

The Limits and Legitimacy of the Maghrebi Constitutional Judge's Authority to Expand the Bloc of Constitutionality

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Abstract

This comparative study examines how the Maghrebi constitutional judge in Algeria, Morocco, and Tunisia has expanded the sources underpinning constitutional decisions and identifies the nature and components of the “bloc of constitutionality” applied in the constitutional review of legislation. It explains how constitutional adjudication in these countries has moved beyond the traditionally narrow conception of direct conformity with express constitutional provisions to recognise the constitutional preamble and general principles of constitutional value as binding standards for protecting rights and freedoms. The study also examines the incorporation of international human rights treaties and conventions into constitutional review and the inclusion of organic laws as texts supplementing constitutional provisions. It highlights the distinctive Algerian experience, in which ordinary legislation has been invoked based on the theory of the “constitutional link” and the principle of “non-regression” (the ratchet effect), in contrast to the restraint exercised by the Moroccan and Tunisian constitutional judiciaries to avoid an excessive expansion of the bloc of constitutionality. The study concludes that previous constitutional decisions, by virtue of their absolute binding force, have become binding judicial precedents recognised as a component of the bloc of constitutionality, thereby affirming the principle of legal certainty.

Keywords:

bloc of constitutionality; Maghrebi constitutional judge; constitutional review of legislation; international treaties; organic laws; constitutional link; legal certainty.

Introduction

Constitutional adjudication is a fundamental pillar of the rule of law and a guardian of constitutional supremacy. The contemporary constitutional judge's function is no longer confined to the narrow aim of rationalising parliamentary activity and formally verifying legislation's conformity with the constitutional text. Judicial practice has instead evolved towards an interpretative and creative role that transcends the literal constraints of constitutional provisions. This is reflected in the growing tendency to affirm a broad conception of the Constitution by drawing on an integrated body of rules and principles required by constitutional

review and by the judge's discretionary authority in matters not expressly addressed by the constituent authority. This lies at the heart of what legal scholarship and case law term the "bloc of constitutionality."

Thus, the bloc of constitutionality is the body of principles and rules with constitutional value that bind all public authorities within the state. This concept has, however, undergone a significant theoretical transformation. Under the direct influence of Hans Kelsen's arguments and the strict principle advanced by Charles Eisenmann, traditional constitutional scholarship long confined constitutionality to complete conformity with express provisions of the constitutional text, warning that any departure from this scope would constitute a shift toward political activity. Modern constitutional developments have expanded the bloc to include constitutional preambles, general principles of constitutional value, international human rights conventions, and even organic laws and prior judicial decisions. This development has found clear practical expression in constitutional adjudication in Algeria, Morocco, and Tunisia, where constituent authorities and constitutional judges have differed on the components and criteria of the bloc.

This study's significance derives from two complementary dimensions. Its theoretical significance lies in tracing and conceptualising the flexibility of the sources of constitutional review in Maghrebi constitutional practice and explaining how constitutional adjudication reconciles textual rigidity with the evolving protection of rights. Its practical significance lies in examining the reasoning and grounds on which constitutional courts and councils in the region have relied when reviewing legislation, particularly when incorporating international conventions or legislative texts into the review framework, and the direct consequences for institutional balance and the stability of legal transactions.

Against this background of divergence and rapidly evolving judicial practice, the study centres on the following fundamental question: to what extent is the Maghrebi constitutional judge's expansion of the sources of the bloc of constitutionality legitimate, and what limits and constraints govern the exercise of discretionary authority in balancing the protection of rights and freedoms against respect for parliamentary legislative sovereignty? This central question gives rise to subsidiary questions concerning the nature of the constitutional and international sources underpinning the bloc, the legitimacy of recourse to legislation and previous judicial decisions as standards of review, and adherence to the requirements of legal certainty amid the inevitable development of constitutional jurisprudence.

To address these issues, the study combines a descriptive and analytical method to examine doctrinal concepts and analyse decisions and opinions issued by constitutional adjudicative bodies in the countries concerned, with a comparative method to identify convergences and divergences between Algerian, Moroccan, and Tunisian approaches to expanding the bloc of constitutionality.

Hence, the discussion is organised into two main parts. The first examines the foundational sources of the bloc of constitutionality, namely the constitutional text and

international treaties. The second considers additional sources and the limits of legitimacy by examining legislative texts and the binding force of previous constitutional decisions.

Part One: The Foundational Sources of the Bloc of Constitutionality (the Constitutional Text and International Treaties)

The Maghrebi constitutional judge exercises supervisory authority between the principle of rationalising parliamentary activity and the areas of jurisdiction and constraints established by the Constitution in its narrow sense. The judge may go beyond these areas and constraints to give effect to a broader conception of the Constitution by invoking rules and principles established through judicial practice in matters that the Constitution does not expressly address and leaves to judicial discretion. These sources inform the Maghrebi constitutional judge's decisions, and all fall within what is known as the bloc of constitutionality.¹

The bloc of constitutionality is defined as “the body of principles and rules possessing constitutional value that must be respected and whose provisions bind the legislative or executive authority and, more broadly, all authorities, including judicial and administrative authorities.”² Some of these rules and principles are specified in the constitutional text, whereas others are not; the latter are found in general principles of constitutional value drawn from various international human rights conventions and treaties. Consequently, the concept of the bloc of constitutionality differs between states, depending on the positions adopted by their constituent authorities and constitutional judges regarding its components and the criteria used to identify constitutional norms. It may therefore encompass numerous constitutional norms in some states while remaining narrower in others.³

In expanding the bloc of constitutionality, however, the constitutional judge departs from the long-established principle advanced by Charles Eisenmann: “Constitutionality must be understood ... and can only be understood as conformity with an express provision of the Constitution ... and any departure from this framework is political.”⁴

Departing from this principle produces a diverse and extensive range of sources underpinning the Maghrebi constitutional judge's decisions. Changes in these sources over time prompt questions about the nature and components of the bloc of constitutionality on which constitutional review rests in the political systems of Algeria, Tunisia, and Morocco. In other words, against which sources does the Maghrebi constitutional judge assess the conformity of legislation submitted for constitutional review? How legitimate is the judge's expansion of the sources underpinning constitutional decisions?

¹ See Abdessalam Salmi and Ali Ibrahim Ben Derradj, “The Contribution of the Constitutional Council to Expanding the Bloc of Constitutionality: A Comparative Study,” *Journal of Law and Human Sciences*, no. 04 (Ziane Achour University, Djelfa, 2017): 470.

² See Amin Atif Saliba, *The Role of Constitutional Adjudication in Establishing the Rule of Law: A Comparative Study* (Lebanon: Al-Mu'assasa al-Haditha lil-Kitab, 2002), 241.

³ Saliba, *The Role of Constitutional Adjudication*, 242.

⁴ See Ahmed Ben Ziane, previously cited work, 255.

Answering these questions requires examining constitutional jurisprudence in the Maghreb to identify the components of the bloc of constitutionality each country's constitutional judge uses. The Constitution is the Maghrebi constitutional judge's primary source. Second, given the limitations of the constitutional text, the judge has drawn on comparative experience to identify other sources that rank below constitutional norms. Third, given the absolute binding force of constitutional decisions and the fact that a constitutional decision may produce and interpret a new legal rule, the Maghrebi constitutional judge may also invoke such decisions as part of the bloc of constitutionality.

Section One: The Constitutional Text as a Fundamental Source of Review (the Preamble and General Principles)

In comparative constitutional scholarship, Kelsen maintained that "the Constitution is the decisive source by which the constitutional judge is bound when issuing decisions." He also argued that "the constitutional judge may take account only of constitutional rules, to the exclusion of other legal considerations, whatever their source," adding that "the constitutional judge would contradict himself if he sought to place himself above the legal order according to his subjective inclinations." This position led some comparative constitutional scholars to argue that, when a constitutional dispute is brought before a judge, constitutional provisions must be the primary basis for the final decision.⁵

Thus, the Constitution defines the framework within which the constitutional judge determines the sources for judicial decisions. This is the approach followed by the Maghrebi constitutional judge, as a review of constitutional decisions demonstrates: they open with the formula "Having regard to the Constitution," as in the decisions of the Algerian Constitutional Council.

The Moroccan constitutional judge states that "the Constitution ... takes precedence over all else, and all female and male citizens must respect it."⁶ Another decision confirms that "respect for the principle of constitutional supremacy is, pursuant to Article 6, a binding principle."⁷

Similarly, the Tunisian constitutional judge ensures that challenged legislative provisions are consistent with the Constitution, as the following decision confirms: "Whereas, in the light of the foregoing, Article 24 of the Electoral Bill is consistent with the provisions of the Constitution."⁸

⁵ See Saliba, *The Role of Constitutional Adjudication*, 242.

⁶ See Moroccan Constitutional Council, Decision no. 11-819, 19 Dhu al-Hijjah 1432 (16 November 2011), *Official Gazette of the Kingdom of Morocco*, no. 5997, 25 Dhu al-Hijjah 1432 (22 November 2011), 5562.

⁷ See Moroccan Constitutional Council, Decision no. 14-937, 29 Rajab 1435 (29 May 2014), *Official Gazette of the Kingdom of Morocco*, no. 6262, 7 Sha'ban 1435 (5 June 2014), 4810.

⁸ See Tunisian Provisional Authority for the Review of Legislation, Decision no. 02/2014, 19 May 2014, concerning the conformity with the Constitution of Article 24 of the Organic Law on Elections and Referendums, *Official Gazette of the Republic of Tunisia*, no. 41, 23 May 2014, 1342.

Treating the Constitution as the primary and sole source in comparative constitutional practice has attracted criticism and raised several difficulties, including questions about the constitutional preamble's position. The situation differs, however, in Maghrebi constitutional adjudication. In its first decision, the Algerian constitutional judge declared that constitutional review would not be confined to the Constitution and expanded the bloc of constitutionality.⁹ The Moroccan and Tunisian constituent authorities adopted the same approach.

The Maghrebi constitutional judge did not stop at relying on the constitutional preamble but sought further sources within the constitutional text. This established another component of the bloc of constitutionality: general principles of constitutional value. The overall aim is to safeguard individual rights and freedoms in a manner consistent with the public interest.¹⁰

In this respect, the discussion examines the Moroccan constitutional judge's position on expanding the bloc of constitutionality to encompass the constitutional preamble (1) and general principles of constitutional value (2).

Subsection One: Extending the Bloc of Constitutionality to the Constitutional Preamble

Modern constitutional scholarship holds that the Constitution is not limited to its numbered articles, since these are general and concise and remain insufficient to protect individual rights and freedoms. It also maintains that the constitutional judge must not overlook the preamble, given its express guarantees of individual rights and freedoms. Its mandatory and binding character was settled only after considerable doctrinal debate,¹¹ which established that it forms an integral part of the Constitution.

On this basis, Maghrebi constituent authorities settled the preamble's constitutional value. The Algerian constituent authority expressly stated in the final paragraph of the preamble to the 2016 constitutional amendment that it forms an integral part of the Constitution; the same applies to the 2020 constitutional amendment.¹² The Algerian constitutional judge addressed this provision, noting that it confers constitutional value on the preamble, helps establish the principles on which the state and society are founded, and ensures the progression of Algeria's historical development. The preamble constitutes a constitutional reference for the remaining parts of the Constitution and embodies the fundamental principles governing Algerian society.¹³

The Algerian constitutional judge also relied on the preamble as a source for decisions before the constituent authority expressly recognised its status within the preamble itself. In the opinion on the 2008 constitutional amendment, the judge considered that expanding opportunities for women's representation in elected assemblies derived from the democratic requirement set out in the eighth paragraph of the Algerian constitutional preamble: "Institutions

⁹ See Ben Ziane, previously cited work, 255.

¹⁰ See Said El Ghazi, "Constitutional and Legal Sources in the Exercise of Constitutional Review of Legislation," *African Scientific Journal*, no. 03 (December 2020): 268.

¹¹ See M'hamed Hadjaji, *Constitutional Review*, previously cited work, 211.

¹² For further details, see the preamble to the Algerian Constitution, 2020 constitutional amendment.

¹³ See Algerian Constitutional Council, Decision no. 01/2016, 28 January 2016, *Official Gazette*, no. 6, 3 February 2016, 3.

must be founded on the participation of all male and female citizens in the conduct of public affairs and on the achievement of social justice, equality, and the freedom of individuals and groups.”¹⁴

The Moroccan constituent authority likewise resolved the debate over whether the constitutional preamble could serve as a source for constitutional decisions. The 2011 Constitution expressly states: “This preamble forms an integral part of the Constitution.”¹⁵

Recognising the principles, values, and rights contained in the preamble, the Moroccan constituent authority conferred constitutional value upon it and made it a source for the constitutional judge. The judge, in turn, readily invoked it on numerous occasions. Decision no. 819/11 states: “By affirming that free, fair, and transparent elections are the foundation of the legitimacy of democratic representation ... and by assigning political parties a central role, particularly in expressing the will of the electorate ... the Constitution seeks to consolidate and strengthen the institutions of a modern state, as stated in its preamble”¹⁶

Subsection Two: Extending the Bloc of Constitutionality to Principles of Constitutional Value

Principles of constitutional value are defined as the body of principles that the constitutional judge derives from rules with constitutional value, whether contained in the constitutional text or drawn from its preamble and declarations of human rights. A distinction is made between express principles of constitutional value, derived from explicit constitutional provisions, and implicit principles of constitutional value, derived from the judge’s interpretation of constitutional provisions.¹⁷

The constitutional judge confers constitutional force on these principles so that they may serve as sources for decisions resolving constitutional disputes. Their substance is fundamentally connected to the human essence reflected in constitutional texts, particularly the preamble and the declarations it contains that seek to protect human rights and freedoms. Comparative constitutional scholarship agrees that these principles of constitutional value are not hierarchically ordered.¹⁸

The Algerian constitutional judge has adopted principles of constitutional value as part of the bloc of constitutionality used to resolve constitutional disputes referred for review. Since the establishment of the Algerian Constitutional Council, the principle of the separation of powers

¹⁴ See Algerian Constitutional Council, Opinion no. 01/R.T.D./M.D./08, 9 Dhu al-Qa’dah 1429 (7 November 2008), concerning the bill containing the constitutional amendment, *Official Gazette of the Algerian Republic*, no. 63 (2008), 4. The Algerian constitutional judge also relied on the constitutional preamble in Opinion no. 01/R.T.D./M.D./02, 20 Muharram 1423 (3 April 2002), concerning the proposed constitutional amendment, *Official Gazette of the Algerian Republic*, no. 22 (2002), 4.

¹⁵ See, in this regard, the preamble to the Moroccan Constitution of 2011.

¹⁶ See Moroccan Constitutional Council, Decision no. 819, 16 November 2011, cited above. The Moroccan constitutional judge also relied on the preamble in other decisions, including Decision no. 854-12, 3 June 2022.

¹⁷ See Ahmed Fathi Sorour, *The Constitutional Regulation of Rights and Freedoms*, 2nd ed. (Dar al-Shorouk, 200), 262.

¹⁸ Sorour, *The Constitutional Regulation of Rights and Freedoms*, 263.

has been recognised as a means of balancing the authorities established by the Constitution. The Council stated: “Whereas the framers of the Constitution established the principle of the separation of powers as an essential element in the organisation of public authorities”¹⁹

The judge has invoked this principle on numerous occasions, including in the 1998 opinion on the conformity with the Constitution of the Organic Law on the Jurisdiction, Organisation, and Functioning of the Council of State. The constitutional judge affirmed that any infringement of the principle renders the legislative provision unconstitutional, stating: “By requiring the rules of procedure of the Bureau of the Council of State to be submitted for the approval of the President of the Republic, the legislature has infringed the principle of the separation of powers, which requires each authority to act within the limits of the jurisdiction conferred upon it by the Constitution.”²⁰

The Moroccan constitutional authority expressly recognised principles of constitutional value in the preamble, stating: “Based on these enduring values and principles”²¹ The Moroccan constitutional judge has treated these principles as part of the bloc of constitutionality underpinning decisions on numerous occasions. These include Decision no. 630 of 2007, which recognised the principles of multiparty pluralism and freedom of competition: “... political parties, whose functions include contributing to the formation of representative institutions ... and participating in the organisation of the electoral process, perform these functions within a party system incompatible with a one-party system and founded on principles of constitutional value, including multiparty pluralism and freedom of competition between parties.”²²

Section Two: Opening the Bloc of Constitutionality to International Treaties and Conventions

This discussion is divided into two subsections. The first examines the Maghrebi constitutional judge’s position on extending the bloc of constitutionality to international treaties. The second addresses Maghrebi states’ position on extending the bloc to legislative texts.

Subsection One: The Constitutional Basis for the Supremacy of International Treaties in Maghrebi Legal Systems

International constitutional scholarship generally holds that international treaties take precedence over states’ domestic laws. Article 27 of the 1969 Convention on the Law of Treaties provides: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”²³

¹⁹ See Algerian Constitutional Council, Opinion no. 01 of 1989.

²⁰ See Algerian Constitutional Council, Opinion no. 06/R.Q.A./M.D./98, 22 Muharram 1419 (19 May 1998), concerning the review of the conformity with the Constitution of the Organic Law on the Jurisdiction, Organisation, and Functioning of the Council of State, *Official Gazette of the Algerian Republic*, no. 37 (1998), 6 Safar 1419 (1 June 1998), 9.

²¹ See the fourth paragraph of the preamble to the Moroccan Constitution of 2011.

²² See Moroccan Constitutional Council, Decision no. 630, 3 Muharram 1428 (23 January 2007), *Official Gazette of the Kingdom of Morocco*, no. 5498, 19 Muharram 1428 (8 February 2007), 586.

²³ See Ali Ibrahim Ben Derradj, previously cited work, 178.

Maghrebi constituent authorities have affirmed this in their constitutional provisions. In Algeria, it appears in most constitutional amendments: Article 123 of the 1989 Constitution and Article 154 of the 2020 constitutional amendment provide that international treaties ratified by the President of the Republic under the conditions prescribed by the Constitution take precedence over legislation. Likewise, under Article 55 of the 2011 Constitution, the Moroccan constituent authority expressly recognised the supremacy of international treaties over legislation following ratification. The Tunisian constituent authority adopted the same approach in Article 20 of the 2014 Constitution, recognising that international treaties ratified by the Tunisian state take precedence over legislation.

Subsection Two: Judicial Applications of the Review of Legislation for Conformity with International Treaties

The question is how the Maghrebi constitutional judge treats international treaties once ratified and incorporated into domestic law. Does the judge regard them as part of the bloc of constitutionality and invoke them when reviewing legislative texts?

An examination of Maghrebi constitutional practice shows that the Algerian constitutional judge extended the bloc of constitutionality to international treaties in the very first decision.²⁴ In reviewing the constitutionality of the 1989 Electoral Law, the judge relied on conventions to which Algeria had acceded, including the United Nations Charter and the African Charter on Human and Peoples' Rights, stating:

Once ratified and published, any convention becomes part of domestic law and, under Article 123 of the Constitution, acquires precedence over legislation, entitling every Algerian citizen to invoke it before the courts. This applies particularly to the United Nations Charter of 1966 ... to which Algeria acceded by presidential decree ... and the African Charter on Human and Peoples' Rights. These legal instruments expressly prohibit discrimination of any kind. Accordingly, the Constitutional Council declares that requiring candidates for legislative elections to have nationality of origin is unconstitutional.²⁵

Before the 2011 Constitution, the Moroccan constitutional judge adopted a negative position. In its first decision on the conformity of the House of Representatives' Rules of Procedure, the Constitutional Chamber held:

If the Constitutional Chamber is asked to determine whether a treaty with another state contains a provision contrary to the Constitution, deliberations on the bill authorising the ratification and acceptance of that treaty shall not be concluded. If the matter is referred to the Constitutional Chamber during a legislative sitting, consideration of the treaty concerned shall be deferred. Deliberations on international treaties and conventions may therefore resume only after the Constitutional Chamber publishes a statement in the

²⁴ See Nafissa Bekhti and Ammar Abbas, "The Constitutional Limits of Review by the Algerian Constitutional Council," *Parliamentary Thought*, Council of the Nation, Algeria, no. 22 (March 2009): 46.

²⁵ See Algerian Constitutional Council, Opinion no. 01 of 1989.

Official Gazette confirming that the treaty contains nothing contrary to the Constitution ²⁶

The constitutional judge's position on extending the bloc of constitutionality to international treaties should therefore change following the Moroccan constitutional authority's clear and express recognition, in the 2011 Constitution, of their status as superior to legislation.

The Tunisian constitutional judge, by contrast, adopted a clear position, extending the bloc of constitutionality to international treaties on numerous occasions. In Opinion no. 56-2005, Article 17 of the Bill Regulating Diving Activities was declared unconstitutional because it conflicted with the 1982 United Nations Convention on the Law of the Sea, ratified by the Tunisian Republic under Law no. 6 of 1985, dated 22 February 1985.²⁷

Article 17 of the Bill Regulating Diving Activities prescribed imprisonment for between sixteen days and one year and a fine of between one hundred and five hundred dinars. The constitutional judge ruled that this legislative provision was inconsistent with Article 32 of the Constitution, which provides that treaties ratified by the President of the Republic and approved by the Chamber of Deputies have greater legal force than legislation. Article 17 was therefore inconsistent with Article 73 of the United Nations Convention on the Law of the Sea, which states: "Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned."

Part Two: Additional Sources and the Limits of the Legitimacy of the Bloc of Constitutionality (Legislative Texts and Judicial Decisions)

Section One: Incorporating Legislative Texts into the Bloc of Constitutionality and the Question of Parliamentary Sovereignty

An analysis of the Maghrebi constitutional judges' decisions shows that their sources are not confined to the constitutional text. Legislative texts have also been incorporated into the bloc of constitutionality and invoked in constitutional review.

This section examines how judges in Maghrebi constitutional courts use legislation as a source for their decisions and whether citing legislative provisions extends the bloc of constitutionality to encompass legislative texts.

Subsection One: Applying Organic Laws as Supplementary Constitutional Rules

A distinction must be drawn between the constitutional judge's use of organic laws and other legislative texts. Some constitutional scholars regard extending the bloc of constitutionality to organic laws as legitimate, whereas others consider it illegitimate. The latter argue that organic laws cannot be subject to constitutional review while simultaneously occupying the same rank as

²⁶ See Moroccan Constitutional Chamber, Decision no. 1, 31 December 1963, unpublished, available on the website of the Moroccan Constitutional Court: https://www.cour-constitutionnelle.ma/sites/default/files/documents/1-1963_0.pdf.

²⁷ See Tunisian Constitutional Council, Opinion no. 56-2005, 10 August 2005, concerning the Bill Regulating Diving Activities, *Official Gazette of the Republic of Tunisia*, no. 79, 4 October 2005, 2786.

the organic laws on which the Maghrebi constitutional judge relies when reviewing the law submitted for examination.²⁸

Scholars who consider this practice legitimate advance several arguments, including that organic laws supplement constitutional provisions and contain detailed rules for their implementation. The substance of the constitutional text becomes clear only once the organic laws envisaged therein have been enacted.²⁹

A second argument concerns the position of organic laws within the legal hierarchy the Constitution establishes for legislative acts. Organic laws occupy the highest rank within that hierarchy because their substance, which governs the functioning of public authorities, is closer to constitutional than legislative value. Any breach of these organic laws therefore constitutes a breach of the Constitution.³⁰

An examination of the practice of Maghrebi constitutional courts shows that their judges have relied on organic laws on numerous occasions. The Algerian constitutional judge invoked the Organic Electoral Law, enacted as Ordinance no. 07-97 of 6 March 1997, in finding that Article 52 of the National People's Assembly's Rules of Procedure of 2000 conflicted with Article 109 of Ordinance no. 07-97 concerning the Organic Electoral Law. Article 52 provided that deputies could form parliamentary groups based on the original political affiliation of the parties represented in the National People's Assembly. The Algerian constitutional judge considered that this provision discriminated between deputies and infringed the principle of equality enshrined in Article 109, which states: "Each list of candidates shall be presented either under the auspices of one or more political parties or as a list of independent candidates."³¹

In the same decision, the Algerian constitutional judge expanded the bloc of constitutionality by relying on the Organic Law Governing the Organisation and Functioning of the National People's Assembly and the Council of the Nation and Their Functional Relations with the Government to declare Article 61 of the Rules of Procedure unconstitutional. Article 61 provided that "the chair of each parliamentary group may request a suspension of the sitting." It conflicted with Article 34 of the aforementioned Organic Law, which exhaustively identified the parties entitled to request a suspension: the government representative, the bureau of the competent committee, or the delegate of the sponsors of the legislative proposal.³²

In Decision no. 786-2010, the Moroccan constitutional judge held that organic laws derive from and supplement the Constitution and that, once declared constitutional, their

²⁸ See El Ghazi, "Constitutional and Legal Sources," 266.

²⁹ El Ghazi, "Constitutional and Legal Sources," 268.

³⁰ See Mohamed Mounir Hassani, previously cited work, 173.

³¹ See Algerian Constitutional Council, Opinion no. 10/R.N.D./M.D./2000, 1309 Safar 1421 (13 May 2000), concerning the review of the conformity with the Constitution of the National People's Assembly's Rules of Procedure, *Official Gazette of the Algerian Republic*, no. 46 (2000), 28 Rabi' al-Thani 1421 (30 July 2000), 3.

³² Algerian Constitutional Council, Opinion no. 10/R.N.D./M.D./2000.

provisions become an extension of it.³³ The judge thus conferred constitutional value upon them and treated them as a source for decisions. In Decision no. 386-2000, the Court declared an ordinary law unconstitutional because it conflicted with an organic law. The text submitted for review was found to contradict Article 4 of Organic Law no. 7-98, which provides that finance laws may be amended during the financial year only by finance laws known as amending finance laws. Amending an annual finance law through an ordinary law therefore breached the Constitution.³⁴

The Moroccan constitutional judge considers that the rules of procedure of both chambers of Parliament must conform to the Constitution and to the organic laws envisaged therein. The reasoning in Decision no. 52-95 states:

Concerning Article 304: whereas this article provides that the parliamentary seats of deputies appointed by the House of Representatives as members of the Constitutional Council shall be declared vacant following their installation by His Majesty the King, this is inconsistent, first, with Article 77 of the Constitution ... and, second, with the first paragraph of Article 5 of Organic Law no. 93-29 concerning the Constitutional Council, which provides that the members concerned are deemed to have chosen membership of the Constitutional Council rather than Parliament unless they express a contrary intention within fifteen days of the publication of their appointment.³⁵

The Tunisian constitutional judge has followed the same approach, extending the bloc of constitutionality to organic laws in numerous decisions. In Opinion no. 40 of 2008, the Court found the law on advertising on public property constitutional because it was consistent with the organic laws governing municipalities and regional councils. The opinion states:

Whereas Article 71 of the Constitution provides, in particular, that municipal and regional councils shall administer local affairs as prescribed by law, which is an organic law pursuant to Article 28 of the Constitution In contrast, the Organic Law on Municipalities of 14 May 1975 established provisions concerning the occupation of municipal property for advertising purposes, and the Organic Law on Regional Councils of 4 February 1989 established provisions concerning the occupation of local authority property. Whereas nothing in the bill submitted for examination conflicts with the

³³ See Moroccan Constitutional Council, Decision no. 786, 15 Rabi' al-Awwal 1431 (2 March 2010), *Official Gazette of the Kingdom of Morocco*, no. 5820, 24 Rabi' al-Awwal 1431 (11 March 2010), 967.

³⁴ See Moroccan Constitutional Council, Decision no. 386/2000, 23 Dhu al-Hijjah 1420 (30 March 2000), concerning Law no. 15-97 constituting the Code for the Collection of Public Debts, *Official Gazette of the Kingdom of Morocco*, no. 4789, 19 Muharram 1421 (24 April 2000), 984.

³⁵ See Moroccan Constitutional Council, Decision no. 52/95, 1 Sha'ban 1415 (3 January 1995), *Official Gazette of the Kingdom of Morocco*, no. 4291, 23 Sha'ban 1415 (25 January 1995), 196.

provisions contained in those two organic laws ..., it does not contravene Articles 71 and 28 of the Constitution and is consistent with them.³⁶

The Tunisian constitutional judge has also extended the bloc of constitutionality to organic laws in numerous other rulings, including Opinion no. 83-2007 of 4 December 2007, Opinion no. 24-2008 of 17 May 2009, and the decision of the Provisional Authority for the Review of the Constitutionality of Bills of 22 December 2014 in Case no. 08/2014.

Subsection Two: The Controversial Extension to Ordinary Laws and the Position of Legal Scholarship

About legislative texts ranking below organic laws, namely ordinary laws, only the Algerian constitutional judge has extended the bloc of constitutionality to such laws on several occasions. These include the 1997 opinion on the conformity with the Constitution of the Organic Law on Political Parties, in which the judge relied on an ordinary law enacted as Ordinance no. 70-86 of 15 December 1970 to exclude a provision of Article 13 of the aforementioned Organic Law.

This provision required the founding members of a political party to possess nationality of origin or to have held acquired nationality for at least ten years. The Algerian constitutional judge responded that Algerian nationality is defined by law and that all legislation in this field must comply with the Algerian Nationality Code. A person who acquires Algerian nationality enjoys all rights attached to Algerian status under Article 154 of Ordinance no. 70-86 concerning the Algerian Nationality Code.³⁷

The Algerian constitutional judge also relied on an ordinary law, Public Accounting Law no. 90/21, when reviewing the National People's Assembly's Rules of Procedure of 2000. Articles 14 and 85 provided that the National People's Assembly determined the rules governing public accounting. The constitutional judge responded:

The determination of the specific rules applicable to the accounts of the National People's Assembly does not, in itself, empower the Bureau of the National People's Assembly to establish rules other than those laid down in the aforementioned Public Accounting Law; rather, it refers to the rules governing scrutiny of the implementation of the National People's Assembly's budget.³⁸

The Algerian constitutional judge's distinctive extension of the sources of constitutional decisions to ordinary laws has attracted criticism because it adversely affects parliamentary sovereignty. The issue remains contested for several reasons, and constitutional scholars differ in how they characterise this expansion.

³⁶ See Tunisian Constitutional Council, Opinion no. 40-2008, 3 July 2008, concerning the bill on advertising on public road property and adjoining immovable property belonging to persons, *Official Gazette of the Republic of Tunisia*, no. 19, 6 March 2009, 1097.

³⁷ See Algerian Constitutional Council, Opinion no. 01/97, 27 Shawwal 1417 (6 March 1997), concerning the review of the conformity with the Constitution of the ordinance containing the Organic Law on Political Parties, *Official Gazette of the Algerian Republic*, no. 12, 27 Shawwal 1417 (6 March 1997), 40.

³⁸ See Algerian Constitutional Council, Opinion no. 10/2010.

Some consider that the Algerian Constitutional Council's approach closely resembles the French Constitutional Council's jurisprudence on the constraints governing the regulation of public freedoms, particularly the principle of the "ratchet effect" (*effet cliquet*), or "non-regression." This principle provides a special guarantee for certain fundamental rights and freedoms that legislation may not curtail. Any legislative intervention must seek to protect and give effect to these guarantees. The constitutional judge must invalidate any subsequent law or amendment that restricts them, invoking the notion of "legislative guarantees of constitutional requirements," according to which every legislative provision that guarantees a constitutional principle is protected against repeal.^{39,40}

Others argue that the Algerian constitutional judge has extended the bloc of constitutionality to ordinary laws whose reasoning and provisions embody constitutional principles protecting individual rights and freedoms. The judge has a duty to protect these principles and to oppose any provision that contravenes or obstructs them. On this view, the constitutional judge has established a new hierarchy among legislative texts, placing at its apex those whose provisions embody constitutional principles relating to individual rights and freedoms.⁴¹

We nevertheless endorse Dr Abdelaziz Barkouk's position⁴² on extending the bloc of constitutionality to legislative texts: the Algerian constitutional judge has effected an indirect expansion through the notion of the "constitutional link." Under this approach, the judge does not confer constitutional value on the legislation invoked but accords it a distinctive status that allows it to serve as a standard of constitutional legality, provided that the legislative text is linked to a constitutional principle.

We also consider that constitutional judges in Morocco and Tunisia have refrained from extending the bloc of constitutionality to ordinary laws for fear of its excessive expansion. This would complicate constitutional review by confronting the judge with an incoherent body of sources for constitutional decisions and requiring recourse to every legal text ranking above the legislative provision under review.

Section Two: Previous Constitutional Decisions as Standards of Review between Legal Certainty and the Inevitability of Change

Subsection One: The Absolute Binding Force of Constitutional Decisions and Their Binding Effect on Public Authorities

Maghrebi constituent authorities have enshrined the binding force of constitutional decisions in their constitutions, affirming that all decisions of Maghrebi constitutional courts are

³⁹ Georges Burdeau, Francis Hamoun, and Michel Tropper, *Droit constitutionnel* (France: L.G.D.J., 2000), 30ff.

⁴⁰ See Abdelaziz Barkouk, "The Role of Constitutional Review in Protecting Public Freedoms" (PhD diss. in law, Department of Public Law, Faculty of Law, University of Algiers 1, 2015–2016), 224.

⁴¹ See Ben Ziane, previously cited work, 285.

⁴² For further details, see Barkouk, "The Role of Constitutional Review," 225.

final and binding on all public, administrative, and judicial authorities. Constitutional decisions thus acquire the force of *res judicata*.

This binding force is not confined to the provision on which a decision was issued but extends to any other provision sharing the same subject matter and grounds. Applications seeking reconsideration of such decisions must therefore be declared inadmissible, since they would undermine the binding force acquired by constitutional decisions.

The relationship between the constitutional judge and previous rulings, together with their absolute binding force, supports the conclusion that the judge may rely on all the principles established in earlier constitutional decisions. The Algerian constitutional judge has adopted this approach in numerous rulings,⁴³ including the 1998 opinion reviewing amended Article 29 of the National People's Assembly's Rules of Procedure. In the introductory citations to that opinion, the judge included the Constitution, the Council's Rules of Procedure, and an earlier opinion.⁴⁴

Similarly, Opinion no. 04/98 on the conformity with the Constitution of the Council of the Nation's Rules of Procedure was cited as a source in Opinion no. 08/99 of 1999 on the conformity with the Constitution of the Organic Law Governing the Organisation and Functioning of the National People's Assembly and the Council of the Nation and Their Functional Relations with the Government.⁴⁵

The Moroccan constitutional judge recalls the sources of constitutional decisions on which the interpretations and observations in the operative part are based. Because absolute binding force extends to both the operative part and the reasoning, references to previous rulings at the beginning of certain decisions support the conclusion that they constitute a fundamental source for subsequent rulings in constitutional review.

Subsection Two: The Question of Departing from Previous Constitutional Jurisprudence

The question, however, is whether the constitutional judge may depart from previous constitutional rulings that have served as sources in exercising review.

Two hypotheses arise. Under the first, the Maghrebi constitutional judge stops relying on previous rulings when reviewing legislative texts. Under the second, the judge adheres to previous rulings and relies on them in formulating decisions, treating them as part of the bloc of constitutionality.

Constitutional law, as a field of knowledge, remains a reference standard for the constitutional judge in exercising constitutional review, thereby constituting the bloc of constitutionality. This includes previous constitutional rulings delivered in an unstable

⁴³ See Ben Ziane, previously cited work, 292.

⁴⁴ See Algerian Constitutional Council, no. 05/R.N.D./M.D./98, 28 Shawwal 1418 (25 February 1998), concerning the review of the conformity with the Constitution of amended Article 29 of the National People's Assembly's Rules of Procedure, *Official Gazette of the Algerian Republic*, no. 14, 16 Dhu al-Qa'dah 1418 (15 March 1998), 4.

⁴⁵ See Algerian Constitutional Council, Opinion no. 08/R.Q.A./M.D./99, 5 Dhu al-Qa'dah 1419 (21 February 1999), concerning the review of the conformity with the Constitution of the Organic Law Governing the Organisation and Functioning of the National People's Assembly and the Council of the Nation and Their Functional Relations with the Government, *Official Gazette of the Algerian Republic*, no. 15, 21 Dhu al-Qa'dah 1419 (9 March 1999), 4.

environment that changes over time, because political and social circumstances directly affect constitutional institutions and alter the sociological composition of each judicial body from one term to the next.⁴⁶

We consider the first hypothesis inapplicable because it would undermine previous constitutional rulings that safeguard rights and freedoms. At the same time, rejecting this hypothesis constrains the constitutional judge's role in seeking modern mechanisms and methods to renew constitutional jurisprudence and maintain a balance among public authorities.⁴⁷

Comparative constitutional scholarship supports the second hypothesis to preserve the principle of "legal certainty."⁴⁸ Algerian and Moroccan constitutional judges also endorse this position by treating previous constitutional rulings as part of the bloc of constitutionality.

Conclusion

This comparative study shows that the Maghrebi constitutional judge's expansion of the sources underpinning constitutional decisions has not been an unjustified departure from the text. Instead, it has responded to practical requirements arising from the inability of the constitutional text, narrowly understood, to keep pace with the complexities of legislative activity and the need to provide effective protection for public rights and freedoms. Constitutional adjudication in Algeria, Morocco, and Tunisia has thus moved beyond a rigid, literal model of express conformity towards a flexible "bloc of constitutionality" responsive to the requirements of the rule of law.

The study has yielded several principal findings:

Expansion of constitutional sources: supported by the positions adopted by constituent authorities, Maghrebi constitutional adjudication has established the binding value of constitutional preambles and unwritten general principles, such as the separation of powers and multiparty pluralism, making them fundamental standards for assessing the constitutionality of legislation.

Affirmation of the supremacy of international conventions: ratified international treaties, particularly those concerning human rights, have constituted a major source on which the Maghrebi constitutional judge has relied in reviewing domestic legislation and invalidating provisions that conflict with them.

Divergence in the incorporation of legislative texts: while Maghrebi constitutional practice has converged on the inclusion of organic laws within the bloc of constitutionality as a supplementary extension of constitutional provisions, the Algerian constitutional judge has uniquely relied on ordinary laws through the notion of the "constitutional link" and the principle of "non-regression." Moroccan and Tunisian constitutional judges have preferred restraint for

⁴⁶ See Abderrahim Manar Slimi, "The Constitutional Judge's Working Methods," *Moroccan Journal of Local Administration and Development*, special issue (2006): 315.

⁴⁷ See El Ghazi, "Constitutional and Legal Sources," 275.

⁴⁸ See Slimi, "The Constitutional Judge's Working Methods," 316.

fear of an excessive expansion of the bloc of constitutionality and an infringement of parliamentary sovereignty.

Stability of constitutional jurisprudence: by virtue of their absolute binding force, previous constitutional decisions and opinions have become binding judicial precedents recognised as sources for subsequent review, giving priority to the principle of legal certainty.

Thus, precise methodological constraints are still needed to govern the Maghrebi constitutional judge's discretionary authority, ensuring a balance between effective rights protection and respect for the separation of powers and legislative sovereignty.