Menoufia University

Faculty of Law

Department of Public Law

Constitutional review on legislature's negative incompetence- comparative study.

اعداد/

الدكتور/ سامى محمد فرج خليل

مدرس بقسم القانون العام بكلية الحقوق – جامعة المنوفية

Introduction

The law must be comprehensive and leave nothing in the shadow of what falls within the exclusive competence of Parliament[1]. The negative incompetence take place when the legislature falls short to use its own constitutional competence, especially in case of illegal explicit or implicit delegation of its competence to executive authority, which leads to usurpation of legislative competence of legislature. The sanction of negative incompetence of legislature both cleans up and honors the eminent dignity of the law, which must meet requirements, clarity in form, and density in substance. The legislature must then demonstrate double vigilance unless it does not express the general will in compliance with the Constitution[2].

Negative incompetence of legislature can be presented in France as a jurisdictional means allowing constitutional judges to be part of a general movement to revalorize Parliament. By censoring the legislature for not having fully exercised its competence, the French Constitutional Council, a real bulwark against the progressive fragmentation of the parliamentary function, would in fact force representatives to neither carry out excessively generous legislative delegations nor systematic referrals or delegation to the executive power[3]. Negative incompetence of legislature would therefore be part of this political history which saw the consecration of the sacred

[1] Franck Miatti, The Constitutional judge, the administrative judge and the abstention of the legislator, Les Petites Affiches (French law review), n°52, April 1996, p.7.

[2] Ibidem, p.5.

[3] Jordane Arlettaz, Incompetence in Constitutional Law. The State of the Case Law of the Constitutional Council on Negative Incompetence, *Nouveaux Cahiers du Conseil constitutionnel* (French law review), n° 46, January 2015, p.58.

character of the law at the origin of the omnipotence of Parliament, before experiencing an equalization of powers for the benefit of the executive under the effect of the advent of the welfare state to, ultimately, establish jurisdictional censorship of a Parliament that remained below its competence[4].

The surprise is made through the observation of the absence, in a large majority of States, of constitutional provisions expressly conferring on supreme judges the power to control and sanction negative incompetence of legislature. In the absence of explicit provisions opening the way to the censure of negative incompetence of legislature, constitutional judges base their control as much on the principles of democracy and political liberalism as on those specific to constitutionalism and the rule of law[5].

The comparative analysis of the constitutional control of negative incompetence of legislature presents a serious difficulty. The difficulty lies in a linguistic constraint, foreign case law in constitutional litigation does not in fact recognize the expression "negative incompetence" of legislature, thus testifying to the existence of a French specificity[6]. Faced with this terminological obstacle revealed by the presence of the thing without the word, the exploration of foreign constitutional law has necessarily focused on the jurisdictional censorship of a failing Parliament due to a legislative insufficiency that can be compared to negative incompetence[7]. in reality, the

[4] Gregory Mollion, The legal guarantees of constitutional requirements, The French Review of Constitutional Law (*La Revue française de droit constitutionnel*), n°62, p.263.

[5] Ariane Vidal-Naquet- Ilf-Gerjc., Incompetence in constitutional law. The state of the jurisprudence of the Constitutional Council on negative incompetence, *Nouveaux Cahiers du Conseil constitutionnel* (French law review), n° 46, January 2015 p. 8.

[6] Jordane Arlettaz, op. cit., p. 59.

[7] Ibidem.

expression “negative incompetence” of legislature must therefore be understood here broadly, taking the form of a sanction either for normative imprecision, or an unconstitutional delegation of legislative competence to the executive power, usurpation of legislative competence of legislature, or in an original way, a legislative omission[8].

Some constitutional judges referred to "over-delegation", Parliament cannot make legislative delegations so general that they could be likened to blank delegations, liable to incur the sanction of negative incompetence[9]. The nondelegation doctrine in the United States is one illustration of this. This doctrine, although it has not led to any censure of legislative delegations since 1935, nevertheless seeks to affirm that "Congress is not permitted to abdicate or transfer to other bodies the essential legislative functions that have been conferred upon it"[10]. Its primary foundation, according to judges loyal to this doctrine but now largely in the minority within the Supreme Court, is the guarantee that "decisions in the most fundamental policies will be taken not by an appointed body but by the body immediately responsible to the people"[11] or that "the most important choices in matters of social policy are

[8] Abdul Rahman Azawi, Control over the negative behavior of the legislator, legislative omission as a model, an article in the Journal of Legal, Administrative and Political Sciences, Faculty of Law and Political Sciences, Abu Bakr Belkaid University, Algeria, Issue 10, 2010, p.82.

[9] Jordane Arlettaz, op. cit., p. 60.

[10] Article on line : https://www.law.cornell.edu/constitution-conan/article-1/section-1/overview-of-nondelegation-doctrine#fn5

[11] Supreme Court of the United States, ARIZONA v. CALIFORNIA, No. 592 Decided: June 03, 1963, online: https://caselaw.findlaw.com/court/us-supreme-court/373/546.html

made by Congress, the branch of our government most sensitive to the popular will"[12].

In Egypt, despite the lack of explicit recognition of the legislature's abstention or silence from exercising its legislative authority, whether in the current constitution or in previous constitutions, as one of the aspects of unconstitutionality, the Egyptian Supreme Constitutional Court was able to extend its oversight to cases of defect of the legislature's negative lack of competence, especially in cases where the legislature is unable to regulate the issues that the constitution entrusts to the legislative authority to regulate or settle in a complete manner, or when the legislature does not exercise its legislative competence in the manner specified in the constitution[13].

In Egypt, some jurists[14] declare that the Constitution did not give the executive authority any competence to regulate issues relating to fundamental rights and freedoms guaranteed by the Constitution, as this regulation must be undertaken by the legislative authority through the laws it issues[15]. The Egyptian Supreme Constitutional Court case law declared that: If the Constitution assigns the organization of rights or freedoms to the legislative

[12] Supreme Court of the United States, Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607(1980), online: https://www.courtlistener.com/opinion/110340/industrial-union-dept-afl-cio-v-american-petroleum-institute/

[13] Eid Ahmed Al-Ghafoul, The idea of the legislator's lack of negative competence, a comparative study, Cairo, Dar Al-Nahda Al-Arabiya, 2003, P. 31.

[14] Ibidem, p.39.

[15] Hala Mohamed Tareeh, The limits of the Egyptian legislator's authority in regulating rights, freedoms, and the guarantees stipulated for their exercise, Dar Al Nahda Al Arabiya, Cairo, 2011, p.28.

authority, so the parliament may not deprive its competence (which leads to the usurpation of legislative competence) and refer or delegate the entire matters to the executive authority without restricting it in this with general controls and main foundations within which it is committed to working. If the legislator deviates from this and entrusts the executive authority with determining the right and freedom from its foundations, the legislative authority would be abandoning its original competence stipulated in Article (101) of the Egyptian Constitution[16]. Legislative authority is falling into the abyss of constitutional violation, as the legislature, which the constitution has assigned to it the authority to legislate, may not relinquish that on its own. And although the constitutions, starting with the constitution of 1923 and ending with the current constitution (Egypt's Constitution of 2014 with Amendments through 2019), have recognized the right of the executive authority to issue regulations, this is only an exception and within the narrow limits that the texts of the constitution have exclusively indicated, and under which falls the issuance of the regulations to implement the laws, these regulations are subordinate or inferior to a law insofar as it must allow a law to apply. The purpose of issuing the regulation must be limited to completing the law, setting the rules and details necessary for its implementation in such a manner that does not involve any disruption, modification, or exemption enforcement of law or adding provisions to law that distance it from the spirit of the legislation, thus exceeding its source of the constitutional competence granted to it, encroaching on the legislative authority[17].

[16] Mohamed Wahid Abu Younis, Constitutional oversight of legislative negligence in the judgments of the Supreme Constitutional Court, Journal of Law for Legal and Economic Research, Alexandria University, Volume 1, Issue 2, 2020, p. 357.

[17] Hala Mohamed Tareeh, op. cit., p.٣٦.

Negative incompetence exists implicitly when the legislative norms are so vague or imprecise. In Canada, the principle of fundamental justice that flows from section 7 of the Charter of Rights and Freedoms requires Parliament to adopt laws that are sufficiently precise to provide a virtuous trial: "A rule of law is unconstitutionally imprecise if it does not provide an adequate basis for judicial debate and analysis, if it does not sufficiently delimit a sphere of risk, or if it is not intelligible. The rule of law must provide a basis for judicial power"[18]. When Parliament does not fully exercise its competence, it harms the conduct of the trial at the same time as it increases jurisdictional power. Negative incompetence here penetrates, in an original way, the field of both the separation of powers and the right to a fair trial[19].

The unexpected evolution of the attitude of some constitutional judges toward the question of the competence of the legislature is not an obstacle to the competence of Parliament; it is sometimes an obstacle to its freedom to act, but not to its competence. By a recurrent assessment of the competence, or the "positive", and especially "negative" incompetence, of the legislature, in the drafting of a text of law, by the sanction for unconstitutionality of the law in whole or in part, in some countries the constitutional judge establishes legislative competence, and even the content of this legislative competence which falsely seemed to go by itself[20]. In doing so, it outlines an obligation

[18] Supreme Court of Canada, Nova Scotia Pharmaceutical Society case, Collection. Supreme Court Jugements. Date. 1992-07-09. Report. [1992] 2 SCR 606. Case nombre. 22473.

[19] Beaudoin Gérald A. "Nova Scotia Pharmaceutical Society Case". *The Canadian Encyclopedia*, 13 February 2015, *Historica Canada*. www.thecanadianencyclopedia.ca/en/article/nova-scotia-pharmaceutical-society-case. Accessed 14 September 2024.

[20] Ariane Vidal-Naquet - Ilf-Gerjc., Incompetence in constitutional law, op. cit., p.١١.

for the legislature, that of exercising its competence, and therefore of legislating. This is a somewhat unusual jurisprudential development because this obligation did not emerge completely from the constitutional text.

This is a point which is partly integrated into the debate on the limited/extensive delimitation of the domain of the law, and its place before the constitutional judge[21]. Indeed, in Egypt, France and other countries, the numerous judgments where the constitutional judge is required to examine the text of the law, and to assess whether there was negative incompetence of the legislature, if the legislative authority "remained below its competence", forces us to question the function of legislating. These are all questions on the extent of the function of legislating and on the nature of the function (splitting of the reserved exercise of national sovereignty with legal or indirect delegations to other authorities vested with a part of the legislation…)[22].

The Research Problem:

The research problem of our study seeks to find effective jurisdictional control allowing constitutional judges of different countries to control the defect of the legislature's negative incompetence, by censoring and sanctioning the legislature in case not having fully exercised its constitutional competence.

The legislature must not ignore the extent of its competence by leaving the exercise of it to others. Thus, the legislative authority commits an unconstitutionality when it remains below its competence either by subdelegating to other authorities the task of enacting rules so fundamental that they can only be taken by parliament or by laying down legislative norms

[21] Ibidem, p.١٢.

[22] Eid Ahmed Al-Ghafoul, op. cit., p.١١١.

in such a general way or so vague that lead the executive authority responsible for applying them encroach on the domain of the law.

The Importance of Research:

The significance of our study is presenting comparative analysis of the constitutional control of negative incompetence of legislature of different countries to serve as guide for the Egyptian Supreme Constitutional Court to find out best judicial precedents in constitutional litigation to control and sanction defect of the legislature's negative lack of competence.

The Research Plan:

To achieve the goals of our research, I plan to divide it into four sections:

Section I. The identity of negative incompetence of legislature in constitutional disputes.

Section II. The negative incompetence of the legislature and consecration of legislative competence.

Section III. Negative incompetence, an instrument of sanction of violation the legislature's duty to achieve good enough legislation.

Section IV. Negative incompetence of the legislature and predictability of laws.

Section I. The identity of negative incompetence of legislature in constitutional disputes.

The term incompetence is strong: it is neither imprecision nor unintelligibility. It is not incongruous to recall that the case law of negative incompetence of the legislature is, above all, a sanction of ignorance of the distribution of powers as it is constitutionally established. The failure of the legislature must

be understood in a vertical logic of hierarchy of competence[23]. In France, article 34 of the French constitution empowers the legislature, in each area of competence (the status of persons, matrimonial regimes, labor law, criminal law, etc.), to adopt a certain type of standard: those which aim to establish rules or to determine fundamental principles. What is sanctioned is not the intervention of another authority in the area of competence of the legislature but the failure of the legislature in this process of concretizing the norms[24].

In France, the obligation placed on the legislature to completely exercise the competence devolved to it by the French Constitution, in particular in its article 34, under penalty, otherwise, of seeing sanctioned what is commonly called "negative incompetence", especially when we find ourselves in the field of rights and freedoms results from well-established case law forged since the end of the 1960s[25].

In Egypt, case law of the Egyptian Supreme Constitutional Court stated if the legislature deviates from its competence and entrusts the executive authority with determining matters fall within the scope of the specific competence of the legislative authority alone, the legislature would be abandoning its original competence stipulated in Article (101) of the Egyptian Constitution[26].

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[23] Rrapi Patricia, "Negative incompetence" in the QPC : from double negation to double incomprehension", *Les Nouveaux Cahiers du Conseil constitutionnel* (French law review), n°34, 2012/1, p. 163-171. DOI : 10.3917/nccc.034.0163. URL: https://www.cairn.info/revue-nouveaux-cahiers-conseil-constitutionnel-2012-1-page-163.htm

[24] Ibidem.

[25] Louis Favoreu, Jurisprudential of Constitutional Law, *Revue du droit public* (French law review), 1986, p. 391.

[26] Mohamed Wahid Abu Younis, op. cit., p.358.

In order to pinpoint of negative incompetence of legislature in constitutional disputes, I must throw light on:

Paragraph I. The original concept of negative incompetence.

Paragraph II. Identification of negative incompetence.

Paragraph III. The delimitation of negative incompetence.

Paragraph IV. The extent of the notion of negative incompetence before constitutional and administrative judges.

Paragraph V. Different forms of negative incompetence of the legislature before constitutional judges.

Paragraph I. The original concept of negative incompetence

We might as well say it bluntly: the expression "negative incompetence" is not very happy. The reason is simple: the adjective does not add precision to the noun, it contradicts it. When an act of an authority is said to be tainted by incompetence (quite simply), this means that the authority did not have the competence to take this act - that it was, literally, incompetent to take it[27]. But if we say of an authority that it is guilty of negative incompetence, we mean on the contrary that it remained "below the limits" of its competence in taking the decision in question. It also becomes difficult in this case to assert that the authority was incompetent, since what it is accused of is precisely not having fully exercised its competence. The obvious conclusion highlights the paradoxical nature of the expression considered: incompetence, if it is negative, is no longer, strictly speaking, incompetence. This apparent paradox

[27] Bruno Genevois, A false friend: the principle of parallelism of competences, in Melanges in honor of Daniel labetoulle, judging the administration, administering justice, Dalloz (French Edition), 1 May 2007, p.104.

is undoubtedly not unrelated, as we will see, with the doctrinal and even jurisprudential hesitations that this notion gives rise in administrative law[28]. And undoubtedly it would be necessary, for greater rigor, to speak of two symmetrical vices affecting the competence of the author of the act: the fact of exceeding his competence and the fact of ignoring his competence.

The expression “negative incompetence” retains from its birth from discipline of French administrative law[29], its general meaning – a refusal to exercise competence – accompanied by an (illegal) sub-delegation of competence, a meaning also recognized by French constitutional law, but it is from 1967 that "the negative incompetence of the legislature " acquires a more autonomous meaning in French constitutional law[30]: it is one of the two cases of control of the external constitutionality of a law exercised by the Constitutional Council whose role has (become) to guarantee the respect of the law with the block of constitutionality; it is also intrinsically linked to this particular act that is the Law, which is neither assimilable nor reducible to simple administrative acts and the defects of competence that administrative law organizes in their place; finally, it mainly overlaps with the relations between Parliament and the Government traditionally attracted to comments on constitutional law or political science[31].

[28] Aurélie Bretonneau, Incompetence in constitutional law. Negative incompetence, the “false friend” of the administrative judge, *Nouveaux Cahiers du Conseil constitutionnel* (French law review), n°46, January 2015 p. 23.

[29] Christian Debout, Public order means in contentious administrative procedure, Paris, University Press of France, 1980, p.44.

[30] French Constitutional Council, 67-31 DC, January 26, 1967, Official Journal of February 19, 1967, p.1793, online: https://www.conseil-constitutionnel.fr/decision/1967/6731DC.htm

[31] Louis Favoreu, Jurisprudential of Constitutional Law, op. cit., p.395.

But it is above all the legal attitude of the French Constitutional Council towards the question of the competence of the legislature which has given it its importance. The Council practices, based on requests from seizors or by referral, two kinds of examination of the competence or incompetence of Parliament: whether it can sanction the positive incompetence of the legislature when the intervention of Parliament occurs in a field which is not its own, it has above all developed the examination of the negative incompetence of the legislature, namely the "fact for the legislature of remaining below its competence". The two situations are different. With the negative incompetence of the legislature, what is in question is "the retention of competence of Parliament", not the extension of positive competence that it would have organized[32].

Constitutional jurists have unquestionably made the expression of "the negative incompetence of the legislature" one of the key notions of constitutional litigation. It must be said that "negative incompetence is one of the grounds of unconstitutionality of the law most often sanctioned by the French Constitutional Council". The Constitutional Council in France, since the 1967 in judgment *n° 67-31 DC* by which the Council has increasingly ensured that the legislator must exercises "the fullness of its powers" and does not abandon to other authorities, in particular the regulatory power, "the establishment of certain rules or statutes"[33]: laws are thus declared contrary to the Constitution which regulate a matter in an insufficiently precise manner, so that another authority will necessarily be required to replace the legislator

[32] Aurélie Bretonneau, op. cit., p. 24.

[33] Franck Claude, « Note sous décision n° 67-31 DC », Grandes Décisions de la Jurisprudence Constitutionnelle (French publishing house), 1984, n° s.n., p. 320-321

for this regulation. The Constitutional Council itself also uses the expression "negative incompetence" to name this head of unconstitutionality – and to date it remains the only jurisdiction to do so.

Paragraph II. Identification of negative incompetence

When the legislature commits negative incompetence, it gives up setting the rules and fundamental principles and allows, explicitly or implicitly, another authority to intervene in its place. For negative incompetence to be constituted in French constitutional disputes, it is therefore necessary, first of all, to interpret and delimit not only the material domain of the legislative norm, for example knowing whether it is an imposition of any kind covered by the article 34 of the French constitution, but also qualify the standard adopted, which can also provide information, sometimes very clearly, on the content of the rules or principles referred to in Article 34[34]. The reasoning should be identical regarding to priority question of constitutionality: French Constitutional Council specifies the scope of application of article 34 and the Council search if legislative provision does not sufficiently establish the rules or fundamental principles and only then questions whether the failure of the legislature affects, by itself, a right, a freedom or civil liberties[35].

The most obvious hypothesis of the failure of the legislature in this process of concretization is that of the reference (*le renvoi*) or delegation, in particular to the regulatory power: the law entrusts to the regulation the task of intervening to concretize the rules or the fundamental principles of a matter, and for that this law commits negative incompetence. In this case, it is not the referral (*le*

[34] Ariane Vidal-Naquet - Ilf-Gerjc., Incompetence in constitutional law, op. cit., p.١3.

[35] Ibidem.

renvoi) or delegation, in itself, which is censored, but rather the referral or delegation which has the consequence of conferring on a third party the possibility of intervening in place of the legislature. The referral or delegation can also be made for the benefit of the social partners: despite the provisions of the eighth paragraph of the Preamble of the French Constitution 1946, the legislature commits negative incompetence by entrusting them with the determination of the basic or fundamental principles of labor law. On the other hand, the reference or delegation to the jurisdictional authorities is harder to conceive, because these jurisdictional authorities, whatever the extent of their power of appreciation and interpretation, can only with difficulty replace the legislature in defining the rules and principles covered by article 34 of the French constitution[36]. It is also possible to distinguish between explicit references or delegation and implicit references or delegation, between partial references or delegation and absolute references or delegation, in which it is the omission of the legislature which is sanctioned. This hypothesis makes it possible to underline that what is censored is not the reference or delegation in itself, but the fact that the legislature itself did not establish the rules and fundamental principles.

It is also necessary to distinguish the cases in which the reference or delegation made by the legislature does not confer on a third party the power to set the rules or fundamental principles, but simply entrusts to another authority, administrative, jurisdictional or even private law, a power of decision[37]. In this hypothesis, the legislature can entirely play its role in the

[36] Patricia Rrapi, op. cit., p. 166.

[37] Abdul Hafeez Ali Al-Shaimi, Supervision of legislative omissions in the judiciary of the Supreme Constitutional Court: A Comparative Study, Cairo, Dar Al-Nahda Al-Arabiya, 200٣, p. 13.

process of concretizing the norm, that is to say, set the rules or determine the fundamental principles, and therefore legislature does not commit negative incompetence in *stricto sensu*, while conferring on this authority a power of appreciation which is not sufficiently regulated, or which is arbitrary. This type of referral could then be censored not on the basis of negative incompetence, but rather on the basis of indeterminacy of the law (*grief d'indétermination de la loi*)[38].

Paragraph III. The delimitation of negative incompetence

Negative incompetence, deprivation of legal guarantees, unintelligibility, indeterminacy. According to precedents of French constitutional judge, the effort of clarification should make it possible to better distinguish between these case laws.

Negative incompetence must be distinguished from cases in which the legislature has deprived legal guarantees of constitutional requirements. Indeed, this control assumes that the legislature has actually intervened in its area of competence, that it has effectively defined the rules and fundamental principles but that the level of protection granted to the rights and freedoms in question is insufficient[39]. Here, the question of whether or not the insufficiency of the legislature allows the interference of other normative authorities, in particular that of the regulatory power, is irrelevant. The dissociation of controls is highlighted by certain judgements in which the Constitutional Council successively checks whether the law is tainted by

[38] Ibidem.

[39] Gregory Mollion, op. cit., p.271.

negative incompetence, then whether it has not deprived legal guarantees of constitutional requirements[40]. This is the case of judgement *93-322 DC* in which the French Constitutional Council considers by authorizing the regulatory power or existing public establishments of a scientific, cultural and professional nature to deviate from the constitutive rules it has established and the ministerial authority to oppose or put an end to such derogations, the legislature has disregarded the power it derives from article 34 of the Constitution in the creation of categories of public establishments and has not provided legal guarantees for the constitutional principles of the freedom and independence of lecturer-researchers[41].

The fact remains that, in certain recent judgements of French Constitutional Council, it is still the negative incompetence committed by the legislature which deprives constitutional requirements of legal guarantees. Thus, in its judgement *2014-393 QPC*, the Constitutional Council considers that the legislature's lack of recognition of its own competence can only be invoked in support of a priority question of constitutionality in the case where this lack of recognition in itself affects a right or freedom that the Constitution guarantees[42.] In another judgement 2013-367 QPC, the Constitutional Council considers that by virtue of the eleventh paragraph of the preamble to the Constitution of 1946, the Nation guarantees to all the right to health protection; that article 34 of the Constitution provides that the law establishes the rules concerning the fundamental guarantees granted to citizens for the

[40] Xavier Philippe, "[Note under decision no. 93-322 DC]", French Review of Constitutional Law, October-December 1993, n° 16, p. 830.

[41] French Constitutional Council, 93-322 DC, July 28, 1993, Official Journal of July 30, 1993, p.10750.

[42] French Constitutional Council, 2014-393 QPC, April 25, 2014, Official Journal of April 27, 2014, p.7362.

exercise of public freedoms; that it is at any time open to the legislature, ruling in the field of its competence, to adopt new provisions, the appropriateness of which it is up to legislator to assess, and to modify previous texts or to repeal them by replacing them with other provisions, provided that, in the exercise of this power, it does not deprive legal guarantees of constitutional requirements[43].

Negative incompetence should also be distinguishable from ignorance of the objective of constitutional value of accessibility and intelligibility of the law, which is primarily concerned with the drafting qualities of the law and aims for minimal comprehensibility for citizens. The objective of constitutional value of accessibility and intelligibility of the law which it bases on articles 4, 5, 6 and 16 of the Declaration of 1789 whose aim is to protect subjects of law against an interpretation contrary to the Constitution or against the risk of arbitrariness, without deferring to administrative or jurisdictional authorities the task of setting rules whose determination has been entrusted by the Constitution only to the law[44]. Clarity and intelligibility constitute two distinct notions whose foundation and nature differ. The first is a principle linked to the competence of the legislator while the second: a law could be clear while being unnecessarily unintelligible. Thus, we can definitely conclude, in the matter of ignorance of the objective of constitutional value of accessibility and intelligibility of the law, the legislature intervened to set the rules and

[43] French Constitutional Council, 2013-367 QPC of February 14, 2014, Official Journal of February 16, 2014, p.2726.

[44] French Constitutional Council, 2005-514 DC, April 28, 2005, Official Journal of May 4, 2005, p.7702.

determine the fundamental principles, but it was unable to give the legislative provisions sufficient clarity[45].

Negative incompetence should also be able to be distinguished from cases in which the legislature has actually intervened in accordance with the distribution of powers operated by article 34 of French the Constitution, but the legislative provisions adopted, by their indeterminacy, allow an arbitrary application of the law and/or contrary to the principle of equality[46].

The control of the predetermination of the use of the text by the authorities in charge of applying the law can be emancipated from the jurisprudence of the negative incompetence. This control, already largely germinated in the jurisprudence of the French Constitutional Council, would also explain the cases in which the reference (*le renvoi*) to the future legislature is censored. Because the basis of censorship is not referral (*le renvoi*), but carte blanche issued to law enforcement authorities pending the intervention of future laws.
The Constitutional Council in its judgement *2004-499 DC*, quite clearly confirms this analysis[47]. In this judgement, the Constitutional Council considers that paragraph 3 of article 9 of the law of 6 January 1978 could allow a legal person under private law, mandated by several other legal persons who are victims of criminal offences - or who consider that they were victims or who think they might be victims - to gather a large amount of personal information relating to offences, convictions and security measures.

[45] Ibidem.

[46] Franck Miatti, op. cit., p. 11.

[47] French Constitutional Council, 2004-499 DC, July 29, 2004, Official Journal of August 7, 2004, p.14087.

It was likely to affect, by its consequences, the right to privacy and the fundamental guarantees granted to citizens for the exercise of public freedoms. It must therefore include appropriate and specific guarantees that meet the requirements of article 34 of French the Constitution. As regards the purpose and conditions of the mandate in question, paragraph 3 of article 9 of the law of 6 January 1978 does not provide those clarifications. It is ambiguous as to the offences to which the term "fraud" applies. It leaves open the question of whether the data processed could be shared or transferred, or whether there could be people on whom the mere fear of being able to commit an offence. It does not say anything about the limits that may be assigned to the retention of the statements relating to convictions. With regard to article 34 of French Constitution, all these clarifications cannot be provided only by the authorizations issued by the National Commission of Informatics and Freedoms. In the present case and having regard to the matter concerned, the legislature could not be satisfied either, as provided for by the provision criticized enlightened by parliamentary debates, to lay down a rule of principle and to refer its application in its entirety to future laws. Consequently, 3° of the new article 9 of the law of 6 January 1978 is vitiated by negative incompetence[48].

Paragraph IV. The extent of the notion of negative incompetence before constitutional and administrative judges

The notion of “negative incompetence” in fact not specific to French constitutional litigation: it was borrowed from French administrative litigation - and as is often the case in this matter, we owe it to the Treatise on

[48] Ibidem.

Administrative Jurisdiction and Contentious Appeals by *Édouard Laferrière*[49]. The first author to have highlighted the notion of negative incompetence is *Édouard Laferrière* by opposing it to positive incompetence. In its original meaning, negative incompetence was intended to censor refusals to exercise their powers by authorities wrongly alleging this same incompetence. In this matter, *Édouard Laferrière* declares at the end of his presentation of the different forms of incompetence, concludes by stating the first definition of negative incompetence: it is the case "where an authority, instead of crossing the limits of its competence, remains below, and refuses to carry out an act within its competence by declaring that it does not have the capacity to carry it out and added : "it constitutes the case of negative incompetence, as opposed to positive incompetence". In terms of formal definition, these are two strictly antagonistic notions. In fact, we qualify positive incompetence as characterizing any decision which emanates from an authority which did not have the legal competence to be able to take it. Therefore, within the framework of this incompetence, the authority which issues the act necessarily encroaches on the powers of another authority.

We can now wonder whether, from a comparative perspective, the *Édouard Laferrière* analysis can be integrated into the approach followed by the French Constitutional Council regarding the notions of negative incompetence and positive incompetence of the legislature?

Initially, the evolution of the Constitutional Council's jurisprudence seemed to opt for a firm attitude. On various occasions, the Constitutional Council accepted, based on article 61-2 of the Constitution to examine the argument

[49] Édouard Laferrière, *Traité de la juridiction administrative et des recours contentieux*, Berger-Levrault et Cie, edition 2, volume 2, 1888, p. 491.

based on Parliament's ignorance of the competence initially reserved for the regulatory power[50]. As an example, we can cite the judgment of 18 December 1964, where after having examined the merits of the argument based on the legislator's ignorance of the regulatory field, the Council annulled the legislative provision in question, considered to be non-compliant with article 34 of the French constitution[51]. In the same way, in the judgment *of July 27, 1978*, the applicants invoked, against the law in question, the violation by the legislator of the competence reserved to the Government, under article 21 of the Constitution. The constitutional judge, just as in the case previously mentioned, agreeing to examine the merits of the plea declares: "considering that by adopting this text the legislator disregarded the provisions of article 21 of the Constitution relating to the execution laws and the exercise of regulatory power[52].

At this precise point in the analysis, one could obviously consider that the Constitutional Council sanctions positive incompetence and negative incompetence in the same way and with the same rigor. So, we can conclude that from a comparative perspective, the *Édouard Laferrière* analysis can be integrated into the approach followed by the Constitutional Council. However, the Council would seem to have made a reversal of its traditional jurisprudence in the matter. In its judgment of *July 30, 1982, «Blocage des prix et des revenus »*, the Constitutional Council admitted that it was not

[50] Luchaire François, The sources of legislative and regulatory powers, Actualité juridique du droit administratif (French law review), 1979, p. 6.

[51] French Constitutional Council, 64-27 DC, December 18, 1964, Official Journal of December 24, 1964, p.11593.

[52] French Constitutional Council, 78-97 DC, July 27, 1978, Official Journal of July 29, 1978, p.2949.

possible, in the framework of the procedure for controlling the constitutionality of article 61, to censure the encroachment of the legislator on the domain of the regulation[53].

The refusal of the constitutional judge to censor a legislative provision which would encroach on the regulatory domain has various consequences, some of which are in the direction of a fragmentation of the notion of negative incompetence and the diversity of forms of incompetence. While the legislature cannot improperly subdelegate the powers it holds from the Constitution, through this case law, Parliament can, despite its conferred jurisdiction, enter the regulatory domain with complete impunity[54].

After these developments, it seems possible to answer the question initially asked, by offering a categorical denial of the comments made by *Édouard Laferrière*. Indeed, if this analysis by the eminent *Édouard Laferrière* retains all its relevance in administrative litigation, it cannot in any way be accepted in constitutional litigation.

Following *Édouard Laferrière*, it would seem that administrative jurisprudence as a whole has imposed an expansion of the framework established by *Laferrière*. The administrative judge, for his part, extended the notion of negative incompetence and brought into the original concept a multitude of hypotheses[55]:

[53] French Constitutional Council, 82-143 DC, July 30, 1982, Official Journal of July 31, 1982, p.2470.

[54] Terneyre Philippe, The ordinary legislative procedure in the jurisprudence of the Constitutional Council, Revue du droit public (French law review), 1985, p. 691.

[55] Aurélie Bretonneau, op. cit., p.26.

The first hypothesis can be cited in this respect, the case in which the administrative authority declines its competence by subordinating its decision to the intervention of other organizations without authority to participate in the taking of the act, or by binding itself in advance following the result of a municipal referendum.

The second hypothesis corresponds to matters of opinion (*en matière d'avis*); the competent authority may wrongly consider itself bound by the opinion of an advisory body which it was not obliged to follow. In doing so, the competent authority allows advisory body to make the decision in its place, and it is for this reason that this imaginary and abusive linked competence is linked to the defects of incompetence[56] (for example when the Minister of Justice had voluntarily linked his discretion in matters of discipline of public prosecutors to that of the Superior Council of the Judiciary[57]).

The third hypothesis corresponds to the so-called case where the notion of negative incompetence has again been recognized, in the face of a refusal to rule by the administrative authority even though it was required to take the action requested of it[58].

The fourth hypothesis corresponds to the fact that the notion of negative incompetence can come into play in the case of linked competence. The Council of State applies the illegal sub-delegation of competence when the competent authority takes an act whereas in this case, it had a discretionary

[56] Ibidem.

[57] Conseil d'État, (French : Council Of State), June 20, 2003, M. Stilinovic, N° 248242, Actualité Juridique Du Droit Administratif (French Law Review), 2003, P. 1334.

[58] Schmitter Georges, Op. Cit., p. 41.

power allowing it to reject the request of the citizen on its merits. The Council of State also applies illegal sub-delegation, by which the competent authority expressly transfers its decision-making power to a lower authority, and without respecting the necessary formalities[59].

After having successively examined the attitude of administrative jurisprudence in France, it seems to emerge from this examination that for the administrative judge, negative incompetence is understood more broadly than it can be for the Constitutional Council. Indeed, the Constitutional Council seeks more frequently than the Council of State seems to do to respect the will of Parliament through the conciliation of often competing principles. The constitutional judge does not, it seems, require that the legislator use its full competence. In most cases, the Constitutional Council is led to annul the contested provision because, according to it, Parliament must not abandon the determination of rules to the discretionary power of the government[60]. In other cases, what the legislature is criticized for is the absence of details of the rule laid down allowing the administrative authority to choose this or that interpretation according to its discretion[61]. We can state lastly, each time the legislature is too laconic or imprecise to "exhaust its competence", thus leaving the regulatory power of the government the opportunity to investigate a field which is normally closed to it by the Constitution[62].

[59] Aurélie Bretonneau, Op. Cit., P.26.

[60] French Constitutional Council, 83-162 DC, 20 July 1983, Official Journal of 22 July 1983, p.2267.

[61] French Constitutional Council, 85-191 DC, 10 July 1985, Official Journal of 12 July 1985, p.7888.

[62] French Constitutional Council, 64-27 DC, op. cit., p.11593.

Paragraph V. Different forms of negative incompetence of the legislature before constitutional judges

For some jurists, there are two forms of negative incompetence of the legislature, implicit references to regulatory power and explicit references, in which it is in reality the abstention of the legislator which is sanctioned.

For other jurists in France, negative incompetence has two variants: a hypothesis of general application, namely the sanction of delegations of powers carried out outside the framework of article 38C French constitution and a particular hypothesis, that of the deprivation of guarantees legal constitutional requirements[63].

Many other jurists consider two "moments" of negative incompetence could also be discerned: one at the stage of drafting the law, the legislator having remained below its competence, the other at the stage of application of the law[64].

In Egypt, some jurists[65] declare that when the constitution assigns the organization of a right to the legislative authority. In this case, the legislature must undertake the organization of this subject by issuing legislation that regulates this right directly, or at least undertakes the regulation of its general frameworks, broad outlines, and main elements. If the legislative authority does not undertake this regulation and refers or delegates it entirely to the executive authority, then this is considered usurpation of the legislature's

[63] Valérie Goesel-Le Bihan, Constitutional litigation, Ellipses, Publisher : Ellipses; Collection: Cours magistral, 2010, p. 160.

[64] Ariane Vidal-Naquet - Ilf-Gerjc., Incompetence in constitutional law, op. cit., p.11.

[65] Dr. Ahmed Kamal Abu Al-Majd, The Role of the Supreme Constitutional Court in the Political and Legal Systems in Egypt, research published in the Constitutional Journal, Issue One, Year One, 2003, p.106.

competence that the constitution entrusts the legislative authority to exercise. This is something completely different from the idea of legislative omission, in which the legislator undertakes the regulation of the subject, but its regulation is deficient and incomplete in its aspects. To clarify the idea of the legislator's negative lack of competence, the Supreme Constitutional Court in Case number 243 on November 2000[66] stated that freedom of movement is included in the ranks of public freedoms, and restricting it without a legitimate reason strips personal freedom of some of its characteristics and undermines its sound structure; and the Constitution has entrusted this text to the legislative authority alone to assess this requirement, and it is necessary that the determination of the conditions for issuing a travel document be in the hands of this authority, and the basis thereof is granting, in keeping with the principle of freedom of movement; and the exception is prevention; and the prevention of movement is only possessed by a judge, or a member of the Public Prosecution, to whom the law entrusts this without interference from the executive authority.

Whereas the Constitution has also celebrated the rights related to the right to movement, it stipulated in Article (50) thereof the prohibition of obligating a citizen to reside in a specific place or preventing him from residing in a specific area except in the cases specified by law, and Article (51) followed it to prevent the citizen from being deported from the country or being deprived of returning to it, and Article (52) came to confirm the citizen’s right to permanent or temporary immigration on That the law regulates this right and the procedures and conditions for immigration and leaving the country; and

[66] Egyptian Supreme Constitutional Court, Case No. 243 of the 21st Judicial Year “Constitutional” in the session of 11/4/2000, online: http://sub.eastlaws.com/GeneralSearch/Home/articlesA/4824

the consequence of this is that the constitution did not grant the executive authority any competence to regulate anything that affects the rights guaranteed by the constitution above, and that this regulation must be undertaken by the legislative authority through the laws it issues. Whenever that is the case, and the ruling of this court has been that if the constitution assigns the regulation of a right to the legislative authority, it is not permissible for it to deprive it of its competence and delegate the entire matter to the executive authority without restricting it in that with general controls and main foundations within which it is obligated to work, so if the legislator deviates from that and entrusts the executive authority with regulating the right from its foundation, he would have abandoned its original competence stipulated in Article (86) of the constitution, and thus falls into the abyss of constitutional violation[67].

Case law relating to the negative incompetence of the legislature can be presented by major areas of intervention by Parliament. Two areas of intervention emerge. The negative incompetence of the legislature has often been noted in matters of economic law, giving rise of constitutional judgments relating to the right to public property, the regime of civil and commercial obligations and the law relating to the security and transparency of the financial market[68].

The negative incompetence of the legislature is also noted in matters of taxation, where the legislature is sanctioned for not having sufficiently exercised its tax jurisdiction in terms of determining the tax base, in terms of

[67] Ibidem.

[68] Didier Ribes, Is there a right to the norm? Control of constitutionality and legislative omission, the Belgian Review of Constitutional Law, 1999, p. 237.

tax recovery methods, and is regularly monitored by referrals to finance and social security financing laws.

In Egypt, in the field of distinguishing between taxes and other financial obligations. The Egyptian Constitution distinguishes between the general tax and other financial obligations[69], stipulating that the general tax : may not be imposed, amended or cancelled except by law, and that other financial obligations: may be established within the limits specified by law; and this meant that the legislative authority is the one that holds the reins of the general tax in its hand, as it undertakes to regulate its conditions by a law issued by it that includes determining its scope, especially by specifying its base and the bases for its assessment, stating its amount, those originally obligated to pay it and those responsible for it, the rules for its connection, collection and deposit, how to pay it and other things related to the structure of this tax, except for exemption from it, as it may be decided in the cases specified by law[70].

The Egyptian Supreme Constitutional Court addressed the issue of the rules and procedures for collecting fees in the current Egyptian Constitution, when it addressed the prescribed cleaning fees, as it ruled that the text of the fourth paragraph of Article (8) of Law No. 38 of 1967 regarding public cleaning, as amended by Law No. 10 of 2005, is unconstitutional, in what it included regarding the text of delegating the competent governor to determine the

[69] Egyptian Supreme Constitutional Court, Case No. 160 of the 36th Judicial Year "Constitutional" in the session of 12/3/2016.

[70] Counselor Dr. Tariq Abdel Qader, Principles Governing Financial Obligations in the Judiciary of the Supreme Constitutional Court, February 21, 2024, online : https://manshurat.org/content/lmbdy-lhkm-llfryd-lmly-fy-qd-lmhkm-ldstwry-lly

procedures for collecting cleaning fees due to the defect of the legislator's negative lack of competence[71].

The Egyptian Supreme Constitutional Court has based its judgment on the fact that "the constitution took a middle path regarding fees that are compulsorily collected in exchange for a specific service provided by the public person to whoever requests it in exchange for its cost, even if not in its amount, and allowed the legislative authority to delegate the executive authority to organize its conditions, but it did not want this delegation to be absolute, but rather restricted by the restrictions specified by the constitution itself, most notably that it be within the limits of the law, meaning that the law defines its borders and boundaries and indicates its features, clarifying the broad aspects of its affairs, so it does not encompass it in all its details, but rather the delegation of the executive authority is to complete what is missing from its aspects, The law is the one that must determine the type of service for which the fee is collected, and its maximum limits that may not be exceeded, by specifying limits for it, so that the executive authority does not monopolize these matters, contrary to what the constitution requires, that its authorization to impose these fees be "within the limits of the law," and the restrictions imposed by the constitution, that its authorization to the executive authority, regarding financial obligations other than the general tax, be consistent with these obligations being a source of state revenues, and a means of its intervention in economic and social guidance, confirming the provision of equal opportunities to obtain public services provided by the state, and so that fees are not merely a means of collection, not matched by real services obtained by those who pay them, and all of this cannot be achieved except

[71] Egyptian Supreme Constitutional Court, Case No. 95 of the 30th Judicial Year "Constitutional", in the session of 8/1/2017.

through a balanced approach by the legislator. This court also ruled that the legislative authority may not, in exercising its powers in the field of enacting laws, relinquish them by itself, in neglect of the text of Article (86) of the 1971 Constitution, corresponding to Article (101) of the 2014 Constitution, which originally entrusted it with legislative tasks, and the executive authority is not authorized to exercise them except as an exception, and within the narrow limits specified exclusively by the texts of the Constitution, and which includes issuing the necessary regulations to implement the laws, and which does not include its initial undertaking to organize matters other than the law, from stating the general framework that governs them, so the regulation does not then detail the provisions that the legislator included in general, but it is legislated initially through new texts that cannot be attributed to the law, and with them the regulation goes beyond the limits set by Article (144) of the 1971 Constitution, which corresponds to Article (170) of Egypt's Constitution of 2014.

Whereas the Egyptian Constitution, taking into account the importance of the role played by public funds, the necessity of providing protection for them, and controlling the rules governing their collection and disbursement, has made the law the tool for organizing the basic rules for collecting these funds and the procedures for disbursing them, which is what Article (120) of the 1971 Constitution stipulated, and was repeated by Article (126) of the current Constitution (2014 Constitution), which was emphasized by Article (38) of this constitution with regard to taxes and fees, stating that "..... The law shall determine the methods and tools for collecting taxes and fees.....", considering them public funds, one of the important and main sources of state revenues, and a basic tributary of the state's general budget, which enables it to carry out the tasks assigned to it by the Constitution, which means that the legislative authority itself must determine the methods and tools for collecting

fees, and therefore it may not delegate to the executive authority the organization of the means and tools by which these fees are collected, but it must itself organize its conditions by law, considering it the tool designated by the Constitution for that, otherwise it will fall into the realm of violating the provisions of The Constitution[72].

The text of the fourth paragraph of Article (8) of Law No. 38 of 1967 amended by Law No. 10 of 2005, had authorized the competent governor to determine the procedures for collecting the cleaning fee, including determining the methods and tools for that, while all of these matters fall within the scope of the specific competence of the legislative authority alone, which constitutes a deprivation of its competence stipulated in accordance with the provisions of the Constitution (usurpation of the legislature's competence that the constitution entrusts the legislative authority to exercise), and this constitutional violation is not lifted by requiring the approval of the local popular council of the governorate, or taking the opinion of the local popular council of the relevant local unit, and thus this text falls in violation of the texts of Articles (86, 119, 120) of the 1971 Constitution, and corresponding to Articles (38, 101, 126) of the current constitution[73].

In the field of protection of fundamental rights then, the negative incompetence of the legislature finds a privileged ground to develop. It is a means for the constitutional judges to protect public persons such as local authorities, as well as individual private persons, from attacks on their rights. All laws which likely reduce the level of protection of fundamental rights because they include references affect public freedoms, offenses, procedures,

[72] Counselor Dr. Tariq Abdel Qader, loc.cit.

[73] Ibidem.

they are referred to the Constitutional judges, controlled through method of negative incompetence and then modified regarding illegal provisions[74].

[74] Jordane Arlettaz, op. cit., p.63.

Section II. The negative incompetence of the legislature and consecration of legislative competence

Although it is difficult to evoke an autonomous jurisprudence, since the question of negative incompetence is often mixed with other points and ideas in constitutional judgments, the construction of a constitutional jurisprudence of the negative incompetence of the legislature remains linked to the question of the defense of the competence of the legislature[75].

The negative incompetence of the legislature is means to constitutional judge to defend the reserved domain of the legislature (Paragraph I).
The negative incompetence of the legislature also is means to control over the transfer of legislative competence to the government which is the essential line of defense of legislative competence (Paragraph II).

Paragraph I. The negative incompetence of the legislature as means of defense the competence of the law

French constitutional jurisprudence extends the reserved domain of the law, an area whose definition is not exhausted by the enumeration contained in article 34 but is supplemented by successive constitutional judgments.

The negative incompetence of the legislature is the very incarnation of the way in which the French Constitutional Council uses the freedom of the ancients to protect the freedom of the Moderns[76]: it demands that the

[75] Rrapi Patricia, op. cit., p. 173.

[76] Constant Benjamin, Political Writings. Edition by Marcel Gauchet., Paris, Gallimard, 1997 [1819], p. 624: The notions of freedom of the Ancients and freedom of the Moderns

parliamentary institution itself proves itself worthy of the trust that is supposed to be instilled by suffrage in representative democracy, in accordance with the inspiration of the Declaration of 1789[77].

"The law is the expression of the general will. All Citizens have the right to contribute personally, or through their representatives, to its formation. It must be the same for all, whether it protects or punishes...." solemnly states article 6 of the Declaration of 1789. Like the other articles of the Declaration, it will be implemented by article 34 of the Constitution, as the French Constitutional Council persistently repeats. Law is a general and impersonal norm, implies respect for the equality of citizens who reciprocally participate in its development[78]. The original conception of the reserved domain of the law (*notion de réserve de loi*) is eminently democratic: it was proposed to determine the function of law in relation to the democratic character of the State. In this logic, it seems normal to entrust political decisions of

come from the work of Benjamin Constant, and in particular from his speech delivered at the Royal Athenaeum in 1819: On the freedom of the Ancients compared to that of the Moderns. The freedom of the Ancients is that which prevailed in ancient Greece, it is the right of citizens to participate in the political life of the Nation and, updated, the legitimacy of the intervention of national representation in the civil and private sphere. The freedom of the Moderns would conversely suppose the preservation of a private area for the individual in which he must be left alone. It therefore implies what we call "negative freedoms", although the term can be the subject of discussion regarding the work of the Swiss author. Indeed, the rights-liberties of the freedom of the Moderns are the condition for a sincere exercise of the freedom of the Ancients in liberal democracy.

[77] Anceau Éric, Bertran De Balanda Flavien, « Anciens et Modernes : de la liberté selon Benjamin Constant », Commentaire, 2021/4 (Numéro 176), p. 837. DOI : 10.3917/comm.176.0837. URL : https://www.cairn.info/revue-commentaire-2021-4-page-837.htm

[78] Ibidem.

fundamental importance to parliament as holder of popular sovereignty[79]. Certainly, the Government, in parliamentary democracy, is not devoid of legitimacy since it necessarily has the confidence of the representative assembly, but this legitimacy is only indirect, which convinces us to entrust essential choices to national representation. But there is also a second argument: the publicity of the decision-making procedure within the legislative framework. We can thus see opposites: on the one hand a procedure based on a public debate and on the other hand a secret enactment within the regulatory framework[80]. Finally, it is argued that the law would offer better protection because of its better ability to be known by those administered and its greater precision. For Constitutional Council, the argument is really held which would be the justification for resorting to the negative incompetence of the legislature in the context of the a *posteriori* control[81].

In reality, the Constitutional Council, through recourse to negative incompetence, seeks to link the freedom of the Ancients and the freedom of the Moderns so that it is through the will – sincere or dictated by the judge – of their elected officials that citizens see their freedoms protected.

In Egypt, the declare the unconstitutionality of norms by Egyptian Supreme Constitutional Court due to the negative incompetence of the legislature is means to constitutional judge to defend the reserved domain of law, that the Egyptian Constitution prescribes exclusive competence for the organization of

[79] Jérôme Tremeau, The reserve of law, Legislative competence and Constitution, Doctoral thesis, Under the direction of Louis Favoreu, University of Aix-Marseille, Economica, 1997, p.42.

[80] Ibidem., p 40.

[81] Rrapi Patricia, op. cit., p. 170.

such norms to the legislative authority[82]. The Egyptian Supreme Constitutional Court on January 14, 2023[83] issued judgment ruled that the granting of the Board of Directors of the Egyptian Olympic Committee the authority to issue the statutes of the Egyptian Sports Settlement and Arbitration Center is unconstitutional due to the defect of the legislator's negative lack of competence. The Egyptian Supreme Constitutional Court based its judgment on the fact that Article 84 of the Constitution maintained that the legislator alone without delegation to the Egyptian Olympic Committee should have directly regulated the affairs of sports and how to resolve sports disputes. The Egyptian Supreme Constitutional Court's judgment stated that Article (84) of the Constitution stipulates that "practicing sports is a right for all, and state and community institutions shall discover and sponsor talented athletes and take the necessary measures to encourage the practice of sports. The law shall regulate the affairs of sports and private sports bodies in accordance with international standards, and the method of resolving sports disputes". Whereas the origin of arbitration, according to case law (precedents) of this court, is that it is a technical means of a judicial nature, the purpose of which is to resolve a specific dispute, based on a relationship of interest to both parties, and its foundation is an agreement between disputing parties to submit their disputes to an arbitrator from outside, appointed by their choice, or by their authorization, or in light of conditions they specify. The arbitrator derives his authority from this agreement to resolve that dispute with a decision that is far from any

[82] Dr. Ragheb Gabriel Khamis Ragheb Sakran, The Conflict between Individual Freedom and State Authority, Modern University Office, Alexandria, 2009, p.57.

[83] Egyptian Supreme Constitutional Court, Case No. 61 of the 42nd Judicial Constitutional Year Constitutional", in the session of 1/14/2023, online: sccourt.gov.eg/SCC/faces/Rules_Html/13135_42_61_1_2.html?timestamp=1695750992328

semblance of collusion, devoid of prejudice, and decisive to the root of the dispute that the two parties referred to him, after each of them has stated his point of view in detail through the main litigation guarantees. Thus, arbitration is a free and optional act, and by the will of its parties, it is considered an alternative mechanism to the judiciary, and they cannot come together; since its requirement is to isolate all courts from considering the issues that it focuses on, as an exception to the principle of their subjection to its jurisdiction, although this should not affect the basic guarantees in litigation.

When constitution in Article (84) thereof has entrusted the legislature with organizing the affairs of sports and civil sports bodies in accordance with international norms or standards, and in conjunction with this provision, the legislature is authorized to organize how to resolve sports disputes, and international norms and standards in the sports field adopt arbitration as a means to settle these disputes, then the implication of this is that the legislator's adoption, in Chapter Seven of New Egyptian Sports Law no. 71 of 2017 on 31 May 2017, of the principle of sports arbitration - in itself - as a tool for settling sports disputes is consistent with international standards, provided that this arbitration does not differ, from the procedural and substantive aspects, from other types of arbitration[84].

Whereas the case law (precedents) of this court has been that if the constitution assigns the organization of a right to the legislative authority, it is not permissible to the legislature to deprive itself of its competence and refer or delegate the entire matter to the executive authority without restricting it in this regard to general controls and main foundations within which it is obligated to work. If the legislature deviates from this and entrusts the

[84] Ibidem.

executive authority with the organization of the right from its foundation, the legislative authority has relinquished its original competence stipulated in Article (101) of the constitution (due to defect of the legislature's negative lack of competence), and thus falls into the realm of constitutional violation.

The Egyptian Supreme Constitutional Court's judgment concluded whereas Article (69) of Egyptian Sports Law no. 71 of 2017 on 31 May 2017, in what it included of delegating and authorizing the Board of Directors of the Egyptian Olympic Committee to issue the statutes of the Egyptian Sports Settlement and Arbitration Center, regulating the rules and procedures of mediation, conciliation and arbitration, is merely a deprivation of the legislature from organizing how to resolve sports disputes, which the Constitution entrusted to legislative authority and exclusively allocated to parliament, it was necessary for the legislature to organize this matter, and establish the rules for settling sports disputes from the procedural and substantive aspects, without delegating others to organize this or any part of it, since this organization includes in its procedural and substantive aspects the means of judicial satisfaction that are appropriate for this type of dispute, and is closely related to the right to litigation effectively, which is one of the rights whose organization must always be the exclusive competence of the legislature, and no one else, and if the legislative authority deprived from regulating rules for settling sports disputes, (both procedurally and substantively), its deprivation is in violation of Articles (84 and 101) of the Constitution (due to defect of the legislature's negative lack of competence), which requires, in this case, to rule that it is unconstitutional Article (69) of Egyptian Sports Law no. 71 of 2017 on 31 May 2017[85].

[85] Ibidem.

The negative incompetence of the legislature presupposes that there is a competence of the legislature, that the Constitution or the block of constitutionality prescribes a competence of the French parliament[86]. Based on various provisions, section 34 of the constitutional text of course, or articles 61 paragraphs 1 and 2, 64, 72, 73, 74 for example, but also articles 3, 4, 11, 16 of the Declaration of the Rights of Man and the Citizen of 1789, the French Constitutional Council largely interprets this competence, it recalls and reinforces it while it does not always appear explicitly[87]. In the absence of a direct textual prescription of the legislative competence, it is sufficient a possibility of linking the measure, rule, or decision of an authority, an article of the Constitution providing for the competence of Parliament or a rule of constitutional value, so that the French Constitutional Council recalls the competence of the legislature. The bond of attachment is forbidden, even if it is loose. Thus, in terms of the date of entry into force of tax provisions, case law (Stare decisis) criticizes laws which leave it to the regulatory power to set the date of entry into force of a tax provision, without setting a limit; the French Constitutional Council appeals to article 34[88], but this point of the entry into force of a provision tax is linked more to the traditional legislative competence in tax matters (important powers of the legislature), than by reference to the provisions of article 34 on the base, the rate, the methods of recovery of the tax. The French Constitutional Council also uses, if necessary, a double connection, to say that the measure in question falls within legislative competence on two counts. The text of the Declaration of the

[86] Alf Ross, Delegation of power. Meaning and validity of the maxim delegata potestas non potest delegari, French review of legal culture, 1997, p. 99.

[87] Jérôme Tremeau, op. cit., p. 52.

[88] French Constitutional Council, 86-223 DC, 29 December 1986, Official Journal of 30 December 1986, p.15802.

Rights of Man and of the Citizen becomes a source from which the Council extracts new foundations of legislative competence. The French Constitutional Council contributes to defining a quantitative content of legislative competence. There is also a qualitative content of legislative competence which the French Constitutional Council also seems to be tackling[89].

The use of negative incompetence allows the French Constitutional Council to refer the law to a democratic debate which must guarantee the enactment of a standard respectful of individual rights after the defense of the interests of each citizen by the different political forces[90]. The use of negative incompetence therefore allows not only for the law to be the expression of the general will, but also to protect the requirements relating to the freedom of individuals. This justification for referring to the democratic debate supposed to allow the protection of individual rights is certainly not without influence on the acceptance of the use of negative incompetence in a posteriori control: would fall within the rights and freedoms that the Constitution guarantees that, for the litigant, to see the standard that we want to apply to him promulgated in a democratic manner, that is to say at the end of a debate likely to take into account all the interests present[91].

[89] French Constitutional Council, 90-277 DC, 25 July 1990, Official Journal of 27 July 1990, p.9021.

[90] Anceau Éric, Bertran De Balanda Flavien, op. cit., p.840.

[91] Jérôme Tremeau, op. cit., p. 58.

Paragraph II. Negative incompetence of the legislature and clarification of the distribution of powers

It is the control over the transfer of legislative competence to the government which is the essential line of defense of legislative competence. This concerns those situations where the legislature has assigned to another authority the task of determining the rules in a matter of which legislator would have to know and in which legislator should be active[92]. In terms of the standard that the public authorities intend to create and include in the national legislative corpus, the negative incompetence of the legislature is linked to the question of the complementary relationships between the law and the regulations, necessarily intertwined to allow the effective implementation of a new law, usefully supplemented by all necessary implementing measures, most often taken in regulatory form[93]. At the institutional level, negative incompetence primarily intersects with established transfers from parliamentary assemblies to the regulatory authority (government). The most common textual hypothesis is that of reference to a decree. In this matter, any irregular (and direct) delegation of competence is sanctioned. Thus, in its judgement *85-189 DC,* the French Constitutional Council decide that a legislative provision which, after having precisely defined limitations on the exercise of the right to property, refers to a decree the task of specifying its conditions of application does not involve a delegation of the legislator's competence. The Constitutional Council considers that plaintiff's in the case maintain that the law subdelegated to the regulatory power its competence to determine the fundamental principles of the property regime and, consequently that law violated the provisions of article 34 of the Constitution; Considering that

[92] Gregory Mollion, op. cit., p.272.

[93] Luchaire François, loc. cit.

article 111-5-2 of the urban planning Code precisely sets the limitations placed on the exercise of the right of ownership; that, therefore, the reference to the decree to determine the conditions of application and, in particular, to specify the divisions subject to authorization and the conditions of publication of the delimitation of protected zones does not involve any delegation of legislative competence[94].

In Egypt also, at the institutional level, negative incompetence of legislature primarily intersects with established transfers from legislative authority to the regulatory authority (government)[95].

To clarify the defect of the legislator's negative lack of competence in case of irregular delegation of competence to regulatory authority, the Egyptian Supreme Constitutional Court on December 6, 2009[96] issued judgment that ruled the unconstitutionality of Article 2 of Law 105 of 1985. The court based its ruling on the fact that Article 2 referred and delegate the competence to set the maximum wage to the Council of Ministers without clarifying the general controls and main foundations that regulate the method of setting this limit, which the Council of Ministers' decision must follow.

The Egyptian Supreme Constitutional Court's judgment stated that the Constitution, in Article (122), entrusted the legislator with determining the rules by which salaries, pensions, compensations, subsidies, and bonuses are determined for the State Treasury, and organizing the cases of exception

[94] French Constitutional Council, 85-189 DC, 17 July 1985, Official Journal of 19 July 1985, p.8200

[95] Mohamed Wahid Abu Younis, op. cit., p.361.

[96] Egyptian Supreme Constitutional Court, Case No. 202 of the 28th Judicial Year "Constitutional", in the session of December 6, 2009.

thereto, and the public bodies that be responsible for their implementation, to create the best conditions that meet the needs of those for whose benefit they are determined, and guarantee their basic components, by which they are freed from poverty, and with which they assume the responsibility of protecting their families and improving their living conditions. The Egyptian Supreme Constitutional Court's judgment stated that the implication of Article (122) of Egypt's Constitution of 2014 did not grant the executive authority any competence to establish the rules referred in Article (122) of the Egyptian Constitution, and that these rules must be undertaken by the legislative authority, through the laws it issues. If the constitution assigned the regulation certain rights to the legislative authority, it is not permissible for the legislature to deprive itself of its competence and refer or delegate the regulation of these rights, in its entirety, to the executive authority, without restricting it, in this, to general controls and main foundations, within the framework of which it is obligated to work. If the legislator deviated from this and entrusted the executive authority with the regulation of a right from its foundation, the legislative authority would have abandoned its original competence, stipulated in Article 86 of the constitution.

The Egyptian Supreme Constitutional Court's judgment also stated that whereas the text of Article 2 of Law No. 105 of 1985, while authorizing the Council of Ministers to set the maximum limit for the total amount received by employees in the government, local government units, public bodies or institutions, companies, or associations, in the form of salaries, allowances, bonuses, incentives, or in any other form, without setting the general controls or main foundations that regulate the subject of the maximum amount received by these employees in salaries and what is similar to them from what was mentioned above (allowances, bonuses, incentives, or in any other form), despite the fact that it represents a financial burden on the state treasury, its

approach in this regard is in violation of the text of Articles (86, 122) of the Constitution[97].

Refocusing negative incompetence on a question of «pure» division of powers makes it possible to become aware of the democratic function it fulfils. In fact, the guarantees provided by the regulatory or judicial process can be just as protective, substantially speaking, as those resulting from legislative intervention[98]. Nevertheless, in this case, the French Constitutional Council chooses to censure the lack of knowledge of the division of powers, regardless of the content of the guarantees provided by other authorities. Even if the regulatory powers or even judicial authority would have the same qualities of stability, generality, publicity as those traditionally attached to the law, even if it would provide an equivalent level of protection, it cannot replace the law. Thus, in judgement *2010-33 QPC*, the French Constitutional Council decide that if there are guarantees provided by the implementing decrees and by case law, "no other legislative provision establishes guarantees allowing that article 17 of the Declaration of 1789 is not infringed"[99]. In its judgement the Council considers that 2° of article 332-6-1 of the urban planning code allows municipalities to impose on builders, by a prescription included in the land use authorization, the free transfer of part of their land; that it grants the public community the broadest power of appreciation over the application of this provision and does not define the public uses to which the land thus transferred must be assigned; that no other legislative provision

[97] Ibidem.

[98] Didier Maus, Parliament and cohabitation., revue française d'études constitutionnelles et politiques (French law review), n°91 - Cohabitation - September 1999 - p.73.

[99] French Constitutional Council, 2010-33 QPC, 22 September 2010, Official Journal of 23 September 2010, p.17292.

establishes guarantees enabling Article 17 of the Declaration of 1789 not to be infringed; that, as a result, the legislature misunderstood the extent of its competence; "it follows that, without there being any need to examine the complaints raised by the applicant, 2° of article 332-6-1 of the urban planning code must be declared contrary to the Constitution"[100].

By pronouncing censure for negative incompetence, French Constitutional Council does nothing other than invite the legislature to fulfill its mission, which makes this litigation method more attractive than others because it defends legislative prerogatives.it is up to the legislature to adopt sufficiently precise provisions and unequivocal formulas in order to protect the subjects of law against an interpretation contrary to the Constitution or against the risk of arbitrariness, without deferring to administrative or jurisdictional authorities the responsibility of fix rules whose determination has been entrusted by the Constitution only to the law[101]. To guarantee freedom of action, the legislature must not rely on the regulatory authority, whether governmental, decentralized entity or independent administrative. He must also renounce letting the judge decide in a matter which only falls within its competence. It is indeed a question, of guaranteeing the exclusive competence of the legislator and of defending its "private territory", if necessary, against itself[102]. The domain of the law is not a maximal domain, but a minimal one, a kind of impregnable domain from which the legislature cannot be dislodged, even with its consent. Moreover, if the article 38 of the Constitution provides for the possibility for the government to request to be authorized by the legislature to take measures falling within the domain of the law, the

[100] Ibidem.

[101] Didier Maus, op. cit., p. 84.

[102] Georges Bergougnous, op. cit., p. 42.

legislature cannot decide this on its own; If legislature did so, it would incur censorship for negative incompetence[103]. Thus, in judgement *86-207 DC*, the French Constitutional Council decide that article 38 of the Constitution must be understood as requiring the government to indicate precisely to parliament what is the purpose of the measures it proposes to take by way of ordonnance and their areas of intervention, any authorization too wide being then censored for negative incompetence[104].

The sanction of legislature by constitutional judges in negative incompetence is part of a perspective of defense of the law. It is a second part of the concept according to which, by virtue of the hierarchy of norms, the legislature does not have to grant any delegation other than in a derogatory manner[105]. This derogation from the competence of parliament is provided for, interpreted restrictively, and controlled by the French Constitutional Council, it is the transfer of competence by ordonnance, which requires enabling laws delegating a part of legislative power to the government. To this diagram, we must add the situations of "indirect" delegations (all other delegations) of competence to the government or to other non-governmental authorities not necessarily invested with regulatory power, to which the legislature attributes part of its function to legislate. These transfers are sometimes invalidated. There are cases where there is no legal "delegation" formalized in the text of the law, but where it is implicit; the delegation is "contained in germ in the law", "because it is clear that if the legislature has not provided for adequate

[103] Ibidem.

[104] French Constitutional Council, 86-207 DC, 26 June 1986, Official Journal of 27 June 1986, p.7978.

[105] Priet François, The negative incompetence of the legislator, French Review of Constitutional Law, 1994, p.70.

provisions in a specific area, it is another authority which will provide for them, and everything suggests that "it will be about the government"[106]. Constitutional judgments have given reality to this prediction, with, increasingly, a shift in responsibilities towards relay authorities, distinct from the government.

There is a shift in the meaning of the constitutional jurisprudence of negative incompetence; it is a question not only of ensuring the distribution of competences but above all of fighting against the (partial) silence of the legislature[107]. This censorship of an abstention would characterize a control of constitutionality of a preventive nature, prevention no longer against error (in understanding the distribution of legislative and regulatory powers), but against legislative inaction[108]. When the French Constitutional Council notes the negative incompetence of the legislature and sees it, either as a reason added to others, or as a single and sufficient reason, to declare the unconstitutionality of the law or the provision, what is sanctioned is the deficiency to act by the legislature, which is both masked and revealed by delegation to others; behind the vice of incompetence, an element of an external constitutionality check, is there not more, that is to say an incrimination of an attitude of the legislative body, at least in the cases where the referral to another authority cannot be attributed to an error in controlling the distribution of powers? According to the jurists, it is this attitude of "discard" or opportunity, this incompetence, which is apparent and which the

[106] Ibidem.

[107] Florence Galletti, Is there an obligation to legislate well? Remarks on the negative incompetence of the legislator in the case law of the Constitutional Council, French Review of Constitutional Law, 2004, n° 58, p. 395

[108] Georges Bergougnous, op. cit., p. 43.

French Constitutional Council refuses[109]. By sanctioning a provision of a text, even if preventively, the French Constitutional Council ended up instilling a surprising obligation for the legislature, that of legislating[110].

Section III. Negative incompetence, an instrument of sanction of violation the legislature's duty to achieve good enough legislation.

If the function of legislating was obvious for too long, it was invisible. There is no doubt is existence of a general obligation to legislate on the legislature explicitly mentioned in different constitutions, but this also arises indirectly from certain constitutional provisions (which establishes the basic and fundamental rights and duties of the citizens) and from the Constitutional judgments[111].

We can say that the sanction of the defect of the legislator's negative lack of competence reveals itself to be a catalyst for an obligation to force legislature to make high quality legislation.

The following section will discuss three following points:
The declaration of unconstitutionality as a sanction of the weakness of the legislature to achieve good enough legislation (paragraph I).
The delimitation of the legislature's duty to achieve good enough legislation (paragraph II).

[109] Priet François, op. cit., p. 73.

[110] Florence Galletti, op. cit., p. 398.

[111] Ibidem., p. 402.

The discretionary power in the legislature's duty to achieve good enough legislation (paragraph III).

Paragraph I. The declaration of unconstitutionality as a sanction of the weakness of the legislature to achieve good enough legislation.

Failing to constitutionalize a positive obligation to legislate on the legislature, the Constitutional law cases, depending on declarations of unconstitutionality of the provisions, provides a completely effective sanction for this still implicit obligation which is, for the legislator, the obligation to achieve good enough legislation[112]. It is important to draw lessons from this case law since it begins to clarify, with regard to various matters with which Parliament has had to deal, what Parliament can and must do, and what it is free to have done, let to do or not to do. It is the norm (in the making) which is immediately sanctioned, but it is the attitude of the legislator upstream which is stigmatized[113].

We can see in some constitutional law cases, a new suggestion for parliamentarians, gradually revealing the contours of an obligation to legislate well. The expression, still difficult to define, will be given meaning by future constitutional judgments. From an obligation of means (to legislate well, to give the text every chance, presentation of a text allowing the law to achieve its objectives and exploit all its potential), are we not moving towards an obligation of result in terms of legislation (the law must achieve the objective,

[112] Priet François, op. cit., p. 79.

[113] Bruno Genevois, op. cit., p. 110.

and an evaluation of the text is not excluded)?[114] The law is not just written in such a way that it can be best applied. It must be written in such a way as to achieve the result.

We can say that the sanction in form of declarations of unconstitutionality suggests a constitutional consecration of the obligation of legislature to make legislation that is proportionate and consistent with constitutional principles. Today the constitutional sanction which prevents a future legislative text violates the legislature's duty to legislate well, is the best argument in favor of the existence of an obligation on the legislature to make high quality legislation. In reality, legislature's duty to legislate well, understood differently depending on the authors viewed, as a veto[115], or as a technique allowing the governmental majority and sometimes a parliamentary minority to better express the general will by purging it of unconstitutionality[116], it is, in any case, the effective sanction of violation the legislature's duty to legislate well.

Whether there was a sanction of unconstitutionality for only negative incompetence of the legislator, or for negative incompetence coupled with unconstitutionality for violation of a fundamental constitutional provision, Parliament must, during a new reflection on the text, rewrite the sanctioned

[114] Jacques Arrighi De Casanova, Incompetence in constitutional law. What future for Kimberly Clark jurisprudence ? Nouveaux Cahiers du Conseil constitutionnel (French law review), n° 46, January 2015 p. 29.

[115] Emeri Claude, *Gouvernement des juges ou veto des sages ?* Revue du droit public (French law review), 1990, p. 336.

[116] Philippe Blachèr, Constitutional Control and General Will, Presses universitaires de France (French publishing house.), 2001, p. 168.

provisions or sometimes the entire act[117]. The legislature can only do this by fully using its competence, namely by including all the provisions necessary to make (legally) viable this draft text relating to a matter in which it has the primary title of competence. It is up to Parliament to find discretionarily, but necessarily, what, in the matter addressed by the text of the law, falls under "essential rules" for which it alone is responsible, an exercise of appreciation to be carried out without error; unless helped or "put on the track" by a Constitutional judgments which will have indicated what the law itself should have provided for, Parliament will only have to follow the indications of the Constitutional judgments, only to enter in the text the suggested provisions, or, more often, develop them[118]. The appreciation of the constitutional courts, mark on the future text, is indirect, but it exists. Their directives are suggested, are not imperative to parliament, but indifference towards them is compelling. So, when the constitutional judge appears that a law affects the protection of fundamental rights, the courts establish the need for a series of precise provisions, which the future law must contain to protect these fundamental rights[119].

The legislature is therefore required to regulate the exercise of fundamental rights and freedoms, the protection of these fundamental rights and freedoms falling on the constitutional judge[120]. This does not mean, of course, that the legislature must not or cannot protect a fundamental right or freedom. Constitutional justice simply presumes that the law has the potential to violate a fundamental right or freedom. Thus, we see that negative incompetence in

[117] Florence Galletti, op. cit., p. 403.

[118] Ibidem.

[119] Gregory Mollion, op. cit., p.265.

[120] Mohamed Wahid Abu Younis, op. cit., p.362.

the exercise of a fundamental right and the violation of a fundamental right are two distinct defects of unconstitutionality. The first aims to oppose the legislator's own competence in matters of exercise of fundamental rights, the second aims to protect fundamental rights[121].

In Italy, in order not to leave fundamental rights without guarantees due to the inaction of the legislature, the Italian Constitutional Court has demonstrated a certain activism, in particular by consecrating a new judgment -making technique to sanction the negative incompetence of the legislator when this leaves fundamental rights without guarantee.

In a highly anticipated decision of 25 September 2019[122], the Italian Constitutional Court decriminalized assisted suicide in certain cases and under certain well-defined conditions. It ruled in this sense after having, in a previous judgment, given a deadline to the legislator to adopt a law on end-of-life matters. Considering the latter's inertia, the Court shows a balancing act in its second judgment, oscillating between guaranteeing fundamental rights and respecting the discretionary power of Parliament. With these two judgments, the Italian constitutional judges have thus implemented an unprecedented technique to achieve, in two stages, the same effects as a declaration of unconstitutionality with deferred effect, in order not to leave fundamental rights without guarantees due to the inaction of the legislature[123].

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[121] Rrapi Patricia, op. cit., p. 168.

[122] Italian Constitutional Court, 24 September 2019, the Cappato case, no. 242/2019, International Yearbook of Constitutional Justice, 2020, 35, pp.924-927, online: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_n_242_del_2019_Modugno_en.pdf

[123] Anna-Maria Lecis Cocco Ortu, The balancing act of the Italian Constitutional Court in matters of euthanasia and assisted suicide: between activism and respect for the role of the legislator", La Revue des droits de l'homme [Online], Actualités Droits-Libertés, published

The Italian Constitutional Court technique consists in issuing, in a first step, an order that recognizes the unconstitutional nature of a norm, without however annulling it, postponing the final decision to a later date; it involves, in a second step, a declaration of unconstitutionality of the norm contrary to the Constitution, accompanied by an additional reservation of interpretation if the legislature, within the time limit, has not adopted the necessary measures to prevent the annulment of the unconstitutional norm from creating a legal vacuum[124].

In France, who denies today that the French Constitutional Council has developed a power of appreciation, for example of provisions likely to infringe a freedom, of the intensity of the infringement of this freedom, of the arbitration between several infringements of freedoms?[125] The specter of the government of judges and the substitution of the French Constitutional Council for elected representatives remains, however, at a safe distance from the precincts of Parliament, provided that the Constitution and the interpretations of the French Constitutional Council are respected. Thus, in judgement *93-321 DC*, the French Constitutional Council decide that the law tending to reform the law of nationality provides that the acquisition of French nationality must be the subject of a manifestation of will on the part of the interested party while the law on nationality of June 26, 1889, confirmed by the law on nationality of August 10, 1927, established the rule according to which any person born in France to a foreigner is French upon reaching

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on January 15, 2020, consulted on September 5, 2024.. URL : http://journals.openedition.org/revdh/8185 ; DOI : https://doi.org/10.4000/revdh.8185

[124] Ibidem.

[125] Jérôme Tremeau, op. cit., p. 56.

majority under certain conditions of residence without any initiative on their part being required. This provision having been instituted for circumstantial reasons relating in particular to conscription, it was allowed to the legislator to lay down the condition of the manifestation of will without infringing a fundamental principle recognized by the laws of the Republic[126].

The Council also considers the legislature can at any time, ruling in its field of competence reserved to it by article 34 of the Constitution, to modify previous texts or to repeal them by substituting, where appropriate, other provisions. However, the exercise of this power cannot result in depriving legal guarantees of constitutional requirements[127].

From the first manifestations of this judgment, the jurists have underlined the negative incompetence thus committed by the legislature: by depriving legal guarantees of constitutional requirements, the legislature would have remained below its competence and would have committed negative incompetence, so that monitoring compliance with legal guarantees would then only be a variant, sometimes even useless, of negative incompetence[128].

However, the legislature will be thwarted in its intention each time it "misunderstands" its competence by not exhausting it. It is a lack of awareness of its competence, by default, in the sense that the expression "lack of recognition of its competence" means the partial normative silence of the legislature, within the text of the law that it presents[129]. This non-exhausted competence is the one which the legislature does not use without even relying on a third authority to decide on a question, it is also the one which legislature

[126] French Constitutional Council, 93-321 DC, 20 July 1993, Official Journal of 23 July 1993, p. 10391.

[127] Ibidem.

[128] Rrapi Patricia, op. cit., p. 169.

[129] Jacques Arrighi De Casanova, op. cit., p. 31.

uses while nevertheless relying on a third authority to dispose of part of the question. By noting this type of negative incompetence of the legislature, the constitutional judge seems to be fighting against the normative silence of the legislature and prescribing a positive obligation[130].

The sanction of negative incompetence, as soon as it is identified by the constitutional judge, is less the cause of a violation of the rule of competence than the sanction of an omission to act or legislate[131]. Parliament has an obligation to legislate, just as the judge has an obligation to judge. The hypothesis of the silence of the law is also problematic for these two institutions[132].

It remains to be seen whether Parliament has complete freedom to fulfill its obligation to legislate, or whether the constitutional judge does not indirectly undertake to outline the contours of an obligation to "legislate well". This remark must be supported by future case law and consistent or contrary opinions[133].

Paragraph II. The delimitation of the legislature's duty to achieve good enough legislation.

In examining legislative competence, the constitutional judge is required to consider aspects other than those of the distribution of competences stricto sensu. Under the guise of examining legislative competence, the

[130] Yves-Louis Hufteau, The legislative referral and the powers of the judge in the silence of the law, Publisher: Presses universitaires de France (French publishing house.), Paris, 1965, p. 1.

[131] Ibidem.

[132] Bernatchez Stéphane. Breaking the law of silence on the silence of the law: from semantic interpretation to the pragmatic application of law. Les Cahiers de droit, volume 56, number 3-4, September–December 2015, pp. 233, online : https://doi.org/10.7202/1034451ar

[133]Florence Galletti, op. cit., p. 399.

constitutional judge evaluates the text itself, although the judge denies a general interpretation of the text which would replace the will of the legislator. We sometimes have the feeling of a shift from constitutional control of legislative competence to constitutional control to achieve good enough legislation[134].

Upon referral of complaint of negative incompetence, the constitutional judge convicts what appears to constitute a degradation of the law, the judge poses as guardian of the law and its quality (existence an obligation on the legislature to make high quality legislation)[135].

From constitutional case law relating to the negative incompetence of the legislature, it appears that a law must contain certain characteristics, in particular regarding its content (for ensuring of make high quality legislation). The law is therefore a norm which is no longer only defined as to its place in the hierarchy of norms but is evaluated by Constitutional judgments as to its content[136].

Constitutional justice which dealing with the negative incompetence of the legislature would make it possible to identify the necessary content of a legal text for ensuring of make high quality norm, but in what way? In other words, how does the constitutional judge exercise constitutional control over the legal text to achieve good enough legislation and to make high quality statute?

[134] The Legislation Design and Advisory Committee (LDAC) in NZ: http://www.ldac.org.nz/guidelines/legislation-guidelines-2021-edition/early-design-issues-2/chapter-1/

[135] Boucher J., The negative incompetence of the legislator, Conclusions on the French State Council, April 23, 2010, SNC Kimberly-Clark, Revue française de droit administratif (French law review), 2010, p. 704.

[136] Aurélie Bretonneau, op. cit., p. 34.

Some of the constitutional case law provides clarification on the necessary content of the legislative norm: extent of the content of the norm, nature of this content, quality of this content, deficiency in this content with[137].

If the constitutional judge considers that minimum content of the legislative norm is lacking, the judge imposes sanctions. To approach the content of legislative competence, it is necessary to consider the content of legislative competence, as defined by the block of constitutionality, and to refer to this variety of foundations of legislative competence mentioned by the constitutional judge throughout its judgments[138].

For ensuring to achieve good enough legislation, the text of the law must have "fundamental", "essential" content, a "hard core" of provisions, which should be prospective, open, clear and must constitute "a true normative substance"[139]. If we easily imagine that there is a minimal and indivisible legislative competence, there are cases, where this minimal competence is unfathomable. And the further we move away from the center of competence (the heart of the hard core), the more the uncertainty grows; which provisions must be dealt with within the framework of the law, which remain within the orbit (of legislative competence), which escape the gravity of the core competence, finally which escapes will be accepted by the constitutional judge?[140] The fact that the content (set of minimum provisions) varies, depending on the risk involved in the area in which the text of the law

[137] Florence Galletti, op. cit., p. 412.

[138] Garrigou-Lagrange J.-M., "The obligation to legislate", in Mélanges Ph. Ardant, Law and politics at the crossroads of cultures, Paris, LGDJ (French legal publisher), 1999, p. 307.

[139] Priet François, op. cit., p. 80.

[140] Avril Pierre, The Legislative Parliament, French Review of Political Science, 1981, p. 17.

intervenes, adds heterogeneity: thus, the obligatory share of prescriptions which falls to Parliament is greater depending on whether the legal text affects the area of fundamental rights, or a more marginal area, with a smaller scope[141]. We may think that judgments relating to legal text affecting fundamental rights are more likely to provide information on the minimum content of the legislative norm. The law must contain materially, even philosophically, "the essentials of what affects the rights and freedoms of individuals"[142].

Constitutional justice uses the notion of negative incompetence cautiously to ensure the respect and the protection of minimum standards of fundamental rights guaranteed to all citizens, which the judge assesses as sufficient or insufficient in the text of the law referred to the court[143]. We therefore have the impression that there are, in negative incompetence, different degrees of error, irregularity or incompetence likely to be committed. The constitutional judge does not sanction the disputed provisions if the legislature makes their development subject to compliance with fundamental human rights

[141] Florence Galletti, op. cit., p. 410.

[142] Priet François, The negative incompetence of the legislator, op. cit., p. 83.

[143] French Constitutional Council, 86-217 DC, 18 September 1986, Official Journal of 19 September 1986, p.11294 : The French Constitutional Council considers that due to the insufficiency of the rules set out by articles 39 and 41 of the law relating to freedom of communication to limit concentrations likely to undermine democratic pluralism, the legislator has disregarded its competence with regard to the provisions of article 34 of the Constitution which oblige it to establish "the rules concerning... the fundamental guarantees granted to citizens for the exercise of public freedoms"; Florence Galletti, op. cit., p. 412.

standards[144]; there is also no sanction for negative incompetence if these standards are present and ensured in the law referred to the court[145]. We can refer here, for example to the French Constitutional Council's judgement *99-419 DC*, in which the Council considers that the legislator, by establishing in new articles 515-3 and 515-7 of the civil code the principle of publicity of the conclusion, modification and end of the civil solidarity pact, did not disregard the extent of the powers (the legislator's competence) which it derives from article 34 of the Constitution. However, it will be up to the regulatory authority, competent to establish the terms of application of these provisions, to arrange in the decree provided by article 15 of the law relating to the civil solidarity pact the access of third parties to the various registers in a manner

[144] For example, the French Constitutional Council in its judgement 88-248 DC, January 17, 1989 , Official Journal of January 18, 1989, p.754, considers that "referring to the concept of "serious breach" by public audiovisual sector organizations of the obligations imposed on them by virtue of both the law of 30/09/1986 as amended, and the decrees *en Conseil d'État* provided in its article 27, the legislator intended to exclude, for minor breaches, the implementation of a binding procedure with regard to national program companies or the National Audiovisual Institute; it will be up to the Superior Audiovisual Council to comply, under the control of the judge of legality, with the distinction made by the law according to the degree of seriousness of the breach; thus, the legislator cannot be criticized that it remained below its competence, as it results, in particular, from article 34 of the Constitution".

[145] French Constitutional Council, 85-189 DC, 17 July 1985, loc. cit. : The French Constitutional Council declare that a legislative provision which, after having precisely defined limitations on the exercise of the right to property, refers to a decree the task of specifying its conditions of application does not involve a delegation of the legislator's competence.

to reconcile the protection of the rights of third parties and respect for the private lives of persons bound by a pact[146].

We know that the notion of discretionary power has been used for a long time in administrative law. This is why it is necessary to determine whether, in the state of positive law, we can use the expression: "discretionary power" to qualify the latitude of action available to the legislator. For jurist *André de Laubadère*, there is discretionary power when, in the presence of given factual circumstances, the (competent) authority is free to take this or that decision, has the choice between these decisions, in other words when its conduct does not dictate in advance by the law[147]. Undoubtedly, "Discretionary power exists to the highest degree in the legislative function for which legislators are generally not bound by any prior peremptory norm"[148].

Paragraph III. The discretionary power in the legislature's duty to achieve good enough legislation.

In practice, we can say that the sanction in form of the negative incompetence of the legislature reveals itself to be a catalyst for an obligation to achieve good enough legislation, likely more certainly to force legislature to make high quality legislation[149].

[146] French Constitutional Council, 99-419 DC, 09 November 1999, Official Journal of 16 November 1999, p.16962.

[147] André de Laubadère, In Mélanges offered to Marcel Waline, The judge and public law, Paris, LGDJ (French legal publisher), 1974, Volume II, p. 531.

[148] Schmitter Georges, The negative incompetence of the legislator and administrative authorities. In: International Yearbook of Constitutional Justice, 5-1989, 1991. Principle of equality and right to vote, p. 137.

[149] Florence Galletti, op. cit., p. 413.

Does the hypothesis of an implicit construction of the legislature's duty to achieve good enough legislation accommodate the preservation by the legislature of its discretionary power to legislate? We can use similar situations in administrative law to refer to the first element of the answer. In administrative law, the judge sometimes controls discretionary power of the administration, or rather of the administrator, and we then find ourselves on the borders of a control of expediency (control of the appropriateness)[150]. There are also cases where another judge, the criminal judge for example, is put in a position to control the management, or even the opportunity for public choices in cases in which a public official or an elected official is brought before him for possible criminal liability. It is therefore understandable that a judge can control and ultimately undermine the discretionary power of the competent authorities. The legislature is also an authority endowed with competence, very broad and specific but at the same time not absolute and bound by legality[151].

More precisely, if discretionary power exists in administrative law, its counterpart in constitutional law is the sovereign power of the legislator, sovereign in the sense that for a long time the judge has not been able to exercise control over the normative activity of Parliament. We can say that the discretionary power left to the legislature cannot in any event be placed on the same level as that vested in the administrative authority. Parliament generally

[150] Bockel Alain, Contribution to the study of the discretionary power of the administration, Actualité juridique du droit administratif (French law review), 1978, p. 355.

[151] Abdul Majeed Ibrahim Salim, The Discretionary Power of the Legislator, A Comparative Study, Dar Al-Jami'a Al-Jadida, Alexandria, 2010, p.71.

has the discretion to assess whether it is necessary to intervene and to legislate in a matter which falls within its competence[152].

With Constitutional law cases, it must be admitted that on the one hand the Constitutional justice defends the exercise by Parliament of its sovereignty, the Constitutional justice prevents legislator from alienating part of its sovereignty by disseminating its legislative function to make good enough legislation, but on the other hand, the Constitutional justice refuses to provide the legislator the quality of absolute sovereignty[153]. Thus, the constitutional judge censors itself and prevents itself from examining certain areas belong exclusively to legislative competence of Parliament which it considers " eminently political", however, the constitutional judge does not allow other areas to be surveyed outside its supervision[154]. Without worrying here about the eminently political aspect of the activity of the legislator, we can consider as in mathematics, the intersection of two elliptical sets with a zone where the activity of Parliament and the control of the constitutional judge intermingle. It's the place of the discretionary power of Parliament, which is therefore neither arbitrary nor outside of legality[155].

The French constitutional judge more particularly, has chosen to impose a certain number of rules on himself to respect, as far as possible, the discretionary power of the legislator. In most cases, the desire of the

[152] Bockel Alain, the discretionary power of the legislator, Mélanges Léo Hamon, Paris, Economica 1982 (French legal publisher), p. 43.

[153] Hassan, Haider Mohammed, Addressing Parliament's Refusal To Exercise Its Legislative Powers, A Research Published In Al-Mohaqiq Al-Hilli Journal Of Legal And Political Sciences, Issue 4, Year 7, 2015, P.577, Online: Https://Iasj.Net/Iasj/Download/D38adde63784441b

[154] Bockel Alain, loc. cit.

[155] Abdul Majeed Ibrahim Salim, op. cit., p.73.

constitutional judge is not to interfere in the choices of the legislator. This goal can be partly achieved, thanks to the development of the technique of "the constitutionality subject to reservation" (*la technique de la conformité sous réserve de constitutionnalité)*[156]. Through this technique, the constitutional judge may, where appropriate, not proceed to the annulment of a legislative provision, taking care, however, beforehand, to attach a certain number of guarantees. In France, the decision of "the constitutionality subject to reservation" constitutes a decision-making process by which the constitutional judge validates a provision subject to his control under the "reservation" that it is interpreted in a certain sense, the only valid one with regard to constitutional principles[157]. It is with this in mind that the French constitutional judge has often applied the consideration according to which: "article 61 of the Constitution does not confer on the Constitutional Council a general power of appreciation and decision identical to that of Parliament, but it only gives jurisdiction to rule on the conformity with the Constitution of the laws referred to it for examination"[158].

Despite the margin of appreciation available to the legislature in enacting the law, the Parliament is nevertheless subject to various constraints. It is subject first of all to the substantive rules of the Constitution, which, due to their clarity, tend to deny the legislature any initiative of its own. Although the expression applied to the legislature may seem to be poorly chosen, it is in

[156] Schmitter Georges, op. cit., p.158.

[157] Thierry Di Manno, The Constitutional Judge and the technique of "interpretative decisions in France and Italy", Preface by Louis Favoreu, Published: Paris: Economica, Public Law Collection, 1999, P.242.

[158] French Constitutional Council, 74-54 DC, 15 January 1975, Official Journal Of 16 January 1975, P. 671.

any case the classic hypothesis of "bound competence"[159]. Secondly, despite its discretionary power regarding the choice of the content of the act, the legislature cannot rely on regulatory power[160]. In such cases, with the exception of the delegation techniques made available by the Constitution, this act of sub delegation would be considered as infringing the principle of distribution of powers and canceled on the basis of negative incompetence[161]. We can cite as an example, the judgment "*loi relative à la démocratisation du secteur public"*, in which the French Constitutional Council states: "that it is not open to the legislator to completely abandon the discretionary power of the Government (the setting ... the importance of employee representation (which) calls into question fundamental principles relating either to labor law or to the civil and commercial obligations that Article 34 reserves for the law »[162].

The influence likely to be caused by negative incompetence to the discretionary power of Parliament could be realized when the constitutional provision does not impose too great an obligation of conformity on the legislature, the Parliament being therefore able to doubt the extent of its powers.

Consequently, three solutions are available to the judge in order to try not to infringe, in any way, the discretionary power of Parliament[163]. Firstly, the judge, at the end of his control, will be able to either legitimize legislative

[159] Garrigou-Lagrange J.-M., the obligation to legislate, op. cit., p.312.

[160] Bockel Alain, the discretionary power of the legislator, op. cit., p.45.

[161] Arnaud Le Pillouer, The negative incompetence of administrative authorities: a look back at an ambivalent notion, *Revue française de droit administratif* (French law review), 2009, p. 1203.

[162] French Constitutional Council, 83-162 DC, 20 July 1983, loc. cit.

[163] Schmitter Georges, op. cit., p. 163.

provisions adopted by the legislature, or disapprove of them. In the case of disapproval of legislative provisions, the Constitutional judge will only annul the legislative provisions if the legislator has improperly subdelegated part of its powers to the regulatory power. The notion of illegal sub-delegation of competence would then only ensure the role that jurists have always assigned to it, namely respect for the distribution of competences within the two Powers in question[164].

Secondly, the judge may use the notion of negative incompetence in correlation with that of conditional "the constitutionality subject to reservation"[165]. From such a perspective, under the guise of rejecting the notion of illegal sub-delegation of competence, the French constitutional judge, through the technique of "the constitutionality subject to reservation", will take care to surround with a significant number of constraints legislative provisions that the legislator intended to see come into force[166]. The judge thus limits the powers of the legislature by restricting the scope of the principle initially adopted, and thereby the judge reduces the possibility of the Government to escape from the strict provisions of the law. Consequently, by pretending to rule out the case of illegal sub-delegation of competence, the

[164] Ibidem.

[165] Thierry Di Manno, op. cit., p. 286.

[166] By using the technique of "the constitutionality subject to reservation", the French Constitutional Council shows that its role is not to be the systematic censor of the legislator, but rather to be a guide of normative activity. This faculty possessed by the judge is perfectly illustrated in the decision of July 30, 1982 «*Blocage des prix et des revenus* ». By refusing to censor an attack on the constitutional distribution of powers between the law and the regulations, the Constitutional Council warns public authorities in general. They must use the specific procedural means that the Constitution makes available to them: French Constitutional Council, 82-143 DC, loc. cit.

judge succeeds while respecting on a formal level the will of the legislature to indirectly impose its own assessment (the judge may substitute its assessment for that of the Parliament vested with discretionary power)[167].

Finally, the judge can initially proceed to annul the legislative provision in question based on negative incompetence. At this stage, we can consider that this cancellation is simply linked to the excessive margin of appreciation that the legislature intended to leave to the regulatory power[168]. Once this step is completed, the Constitutional judge will not itself set the conditions under which the law could come into force. The judge will rather be content to guide the legislature's assessment, through a certain number of directives, which the Constitutional judge will most of the time take care to present as having no imperative nature. During the re-examination by the legislator of the text initially questioned, the Parliament wishing at all costs to avoid a second declaration of unconstitutionality within the framework of double-trigger control, will tend to model in a certain way its assessment on that issued by the judge[169].

Negative incompetence appears protean, bordering on ignorance of rules of competence and substance, leading to censures most often satisfying both the applicants and the defenders of the law, inviting the legislator to fully exercise its role, in a field significantly larger than that which had been originally assigned to it[170]. Therefore, the sanction of negative incompetence both cleans up and honors the eminent dignity of the law, guarantor of rights and

[167] Florence Galletti, op. cit., p. 414.

[168] Arnaud Le Pillouer, op. cit., p. 1209.

[169] Schmitter Georges, op. cit., p.165.

[170] Jordane ARLETTAZ, op. cit., p.61.

freedoms. It is up to the legislator to give the law all its thickness, its density, but by finding in legislative provisions founding its competence the very limits of its powers. And it is therefore a double vigilance that the legislator must demonstrate when legislating, unless it does not express the general will in compliance with the Constitution[171].

[171] Florence Galletti, op. cit., p. 418.

Section IV. Negative incompetence of the legislature and predictability of laws.

The legislature must adopt understandable legal provisions and unequivocal formulas, in order to protect the subjects of law against an interpretation contrary to the Constitution or against the risk of arbitrariness[172] (paragraph I).

Legal provisions whose impact on the legal system is uncertain are therefore contrary to the Constitution. This is because in reality the hunt for negative incompetence has found new spaces with the principle of clarity and precision of the law and the objective of constitutional value of intelligibility and accessibility of the law[173] (paragraph II).

Paragraph I. The legislature's failure to adopt understandable laws and unequivocal formulas

The legislature's failure, a source of ambiguities and equivocations whatever its form, is not only a legal defect, a legislative disorder (resulting from poor execution or defects in the carrying out of the competence) but can be considered as constituting negative incompetence and therefore unconstitutionality.

[172] Vito Marinese, The Legislative ideal of the Constitutional Council, Study on the qualities of the law, University of Nanterre - Paris X (French thesis), 2007, p. 437.

[173] Ibidem, p. 454.

A. Censorship of the law giving rise to a plurality of interpretations and statutory silence

The Constitutional judge censors imprecise provisions due to the plurality of interpretations to which they can give rise. For example, the French constitutional judge declares a provision of law relating to various economic and financial provisions leaving the choice between two contradictory interpretations violate article 34 of the Constitution[174], the constitutional judge considers that the criticized provision subjects to an annual taxation regime the securities proceeds which will only be paid by the issuer at the end of the operation; that this text is susceptible to at least two interpretations, one favoring the simplicity of the base rules by setting equal annuities, the other favoring the adaptation of the base to economic reality by setting progressive annuities taking into account compound interest; that the choice between these two interpretations is all the more uncertain as arguments in favor of one and the other can be found in the preparatory works[175].

It will be observed in this regard that when the parliamentary work has been insufficient or reveals that a provision was adopted without real debate, often by a session amendment, without the committees being able to express their opinion, the constitutional judge will be less tempted to save it. by a reservation of interpretation and will more easily go to censorship for negative incompetence, such Judgement revealing a close link between clarity of the law and clarity of parliamentary debate[176].

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[174] Louis Favoreu, Note under decision n° *85-191 DC*, Review of public law and political science in France and abroad, March-April 1986, n° 2, p.395.

[175] French Constitutional Council, 85-191 DC, 10 July 1985, loc. cit.

[176]Georges Bergougnous, op. cit., p. 41: In its jugement *n° 96-378 DC, 23 juillet 1996, Journal officiel du 27 juillet 1996, page. 11400, Rec. p. 99,* the Constitutional Council censored three articles – in reality a real small bill establishing a higher telematics

The French Constitutional judge also censures an imprecision resulting from the silence of the legislator. Thus, in its jugement *n° 85-198 DC, afférente à la loi modifiant la loi n° 82-652 du 29 juillet 1982 et portant diverses dispositions relatives à la communication audiovisuelle*, the French Constitutional Council considered that article 3-II of the law referred "allows the public broadcasting establishment to carry out work and installations of unspecified importance on public or private built properties and provides that agents of the public establishment may be authorized to enter inside these properties, including in residential premises, in particular for the operation of installed equipment; that these installations and the right of visitation which they imply could, in the absence of sufficient details, lead to an infringement of constitutionally guaranteed rights and freedoms which it is up to the law to safeguard"[177].

The constitutional judge also considered that, "if the implementation of such a safeguard falls under an implementing decree, it was up to the legislator to determine for himself the nature of the necessary guarantees; that in any event

committee without sufficiently regulating its powers – introduced by government amendment during the reading of the adopted text. the French constitutional judge declares by entrusting the Higher Committee for Telematics(*Comité supérieur de la télématique*) with the task of developing and proposing for adoption by the Higher Audiovisual Council(*Conseil supérieur de l'audiovisuel*), to which it is placed, recommendations to ensure compliance by certain communication services with ethical rules, without setting limits to the determination of these recommendations, with regard to which opinions likely to have criminal consequences may be issued, other than those, of a very general nature, resulting from article 1 of the law of September 30, 1986 on freedom of communication, the legislator has disregarded the competence it derives from article 34 of the Constitution.

[177] French Constitutional Council, 85-198 DC, 13 December 1985, Official Journal of 14 December 1985, p.14574.

it had to lay down the rule that the servitude must be established not by the public establishment but by a State authority and provide the principle of a procedure intended to allow interested parties, on the one hand , to be informed of the reasons making the establishment of the easement necessary, on the other hand, to make their observations known; that, in the absence of having established an information and complaint procedure accompanied by reasonable deadlines or any other means intended to eliminate the risk of arbitrariness in the determination of the buildings designated to support the easement, the provisions of article 3- II relating to its institution must be declared non-compliant with the Constitution"[178].

B. Censorship of ambiguous law

The legislator must not ignore the extent of its competence by leaving the exercise of it to others. Thus the legislator commits an unconstitutionality when it remains below its competence either by subdelegating to other authorities the task of enacting rules so fundamental that they can only be taken by legislator or by laying down rules in such a general way , so vague or so vague that the margin of appreciation thus left to the authorities responsible for applying them (regulatory power, administrative supervisory authorities, social partners, etc.) encourages them to encroach on the domain of the law[179].

[178] Ibidem; Pierre Sablière, The decision of the Constitutional Council of December 13, 1985: towards a general theory of administrative easements?", *Cahiers juridiques de l'électricité et du gaz* (French law review), 1986, p. 109.

[179] Priet François, op. cit., p. 73; Aurélie Bretonneau, op. cit., p. 30 ; Ariane Vidal-Naquet - Ilf-Gerjc., op. cit., p.١3.

Consequently, when legislative rules are restrictive in law or when they entrust public authorities with exorbitant prerogative powers over the citizens, these rules- under penalty of revealing a negative incompetence of the legislator - must be determined "with sufficient precision[180].

IV of article 1 of the law relating to the negotiated reduction of working time in France (*loi relative à la réduction négociée du temps de travail*) provided that the employer, in companies employing at least fifty employees, must have concluded, prior to the establishment and communication to representatives of the personnel of the social plan intended in particular to avoid layoffs or limit their number, an agreement to reduce working hours bringing the collective working hours of the company's employees to a level equal to or less than thirty-five hours per week or at 1,600 hours per year, or, failing that, having seriously and loyally engaged in negotiations aimed at concluding such an agreement[181].

The French Constitutional Council, in its judgement n° *99-423 DC* on this law relating to the negotiated reduction of working time in, considered that "by establishing an obligation prior to the establishment of the social plan, without specifying the effects of its non-compliance and, in particular, by leaving it to the administrative and jurisdictional authorities to determine whether this obligation is a condition of validity of the social plan, and whether its non-compliance renders subsequent dismissal procedures null and void, the

[180] Senate Working Papers (French Senate): The Quality of the Law, online: https://www.senat.fr/ej/ej03/ej03_mono.html#fnref8

[181] Ibidem.

legislator has not fully exercised its competence », and censored IV of article 1 of the law referred[182].

According to the French Constitutional judge the legislator misunderstood the extent of its competence over several provisions:

Firstly, the 3rd paragraph of Article 11 of this article. Furthermore, this same article 11-XIV entrusts URSSAF controllers and labor inspectors with the task of ensuring this compatibility. By simply referring to a decree in the Council of State the determination of the terms of suspension of the benefit of the relief (article 11-XV) without itself setting objective criteria used to assess compliance or not with this requirement of "compatibility", the legislator misunderstood the extent of its competence which it derives from article 34 of the Constitution.

Other provisions also incur the criticism of negative incompetence by leaving vague provisions which are more incantatory than normative, and which will lead to the introduction of elements of assessment of a subjective nature opening the way to litigation and an inequality in the application.

So, how can we assess the fair and serious nature of the negotiation on the reduction of working hours to 35 hours that any company must undertake before the presentation of a social plan (article 1 IV)? How can we distinguish between what relates to adaptation to changes in a job and what relates to the development of skills, in training organized outside of working time (article 10)? Thus articles 1 IV, 10, 11 IV and 15 are therefore contrary to the Constitution[183].

[182] French Constitutional Council, 99-423 DC, 13 January 2000, cons. 6, 7, 8, Official Journal of 20 January 2000, p .992.

[183] Valérie Ogier-Bernaud, Note under decision n° *99-423 DC*, French Review of Constitutional Law, April-June 2000, n° 42, p. 341

The Constitutional Council also censured for negative incompetence the 3° of article 9 of the law of January 6, 1978, relating to data processing, files and freedoms (*loi relative à l'informatique, aux fichiers et aux libertés*), in its wording resulting from the law relating to the protection of natural persons with regard to the processing of personal data. In its judgement *n° 2004-499 DC* on this law[184], the Constitutional judge noted that, "due to the scope of the processing of personal data thus implemented and the nature of the information processed, 3° of the new article 9 of the law of January 6, 1978 could affect, through its consequences, the right to respect for private life and the fundamental guarantees granted to citizens for the exercise of public freedoms; that the criticized provision must therefore include appropriate and specific guarantees meeting the requirements of article 34 of the Constitution. Thus, the Constitutional judge declared this provision unconstitutional on the basis of the following arguments: "With regard to the object and conditions of the mandate in question, the criticized provision does not provide these details; it is ambiguous as to the offenses to which the term "fraud" applies; it leaves undetermined the question of knowing to what extent the processed data could be shared or transferred, or even if there could be people there who are weighed by the simple fear that they are capable of committing an offense; it says nothing about the limits likely to be assigned to the conservation of information relating to convictions; with regard to article 34 of the Constitution, all these details cannot be provided by authorizations issued by the National Commission for Information Technology and Liberties alone"[185].

[184] French Constitutional Council, 2004-499 DC, July 29, 2004, loc. cit.

[185] Hubert Alcaraz, Note under decision n° 2004-499 DC, French Review of Constitutional Law, 2004, n° 60, p. 822

Paragraph II. It is up to Parliament to fully exercise its competence by legislating in an intelligible manner with precision and clarity.

Although the effects of the notion of negative incompetence and the requirement for precision, clarity and intelligibility of the law may be similar, they are nevertheless distinct. The legislator can exhaust its competence while passing unclear or insufficiently intelligible provisions, but it cannot delegate its competence[186].

Negative incompetence exists implicitly when the legislative standard is so vague or imprecise: according to Constitutional judges, the imprecision of the law would have the effect of de facto conferring too broad a power of interpretation on the authorities responsible for its application, whether administrative authorities or jurisdictional authorities[187]. The imprecision of the law would therefore be like a form of legislative delegation that does not say its name: when Parliament does not do enough, its role will necessarily have to be fulfilled by other bodies at the time of application, in violation of constitutional principles[188].

In the United States, this original understanding of negative incompetence is widely developed by the case law of Supreme Court; it uses legal foundations that are certainly distinct but substantially similar because of the same essential function assigned to the trial, in terms of regulating the legal

[186] Jacques Arrighi De Casanova, op. cit., p. 29 ; Louis Favoreu, Jurisprudential of Constitutional Law, op. cit., p.403.

[187] Beaudoin Gérald A., loc. cit. **:** Retrieved from https://www.thecanadianencyclopedia.ca/en/article/nova-scotia-pharmaceutical-society-case

[188] Jordane ARLETTAZ, op. cit., p.65.

order[189]. The American Supreme Court has thus constructed a doctrine relating to the censure of the textual insufficiency of the law (the void for vagueness doctrine) based on the principle of due process of law. According to this doctrine, the requirement of legislative precision, the lack of which incurs the sanction of unconstitutionality, pursues two objectives: the imperative knowledge by the parties of what is expected of them and the necessity that the application of the law will not be done in a manner that is neither arbitrary nor discretionary, by the judges[190].

In France, the principle of clarity of the law refers to the exercise by the legislator of its competence, which the legislator derives from article 34 of the Constitution. We therefore understand that article 34 of the Constitution constitutes the basis of the principle of clarity of the law[191]. The jurisprudential construction linking the competence of the legislator to the formal quality of the laws finds its extension in the consecration of the constitutional requirement of clarity of the law on the basis of article 34 of the Constitution. This requirement is in fact presented by the Constitutional Council as a corollary of legislative competence[192]. The legal obligations arising from the principle of clarity being the same as those imposed by the Constitutional Council through negative incompetence.

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[189] Roberto J. Borgert, Negative Legislation, Federalist Society Review, Volume 22, p. 86, online: https://fedsoc.org/commentary/publications/negative-legislation

[190] US Supreme Court, Federal Communications Commission v. Fox Television Stations, Inc., ET AL. (June 21, 2012) N°10-1293, online: https://caselaw.findlaw.com/court/us-supreme-court/10-1293.html

[191] Geoffroy De Baynast De Septfontaines, Legislative inflation and articles 34 and 37 of the Constitution, public law thesis, Paris II, 1997, p. 31.

[192] Philippe Malaurie, The intelligibility of laws, *Pouvoirs* (French review of constitutional and political studies), n°114, 2005, p.131.

A. The meaning of clarity and precision of a legislative provision

The qualities of clarity and precision of legal provisions are often associated. It is in fact common to find them stated as going hand in hand: we then talk about the need to adopt "clear and precise" laws. This association of clarity and precision is also found in the constitutional case law (Stare decisis). Thus, in the judgment "*la loi de nationalisation*", the French constitutional judge considers that the provisions of articles 3, 15 and 29 of the law referred "are sufficiently clear and precise and do not contravene to the requirements of article 34 of the Constitution"[193].

Their recurring association (qualities of clarity and precision) allows us to consider that these two terms refer to different qualities, although closely linked.

Precision refers to the notion of completeness. This term characterizes a "detailed", "explicit" and "rigorous" text. Clarity, for its part, refers to the notion of transparency. The clear text is "easy to understand", "unequivocal" as opposed to "unclear, difficult, and confused text"[194]. We understand the autonomy of these two terms all the better because what is precise is not necessarily clear. Conversely, many jurists believe that "it is possible for the legislator to be very clear, while remaining below its competence…"[195]. It thus distinguishes imprecision and lack of clarity as two failures that must be sanctioned respectively through negative incompetence and through that of

[193] French Constitutional Council, 81-132 DC, 16 January 1982, Official Journal of 17 January 1982, p. 299.

[194] Vito Marinese, op. cit., p.462.

[195] Ibidem.

the principle of clarity. However, in the constitutional case law, the Constitutional judge does not seem to materialize this differentiation. Indeed, the analysis of its judgements reveals, beyond the association of these two qualities (clarity and precision), a real confusion[196].

This confusion is not only reflected in the fact that the Constitutional judge examines in a single consideration the complaints based on the lack of recognition of the constitutional requirement of clarity of the law and the negative incompetence of the legislator[197]. We can indeed see that the two notions are systematically associated: the Constitutional Council uses either precision alone, or clarity combined with precision. Even when the lack of clarity seems to affect the law more than the lack of precision, the French Constitutional Council justifies its judgment based on both qualities (clarity and precision). This is the case "*la loi de nationalisation*", the French constitutional judge considers that the provision of article 14 disregards article 34 of the Constitution due to the uncertainty of the limitations placed on the freedom of enterprise. If the provision could be considered obscure, we note that the Constitutional Council justifies its censorship by considering that the limitations made were not "stated clearly and precisely"[198].

The explicit consecration of the principle of clarity in French Constitutional Council precedent cases, comes with judgement of "*Loi de modernisation sociale*" *2001-455 DC*. In this judgement, the Constitutional judge developed a consideration to explain the consequences of the principle of clarity which requires the legislature to adopt sufficiently precise and unequivocal

[196] Philippe Malaurie, op. cit., p.134.

[197] Ariane Vidal-Naquet - Ilf-Gerjc., op. cit., p.16.

[198] French Constitutional Council, 2000-435 Dc, 07 December 2000, Cons. 47, Official Journal Of 14 December 2000, P. 19830.

provisions[199]. We must, having regard to this consideration, note, on the one hand, that precision remains intertwined with clarity and, on the other hand, that univocity is distinguished from the two previous qualities[200]. When the Constitutional Council explicitly enshrines the constitutional requirement of clarity of the law, the Constitutional Council indicates that the legislature should adopt sufficiently precise provisions and unequivocal formulas. If we admit that clarity presupposes more than precision, it remains from this equation that clarity requires the adoption of unequivocal formulas[201]. By referring to this need to adopt unequivocal formulas, the Constitutional Council fails to clearly distinguish clarity and precision to the extent that both of these qualities are intended to avoid the equivocal nature of the law. In view of the motivations developed by the Constitutional Council, it appears that the principle of clarity and negative incompetence equally imply for the legislator the obligation to adopt sufficiently precise provisions in order to avoid these provisions having an equivocal character[202].

In constitutional litigation, we see a similar convergence of the qualities of clarity and precision imposed through negative incompetence and through that of the requirement of clarity[203]. Whether the Constitutional judge sanctions the legislature for negative incompetence or for violation of the constitutional requirement of clarity of the law, the Constitutional judge mobilizes the same logic since it is a question of fighting against the

[199] French Constitutional Council, 2001-455 DC, 12 January 2002, Official Journal Of 18 January 2002, P.1053.

[200] Ribeiro Marc, The constitutional problem of the imprecision of laws, Revue juridique Thémis (French law review), 1998, p. 677.

[201] Ibidem.

[202] Vito Marinese, op. cit., p.463.

[203] Arnaud Le Pillouer, op. cit., p. 1211.

equivocality of laws, their ambiguity to ensure their predictability[204]. In either case, the French Constitutional judge relies on a common conception of the legislative function, and thus proceeds to a teleological interpretation of article 34 of the Constitution. Whether it does not provide sufficient precision or lacks clarity, the legislator misunderstands in either case the competence conferred to legislative authority by the Constitution[205].

We can say that the definition of legislative competence and the content and aim of a legislative text, is linked to an analysis of the formal quality of laws and is focused on the future of the rule at the time of its application[206]. The latest formulations used by the Constitutional Council in its principle considerations directly link the competence of the legislator to the future application of the text by the implementing authorities: In its judgement of "*Loi de modernisation sociale*" 2001-455 DC, the Constitutional Council explains: "that it is up to the legislator to fully exercise its competence entrusted to parliament by article 34 of the Constitution; that it must, in the exercise of this competence, respect the principles and rules of constitutional value and ensure that respect is ensured by the administrative and jurisdictional authorities responsible for applying the law...".[207]

This judgement of the Constitutional Council, which seeks to detect the risks of uncertainty when determining the meaning of the norm conveyed by the text, is turned towards the future of the text: the application of the law. This search for predictability therefore essentially translates into the declared

[204]Laurence Gay, The control of the formal qualities of the law in comparative constitutional law: France, Spain and Canada, Publisher: Bruylant., 2010, p.110.

[205] Ibidem.

[206] Théodore Ivainier, What is a clear text? An essay on mathematization, in Le droit en procès, Presses universitaires de France (French publishing house.), 1983, p. 147.

[207] French Constitutional Council, 2001-455 DC, loc. cit.

desire of the Constitutional Council to reduce the space for co-determination of law enforcement authorities[208].

B. The principle of clarity and the objective of constitutional value of intelligibility of the law

In France, the judgement of "*Loi de modernisation sociale" 2001-455 DC*, the Constitutional Council, while distinguishing the principle of clarity of the law and the objective of constitutional value of intelligibility of the law, seems to give them a very similar scope and content[209].

However, jurists were able to note that "the objective of intelligibility encompasses and goes beyond the requirement of clarity. This is due to the absence of contradiction or confusion of the norm[210]. In this sense, it constitutes a minimum condition for the intelligibility of the law. The Constitutional Council therefore seems to be aiming, through the requirement for clarity of the law, the need for the rules laid down to be neither confused nor equivocal while the objective of intelligibility recognized in 1999 would more generally obstruct a degree unnecessarily high level of hermeticism of the law[211].

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[208] Laurence Gay, op. cit., p.117.

[209] Favoreu Louis, Gay Laurence and Lanisson Valérie, Jurisprudence of the Constitutional Council. January 1-March 31, 2002, French Review of Constitutional Law, 2002/2 (n° 50), p. 385-445. DOI : 10.3917/rfdc.050.0385.URL : https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2002-2-page-385.htm

[210] Philippe Malaurie, op. cit., p.136.

[211][211] Bertrand Mathieu, The requirement for clarity and intelligibility of the law, Les Petites Affiches (French law review), September 24, 2002, n° 191, p. 16.

The principle of clarity and the objective of intelligibility of the law "represent two aspects of the same requirement,but responding to different considerations and assigned a distinct role with regard to the modalities of exercising control of constitutionality "[212]. The subjective dimension of the requirement of intelligibility of the law is strongly neutralized by its consecration as an objective of constitutional value, which is not a subjective right which individuals could avail themselves of. On the contrary, the requirement for clarity of the law is constitutionalized as a principle. Consequently, the legislator has an obligation of result regarding clarity, while the legislator is only subject to an obligation of means regarding intelligibility of the law[213]. Furthermore, intelligibility seems to be able to be assessed by an overview of the provisions of a law, whereas clarity must characterize each of the terms of the law. The requirement for accessibility and intelligibility is thus less restrictive than that of clarity, but more extensive. The principle of clarity and the objective of accessibility and intelligibility ultimately appear complementary[214].

It nevertheless remains that the distinction between the principle of clarity of the law and the objective of constitutional value of accessibility and intelligibility of the law appears relative[215]: the analysis of constitutional litigation, according to some jurists, "demonstrates [...] the confusion made by the Council between the principle of clarity and the objective of accessibility

[212] Ibidem.

[213] Vito Marinese, op. cit., p. 471.

[214] Maurice-Christian Bergerès, A principle of constitutional value paradoxically ignored by tax law: the intelligibility of the law, *Revue de jurisprudence et des conclusions fiscales* (French law review), 2003, n° 24, p. 799.

[215] Bertrand Mathieu, The requirement for clarity and intelligibility of the law, op. cit., p. 17.

and intelligibility. This tangle of concepts casts doubts on the practical usefulness of the application of two reference norms and must encourage the constitutional judge, in an effort of simplification, to determine a single standard of control. The same jurists conclude: The Council's desire to distinguish between the principle of clarity of the law and the objective of intelligibility and accessibility of the law would only have been legitimate at the cost of a rigorous jurisprudential policy justifying the respective usefulness of each of the concepts, but it must be admitted that this is not the case"[216].

Some jurists consider that "the choice of the objective of constitutional value of accessibility and intelligibility of the law as the primary reference standards for controlling the quality of the law, would allow the Constitutional judge to clarify its case law but also to deepen its control"[217], especially since the principle of clarity and the sanction of negative incompetence have the same textual basis, that of article 34 of the Constitution. The jurists concluded: "The malleability of the objective of constitutional value therefore seems particularly suited to the search for greater quality of law because this cannot be decreed, it can only be an objective towards which it you have to be tender. On the contrary, the principle of clarity, because it seems to want to cover an objective dimension, induces a rigidity which fits poorly with the relativity of the notion of "quality of law", notion-ambition, standard of law which, image of the notion of "good administration of justice", suffers from

[216] Mme Laure Milano, Control of constitutionality and quality of the law, Review of public law and political science in France and abroad 2006, May-June n° 3 p. 637.

[217] Favoreu Louis, GAY Laurence and Lanisson Valérie, Jurisprudence of the Constitutional Council. January 1-March 31, 2002, loc. cit.

an element of indeterminacy and can only be assessed in the light of the circumstances of the case"[218].

In fact, the Constitutional Council modified its principle consideration relating to the standards applicable to the quality of the law and established the objective of intelligibility as basic reference standards in the matter[219], in its judgement of "*la loi relative au droit d'auteur et aux droits voisins dans la société de l'information*" n°2006-540 DC: "Considering that it is the responsibility of the legislator to fully exercise the competence entrusted to parliament by the Constitution and, in particular, its article 34; that the full exercise of this competence, as well as the objective of constitutional value of intelligibility and accessibility of the law, which arises from articles 4, 5, 6 and 16 of the Declaration of the Rights of Man and of the Citizen of 1789, require it to adopt sufficiently precise provisions and unequivocal formulas; that it must in fact protect legal subjects against an interpretation contrary to the Constitution or against the risk of arbitrariness, without deferring to administrative or jurisdictional authorities the task of establishing rules whose determination has been entrusted by the Constitution to the law"[220].

C. The obligations arising from the principles of clarity, precision and intelligibility of legal provisions are identical to those imposed through negative incompetence.

[218] Ibidem.

[219] Bertrand Mathieu, Community law enters the Constitutional Council, Les Petites Affiches (French law review), 2006, p. 3.

[220] French Constitutional Council, 2006-540 DC, 27 July 2006, Official Journal of 3 August 2006, p.11541, text n°2.

Negative incompetence and the principles of clarity, accessibility and intelligibility of the law are intended to ensure the protection of the coordinating function of the law[221]. By protecting the competence of Parliament, the Constitutional judge preserves the function of the law within the normative system. The law must set limits to the power of the enforcement authorities, which will be a guarantee that these authorities will not have discretionary power. The predictability of the law sought by the Constitutional judge therefore relates to the predictability of the interpretation that it will give rise to[222].

The consecration of the requirements of clarity accessibility and intelligibility of the law are thus in line with the jurisprudence of negative incompetence, both being based on the same conception of legislative competence[223].

As has been demonstrated, the French constitutional jurisprudence of negative incompetence has made it possible to accommodate requirements relating to the quality of the law, so that the negative incompetence could be considered, in its entirety, as sanction of violation the legislature's duty to achieve good enough legislation (obligation to legislate well)[224] and as a tool for controlling the quality of the law (obligation to make high quality legislation)[225]. Thus, it made it possible, very early on, to censure the insufficient clarity or precision of the law, well before this grievance was individualized in the jurisprudence

[221] Bertrand Mathieu, The requirement for clarity and intelligibility of the law, op. cit., p. 16.

[222] Alexandra Bensamoun, The law of August 1, 2006: new manifestation of the dialogue between the legislator and the judge in copyright law, Recueil Dalloz (French law review), 2007, n°05, p. 328.

[223] Vito Marinese, op. cit., p.469.

[224] Florence Galletti, op. cit., p. ٣٧٩

[225]Mme Laure Milano, op. cit., p. 637 ; Florence Galletti, op. cit., p. ٣٧٩.

of the French Constitutional Council. The consecration, in the 2000s, of requirements relating to the quality of the law did not really change the situation. If the principle of clarity of the law gradually became detached from criminal matters[226], it was quickly replaced by a more direct reference to article 34 of the French constitution which, combined with the objective of constitutional value of intelligibility and accessibility of the law, requires the legislator "to adopt sufficiently precise provisions and unequivocal formulas"[227]. This connection to article 34 facilitates, even confirms, the confusion with the case law of negative incompetence, moreover maintained by case law. The consecration of the objective of constitutional value of accessibility and intelligibility of the law, which finds its foundations in articles 4, 5, 6 and 16 of the Declaration of 1789, did not prevent grievances of the negative incompetence and intelligibility of the law to remain very closely intertwined, and sometimes even to be used for one another[228].

[226] French Constitutional Council, 98-401 DC, 10 June 1998, cons. 26, Official Journal of 14 June 1998, p.9033.

[227] French Constitutional Council, 2006-540 DC, 27 July 2006, loc. cit. ; Ariane Vidal-Naquet - Ilf-Gerjc., Incompetence in constitutional law, op. cit., p.16.

[228] The Quality of the Law, French Senate Working Papers, Legal Studies Series, September 2007, p. 11; Vito Marinese, op. cit., p. 562.

Conclusion

In this research I try to shed light on effective jurisdictional means allowing constitutional judges of different countries to control and sanction negative incompetence of the legislature. This research focused on four main points:

First: Pinpoint of negative incompetence of legislature in constitutional disputes through explore the original concept of negative incompetence, the extent of the notion of negative incompetence before constitutional and administrative judges, discuss different forms of negative incompetence of the legislature before constitutional judges and the distinction among negative incompetence, deprivation of legal guarantees, unintelligibility and indeterminacy.

Second: The negative incompetence of the legislature presupposes that there is a competence of the legislature, that the Constitution or the block of constitutionality and successive constitutional judgments prescribe and interpret a competence of parliament. We can say that the negative incompetence of the legislature is a means to constitutional judge to defend the reserved domain of the of parliament. The negative incompetence of the legislature also is means to control over the transfer of legislative competence to the government which is the essential line of defense of legislative competence.

Third: The negative incompetence, an instrument of sanction of violation the legislature's duty to achieve good enough legislation.

We can say that the sanction in form of the negative incompetence of the legislature reveals itself to be a catalyst for an obligation to achieve good

enough legislation, likely more certainly to force legislature to make high quality legislation.

From constitutional case law relating to the negative incompetence of the legislature, the law must contain certain characteristics, regarding its content (for ensuring of make high quality legislation). The law is therefore a norm which is no longer only defined as to its place in the hierarchy of norms but is evaluated by Constitutional judgments as to its content. Constitutional justice which dealing with the negative incompetence of the legislature would make it possible to identify the necessary content of a legal text for ensuring of make high quality norm.

Fourth: The legislature must adopt understandable legal provisions and unequivocal formulas, in order to protect the subjects of law against an interpretation contrary to the Constitution or against the risk of arbitrariness. The legislature's failure, a source of ambiguities and equivocations whatever its form, is not only a legal defect, a legislative disorder (resulting from poor execution or defects in the carrying out of the competence) but can be considered as constituting negative incompetence and therefore unconstitutionality.

It is up to Parliament to fully exercise its competence by legislating in an intelligible manner with precision and clarity. Negative incompetence and the principles of clarity, accessibility and intelligibility of the law are intended to ensure the protection of the coordinating function of the law. By protecting the competence of Parliament, the Constitutional judge preserves the function of the law within the normative system. The law must set limits to the power of the enforcement authorities, which will be a guarantee that these authorities will not have discretionary power. The predictability of the law sought by the

Constitutional judge therefore relates to the predictability of the interpretation that it will give rise to.

The consecration of the requirements of clarity accessibility and intelligibility of the law are thus in line with the jurisprudence of negative incompetence, both being based on the same conception of legislative competence.

Recommendation

By the end of this research, I would like to draw attention of the Egyptian Supreme Constitutional Court, to benefit from foreign judicial precedents of Constitutional judges of different countries (especially French Constitutional Council), to extend its control and sanction the defect of the legislature's negative incompetence in following cases:

1- The legislature not having fully exercised its constitutional competence in the manner specified in the constitution, or when the legislature abandons its original competence and delegates it to the regulatory authority.

2- Weakness of the legislature to achieve good enough legislation (obligation to make high quality legislation).

3-If the legislature enacts legislative norms so vague due to plurality of interpretations (contradictory interpretations) and imprecision resulting from the silence of the legislator.

4- insufficient clarity or unintelligibility of legal provisions (The law must be clear, precise, intelligible to be predictable).

Abbreviation

Coll.	Collection
Concl.	Conclusions
p.	Page
pp.	Pages
Vol.	Volume
op. cit.	refers to the prior reference by the same author.
loc. cit.	endnote term used to repeat the title and page number for a given work (and author).
Ibidem.	refers to the same author and source in the immediately preceding reference.

Bibliography

1. Books & Articles:

Abdul Hafeez Ali Al-Shaimi, Supervision of legislative omissions in the judiciary of the Supreme Constitutional Court: A Comparative Study, Cairo, Dar Al-Nahda Al-Arabiya, 200٣, p. 13.

Abdul Majeed Ibrahim Salim, The Discretionary Power of the Legislator, A Comparative Study, Dar Al-Jami'a Al-Jadida, Alexandria, 2010, p.71.

Abdul Rahman Azawi, Control over the negative behavior of the legislator, legislative omission as a model, an article in the Journal of Legal, Administrative and Political Sciences, Faculty of Law and Political Sciences, Abu Bakr Belkaid University, Algeria, Issue 10, 2010, p.82.

Alexandra Bensamoun, The law of August 1, 2006: new manifestation of the dialogue between the legislator and the judge in copyright law, Recueil Dalloz (French law review), 2007, n°05, p. 328.

Alf Ross, Delegation of power. Meaning and validity of the maxim delegata potestas non potest delegari, French review of legal culture, 1997, p. 99.

Anceau Éric, Bertran De Balanda Flavien, « Anciens et Modernes : de la liberté selon Benjamin Constant », Commentaire, 2021/4 (Numéro 176), p. 837. DOI : 10.3917/comm.176.0837. URL : https://www.cairn.info/revue-commentaire-2021-4-page-837.htm .

André de Laubadère, In Mélanges offered to Marcel Waline, The judge and public law, Paris, LGDJ (French legal publisher), 1974, Volume II, p. 531.

Anna-Maria Lecis Cocco Ortu, The balancing act of the Italian Constitutional Court in matters of euthanasia and assisted suicide: between activism and respect for the role of the legislator", La Revue des droits de

l'homme [Online], Actualités Droits-Libertés, published on January 15, 2020, consulted on September 5, 2024.. URL : http://journals.openedition.org/revdh/8185 ; DOI : https://doi.org/10.4000/revdh.8185.

Ariane Vidal-Naquet - Ilf-Gerjc., Incompetence in constitutional law. The state of the jurisprudence of the Constitutional Council on negative incompetence, *Nouveaux Cahiers du Conseil constitutionnel* (French law review), n° 46, January 2015 p. 8.

Arnaud Le Pillouer, The negative incompetence of administrative authorities: a look back at an ambivalent notion, *Revue française de droit administratif* (French law review), 2009, p. 1203.

Aurélie Bretonneau, Incompetence in constitutional law. Negative incompetence, the "false friend" of the administrative judge, *Nouveaux Cahiers du Conseil constitutionnel* (French law review), n° 46, January 2015 p. 23.

Avril Pierre, The Legislative Parliament, French Review of Political Science, 1981, p.17.

Beaudoin Gérald A., "Nova Scotia Pharmaceutical Society Case". *The Canadian Encyclopedia*, 13 February 2015, *Historica Canada*. www.thecanadianencyclopedia.ca/en/article/nova-scotia-pharmaceutical-society-case. Accessed 14 September 2024.

Bernatchez Stéphane, Breaking the law of silence on the silence of the law: from semantic interpretation to the pragmatic application of law. Les Cahiers de droit, volume 56, number 3-4, September–December 2015, pp. 233, online : https://doi.org/10.7202/1034451ar.

Bertrand Mathieu, Community law enters the Constitutional Council, Les Petites Affiches (French law review), 2006, p. 3.

Bertrand Mathieu, The requirement for clarity and intelligibility of the law, Les Petites Affiches (French law review), September 24, 2002, n° 191, p. 16.

Bockel Alain, Contribution to the study of the discretionary power of the administration, Actualité juridique du droit administratif (French law review), 1978, p.355.

Bockel Alain, the discretionary power of the legislator, Mélanges Léo Hamon, Paris, Economica 1982 (French legal publisher), p. 43.

Boucher J., The negative incompetence of the legislator, Conclusions on the French State Council, April 23, 2010, SNC Kimberly-Clark, Revue française de droit administratif (French law review), 2010, p. 704.

Bruno Genevois, A false friend: the principle of parallelism of competences, in Melanges in honor of Daniel labetoulle, judging the administration, administering justice, Dalloz (French Edition), 1 May 2007, p.104.

Christian Debout, Public order means in contentious administrative procedure, Paris, University Press of France, 1980, p.44.

Constant Benjamin, Political Writings. Edition by Marcel Gauchet., Paris, Gallimard, 1997 [1819], p. 624.

Counselor Dr. Tariq Abdel Qader, Principles Governing Financial Obligations in the Judiciary of the Supreme Constitutional Court, February 21, 2024, online : https://manshurat.org/content/lmbdy-lhkm-llfryd-lmly-fy-qd-lmhkm-ldstwry-lly .

Didier Maus, Parliament and cohabitation., revue française d'études constitutionnelles et politiques (French law review), n°91 - Cohabitation - September 1999 - p.73.

Didier Ribes, Is there a right to the norm? Control of constitutionality and legislative omission, the Belgian Review of Constitutional Law, 1999, p. 237.

Dr. Ahmed Kamal Abu Al-Majd, The Role of the Supreme Constitutional Court in the Political and Legal Systems in Egypt, research published in the Constitutional Journal, Issue One, Year One, 2003, p.106.

Dr. Ragheb Gabriel Khamis Ragheb Sakran, The Conflict between Individual Freedom and State Authority, Modern University Office, Alexandria, 2009, p.57.

Édouard Laferrière, *Traité de la juridiction administrative et des recours contentieux*, Berger-Levrault et Cie, edition 2, volume 2, 1888, p. 491.

Eid Ahmed Al-Ghafoul, The idea of the legislator's lack of negative competence, a comparative study, Cairo, Dar Al-Nahda Al-Arabiya, 2003, P. 31.

Emeri Claude, *Gouvernement des juges ou veto des sages ?* Revue du droit public (French law review), 1990, p. 336.

Favoreu Louis, Gay Laurence and Lanisson Valérie, Jurisprudence of the Constitutional Council. January 1-March 31, 2002, French Review of Constitutional Law, 2002/2 (n° 50), p. 385-445. DOI : 10.3917/rfdc.050.0385.URL : https://www.cairn.info/revue-francaise-de-droit-constitutionnel-2002-2-page-385.htm .

Florence Galletti, Is there an obligation to legislate well? Remarks on the "negative incompetence of the legislator in the case law of the Constitutional Council, French Review of Constitutional Law, 2004, n° 58, p. 395

Franck Claude, « [Note sous décision n° 67-31 DC] », Grandes Décisions de la Jurisprudence Constitutionnelle (French publishing house), 1984, p. 320-321.

Franck Miatti, The Constitutional judge, the administrative judge and the abstention of the legislator, Les Petites Affiches (French law review), n°52, April 1996, p.7.

Garrigou-Lagrange J.-M., "The obligation to legislate", in Mélanges Ph. Ardant, Law and politics at the crossroads of cultures, Paris, LGDJ (French legal publisher), 1999, p. 307.

Geoffroy De Baynast De Septfontaines, Legislative inflation and articles 34 and 37 of the Constitution, public law thesis, Paris II, 1997, p. 31.

Gregory Mollion, The legal guarantees of constitutional requirements, The French Review of Constitutional Law (*La Revue française de droit constitutionnel*), n°62, p.263.

Hala Mohamed Tareeh, The limits of the Egyptian legislator's authority in regulating rights, freedoms, and the guarantees stipulated for their exercise, Dar Al Nahda Al Arabiya, Cairo, 2011, p.28.

Hassan Haider Mohammed, Addressing Parliament's Refusal To Exercise Its Legislative Powers, A Research Published In Al-Mohaqiq Al-Hilli Journal Of Legal And Political Sciences, Issue 4, Year 7, 2015, P.577, Online: Https://Iasj.Net/Iasj/Download/D38adde63784441b.

Hubert Alcaraz, Note under decision n° 2004-499 DC, French Review of Constitutional Law, 2004, n° 60, p. 822

Jacques Arrighi De Casanova, Incompetence in constitutional law. What future for Kimberly Clark jurisprudence ? Nouveaux Cahiers du Conseil constitutionnel (French law review), n° 46, January 2015 p. 29.

Jérôme Tremeau, The reserve of law, Legislative competence and Constitution, Doctoral thesis, Under the direction of Louis Favoreu, University of Aix-Marseille, Economica, 1997, p.42.

Jordane Arlettaz, Incompetence in Constitutional Law. The State of the Case Law of the Constitutional Council on Negative Incompetence, *Nouveaux Cahiers du Conseil constitutionnel* (French law review), n° 46, January 2015, p.58.

Laurence Gay, The control of the formal qualities of the law in comparative constitutional law: France, Spain and Canada, Publisher: Bruylant., 2010, p.110.

Louis Favoreu, Jurisprudential of Constitutional Law, *Revue du droit public* (French law review), 1986, p. 391.

Louis Favoreu, Note under decision n° *85-191 DC*, Review of public law and political science in France and abroad, March-April 1986, n° 2, p.395.

Luchaire François, The sources of legislative and regulatory powers, Actualité juridique du droit administratif (French law review), 1979, p. 6.

Maurice-Christian Bergerès, A principle of constitutional value paradoxically ignored by tax law: the intelligibility of the law, *Revue de jurisprudence et des conclusions fiscales* (French law review), 2003, n° 24, p. 799.

Mme Laure Milano, Control of constitutionality and quality of the law, Review of public law and political science in France and abroad 2006, May-June n° 3 p. 637.

Mohamed Wahid Abu Younis, Constitutional oversight of legislative negligence in the judgments of the Supreme Constitutional Court, Journal of Law for Legal and Economic Research, Alexandria University, Volume 1, Issue 2, 2020, p. 357.

Philippe Blachèr, Constitutional Control and General Will, Presses universitaires de France (French publishing house.), 2001, p. 168.

Philippe Malaurie, The intelligibility of laws, *Pouvoirs* (French review of constitutional and political studies), n°114, 2005, p.131.

Pierre Sablière, The decision of the Constitutional Council of December 13, 1985: towards a general theory of administrative easements?", *Cahiers juridiques de l'électricité et du gaz* (French law review), 1986, p. 109.

Priet François, The negative incompetence of the legislator, French Review of Constitutional Law, 1994, p.70.

Priet François, The negative incompetence of the legislator, op. cit., p. 83.

Ribeiro Marc, The constitutional problem of the imprecision of laws, Revue juridique Thémis (French law review), 1998, p. 677.

Roberto J. Borgert, Negative Legislation, Federalist Society Review, Volume 22, p. 86, online: https://fedsoc.org/commentary/publications/negative-legislation .

Rrapi Patricia, "Negative incompetence" in the QPC: from double negation to double incomprehension", *Les Nouveaux Cahiers du Conseil constitutionnel* (French law review), n°34, 2012/1, p. 163-171. DOI : 10.3917/nccc.034.0163. URL: https://www.cairn.info/revue-nouveaux-cahiers-conseil-constitutionnel-2012-1-page-163.htm

Schmitter Georges, The negative incompetence of the legislator and administrative authorities. In: International Yearbook of Constitutional Justice, 5-1989, 1991. Principle of equality and right to vote, p. 137.

Terneyre Philippe, The ordinary legislative procedure in the jurisprudence of the Constitutional Council, Revue du droit public (French law review), 1985, p. 691.

Théodore Ivainier, What is a clear text? An essay on mathematization, in Le droit en procès, Presses universitaires de France (French publishing house.), 1983, p. 147.

Thierry Di Manno, The Constitutional Judge and the technique of "interpretative decisions in France and Italy", Preface by Louis Favoreu, Published: Paris: Economica, Public Law Collection, 1999, P.242.

Valérie Goesel-Le Bihan, Constitutional litigation, Publisher : Ellipses (French legal publisher), Collection: Cours magistral, 2010, p. 160.

Valérie Ogier-Bernaud, Note under decision n° *99-423 DC*, French Review of Constitutional Law, April-June 2000, n° 42, p. 341

Vito Marinese, The Legislative ideal of the Constitutional Council, Study on the qualities of the law, University of Nanterre - Paris X (French thesis), 2007, p. 437.

Xavier Philippe, "[Note under decision no. 93-322 DC]", French Review of Constitutional Law, October-December 1993, n° 16, p. 830.

Yves-Louis Hufteau, The legislative referral and the powers of the judge in the silence of the law, Publisher: Presses universitaires de France (French publishing house.), Paris, 1965, p. 1.

2. Judicial Cases

U.S. Supreme Court Cases

Supreme Court of the United States, ARIZONA v. CALIFORNIA, No. 592 Decided: June 03, 1963, online: https://caselaw.findlaw.com/court/us-supreme-court/373/546.html

Supreme Court of the United States, Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607(1980), online: https://www.courtlistener.com/opinion/110340/industrial-union-dept-afl-cio-v-american-petroleum-institute/ .

Supreme Court of the United States, Federal Communications Commission v. Fox Television Stations, Inc., ET AL. (June 21, 2012) N°10-1293, online: https://caselaw.findlaw.com/court/us-supreme-court/10-1293.html .

Supreme Court of Canada Case

Supreme Court of Canada, Nova Scotia Pharmaceutical Society case, Collection. Supreme Court Jugements. Date. 1992-07-09. Report. [1992] 2 SCR 606. Case nombre. 22473.

Egyptian Supreme Constitutional Court Cases

Egyptian Supreme Constitutional Court, Case No. 243 of the 21st Judicial Year "Constitutional" in the session of 11/4/2000, online: http://sub.eastlaws.com/GeneralSearch/Home/articlesA/4824 .

Egyptian Supreme Constitutional Court, Case No. 202 of the 28th Judicial Year "Constitutional", in the session of December 6, 2009.

Egyptian Supreme Constitutional Court, Case No. 160 of the 36th Judicial Year "Constitutional" in the session of 12/3/2016.

Egyptian Supreme Constitutional Court, Case No. 95 of the 30th Judicial Year "Constitutional", in the session of 8/1/2017.

Egyptian Supreme Constitutional Court, Case No. 61 of the 42nd Judicial Constitutional Year Constitutional", in the session of 1/14/2023, online: sccourt.gov.eg/SCC/faces/Rules_Html/13135_42_61_1_2.html?timestamp=1695750992328.

Italian Constitutional Court Case

Italian Constitutional Court, 24 September 2019, the Cappato case, no. 242/2019, International Yearbook of Constitutional Justice, 2020, 35, pp.924-927, online:

https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/Sentenza_n_242_del_2019_Modugno_en.pdf .

French Constitutional Council Cases

French Constitutional Council, 99-419 DC, 09 November 1999, Official Journal of 16 November 1999, p.16962.

French Constitutional Council, 99-423 DC, 13 January 2000, cons. 6, 7, 8, Official Journal of 20 January 2000, p .992.

French Constitutional Council, 98-401 DC, 10 June 1998, cons. 26, Official Journal of 14 June 1998, p.9033.

French Constitutional Council, 93-321 DC, 20 July 1993, Official Journal of 23 July 1993, p.10391.

French Constitutional Council, 93-322 DC, July 28, 1993, Official Journal of July 30, 1993, p.10750.

French Constitutional Council, 90-277 DC, 25 July 1990, Official Journal of 27 July 1990, p.9021.

French Constitutional Council, 88-248 DC, January 17, 1989, Official Journal of January 18, 1989, p.754,

French Constitutional Council, 86-217 DC, 18 September 1986, Official Journal of 19 September 1986, p.11294.

French Constitutional Council, 86-223 DC, 29 December 1986, Official Journal of 30 December 1986, p.15802.

French Constitutional Council, 85-198 DC, 13 December 1985, Official Journal of 14 December 1985, p.14574.

French Constitutional Council, 85-191 DC, 10 July 1985, Official Journal of 12 July 1985, p.7888.

French Constitutional Council, 86-207 DC, 26 June 1986, Official Journal of 27 June 1986, p.7978.

French Constitutional Council, 85-189 DC, 17 July 1985, Official Journal of 19 July 1985, p.8200

French Constitutional Council, 83-162 DC, 20 July 1983, Official Journal of 22 July 1983, p.2267.

French Constitutional Council, 81-132 DC, 16 January 1982, Official Journal of 17 January 1982, p. 299.

French Constitutional Council, 82-143 DC, July 30, 1982, Official Journal of July 31, 1982, p.2470.

French Constitutional Council, 78-97 DC, July 27, 1978, Official Journal of July 29, 1978, p.2949.

French Constitutional Council, 74-54 DC, 15 January 1975, Official Journal Of 16 January 1975, P. 671.

French Constitutional Council, 64-27 DC, December 18, 1964, Official Journal of December 24, 1964, p.11593.

French Constitutional Council, 67-31 DC, January 26, 1967, Official Journal of February 19, 1967, p.1793, online: https://www.conseil-constitutionnel.fr/decision/1967/6731DC.htm .

French Constitutional Council, 2006-540 DC, 27 July 2006, Official Journal of 3 August 2006, p.11541, text n°2.

French Constitutional Council, 2005-514 DC, April 28, 2005, Official Journal of May 4, 2005, p.7702.

French Constitutional Council, 2004-499 DC, July 29, 2004, Official Journal of August 7, 2004, p.14087.

French Constitutional Council, 2001-455 DC, 12 January 2002, Official Journal Of 18 January 2002, P.1053.

French Constitutional Council, 2000-435 Dc, 07 December 2000, Cons. 47, Official Journal Of 14 December 2000, P. 19830.

French Constitutional Council, 2014-393 QPC, April 25, 2014, Official Journal of April 27, 2014, p.7362.

French Constitutional Council, 2013-367 QPC of February 14, 2014, Official Journal of February 16, 2014, p.2726.

French Constitutional Council, 2010-33 QPC, 22 September 2010, Official Journal of 23 September 2010, p.17292.