

Constitutional Review of Legislative Omission in Algeria (A Comparative Study)

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Abstract:

Constitutional review of legislation is one of the main safeguards of constitutional legality and the supremacy of the constitution. It is not limited to the legislature's positive acts. It may also extend to legislative inaction. Review of legislative omission is therefore an important means of correcting an improper exercise of legislative power. This form of constitutional review is relatively recent. Most legal systems do not define legislative omission in clear constitutional or statutory terms. Courts have nevertheless used several expressions that treat omission as a constitutional defect. A challenged provision may be unconstitutional when it regulates a matter incompletely and leaves out a rule that the constitution requires.

This study clarifies the concept of legislative omission and examines the legal basis for constitutional review in this field. It also analyses the position of Algerian constitutional adjudication and the extent to which it can review legislative omission in comparison with other legal systems. The study seeks to identify a coherent legal framework that protects constitutional supremacy, rights, and freedoms.

Keywords: legislative omission; constitutional review; review of omission; legislative deficiency

Introduction

Under the principle of separation of powers, the constitution defines the powers of the state and assigns a specific jurisdiction to each authority. No authority should exercise the jurisdiction of another, and an authority entrusted with a constitutional function may not abandon it in favour of another body. When the legislature regulates a matter, its intervention may be incomplete, whether intentionally or inadvertently. It may fail to address all aspects of the subject. This produces what is known as legislative omission. The concept is sometimes confused with legislative abstention or legislative deficiency. These are relatively recent terms whose meanings remain uncertain. Constitutional courts have nevertheless addressed them through constitutional review based on constitutional supremacy and the protection of rights and freedoms. Legislative omission may therefore amount to a constitutional violation, whether it results from intent or negligence.

Review of legislative omission falls within the broader review of the constitutionality of laws. However, it focuses on what the legislature failed to include in the challenged provision. A finding of unconstitutionality does not arise from a direct breach of a formal or substantive constitutional rule. It arises because the legislature omitted an element or regulated a right or freedom inadequately. The legislature may also fail to regulate a matter that the constitution requires it to address. This is described as legislative silence or total legislative omission. Some scholars justify such silence by reference to the legislature's discretionary power.

The central question is therefore: What are the doctrinal and judicial foundations for reviewing legislative omission, and does the Algerian constitutional judge have authority to exercise such review?

This issue is particularly important because constitutional review must also respond to negative legislative conduct and to its harmful effects on citizens' rights and freedoms.

The purpose of this study is to examine the position of legal scholarship and constitutional adjudication, with particular attention to the Algerian Constitutional Court. Legislative omission is a recent issue that directly concerns rights and freedoms.

The study adopts a descriptive, analytical, and comparative method. It compares selected legislative provisions, constitutional decisions, and scholarly opinions from different constitutional systems.

The study is divided into two sections. The first explains the meaning of legislative omission and distinguishes it from related concepts. The second examines the basis for constitutional review of legislative omission, especially the principle of constitutional supremacy, and then considers how Algerian constitutional adjudication has addressed the issue.

Section One: The Nature of Legislative Omission

Interest in this subject arises from a doctrinal question: Does constitutional review concern only the matters that the legislature has regulated, or does it also extend to matters that it has omitted? Some scholars argue that every constitutional violation, whether intentional or unintentional, must be remedied and that every constitutionally protected right or freedom must receive effective protection. Because the term lacks precision, the first subsection defines legislative omission. The second then examines its principal forms.

Subsection One: The Concept of Legislative Omission

Legislative omission is a relatively recent and disputed concept. It has no single, precise definition. The term appeared later than related concepts such as the legislature's negative incompetence, legislative deviation, and legislative abstention.

In linguistic usage, omission means leaving a matter unaddressed despite being aware of it. The Arabic verb also conveys heedlessness, while deliberate disregard denotes intentional omission¹.

Because the term remains ambiguous, its technical and judicial meanings must be clarified. It must also be distinguished from related concepts.

Part One: The Technical and Judicial Meaning of Legislative Omission

In legal terminology, legislative omission is the legislature's failure, whether intentional or negligent, to regulate matters within its jurisdiction. This failure impairs the constitutional guarantee attached to the matter concerned².

Another definition describes it as the legislature's negative attitude toward its constitutional jurisdiction, which it fails to exercise wholly or partly in particular circumstances or for particular reasons³.

¹Al-Farahidi, Abu Abd al-Rahman al-Khalil ibn Ahmad ibn Amr ibn Tamim, edited by Mahdi al-Makhzumi and Ibrahim al-Samarrai, Vol. 4, Dar wa Maktabat al-Hilal, p. 419 [in Arabic].

²Al-Tarawneh, Muhannad Salih, The Relationship between the Executive and Legislative Authorities in the Parliamentary System, 1st ed., Dar al-Riwaq, Jordan, 2009 [in Arabic].

³Abd al-Wahhab, Muhammad Rif'at, Constitutional Law and Constitutional Principles, Dar Rawi, Egypt, 2008 [in Arabic].

A further view defines legislative omission as the legislature's failure to regulate one aspect of a subject. This weakens the effectiveness of the regulation and prevents the constitutional provision from being implemented or consolidated.

Legislative omission therefore occurs when the legislature regulates a subject incompletely. It leaves out an important aspect and fails to give effect to a constitutional provision⁴.

French legal scholarship describes legislative omission as a situation in which statutory regulation does not conform to the general rules and standards of law because gaps undermine the coherence of the legal system and its mechanisms⁵.

Other scholars define it as Parliament's incomplete regulation of one or more matters. Such regulation may create a legislative vacuum that is inconsistent with Parliament's duty to exercise its legislative jurisdiction in the manner prescribed by the constitution⁶.

Constitutional courts have not adopted one precise definition of legislative omission. They have instead used expressions that convey the idea. The Brazilian Federal Court, for example, has treated omission as a constitutional defect that may render a provision unconstitutional because it contains an incomplete rule. The same court has stated that omission arises when the necessary measures are not adopted, wholly or partly, to implement constitutional principles. It regards this as a negative violation of the constitution. In France, review of legislative omission was recognised in Constitutional Council Decision No. 67-31 DC, although the Council did not define the concept. The Spanish Constitutional Court stated in Decision No. 24/1972 that legislative omission occurs when the constitution requires the legislature to enact rules and it fails to do so. In 1969, the German Federal Constitutional Court directed Parliament to remedy an omission that made Article 1712 of the Civil Code unconstitutional because it did not provide equal conditions for children born within and outside marriage⁷.

Egypt follows a similar approach. Its Supreme Constitutional Court has not defined legislative omission, but its judgments state that constitutional review covers rights guaranteed by the constitution and implicitly impaired by the challenged provision, whether the impairment was intended or incidental⁸.

This indicates that the Egyptian Supreme Constitutional Court has set conditions for reviewing legislative omission. The legislature must have regulated the right or freedom, but the regulation must be incomplete. The deficiency may be intentional or negligent, and it must breach the constitution. The Court's case law therefore concerns what is known as partial legislative omission. By contrast, the Kuwaiti Constitutional Court has held that it may not exceed the jurisdiction defined by its establishing statute or examine deficiencies appearing in a provision. The Court considers itself bound by the scope of the constitutional challenge. In its view, constitutional review depends on whether

⁴Al-Shimi, Abd al-Hafiz, Review of Legislative Omission before the Supreme Constitutional Court: A Comparative Study, Dar al-Nahda al-Arabiyya, Cairo, 2003, p. 5 [in Arabic].

⁵Abu Younes, Muhammad Bahi, Principles of Constitutional Adjudication, Dar al-Jami'a al-Jadida, Alexandria, 2017, p. 320 [in Arabic].

⁶Ghafoul, Eid Ahmad, The Legislature's Negative Incompetence: A Comparative Study, revised 2nd ed., Dar al-Nahda al-Arabiyya, Cairo, 2003, p. 159 [in Arabic].

⁷Abd al-Rahman, Jawahir Adel, Constitutional Review of Legislative Omission, Dar al-Nahda, Cairo, 2016, p. 32 [in Arabic].

⁸Egyptian Supreme Constitutional Court, Case No. 5 of Judicial Year 8, hearing of 6 January 1996, Official Gazette, No. 3, 18 January 1996.

the challenged legislation violates a constitutional provision. It may not assess the policy suitability of the text or investigate its deficiencies, because such matters fall outside its judicial jurisdiction⁹.

Part Two: Distinguishing Legislative Omission from Related Concepts

A clear understanding of legislative omission requires distinguishing it from concepts that resemble it. The most important are the legislature's negative incompetence and legislative deficiency.

First: Legislative Omission and the Legislature's Negative Incompetence

The legislature's negative incompetence occurs when the legislative authority abandons its constitutional jurisdiction. It may fail to exercise that jurisdiction altogether or restrict it so that the executive exercises it instead. Legislative omission, by contrast, results from leaving out one aspect of a matter under regulation without transferring jurisdiction to another authority. The expression "negative incompetence of the legislature" is originally French. Jean Rivero first used it while commenting on decisions of the Constitutional Council concerning the exercise of legislative jurisdiction. He defined it as Parliament's abandonment, or surrender, of its legislative jurisdiction to another authority¹⁰.

This doctrinal approach derives from French scholarship, which treated legislative omission as one form of the legislature's negative incompetence and therefore as a form of abandonment of legislative jurisdiction.

When Parliament regulates one or more matters incompletely, it may create a legislative vacuum that conflicts with its duty to exercise its jurisdiction as prescribed by the constitution.

Scholarship identifies several forms of negative legislative incompetence. The first is legislative incompetence without delegation, which occurs when Parliament abandons its jurisdiction without delegating it to another authority. The second is legislative incompetence accompanied by excessive delegation. This may amount to an almost complete transfer of jurisdiction to the executive and may breach the constitutional rules governing competence¹¹.

The Egyptian Supreme Constitutional Court has required the following safeguards:

- The delegation must be justified by exceptional circumstances.
- It must be limited in time.
- It must concern specifically identified matters and define the principles on which it is based.

These restrictions limit the executive's exceptional power to issue decisions having the force of law. Such power is permissible only when justified and exercised within safeguards established by the competent legislative authority¹².

The preceding discussion shows that the legislature's negative incompetence differs from legislative omission in several respects:

- Negative incompetence violates the constitutional rules on jurisdiction because the legislature surrenders its competence to the executive. Legislative omission, however, is the legislature's failure to perform its function, wholly or partly, without transferring that function to another authority¹³.

⁹Kuwaiti Constitutional Court, Constitutional Appeal No. 26 of 2012, hearing of 25 September 2012.

¹⁰Ghafoul, previously cited work, p. 50.

¹¹Ibrahim, Abd al-Majid, *Legislative Discretion: A Comparative Study*, Dar al-Jami'at al-Jadida, Cairo, 2010, p. 580 [in Arabic].

¹²Egyptian Supreme Constitutional Court, Case No. 3 of Judicial Year 4 (Constitutional), judgment of 5 April 1975.

¹³Al-Shimi, previously cited work, p. 22.

- The legal basis for reviewing negative incompetence is the principle of legislative exclusivity. The basis for reviewing legislative omission is the legislation's incompatibility with the substance of the constitution, including constitutional guarantees for rights and freedoms and the principle of constitutional supremacy¹⁴.

- Negative incompetence is an external defect because it violates the constitutional allocation of jurisdiction, which is a formal rule. Legislative omission is not an external defect. It is a direct violation of the substance of the constitution¹⁵.

- Negative incompetence is generally intentional, whereas legislative omission is generally unintentional¹⁶.

Second: Legislative Omission and Legislative Deficiency

As explained above, legislative omission concerns the legislature's negative attitude toward its constitutional jurisdiction, whether total or partial. It involves abstaining from enacting a law or from regulating a right or freedom that the constitution places within legislative competence. The abstention may be intentional or unintentional.

Legislative deficiency, by contrast, concerns the inadequacy of an existing legal text. The text does not regulate the legislative subject with sufficient precision, especially at the level of legal drafting¹⁷. The distinction is therefore that legislative omission is negative legislative conduct, while legislative deficiency arises from positive conduct. The latter concerns an existing legal text that regulates a matter inadequately.

The two concepts also differ in the type of judgment issued by the constitutional judge. Judgments addressing legislative deficiency are often described as additive judgments. Judgments addressing total legislative omission take the form of directive judgments¹⁸.

Third: Legislative Abstention and Legislative Omission

Legislative abstention occurs when the legislature adopts a negative position toward an exclusive legislative jurisdiction that must be exercised to implement the constitution. Legislative omission is also a negative position, but the two concepts differ. In legislative abstention, the legislature refuses to regulate a matter that the constitution expressly entrusts to it. The matter therefore falls outside legislative discretion and becomes subject to constitutional review. Legislative omission or silence, by contrast, may fall within the legislature's discretion under the constitution. When the legislature chooses silence in such a case, review would concern legislative policy and should remain outside constitutional adjudication¹⁹. The decisive distinction between abstention and silence is therefore the scope of legislative discretion.

¹⁴Ghafoul, previously cited work, p. 37.

¹⁵Subhi, Jaber Muhammad, *The Judicial Policy of the Supreme Constitutional Court*, Dar al-Nahda al-Arabiyya, Cairo, 2012, p. 401 [in Arabic].

¹⁶Al-Shimi, previously cited work, p. 23.

¹⁷Al-Azzawi, Abd al-Rahman, "Review of the Legislature's Negative Conduct: Legislative Omission as a Model," *Journal of Legal, Administrative and Political Sciences*, Faculty of Law, Abu Bakr Belkaid University, Ibn Khaldun Publishing, No. 10, 2010, p. 89 [in Arabic].

¹⁸Al-Nuwaiji, Muhammad Fawzi, *Constructive Interpretation by the Constitutional Judge*, Dar al-Nahda al-Arabiyya, 2008, p. 103 [in Arabic].

¹⁹Abu Younes, Muhammad Bahi, *Principles of Constitutional Adjudication*, Dar al-Jami'a al-Jadida, 2015, p. 385 [in Arabic].

The object of review in legislative omission is an implicit legislative rule²⁰ that conflicts with constitutional principles. According to this view, silence or omission is not reviewed in itself. Review concerns the implicit legal rule created by that silence and its incompatibility with the constitution. In legislative abstention, the object of review is a negative rule expressing the legislature's refusal to fulfil its legislative obligations.

- Legislative abstention itself is the object of constitutional review when such review is recognised. Legislative omission is not reviewed in itself; review concerns the rules implicitly derived from the legislation.

- Review of legislative omission rests on the same basis as review of express legislative rules: the supremacy of the constitution. Review of legislative abstention also rests on legislative exclusivity and the binding nature of legislative jurisdiction.

For these reasons, some scholars consider it unreasonable to place partial legislative omission and total legislative abstention in the same category and to treat judicial review as the only difference between them²¹.

Subsection Two: Forms of Legislative Omission

Legislative omission has been classified in several ways. One classification is based on its scope and distinguishes relative or partial omission from absolute or total omission. Another is based on the constitutional provision and distinguishes omission that violates formal constitutional requirements from omission that violates substantive requirements. A third category is sometimes described as indirect legislative omission²².

This study focuses on total and partial legislative omission.

Part One: Total Omission or Legislative Silence

Total omission means that the legislature refrains from enacting a law to regulate a right or freedom guaranteed by the constitution. It also refers to the complete absence of legislation or of a legal rule governing a situation identified by the constitution²³.

It is also called absolute legislative silence. It is the complete absence of legislation, or of a legal rule, concerning a legal situation defined by the constitution. Silence on a matter, or failure to intervene through legislation, is therefore described in scholarship as total omission²⁴.

Many scholars consider that the legislature has discretion when enacting laws. It may intervene to enact legislation contemplated by the constitution or may remain silent. It may also determine the content of legislation without following a specific method. This discretion is nevertheless limited by constitutional requirements. A breach of those requirements is unconstitutional. The legislature also

²⁰An implicit rule is inferred a contrario. For example, if an express rule provides that a lease continues for the tenant's wife and children after the tenant's death, the contrary implicit rule would deny continuation where the stated conditions are not met.

²¹Abd al-Rahman, previously cited work, p. 45.

²²Muhammad Ali, al-Hussein Abd al-Da'im Saber, "Review of Omission and Its Remedies in Constitutional Adjudication and Its Impact on Legislative Reform," *Journal of the Faculty of Law, Ain Shams University*, No. 79, March 2022, pp. 785-788 [in Arabic].

²³Al-Azzawi, previously cited work, p. 89.

²⁴Al-Shimi, previously cited work, p. 121.

has broad discretion to choose the time of intervention. Prolonged silence may be a constitutional shortcoming rather than a constitutional violation²⁵.

A second view holds that the legislature may amend or repeal a legal rule at its discretion, but it may not refuse to give effect to a right guaranteed by the constitution. In that situation, discretion narrows and becomes a legislative duty²⁶.

When a constitutional provision identifies the legislative rule that must be enacted, it creates a constitutional duty. The legislature is then required to establish the rule guaranteed by the constitution²⁷.

Such a duty may be express or may be inferred. If no duty exists, legislative power remains discretionary, and the claim of total legislative omission has no legal basis.

Part Two: Relative or Partial Legislative Omission

Partial omission occurs when the legislature regulates a matter within its jurisdiction but does so incompletely. The regulation fails, intentionally or unintentionally, to cover all aspects of the subject and thereby impairs its constitutional guarantee.

Relative or partial omission also occurs when a statute enacted by the legislature does not provide complete regulation of its subject²⁸.

This is unconstitutional because it may create unequal treatment between comparable legal positions. Partial legislative omission reveals a gap in the existing legal framework and its failure to satisfy constitutional requirements. In other words, it exists when the essential content of the legislative scheme is incomplete and does not comply with the constitutional rules from which it derives²⁹.

Accordingly, when the legislature regulates a matter within its jurisdiction but the regulation remains incomplete, whether intentionally or negligently, partial legislative omission arises. Such omission impairs the constitutional guarantees governing the matter and constitutes a constitutional violation. The challenged provision is deficient because it does not fully protect the constitutionally guaranteed right or freedom. The deficiency seriously undermines that right or freedom, disrupts the coherence of its elements, and violates the constitution³⁰.

Section Two: The Basis and Models of Review of Legislative Omission in Constitutional Systems

Legal scholarship links review of legislative omission to the supremacy of the constitution. Constitutional supremacy is therefore regarded as the legal basis of such review. The higher rule established by the constitution must be respected, and review serves to remedy constitutional violations caused by legislative omission.

²⁵Al-Tabtabai, Adel, *The Constitutional Boundaries between the Legislative and Judicial Authorities: A Comparative Study*, Scientific Council for Publishing and the Committee for Authorship and Arabisation, Kuwait University, 2000, p. 447 [in Arabic].

²⁶Jum'a, Fahd Yusuf Abd Allah, "The Position of the Kuwaiti Constitutional Court on Review of the Constitutionality of Legislative Omission," p. 72 [in Arabic].

²⁷Bouziane, Alyan, "The Constitutional Value of Social Justice and Its Judicial Protection: A Comparative Applied Study of Modern Arab Constitutions," *Journal of the Academy for Social and Human Studies, Economics and Law Section*, No. 10, June 2013, p. 112 [in Arabic].

²⁸Siddiq, Siham, "Legislative Omission and Methods of Remedy," *Journal of Law and Business*, No. 239, 2014 [in Arabic].

²⁹Jum'a, previously cited work, p. 73.

³⁰Egyptian Supreme Constitutional Court, Case No. 153 of Judicial Year 32 (Constitutional), hearing of 4 February 2017, *Official Gazette, Supplement to No. 6*, 15 February 2017, pp. 18-27.

Two approaches have emerged. The first rejects judicial review of legislative omission because it would concern rules that do not exist, interfere with legislative discretion, and lack a clear judicial mechanism. The second supports review because omission produces negative rules in matters that the constitution requires the legislature to regulate. Such review does not violate legislative discretion, since the constitution is the source of that discretion. It is a review of public power that must remain subject to constitutional limits.

Subsection One: The Basis for Constitutional Judicial Review of Legislative Omission

The general basis for reviewing the constitutionality of laws is that every rule enacted by the legislature is subject to the constitution. This ensures constitutional supremacy and requires all state authorities to comply with constitutional provisions. Ribes argues that this basis is not sufficient. In his view, review is also grounded in the positive obligations that the constitution imposes on the legislature³¹. Other scholars consider the principle of legislative exclusivity an additional basis, especially for legislative abstention and total omission.

This subsection has two parts. The first examines constitutional supremacy as a basis for review of legislative omission. The second addresses the principle of legislative exclusivity.

Part One: The Principle of Constitutional Supremacy

The supremacy of the constitution over all other legal rules is a central foundation of the state governed by law. A state cannot be described as a constitutional state unless its constitutional rules prevail over all other rules³².

Some scholars argue that there is little value in grounding review of legislative omission in constitutional supremacy because supremacy is the basis of all constitutional review³³. This objection can be answered through a broader understanding of the principle. The rule of law requires respect for the constitution and its proper implementation. Constitutional review must therefore operate in a way that secures constitutional legality and supremacy. Constitutional supremacy has a negative and a positive dimension. The negative dimension is well established in scholarship, legislation, and case law. It requires the legislature not to enact rules that conflict with the constitution. The positive dimension addresses legislative inaction. It requires the legislature to adopt the measures needed to implement constitutional provisions.

Constitutional supremacy has both formal and substantive aspects. Under the formal criterion, the constitution occupies the highest rank because it is adopted by the constituent power. No other authority may override it.

Under the substantive criterion, the constitution regulates the powers of public authorities, their relations, and the rights and public freedoms of individuals. These are supreme legal rules. They require every authority, especially the legislature, to exercise the jurisdiction entrusted to it and not to neglect the necessary regulation³⁴.

Constitutional supremacy is a fundamental principle of legal scholarship and constitutional adjudication. It is an expression of the rule of law, under which all state authorities are subject to law.

³¹Al-Shimi, previously cited work, p. 71.

³²Bassiouni, Abd al-Ghani, *Political Systems and Constitutional Law*, al-Dar al-Jami'iyya, Cairo, 1992, p. 537 [in Arabic].

³³Kilali, Zahrat al-Rahman, *Legislative Omission and Constitutional Review*, Master's thesis, Faculty of Law and Political Science, Abu Bakr Belkaid University, Tlemcen, Algeria, 2013, p. 30 [in Arabic].

³⁴Al-Shimi, previously cited work.

It is also an essential safeguard of individual rights and freedoms. The supremacy of constitutions is generally accepted even when a constitution does not state it expressly. Some constitutions nevertheless contain an explicit provision, including the Iraqi Constitution of 2005³⁵.

The constitution is supreme because its subject matter is indispensable to the legal structure of the state. It establishes the rules and principles of government, identifies public authorities, and defines the limits governing their activity³⁶.

To secure constitutional supremacy, legal systems have established review of the constitutionality of laws. Eisenmann stated as early as 1928 that judicial review is the principal factor that makes constitutional rules binding and effective. Without review, the constitution would be no more than a political programme with moral value.

German scholarship has also affirmed a necessary connection between legislative omission and constitutional violation, whether formal or substantive. The constitution imposes legal obligations on the legislature. A constitutional violation occurs not only when the legislature acts contrary to the constitution, but also when it neglects or fails to complete its function³⁷.

First: Omission Contrary to Formal Constitutional Supremacy

A formal defect in constitutional law concerns the procedures prescribed by the constitution for enacting legislation. A law passes through stages such as proposal, adoption, approval, promulgation, and publication before it enters into force. A defect in these procedures may render the law unconstitutional.

Formal and procedural violations include enactment without the required parliamentary majority or without presidential approval when the constitution requires it. Breach of these rules leads to unconstitutionality.

Judgments finding legislative omission unconstitutional on formal grounds are very rare because omission usually concerns substantive matters.

The relationship between legislative omission and formal supremacy concerns a legislative oversight, deficiency, or failure to comply with procedural elements that should be present to avoid constitutional defects.

Second: Omission Contrary to Substantive Constitutional Supremacy

Substantive constitutional supremacy requires the Constitutional Court, as the authority responsible for constitutional review, to ensure that legislation fully conforms to the constitution. The law must be free from constitutional defects such as omission, abstention, or legislative deviation. If such a defect exists, the law may be declared unconstitutional. Substantive supremacy has several consequences. It defines the powers of public authorities and requires each authority to exercise its own jurisdiction. It also prohibits an authority from transferring constitutional powers to another body except as permitted by the constitution. Most importantly, public authorities may not neglect or fail to exercise powers assigned to them by the constitution, because those powers are constitutional duties rather than private privileges.

³⁵Shiha, Ibrahim Abd al-Aziz, *Constitutional Principles*, Mansha'at al-Ma'arif, Alexandria, 2006, p. 173 [in Arabic].

³⁶Jamal al-Din, Sami, *Constitutional Law and International Legitimacy*, 3rd ed., Horus International Foundation, 2015, p. 140 [in Arabic].

³⁷Abu al-Majd, Ahmad Kamal, *Studies in Constitutional Law: Lectures Delivered to Postgraduate Students*, Kuwait University, 1995, p. 85 [in Arabic].

Part Two: The Principle of Legislative Exclusivity

Legislative exclusivity means that the legislature alone has original jurisdiction to regulate matters reserved to it. The concept was developed by the German jurists Paul Laband and Otto Mayer. Its early development did not completely prevent Parliament from delegating some or all of its jurisdiction to the executive. Because legislative delegation is an exception to Parliament's exclusive law-making function, constitutions subject it to substantive and procedural safeguards. For matters fully reserved to legislation, the parliamentary obligation may be complete. This is absolute legislative exclusivity, under which Parliament must regulate every aspect of the subject. The reservation may also be partial or relative, so that Parliament is required to establish only the fundamental principles. This is relative legislative exclusivity.

Some definitions of legislative exclusivity imply that the legislative authority may not refuse to exercise its jurisdiction in matters reserved to it³⁸. This conclusion is often justified by the separation of powers. Since the constitution allocates powers and jurisdiction among state authorities, each authority must perform its assigned function. Scholars therefore rely on constitutional provisions conferring legislative power on Parliament as the source of Parliament's positive duty to exercise that power. This raises the question: May Parliament, as the original holder of legislative jurisdiction, decline to exercise it?

Mayer raised this question. The connection between legislative exclusivity and legislative omission is particularly clear in cases of total omission or legislative abstention. Some scholars do not regard legislative exclusivity as a basis for reviewing legislative omission, but rather as a basis for reviewing abstention. The principle requires the legislature to fulfil its constitutional obligation. If it adopts a negative position and refuses to exercise its jurisdiction, it falls into legislative omission and violates the constitution.

Subsection Two: Models of Constitutional Review of Legislative Omission in Comparative Systems and Algeria

Constitutional courts derive their authority to review legislative omission from constitutional provisions and statutes governing the court. These texts may provide expressly or implicitly for such review. Courts may also rely on constitutional case law. Constitutional systems therefore differ in how they address legislative omission. This subsection examines these models and the extent to which Algeria applies review of legislative omission.

Part One: Constitutional Models and Their Treatment of Legislative Omission

Review of legislative omission has generally developed through constitutional scholarship and constitutional case law. Some contemporary constitutions, however, expressly provide that Parliament's failure to exercise its jurisdiction is a form of unconstitutionality³⁹.

Legal systems consequently differ in their treatment of legislative omission.

First: Constitutions That Recognise Review of Legislative Omission

Some constitutions expressly authorise the constitutional court to review legislative omission and the failure to adopt measures needed to implement constitutional rules. They therefore allow review of the legislature's failure to enact required legislation⁴⁰. Few states have adopted this approach.

³⁸Surur, Ahmad Fathi, p. 368 [in Arabic].

³⁹Ghafoul, previously cited work, p. 128.

⁴⁰Hussein, Abeer Hussein al-Sayyid, The Role of the Constitutional Judge in Reviewing Legislative Discretion, Dar al-Nahda al-Arabiyya, 2009, p. 370 [in Arabic].

Examples include the amended Portuguese Constitution of 1976, which uses the term legislative abstention; the Brazilian Constitution of 1988, which refers to the absence of legislative measures; and the South African Constitution of 1996, which describes a failure by Parliament to fulfil a constitutional obligation. These systems differ in their remedies, including whether the legislative authority must be notified.

Other constitutions recognise the concept implicitly. The Hungarian Constitution of 1989, for example, did not expressly mention legislative omission. It empowered the Constitutional Court to review the constitutionality of laws and equivalent legal rules, while the implementing legislation expanded the meaning and scope of legislative omission.

Second: Constitutions That Do Not Mention Review of Legislative Omission

Most constitutions are based on the view that constitutional rules should be general, broad, and adaptable to social change. They therefore avoid regulating specific questions and leave room for constitutional interpretation. Some constitutional courts initially considered legislative omission outside their jurisdiction but later treated it as a legal breach of legislative obligations. Examples include the Egyptian Constitution of 2014, the Iraqi Constitution of 2005, and the Algerian Constitution of 2016. The statutes governing constitutional adjudication in these systems contained no express provision on legislative omission. Practice nevertheless shows that constitutional courts have addressed the issue. The Egyptian Supreme Constitutional Court and the former Algerian Constitutional Council relied on legislative omission in findings of unconstitutionality. In 2002, the Egyptian Court issued three decisions concerning partial legislative abstention. The first declared paragraph 4 of Article 17 of Law No. 136 of 1981 on the lease and sale of premises unconstitutional because it discriminated between men and women on the basis of sex. The second concerned Customs Law No. 66 of 1963, and the third concerned the final paragraph of Article 29 of a 1977 law⁴¹.

Constitutions have therefore adopted different approaches to legislative omission according to their underlying constitutional philosophy.

Third: Remedies for Legislative Omission in Constitutional Systems

Constitutional systems use different remedies for legislative omission. The choice of remedy is central because it defines the limits of the constitutional judge's role and prevents the court from exceeding its judicial function.

Four principal forms of remedy can be identified:

1. Declaratory judgments: The constitutional judge merely identifies a defect consisting of constitutional omission and notifies the legislature⁴². The judge does not declare the law unconstitutional. Article 283(2) of the Portuguese Constitution provides for this mechanism, and Article 103(2) of the Brazilian Constitution adopts a similar approach.
2. Directive judgments: The constitutional judge does more than identify legislative abstention or omission. The court addresses the legislature and calls on it to remedy the defect. Such a judgment may appear advisory, but the court may use mandatory language and require action within a reasonable period. Failure to act may invalidate the deficient provision. The German, Italian, and Spanish constitutional courts have followed this approach. A law containing an omission may remain temporarily constitutional, especially when the constitution requires

⁴¹Al-Shimi, previously cited work.

⁴²Salman, Abd al-Aziz, "Review of Omission in Constitutional Adjudication," Constitutional Journal, No. 15, p. 58 [in Arabic].

legislative intervention. The court may set a period within which the legislature must act; failure to comply may lead to a declaration of unconstitutionality⁴³.

3. Declaration of unconstitutionality: The judge declares unconstitutional the part of the provision that contains the omission, without issuing a legislative directive. This approach is followed by the French Constitutional Council.

4. Additive judgments: The judge interprets the legal provision and adds the omitted element so that the text conforms to the constitution. The interpretation may be constructive, with the purpose of filling a legislative gap; neutral, with no addition beyond interpretation; or directive, with the purpose of guiding the authorities responsible for applying the law.

Part Two: Constitutional Review of Legislative Omission in Algeria

The Algerian Constitution follows the approach that does not expressly recognise or mention review of legislative omission. The constitutional text contains no clear provision authorising such review. The former Constitutional Council, and potentially the present Constitutional Court, nevertheless addressed cases of legislative silence and failure to exercise legislative jurisdiction. Such failures may create a legislative vacuum and violate constitutional rules. In reviewing legislation, the constitutional judge may therefore consider what the legislature omitted when regulating a constitutional matter⁴⁴. One of the main techniques used by the Algerian constitutional judge is constructive or interpretative reservation. This technique addresses legislative omission and legislative abstention and encourages the legislature to regulate or settle a matter within its constitutional jurisdiction. The court may issue directive, constructive interpretative, or neutral interpretative judgments. The interpretation may be additive or substitutive⁴⁵. Through constructive reservations, the court interprets the legislation, adjusts some of its provisions, and reformulates them to conform to the constitution. It may replace a legislative rule or add rules to the original text in order to remedy legislative omission⁴⁶.

A review of Algerian constitutional decisions shows that the constitutional judge has used the various forms of interpretative reservation since the institution was established. These reservations are among the most far-reaching tools available to the constitutional judge because they influence legislative work and may even place the judge in the position of exercising legislative jurisdiction⁴⁷.

The constitutional judge may also correct the meaning of a provision by identifying a deficiency in the text. This is known as directive interpretation. These examples do not, however, establish that the Algerian Constitutional Council clearly and expressly reviewed legislative omission, especially total omission. Such review was difficult to envisage under the mechanisms previously available to the Council for the following reasons:

- Legislative abstention often results from the state's unwillingness to implement certain constitutional commitments. It is therefore difficult to initiate review through a referral by the President of the Republic, the Prime Minister, the President of the People's National Assembly, the President of the Council of the Nation, forty members of the People's National Assembly, or twenty-five members of the Council of the Nation.

⁴³Al-Shimi, previously cited work, p. 145.

⁴⁴Beldjilali, Khaled, *Legislative Discretion: A Comparative Study*, PhD thesis in Public Law, Faculty of Law and Political Science, Tlemcen, 2017, p. 302 [in Arabic].

⁴⁵Ghafoul, previously cited work, p. 315.

⁴⁶Beldjilali, previously cited work, p. 302.

⁴⁷Khaled, Dhabia, "Working Methods of the Constitutional Council," *Parliamentary Thought Journal*, No. 15, 2005, p. 52 [in Arabic].

The power of direct constitutional interpretation introduced when the Constitutional Council was replaced by the Constitutional Court under the 2020 constitutional amendments should nevertheless create opportunities to address legislative omission through requests for interpretation of legal or constitutional rules.

Legislative omission is no longer confined to prior review. Following the 2016 constitutional amendments, the Algerian Constitutional Council acquired jurisdiction to conduct subsequent review of certain laws through an individual plea of unconstitutionality when a provision violates a constitutionally guaranteed right or freedom. The 2020 constitutional amendment retained this mechanism⁴⁸. This jurisdiction may give the Constitutional Court an opportunity to extend review to omissions in the regulation of specific matters.

Review may also extend to any law that conflicts with the constitution because of a formal or substantive drafting defect, including a deficiency or gap caused by legislative silence.

CONCLUSION

Legal scholarship and constitutional adjudication have not reached a uniform position on the review of legislative omission or on the appropriate remedies. Subjecting legislative omission to judicial review nevertheless represents an advanced constitutional approach. It places the legislature, as a public authority, under the rule of law and strengthens the protection of rights and freedoms.

- The supremacy of the constitution imposes positive legislative obligations. Constitutional matters must be regulated fully and effectively. Incomplete regulation that fails to address all relevant aspects may impair constitutional guarantees.
- Algerian constitutional adjudication has not expressly established review of legislative omission. It has nevertheless addressed the issue indirectly through constitutional review of laws and findings of incompatibility with constitutional provisions.
- Review of legislative omission should be activated and its remedies developed. The court should not be limited to notifying the legislature, but should be able to use directive and additive judgments.
- A provision should recognise state liability for acts of the legislative authority as an alternative remedy for total omission, especially where discretion is exercised arbitrarily or abusively.
- The constitution should expressly authorise the Constitutional Court to review legislative omission.
- The Constitutional Court should accept claims of unconstitutional legislative omission through the plea of unconstitutionality rather than relying only on constructive interpretative judgments to fill legislative gaps.
- Research on legislative omission in Algeria should be encouraged in order to identify and remedy deficiencies in legislation and regulations.

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