International Journal of Law and Jurisprudence
Volume 15 · Issue 2 · 2026 · Pages 1921–1931
e-ISSN 2255-1824 (Online) · revistaidj.com/IJLJ

Ex Post Constitutional Review of Regulations in Algeria and Its Impact on the Principle of Legal Certainty - An analytical study in light of the amended Algerian Constitution and Constitutional Court Opinion No.01/2024 -

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Received: 14 February 2026 | **Accepted:** 22 June 2026 | **Published:** 19 October 2026

Abstract

This study examines ex post constitutional review of regulations in the Algerian legal system following the 2020 constitutional amendment and the enactment of Organic Law Nº.22-19, focusing on Constitutional Court Interpretative Opinion Nº.01/2024 and its implications for the principle of legal certainty.

The article highlights the difficulties arising from restricting the terms "regulations" and "regulatory provision" to autonomous presidential decrees issued pursuant to Article 141(1), while excluding executive decrees and assigning their review to the administrative courts exercising jurisdiction over legality. This approach has generated scholarly debate over its adequacy in safeguarding freedoms and closing the gap in legal protection.

The study also examines the judicial screening process before the Council of State and the rules governing stays of proceedings without compromising the timely administration of justice. Finally, it considers the flexibility of the temporal effects of the Court's decisions under Article 198 of the Constitution and the fate of individual administrative decisions implemented under the regulations concerned. It concludes that constitutional protection must be balanced against the stability of acquired legal positions and legal certainty.

Introduction:

Regulations are the principal legal instrument through which the executive conducts public affairs, ensures the continuity of public services, and implements legislation. Although regulatory rules should, in principle, remain within their implementing function or the fields assigned to them, the expansion of administrative activity has led them to establish substantive rules of general and abstract application that directly affect individuals' legal positions and, at times, fundamental rights and freedoms.

Accordingly, subjecting regulations to the principle of legality through judicial review by way of an action for annulment is no longer sufficient to preserve the constitutional order. Their subjection to the supremacy of the Constitution has become an indispensable foundation of the rule of law.

The Algerian constitutional system underwent a significant transformation through the 2020 constitutional amendment, which moved beyond the traditional restriction of ex post review to legislative texts. It introduced ex post constitutional review of "regulations" through direct referral within one month of publication under Article 190(3), and extended the plea of unconstitutionality under Article 195 to encompass a "regulatory provision" alongside a legislative provision where it infringes a litigant's constitutionally guaranteed rights and freedoms. However, the use of the terms "regulations" and "regulatory provision" without qualification or specification of the issuing authority raised intricate legal questions concerning the scope of this review: does it extend to all regulatory acts issued by the executive, or only to particular categories?

The Constitutional Court intervened to resolve this issue in Interpretative Opinion Nº.01/R.C.C./I.C./24 of 16 January 2024. It assigned the same meaning to both terms and confined them exclusively to autonomous regulations issued by the President of the Republic under Article 141(1), excluding implementing regulations issued by the Head of Government or the Prime Minister from its jurisdiction and subjecting them to administrative judicial review.

The effects of this judicial delimitation extend beyond the allocation of jurisdiction between constitutional and administrative courts. They directly affect the principle of legal certainty enshrined in Article 34 of the Constitution, raising complex questions about reconciling the removal of defective provisions from the legal system with the stability of transactions and acquired legal positions created under provisions subsequently declared unconstitutional, as well as the temporal effects of those provisions ceasing to have effect under Article 198.

Research problematic

The central question addressed in this study is as follows:

To what extent does ex post constitutional review of regulations protect rights and freedoms in Algeria while preserving legal certainty and the stability of acquired legal positions, in light of the interpretation adopted by the Constitutional Court in Opinion Nº.01/2024?

This central question gives rise to the following subsidiary questions:

- What precise criterion distinguishes regulations subject to constitutional review, and did the Constitutional Court rely on an institutional criterion or a substantive criterion?
- Did the constituent authority intend, in the 2020 amendment, to distinguish between "regulations" and a "regulatory provision," and to what extent is Opinion Nº.01/2024 consistent with the amendment's purposes and preparatory materials?
- What procedural requirements govern direct referral and the plea of unconstitutionality, and what limits apply to the Council of State's screening function?
- How did the legislature balance stay of proceedings against the requirement to determine cases within a reasonable time, and what legal consequences does a declaration of unconstitutionality have for earlier and subsequent individual decisions?

Research hypotheses

The study tests the following hypotheses:

First hypothesis. The Constitutional Court's reliance on a purely institutional criterion to confine regulations to autonomous presidential decrees reflects a desire to avoid an overlap of functions with the administrative courts, but narrows the constitutional protection available to litigants against executive decrees affecting their rights.

Second hypothesis. "Regulations" and a "regulatory provision" are substantively distinct concepts. The former denotes the legal instrument as a whole for the purposes of abstract referral, whereas the latter denotes the general and abstract rule applicable to a pending dispute. The plea of unconstitutionality is therefore an incidental defence subject to strict requirements that prevent it from becoming a parallel, autonomous action.

Third hypothesis. The constitutional power conferred on the Constitutional Court under Article 198 to determine the date on which a provision ceases to have effect provides a legal basis for protecting legal certainty and limiting the adverse consequences of fully retroactive invalidity.

Significance of the study

Theoretical significance. The study addresses a particularly sensitive intersection between administrative and constitutional law. It clarifies the central concepts relating to general executive rulemaking, explains the transition from ordinary legality review to constitutional justice, assesses the legal status and binding force of the Constitutional Court's interpretative opinions, and examines their impact on the hierarchy of legal norms.

Practical significance. The study offers a practical interpretation of the procedural provisions of Organic Law Nº.22-19 and the Code of Civil and Administrative Procedure. It assists judges and lawyers in identifying the requirements for raising a constitutional plea, understanding procedural screening before the Council of State, and determining the direct effects of a stay of proceedings and the fate of individuals' legal positions arising from individual decisions adopted pursuant to defective regulations.

Objectives of the study

The study pursues the following objectives:

- To examine Constitutional Court Opinion Nº.01/2024 in order to identify its institutional basis and interpretative limits.
- To clarify the terminology distinguishing direct ex post referral, the plea of unconstitutionality, and an action for annulment on grounds of excess of power.
- To examine the limits of the Council of State's power to assess the seriousness of constitutional pleas without encroaching on the jurisdiction of the constitutional court.
- To explain the rules governing the temporal effects of declarations of unconstitutionality and the protection of rights acquired in good faith under Article 198 of the Constitution.

Methodology

The study primarily adopts an analytical method to examine constitutional and statutory provisions and Constitutional Court Opinion Nº.01/2024, and a descriptive method to present the procedures governing referral and the plea of unconstitutionality. It also draws, to a limited extent, on comparative analysis when discussing French jurisprudence on adjusting the temporal effects of annulment, while respecting the distinctive features of the Algerian legal system.

Structure of the study

The study is divided into two parts. The first addresses the conceptual framework and scope of constitutional review of regulations. The second examines its procedural and substantive effects on the principle of legal certainty.

1. Conceptual Framework and Constitutional Avenues for Ex Post Review of Regulations

Defining the scope of review requires an understanding of a regulatory act in administrative law before turning to the constitutional concept adopted by the Constitutional Court. This part is accordingly divided into two sections: the first addresses the nature and scope of regulations; the second considers the means of initiating review and their limits.

1.1. The nature and scope of regulations in light of Constitutional Court jurisprudence

An act cannot be characterised as regulatory merely because it emanates from an executive authority: its legal classification depends on both its source and its content. The first subsection therefore addresses the institutional and substantive criteria, while the second considers constitutional intent as understood by the Constitutional Court.

1.1.1. The institutional and substantive criteria for a regulatory act

The institutional criterion identifies the authority issuing the act, whereas the substantive criterion concerns the nature and effects of the rule. Each criterion is considered separately before explaining the importance of combining them when defining the scope of review.

The institutional criterion: This criterion examines the source of the act and the legal status of the issuing authority. In principle, an act belongs to the administrative function where it is issued by a competent administrative authority, such as the President of the Republic, the Prime Minister, the Head of Government, a minister, or a local authority, each acting within its legally assigned competence (Algerian Constitution, 2020, art. 141).

The criterion is important for identifying the competent authority and verifying compliance with rules governing competence, hierarchy, form, and procedure. It cannot, however, determine the legal nature of an act in every case. The law may empower persons outside the administrative apparatus to issue acts of an administrative nature; conversely, an administrative authority may issue acts that, because of their nature or subject matter, do not fall under the same legal regime (Jabbar, 1995; Murgue-Varoclier, 2018).

The source of the act is therefore insufficient by itself to determine whether it is subject to constitutional review. It must be considered alongside the content of the act and the constitutional provision defining the scope of review (Tifine, 2019).

The substantive criterion: This criterion examines the content and legal effects of an act rather than the authority issuing it. An act is regulatory where it establishes a general, abstract, and impersonal rule applicable whenever its conditions are satisfied, rather than one confined to an identified person or a particular individual event (Law Nº.08-09, 2008, as amended by Law Nº.22-13, 2022, art. 829; Bougrit, n.d.).

Generality does not necessarily mean that the actual number of addressees is large. What matters is that the rule is formulated to apply to everyone satisfying its conditions, including persons who may satisfy them in the future (Untermaier-Kerléo, 2017, pp.23–28).

A regulation is therefore described as “law in the substantive sense”: it shares the general character of a statutory rule but does not become law in the formal sense, since its source and adoption procedure remain distinct from those of an Act of the legislature.

The complementarity of the two criteria: Combining the criteria makes it possible to distinguish the administrative character of the act from the generality of the rule it contains. A rule may emanate from the administration and have wide-ranging effects on legal positions. That alone, however, does not establish the Constitutional Court’s jurisdiction, which remains governed by the constitutional text and its interpretation.

1.1.2. The scope of regulations under the 2020 constitutional amendment and the Constitutional Court Opinion

The 2020 constitutional amendment marked a turning point in strengthening the rule of law in Algeria. In particular, it introduced new mechanisms for protecting constitutional rights and freedoms and extended constitutional review to “regulations” under Article 190 and to a “regulatory provision” through the plea of unconstitutionality under Article 195, after review had historically been confined to legislation.

The use of these general terms nevertheless prompted extensive scholarly and judicial debate over their nature and scope: did they encompass all regulatory instruments, including executive decrees and implementing orders, or only autonomous presidential regulations under Article 141?

Faced with this ambiguity, the Constitutional Court issued Interpretative Opinion Nº.01/24 to delineate these concepts and distinguish constitutional jurisdiction from administrative jurisdiction. This approach raised profound questions concerning its consistency with the intentions of the constitutional drafters and its binding force within the legal system.

The concept and domains of regulations in the 2020 constitutional framework. General executive rulemaking denotes the administration’s power to establish general and abstract rules applicable to everyone or to specified categories without

identifying individuals by name. This contrasts with individual decisions addressed to particular persons, such as appointments, promotions, or disciplinary sanctions.

Article 141 of the Constitution distributes this competence between two levels:

- ***Autonomous regulations issued by the President of the Republic***: The President exercises regulatory power through presidential decrees in matters and fields not expressly reserved by the Constitution to Parliament (Article 141(1)). These are self-standing instruments deriving their authority directly from the Constitution without relying on a pre-existing statute.
- ***Implementing regulations issued by the Prime Minister or the Head of Government***: These relate exclusively to the implementation of legislation and take the form of executive decrees establishing the procedural and practical measures required to give effect to statutes enacted by Parliament (Article 141(2)).

The conceptual distinction between "regulations" and a "regulatory provision": In theory and public-law scholarship, the terms are not wholly synonymous; their relationship is that between a legal instrument and its content.

"Regulations" under Article 190(3) denotes, in institutional and substantive terms, the regulatory instrument as a whole—the entire decree or order—as a single legal instrument containing general and abstract rules.

A "regulatory provision" under Article 195(1) denotes the individual substantive normative rule or article contained within a regulatory instrument. By adopting this more specific expression, the constituent authority intended, first, to exclude individual administrative decisions from the scope of the plea of unconstitutionality and, second, to confine the dispute to the particular regulatory article or paragraph affecting a party's legal position and alleged to infringe constitutionally guaranteed rights and freedoms, without requiring a challenge to the entire decree.

Constitutional intent in the 2020 draft amendment and preparatory materials: Reference to the 2020 draft constitutional amendment and its accompanying explanatory memorandum indicates the following:

- Under the 2016 Constitution, the plea of unconstitutionality was confined to a "legislative provision." Judicial practice revealed a gap in protection: most infringements of individual rights and freedoms, including freedom of movement, trade, investment, and property rights, arose through executive decrees and ministerial orders rather than parliamentary legislation.
- The addition of "or regulatory" in Article 195 and "regulations" in Article 190 reflected the express intention announced by the drafting committee to broaden constitutional protection and subject general executive rulemaking to constitutional review wherever it affected human rights and freedoms.
- Neither the draft nor the preparatory materials expressed an intention to restrict review to one category of decree. The terms were framed in general and unqualified language.

The substance of the Constitutional Court Opinion (Constitutional Court of Algeria, 2024, pp.3–5***)***: The Constitutional Court issued Interpretative Opinion Nº.01/24 on 16 January 2024 following a referral by forty-six members of the People's National Assembly. Its operative provisions:

- Assigned the same meaning to "regulations" in Article 190 and "regulatory provision" in Article 195.
- Confined both expressions exclusively to autonomous regulations issued by the President of the Republic in matters not reserved to statute, pursuant to Article 141(1).
- Excluded all executive decrees and interministerial orders issued by the Prime Minister or the Government from the Constitutional Court's jurisdiction, placing them entirely within administrative judicial review through actions for annulment and review of legality.

The legal status of the interpretative opinion between advisory character and practical binding force: Describing the instrument as an "opinion" raises the question of its binding nature.

From the standpoint of the literal text and the draft Constitution, Article 198 provides that the Constitutional Court's "decisions" are final and binding on all authorities, whereas Articles 192 and 193 employ the expression "gives an opinion" in relation to interpretation. Formally, an "opinion" is therefore advisory, since opinions are not expressly declared binding in the same way as decisions.

In terms of its effects and actual judicial application, however, the interpretative opinion has decisive judicial and practical binding force. It constitutes an authoritative interpretation elucidating the constitutional text, issued by the sole body entrusted with safeguarding the Constitution.

Accordingly, the Constitutional Court itself is bound, in future, to reject for lack of jurisdiction any plea concerning an executive decree. The referring courts—the Supreme Court and the Council of State—must likewise screen out and refuse to refer such pleas because they know in advance that they will not be entertained. The Opinion thus becomes effective in practice and cannot be disregarded by any court.

A critical assessment of the Constitutional Court's approach:

While recognizing the Court's concern to avoid overwhelming its registry with everyday incidental pleas and to preserve the allocation of jurisdiction with the Council of State, its interpretation displays methodological and legal shortcomings in the following respects.

Confusion over the scope of implementing regulations: The Court reasoned that implementing regulations serve to "implement laws and autonomous regulations." This reasoning is constitutionally imprecise. Article 141(2) expressly confines the Prime Minister's competence to the "implementation of laws." The Constitution does not state that the Prime Minister issues executive decrees to implement autonomous presidential decrees, which operate in their own right by virtue of their autonomous nature.

Conflation of legality review and constitutional review: The Court justified denying litigants access to a constitutional plea by pointing to the availability of an action for annulment before the administrative courts. Yet an administrative judge examines whether a decree conforms to legislation. If a statute is broadly framed or delegates powers to the administration, and the Government issues an executive decree imposing restrictions that directly infringe a constitutional right without conflicting with the wording of the enabling statute, the administrative judge will uphold the decree as lawful because it does not contravene ordinary legislation. A serious gap in protection then arises: an implementing provision that infringes the Constitution becomes insulated from administrative annulment while being excluded from constitutional review.

Restricting unqualified language and disregarding constitutional intent: The interpretative principle is that "an unqualified expression retains its unrestricted meaning unless there is evidence requiring its restriction." "Regulatory provision" in Article 195 and "regulations" in Article 190 appear in general, unqualified terms. Confining them to autonomous presidential decrees amounts to amending the text rather than merely elucidating its meaning.

Depriving the new constitutional provision of substance: Autonomous presidential regulations issued in fields not reserved to statute are very rare in practice, since Articles 139 and 140 and the provisions of Title One assign matters affecting citizens' freedoms and legal positions to the legislative domain. Executive decrees, by contrast, constitute the overwhelming majority of normative rules affecting litigants' lives. Restricting constitutional review to autonomous instruments therefore renders the protection introduced by Article 195 largely inoperative and of almost no practical effect.

1.2. Avenues for initiating ex post constitutional review of regulations

The review considered here follows two distinct routes, differing in who may initiate them, whether pending proceedings are required, and the applicable time limits. The first subsection addresses direct referral; the second addresses the plea of unconstitutionality.

1.2.1. Direct referral concerning the constitutionality of regulations

Direct referral is an institutional mechanism that does not require an individual dispute. This subsection first examines the authorities entitled to refer a matter and the applicable time limit, before considering the limits of the mechanism's effectiveness.

Authorities and time limit: Article 193 identifies the authorities entitled to make a referral: the President of the Republic, the President of the Council of the Nation, the President of the People's National Assembly, and the Prime Minister or Head of Government, as applicable. It also permits referral by forty members of the People's National Assembly or twenty-five members of the Council of the Nation (Algerian Constitution, 2020, art. 193). A referral concerning the constitutionality of regulations must be made within one month of publication under Article 190(3) (Algerian Constitution, 2020, art. 190(3)) and Article 5 of Organic Law Nº.22-19 (Organic Law Nº.22-19, 2022, art. 5).

Procedure: The Organic Law requires a reasoned letter of referral accompanied by the text concerned (Organic Law Nº.22-19, 2022, art. 3). The Constitutional Court determines the matter within the general constitutional time limit, subject to any special provisions: Article 194(1) provides for thirty days from referral, reducible to ten days at the President of the Republic's request in an emergency (Algerian Constitution, 2020, art. 194(1); Organic Law Nº.22-19, 2022, arts. 6, 7, 14). It should be stressed that Article 13 of Organic Law Nº.22-19 concerns the period for issuing an opinion on the interpretation of constitutional provisions—thirty days from referral under Article 192(2) (Organic Law Nº.22-19, 2022, art. 13). It does not establish the one-month period for referring regulations to the Court; that period is expressly established by Article 190(3) and confirmed by Article 5 of the Organic Law (Algerian Constitution, 2020, art. 190(3); Organic Law Nº.22-19, 2022, art. 5).

Limits of effectiveness: The one-month period remains short given the potential complexity of a regulatory instrument and its effects. It is a relatively restrictive time bar when assessed against the breadth of regulations' practical effects and the time needed to determine whether they conflict with constitutional provisions (Algerian Constitution, 2020, art. 190(3); Organic Law Nº.22-19, 2022, art. 5).

The initiative is also confined to political and institutional actors: the designated office-holders and parliamentary groups meeting the numerical thresholds (Algerian Constitution, 2020, art. 193). Moreover, Opinion Nº.01/2024 confines this form of referral, as regards regulations, to autonomous instruments issued by the President of the Republic (Constitutional Court of Algeria, 2024, p. 5).

1.2.2. The plea of unconstitutionality in pending judicial proceedings

The plea differs from direct referral because it is a defence raised by a party to pending proceedings and does not give the litigant direct access to the Constitutional Court. This subsection sets out its requirements and procedural course before explaining the limits of its procedural effects.

Requirements and legal nature: The plea must be submitted in a separate, written, and reasoned memorandum (Organic Law Nº.22-19, 2022, art. 19). The contested legislative or regulatory provision must determine the outcome of the dispute or

constitute the basis of the prosecution (Algerian Constitution, 2020, art. 195(1); Organic Law Nº.22-19, 2022, art. 21, first indent, p.9). It must not previously have been declared constitutional, unless circumstances have changed (Organic Law Nº.22-19, 2022, art. 21, second indent). The constitutional ground raised must also be serious (Organic Law Nº.22-19, 2022, art. 21, third indent).

The fact that the plea is not subject to the one-month period applicable to direct referral does not make it an autonomous action available at any time (Algerian Constitution, 2020, arts. 190(3), 195; Organic Law Nº.22-19, 2022, art. 5). It depends on the existence of pending proceedings and compliance with the Organic Law. Constitutional Court Opinion Nº.01/2024 also restricts pleas concerning regulatory provisions to autonomous regulations issued by the President of the Republic.

The referral process: The court hearing the substantive dispute decides whether to transmit the plea to the Supreme Court or the Council of State, according to jurisdiction (Organic Law Nº.22-19, 2022, art. 20). The Supreme Court or the Council of State then decides whether to refer it to the Constitutional Court within two months of receiving the decision concerning the plea referred to in Article 23 of Organic Law Nº.22-19 (Organic Law Nº.22-19, 2022, art. 30).

The Council of State's role is confined to procedural screening: verifying the seriousness of the plea and its relevance to the dispute before referral. It may not examine the merits in order to declare the provision constitutional or invalid. The final substantive determination of constitutionality falls exclusively within the Constitutional Court's jurisdiction. Article 30(2) provides that referral takes place when the legal conditions in Article 21 are met (Organic Law Nº.22-19, 2022, art. 30(2)).

Effects on the conduct of proceedings and exceptions to the stay: Deferral of the determination of the principal dispute—a stay of proceedings—is the immediate procedural effect of a decision to transmit or refer a plea of unconstitutionality. Its purpose is to prevent judgments based on normative provisions affected by unconstitutionality (Organic Law Nº.22-19, 2022, art. 25(1), p.10). Nevertheless, to balance constitutional legality against the timely administration of justice and the protection of individual liberty, the organic legislature did not make the stay an absolute rule. It introduced specific statutory exceptions allowing the case to proceed.

Continuing judicial investigation and protective measures: Deferral of the substantive determination does not freeze the judicial investigation. The judge retains full authority to order the interim or protective measures necessary to preserve the parties' rights (Organic Law Nº.22-19, 2022, art. 25(2), p. 10).

Disputes affecting personal liberty: The stay does not apply where a person is deprived of liberty because of the pending proceedings, or where the proceedings seek to end that deprivation, unless the person concerned personally objects to the case continuing (Organic Law Nº.22-19, 2022, art. 26(1), p.10).

Urgent proceedings and proceedings subject to statutory time limits: The court does not stay proceedings where the law expressly requires a determination within a specified period or the case is being heard under an urgent procedure (Organic Law Nº.22-19, 2022, art. 26(2), p.10). These exceptions and safeguards apply at the various levels of adjudication, both before courts hearing the merits at first instance and on appeal, and before the Supreme Court and the Council of State when hearing appeals in cassation, subject to the liberty, urgency, and time-limit exceptions specified in Article 27 (Organic Law Nº.22-19, 2022, arts. 26(3)–(4), 27, p.10).

2. Procedural and Substantive Implications of Regulatory Review for Legal Certainty

Constitutional review of regulations does more than determine whether a general and abstract rule is constitutional. It directly affects the procedural rules governing administrative litigation, the course of judicial proceedings, and the stability of the resulting legal positions. Subjecting regulatory acts to judicial scrutiny, whether through constitutional review or legality review, confronts judges and litigants with a delicate balance: safeguarding constitutional supremacy and removing defective provisions from the legal system, while preserving legal certainty (*sécurité juridique*), stable transactions, and acquired rights (Boudiaf, 2023, pp.45–49).

This balance becomes more difficult because of the coexistence of different avenues of challenge. Actions for annulment on grounds of excess of power intersect with direct ex post referral and the plea of unconstitutionality. This coexistence produces procedural difficulties arising from different time limits and the Council of State's judicial screening powers, as well as complex substantive questions concerning the temporal effects of declarations of unconstitutionality and the fate of individual administrative decisions adopted pursuant to the regulations concerned.

To examine these dimensions in a thorough and balanced manner, this part is divided into two sections: the first concerns time limits and the challenges of judicial screening before the Council of State; the second addresses the substantive effects of a declaration of unconstitutionality and the fate of legal positions.

2.1. Time limits and the challenges of judicial screening before the Council of State

The effectiveness of review depends on the integrity of the procedural route followed. Clearly defining time limits and the roles of screening courts provides an initial safeguard for legal certainty and against vexatious litigation, while ensuring that litigants can access constitutional justice without arbitrary obstacles.

2.1.1. Distinguishing the time limit for an action for annulment from constitutional review periods

A sound procedural analysis requires a strict distinction between the time limits for challenging regulations before administrative courts and those applicable in constitutional proceedings, so as not to confuse remedies differing in nature, grounds, and effect.

The time limit for an action for annulment in administrative proceedings: Challenges to regulatory acts before administrative courts are governed by the Code of Civil and Administrative Procedure.

General time limit: Article 829 of Law Nº.08-09 establishing the Code of Civil and Administrative Procedure, as amended and supplemented by Law Nº.22-13, sets a four-month period for bringing proceedings before an administrative court. For individual decisions, time runs from personal notification; for collective or regulatory decisions, it runs from publication (Law Nº.08-09, 2008, as amended by Law Nº.22-13, 2022, art. 829).

Commencement of the period and administrative publication: For the period to run against all persons, publication must be proper and valid in the Official Gazette or in the official bulletins and websites designated for that purpose, according to the hierarchical level of the authority issuing the regulation. Incomplete or ambiguous publication does not start the limitation period against interested persons (Kheloufi, 2019, pp.218–222).

Effect of expiry: Expiry of the four-month period without an action for annulment renders the regulatory act immune from challenge by that judicial remedy and makes it definitively effective at the administrative level, protecting the stability of the situations and regulatory legal positions arising from it (Baali, 2020, p.134).

The distinct period for direct ex post referral under Article 190(3): This administrative avenue is entirely separate from political or institutional ex post referral.

Short constitutional referral period. Article 190(3) of the amended Constitution and Article 5 of Organic Law Nº.22-19 establish a short period of no more than one month from publication for referring the constitutionality of regulations to the Constitutional Court (Algerian Constitution, 2020, art. 190(3); Organic Law Nº.22-19, 2022, art. 5).

Rationale: The constituent authority intended this narrow period to ensure that the constitutionality of a regulation is settled at an early stage, before it becomes established within the legal system (Aoussedik, 2021, p.310).

Restricted initiative: The period applies solely to the referring authorities specified in Article 193: the President of the Republic, the presidents of both parliamentary chambers, the Prime Minister or Head of Government, and the qualifying parliamentary minority. It is therefore unavailable to individuals and litigants (Algerian Constitution, 2020, art. 193).

The limited consequences of the expiry of the annulment period and the independence of the constitutional plea: Expiry of the period for an action for annulment raises a precise constitutional question: does a regulation insulated from administrative annulment thereby become immune from constitutional review?

No absolute immunity from the Constitution: Missing the time limit for an action for annulment protects the regulation from direct judicial annulment by the court reviewing legality. It does not cure its underlying substantive constitutional defects. The substantive supremacy of the Constitution precludes the indefinite survival of provisions violating rights and freedoms merely because a formal procedural period has elapsed (Chihoub, 2018, p.167).

The plea is not an automatic substitute for annulment: A litigant who failed to act within the annulment period may not automatically use a plea of unconstitutionality as a procedural device to circumvent the time bar. The plea is subject to stringent substantive and procedural conditions:

- Genuine, pending principal proceedings relating to the dispute must exist (Algerian Constitution, 2020, art. 195(1)).
- The determination of the constitutionality of the regulatory provision must be necessary to the outcome of the pending dispute (Organic Law Nº.22-19, 2022, art. 21).
- The constitutional plea must be serious and must not be used to obstruct the administration of justice or cause procedural delay (Mahiou, 2017, p.289).

2.1.2. The Council of State as a constitutional screening and referring court

Article 195 of the amended Algerian Constitution assigns the Council of State, alongside the Supreme Court in the ordinary judicial order, the exclusive role of screening pleas of unconstitutionality raised before administrative courts (Algerian Constitution, 2020, art. 195). This competence raises fundamental questions about the relationship between the jurisdiction of the court reviewing legality and that of the constitutional court.

Screening conditions and the limits of judicial examination: Under Article 195(1) of the Constitution and Articles 21, 30, and 31 of Organic Law Nº.22-19, the Council of State performs a defined procedural and substantive screening function before deciding whether to refer a plea to the Constitutional Court. It must verify that:

- The contested legislative or regulatory provision determines the outcome of the dispute or constitutes the basis of the prosecution (Organic Law Nº.22-19, 2022, art. 21, first indent, p.9).

- The contested provision has not previously been declared constitutional by the Constitutional Council or Constitutional Court, unless circumstances have changed (Organic Law Nº.22-19, 2022, art. 21, second indent, p.9).

- The ground of unconstitutionality raised is serious and concerns an alleged infringement of constitutionally guaranteed rights and freedoms (Organic Law Nº.22-19, 2022, art. 21, third indent, p.9).

Distinguishing examination of referral conditions from a determination on the constitutional merits. The distinction between screening jurisdiction and jurisdiction to determine constitutionality is central to a fair hearing and judicial certainty.

Prohibition on determining the merits: The Council of State must remain within its screening role (Algerian Constitution, 2020, art. 195(1); Organic Law Nº.22-19, 2022, art. 21). It may not proceed to a substantive assessment of constitutionality or encroach on the Constitutional Court's jurisdiction by implicitly holding a provision constitutional under the guise of refusing referral for lack of seriousness. Determination of the constitutional merits is reserved exclusively to the Constitutional Court; a refusal to refer must not contain an express or disguised substantive constitutional assessment of the rights and freedoms at issue (Algerian Constitution, 2020, arts. 185, 190, 195; Organic Law Nº.22-19, 2022, art. 43).

Prima facie assessment of seriousness: The Council of State's authority is confined to examining the prima facie constitutional dimension of the dispute—whether there is serious doubt (*le doute sérieux*). If the constitutional issue admits of doubt or differing interpretations and raises a serious rights question, it must be referred promptly, without prejudging the dispute (Lealam, 2021, p.112).

The tension between the authority of a legality judgment and a newly raised constitutional issue. The most delicate screening questions arise where the Council of State has itself delivered a prior final judgment upholding the legality of the regulatory instrument and dismissing an action for its annulment.

Independence of the normative basis. The authority of a judgment refusing annulment does not prevent a subsequent plea of unconstitutionality. A legality judgment has relative res judicata effect, concerning the regulation's conformity with ordinary or organic legislation as to form and competence. The constitutional plea instead addresses the provision's conformity with the Constitution and its superior rights and guarantees (Lzehari, 2022, p.275).

The duty to give reasons and improve predictability. To maintain litigants' confidence and safeguard legal certainty, the Council of State must give detailed reasons for decisions refusing or allowing transmission and publish the principles and leading decisions of its chambers. Publication helps create a predictable judicial environment and harmonises screening criteria before administrative courts and administrative courts of appeal (Council of State of Algeria, 2023, pp.14–16).

2.2. Substantive effects of a declaration of unconstitutionality and the fate of legal positions

The essential purpose of constitutional review of regulations goes beyond determining whether an administrative rule conforms to the Constitution. It has profound substantive implications for the State's legal order and individuals' acquired legal positions (Boudiaf, 2023, pp.45–49). A declaration of unconstitutionality raises two interconnected legal problems central to balancing constitutional legality and legal certainty, the latter expressly enshrined in the final paragraph of Article 34 of the 2020 Constitution.

The first concerns pending proceedings: to what extent must their determination be stayed pending the Constitutional Court's ruling, and how can protecting litigants from the application of a defective regulation be reconciled with the timely administration of justice and adjudication within a reasonable period?

The second concerns the temporal dimension of the declaration: in particular, the date on which the provision ceases to have effect and the fate of individual administrative decisions adopted and implemented under it that have created settled legal positions.

These questions are examined in two subsections: the effect of the plea on proceedings and the timely administration of justice; and the temporal effects of a declaration of unconstitutionality and the fate of individual decisions.

2.2.1. The effect of the plea on proceedings and the timely administration of justice

The procedural regime for the plea of unconstitutionality balances suspending a case to avoid unjust judgments against ensuring that the judicial service continues to discharge its functions in protecting rights and freedoms requiring urgent protection.

Reasons for staying determination under Article 25 of Organic Law Nº.22 19. Article 25(1) expressly provides: "Where a plea of unconstitutionality is transmitted, the court shall defer determination of the dispute until it receives the decision of the Supreme Court, the Council of State, or the Constitutional Court where the plea is referred to it." This deferral rests on the following considerations.

Preventing judgments affected by unconstitutionality. If the court hearing the merits continues to determine the principal dispute on the basis of a regulatory rule subject to a serious constitutional objection, it may convict a party or deprive that party of an established right. If the Constitutional Court subsequently declares the regulation invalid, the litigant and the courts face an enforceable judgment founded on a constitutionally invalid basis, undermining confidence in justice (Bougouffa, n.d., p.66).

Giving effect to the authority of Constitutional Court decisions erga omnes. Awaiting the Constitutional Court's decision ensures that all courts apply its rulings immediately upon delivery, pursuant to Article 171, which requires judges to apply treaties, laws, and Constitutional Court decisions, and Article 198(5), which makes those decisions final and binding on all administrative and judicial authorities.

Exceptions to the stay and their statutory limits under Articles 25 and 26. Recognising the serious harm that automatic suspension could cause to litigants' interests, the organic legislature did not make the stay rigid or absolute. It established specific qualifications and exceptions in Articles 25(2) and 26 of Organic Law Nº.22-19.

Continuing investigation and interim or protective measures under Article 25(2). Deferral of the substantive determination does not suspend judicial investigation, the hearing of parties, or the collection of evidence. The court may order all interim and protective measures necessary to safeguard the disputed rights, such as preparing an inventory, appointing a judicial custodian, or temporarily staying specified works. This prevents parties from exploiting the stay to create a fait accompli.

The exception for deprivation of liberty under Article 26(1). Determination may not be deferred where a person is deprived of liberty because of the proceedings or where the proceedings seek to end that deprivation. Personal liberty is a fundamental constitutional right protected by Articles 34 and 44. It cannot be sacrificed by keeping a person in custody or detention solely while awaiting the screening of a constitutional issue, unless that person expressly objects to the proceedings continuing.

Urgent cases and statutory time limits under Article 26(2). The judge must continue to determine the case without awaiting the outcome of the plea where the law requires adjudication within a specified period or the matter is brought under an urgent procedure. Urgent judicial protection addresses imminent danger and irreparable harm; suspending it would defeat its purpose.

The stay on appeal and in cassation under Articles 26(3) and 27. Where the first-instance court determines the case without waiting because of urgency or a liberty issue, and its judgment is appealed, the appellate court must defer determination unless the same exceptional circumstances persist. Article 27 likewise requires the Supreme Court and the Council of State to stay determination of an appeal in cassation until the constitutional issue has been resolved, subject to its specified exceptions (Organic Law Nº.22-19, 2022, art. 27, p.10).

2.2.2. Temporal effects of a declaration of unconstitutionality and the fate of individual decisions

The Constitutional Court alone determines the constitutionality of regulatory provisions within four months, extendable once, by a reasoned decision, for a further period not exceeding four months under Article 195(2) of the Constitution and Article 43 of Organic Law Nº.22-19 (Algerian Constitution, 2020, art. 195(2), p. 41; Organic Law Nº.22-19, 2022, art. 43, p. 11). Its decision raises questions about temporal application and the fate of settled legal positions.

The constitutional distinction governing temporal effects under Article 198. Article 198 distinguishes the effects of a declaration of unconstitutionality according to the procedural route followed.

Direct ex post review of regulations under Article 198(3): That provision states: "Where the Constitutional Court declares an ordinance or a regulation unconstitutional, the text shall cease to have effect from the date of the Constitutional Court's decision." A declaration concerning a regulation made on direct ex post referral therefore has immediate prospective effect, preventing application from the date of the decision without affecting applications completed before it (Aoussedik, 2021, p.312).

Review following a plea of unconstitutionality under Articles 195 and 198(4): Article 198(4) states: "Where the Constitutional Court declares a legislative or regulatory text unconstitutional on the basis of Article 195 above, it shall cease to have effect from the date specified in the Constitutional Court's decision." The constituent authority thus established an exceptional and flexible rule, granting the Court full discretion to shape the temporal effects of its decision:

- It may give invalidity retroactive effect from the date on which the defective regulation was issued, to afford relief to the litigant who raised the plea.
- It may make invalidity effective immediately from the date of the decision.
- It may postpone the date on which the provision ceases to have effect to a later date expressly specified in its operative ruling. This allows the regulatory authority to amend the defective regulation or replace it with constitutionally compliant rules, avoiding a sudden legal vacuum that could disrupt public services or destabilise transactions.

The fate of individual administrative decisions adopted under a regulation declared unconstitutional: Removing a regulation's binding force raises a particularly delicate question: what becomes of individual decisions based on it, such as appointments, licences, withdrawal of authorisations, or disciplinary sanctions? To protect settled legal positions and legal certainty, the Algerian legal system does not recognise the automatic invalidity or legal non-existence of all earlier decisions. The consequences differ in three principal situations.

The individual decision challenged in the principal proceedings in which the plea was raised: The party raising the plea benefits directly and necessarily from the Constitutional Court's decision. Once the court hearing the merits is notified of that decision, which is published in the Official Gazette, it resumes proceedings under Article 28 of Organic Law Nº.22-19. The judge refrains from applying the regulation declared unconstitutional and must annul the contested individual decision founded on it.

Individual decisions that have become immune from administrative and judicial challenge: Individual decisions for which judicial remedies have been exhausted or the four-month period for an action for annulment has expired are protected decisions creating acquired and settled legal positions. The subsequent disappearance of the implementing regulation does not undermine them, in order to preserve stable transactions and citizens' financial and employment situations. This protection rests on four grounds:

- Procedural ground—the expiry of the challenge period. Expiry of the four-month period under Article 829 of the Code of Civil and Administrative Procedure bars the challenge and protects the individual decision from judicial annulment.

- Constitutional ground—legal certainty. Article 34(4) protects stable transactions and legal positions acquired in good faith.
- Constitutional adjudication—the authority of judgments and determination of temporal effects. Under Article 198, a regulation's invalidity does not automatically and absolutely operate retrospectively against completed situations; its effects remain confined to those determined by the Constitutional Court.
- Administrative-law ground—protection of acquired rights. The established principle prohibiting interference with, or withdrawal of, individual rights-creating decisions once they have become protected safeguards continuity of public services.

Individual decisions challenged in other concurrent proceedings. Where parallel administrative disputes have been brought within the applicable time limits and remain pending before courts on the basis of the same regulation, the administrative courts must comply with Article 198(5), which makes Constitutional Court decisions binding on all administrative and judicial authorities. They must disapply the regulation and annul the individual decisions resulting from it.

Limits to drawing on the comparative doctrine of adjusting the temporal effects of annulment. Since the French Council of State's landmark judgment of 11 May 2004 in *Association AC! et autres*, its jurisprudence has recognised the possibility of limiting and adjusting the retroactive effects of annulment of regulatory acts in the public interest and to prevent the excessively disruptive consequences of absolute invalidity (Association AC! et autres, 2004).

Applying this doctrine by analogy in Algeria nevertheless requires attention to important differences. In France, the adjustment of temporal effects originated in exceptional judicial innovation by the Council of State to fill a legislative gap in administrative litigation. In the Algerian constitutional system, the constituent authority did not leave the matter to judicial development. Article 198(4) expressly grants the Constitutional Court exclusive authority to specify the date on which a provision ceases to have effect. Adjustment of temporal effects in Algeria thus rests on the written Constitution, providing a firmer basis for legal certainty and the protection of acquired legal positions.

Conclusion

Examination of ex post constitutional review of regulations in Algeria and its impact on legal certainty, in light of the 2020 constitutional amendment, Constitutional Court Interpretative Opinion Nº.01/2024, and Organic Law Nº.22-19, yields the following principal findings and recommendations for improving the legal framework.

- **Findings**
- *Expansion of constitutional review and its restriction by the Constitutional Court*: The 2020 amendment introduced a significant development by including "regulations" in Article 190 and a "regulatory provision" in Article 195 within ex post review, with the intention of expanding the protection of rights and freedoms. Opinion Nº.01/2024 nevertheless restricted that unqualified language exclusively to autonomous presidential regulations under Article 141(1), excluding implementing regulations from the Court's jurisdiction.
- *Inadequate reasons for distinguishing autonomous from implementing regulations*: The study demonstrates that the Court's explanation of the subordination of implementing regulations to autonomous regulations lacks constitutional precision. Article 141(2) confines the Prime Minister's or Head of Government's competence to implementing legislation.
- *The study also identifies a gap in constitutional protection resulting from assigning implementing regulations exclusively to administrative judicial review*: Administrative judges review legality by assessing conformity with ordinary or organic legislation and cannot themselves review the constitutionality of legislation. Thus, where ordinary legislation uses broad language and leaves its implementation to regulations, an executive decree may impose unjustified restrictions on constitutional rights and freedoms without violating the literal wording of the implemented statute. The administrative judge is then unable to annul it because no illegality is established by reference to that statute, while the
- *Constitutional Court's Opinion prevents the litigant from raising a constitutional plea against it*: These implementing provisions affecting the Constitution are consequently insulated from an effective judicial sanction.
- *The practically binding nature of the interpretative opinion*: Although Article 198 reserves finality and absolute binding force for the Constitutional Court's "decisions," while Articles 192 and 193 use the expression "gives an opinion," Opinion Nº.01/2024 has decisive practical force. It directs the Council of State and Supreme Court in screening pleas and constrains the Constitutional Court itself from entertaining a plea directed against an implementing regulation.
- *The procedural distinction between annulment and the constitutional plea*: Expiry of the four-month annulment period under Article 829 protects a regulatory act from administrative judicial annulment but does not immunise it against a plea of unconstitutionality where the required conditions—pending proceedings, relevance to their outcome, and seriousness—are met, provided that the plea concerns an autonomous regulation in accordance with the Court's jurisprudence.
- *Discipline in the Council of State's screening function*: The Council of State screens pleas for compliance with Article 21 of Organic Law Nº.22-19 without assuming jurisdiction over the constitutional merits or encroaching on the Constitutional Court's exclusive competence through an implicit ruling on constitutionality.
- *Flexibility of temporal effects as a guarantee of legal certainty*: Article 198(4) expressly authorizes the Constitutional Court to determine when a provision ceases to have effect. This enables it to defer invalidity to avoid a legal vacuum and protect settled, acquired legal positions and earlier individual decisions that have become final.

- **Proposals and recommendations**
- *Reconsider the scope of regulatory constitutional pleas through legislation or constitutional amendment*: Article 195 should be redrafted or clarified in the Organic Law to establish Constitutional Court review over all general and abstract regulatory acts affecting citizens' fundamental freedoms, irrespective of whether their source is presidential or governmental, thereby closing the gap in protection.
- *Strengthen the plea of illegality alongside the constitutional plea*: Administrative courts should broaden proportionality review and examine executive decrees' conformity with general principles of constitutional value in annulment proceedings, compensating for their exclusion from Constitutional Court review.
- *Require fuller reasons for decisions refusing referral*: Screening courts—the Council of State and the Supreme Court—should publish decisions refusing referral and provide precise reasons. They should avoid arbitrary assessments of seriousness that deprive litigants of constitutional access to the constitutional court.
- *Formalize criteria for adjusting the temporal effects of invalidity*: The Constitutional Court should adopt predetermined, reasoned criteria when exercising its Article 198 power to postpone the date on which a provision ceases to have effect. These should balance meaningful relief for the party raising the plea against the need to avoid disruption of public services.
- *Observe judicial determination periods*: The exceptions in Articles 25 and 26 of Organic Law Nº.22-19 should be applied precisely and cautiously, preventing stays from becoming a means of prolonging disputes involving commercial, economic, or public-finance matters.

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