
The unconstitutionality plea in Algeria

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Abstract---The Algerian constitutional legislator has established a mechanism for the posterior review of the constitutionality of laws under the designation of the "unconstitutionality plea" — a procedure known in French law as the *Question Prioritaire de Constitutionnalité* (QPC). Article 188 of the 2016 Constitutional Amendment granted, for the first time, the parties to a judicial dispute the right to challenge legislative provisions they claim violate the rights and freedoms guaranteed to them by the Constitution (later re-enacted as Article 195 of the 2020 Constitutional Amendment). The organic law 18-16 subsequently regulated the legislative dimensions of this mechanism by establishing its conditions and modalities of application, followed by Organic Law 22-19 of 25 July 2022, which specifies the notification and referral procedures before the Constitutional Court. To provide a comprehensive examination and critical evaluation of this experience in Algeria, this article is structured around four principal axes. The first examines the unconstitutionality plea in Algeria and situates it within comparative legal frameworks, exploring the extent to which the Algerian legislator has charted a distinct course in regulating this matter. The second axis addresses the conceptual framework of the mechanism, with particular attention to the applicable conditions and standards governing its use. The third axis traces the filtration procedures through which unconstitutionality pleas are screened — first at the level of the lower courts, and then at the level of the Supreme Court or the Council of State. The fourth and final axis offers a critical reading of the decisions issued through this mechanism during both the era of the Constitutional Council and that of the Constitutional Court, presenting a comprehensive inventory of all relevant decisions and comparing the Algerian experience with its French counterpart.

Keywords---Unconstitutionality Plea, Constitutional Review, Constitutional Court, Constitutionality Filtration, QPC, Fundamental Rights and Freedoms, Algeria, France.

Introduction

The Algerian constitutional legislator introduced an additional reform relating to the referral mechanism of the constitutional body — a mechanism that had previously been restricted to the executive and legislative branches until 2016, before being extended to litigants through the unconstitutionality plea, pursuant to referral from the Supreme Court or the Council of State.¹ The entrenchment of the principle of challenging the constitutionality of laws embodies the Algerian legislator's commitment to protecting human rights and purging the legal system of legislative provisions that impinge upon rights and freedoms. Such protection cannot be confined to the mere inscription of these rights in constitutional texts; ensuring their efficacy requires that constitutional review extend to the practical and applied dimension of the law — for the unconstitutionality of a given statute does not always manifest at

¹ The rationale for this indirect referral mechanism is to prevent the Constitutional Council from being inundated with challenges whose sole purpose is delay or deception.

the drafting stage, but frequently reveals itself only upon its implementation in practice.²

The present article accordingly examines this mechanism in its full institutional and procedural dimensions, drawing on comparative constitutional law — with particular emphasis on the French model — in order to evaluate the Algerian experience and identify avenues for its further development.

1. The Unconstitutionality Plea in Comparative Legal Systems and in Algeria

Constitutional review of legislation may be exercised before specialized constitutional courts established for that purpose through a direct action — the principal plea — or it may arise incidentally in the course of ongoing litigation, when questions concerning the constitutionality of legislative provisions to be applied by the court emerge, giving rise to the incidental unconstitutionality plea.

The Constitution has thus become an instrument available to the litigant for defending his rights against unconstitutional laws. Constitutional review of legislation admits of multiple classifications depending on the criterion adopted: prior and posterior review according to the timing of its exercise; political and judicial review according to the nature of the reviewing body; review of laws versus review of judicial decisions according to the subject matter of review; and annulment review versus exclusion review according to the legal effect produced.³

1.1. Models of Constitutional Review Worldwide

Constitutional scholarship has traditionally identified three principal models of constitutional review: the American model, the European (Kelsenian) model, and the French model.

➤ The American Model

The American federal judiciary — particularly through the landmark case *Marbury v. Madison* (1803) — established the foundational doctrine of judicial review without any express constitutional authorization, to the point that the principle of judicial supremacy was engraved on the very walls of the Federal Court: the judiciary is duty-bound to set aside any law that conflicts with the Constitution. The United States was thus the first legal order to give concrete expression to constitutional review through the incidental plea mechanism. The case arose from the Constitution's silence

² The French Conseil Constitutionnel records annually no fewer than 200 notifications concerning the unconstitutionality of laws, of which approximately 60 are admitted. See: Mourad Medelci (President of the Constitutional Council), opening address at the National Conference on "The Unconstitutionality Plea," Algerian Press Agency (APS), Monday, 10 December 2018, <https://www.aps.dz/> (accessed 11 June 2021).

³ Ammar Abbas, "The Opening of Constitutional Adjudication to Litigants and Its Contribution to Purging the Legal System of Provisions Affecting Rights and Freedoms in the Maghreb Constitutions (Algeria, Tunisia and Morocco as Models)," *Journal of the Constitutional Council*, no. 7 (2016), Algiers, p. 9.

on the matter of judicial review, prompting the Federal Supreme Court to assert the judiciary's inherent authority to examine the constitutionality of legislation.

Judicial review of legislation is, in truth, the most complete form of constitutional review and one of the fundamental guarantees for the protection of individual rights and freedoms. When the Constitution entrusts the task of review to a judicial body, it ensures impartiality and objectivity in resolving the underlying constitutional question, for the judiciary, as an independent institution, is the very guarantor of the integrity of its judgments and decisions.

Judicial review operates through two principal methods: the first is review by way of a direct action — or annulment review — whereby a lawsuit is filed directly against a specific law on the grounds of its unconstitutionality before a court competent to adjudicate such claims. The second method is review by way of the incidental plea — or abstention review — which is a defensive mechanism invoked by a party harmed by the application of a given law in the context of pending proceedings, requesting the court to set aside that law and decline to apply it on account of its conflict with the Constitution.⁴

➤ **The European (Kelsenian) Model**

This model is attributed to the Austrian legal theorist Hans Kelsen, who advocated for the creation of a supreme judicial body responsible for constitutional review. The Austrian Constitutional Court, established in 1920, provided the institutional template that profoundly influenced numerous European states, including Germany, Italy, and Spain.

➤ **The French Model**

France developed its own distinct model, vesting the function of constitutional review in a specialized body whose membership reflects both the executive and legislative branches — the Conseil Constitutionnel, established by Articles 56-63 of the Constitution of the Fifth Republic (1958). In response to sustained criticism of the Council's performance and the exclusively preventive and prior nature of its review — which was contingent upon referral by the President of the Republic, the Presidents of the two parliamentary chambers, and the Prime Minister — the right of referral was extended to parliamentarians in 1974. A further reform, the Organic Law 2008-427 of 23 July 2008 on the modernization of the institutions of the Fifth Republic, introduced Article 61-1 into the Constitution, enabling litigants to challenge the

⁴ Two additional forms of judicial review also exist: (i) the judicial injunction, whereby any individual may request a competent court to suspend the application of a law on grounds of unconstitutionality — if the court confirms the violation, it issues an order to the competent administrative authority to refrain from applying the law in question; and (ii) the declaratory judgment, whereby an individual petitions the court to declare whether a given law is constitutional or not — the application of the law is suspended pending the court's ruling, after which it is either applied (if constitutional) or set aside (if unconstitutional). See: Nasreddin Mamri, Lectures in Constitutional Law, delivered to first-year law students, Faculty of Law and Political Science, Setif 2 University, p. 34.

constitutionality of legislative provisions applicable to their disputes. This mechanism was subsequently implemented by Organic Law 2009-1523 of 10 February 2009, which designated it the *Question Prioritaire de Constitutionnalité* (QPC). The provisions of Article 61-1 entered into force on 1 March 2010 pursuant to Presidential Decree No. 148/2010 of 16 February 2009.⁵

1.2. Constitutional Review in the Arab World and in Algeria

➤ Arab World

The European model of constitutional adjudication has been broadly influential across the Arab world. Egypt was a pioneer in this regard, establishing the Supreme Constitutional Court in 1971. The Maghreb states were shaped by the French model and accordingly created constitutional councils. However, following the political transformations that swept the region from 2011 onwards and the subsequent constitutional reforms, Morocco and Tunisia transitioned toward judicial constitutional review, while Algeria retained the political model of review — albeit supplemented with a quasi-judicial role through the 2016 amendment — before ultimately establishing a Constitutional Court in 2020. Across the region, the substance of constitutional amendments relating to the composition and competence of the constitutional review body has tended to converge around common features: the expansion of the reviewing body's membership, the tightening of eligibility conditions for appointment, and the extension of the referral mechanism to members of parliament and to litigants.

➤ Algeria

The Algerian constitutional legislator replaced the designation "Constitutional Council" with "Constitutional Court" through the 2020 Constitutional Amendment — a change reflecting the prevailing global and regional trend toward judicial constitutional adjudication. This reform consolidated both mandatory and optional constitutional review with a new instrument of posterior review applicable to laws that had not previously been subjected to prior constitutional scrutiny, constituting an addition that may contribute to strengthening and rationalizing the legal order in the service of constitutional harmony and the protection of rights and freedoms.⁶

The unconstitutionality plea is a form of posterior judicial review adopted by many states in their constitutional frameworks. The mechanism as practiced in Algeria since the 2016 amendment takes the form of an incidental plea aimed at excluding the applicable law rather than annulling it, rendering it less interventionist than the principal action — which directly challenges the law and seeks its outright invalidation.

⁵ Al-Amine Chrait, *Concise Constitutional Law and Comparative Political Institutions*, 5th ed. (Algiers: Office of University Publications, 2007), p. 150.

⁶ Samia Samri, "The Competences of the Constitutional Court in the Field of the Unconstitutionality Plea," *Journal of the Constitutional Council*, no. 17 (2021), pp. 189-190.

2. The Conceptual Framework of the Unconstitutionality Plea Mechanism

The Constitutional Court may be seized of an unconstitutionality plea by referral from the Supreme Court or the Council of State when a party to proceedings before an ordinary or administrative court contends that the legislative or regulatory provision upon which the outcome of the dispute depends violates the rights and freedoms guaranteed to him by the Constitution. The law sets out a number of conditions that must be satisfied for a plea to be transmitted.

- **Existence of a Pending Dispute.** The unconstitutionality plea must be raised in the context of ongoing litigation. This requirement raises the question of why the legislature prohibits the plea from being raised before a first-instance criminal court (as opposed to the appellate criminal court),⁷ and whether the plea may be raised before the Constitutional Court itself sitting as an electoral tribunal to adjudicate disputes relating to presidential and legislative elections and referenda.⁸
- **Raising by a Party to the Proceedings.** Since the unconstitutionality plea does not concern matters of public policy, it cannot be raised *ex officio* by the trial judge or the public prosecutor, remaining instead the exclusive prerogative of the parties to the dispute, whether natural or legal persons.
- **Seriousness of the Plea.** Seriousness is the most demanding condition for the admission of the plea: it constitutes the threshold through which the plea must pass to reach the Constitutional Court, in contrast to the remaining conditions, which are comparatively straightforward. The principal indicators of seriousness are: the relevance of the ground raised in the plea to the subject matter of the dispute; its connection to the legislative provision applicable to that dispute; and the genuine interest of the party raising the plea.⁹

The condition of seriousness is satisfied when two elements are established:

- **First**, a determination that the case actually raises a constitutional question upon whose resolution the outcome of the dispute depends — which requires that the constitutional issue be formulated with sufficient precision, thereby allowing the rejection of pleas designed merely to protract proceedings;
- **Second**, an assessment of whether the constitutional provision invoked is capable of raising genuine doubts as to the manner in which the dispute should

⁷ The French legislature similarly excluded the raising of the unconstitutionality plea before the Court of Conflicts, the Supreme Arbitration Court for collective labor dispute settlement procedures (established in 1950), and first-instance criminal courts. See: Zouaoui Chenna, "The Unconstitutionality Plea in Light of the Provisions of Organic Law No. 18-16," *Journal of the Constitutional Court*, no. 12 (2019), Algiers, pp. 29-30.

⁸ The draft organic law governing unconstitutionality plea procedures in Morocco permits the plea to be raised before the Constitutional Court itself when adjudicating challenges to parliamentary elections.

⁹ Kais Al-Sharif, "The Seriousness Condition in the Unconstitutionality Plea," *Journal of the Constitutional Council*, no. 12 (2019), pp. 12-13.

be resolved, requiring the judge to confront the invoked constitutional text with the contested legislative provision and ascertain that the matter raised is grounded in substantive reasons.

This condition also raises important questions concerning the overlap between the scrutiny of seriousness and the exclusive jurisdiction of the Constitutional Court to interpret the Constitution and assess the constitutionality of legislative provisions. It raises further questions about whether a judicial decision to accept or reject referral of the plea might itself constitute a determination on the merits of the constitutional question.

- **Formulation in a Separate Written Submission.** The Algerian legislature, following its French counterpart, does not require that the submission be signed by an attorney; however, by reference to the codes of civil and administrative procedure and of criminal procedure, it is implied that in cases requiring legal representation, the unconstitutionality plea submission must bear counsel's signature — though the nature of the plea, which demands a thorough command of constitutional law, statutes, and procedure, makes the involvement of counsel more than a mere formality.¹⁰
- **Legislative or Regulatory Provision as Subject Matter.** Article 188 of the 2016 Amendment originally confined the subject of the plea to "legislative provisions." Article 195 of the 2020 Amendment broadened this scope to encompass "legislative or regulatory provisions," pending corresponding adjustment of Organic Law 18-16.¹¹ Given that organic laws are subject to mandatory prior review and that regulatory acts have now been expressly included, the principal target of the plea in practice remains ordinary legislation that has not been referred to the Constitutional Court for prior review.¹²
- **The Provision Must Infringe Constitutionally Guaranteed Rights and Freedoms.** The plea must allege a violation of the rights and freedoms guaranteed by the Constitution, particularly those enshrined in the chapter on public rights and freedoms in the 2020 Amendment (Articles 34-83). The constitutional bloc relevant to rights and freedoms in Algeria is not limited to

¹⁰ Some states, such as Tunisia, require that the unconstitutionality plea submission be signed by a licensed attorney.

¹¹ The Supreme Court ruled on 26 April 2021 that two executive decrees were inadmissible as the subject of an unconstitutionality plea, on the grounds that Organic Law No. 18-16 had not yet been updated to reflect the amendment introduced by Article 195 of the 2020 Constitution (which extended the subject matter to legislative and regulatory provisions). Accordingly, the Court found no basis for applying Article 195 of the new Constitution to the two decrees at issue: Executive Decree No. 142/06 of 27 September 2006, determining the modalities for the application of the levy due on the paid use of the public water domain for industrial, tourist, and service purposes; and Executive Decree No. 262/11 of 30 July 2011, establishing the National Agency for Integrated Management of Water Resources.

¹² The legislatures of Tunisia and Morocco, for example, use the term "law" directly, unlike the Algerian legislature, which follows its French counterpart in using "legislative provision."

this chapter alone,¹³ however, but extends to the preamble, international treaties,¹⁴ principles of constitutional value,¹⁵ and even established diplomatic custom. It is worth noting that the constitutions of certain states — including Tunisia and Belgium — do not require that the subject of the plea concern an infringement of rights and freedoms.

- **Absence of a Prior Declaration of Constitutionality.** The legislature requires that the provision have not been previously declared constitutional, with the exception of a change in circumstances. This exception covers provisions that have been amended: challenge to their constitutionality remains available insofar as the amendment affects them, even if they were previously found to be compatible with the Constitution prior to the amendment. This factor makes ordinary legislation the primary target of the plea, given that organic laws are subject to mandatory prior review and that executive regulations may also be challenged.

On the basis of a reading of Organic Law 18-16, the new provisions of Article 195 of the 2020 Amendment, and Organic Law 22-19, and in light of practical experience, the following procedural and conceptual framework may be distilled:

- The plea may be raised for the first time on appeal or on cassation, as well as during the investigative phase before the indictment chamber; it may also be raised before the appellate criminal court, and — under the new notification and referral legislation — before first-instance criminal courts.
- The plea may not be raised before the Supreme State Court competent to try the President of the Republic and the Prime Minister, the Court of Conflicts, or the Constitutional Court itself, as these bodies are not subject to the supervisory authority of the Supreme Court or the Council of State.
- The plea cannot be raised *ex officio* by the judge or the public prosecutor, as it is not a matter of public policy and remains exclusively within the prerogative of the parties to the dispute.
- The plea is subject to inadmissibility unless formulated in a separate, reasoned, written submission — note that this takes the form of a "memorandum" rather than a "petition."
- The submission must contain the following elements: separation from the principal pleading; signature by the litigant or counsel; identification of the

¹³ The French Conseil Constitutionnel has, through successive decisions, defined the components of the constitutional bloc encompassing rights and freedoms as: the Constitution of 1958 and its preamble, the 1789 Declaration of the Rights of Man and of the Citizen, the fundamental principles of the laws of the French Republic, and constitutional-value principles and objectives.

¹⁴ Constitutional-value principles are not contained in any specific text but are inferred from the spirit of the laws. See: Al-Amine Chrait, "The Place of the Algerian Parliament in the Jurisprudence of the Constitutional Council," *Journal of the Constitutional Council*, no. 1 (2013), p. 13.

¹⁵ Referenced in the opinion of the Algerian Constitutional Council issued on 30 August 1989 concerning the Organic Law on the Status of the Parliamentary Deputy.

legislative provision under challenge; specification of the alleged violations of rights and freedoms; citation of the constitutional provision violated; and copies for all parties.

- Hearings before the Constitutional Court are held in public, with adversarial exchange of observations between the parties represented by their counsel.
- The plea may not be raised by the judge,¹⁶ and, absent an express statutory authorization for the public prosecutor to raise it, such authorization is equally precluded for a number of reasons: the plea was designed for the benefit of litigants; the law requires that the public prosecutor be notified of the plea in order to offer its opinion; the composition of the adjudicating formation of the Constitutional Court does not include a prosecution representative; the parties to the dispute are understood to be the victim and the accused; the public prosecutor's function is to submit requests rather than to raise pleas; and comparative practice has never seen a public prosecutor's representative initiate an unconstitutionality plea.
- A genuine difficulty may arise when the trial judge envisions the application of a different provision than that challenged, which may serve as grounds for rejecting the plea.
- If an action is filed before an incompetent court and the plea is raised there, the plea should not be transmitted to the Supreme Court.
- To avoid any legal vacuum, Article 5 of Law 18-16 provides that the codes of civil and administrative procedure and of criminal procedure shall apply subsidiarily.

3. The Practical Framework: Filtration of the Unconstitutionality Plea

The filtration process to which unconstitutionality pleas are subjected serves to prevent the constitutional courts competent to adjudicate them from being overwhelmed.¹⁷ At least two models of filtration exist in legal systems that adopt centralized constitutional review: the first vests the decision to admit an unconstitutionality plea in the constitutional judge himself; the second assigns a central role to the supreme courts in the filtration process.

3.1. Filtration by Constitutional Courts in Europe

- **Germany.** The German constitutional legislator provides for two filtration mechanisms: the first applies to all constitutional actions and operates through one of the two chambers of the Constitutional Court; the second, specific to the constitutional question (the incidental plea),

¹⁶ Article 4 of Law No. 18-16 of 2 September 2018 specifying the conditions and modalities of application of the unconstitutionality plea. *Official Gazette*, no. 54, p. 10.

¹⁷ Abd Al-Fattah Al-Malhi, "The Unconstitutionality Plea: A Comparative Study of the Filtration System," *Journal of Constitutional Law and Administrative Sciences*, Democratic Arab Center for Strategic, Political and Economic Studies, Germany, no. 14 (February 2022), p. 14.

allows the Court to reject the case from the outset. Following the amendment of the Federal Constitutional Court Act in 1993, the power to declare a referral inadmissible was assigned to the chambers or to the committees of three judges within each chamber.

- **Spain.** The unconstitutionality plea may be raised in Spain either by parties to the dispute before the judge, or by the judge himself *ex officio* at any level of the judicial hierarchy. To manage the volume of referrals, two control mechanisms are imposed: the first concerns the substantive conditions set out in Article 163 of the Constitution and Article 37 of the Constitutional Court Act; the second concerns compliance with the procedural conditions for referral in Article 35, which require, in summary, that the parties and the Attorney General be heard within ten days and that the referral decision be issued within three days.
- **Italy.** Filtration proceeds in two stages. The first is a formal screening in which the President of the Constitutional Court verifies compliance with the formal conditions, notifies the relevant parties, and may return the file to the trial judge in the event of procedural defects for rectification. The second stage involves the Constitutional Court's examination of admissibility under Article 23 of Law No. 87 of 1953, verifying that the question arises in the context of actual pending proceedings and that its resolution is conditional upon the determination of the constitutional question. The Italian Constitutional Court has become increasingly strict in its scrutiny of formal conditions in order to avoid being inundated with referrals, whose numbers have continued to grow.

3.2. Double Filtration in the French System

The French system has established an unprecedented filtration scheme: the first stage of filtration is carried out by the trial judges, who are required to verify, without delay, the satisfaction of three conditions for admitting the referral: that the contested legislative provision is applicable to the dispute; that the Conseil Constitutionnel has not previously declared it compatible with the Constitution, except where there has been a change in circumstances; and that the question presents a sufficiently serious character.

The second stage of filtration takes place before the Cour de Cassation and the Conseil d'État, which scrutinize whether the conditions governing the plea are met before deciding on referral to the Conseil Constitutionnel — the latter adjudicating

exclusively on the referrals received without reviewing the conditions of their admission.¹⁸

- **Assessment of Double Filtration.** The QPC in the French system is a mechanism for litigants to defend their constitutional rights and freedoms. Accordingly, considerable debate has arisen between proponents and critics of the double filtration procedures:

Proponents argue:

- Filtration embodies institutional balance and preserves the position of the Conseil d'État and the Cour de Cassation within the judicial hierarchy by endowing them with a significant role in the unconstitutionality plea process.
- It controls the flow of challenges to the Conseil Constitutionnel and avoids the deluge that many constitutional courts have experienced as a result of the plea mechanism.¹⁹
- The double filtration system ensures a dialogue between the judges of the Conseil d'État and the Cour de Cassation, on one hand, and the Conseil Constitutionnel, on the other, in the interest of developing coherent interpretations of constitutionally guaranteed rights and freedoms.

Critics contend:

- The procedures are complex and protracted.
- Trial judges are deprived of direct access to the Conseil Constitutionnel (as in the Italian system).
- The Conseil d'État and the Cour de Cassation exercise effective control over the fate of the constitutional question, with their judges becoming de facto constitutional adjudicators when assessing the seriousness of the plea — thereby blurring the line between filtration and constitutional review.
- The volume of cases afflicting constitutional courts in Germany and Spain stems from direct individual constitutional complaints or amparo proceedings, not from excessive judicial referrals.

3.3. The Filtration System under Algerian Law

The Algerian constitutional legislator has granted the parties to a dispute the right to raise an unconstitutionality plea against a legislative provision that infringes rights and freedoms guaranteed by the Constitution, provided that the outcome of the dispute depends on that provision. However, this right may not be exercised directly before the Constitutional Court; it is subject to a principle of filtration, the authority

¹⁸ The referral decision must be adopted within three months; if this period expires without a decision being issued, the question is automatically referred to the Constitutional Council, which then plays a significant filtration role by admitting or rejecting the question.

¹⁹ Constitutional courts in Germany, Spain, and Italy receive thousands of files annually, the vast majority of which are rejected.

for which is vested in the judiciary. The Constitutional Court is seized of the plea exclusively by referral from the Supreme Court or the Council of State.

This filtration prevents the Constitutional Court from being burdened by vexatious or dilatory pleas, and enables the judicial bodies to exercise their authority to determine whether a referral is warranted — after verifying the cumulative satisfaction of all required conditions, particularly the seriousness requirement. This assessment proceeds at two levels: the lower courts (first-instance and appellate courts, and administrative courts) and the apex courts (the Supreme Court and the Council of State), which have the final word on the decision to refer the plea to the Constitutional Court. Algeria has thus adopted the principle of double filtration (DOUBLE FILTRAGE), similarly to France.

3.3.1. First Filtration (Lower Courts).

- The court before which the plea is raised adjudicates immediately, by reasoned decision, on the transmission of the plea to the Supreme Court or the Council of State, after consulting the public prosecutor or the government commissioner.
- The legislature has not prescribed a specific time limit within which the lower court must rule on the seriousness of transmission, merely requiring that the determination be made "immediately."²⁰
- If transmission is refused, the court continues to adjudicate on the merits of the case.
- If the court finds the plea to be serious, it issues its decision within ten days of delivery, notifies the parties, and the decision is not subject to appeal. In this case, the court suspends adjudication of the case and defers it until the competent bodies have ruled on the plea. This does not, however, suspend the conduct of the investigative proceedings, and the court may order any necessary provisional or interim measures.
- By way of exception, the decision to transmit the plea does not stay the main proceedings when the person is deprived of his liberty in connection with that very case, or where the law requires adjudication within a specified period or on an expedited basis.
- If the lower court adjudicates on the merits before awaiting the plea decision and the judgment is appealed, the appellate court suspends the appeal until the question of transmission has been resolved by the apex court and, if necessary, by the Constitutional Court.

²⁰ In this situation, the judicial body verifies the satisfaction of both the formal and substantive conditions of the plea (including the seriousness requirement) and rules by reasoned decision to admit or reject it, without involving lay assessors where the court before which the plea is raised includes them (such as in commercial or labor divisions).

- If the main proceedings in connection with which the plea was raised are terminated, that does not affect the adjudication of the plea if it has already been referred. The Constitutional Court's decision declaring a legislative provision unconstitutional does not affect the concluded dispute by virtue of the principle of *res judicata*.

3.3.2. Second Filtration (The Supreme Court or the Council of State).

- The filtration arrangements carried out by the Council of State and the Supreme Court are of particular importance in ensuring effective division of responsibilities, as they guarantee coherence among the lower levels of the judiciary under their supervision and allow these two bodies to contribute to the elaboration of the Constitutional Court's jurisprudence while respecting that body's exclusive competences.
- A specialized formation is constituted at the level of the Supreme Court and the Council of State to adjudicate on the seriousness of transmitting the plea; it is presided over by the First President of the Supreme Court or the President of the Council of State (or their deputy in case of unavailability) and composed of the president of the relevant chamber and three counselors designated by the head of the judicial body.
- These bodies may be seized of the plea in three ways: (i) by way of a plea raised before them as a court of merits — the more common situation before the Council of State; (ii) by way of cassation, when the plea is raised for the first time before them or by way of challenge to a lower court's refusal to transmit; (iii) by way of receipt of the plea transmitted from the lower courts that found transmission to be warranted.
- In the last two scenarios, the formation must adjudicate within two months from the date of receipt of the plea or the transmission decision.

Two stages may thus be identified in the double filtration system:

- **First stage** — at the level of the ordinary and administrative courts: this stage is generally flexible, with the judge primarily verifying whether the plea is raised with dilatory intent.²¹
- **Second stage** — at the level of the Supreme Court and the Council of State: this is the channel through which the plea is referred to the Constitutional Court. It would be incongruous for this stage to be merely formal — otherwise the legislature would have dispensed with it. On the contrary, scrutiny here is more rigorous, given that the apex court is the

²¹ While the judge does verify both the formal and substantive conditions of the unconstitutionality plea, his scrutiny is focused primarily on assessing the genuinely serious character of the constitutional question raised.

ultimate arbiter of the seriousness of the plea and the satisfaction of the remaining conditions for referral to the Constitutional Court.²²

After consulting the public prosecutor or the government commissioner, the referral decision must be reasoned and must identify the challenged legislative provision, the constitutional provision allegedly violated, and the grounds of violation. The decision finding that there is no occasion for referral demands more elaborate reasoning than the decision to refer, given that it is a weighty decision that prevents the plea from reaching the competent body. Some systems, including France, accordingly grant the Conseil Constitutionnel the power to adjudicate the plea even where it was refused referral by the Cour de Cassation or the Conseil d'État.²³

A legislative provision declared unconstitutional becomes inapplicable by any body, in any case, and by any public authority from the date determined by the Constitutional Court's decision. In this context, there are mechanisms for deferring the declaration of unconstitutionality where the immediate loss of effect of the statutory provision would entail legal consequences requiring consideration — a situation that necessitates a comprehensive assessment of the financial, material, and administrative effects and their management with appropriate flexibility.

The Constitutional Court's discretionary power to determine the date from which its decision on the plea takes effect reflects the imperatives of legal certainty and the need to allow the legislature sufficient time to rectify the situation. A Constitutional Court decision declaring a legislative or regulatory provision unconstitutional creates a legal vacuum in the period between the date of the decision and the date of its entry into force, pending legislative intervention to repeal the provision and executive action to revise the regulation and adopt the necessary measures to eliminate its

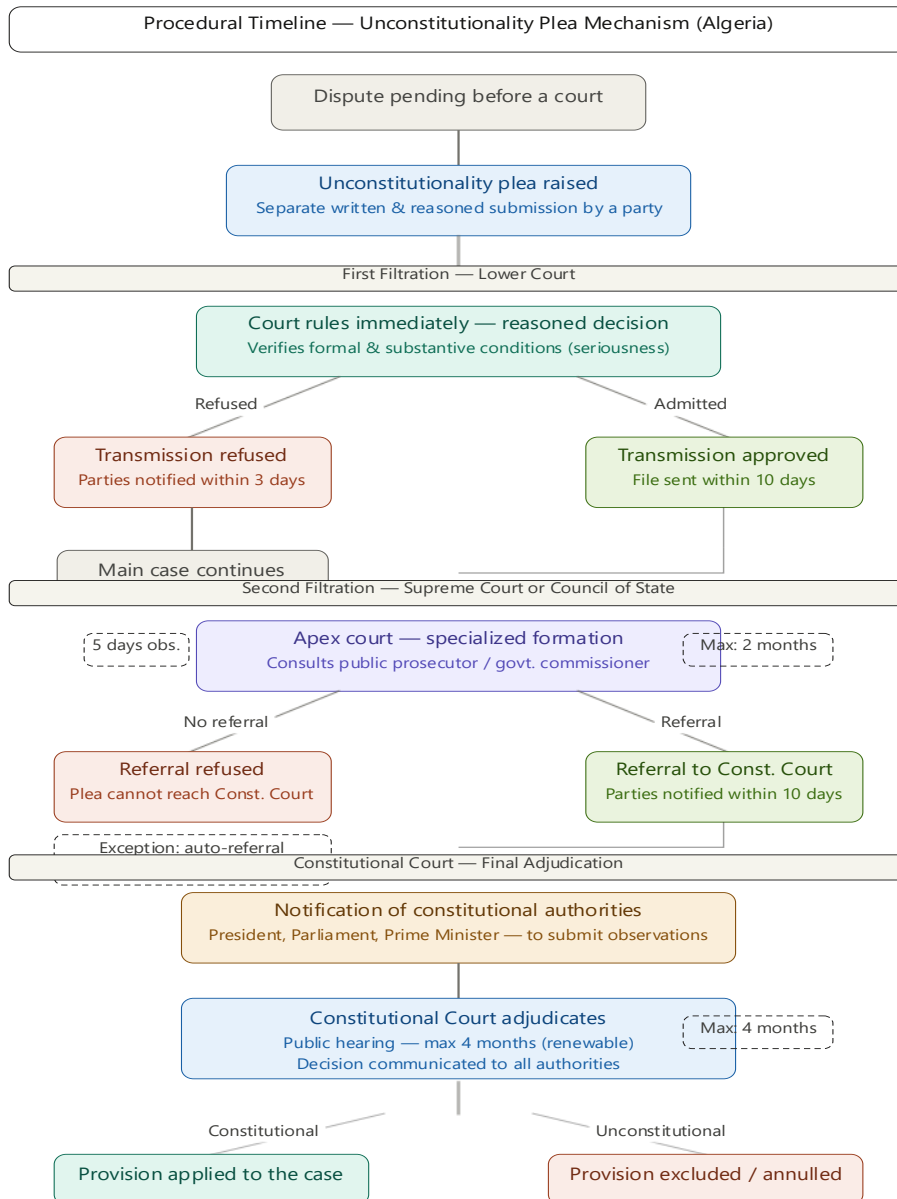
²² The seriousness condition is the decisive dividing line between proponents and opponents of the filtration system. The more strictly judges apply the seriousness requirement, the more opponents of filtration call for stripping the judiciary of control over the plea and allowing citizens direct access to the Constitutional Court. Accordingly, they urge the courts to adopt a flexible approach to seriousness so as to enable litigants to access the Constitutional Court — arguing that the filtration system should be designed to enshrine flexible application of the seriousness condition, lest the judiciary become an obstacle to constitutional review; otherwise, in their view, the low volume of pleas reaching the Constitutional Court due to prior judicial filtration will yield no positive outcomes. In systems that permit direct referral to the Constitutional Court — such as Spain — the legislative instruments subject to an unconstitutionality plea are not confined to statutory law but extend to any parliamentary act, regulatory instrument, or judicial decision. Where the plea is found to be serious, the judge refers it to the Constitutional Court for adjudication; the judge may also raise the plea *ex officio* and order its referral without any request from the parties. In short, while in both the Algerian and French systems the plea is granted exclusively as a tool in the litigant's hands, in the Spanish system it is simultaneously available to both the litigant and the judge — though in all cases it is the judge's role that is most consequential, as it is the judge who ultimately decides whether to refer the plea.

²³ Rafiqah Hijayiliyya, *A Practical Guide on the Unconstitutionality Plea: The Algerian Model* (Algiers: Dar Al-Huda, 2020), p. 73.

effects, with due regard for legal certainty and the preservation of vested legal positions.²⁴

- **Procedural Timeline of the Unconstitutionality Plea Mechanism**

The following timeline summarizes the key procedural milestones of the unconstitutionality plea mechanism under Algerian law:



²⁴ Al-Hashimi Ibrahim, "The Unconstitutionality Plea as a Mechanism for the Protection of Rights and Freedoms," *Journal of the Constitutional Council*, special issue (2020), p. 62.

4. Critical Reading of the Unconstitutionality Plea in Algeria and France: A Comparative Assessment

Given the close structural similarity between the Algerian unconstitutionality plea and the French QPC — the two mechanisms differing primarily in designation — this section presents a comparative reading of the outcomes of both experiences.

4.1. A Review of the Unconstitutionality Plea in Algeria

The record of the unconstitutionality plea experience in Algeria over six years — from 7 March 2019, the date of its entry into force, through 2025 — reveals that the mechanism was invoked five times between 2019 and 2021 during the era of the Constitutional Council, and twenty-six times in the first six months of the Constitutional Court's era between 2021 and 2022.

- **Subject Matter of the Pleas.** Approximately ten provisions from four legislative texts were challenged:
 - Code of Criminal Procedure: Articles 416, 496/6, and 419.
 - Law on the Legal Profession: Article 24.
 - Code of Civil and Administrative Procedure: Article 633/1.
 - Labor Code: Article 73/4 (twenty decisions).
 - Law 08-09 on Civil and Administrative Procedure: Article 643.
 - Law 08-09 on Civil and Administrative Procedure: Articles 10, 558, 559, and 567.
- **Outcomes.** The decisions of the constitutional body reveal that the following provisions were found to be constitutional: Articles 496/6 and 419 of the Code of Criminal Procedure; Article 24 of the Law on the Legal Profession; Article 73/4 of the Labor Code; Article 633/1 of the Code of Civil and Administrative Procedure; and Articles 10, 558, 559, 567, and 643 of Law 08-09. Conversely, unconstitutionality was declared in respect of Article 33 of the Code of Civil and Administrative Procedure, and partial incompatibility was found with respect to paragraphs 1 and 2 of Article 416 of the Code of Criminal Procedure.

The statistics further reveal that all referrals to the Constitutional Court originated from the Supreme Court, following its receipt of transmission files from various courts of appeal; no referrals were received from the Council of State, and no plea was raised directly before the apex judicial bodies.

- **Duration of Proceedings.** While the Constitutional Court has a legal deadline of four renewable months to adjudicate the plea, the longest processing times were recorded for the challenges to Article 24 of the Law on the Legal Profession (eight months) and Article 633 of the Code of Civil and Administrative Procedure (seven months and twenty-one days). The processing time for Article 496/6 of the Code of Criminal Procedure stood at five months and twelve days. For the remaining provisions, processing times ranged from two months and four days to three months and twenty-seven days.

A general observation is the low volume of pleas and the limited disclosure of statistics regarding non-referred pleas. A notable exception is the declaration by the First President of the Supreme Court (now Minister of Justice) that in 2020 — the first full year of the mechanism's operation in Algeria — sixteen pleas were registered at the level of the Supreme Court, of which only three were referred to the Constitutional Council; a single plea was submitted to the Council of State and rejected for referral.²⁵

- **Non-Referral Decisions.** Non-referral decisions by the Supreme Court and the Council of State may be categorized as follows:
 - Non-referral decisions by the Supreme Court: concerning Articles 432 and 438 of the Code of Criminal Procedure; Articles 303 and 324 of the Customs Code; Article 12 of the Anti-Smuggling Act; Articles 3, 4, and 72 of the Constitution on freedom of movement; and Articles 469, 3, and 6 of the Code of Criminal Procedure.
 - Non-referral decisions on the grounds of prior adjudication: Articles 416 and 496/6 of the Code of Criminal Procedure.
 - Decisions of inadmissibility: Executive Decrees 124/06 and 262/11.
 - Council of State: official data is scarce given that the Council's official website does not maintain a dedicated section for the unconstitutionality plea, unlike the Supreme Court and the Constitutional Court. However, two referral decisions to the Constitutional Court were recorded for the first time, coinciding with new referrals from the Supreme Court, bringing the cumulative total to approximately sixty-six referrals as of the end of June 2022.

4.2. A Review of the QPC in France

The French experience presents a far more extensive body of practice. The Conseil Constitutionnel has issued more than one thousand decisions on the QPC, with an annual average of approximately seventy-five decisions, representing around eighty percent of the Conseil's constitutional review activity and approximately thirty percent of its total output. The average time between a referral decision and the Conseil's ruling on unconstitutionality stands at approximately two and a half months (seventy-four days), well within the maximum statutory period of six months.

The record of the Conseil Constitutionnel from 2010 to 2025 shows that approximately 543 referrals came from the Conseil and 658 from the Cour de Cassation, while over

²⁵ By way of comparison, during the first year following the entry into force of Organic Law No. 2009-1523 implementing the QPC system in France, the Cour de Cassation and the Conseil d'État issued 527 decisions on the matter — including 124 referral decisions and 403 non-referral decisions. See: Abd Al-Rashid Tabi, "The Role of Judicial Bodies in Activating the Unconstitutionality Plea Mechanism," paper presented at the International Conference held at the Constitutional Council on 23-24 February 2020 on "The Protection of Rights and Freedoms," Supreme Court official website, <http://www.coursupreme.dz> (accessed 10 June 2025, 21:07).

five thousand non-referral decisions were recorded. The outcomes of the Conseil's decisions were as follows: 681 declarations of constitutionality; 256 declarations of unconstitutionality; 80 partial compatibility findings; and 133 decisions with reservations.²⁶

Conclusion

Constitutional review of legislation stands as one of the foundational pillars of the rule of law and the most effective instrument for safeguarding individuals' rights and freedoms against excess by both the legislative and executive branches. It is also among the most significant mechanisms developed by constitutional scholarship for the protection of the supremacy of law a theme that has attracted sustained attention in the constitutional law literature.

The primacy assumed by fundamental rights and freedoms in the constitutional architecture of states' basic laws has driven the development of constitutional mechanisms for their protection. In Algeria, the constitutional legislator responded by establishing the unconstitutionality plea through the 2016 Constitutional Amendment — a judicial procedure through which posterior review of the constitutionality of legislative texts takes concrete form. Algeria further shifted direction by constitutionalizing the Constitutional Court in the 2020 Amendment, thereby embracing judicial constitutional review of legislation:

- The unconstitutionality plea is neither a procedural objection nor a substantive defense; it is a plea of a special nature by virtue of its connection to a constitutional question beyond the ordinary courts' adjudicative competence.
- The legislature, through Article 16 of the rules governing the operation of the constitutional body, remedied the lacuna in Law 18-16 concerning the refusal to refer a plea, making it mandatory to notify the applicant of the refusal and to transmit a copy of the refusal decision.
- Where a plea is raised for the first time before the Supreme Court or the Council of State and referred to the Constitutional Court for adjudication, a subsequent plea on the same legislative provision may be filed; case data relating to the plea must accordingly be kept current, since processing may take time and the prior adjudication principle may apply.
- Constitutional Court decisions result either in a finding of constitutionality — requiring the trial court to apply the provision to the subject matter of the dispute — or in a finding of unconstitutionality, whereby the provision is excluded from the dispute and either annulled immediately or from a later date to be determined by the Constitutional Court itself.

²⁶ French Conseil Constitutionnel, official website (accessed 10 June 2025), https://www.conseil-constitutionnel.fr/sites/default/files/2022-05/20220509non_renvoy_matrice.pdf.

- A decision to admit and transmit the plea to the Constitutional Court results in the suspension of the application of the legislative provision — constituting a form of "abstention review" following the incidental unconstitutionality plea (as in Algeria and France) — which is distinct from "annulment review," which grants courts the power to annul legislation through a principal unconstitutionality action (as in the United States, Germany, and Spain).
- To verify whether a legislative provision has been previously declared compatible with the Constitution, reference must be made to the Constitutional Court's website under the "Constitutional Jurisprudence" section, which contains all opinions and decisions categorized by type.
- The trial judge must adjudicate without delay where the action aims to end a deprivation of liberty, or where the law requires expedited adjudication or adjudication within a specified period.
- The lower court — whether in the ordinary or administrative judiciary — issues a decision on "transmission" of the plea, while "referral" remains exclusively within the competence of the apex judicial bodies.
- The subject matter of unconstitutionality pleas spans the full range of rights and freedoms guaranteed by the Constitution across the various domains of public and private life.

Recommendations

- Reduce the maximum adjudication period for the plea to six months (three months plus three months renewable), in line with the French practice.
- Establish a six-month deadline for legislative and regulatory bodies to bring legislation into conformity with Constitutional Court decisions declaring incompatibility.
- Intensify training programs and expert consultations with judges and attorneys to ensure full command of the legal and technical complexities of the plea mechanism.
- Enhance public awareness of the mechanism through media campaigns, symposia, radio and television programs, and the simplification of procedures for ordinary citizens, who are the primary beneficiaries of this instrument.
- Standardize working methodology and entrench sound institutional practice, so as to enable effective deployment of the mechanism in the protection of rights and freedoms.
- Develop the official websites of the Constitutional Court, the Supreme Court, and the Council of State, providing comprehensive information, data, and statistics; the same applies to lower judicial bodies.
- Establish a unified digital network linking all judicial bodies in matters related to the unconstitutionality plea, to prevent conflicting interpretations, standardize working methodology, and institutionalize sound practice enabling the mechanism to serve its purpose of protecting rights and freedoms.

- Given that it is the Constitutional Court that communicates its decisions to the Supreme Court and the Council of State for notification to the relevant judicial bodies, and that this may take considerable time, it is recommended that the Constitutional Court assume direct responsibility for this notification – following the French model, where the Conseil Constitutionnel itself notifies the trial court concerned.

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