



Procedures for Initiating Constitutional Review in Egypt

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Abstract:

The review of the constitutionality of laws is a legal mechanism for embodying the rule of law and justice. It guarantees the protection of the rights and freedoms of individuals and confronts attempts by rulers to encroach upon them under the guise of enacting laws and regulations. No legal rule in the state should contradict the constitutional rule, given that the constitution is the supreme law of the land.

Constitutional justice today has become an effective means of defending these acquired rights enjoyed by individuals through the idea of legality and the rule of law. The Supreme Constitutional Court in Egypt has proven its merit in constitutional review and affirmed the effectiveness and importance of annulment review in protecting rights and freedoms.

Keywords: *Constitutional Review, Rule of Law, Judicial Review, Egypt*

Procédures pour engager une révision constitutionnelle en Égypte

Résumé :

Le contrôle de constitutionnalité des lois est un mécanisme juridique qui permet de garantir l'état de droit et la justice. Il assure la protection des droits et libertés des individus et s'oppose aux tentatives des dirigeants de les bafouer sous couvert de promulguer des lois et des règlements. Aucune règle juridique dans l'État ne devrait contredire la règle constitutionnelle, étant donné que la Constitution est la loi suprême du pays.

La justice constitutionnelle est aujourd'hui devenue un moyen efficace de défendre ces droits acquis dont jouissent les individus grâce au principe de légalité et à la primauté du droit. La Cour constitutionnelle suprême d'Égypte a prouvé son bien-fondé en matière de contrôle constitutionnel et a affirmé l'efficacité et l'importance du contrôle d'annulation dans la protection des droits et des libertés.

Mots clés : *contrôle constitutionnel, primauté du droit, contrôle judiciaire, Égypte*



Introduction:

The principle of the supremacy of the constitution is one of the most important principles prevailing in comparative constitutional systems because constitutions are superior both organically and substantively. The written or customary constitution enjoys this status as it consists of binding legal rules that organize public authorities in the state, define their formation, powers, and relations with each other and with individuals, by limiting their rights and freedoms, clarifying ways of enjoying them, and regulating them as a reflection of the rule of law and justice. Moreover, the procedures for enacting, amending, and repealing its rules are more stringent and complex than those for ordinary legal rules.

Accordingly, this principle produces important results both practically and legally, directly and explicitly affecting the rights and freedoms of individuals that constitutions seek to protect, preventing interference or restriction except to the extent necessary to regulate them and facilitate their enjoyment.

The principle of hierarchy of legal rules in the state and the principle of parallelism of forms are among the most important effects of constitutional supremacy. Legal rules are arranged in an ascending hierarchy, with the constitution at the top and regulatory decisions at the base. Thus, it is logical that a lower legal rule must not contradict a higher one, otherwise it will be tainted with unconstitutionality. On the other hand, a lower rule contradicting a higher one would amount to amending or

repealing the higher rule, which contradicts the principle of parallelism of forms and the logic of law.

Therefore, most modern constitutions ensure the establishment of constitutional review and enact appropriate legislation to establish and activate bodies responsible for this review, to guarantee respect for the hierarchy of legal rules and their compliance with constitutional provisions, and to entrench constitutional principles to preserve fundamental rights and freedoms.

Although constitutional systems adopt different forms of constitutional review, they fall into two main categories: political review of constitutionality and judicial review of constitutionality, regardless of timing (whether prior or subsequent). This has been confirmed by constitutional jurisprudence, which states: "The constitution of the state is its fundamental law and occupies the highest rank in the legal hierarchy. However, unless it is protected, guaranteed, and enforced by an independent authority whose decisions bind all powers, it remains mere theoretical slogans. As Omar ibn al-Khattab, may God be pleased with him, stated in his famous letter to his appointed judge: a right without enforcement is of no use."

Political review of constitutionality is exercised by a political body, such as the constitutional council or parliamentary authority. Its most important feature is its preventive nature, as it usually occurs before the law is promulgated. If the reviewing authority finds that the proposed law contradicts some or all constitutional provisions, the law cannot be issued until the unconstitutionality is remedied.

Judicial review, on the other hand, entrusts the task of monitoring constitutionality to a judicial body. The most



Soumission : 01/05/2025 Acceptation : 01/06/2025 Publication : 15/07/2025

important Arab model of this type of review is constitutional review in Egypt, which we will study to answer key questions about how this mechanism is activated in the Egyptian system. These questions may be summarized in one: How does the body responsible for constitutional review operate, and what are the basis and justification for its powers? In other words, has the Egyptian legislator succeeded in creating a system of constitutional review that makes this mechanism effective, achieving the advantages of judicial review as recognized in world constitutions like the American model, or do the mechanisms of constitutional review in Egypt bear special features imposed by political and practical considerations stemming from the nature of its system of governance and other factors affecting political and legal life?

We will attempt to answer this by presenting the foundations of constitutional review of laws (first), then the historical development of judicial review in Egypt (second), and finally, the jurisdiction of the Egyptian Supreme Constitutional Court in constitutional review (third).

1. Foundations of Constitutional Review of Laws

What drives us to study the foundations and justifications of constitutional review is the situation where a rigid constitution fails to designate the authority responsible for such review, or when the prescribed mechanism does not ensure effective review. The question arises: may courts of different levels and jurisdictions review the constitutionality of laws on their own initiative despite the absence of an explicit constitutional provision?

A rigid constitution is enacted by a constituent authority higher than the legislature, requiring special, more complex procedures for its amendment or repeal compared to ordinary laws. Therefore, if the constitution is silent on review, it may be appropriate for courts to exercise the power to refrain from applying laws that contradict the constitution. This is the approach taken by American courts, led by the Federal Court, since the late 18th and early 19th centuries. This remains the prevailing view in comparative jurisprudence in defending courts' right to exercise "abstention review" when the constitution is silent. Yet, this approach faced opposition, especially since the French Revolution of 1789 until the establishment of the French Constitutional Council in 1958.

This opposing doctrine relies on several arguments, sparking extensive debate between critics and defenders of judicial review. The French doctrinal conflict became a model for the general debate over whether courts may exercise constitutional review in any country when the constitution is silent on it.

1.1. The View Opposing Judicial Review:

Supporters of this view argue from legal and historical grounds. They argue that constitutional review contradicts the principle of the sovereignty of the nation. They also feared judicial encroachment on parliamentary authority, citing painful past experiences. Furthermore, revolutionary laws such as Articles 10–11 of the Judicial Organization Law of August 16, 1790, prohibited courts from interfering in parliamentary activities, forbidding them from suspending or preventing the enforcement of laws. Their strongest argument is that exercising constitutional review makes



Soumission : 01/05/2025 Acceptation : 01/06/2025 Publication : 15/07/2025

judges abandon their judicial function to engage in political activity.

1.2. The View Supporting Judicial Review:

Proponents of judicial review refuted these arguments. The fear of judicial encroachment on parliament is weak, as past abuses were due to historical circumstances involving parliaments controlling laws and royal decrees. As for the revolutionary prohibitions, they are inconsistent with modern French constitutionalism, where the judiciary is safeguarded by laws ensuring judicial neutrality.

The objection that judicial review transforms judges into political actors is also invalid, since the separation of powers requires cooperation and mutual oversight between branches. Denying courts the ability to review laws would risk parliamentary despotism and violations of the constitution. Moreover, constitutional supremacy is rooted in the fact that the constitution is enacted by the original constituent authority, and therefore it must prevail over all other legal acts. Judicial review is the best guarantee of this supremacy.

Judicial review through abstention has only relative effect, applying to the specific case where unconstitutionality is raised, and thus does not encroach upon legislative authority. Conversely, forcing courts to apply unconstitutional laws constitutes the real violation of judicial independence and the principle of separation of powers. Finally, judicial review is not a political act but a legal one, since the judge's function is to apply the appropriate legal rule to the dispute, rejecting the inferior rule when it contradicts a higher one. This is the prevailing view among

public law scholars who affirm that judicial review is part of the essence of judicial function, unlike assessing the political merits of legislation, which is indeed a political activity.

2. The Historical Development of Judicial Review in Egypt

Constitutional justice in Egypt is relatively recent, beginning with Law No. 81 of 1969 establishing the Supreme Court. Later, Law No. 48 of 1979 established the Supreme Constitutional Court, dated 06/09/1979, though it failed to define its legal nature—one of its major flaws. Since then, various laws have regulated the Supreme Constitutional Court, with successive Egyptian constitutions never omitting reference to it.

It is thus necessary to outline the main stages of its development, as this is crucial in addressing the legal nature of the Court: Is it judicial or political? Before that, we must define the concept of constitutional justice.

2.1. The Concept of Constitutional Justice:

This concept differs depending on the perspective. From an organic perspective, constitutional justice refers to any body empowered to decide on the constitutionality of laws. From a substantive perspective, it refers to any activity whose subject is the examination of constitutionality, regardless of the body performing it.

The organic definition limits constitutional justice to institutions that are courts, excluding others such as constitutional councils. By contrast, under the substantive definition, constitutional justice requires exclusive competence in constitutional review, unlike courts such as the U.S. Supreme Court, which also hears civil, criminal, and administrative cases.



2.2. The Supreme Court:

The Supreme Court was established by Law No. 81 of 1969, which withdrew from ordinary courts their competence to review the constitutionality of laws. Previously, all courts had exercised such review through abstention, refraining from applying unconstitutional laws in specific cases. On 28/08/1980, Law No. 66 of 1970 was enacted regulating procedures and fees before the Supreme Court. Beyond procedural rules, it expanded the Court's powers in constitutional review and conflict of jurisdiction.

2.3 The Supreme Constitutional Court:

The 1971 Constitution defined the Supreme Constitutional Court as an independent judicial body located in Cairo, exclusively competent to review the constitutionality of laws and regulations, and to interpret legislative provisions as specified by law.

It was established by Law No. 48 of 1979, which repealed the Supreme Court Law. Articles 25 and 26 defined its powers as:

- Judicial review of constitutionality of laws and regulations.
- Interpretation of legal provisions.
- Resolution of jurisdictional conflicts and enforcement of contradictory judgments.

The Court was the first in Egyptian judicial history to have exclusive power in constitutional review, marking the shift from abstention review to genuine annulment review.

2.4. Amendments to the Supreme Constitutional Court Law:

Law No. 48 of 1979 has only been amended three times: Law No. 168 of 1998 (amending Article 49/3), Law No. 184 of 2008 (adding Article 44 bis), and Decree No. 48 of 2011 following the January 25 Revolution, which suspended the 1971 Constitution and replaced it with the March 30, 2011 Constitutional Declaration.

The 2014 Constitution dedicated Chapter Four to the Supreme Constitutional Court. Article 191 defined it as “an independent judicial body, based in Cairo.” Article 192 specified its jurisdiction: “The Supreme Constitutional Court exclusively undertakes judicial review of the constitutionality of laws and regulations, interpretation of legislative provisions, resolution of disputes concerning its members, and conflicts of jurisdiction among courts and judicial bodies...” Most recently, Law No. 137 of 2021 (dated 15 August 2021) reorganized the Court anew.

3. The Jurisdiction of the Egyptian Supreme Constitutional Court over Constitutional Review

Constitutional review of laws is considered the most important function of the Supreme Constitutional Court. This jurisdiction is characterized by distinctive features that set it apart from other competencies of the Court.

3.1. Characteristics of the Supreme Constitutional Court’s Constitutional Review

The jurisdiction of the Supreme Constitutional Court in the field of constitutional review is marked by comprehensiveness and centralization. It extends its review to both formal and substantive defects, making it an all-



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encompassing jurisdiction which the Court may exercise on its own initiative. The Court exclusively enjoys the authority of review, thereby unifying opinions and avoiding situations of contradiction and conflicting judgments – one of the most notable shortcomings of judicial review of constitutionality.

The constitutional review exercised by the Egyptian Supreme Constitutional Court is both subsequent and prior review, i.e., a dual jurisdiction. However, the 2014 Constitution limited its role to subsequent review only, as this function is more consistent with the importance of judicial oversight in protecting individual rights and freedoms.

It is worth noting that the Egyptian legislator departed from this important constitutional gain in the field of public rights and freedoms when it introduced prior review of constitutionality, limiting it solely to the electoral sphere. This move sparked widespread criticism due to its grave infringement upon individual rights, since elections are considered the true mechanism for achieving democracy.

3.2. Procedures for Initiating Constitutional Review before the Supreme Constitutional Court

Law No. 81 of 1969 on the Supreme Court and Law No. 66 of 1970 on procedures and fees allowed constitutional review to be triggered only by raising a plea of unconstitutionality before the courts examining disputes. If the court deems the plea serious, it must suspend the case and set a deadline for filing the case before the Supreme Court, which would only review the constitutionality of the law challenged.

The situation changed with the establishment of the Supreme Constitutional Court, which was vested with broad powers in constitutional review. Its authority came to include reviewing laws and regulations either upon request by individuals or on its own initiative, by ruling on the unconstitutionality of a law presented to it in the course of exercising its jurisdiction. In Egypt, the Supreme Constitutional Court may exercise constitutional review once a case is brought before it through one of three methods:

3.2.1. Referral Method

If, during the examination of a case, a court or judicial body suspects the unconstitutionality of a legal or regulatory provision, it may refer the matter directly, without fees, to the Supreme Constitutional Court for a ruling on its constitutionality, pursuant to Article 29(a) of the Law on the Supreme Constitutional Court. The referral decision must include the contested provision and the constitutional provision alleged to have been violated.

3.2.2. Incidental Plea of Unconstitutionality

A party in a case before a court or judicial body may raise a plea of unconstitutionality regarding a legal or regulatory provision. If the court considers the plea serious, it must suspend the case until the Supreme Constitutional Court decides on the provision's constitutionality after referral. If the case is not filed before the Court within the time limit set by the court hearing the dispute—no more than three months—the plea is deemed inadmissible. (Article 29(b) of the Law on the Supreme Constitutional Court).



3.2.3. *Ex Officio Review*

The Supreme Constitutional Court may, on its own initiative, examine the constitutionality of a specific provision in the course of exercising its jurisdiction, pursuant to Article 27 of the Law on the Supreme Constitutional Court. It rules on the matter after following the procedures of preparing constitutional cases.

This method does not require the existence of a substantive case pending before another judicial body, nor does it require a party to raise a plea of unconstitutionality. It suffices that the Supreme Constitutional Court is presented with the provision while exercising its competencies, such as constitutional review or interpreting legislative texts and presidential decrees. If the provision is related to the subject matter of its jurisdiction, the Court may examine its constitutionality. Thus, the Court is not merely a body for reviewing laws and regulations.

Conclusion

In conclusion, judicial review has proven its effectiveness in protecting the Constitution and consolidating the rights and freedoms it guarantees. The Egyptian legislator's success in moving from abstention-based review, to incidental review, and finally to a genuine judicial review vested in the Supreme Constitutional Court with full and comprehensive authority represents a significant achievement. The Court has repeatedly affirmed its role in safeguarding the supremacy of the Constitution in various cases brought

before it, thereby confirming the efficiency and effectiveness of this approach.

Accordingly, we recommend that the Algerian legislator benefit from the Egyptian experience, which gradually established an effective judicial review system and ultimately achieved a true constitutional judiciary in both its organic and substantive sense. This can be realized in Algeria following the establishment of the Constitutional Court.

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Soumission : 01/05/2025 Acceptation : 01/06/2025 Publication : 15/07/2025

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