

## The Constitutional Status of Economic Rights: Reconciling Normative Guarantees with the Exigencies of Economic Regulation

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### **Abstract:**

This article examines the constitutional problem posed by elevating economic rights to the status of binding normative guarantees. At the same time, the state retains sovereign powers of economic regulation to protect the public economic order. It highlights the legal tension between enforcing these constitutional rights and regulatory policies tied to the criterion of “available resources.” To mediate this conflict, the article emphasizes the centrality of constitutional review, particularly the plea of unconstitutionality, as a means of limiting legislative discretion. Legislative restrictions must therefore be subjected to the principle of proportionality in all its dimensions to ensure that the essential core of rights is not impaired. The article further stresses the need to give effect to legal certainty, legitimate expectations, and the prohibition of regression from vested rights, with a view to safeguarding legal positions against abrupt legislative amendments. It concludes that the constitutional judge must assume an active role in shaping economic security while exercising judicial self-restraint regarding economic expediency, in accordance with the principle of separation of powers.

**Keywords:** economic rights; normative guarantees; economic regulation; constitutional review; principle of proportionality; legal certainty.

### **Introduction:**

The 2020 constitutional amendment fundamentally transformed the state’s economic approach by shifting economic rights, such as the freedoms of investment and initiative, from mere programmatic objectives of public policy to binding normative rights. This constitutional entrenchment is matched by the state’s retention of sovereign powers to regulate the economy in order to protect the economic public order in both its directive and protective dimensions. It

grants the legislature broad discretion to restrict those rights whenever available resources and economic conditions so require.

The jurisprudential and practical importance of this study lies in its attempt to resolve the conflict between the need to give effect to constitutional guarantees and the practical necessities of regulatory and financial policies. This importance is especially evident in light of the strengthened mechanisms for the plea of unconstitutionality, which require the development of normative tools that enable the constitutional judge to assess legislative choices with economic effects and to secure acquired legal positions against abrupt legislative amendments that undermine legal certainty under the pretext of regulatory necessity.

These considerations raise a central legal problem: how can the constitutional judge establish strict proportionality review to protect constitutionally enshrined economic rights, without allowing the judiciary to substitute for the legislature in assessing economic expediency or to confiscate the legislature's discretionary authority to manage available resources?

To address this problem through a critical analytical methodology that goes beyond the classical descriptive narration of rights, the study adopts a two-part structure grounded in a logical progression of legal reasoning. The first section deconstructs the conceptual framework of the duality between normative guarantees and the exigencies of economic regulation, clarifying the legal nature of economic rights and the limits of regulation as a legitimate restriction imposed upon them. The second section analyzes the mechanisms of constitutional review and the balance between entrenchment and regulation, highlighting the limits that preclude review of economic expediency and demonstrating the legal mechanisms for protecting legitimate expectations and the stability of legal positions.

### **Section One: The Conceptual Framework of the Duality between Normative Guarantees and Economic Regulation**

Understanding the constitutional problem of economic rights requires a precise deconstruction of the theoretical foundation that underpins the duality between normative entrenchment and regulatory restriction. This section addresses the conflict in principle between elevating economic rights to the status of binding constitutional rules and the state's continued exercise of sovereign powers to regulate economic activity. To establish the basis of this conflict, the analysis first examines the normative status of these rights in modern constitutional architecture. Then it characterizes the requirements of economic regulation as a legitimate legislative restriction imposed on them.

#### **First Axis: The Normative Value of Economic Rights in Constitutional Architecture**

The Algerian constitutional constituent, particularly through the 2020 constitutional amendment,<sup>1</sup> marked a methodological break with traditional approaches that placed economic rights in the

category of programmatic objectives or nonjusticiable ideological orientations. Thus, the constitutional text elevated fundamental rights, such as freedom of investment, initiative, and property, to the rank of binding normative rules, as Article 61 expressly provides that “freedom of trade, investment, and entrepreneurship is guaranteed.”<sup>2</sup> This entrenchment transfers those rights from the sphere of the administration’s absolute discretion to the sphere of constitutional legality, thereby restricting legislative freedom and obliging the legislature to respect their essence when enacting ordinary legislation.<sup>3</sup>

This normative elevation creates legal complexity concerning the dual nature of the state’s obligations. While these rights impose a negative obligation requiring public authorities to refrain from arbitrary or unjustified restrictions that impede freedom of initiative, they also impose positive obligations connected to the creation of a competitive economic environment. These positive obligations, however, always collide with the limitations of “available resources” or “progressive realization,” making their normative effectiveness subject to fluctuations in economic conditions and the state’s financial capacity. This creates a legal loophole that the legislature may exploit as a pretext to evade its obligations.<sup>4</sup>

The normative value of these rights is confirmed by their justiciability, a characteristic completed through the activation of mechanisms of constitutional review,<sup>5</sup> foremost among them the plea of unconstitutionality. Under this mechanism, constitutional provisions of an economic character are no longer mere political directives; rather, they have become standards of review that allow the constitutional judge to examine whether financial and economic laws comply with the essential minimum of those rights.<sup>6</sup>

Based on the foregoing, activating constitutional review to guarantee the normative value of economic rights does not mean freeing them from every restriction or divesting the state of its powers. This constitutional entrenchment necessarily collides with the state’s sovereign responsibility to direct economic activity and protect the public interest; it therefore requires examination of the legal characterization of economic regulation and the extent to which regulatory requirements may be considered legitimate legislative restrictions that justify limiting freedom of initiative and investment.

### **Second Axis: The Exigencies of Economic Regulation as a Legitimate Legislative Restriction**

The constitutional entrenchment of economic rights does not amount to the acknowledgment of an absolute liberalism that ties the state’s hands. Rather, it is coupled with the need to preserve “economic public order” as a referential framework that justifies legislative intervention.<sup>7</sup> In public law doctrine, this public order has two complementary dimensions: a protective dimension aimed at preserving major balances and securing economic actors, and a directive dimension that

grants public authorities the legitimacy to direct investments and frame freedom of initiative in a manner that serves the public interest.<sup>8</sup> Based on this characterization, the requirements of economic regulation constitute a legitimate legislative restriction on the exercise of economic rights, provided that the restriction seeks to achieve parallel constitutional objectives or protect the higher interests of society.

In this context, the legislature enjoys broad discretion in formulating public policies and determining spending priorities, invoking the principle of “available resources.”<sup>9</sup> Economic regulation often requires regulatory and tax measures that may affect the essence of economic freedom. In adopting such measures, however, the legislature relies on its constitutional authority to assess economic expediency and evaluate the state’s financial capacities. This discretionary margin gives the legislative authority the flexibility necessary to adapt the legal system to economic fluctuations. It is reflected in the Algerian legislature’s introduction of flexible regulatory frameworks, such as granting the “start-up enterprise” label to direct the economy toward digitization and innovation,<sup>10</sup> thereby making “available resources” or economic interest an instrument for justifying restrictions and directing investment.

The breadth of this discretionary margin, however, entails serious legal risks that may undermine the normative value of entrenched rights. Invoking the exigencies of economic regulation and the scarcity of resources cannot constitute an open legislative mandate to infringe upon the essential minimum of an economic right.<sup>11</sup> Therefore, when regulatory authority shifts from an organizational function designed to protect the public economic order to an instrument for confiscating freedom of investment or burdening it with unjustified restrictions, the legislative text moves from the sphere of legality into the sphere of arbitrariness.

This conflict between the binding character of normative entrenchment and the legitimacy of regulatory restriction makes recourse to a supervisory body necessary to regulate the rhythm of this duality. Since the legislature cannot be both party and judge in assessing the proportionality of the restrictions it imposes, constitutional adjudication becomes indispensable.<sup>12</sup> However, this intervention itself raises a complex doctrinal challenge: how to extend effective constitutional review that protects rights and secures the stability of legal positions without allowing the judge to slip into assessing the legislature’s financial choices or interfering with economic expediency.

## **Section Two: Mechanisms of Constitutional Review: Balancing Entrenchment and Regulation**

Establishing effective constitutional review of legislative acts with economic effects requires moving beyond traditional approaches that limit review to matching the ordinary text with the constitutional text. It requires doctrinal mechanisms that can accommodate the flexibility of economic policies. This section addresses the pivotal role of the constitutional judge in regulating

the tensions between the guarantee of entrenched rights and the exigencies of financial regulation. It seeks to draw the dividing line between extending the conformity review to protect the essence of the right and voluntarily abstaining from reviewing expediency out of respect for the principle of separation of powers. To that end, it first sheds light on the limits of the constitutional judge's intervention in the legislature's economic choices before reviewing the judicial mechanisms aimed at securing legal positions and entrenching the principle of legal certainty.

### **First Axis: The Limits Precluding Constitutional Judicial Review of Economic Expediency**

Based on the principle of separation of powers, the constitutional judge adopts an approach marked by voluntary restraint when reviewing legislation of an economic or financial nature, acknowledging the legislature's original competence to assess "expediency."<sup>13</sup> This restraint is reflected in the Constitutional Court's abstention from substituting its own economic assessment for that of the legislature, or from choosing among alternative regulatory policies, so long as the legislature acts within its competence to give effect to public-interest objectives under an "available resources" approach. The constitutional judge is not a judge of public policy, and the judge's intervention is not directed at the text's economic feasibility. However, it is confined to verifying that it does not violate mandatory constitutional limits.

This restraint, however, does not insulate regulatory legislation from judicial review. To overcome the dilemma of discretionary authority, comparative constitutional jurisprudence—an approach strongly entrenched under the mechanism of the plea of unconstitutionality provided for in Article 195 of the Constitution<sup>14</sup> and regulated by the relevant organic law<sup>15</sup>—applies the principle of proportionality as an objective criterion of review.<sup>16</sup> This principle requires legislative restrictions justified by the requirements of economic regulation to be subjected to a three-part test: verifying the suitability of the measure for the intended objective; its necessity, such that no alternative less prejudicial to the right exists; and proportionality in the strict sense, between the gravity of the restriction and the scope of the protected interest.

The proportionality test enables the constitutional judge to curb legislative discretion whenever the legislature uses "scarcity of resources" or "economic regulation" as a pretext for emptying an economic right of its content or impairing its essence. Thus, proving the existence of pressing financial circumstances is not, in itself, sufficient to justify an arbitrary restriction on freedom of initiative or investment. Rather, the restriction must be the legislative option least harmful to acquired constitutional guarantees.

Consequently, the constitutional judge's success in activating proportionality review without infringing upon the legislature's competence to assess expediency constitutes the cornerstone of protecting economic rights against legislative arbitrariness. However, this protection remains

deficient if it is confined to the immediate assessment of legal texts and does not extend to the temporal effect of continuous legislative amendments. This extension necessitates examination of legal mechanisms capable of protecting the stability of transactions and securing operators' acquired legal positions in the face of abrupt regulatory transformations.

### **Second Axis: Protection of Legal Certainty and Acquired Legal Positions**

The effectiveness of constitutional review over economic rights is embodied not merely in warding off immediate legislative arbitrariness but also in protecting the temporal stability of the legal rules regulating the economy. Economic legislation is characterized by rapid dynamics dictated by fluctuations in "available resources" and regulatory requirements. However, continuous amendment of the rules collides with the principle of "legal certainty."<sup>17</sup> This principle is an unwritten constitutional pillar that requires the legislature to formulate clear, foreseeable, and relatively stable texts, enabling economic operators to structure their expectations and investments without abrupt amendments that would undermine their legitimate legal positions.

To guarantee this stability without confiscating the legislature's right to amend, comparative constitutional and administrative jurisprudence applies the principle of "legitimate expectations" as a preventive tool.<sup>18</sup> This principle does not aim to freeze the legislative system; rather, it obliges the public authority, whenever it decides to repeal or amend an economic regulation that has given rise to legal positions, to adopt appropriate transitional measures. The constitutional judge's intervention here is directed at sanctioning legislative omission. The issuance of a new regulatory law that affects prior investment guarantees, without establishing transitional provisions to absorb the shock of the financial transition, constitutes a fundamental breach of the trust placed by addressees in the stability of the legal rule. This path has been proactively entrenched by the Algerian legislature in the new Investment Law, through an express guarantee that the investor's acquired rights and positions will not be impaired.<sup>19</sup>

In parallel, and within the scope of protecting the essence of acquired rights, the principle of nonregression from acquired gains emerges as a stringent restriction on legislative authority. This principle prevents the legislature from enacting laws that eliminate or substantially reduce the level of protection previously accorded to an entrenched economic or social right. While reliance on resource scarcity is a classic justification for regression, modern constitutional review imposes strict scrutiny, requiring the state to prove that regressive measures were the last resort and adopted only after all available resources had been exhausted, while maintaining the essential minimum of the right in all circumstances.

Based on the foregoing, protection of the constitutional status of economic rights is achieved not by denying the state's regulatory authority but by subjecting that authority to a complex network

of judicial standards. The convergence of proportionality, legal certainty, and legitimate expectations forms a preventive structure that prevents the regulatory exception from emptying the mandatory rights-based rule of its content. This leads to the essential conclusions of this approach and to the doctrinal prospects of the expected role of the Constitutional Court in establishing the foundations of this complex balance.

### **Conclusion**

This study reaches a foundational conclusion that goes beyond the classical treatment of rights. The normative entrenchment of economic rights is no longer merely a textual constraint; rather, it has established an integrated constitutional-economic public order. Thus, the pretext of available resources or the requirements of financial regulation is no longer a blank legislative instrument permitting the evasion of positive obligations or the confiscation of the essence of the right. Instead, in modern constitutional doctrine, it has become a criterion of review that is itself subject to strict judicial scrutiny.

Resolving this conflict is not achieved by paralyzing the regulatory state, but by engineering a delicate balance: a public authority that intervenes to ensure economic equilibria, confronted by a legislature constrained by the requirements of proportionality, legal certainty, and the prohibition of regression from acquired gains. This delicate balance constitutes the actual embodiment of the transition from mere formal legality to the foundations of a state of economic law.

On that basis, the true test of the success of this duality now rests with the Constitutional Court, particularly with the expansion of the scope of the plea of unconstitutionality. The elevation of constitutional guarantees requires the constitutional judge to move beyond the classical role of negative legislator, who merely annuls conflicting texts, and to rise to the status of judicial engineer of economic security. The constitutional document will not serve as a protective shield for investment and the stability of legal positions unless constitutional jurisprudence demonstrates the doctrinal boldness necessary to activate the proportionality test as an impregnable barrier that curbs any legislative deviation concealed behind the exigencies of regulation and expediency.

### **Endnotes :**

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<sup>1</sup> Presidential Decree No. 20-442, December 30, 2020, concerning the promulgation of the constitutional amendment approved by referendum on November 1, 2020, Official Gazette of the People's Democratic Republic of Algeria, no. 82 (December 30, 2020).

<sup>2</sup> Constitution of the People's Democratic Republic of Algeria (2020), art. 61.

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<sup>3</sup> Zouina Ben Zidane and Wafa Chiaoui, “The Constitutional Value of Economic Freedoms,” *Journal of the Constitutional Council*, no. 18 (2021): 12–13.

<sup>4</sup> Arab Association of Constitutional Law, *Social and Economic Rights in Arab Constitutions*, Constitutional Law Academy, 3rd sess., 2018.

<sup>5</sup> Khadidja Gherdaine and Fawzia Sekrane, “The Constitutional Framework of Economic Rights in Algeria: Balancing State Control and Market Freedom in the National Economy,” *Journal of Information Systems Engineering and Management* 9, no. 4 (2024).

<sup>6</sup> Kouider Chaachoua, “Constitutional Guarantees of Economic Rights in the Algerian Constitutional Amendment of 2016,” *Algerian Journal of Rights and Political Sciences* 3, no. 5 (2018): 164.

<sup>7</sup> Kamal Mouhoubi, “Economic Regulation Law: An Attempt at Definition,” *Algerian Journal of Legal and Political Sciences* 60, no. 1 (2023): 138–40.

<sup>8</sup> Ordinance No. 03-03 of July 19, 2003, concerning competition, as amended and supplemented by Law No. 08-12 and Law No. 10-05, Official Gazette, no. 43 (July 20, 2003).

<sup>9</sup> Law No. 22-18 of July 24, 2022, concerning investment, Official Gazette, no. 50 (July 28, 2022).

<sup>10</sup> Executive Decree No. 20-254, September 15, 2020, establishing a national committee for granting the “Start-up” label and the “Innovative Project” label and determining the procedures therefor, Official Gazette, no. 55 (September 21, 2020).

<sup>11</sup> Yahia Badir, “The Legislature’s Authority to Regulate Rights and Freedoms between Restriction and Discretion,” paper presented at the First International Scientific Conference on the Humanities, Applied, and Pure Sciences, Al-Mustafa Al-Amin University, 2022, 648.

<sup>12</sup> Abdelkarim El Abdellaoui, “The Right of Individuals to Access Constitutional Justice and Its Role in Protecting Rights and Freedoms in Morocco,” *Rowaq Arabi* 27, no. 3 (2022): 67–68.

<sup>13</sup> Dominique Rousseau, Pierre-Yves Gahdoun, and Julien Bonnet, *Droit du contentieux constitutionnel*, 12th ed. (Paris: LGDJ, 2021).

<sup>14</sup> Constitution of the People’s Democratic Republic of Algeria (2020), art. 195.

<sup>15</sup> Organic Law No. 22-19 of July 25, 2022, determining the procedures and modalities of notification and referral before the Constitutional Court, Official Gazette of the People’s Democratic Republic of Algeria, no. 51 (July 31, 2022).

<sup>16</sup> Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012), 131–35.

<sup>17</sup> Habiba Naili, “The Constitutional Development of Economic Rights in Algeria, or the Liberalization of the Legal Rule,” *Algerian Journal of Legal and Political Sciences* 60, no. 1 (2023): 159.

<sup>18</sup> The French Council of State was among the first to enshrine legal certainty as a general principle of law in Conseil d’État, Assemblée, March 24, 2006, *Société KPMG et autres*, Rec. Lebon 154. In the Algerian legal system, administrative courts—the Council of State and the Supreme Court—ensure the practical embodiment of this principle, even without expressly using the term “legitimate expectations,” through the strict application of the principle of the nonretroactivity of administrative decisions and the protection of acquired legal positions, a principle rooted in article 2 of the Algerian Civil Code, whose effect extends to the stability of economic legislation.

<sup>19</sup> Law No. 22-18, art. 11, which expressly prohibits infringement of the investor’s acquired rights and legal positions.