of the President of the Republic, the Secretary-General of the Party, responsible for deciding on the constitutionality of laws, with the aim of guaranteeing respect for and the supremacy of the Constitution, enhancing the legitimacy and sovereignty of the law, as well as asserting and consolidating responsible democracy in our country."[2] This recommendation was however not implemented.

Constitutional review was reintroduced in Algeria by the 1989 Constitution, which represented one of the major outcomes of the October 1988 revolts. The country was experiencing difficult economic circumstances as a result of the collapse in the price of oil on the international market, and there were increasingly pressing calls for a democratic turn. This Constitution marked a genuine watershed in Algerian history, with the single-party system being abandoned in favor of a multi-party system. All references to the Socialist model were eliminated, and although the President of the Republic remained the fulcrum around which the entire system rotated, the principle of the separation of powers was reinforced. With the aim of fostering the rule of law in the country, the 1989 Constitution also provided for a Constitutional Council, the powers and prerogatives of which were broader than those granted to this institution by the 1963 Constitution (see Ben Achour and Lachaal 1993: 637 et seq.). However, as early as 1992 the social and political circumstances in the country (i.e. the cancellation by the political and military leadership of the second round of parliamentary elections after the victory of the Islamic Salvation Front in the first round, followed by the proclamation of a state of emergency, and the outbreak of civil war) prevented the Council from continuing to perform its functions. During the mid-nineties, a period of relative stability favored the resumption of the work of the Constitutional Council.

2 See http://www.conseil-constitutionnel.dz/index.php/fr/la-constitution/presentation-generale.

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Moreover, in 1996 the status and the functions of this body were further enhanced following the adoption of a new Constitution.

Under the 1996 constitutional framework, the Constitutional Council was composed of nine members (art. 164): three (including the president) appointed by the President of the Republic, four elected by Parliament (two by the People's National Assembly and two by the Council of the Nation), and two selected by the judiciary (one by the Supreme Court, and one by the Council of State). Although all three branches of government were involved in the appointment process, the views of the President of the Republic – also in the light of his leading role in the political and institutional system – was predominant (see Magnon 2011: 619 et seq.). One of the most evident demonstrations of the extremely close link between the executive branch and the Constitutional Council occurred in 2012, when Abdelaziz Bouteflika appointed the then Minister of Justice Tayeb Belaiz as President of the Council. Belaiz did not resign from his position of Minister of Justice and retained both positions for a few months, thus clearly violating the principle of the separation of powers and the most basic rules on incompatibility of office.

As regards the form of review conducted by the Constitutional Council, it must be recalled that Algeria was for a long time the only country in the Maghreb in which abstract review of the constitutionality of legislative acts was possible not only *ex ante* (which was typical of the other countries from the region), but also *ex post*, thus departing from the "original" French model of constitutional review.[3] In fact, Article 165 of the 1996 Constitution stipulated that the Council was required to rule by an *avis* in relation to laws, treaties and regulations that were not yet in force ("si ceux-ci ne sont pas rendus exécutoires") (*ex ante* review), and otherwise to rule by a *décision* (*ex post* review). In addition, the 1996 Constitution also provided for mandatory *ex ante* review of organic laws as well as the internal regulations of each of the Houses of Parliament (arts. 123 and 165).

One of the main weak points of the Algerian system of constitutional review concerned the procedural gateways to the Constitutional Council (see Laggoune 1996: 18–19; Graëffly 2005: 1399). Indeed, only the President of the Republic and the Speakers of the two Houses of Parliament had standing to apply to the Council (art. 166). This drastically reduced the overall number of legislative acts on which the Council could rule. This

3 As is well known, before the constitutional revision in 2008 France only contemplated *ex ante* review.

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body ruled on the constitutionality of laws only in a handful of cases, and moreover was never seized in order to review the constitutionality of regulatory acts or of legislation ratifying international treaties.[4] In the vast majority of the cases the Council verified the constitutional legitimacy of organic laws and the internal regulations of the Houses of Parliament, namely the legislative acts for which the Constitution stipulated a requirement of mandatory (*ex ante*) review.

In the light of this "stranglehold" on access, the bulk of the Algerian Constitutional Council's action did not involve the constitutional review of legislation, but consisted rather in ruling on the regularity of legislative elections, presidential elections and referendums, as well as proclaiming the results of these electoral processes (*Constitution*, art. 163(2)). In other words, the role of the Algerian Council – as was also the case in Morocco[5] – was mainly that of an "arbiter of electoral life" (Graëffly 2005: 1403) of the country.

It should be noted, however, that the Council was also vested with many other "ancillary" functions (on the "ancillary" functions performed by Arab constitutional review bodies see Biagi, in this volume). Indeed, the 1996 Constitution granted this body the power to verify the incapacity of the President of the Republic and to rule that this office is permanently vacant (art. 88), as well as the power to postpone the holding of presidential elections in exceptional circumstances (art. 89). Moreover, the Council had to be consulted by the President of the Republic concerning any declaration of a state of emergency or a state of siege (art. 91), a state of exception (art. 93), general mobilization (art. 90(5)), and war (art. 90(5)). Furthermore, in certain extreme circumstances (e.g. if the office of President of the Council of the Nation is vacant at the time of the resignation or death of the President of the Republic), it was provided that the President of the Constitutional Council should assume the duties of Head of State (art. 88). Finally, the Council also had the power to review the constitutionality of constitutional amendments. In particular, the 1996 Constitution provided for two different procedures for constitutional amendment: on the one hand, Article 174 stipulated that proposed constitutional amendments,

4 See http://www.conseil-constitutionnel.dz/index.php/fr/les-attributions-du-cc.

5 With reference to the constitutional review of legislation, the Moroccan Constitutional Council was compared to the "sleeping beauty castle" (a metaphor used by Robert Badinter, cited by Bernoussi 2012: 211). Indeed, in the period 1994–2013, the vast majority of its decisions (724 out of 913) concerned electoral justice (see Benabdallah 2013: 19). See more generally, on the role of the Moroccan Constitutional Council in the electoral processes, Moussebbih 2017: 437 et seq.

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which could be presented on the initiative of the President of the Republic, had to be approved by both houses of Parliament and thereafter subject to a referendum within 50 days of their adoption; on the other hand, Article 176 provided for a different procedure under which, if the proposal was considered to be constitutional by the Constitutional Council, the President was able to promulgate the amendment directly, provided that it had been approved by Parliament by a majority of three-fourths of the members of both houses. It should be noted that this latter procedure has been followed in relation to all three reforms of the 1996 Constitution, namely in 2002, 2008 and 2016.

The Algerian Constitutional Council – like most constitutional review bodies in the region before the Arab Spring (Brown 1998: 89; Biagi, in this volume) – only rarely stood up as an effective defender of constitutionalism. In most cases the Council displayed a high degree of deference towards the ruling regime, thus confirming the concerns of those who had questioned the neutrality of this body (see Graëffly 2005: 1398 et seq.). It is sufficient to consider several judgments in the field of electoral justice[6] or on the constitutionality of constitutional amendments,[7] which threw into considerable doubt the effective independence of the Council from the executive branch. Thus, those few decisions in which the Council acted as a real protector of constitutional principles and fundamental rights and freedoms seem to have been the exceptions that confirmed the rule.[8] Several reasons explain the difficulties encountered by the Algerian Constitutional Council in playing a "counter-majoritarian" role, including the strong grip of the executive on this institution, the "stranglehold" on access, the political, social and cultural context (characterized by a weak separation of powers and a poor constitutional culture), as well as certain factual circumstances (such as the civil war that broke out during the 1990s).

6 E.g. *Proclamation 1-P-CC-2 of June 3, 2002*; *Decisions 12, 14 and 15 DCC of March 1, 2004*. See Graëffly 2005: 1400–1401.

7 *Avis 01/08 A.RC/CC of November 7, 2008*; *Avis 01/16 A.RC/CC of January 28, 2016*. See Biagi 2017: 5–6.

8 E.g. *Decision 1 – D.L.CC-89 of August 20, 1989*; *Decision 1 – D.O.CC-95 of August 6, 1995*; *Avis 02/A.LO/CC/04 of August 22, 2004*. On these and other decisions see Mallat 2007, 186–188; Gallala-Arndt 2012: 252–254.

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3. The 2016 reform and the strengthening of the Constitutional Council's position

Following its announcement by Abdelaziz Bouteflika in April 2011, the reform of the 1996 Algerian Constitution – which had previously been amended in 2002 and 2008 – was finally adopted in February 2016. It was a broad-sweeping reform, both to the preamble and to all four titles comprising the Constitution (see Philippe 2016; Biagi 2016; Biagi 2017). On the one hand, this reform was characterized by a high degree of continuity with the past. Specifically, it did not alter the excessive concentration of power in the hands of the President of the Republic, with the consequence that the principle of separation of powers – which is now explicitly provided for in the Constitution (art. 15) – remains more theoretical than substantive. Indeed, the President continues to be the *dominus* of the political and institutional system, occupying a position that is undoubtedly much more powerful than that of the Prime Minister and Parliament. On the other hand, however, this reform introduced several important novelties, which effectively pointed towards greater democratization. A crucial aspect was the reintroduction of the two-term limit for the President of the Republic (art. 88), a limit which had previously been included in the original version of the 1996 Constitution but was removed by the constitutional reform of 2008 in order to enable Bouteflika to stand for a third (and subsequently a fourth) term in office. Another significant change was the recognition of Tamazight as a genuine "official" language, and no longer only as a "national" language (art. 4). Furthermore, the recognition and protection of fundamental rights and freedoms were strengthened, whilst the independence of the judiciary was (partially) reinforced.

The 2016 reform introduced some major innovations also in the field of constitutional justice. It would appear that the main aim of the drafters was to remedy the weaknesses (discussed above) that characterized the system of constitutional review by introducing a full range of provisions which, considered overall, appear to have reinforced the Constitutional Council's role (at least on paper).

First, the number of members of the Council was increased from 9 to 12. The President of the Republic continues to play a key role in the selection process with entitlement to appoint one-third (four) of the members of the Council, including the President and the Vice-President (which latter position was established by the 2016 reform); a further one-third are elected by Parliament (two judges by the People's National Assembly and two by the Council of the Nation), whilst the remaining one-third are appointed by the judiciary (two members by the Supreme Court and two

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by the Council of State) (art. 183). All three branches of government thus continue to be involved in the appointment process, although in contrast to the past the proportion of members appointed by the judiciary has increased. With regard to incompatibilities, Article 183(3) stipulates that as soon as they are selected, the members of the Council must cease to hold any other mandate, function, task or mission or to carry out any other activity or practice any profession. Moreover, according to Organic Law 12-04 on Political Parties, members of the Constitutional Council must not be members of any political party whilst in office (art. 10(3)).

The 2016 reform also established for the first time the appointment criteria for members of the Constitutional Council. Specifically, its members must be at least 40 years of age and must have experience of at least 15 years in the field of higher legal education, as a judge, as a barrister with rights of audience before the Supreme Court or the Council of State or in a senior position in the state apparatus (art. 184). These requirements based on merit and expertise are extremely important as they can help to foster the Council's independence. Moreover, it should be noted that – as is the case in other countries in the region (such as Morocco and Tunisia) – a *legal* background has become an essential requirement for appointment to the bench, which confirms the shift towards the "judicialization" of many Arab constitutional review bodies (see Biagi, in this volume).

The 2016 reform also expressly stipulates that the Constitutional Council enjoys administrative and financial autonomy (art. 182(4)). Furthermore, with the aim of limiting external interference or pressure, the reform introduced some very important innovations with respect to immunity. Indeed, Article 185 provides that the members of the Constitutional Council enjoy judicial immunity in respect of criminal matters during their term in office. In particular, they may not be prosecuted or arrested for committing a crime or an offense unless an explicit waiver has been granted by the individual concerned or with the authorization of the Constitutional Council.

The form of constitutional review has also undergone profound changes. Indeed, *ex ante* and *ex post* review have been maintained, although they now take on a different form. As regards *ex ante* review, the Constitution provides that the Council rules by an *avis* on the constitutionality of treaties, laws and regulations (art. 186(1)). In addition, the Constitution continues to provide for mandatory *ex ante* review of specific legislative acts (art. 186(2) and (3)): in particular, the Council is required to verify the constitutionality of organic laws prior to their promulgation (*Constitution*, art. 141(3); *Rules of Procedure of the Constitutional Council*, art.

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2)[9] and the constitutionality of the internal regulations of each house of Parliament prior to their implementation (*Rules of Procedure of the Constitutional Council*, art. 3).

It is important to stress that the calls made within the literature (see Graëffly 2005: 1399; Kaïs 2014: 247) and by former President of the Constitutional Council Tayeb Belaiz (see Belaiz 2013: 52) to broaden the grounds for access were accepted by the lawmakers who adopted the 2016 constitutional reform: indeed, in addition to the President of the Republic and the speakers of the two houses of Parliament, the right to apply to the Council (on an *ex ante* basis) was also granted to the Prime Minister and the parliamentary opposition (in particular to 50 members of the People's National Assembly and to 30 members of the Council of the Nation) (art. 187). As much as it may be of major importance, the success of *saisine parlementaire* must not be taken for granted: indeed, whilst the introduction of that mechanism in France in 1974 resulted in a significant increase in the number of applications to the Constitutional Council (see Morton 1988: 91), the same cannot be said, for example, in relation to Morocco, where by contrast the opposition forces have only rarely applied to the Constitutional Council (see Gallala-Arndt 2012: 254–255).

With regard to *ex post* review, the Constitution no longer vests political authorities with the power to apply to the Constitutional Council. Thus, abstract review can now only take place before the legislative act concerned is enacted (*ex ante* review), whereas the only permitted form of *ex post* review is concrete review. Indeed, as will be discussed in greater detail below, the constitutionality of legislative acts that are already in force can now only be challenged before the Constitutional Council by the ordinary courts (and in particular by the Supreme Court and the Council of State) through the "exception of unconstitutionality" mechanism (art. 188).

The 2016 constitutional reform also continues to vest the Constitutional Council with extremely significant "ancillary functions". Interestingly, some of these functions have been crucial in regulating the transition process following the decision by Abdelaziz Bouteflika not to run for a fifth term in office and to resign on April 2, 2019. This decision was made in the wake of several weeks of mass protests throughout the country (known as the *Hirak* Movement), in which the Algerian people not only demanded an end to Bouteflika's twenty-year rule, but also, more generally, called for

9 *Rules of Procedure of the Constitutional Council of May 12, 2019*, as amended on October 17, 2019.

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the dismantling of the "system" (*le Pouvoir*, comprised of the military, the President of the Republic and the National Liberation Front) (see Burchfield 2019; Mezran and Neale 2019; L'Année du Maghreb 2019). In the first place, following President Bouteflika's resignation, the Constitutional Council ruled that the office of President of the Republic was definitively vacant, and gave notice of this fact to Parliament (*Constitution*, art. 102(4) and (5)).[10] The duties of the Head of State were then assumed by the President of the Council of the Nation, Abdelkader Bensalah, who was entitled to remain in office for a maximum of 90 days, during which presidential elections were to be organized (art. 102(6)). These were scheduled for July 4, 2019, although due to a lack of eligible candidates they had to be postponed. Indeed, the Constitutional Council – which continues to be vested with the task of deciding on the regularity of electoral processes (art. 182(2) and (3)) – rejected applications by the two candidates due to the lack of a sufficient number of signatures endorsing them as candidates, as well as irregularities when collecting them,[11] with the consequence that the election could not be held on July 4, 2019 and had to be postponed.[12] With the aim of guaranteeing the continuity of state institutions, the Constitutional Council clarified that it was for the provisional Head of State – whose 90-day term expired on July 9, 2019 – to call a new election and to complete the process of electing a new President of the Republic.[13] These rulings attracted harsh criticism, and the Constitutional Council was accused of giving a "constitutional veneer" to decisions made by the political and military leadership (Boumghar 2019: 69 et seq.).

The presidential elections were eventually held on December 12, 2019, and saw the victory in the first round of former Prime Minister and Minister of Housing Abdelmadjid Tebboune. In the meantime, in September 2019 an electoral commission (*Autorité nationale indépendante des élections*) had been set up and Organic Law 16-10 of August 25, 2016 on the electoral system had been changed. In spite of the fact that their constitutionality was questionable on various grounds (see Hammadi 2019), the Constitutional Council upheld both the Organic Law establishing the electoral commission and the Organic Law reforming the electoral system. Only minor aspects of these laws were struck down as unconstitutional.[14] Further-

10 *Declaration of April 3, 2019.*
11 *Decisions 18/D.CC/19* and *19/D.CC/19 of June 1, 2019.*
12 *Decision 20/D.CC of June 1, 2019*.
13 *Communication of June 2, 2019*.
14 See *Avis 01/A.L.O/19 of September 14, 2019*, and *Avis 02/A.L.O/19 of September 14, 2019*.

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more, on November 9, 2019, the Council validated the list of candidates for the presidential elections (after rejecting nine appeals by candidates who had been excluded by the Electoral Commission),[15] and on December 16 proclaimed the final results of the elections.[16]

In addition to the powers mentioned above, some other important "ancillary functions" of the Constitutional Council include the power to verify the incapacity of the President of the Republic (art. 102(1)), and the power to extend the timeframes for holding new presidential elections up to a maximum period of 60 days in the event that any of the second round candidates dies or is subject to a lawful impediment (art. 103(3)). Furthermore, the President of the Council must be consulted by the President of the Republic concerning any declaration of a state of emergency or a state of siege (art. 105), a state of exception (art. 107(2)), war (art. 109), or in the event of the dissolution of the People's National Assembly (art. 147), whilst the Council as a whole must be consulted in the event of general mobilization (art. 104(4)) or the extension of the parliamentary term (art. 119(5)). Furthermore, under certain extreme circumstances (e.g. if the office of President of the Council of the Nation is vacant at the time of the resignation or death of the President of the Republic) the President of the Constitutional Council assumes the duties of the Head of State (art. 102(8)). The 2016 Reform also maintained the provision enabling the Constitution to be amended without any popular referendum. In fact, if the proposed constitutional amendment is upheld as constitutional by the Constitutional Council, the President of the Republic may promulgate the amendment law directly, provided that it has been approved by Parliament by a majority of three-fourth of the members of both Houses (art. 210).

4. The "exception of unconstitutionality"

The most significant innovation in the field of constitutional justice introduced by the 2016 reform is undoubtedly the "exception of unconstitutionality" mechanism. Article 188(1) of the Constitution provides that the Constitutional Council has the power to examine "an exception of unconstitutionality pursuant to a referral by the Supreme Court or the Council of State in the event that one of the parties to a trial claims before a judicial authority that the legislative provision on which the dispute

15 *Decision 36 /D.CC/19 of November 9, 2019*.
16 *Proclamation 03/P.CC/19 of December 16, 2019*.

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depends violates the rights and freedoms guaranteed by the Constitution." This Article also stipulates that the conditions and arrangements governing the implementation of this form of access to the Constitutional Council must be laid down in an organic law (art. 188(2)), which was adopted on September 2, 2018 (*Organic Law 18-16*; hereinafter: Organic Law), and entered into force on March 7, 2019. The Constitutional Council ruled (on an *ex ante* basis) on the constitutionality of this Organic Law in the *Avis 3/A.L.O/C.C/18 of August 2, 2018*.

At the time of writing, the Council has delivered two judgments concerning an exception of unconstitutionality, namely *Decision 01/D.CC/EI/19* and *Decision 02/D.CC/EI/19 of November 20, 2019*. Since these two cases concern the same provision, i.e. Code of Criminal Procedure, art. 416-1, the Council ruled on the merits only in the first case (as provided for under *Rules of Procedure of the Constitutional Council*, art. 29bis). One more case is currently pending before the Council, namely *Exception 2020-01/EI*, which concerns the Code of Criminal Procedure, art. 496(6).

In the following text, I shall make some preliminary remarks concerning five aspects of this new procedural gateway to the Constitutional Council, namely 1) the introduction of a "double-filter" system; 2) those with standing to raise an exception of unconstitutionality; 3) the parameter for constitutional review; 4) the conditions that must be met in order to raise an exception of unconstitutionality; 5) the effects of the Constitutional Council's decisions. I shall also show that Algerian lawmakers have relied considerably on the system of concrete constitutional review introduced in France in 2008, namely the *question prioritaire de constitutionnalité*.

4.1. The introduction of a "double-filter" system

As is well known, the French legal model has traditionally exerted a strong influence over the Maghreb countries (Le Roy 2012: 109 et seq.), including in the field of constitutional review (Gallala-Arndt 2012: 239 et seq.). The decision made by Algerian constitutional lawmakers in 2016 to introduce the exception of unconstitutionality represents a further example of the continuation of this tradition, as well as being the outcome of frequent and intense exchanges among the members of the French and Algerian

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Constitutional Councils.[17] In 2008 France adopted an extremely important constitutional reform, which – *inter alia* – introduced *ex post* constitutional review for the first time, in the form of concrete review (*question prioritaire de constitutionnalité*) (see Fabbrini 2008: 1297 et seq.; Pouvoirs 2011). A peculiarity of the French system is that not all courts have the authority to challenge a legislative act before the Constitutional Council. Indeed, when any *lower* court concludes that a law violates any rights and freedoms guaranteed by the Constitution, it must stay the proceedings and refer the matter to the highest courts – specifically the Court of Cassation or the Council of State – which then decide whether or not to refer the question of constitutionality to the Constitutional Council. This mechanism, which may be described as a "double-filter" system, clearly departs from the most common model of concrete constitutional review, i.e. the "single-filter" system. Indeed, under the latter system, all courts – including lower courts – can refer questions of constitutionality *directly* to the Constitutional Court. The single-filter system can be found in a number of European countries, including Italy, Germany and Spain, as well as many central and eastern European states.

As discussed in greater detail elsewhere in this volume (see Biagi 2021), some Arab countries, including Egypt, Kuwait, Palestine, and Tunisia, have adopted the single-filter system. Algeria, together with Jordan, has by contrast followed the French model and opted for the double-filter system. Thus, when a lower court concludes that the legislative act that has to be applied to the specific case violates a fundamental right or freedom recognized by the Constitution, it cannot raise an exception of unconstitutionality directly before the Constitutional Council, but is required to refer it to the Supreme Court or the Council of State, and it is for these apex courts to decide whether or not to submit the exception to the Constitutional Council (*Constitution*, art. 188; *Organic Law*, arts. 7 et seq. and 13 et seq.). All three exceptions of unconstitutionality raised thus far before the Constitutional Council originated from the Supreme Court.

As has been pointed out also by former President of the Algerian Constitutional Council Mourad Medelci, the aim of the double-filter system is to prevent the Constitutional Council from being overloaded by cases (Medelci 2016: 31). However, comparative examples show that this mechanism can be rather problematic, especially at the outset, as it can foster

17 The journal of the Algerian Constitutional Council has often included a report of these exchanges and meetings. See, for example, *Revue du Conseil Constitutionnel* 2, 2013, and 8, 2017.

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tensions between the highest courts and the Constitutional Court, and it can hinder access to constitutional justice. For example, between 1951 and 1956 Germany adopted an access route that had some similarities with the double-filter system. Specifically, courts could only refer a question of constitutionality to the *Bundesverfassungsgericht* via the supreme courts. These courts did not have the power to block the referral, but had the right to submit to the Constitutional Court their own opinion concerning the question referred by the lower courts. However, within the practice of the *Bundesgerichtshof* (the supreme court in civil and criminal matters),

"such opinions began to take the form of all but complete judgments on constitutionality and were published in the official collection of the *Bundesgerichtshof*'s decisions, sometimes before the Constitutional Court had rendered its decision. In 1955, the Constitutional Court declared that the supreme courts were not allowed to submit their opinions. In response, all five supreme court presidents addressed a note of protest to the President of the Constitutional Court. Finally, in July 1956, the Federal Constitutional Court Act was amended and the participation of supreme courts in the procedure of judicial referrals was abolished" (Garlicki 2007: 51).

In Jordan, where the double filter system was introduced by the 2011 Constitutional Reform, the extremely low number of judgments issued thus far by the Constitutional Court would appear to be related – amongst other things – to a certain degree of reluctance on the part of the Court of Cassation to refer questions of constitutionality to the Constitutional Court (Biagi 2019: 652-653). Even in France, during the first years of operation of the *question prioritaire de constitutionnalité*, the Court of Cassation (but not the Council of State (see Stefanini 2013: 1 et seq.) displayed a certain level of resistance when referring cases to the Constitutional Council (see Molfessis 2011: 83 et seq.; de Montalivet 2018: 927) – as was also recalled by the President of the French Constitutional Council Laurent Fabius during a visit to the Algerian Constitutional Council in February 2017 (see Fabius 2017: 118–119).

In the light of the above-mentioned examples, extremely close cooperation between the highest courts (i.e. the Supreme Court and the Council of State) and the Constitutional Council will be of the utmost importance for the exception of unconstitutionality to be successful in Algeria. Without such a dialogue, the double-filter system risks creating contrasts between the apex courts and the Constitutional Council, as well as to hindering access to constitutional justice, thus reducing the ability of the Council to guarantee effective protection for fundamental rights and freedoms.

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4.2. Who is entitled to raise an exception of unconstitutionality?

In Algeria, the exception of unconstitutionality can be raised upon request by one of the "parties to a trial" (*Constitution*, art. 188; *Organic Law*, art. 2). Although it will have to be clarified within the case-law of the ordinary courts and the Constitutional Council, this notion seems to suggest that *all* parties to a trial are entitled to raise an exception of unconstitutionality, thus both natural and legal persons, whether the plaintiff, the defendant or the prosecutor. It has also been argued within the literature that not only Algerian citizens, but also foreign nationals should be entitled to raise an exception of unconstitutionality (see Bousoltane 2017: 15).

It must be stressed that *only the parties* to a trial have the ability to raise an exception of unconstitutionality, whereas the judges are not entitled to do so *ex officio* (*Organic Law*, art. 4). Thus, Algeria, together with other countries in the region (including Jordan and Tunisia) (see Biagi, in this volume) has decided to follow the French model (see Articles 23-1 et seq. of the *Ordinance 58-1067 of November 7, 1958*, as amended by *Organic Law 2009-1523 of December 10, 2009*, regulating the *question prioritaire de constitutionnalité*, hereinafter: *Organic Law QPC*). It is evident that preventing judges from raising an exception of unconstitutionality *ex officio* risks further hindering access to constitutional justice – as was also pointed out by the Venice Commission in its opinion on the draft Organic Law on the Constitutional Court of Tunisia (see Venice Commission 2015: 8).

As is the case in France (*Organic Law QPC*, art. 23-2(6)), a decision by a lower court to raise an exception of unconstitutionality cannot be appealed, whereas the refusal to do so can only be challenged within an appeal lodged against the decision in respect of all or part of the trial (*Organic Law*, art. 9). Furthermore, it seems that in Algeria (as is the case in France) a refusal by the highest courts to raise an exception of unconstitutionality before the Constitutional Council cannot be appealed. It should be noted, however, that if the Supreme Court or the Council of State does not comply with the two-month deadline for deciding whether the exception of unconstitutionality should be raised before the Constitutional Council (as provided for under *Organic Law*, art. 13), the exception is raised *ex officio* before the Council (*Organic Law*, art. 20). A similar provision can also be found in France (*Organic Law QPC*: art. 23-7(1)).

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4.3. The parameter for constitutional review

The parties to a trial can raise an exception of unconstitutionality if they consider that the legislative provision on which the dispute depends violates "the rights and freedoms guaranteed by the Constitution" (*Constitution*, art. 188(1); *Organic Law*, art. 2). This means that – as is the case in France (*Constitution*, art. 61-1) – the parameter for constitutional review (*bloc de constitutionnalité*) is not comprised of all constitutional provisions (as is usually the case for concrete constitutional review mechanisms), but only comprises the provisions that refer to rights and freedoms.

The Organic Law on the exception of unconstitutionality has not provided any clarification with respect to the actual meaning and scope of this provision, thus leaving this task to the case-law of the ordinary courts and the Constitutional Council. In any case, it should be noted that Chapter IV of Title I of the Constitution dedicated to "Rights and Freedoms" (arts. 32 to 73) was significantly modified following the 2016 Constitutional Reform: new rights were constitutionalized, and the protection of others was reinforced (see Biagi 2017: 5–7). Furthermore, the preamble, which continues to refer to "individual and collective rights and freedoms", is now defined as an "integral part" of the Constitution. This expression appears to establish the normative status of the preamble and its eligibility as a parameter for constitutional review. These novelties are likely to strengthen the exception of unconstitutionality mechanism, by indirectly favoring access to the Constitutional Council.

In *Decision 01/D.CC/EI/19* the Constitutional Council opted for a broad interpretation of the expression "rights and freedoms guaranteed in the Constitution", since it used as a parameter for constitutional review a provision that is *not* included within Chapter IV of Title I of the Constitution on "Rights and Freedoms". Indeed, Article 416-1 of the Code of Criminal Procedure (hereafter: CPP) – the provision to which the exception of unconstitutionality related – was ruled partially unconstitutional, as it was deemed to be in contrast with Article 160(2) of the Constitution, which provides for a second instance of proceedings within criminal trials. The Council accepted the arguments made by the applicant, who stated that Article 416-1 of the CPP – which stipulated, *inter alia*, that only judgments within criminal trials imposing a prison sentence or a fine exceeding 20,000 Algerian dinars on natural persons could be appealed – violated the right to a two instances of jurisdiction in criminal offences ("double degré de juridiction en matière pénale") (*Constitution*, art. 160(2)), and consequently hindered the possibility to prove one's innocence.

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Interestingly enough, in this case the Constitutional Council also ruled on the constitutionality of parts of Article 416 of the CPP, which the exception of unconstitutionality did not mention.[18] Indeed, Article 29(2) of the Rules of Procedure of the Constitutional Council states that the Council may verify the constitutionality of "other legislative provisions when the latter are linked to the legislative provision which was the object of the exception". In the light of their "evident link", the Council decided to strike down also the provisions of Article 416 of the CPP stipulating that only the judgments within criminal trials imposing a fine exceeding 100,000 Algerian dinars on legal persons, as well as judgments relating to minor infractions ("en matière de contravention") imposing a prison sentence, could be appealed. These provisions were (again) held to violate Article 160(2) of the Constitution.

The possibility or reviewing the constitutionality of legislative provisions other than those to which the claim relates seems to depart from the French model. In *Judgment 2010-1 QPC of May 28, 2010*, for example, the Constitutional Council stated that it could not rule on the constitutionality of certain provisions since they "do not appear in the question referred by the Council of State to the Constitutional Council." The Council thus followed the rule of *non ultra petita* (a court may not decide beyond what has been asked of it) (see Conseil constitutionnel français 2012). On the other hand, however, Article 7 of the Rules of Procedure on the *question prioritaire de constitutionnalité* stipulates that the Council has the power to review the constitutionality of the contested legislative provisions on grounds other than those identified by the parties (Jacquelot 2013: 14–15; Severino 2014: 493–494).[19]

18 The French version of CPP, art. 416 reads: "Sont susceptibles d'appel: 1 - les jugements rendus en matière de délits lorsqu'ils prononcent une peine d'emprisonnement ou une peine d'amende excédent 20.000 DA pour la personne physique et 100.000 DA pour la personne morale et les jugements de relaxe. 2 - les jugements rendus en matière de contravention lorsqu'une peine d'emprisonnement avec ou sans sursis a été prononcée."

19 See for example *Judgment 2010-28 QPC of December 16, 2010*, and *Judgment 2010-33 QPC of September 22, 2010*.

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4.4. *The conditions that must be met in order to raise an exception of unconstitutionality*

According to the Organic Law on the exception of unconstitutionality (arts. 8 and 13(2)), three conditions must be met in order for the courts (both the lower and the apex courts) to raise an exception of unconstitutionality. In other words, if these three conditions are met, lower courts must raise the exception before the Supreme Court or the Council of State; similarly, if also the Supreme Court or the Council of State concludes that these conditions are met, then they must raise the exception before the Constitutional Council.

In the first place, "the contested legislative provision" must "determine the outcome of the dispute, or constitute the ground for the proceedings underway" (*Organic Law*, art. 8). This provision clearly recalls Article 188(1) of the Constitution, according to which an exception of unconstitutionality may be raised in the event that one of the parties to a trial claims that "the *legislative provision on which the dispute depends* violates the rights and freedoms guaranteed by the Constitution" (emphasis added). These provisions seem to indicate that the contested legislative provision must be essential in order to resolve the dispute. From this viewpoint, the Algerian system in part departs from the French model, under which courts can raise an exception of unconstitutionality if the contested provision "is *applicable* to the litigation or proceedings underway" (emphasis added) or constitutes the basis for such proceedings (*Organic Law QPC*, art. 23-2(1)). This provision seems to be less "stringent" compared to its Algerian counterpart, as it only requires the existence of a link between the contested provision and the dispute;[20] in Algeria, by contrast, the contested provision must determine the *outcome* of the dispute.

The second requirement – which is almost identical to its French counterpart (see *Organic Law QPC*, art. 23-2(1)) – provides that "the legislative provision has not already been declared consistent with the Constitution by the Constitutional Council, except in the event of a change of circumstances" (*Organic Law*, art. 8). Therefore, as a general rule, if the provision has already been upheld as constitutional, an exception of unconstitutionality cannot be raised. It may only be raised "in the event of a change

20 It should be noted, however, that the Court of Cassation (unlike the lower courts and the Council of State) usually requires the existence of a link between the contested provision and the outcome of the dispute (see for example *Judgment 10-13616 of September 14, 2010*; *Judgment 12-12356 of July 5, 2012*).

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of circumstances". In the light of this ambiguous expression, it will be up to the Constitutional Council to clarify the meaning and scope of the provision, as the French Constitutional Council did in 2009 when reviewing (on an *ex ante* basis) the Organic Law on the *question prioritaire de constitutionnalité*.[21] In particular, in that decision the French Council specified that "a change of circumstances" refers both to circumstances of "law" and circumstances of "fact".[22]

The third condition provides that the question must be "of a serious nature" (*Organic Law*, art. 8). The Constitutional Council held – in its ruling (recalled above) on the Organic Law on the exception of unconstitutionality[23] – that vesting ordinary courts with the competence to verify the seriousness of the question does not mean that "the type of scrutiny [*pouvoir d'appréciation*] of these courts is similar to that vested exclusively in the Constitutional Council", which is the only body responsible for reviewing the constitutionality of legislative acts. Despite this clarification, the notion of seriousness remains open to different interpretations, thus raising a number of questions. For example, do the ordinary courts have to be convinced that the legislative act is unconstitutional, or is a mere doubt as to the constitutionality of the act sufficient in order to raise an exception of unconstitutionality? What standard of scrutiny are ordinary courts supposed to apply: loose scrutiny or strict scrutiny? Only the jurisprudence of the Algerian courts will be able to answer these questions.

As regards this third requirement, it should be noted that the Algerian lawmaker has partially departed from the French model. Indeed, in France, lower courts can raise an exception of unconstitutionality if the question "is not devoid of seriousness" (a negative requirement) (*Organic Law QPC*, art. 23-2(1)), whereas the Court of Cassation and the Council of State can raise an exception if the question is "new" or "of a serious nature" (a positive requirement) (*Organic Law QPC*, art. 23-5(3)). This different formulation has considerable implications for the standard of scrutiny: while the lower courts usually apply quite a loose standard of scrutiny (i.e. they ascertain that the question is not absurd, frivolous, or seeking to postpone the final decision), the Court of Cassation and the Council of State are required to apply a stricter standard of scrutiny (i.e. they raise an exception of unconstitutionality only if they cannot

21 *Decision 2009-595 DC of December 3, 2009*.
22 For specific examples see *Judgment 2010-14/22 QPC of July 30, 2010*, and *Judgment 2011-125 QPC of May 6, 2011*.
23 *Avis 3/A.L.O/C.C/18 of August 2, 2018*.

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interpret the contested provision in a manner that is consistent with the Constitution (constitution-conform interpretation))[24] (see Roblot-Troizier 2013: 58 et seq.; Severino 2014: 489–491). In Algeria, the Organic Law on the exception of unconstitutionality does not provide for any difference as regards the type of scrutiny between the lower courts and the highest courts (since both must establish that the question is "of a serious nature"); however, this does not seem to prevent the case-law of the lower and apex courts from evolving in different ways.

4.5. The effects of the Constitutional Council's decisions

Finally, it is worth recalling that Article 191 of the Constitution provides that a legislative or regulatory provision that is ruled unconstitutional will normally cease to apply on the day on which the Constitutional Council issues its decision, whilst legislative provisions that are ruled unconstitutional pursuant to an exception of unconstitutionality cease to have effect "from the date specified in the decision of the Constitutional Council." Similarly, in France a provision that is declared unconstitutional pursuant to a *question prioritaire de constitutionnalité* ceases to have effect "as of the publication of the […] decision of the Constitutional Council *or as of a subsequent date determined by said decision*" (*Constitution*, art. 62(2)) (emphasis added) (see Deumier 2015: 65 et seq.).

Generally speaking, the possibility of deferring the date on which the invalidation of a legislative act takes effect is intended not only to give the legislature time to intervene so as to avoid any gaps in the law, but also to reduce the impact of decisions of unconstitutionality on political institutions and the legal order as a whole (as, for example, in cases involving the invalidation of laws dealing with taxation matters, which may give rise to some forms of redistribution of the state budget) (see de Visser 2014: 318–320).

5. Concluding remarks

This chapter has shown that, since its establishment in 1989, the status, role and prerogatives of the Algerian Constitutional Council have been

24 On constitution-conform interpretation, from a comparative perspective, see de Visser 2014: 378–384.

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significantly reinforced over time. In most cases, however, this body has focused its action on the resolution of electoral disputes, and has acted as a real "counter-majoritarian" institution only in a few cases. The 2016 constitutional reform introduced several important innovations in the field of constitutional review which, considered overall, have strengthened the position of the Council within the institutional architecture. In particular, the widening of access, especially through the introduction of the exception of unconstitutionality, has increased the possibilities (at least on paper) for this body to play a more effective role in protecting fundamental rights and freedoms. This essay has made some preliminary remarks concerning this new procedural gateway, discussing its major characteristics, its main strengths and weaknesses, and showing the strong influence exerted on it by the French *question prioritaire de constitutionnalité*. However, it is important to stress that it is only after this new mechanism has been operating in practice that it will be possible to fully understand its impact not only on the system of constitutional review, but also on the Algerian legal system as a whole. In particular, the case law of the ordinary courts and the Constitutional Council will be crucial in answering a number of questions that are as yet unresolved. *Avis 3/A.L.O/C.C/18 of August 2, 2018*, on the Organic Law on the exception of unconstitutionality, as well as *Decision 01/D.CC/EI/19* and *Decision 02/D.CC/EI/19 of November 20, 2019*, of the Constitutional Council have started to clarify some of these issues; obviously however, this is still just the beginning of the process.

There is also another variable that must be taken into account. Algeria (as mentioned above) is currently experiencing a period of transition following the resignation of Abdelaziz Bouteflika on April 2, 2019, and since then a large number of protesters have been calling for the adoption of a new Constitution (see Veysset 2019). In an attempt to calm down protest demonstrations, soon after he was elected President of the Republic, Abdelmadjid Tebboune announced his intention to reform the 1996 Constitution. He thus charged a commission of experts (mainly comprised of university professors) with preparing a draft constitutional reform. Interestingly, these draft amendments, which were released in May 2020 (see Al-Ali 2020), also envisaged some significant changes to the system of constitutional review. In particular, as occurred in Morocco and Tunisia, the Constitutional Council has changed its name and will now be called the Constitutional "Court". Its functions have been expanded, as the Court, for example, has been vested with the power to resolve disputes between constitutional "powers" upon request by the President of the Republic, the Speakers of the two houses of Parliament, the Prime Minister or the Head of Government, 40 members of the Lower House or 25 members of the

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Upper House. As regards the Court's jurisdiction, the draft provides for *ex ante* review of laws and international treaties, as well as mandatory *ex ante* review of organic laws and the internal regulations of each house of Parliament. The Court is also responsible for verifying that laws and regulations are consistent with international treaties. Furthermore, the draft makes provision for *ex post* abstract review of ordinances and regulations. With respect to concrete review, the draft maintains the double-filter system, but unlike the current model it provides that not only a legislative provision but also a provision of a *regulation* may be the object of an exception of unconstitutionality. It remains to be seen whether this constitutional reform will be confirmed in the referendum that has been recently scheduled for November 1, 2020.

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