

## The Expansion of the Algerian Constitutional Council in its Work Rules

### توسعة المجلس الدستوري الجزائري في قواعد عمله



— Mohamed Mounir HASSANI (\*)



Lecturer, Faculty of Law and Political Science, Kasdi-Merbah University, Ouargla Algeria



[afaif.8@gmail.com](mailto:afaif.8@gmail.com)

The date of Submission: 05/10/2018

The date of revision: 02/05/2019

The date of acceptance: 06/05/2019

### Abstract:

In order to ensure the legitimacy of the constitutional justice organs in the face of the public authorities, their work has organized through some procedures and constitutional techniques, that ensure its non-arbitrariness within the constitutional system, or undermine the institutional balance.

The work of the Algerian Constitutional Council has also been regulated in accordance with the above philosophy, where the constitutional founder has set out a set of provisions that define the rules of his work according to the European constitutional justice model. What is noticed, however, is the increase of the Constitutional Council in these rules on the occasion of its constitutional control. Where the constitutional opinions confirm that the Council has increased in them procedurally and objectively, which calls for the search of justifications for this expansion to determine its constitutionality.

**Keywords:** Constitutional Council, Constitutional Review, Interpretative Reserves, Interference, Constitutional Block, Constitutional Referral.

### الملخص:

لقد أسست العدالة الدستورية لضمان صحة ودستورية النصوص القانونية. حماية للحقوق والحريات، ويؤمن هذه العدالة في النموذج الأوروبي محاكم ومجالس دستورية مختصة، ليست بأجهزة سياسية، ومستقلة عن الجهاز القضائي، ولا تملك سلطة تقديرية للتدخل في الإنتاج المعياري إلا بمناسبة رقابة مدى دستوريته. وحتى في هذه الحالة يحدد المؤسس الدستوري قواعد إجرائية لتحريك عمل هذه الأجهزة وتفعيل حمايتها للحقوق والحريات، تحقيقاً لفكرة دولة القانون.

ودور المجلس الدستوري الجزائري لا يختلف عن الدور الذي تؤمنه باقي أجهزة العدالة الدستوري المقارنة، حيث كلفه الدستور بالسهر على احترام الدستور، وذلك من خلال ضبطه لدستورية الإنتاج المعياري للمؤسسات الدستورية، ووممارستها باختصاصاتها بالتصورات المرسومة لها فيه. غير أن الملاحظ في الاجتهاد الدستوري لهذا الجهاز، هو زيادته في قواعد عمله من تلقاء نفسه، وذلك إما بتعديله في شكلها الدستوري، أو بابتكاره لقواعد اجتهادية جديدة يُجري عمله وفقها، مما قد يوسع في اختصاصه الدستوري، الأمر الذي يثير مسألة مدى دستوريته وشرعيتها، خاصة وأنه يمارسها على حساب وظيفة وعمل سلطتين عموميتين: التنفيذية والتشريعية.

**الكلمات المفتاحية:** المجلس الدستوري، المراجعة الدستورية، التحفظات التفسيرية، التدخل، الكتلة الدستورية، الاخطار الدستوري، الدفع بعدم الدستورية.

(\*) Corresponding Author.

## Introduction

The idea of constitutional justice dates back to the decision of the US Federal Court in the Marshall decision, which established the possibility of monitoring the validity and constitutionality of legal texts, and from this case, the American constitutional justice model has arisen, followed by the European model at the turn of the twentieth century. Despite difference their philosophy, they agree on the goal of protecting rights and freedoms against the transgressions of its regulator itself, the legislator or the regulator, through the control of the constitutionality of their acts<sup>(1)</sup>.

In the European model of constitutional justice, this function is vested in competent constitutional courts and councils, which are independent bodies do not belong to the judicial system, also they are not political bodies, as they have no discretion to object or intervene in the normative production, except in case of prejudice to the constitutional principles, on the occasion of the control of its constitutionality<sup>(2)</sup>. Even in this case, the constitutional founder sets forth procedural rules for activating the work of these organs and their protection to rights and freedoms, and outlines the subject matter of their function.

The role of the Algerian Constitutional Council is no different from the role-played by the rest of the comparative constitutional justice bodies, in the keeping of the rationalization parliamentary, Through guarding the parliament to remain locked in the fields was allocated to it in the Constitution, and exercise its competences as specified in it. As a change in it constitutes an increase in its authority and a violation of the Constitution itself, the Constitutional Council was mandated to ensure respect for its provisions.<sup>(3)</sup>

However, it is noted in the constitutional jurisprudence, this organ increasing in its work rules on its own initiative, either by modifying their constitutional form or by inventing new jurisprudential rules and practiced its work according to them, which may expand its constitutional competences, and raises the issue of its constitutionality and legality, especially as it exercises them at the function of public authorities; legislative and executive.

In the jurisprudence of the Algerian Constitutional Council, this increase can be monitored in the procedural rules of its work (I) and in the substantive rules as well (II).

<sup>(1)</sup> Michael Fromont, La Justice Constitutionnelle En France Ou L'exception Francaise [Constitutional Justice In France Or The French Exception], Anuario iberoamericano de justicia constitucional, N°. 8, 2004, pages 171-187. <https://dialnet.unirioja.es/servlet/articulo?codigo=1983649>. Accessed February 13, 2014.

<sup>(2)</sup> For more details on European constitutional justice organs, see: Favoreu, Louis. "Rapport Général Introductif" [Introductory General Report], in *Revue internationale de droit comparé*, 33, no. 2, Paris: Société de législation compare, (1981), 255–281

<sup>(3)</sup> Art 182 stipulated, "The Constitutional Council is an independent institution in charge of monitoring the observance of the Constitution", in the work of public authorities, including parliament. See: Constitution of November 28, 1996, published in official journal of Algeria no. 76 of 08 December 1996, amended by Law no. 02-03 of 10 April 2002 official journal of Algeria no.25 of 14 April 2002 and Law no. 08-19 of 15 November 2008. Official journal of Algeria, no. 63, of 16 November 2008, Law No. 16-01 of 06 March 2016 Gazette No. 14 of March 7, 2016.



## I- THE PROCEDURAL ASPECT

The function of the constitutional judge is the examination of the contested legal rules which were referred to him. For that, like any judge, he needs a legal method to reach to extent the constitutionality of those rules. In the beginning, he must diagnostic of the legal issue that regulated by the referred rules, and then rephrases it in a clear legal formulation, so that he can measure their conformity with their reference model. This step requires the Constitutional Judge to first deduce the reference rules for the models of the controlled issues, to judge their validity<sup>(1)</sup>. The constitutional jurisprudence shows that the Constitutional Council has been increased in these procedural rules, where it is controlling a constitutionality of provisions not referred to it. ( A ) And adopted a broad concept of reference rules in form of a Constitutional Block ( B ).

### A- Expanding the subject of constitutional control by addressing non-notified provisions

European constitutional justice is based on the logic of political constitutional control, which prohibits the constitutional judge's objection to the unconstitutionality of texts of his own accord, such as what exists in the American model, but makes his control based on the will of the politicians for activating it<sup>(2)</sup>, they are the ones who determine the disputed subject in the referred texts<sup>(3)</sup>. So, determining of the constitutional defect outside the will of the constitutional judge in the original, what is reinforce the principles of separation of powers and the legal security.

However, the Constitutional Council did not respect these provisions very much, where it has developed a technique to expand the subject of the dispute to provisions were not disputed by the politicians; Addressing the non-referred provisions is an expansion for the subject of the conflict.

From the above, it seems that the original is non-interference of the constitutional judge to provoke of unconstitutionality on its own, and cannot contest the constitutionality of uncontested provisions, because it is restricted by the subject matter of the notification letter. However, the Algerian constitutional jurisprudence shows that the Constitutional Council has not adhered to this principle very much, where it is controlling provisions not specified in the referral letter (1), and has controlled a constitutionality of texts were not originally referred

<sup>(1)</sup> Luchaire. François. "Conseil constitutionnel français" [French Constitutional Council], in *Revue internationale de droit compare*, 33, no. 2, Paris: Société de législation compare, (1981) 285–34.

<sup>(2)</sup> FAVOREU, Louis. *Le modèle européen, de justice constitutionnelles* [The European Model of Constitutional Justice], (1995) Round Table on Constitutional Justice, Centre d'Etudes, de Recherches et de Publications p. 39 – 61.

<sup>(3)</sup> ROUSSILLON, Henry, *La saisine du Conseil constitutionnel. Contribution à un débat* [Referral to the Constitutional Council. Contribution to a debate], *Revue internationale de droit comparé*. Vol; 54, n°2. 2002. p. 490-494.

(2). This is constitutes an increase in the methods of its work and expansion in it through jurisprudential techniques<sup>(4)</sup>.

### 1- Addressing to control the constitutionality of no-indicated provisions in the referral letter

The referral letter is a political speech to inform the Constitutional Council, in which the author expresses his will to object at the constitutionality of a legal text, or to the constitutionality of some of its provisions only, and if he objected at the whole text, the constitutional judge will be committed to its full examine. In practice, the constitutional judge does not address only the provisions that he considers being contrary to the rules of the constitutional bloc, and does not mention the rest of the text in his opinion. But the problem arises in case if the referral letter selected certain provisions only to the control, and the constitutional judge finds that the rest of the provisions of the same text are not constitutional, will he examine them in order to preserve the constitutionality? Or will abide by those specified in the letter of referral or exception?

The Constitutional Council has responded at this question in the Regulation Setting its Functioning Rules<sup>(1)</sup>, by providing the possibility of exceeding the provisions submitted to it and controlling the other provisions of the contested text. And justified that there was a link between the sentences brought to him and the other provisions, considering that “If the decision of constitutionality of a provision necessitates the examination of other provisions not referred to the Constitutional Council and relevant to the subject of the referred provisions ...”<sup>(2)</sup>. And based on this concept, the work of the Constitutional Council by this technique is only in the case of referral or appeal of the constitutionality of the ordinary laws.

In Algerian jurisprudence, we find a few examples of facing the Constitutional Council to control the provisions not referred to it. Example Of that, in the occasion of controlling the constitutionality of some of the articles of the Compensation and Retirement Law for a Member of Parliament, the Council extended its control to articles that were not the subject of the notification, where the referral letter of President of the Nation Council had raised to the Constitutional Council only seven articles (07). However, the Council considered that the declaration of the constitutionality of these articles it was linked to the rest of provisions, and reached to their unconstitutionality, so it had prevented the issuance of that the entire text, although not fully contested. And announced that “this law is referr to Parliament as soon as

<sup>(4)</sup> For more details about this technique see: For more details see: Hassani, Mohamed Mounir. Athar Al'ijthad Aldstwry Ealaa Dawr Albarlaman Aljazayiri [The Impact of Constitutional Jurisprudence on the Role of the Algerian Parliament], PhD diss., University of Muhammad Khaydar, Biskra, Algeria, 2015. <http://univ-biskra.dz>, accessed: June 19, 2016. P. 160-163..

<sup>(1)</sup> REGULATION SETTING THE FUNCTIONING RULES OF THE CONSTITUTIONAL COUNCIL, adopted on June 28, 2000 and published in the official gazette of the Republic of Algeria, number 48 of August 6, 2000.

<sup>(2)</sup> - Article 08 of the Regulation Setting the Functioning Rules of the Constitutional Council.

the wording of this declaration affects the structure of the text as a whole<sup>(3)</sup>. And in the same opinion, it declared that “considering that the Constitutional Council is able to deal with other provisions not notified have relation to the judgment or provisions subject to the notification, the declaration in this case the unconstitutionality of the provisions notified or addressed is sufficient in itself to return the law to Parliament, as long as the separation of these unconstitutional provisions from the rest of the text affects its entire structure<sup>(1)</sup>. This application shows how the Constitutional Council extends the subject of the dispute to uncontested provisions, for increasing in its working techniques through it.

## 2- Addressing to Examine the Texts not Contested

In addition to bypassing the disputed provisions of the same text, the Constitutional jurisprudence demonstrates that the council has observed of constitutionality of texts not originally submitted to it, and were not the subject of the referral letter. That is, the Constitutional Council moved on its own to control the constitutionality of the texts in force and have produced their effects in the legal system, and not disputed about their constitutionality. This is an original jurisdiction for the owners of the referral in accordance with the above-mentioned article, and the Constitutional Council is not one of them, which confirms its increase in the procedural techniques of its work.

And with the lack of a legal basis, the Constitutional Council justified its controlling of provisions that had produced their effects in the legal system, by existing a relationship between them and the disputed provisions. In practice, this relationship may exist by modifying the disputed provision of the old provision, or complementing it, as well as by implementing the new provision of the old<sup>(2)</sup>. This is regardless of the reasons given in the referral letter.

For example, when the Constitutional Council censored the constitutionality of the Statute Law of a Member of Parliament, it was considered that there are a correlation and similarity in the subject, between article 38 of the law notified, and the first paragraph of article 49 of Law No. 14-89, and between the second paragraph of article 49 of the law No 22-91 amending the referred law. And in view of this relationship, all of these provisions should be subject to control<sup>(3)</sup>. And the nature of this relationship can be deduced through the subject of article 38 notified, where the legislator referred its implementation to the article 1/49 of Law No. 14-89, and as amended by article 2/49 of the law 22-91, the constitutionality of this latter is the basis of the constitutionality of article 38. This justifying the facing of the Constitutional Council's to censorship of the two preceding articles.

<sup>(3)</sup> Opinion n° 04/A.L/CC/98 of 13 June 1998 pertaining to the constitutionality of the articles 4 to 7, 11, 12, 14, 15 and 23 of the law relating to the remuneration and the retiring allowance regime of the member of Parliament. Algerian Official Gazette No. 43 of 16 June 1998.

<sup>(1)</sup> Ibid.

<sup>(2)</sup> BLACHÈR, Philippe, Le conseil constitutionnel en fait-il trop ? [Does the constitutional council do too much?], Pouvoirs, 2003/2, n°105, p. 20. <http://www.revue-pouvoirs.fr/Le-Conseil-constitutionnel-en-fait.html> accessed February 13, 2014.

<sup>(3)</sup> Opinion No. 12 / AL / CC / 01 of corresponding to 13 January 2001 on the constitutionality of the statute Law of a Member of Parliament, Algerian Official Gazette No. 09 of 04 February 2001.



This technique has important implications, as it has the same effects as the declaration of the constitutionality after the referral, and this declaration extends to the provisions addressed by the Constitutional Council in the law not referred to it. This is evidenced by the announcement by the Constitutional Council of the unconstitutionality of the articles addressed in the same opinion, and, consequently, their repeal from the legal system, although they have produced their legal effects of long time<sup>(4)</sup>. With the authority of constitutional jurisprudence<sup>(1)</sup>, this technique will constitute a real expansion of the working methods of the Constitutional Council, contributes by it to the preservation of the constitutionality of the rules of the legal system and the preservation of the rights and freedoms in texts that did not submit to it.

However, this technique was criticized for possibility its prejudice to the principle of legal security, and its threat the legal system based on those legal rules addressed by the Constitutional Council, and whenever it wishes. In addition, the constitutional judge examination of text not contested, in general, will enhance the dangers of specter the government of the judges, through contesting in the constitutionality of uncontested provisions by the owners of the right of referral.

### **B- The legal pyramid as a criterion for reference block**

Every modern political system has its own legal system, which is the set of legal rules governing all social phenomena of any country, and vary according to the political system itself; either liberal, socialist or Islamist ... . Liberal systems are characterized by a uniform approach to the legal system, based on the hierarchy of rules from top to bottom in the form of a pyramid, according to Hans Kelsen's vision. Through which it ensures the harmonization of the legal system and non-conflict and collision its rules. In this mechanism, the supreme rules control the production of the sub-rules, and the latter take their validity from those, which are superior to them<sup>(2)</sup>. It also ensures the application of the lower rules of those principles that are higher than them, in case of violation them, they are considered to be incorrect and in violation of their reference principles. In this regard, Hans Kelsen suggested that the constitutional rule be placed on top of the legal pyramid and that the rest of the rules take their constitutionality from their conformity with it, hence, arise Constitutional relationship protected by constitutional control<sup>(3)</sup>.

<sup>(4)</sup> Ibid.

<sup>(1)</sup> Art 49 of the Regulation Setting the Functioning Rules of the Constitutional Council stipulates "The opinions and decisions of the Constitutional Council shall be binding on all public, judicial and administrative authorities. No appeal lies against them".

<sup>(2)</sup> Cyril, Brami, Les Hiérarchiques Des Normes En Droit Constitutionnel Français; Essai d'analyse systématique [The Hierarchical Standards in French Constitutional Law; Testing systematic analysis], Ecole Doctorale Droit et Sciences humains, Université DE CERGY PONTOISE, 04 Décembre 2008, Unpublished, p.04.

<sup>(3)</sup> Michel, TROPER, Ross, Kelsen et la validité [Ross, Kelsen and validity], Droit et société 2002/1 - n° 50, p. 52.

[http://www.cairn.info/article.php?ID\\_REVUE=DRS&ID\\_NUMPUBLIE=DRS\\_050&ID\\_ARTICLE=DRS\\_050\\_0043](http://www.cairn.info/article.php?ID_REVUE=DRS&ID_NUMPUBLIE=DRS_050&ID_ARTICLE=DRS_050_0043). Accessed 04 April 2010.

The mentioned relation of the validity is not only between the constitutional and other rules, but also between the conventional, legislation and regulation norms, in order to ensure the harmonization of the legal system. The Algerian political system establishes its legal system on the same philosophy. The Constitution provides that is " placed above all. it shall be the fundamental law safeguarding the individual and collective rights and freedoms. (...) grant legitimacy to the exercise of powers. (...) The Constitution shall ensure the separation of powers, the independence of the judiciary ..." <sup>(4)</sup>. It also states that "The treaties ratified by the President of the Republic in the conditions specified by the Constitution shall prevail over Acts of Parliament" <sup>(1)</sup>, that is, above the legislation in general, and must respect them.

The Constitution further provides that "The implementation of the laws shall be a matter for the regulatory field of the Prime Minister"<sup>(2)</sup>, through executive decrees. In turn, executive decrees are superior over other sub-regulations, for its direct relationship with legislation.

The Constitutional Council relied heavily on the above-mentioned understanding of the legal pyramid and the sequence of its rules when checking the validity of the texts referred to it. The basis here is not the search for the constitutional relationship between the constitutional text and others, but the hierarchical relationship between two rules have a constitutional value, one of which is higher than the other.

In this regard, the Constitutional Council considered that "Any convention after ratification and publication it, inserted in the national law and acquires, under article 123 of the Constitution (the 1989 Constitution), the power of superiority upon the laws and authorizes every Algerian citizen to invoke it in front of the judicial authorities." Therefore, when checking the constitutionality of the article 86 of the electoral law, was based on the United Nations Charter of 1966 and the African Charter on Human and Peoples' Rights of 1981, and considered that "These legal instruments explicitly prohibit any discrimination of any kind" <sup>(3)</sup>. Accordingly, he had stated that the requirement of the original nationality of a candidate for legislative elections is not in conformity with the Constitution. The validity control here, in this way, has based on a Conventional provision. This is what Hans Kelsen pointed out by saying that "to oppose an ordinary law with a convention that makes it un-normative in the eyes of the constitution", i.e unconstitutional<sup>(4)</sup>.

In the opinion on the constitutionality of The Statute of the Member of Parliament, the Council has returned to the organic law and arbitrated it in the validity of this ordinary law, to preserve the hierarchical relationship between the ordinary text and the organic text that is

<sup>(4)</sup> Preamble of the Algerian Constitution.

<sup>(1)</sup> Art 150 of the same Constitution.

<sup>(2)</sup> Article 144 constitution

<sup>(3)</sup> Algerian Constitutional Council Decision no 4-DL-CC-91 of 28 October 1991 concerning paragraph 2 of article 54 of law no 91-17 dated October 15, 1991, amending and complementing law no 89-13 dated 7 August 1989 pertaining to the electoral law, Algerian Official Gazette no. 53, of 30 October 1991.

<sup>(4)</sup> Hans. KELSEN, La Garantie Juridictionnelle De La Constitution. la Justice constitutionnelle [The Constitutional Guarantee of Jurisdiction. Constitutional Justice] Revue du Droit Public et de la Science Politique en France et à l'Étranger, 1 vol. 1928, 238.



superior upon it. It has noticed unconstitutionality of article 22 of the original text to its violation of the constitutional principle contained in article 109 of Order 07/97 containing the organic law of the elections. It was also considered, in the same opinion, that the authorization of the president of each parliamentary group right to suspend the parliament session is contrary to the provisions of article 34 of the organic law governing the work of the People's National Assembly and the Council of Nation and their work and the functional relationship between them and the government <sup>(5)</sup>.

The return of the constitutional judge to the organic laws to ensure the constitutional relationship can be justified by two reasons:

- The first, these provisions contain rules have a constitutional value, as an extension of the provisions of the Constitution and develop it. They are rules that directly regulate the work of the public authorities of the State, and thus are inherently closer to the constitutional nature than to the legislative.

- The second consideration is the place occupied by the organic texts in the hierarchy of legal principles; they are below the Constitution and above the ordinary laws, this position requires the legislator respect them in the rest of his work.

From the above, it is clear that the constitutional judge, in ensuring the constitutional relationship, did not only based on the rules which have the constitutional value, but returned to all the rules of the legal system and formed a constitutional block for the reference rules, its basis for this is the principle of the hierarchy of legal norms.

## II- THE SUBSTANTIVE ASPECT

In the modern state, the power regulation has ended to granting normative production to both the founder and the legislator, and some countries grant it to the regulator for the initiative of the common rules of life, for several philosophies; as the owner of power in the kingdoms, or as representative of the "people" in the republics. As for the discussion and voting, it remains an exclusive function for parliamentarians. Hence, the normative function is the property of political institutions alone, and the constitutional justice bodies, including the Algerian Constitutional Council, have no authority therein in accordance with the Constitution, nor in the initiative or in the discussion and ratification.

In practice, the constitutional judge may have the opportunity to participate in the normative production, whether in amending the constitution or amending the legislative and regulatory texts, while monitoring their constitutionality, where the constitutional jurisprudence shows that the Council has developed techniques of control that may affect directly on the content of the controlled text, has resorted to the technique of interpretative reservations<sup>1</sup> to contribute in the construction of the controlled text. With this technique the

<sup>(5)</sup> Opinion N. 12 / AL / CC / 01, *ibid*.

<sup>1</sup> - This technique was borrowed by the Constitutional Council from the jurisprudence of European constitutional justice, and has appropriated it according to its needs in ensuring the principle of constitutionality. See about that: Aleksander. VIALA, *Les Réserves D'interprétation Dans La Jurisprudence Du Conseil Constitutionnel*



Constitutional Council does not stop at the declaration of the unconstitutionality of the defective provision in the controlled text, but it intervenes to correct and to rescue it from cancellation, this is a positive role not provide by the Constitution, but the council practices it through the Interpretative Reservations.

The use of interpretative reservations in constitutional jurisprudence, is usually intended to salvage the constitutionality of a flawed normative provision by declaring that it conforms to the Constitution by respecting the interpretation of the Constitutional Council to it<sup>(1)</sup>, where the defective provision must be rescinded, however the constitutional judge, rather than that, would retain it with a specific interpretation when it respected will be in conformity with the Constitution<sup>(2)</sup>. Thus, provision is in conformity with the Constitution by interpretative reservations and not alone.

In the constitutional jurisprudence, the Council knew three applications the interpretative reservations, according to the nature of the defect which it finds; Neutralizing (1), Constructive (2) and Imperative interpretative reserves(3).

### **1- Neutralizing interpretative reservations to reformulate legal provisions.**

The function of Neutralizing interpretative reservations is to erase the harmful effects of the ambiguity of certain legal provisions without declaring their unconstitutionality, for proving simply that the implications of the formulation of this text are devoid of legal force<sup>(3)</sup>.

The name of this category derives from the neutralization it produces by its excluding the misinterpretations and the mysterious to the unconstitutional provision, that through the formulation of alternative terms for those ambiguous and defective in the disputed provision<sup>(4)</sup>. As an example of the work of neutral reservations, the Constitutional Council considered that the restricting the Parliament of the issue of questioning the government in its president is an interpretation contrary to the provisions of the Constitution. Nevertheless, it has considered that the provision in question was partially in conformity with the Constitution, and that its full compatibility is only through the generalization of the issue of questioning to the members of the Government as well. This generalization required the intervention of the Council under the guise of interpretation, to reformulate the text of the

---

[Reserves of Interpretation in the Jurisprudence of the Constitutional Council] Thèse de Doctorat , Droit, Montpellier I, Librairie Générale de Droit et de Jurisprudence, Paris, 1999.

<sup>(1)</sup> Opinion No. 02 / A. CC / 12 of 8 January 2012 on the verification of compliance with the Organic Law on Information, the Constitution, Algerian Official Gazette no. 02, of 15 January 2012.

<sup>(2)</sup> Bachir. YELLES CHAOUCH, La technique des réserves d'interprétation dans la jurisprudence du conseil constitutionnel algérien, [The technique of interpretation reservations in the jurisprudence of the Algerian Constitutional Council,] Revue du Conseil Constitutionnel, no. 01, 2013, p. 03 Site internet : www.conseil-constitutionnel.dz, [Accessed of 14 September 2010].

<sup>(3)</sup> FAVOUREU. Louis, La Décision de Constitutionnalité [The Constitutional Decision], Revue Internationale de Droit Comparé, n° 2, 1986, p. 623.

<sup>(4)</sup> Bachir. YELLES CHAOUCH, The technique of interpretation reservations in the jurisprudence of the Algerian Constitutional Council, *ibid.*, p. 09.

article, so that it could “Members of Parliament to question the government on a current issue in accordance with the provisions of Article 133 of the Constitution”<sup>(5)</sup>.

In another opinion, it was considered that the quorum of three quarters (3/4), which was required by the People's National Assembly to lift the immunity of the Deputy, is contrary to the Constitution, and declared that it is alone not identical to the constitution in the entire rule of immunity, then it had deleted it by rephrasing the defective article by his proposal for the expression which indicates their conformity with the Constitution. It considered that the People's National Assembly decides it in a “closed session by secret ballot by a majority of its members after hearing the report of the committee and the deputy concerned who can use one of his colleagues”<sup>(1)</sup>. This opinion demonstrated that the Constitutional Council was replaced the Parliament in a formulation of this article, and was participated in a build it, through a *Neutralize reservation* that excludes the violation of the Constitution.

## 2- Constructive Interpretations Reservation to rebuild the meaning of defective provision.

Through the constructive Interpretations, the Constitutional Judge avoids the radical abolition of the defective provision, for correction it by reinterpreting to allow it to be in conformity with the Constitution<sup>(2)</sup>. He resorts to this technique when the provisions of the observed text are not sufficiently clear and their ambiguity may produce interpretations that encroach upon the rights and freedoms have a constitutional protection.

The positive intervention of the Constitutional Council through constructive reservations to correct the text will not touch its literality, given the soundness of its formulation, and the flaw that lies in it lies in the ambiguity of its meaning only. Therefore, the judge's interpretation for its conformity by constructive reservations would be an amendment to the legislator's intention of this provision, especially since he obliges those concerned with the text by his interpreting, via stops the constitutionality of the provision on his own reservation<sup>(3)</sup>.

Among the constructive reservations made by the Constitutional Council, it was considered that the stipulation on that “the President of the Republic shall expose orders to the Parliament, including exceptional orders, is contrary to the provisions of article 124 of the constitution”, Where “ ... when the Constitutional Founder specifies paragraphs 1, 2 and 3 of article 124 of the Constitution for orders taken by the President of the Republic in the case of the vacancy of the National People's Assembly or between the two sessions of Parliament, it

<sup>(5)</sup> Opinion n° 08/olo/cc/99 of 21 February 1999 concerning the control of conformity of the organic law stating the organisation and the functioning of the People's National Assembly and the Council of Nation as well as the functional relationships between the two chambers of the Parliament and the Government, to the constitution, Algerian Official Gazette, no. 15, of 09 March 1999.

<sup>(1)</sup> Opinion No. 3 A.R. I / CC / 97 of 31 July 1997 on the conformity of the Rules of Procedure of the National People's Congress to the Constitution, Algerian Official Gazette no. 53, of 13 Aout 1997.

<sup>(2)</sup> Bachir. YELLES CHAOUCH, The technique of interpretation reservations in the jurisprudence of the Algerian Constitutional Council, *ibid.*, p. 08.

<sup>(3)</sup> Hassani, Mohamed Mounir. The Impact of Constitutional Jurisprudence on the ... *Op.cit.*, P.238.



intends to distinguish between the orders presented to each chamber of Parliament and the orders excluded from it”.

Therefore, the Constitutional Council has interpreted the term "orders" as not referring to the orders of exceptional circumstances. And for adapting that to the provisions of article 124, has not touched the text literality, but has given it the correct meaning, and has stated that “provision would not be in conformity with the Constitution except with the said reservation”<sup>(4)</sup>.

### **3- Imperative interpretative reservations to determine the application of the legal text.**

The Constitutional Jurisprudence shows that the Constitutional Judge may retain some defective provisions in return for reservations of another nature, called "Imperative interpretative reservations". They are interpretations that carry determinations and concepts in the form of orders, directed for to respect by the law enforcement authorities<sup>(1)</sup>. These reservations indicate to those concerned the constitutional application of the legal text, they are, therefore, interpretative orders to ensure that the text conforms to the Constitution.

Through the imperative interpretative reservations directed to the law enforcement authorities, judicial and executive, the Constitutional Judge will not provide explanations for correcting the meaning of the defective provision or giving it a new meaning, such as constructive reservations, but send directly to these authorities the constitutional ways of applying the provision. In this sense, the imperative interpretative reservations guarantee the constitutionality of the provision without the need for a new intervention by the legislator, which is self-executing, does not require new normative production<sup>(2)</sup>.

In this regard, when the Constitutional Council has controlled the electoral law's constitutionality, it has considered that the legislator's empowerment of some persons the right to obtain a copy of the lists of municipal elections, is a right to them as parties to involve in the elections. However, it has considered that the exercise of this right may affect on other constitutional requirements are provided in articles 35, 39 and 63 of the Constitution, concerns the inviolability of private life. In order to ensure the conformity of this provision, the Council has considered that it "can not be exercised without respect for the rights

<sup>(4)</sup> Opinion n° 08/olo/cc/99, *ibid*.

<sup>(1)</sup> Xavier. SAMUEL, Les réserves d'interprétation émises par le Conseil constitutionnel [Reserves of Interpretation Issued by the Constitutional Council (French)], Presentation presented for the reception of the new Court of Cassation at the Constitutional Council on 26 January 2007, 26 pages. Electronic version: website of the French Constitutional Council, p. 09. <http://www.conseil-constitutionnel.fr>. Accessed 18 April 2010.

<sup>(2)</sup> Thierry. Di MANNO, quoted by; Christian. BEHRENDT, Le juge constitutionnel comme législateur-cadre positif :

Les normes juridictionnelles relatives à la production et au contenu de normes législatives futures [The Constitutional Judge as a Positive Framework Legislator: an analysis, comparative in French, Belgian and German law], thesis, Paris I, Pantheon -Sorbonne, Librairie Générale de Droit et de Jurisprudence, Paris, 2006, p. 135.

recognized to others under the provisions of the Constitution, especially article 63 thereof <sup>(3)</sup>. by this opinion, the Constitutional Council restricts the executive authority (its public administrations) in interpreting the application of the said right, by requiring the candidates when to use municipal electoral lists to abide by respect for the rights of others announced in the said articles, otherwise, the administration's application of this right will be unconstitutional.

## Conclusion

This study has examined the most important aspects of the increase of the Algerian Constitutional Council in its rules of work, it was shown that is a significant increase in the procedural and substantive aspects of its function, and it is an increase has not explicitly regulated by the Constitution. However, it can be justified it by the need for the Council to secure the protection entrusted to it by the Constitution, and to promote the protection of rights and freedoms.

In the procedural side, for example, the Council has adopted the constitutional bloc to extend the referential rules to principles outside the Constitution in order to ensure the principle of the hierarchy of legal norms and ensure the integrity of the legal system provisions from of the contradiction between them. As well as to control the legal rules not notified, for to prevent the issuance of unconstitutional provisions without control, and to ensure the validity of the controlled text, and the legal system in general.

In the substantive side, the Council has contributed to the production of the provisions of the controlled texts through making of interpretative reservations that suspend the constitutionality of the text on them, in order to give the correct and constitutional meaning to their provisions.

It also intervenes in the production of legal rules, by directing an orders and recommendations to the legislator to show him the constitutional meaning of some rules, for complying with them when they are produced in the future in order to avoid becoming unconstitutional. Through *interpretative reservations, orders and recommendations*, the Constitutional Judge participates positively in the exercise of legislation.

Despite the justified need for the adoption of these techniques by the Constitutional Council, their adoption may increase its power at the rest of the authorities, and feed the spectre of the Government of judges, especially since it has the last word in the fate of the text before or after issued it. To take advantage of these techniques and rationalize them at the same time, it is proposed to organize them constitutionally to legitimize them, and rationalize the Council in its resorting to them or to continue to invent others. This can be done through providing them explicitly in the Constitution, and determine the extent to which they can be used, as an exception to the general rules of constitutional control.

<sup>(3)</sup> Opinion n ° 01 / A.LO / CC / 04 of February 5, 2004, concerning the verification of the conformity of the Organic Law amending and supplementing Ordinance n ° 97-07 of 6 March 1997 on the organic law relating to the electoral system, Constitution. Algerian Official Gazette no. 09, of 11 February 2004.