

Unconstitutionality Review and Constitutional Justice in the Algerian Experience

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Abstract:

The control of the constitutionality of laws is one of the main guarantees of the supremacy of the constitution in countries with rigid constitutions. One manifestation of this control is the mechanism of unconstitutionality review, which serves as a guarantee for achieving constitutional legitimacy. It is a constitutional mechanism designed to protect the rights and freedoms enshrined in the constitution. It is a retrospective instrument for monitoring the constitutionality of laws and regulations.

This study aims to explore the concept of the unconstitutionality review mechanism and identify the conditions and regulations for its application, as well as the process of the Constitutional Court's involvement in the review of unconstitutionality in Algeria, particularly in light of the Algerian constitutional amendment of 2020 and Organic Law No. 22/19, which establishes the procedures and methods of notification and referral to the Constitutional Court.

Keywords: Constitutional Court, unconstitutionality review, referral system.

Introduction:

One of the key principles in the process of building the rule of law in Algeria is the primacy of constitutional rules over other legal rules. The Constitution defines the system of governance in the State, the three powers - executive, legislative and judicial - in terms of their composition, powers, relations with each other and individual rights and freedoms. However, the protection of the principle of constitutional supremacy cannot be guaranteed without the adoption of a control of the constitutionality of laws.

This constitutional control, which can be divided into different types depending on the body exercising it, can be divided into political and judicial control¹. In terms of timing, it can be either pre-legislative or post-legislative. In terms of scope, some forms of control are limited to

¹ - Mouloud Deidan, Topics in Constitutional Law and Political Systems, Dar Baqis for Publishing, Algeria, 2014, p. 98. And Amar Abbas, Lectures on the Scale of Constitutional Disputes, directed to first-year Master of Judicial Law students, Faculty of Law and Political Science, Mustapha Stambouli University in Mascara, academic year 2020-2021, published on the following website visited on February 22, 2023, at 12:00 PM. <http://ammarabbes.blogspot.com>

legal provisions falling within the competence of the legislative and executive powers, while others extend to judicial decisions. In terms of their effects, some forms of control aim to invalidate unconstitutional judgments and purge the legal system of them, while others simply exclude their application¹.

Like other countries, Algeria adopted the approach of political control of the constitutionality of laws through the establishment of the Constitutional Council as an independent body, which has evolved with the history of Algerian constitutions².

However, as a result of criticism of the Constitutional Council, the constitutional legislator established the Constitutional Court as an alternative to the Constitutional Council in the constitutional amendment of 2020. The Constitutional Court is regarded as an independent institution whose task is to ensure respect for the Constitution. It has a unique character and has been granted numerous powers, including the control of the constitutionality of laws.

If, prior to the 2016 and 2020 constitutional amendments, the Algerian constitutions established the mechanism of notification by certain constitutional bodies as the only means of initiating the review of the constitutionality of laws by the Constitutional Council, it should be noted that, as of the 2016 constitutional amendment, and subsequently by the Constitutional Court under the 2020 amendment, this mechanism is no longer the only means by which both institutions exercise their functions. Another means has been introduced, namely the referral mechanism by judicial authorities or the plea of unconstitutionality, which allows litigants to raise issues of unconstitutionality. This serves to strengthen and activate the role of the Constitutional Court in the constitutional control of laws and subordinate regulations, in addition to its contribution to the protection of rights and freedoms enshrined in the Constitution.

Boukra Idris, *General Principles of Constitutional Law and Political Systems*, University Press Office, First Edition, 2016, Algeria, p. 226. Under the 1989 Constitution, the Constitutional Council was responsible for supervising the constitutionality of laws, and Articles 153 to 159 of the Constitution provided for this. In the 1996 Constitution, Articles 163-169 were devoted to the Constitutional Council's supervision of the constitutionality of laws, which was amended in 2002, 2008 and 2016. The most recent amendment included several changes concerning the composition, powers and powers of notification of the Constitutional Council, which are dealt with in Articles 182-191.

¹ - See Suhail Mohammed Al-Azam, *Types of Control over the Constitutionality of Laws*, Amar Publishing and Distribution House, Oman, 2003, p. 6. And Nizam Raad, *General Constitutional Law, General Principles and Political Systems*, Modern Book Institution, Second Edition, Tripoli, pp. 117-118.

² - The contours of the emergence of the control of the constitutionality of laws in Algeria began with the promulgation of the first constitution in 1963, in which articles 63 and 64 confirmed the attribution of the control of the constitutionality of laws to the Constitutional Council. However, the implementation of this constitution was later suspended. Subsequently, the 1976 Constitution overlooked the monitoring of the constitutionality of laws.

As for the constitutional amendment of 2020, it introduced the Constitutional Court as a replacement for the Constitutional Council, which is detailed in 15 articles from Article 184 to Article 198.

The unconstitutionality plea in Algeria is an indirect means for citizens to access constitutional justice and serves as a guarantee for achieving constitutional legitimacy. It is a constitutional mechanism for the protection of rights and freedoms enshrined in the Constitution. It is a retrospective means of monitoring the constitutionality of laws and regulations.

The challenge of unconstitutionality is initiated after the law has entered into force and the regulations have been issued. One of the parties to the case before the judiciary raises the plea of unconstitutionality against the laws and regulations that the judge will apply to the dispute. The judge then rules on the constitutionality of the law or regulation in question on the grounds that it contradicts the Constitution and violates constitutionally protected rights and freedoms. The judge suspends the resolution of the dispute until the constitutionality of the law or regulation has been decided.

However, the exercise of the right to plead unconstitutionality by litigants is subject to the conditions and rules set out in Article 188 of the 2016 Algerian constitutional amendment and Article 195 of the current 2020 constitutional amendment. The constitutional text refers to an organic law that lays down the procedures for applying the plea of unconstitutionality. Law No. 18/16 of 2 September 2018 defined the conditions and procedures for applying the plea of unconstitutionality. However, this law was repealed by another organic law, Law No. 22/19 of 25 July, which establishes the procedures and methods of notification and referral to the Constitutional Court.

This study addresses the following problem: What is the mechanism of the plea of unconstitutionality, the conditions and regulations for its implementation in Algeria according to the first constitutional amendments of 2016 and the second of 2020, Law No. 22/19, and the established system of the Constitutional Court issued in 2023? The study aims to examine the Algerian experience with this mechanism.

To answer this question, the study adopts a descriptive, analytical and comparative approach. It defines the plea of unconstitutionality and the rules governing its practice, and analyses and compares the constitutional and legislative texts governing it. The research aims to reach conclusions and formulate recommendations in the conclusion.

Based on the above, the study is divided into two sections. The first section discusses the concept of the plea of unconstitutionality and the conditions for its exercise by litigants. The second section examines the procedures for dealing with the plea of unconstitutionality and examines the Algerian experience with this mechanism.

Section One: The concept of the non-constitutionality plea mechanism and the conditions for the exercise of the right to raise a non-constitutionality plea by plaintiffs.

The non-constitutionality plea is an a posteriori control mechanism on the constitutionality of laws and regulations in Algeria, subject to various rules governing its application. This mechanism is characterised by its specificity in terms of its concept and the conditions for its

exercise. The plea of non-constitutionality constitutes a constitutional challenge, and this will be clarified by defining the non-constitutionality plea mechanism in the first part. The second part will then deal with the conditions for the exercise of the non-constitutionality plea by claimants, followed by an examination of the characteristics of the non-constitutionality plea in the third part.

The first issue: Defining the plea of unconstitutionality.

The plea of unconstitutionality is a constitutional procedure introduced for the first time in the 2016 amendment to the Algerian Constitution, in Article 188. The purpose of this procedure is to ensure retrospective control of the constitutionality of laws. In practice, it often reveals the existence of laws that violate constitutionally protected rights and freedoms that were not detected by previous political and parliamentary oversight. A constitutional amendment in 2016 gave litigants the right to challenge laws that violate the constitution and affect their judgement and rights. This was influenced by comparative legislation, such as the French legal system¹. The provisions of this article were further amended by the constitutional amendment of 2020, now numbered Article 195, which extended the scope of the plea of unconstitutionality to include regulatory provisions, whereas previously it applied only to legislative provisions.

Among the definitions given for this mechanism is that it is:

"A post-enactment review that is invoked by one of the litigants in a published case before the courts as a means of defending itself by arguing that the law the judge intends to apply in the case is unconstitutional."

It has also been defined as:

"A challenge by one of the parties in a legal dispute to a valid legislative text that violates the rights and freedoms guaranteed by the Constitution".

It is also defined as:

"The method used by one of the parties to a dispute to prevent the court hearing the case from applying a particular law, provided that this law violates the provisions of the Constitution and its principles, and provided that there is a serious interest that can be invoked".

The French Council of State defines it as:

"The right granted to any party before a civil, administrative or criminal court to request, if he wishes, that the law applied to him in the course of the proceedings be checked against the Constitution by means of a separate memorandum, as long as the judge cannot raise this objection automatically.

¹- Kharchi, Ilham and Khalaf Warda, "The Constitutional Codification Impact of the Non-Constitutionality Plea Mechanism on the System of Oversight over the Constitutionality of Laws in Algeria", *Journal of Literature and Social Sciences*, Volume 19, Issue 1, 2022, p. 13.

The second issue: Conditions for the exercise of the right to plead unconstitutionality by litigants.

Article 195 of the Constitutional Amendment 2020 provides as follows: "The Constitutional Court may be notified of a plea of unconstitutionality based on a referral from the Supreme Court or the Council of State, when one of the parties in a case before a judicial authority claims that the legislative or regulatory provision on which the dispute is based violates his rights and freedoms guaranteed by the Constitution".

In addition, Organic Law No. 22/19, which establishes the procedures and methods for notification and referral to the Constitutional Court, establishes in its second chapter, from Article 19 to Article 28, the conditions and procedures for exercising the plea of unconstitutionality. These conditions include formal, procedural and substantive requirements.

Some of these conditions are:

1- Linking the plea of unconstitutionality to the existence of a dispute before the administrative or ordinary courts:

The founder of the Algerian Constitution affirmed in Article 195 of the Constitutional Amendment 2020 and in Organic Law No. 22/19 that the exercise of the plea of non-constitutionality requires the existence of an original legal dispute before the administrative or ordinary judiciary, regardless of the nature of the case, be it commercial, civil, administrative or criminal. However, when the judge intervenes to resolve the dispute by applying a specific legal or regulatory provision, the aggrieved party may plead non-constitutionality, provided that the application of that provision conflicts with and violates his or her constitutionally recognised freedoms and rights. In other words, the plaintiff cannot seek the annulment of a legislative or regulatory provision through an original action; rather, the plea is raised through a subsidiary claim. This is confirmed by Article 15 of Organic Law No. 22/19, which states: "The plea of non-constitutionality may be raised by one of the parties to the action before the judicial bodies of the ordinary judicial system or the judicial bodies of the administrative judicial system, in accordance with the provisions of Article 195, paragraph 1, of the Constitution. This plea may be raised for the first time on appeal or in cassation".

If a plea of unconstitutionality is raised during the judicial investigation, it will be examined by the Indictment Chamber. In addition, the plea of unconstitutionality may be raised before the Court of First Instance and the Court of Appeal. The Court of First Instance examines the plea of unconstitutionality before opening the debate, in accordance with Article 16 of Organic Law No. 22/19. Furthermore, the plea of unconstitutionality cannot be raised automatically by the presiding judge, the public prosecutor or the Attorney General. However, the Public Prosecutor or the State Counsellor may, at the request of the Constitutional Court, submit written observations on the plea of unconstitutionality, as provided for in Article 17 of the same Organic Law. It is noteworthy that the Algerian legislature has introduced the possibility of submitting a plea of unconstitutionality to the Court of First Instance, contrary to what was stated in article 3 of Organic Law No. 18/16, which did not confer this power on that court.

2- The submission of the plea of non-constitutionality is limited to the parties to the case:

The submission of the plea of non-constitutionality must be made by the parties to the case and is not open to everyone. In other words, it is limited to natural or legal persons involved in the course of the proceedings, whether they are claimants, defendants, interveners or involved in any other capacity. This includes all persons connected with the case, whether Algerian or foreign. In addition, the plea of non-constitutionality cannot be raised automatically by the judge, the public prosecutor or the public prosecutor.

3- The need for the plea of unconstitutionality to be linked to the legislative judgment or rule in question:

There must be an objective condition for the acceptance of the non-constitutionality plea by the judiciary, which is achieved by the existence of a link between the legislative judgment or regulatory provision and the dispute to which it is applied. It is noteworthy that the scope of the application of the non-constitutionality plea has been extended to regulatory provisions under the Constitutional Amendment 2020, whereas it was previously limited to legislative judgments under the Constitutional Amendment 2016.

4- Impossibility to raise the objection of non-constitutionality of a legislative or regulatory text previously examined by the Constitutional Court:

Article 21 of Organic Law No. 22/19 establishes the conditions for the exercise of the plea of non-constitutionality, stating that the legislative or regulatory text must not have been previously declared constitutional by the Constitutional Court, unless circumstances have changed. This is a confirmation of Article 198 of the Constitutional Amendment 2020, which stipulates that the decisions of the Constitutional Court are final and binding on all public, administrative and judicial authorities.

With regard to the exception mentioned in Algerian legislation, the plea of non-constitutionality can be raised against a legislative or regulatory text previously examined by the Constitutional Court, but only if there has been a change in circumstances. In this case, the challenger must rely on a new basis different from the one considered by the Court in its previous decision.

5- Acceptance of the plea of unconstitutionality in connection with the violation of constitutionally recognised rights and freedoms:

The founder of the Constitution has established this condition in Article 195 of the Amendment to the Constitution of 2020. The plea of non-constitutionality shall be accepted only if the legislative or regulatory decision violates the rights and freedoms of the citizen enshrined in the Constitution.

6- Seriousness of the plea of unconstitutionality:

The condition of seriousness is a legal requirement established by Organic Law No. 22/19, and it is a fundamental condition for the acceptance of the plea of non-constitutionality. This condition was also established by the previous Organic Law No. 18-16. It is crucial because it determines whether or not the appeal will be referred to the Constitutional Court. This stage is of great importance because it requires the establishment of an effective system for the

examination of pleas of non-constitutionality and for distinguishing between genuine and frivolous challenges. The aim is to ensure that such challenges are not misused to prolong the resolution of disputes.

However, the legislature has not provided specific criteria for the judge to use in determining the seriousness of the challenge¹. Instead, it is left to the judge's discretion. Thus, the judge's role is solely to assess whether or not the conditions for accepting the plea of unconstitutionality are met. The judge is not supposed to interfere in the work of the Constitutional Court¹. This issue, according to experts, remains linked to the practices and decisions of the Constitutional Court and the judiciary.

7- The need to submit a written, reasoned and separate plea of non-constitutionality:

The plea of non-constitutionality must be submitted, on pain of rejection, in the form of a written, separate and reasoned memorandum. This requirement is laid down in Article 19 of Organic Law No. 22/19. It emphasises that the plea of unconstitutionality must be presented separately from the original complaint, in the form of a written memorandum with reasons. The memorandum should specify the legal or regulatory provision that is alleged to be unconstitutional, and the challenger must demonstrate his interest in challenging it by showing how he is adversely affected by the challenged legal or regulatory provision. These conditions facilitate the examination of the challenge and ensure an assessment of its seriousness before it is referred to the higher judicial authorities.

The third issue: Characteristics of the claim of unconstitutionality.

The claim of unconstitutionality has several characteristics that distinguish it from other claims. It is a constitutional dispute, which is an objective rather than a personal claim. It is, at all stages, a separate claim from the original one. Moreover, it is a precautionary claim linked to the principal claim, which becomes the principal claim when it is brought before the Constitutional Court. The right to claim unconstitutionality is granted to the parties involved in the proceedings. In addition, the claim of unconstitutionality is not related to public policy and it is not permissible for the judge to raise it spontaneously, as indicated in article 17, paragraph 1, of Organic Law No. 22/19: "The claim of unconstitutionality cannot be raised spontaneously by the judge, the public prosecutor or the public prosecutor".

Ben Dradj, Ali Ibrahim. "The Evolution of the System of Control over the Constitutionality of Laws in Algeria." Doctoral Thesis in Public Law, Faculty of Law and Political Science, University Ziane Achour, Guelma, Academic Year 2018-2019, p. 388.

Section Two: Procedures for dealing with allegations of unconstitutionality and the Algerian experience with this mechanism.

The constitutional legislator has granted the parties to the proceedings the right to raise issues of unconstitutionality against legislative or regulatory provisions that affect rights and freedoms enshrined in the Constitution. However, this right is not exercised directly before the

¹- Dabouche, Farid. "Constitutional Law in Algeria and Comparative Law." Labad Publishing and Distribution, First Edition, Algeria, 2022, p. 176.

body that monitors the constitutionality of laws. Instead, it is subject to the principle of referral, which confers powers on the judiciary. The Constitutional Court is informed of the claim by the Supreme Court and the Council of State, thus establishing a procedural framework.

As explained above, the plea of unconstitutionality is raised before the judicial authority by one of the parties to the dispute and is not automatically raised by the judge. Therefore, the higher judicial bodies, whether the Supreme Court or the Council of State, have the power to refer the plea of unconstitutionality to the Constitutional Court. However, before reaching this stage, the plea of unconstitutionality undergoes an examination and filtering before it reaches the Constitutional Court. This is done to prevent the plea of unconstitutionality from becoming a means of delaying or preventing the courts from dealing with the cases. In addition, the plea of unconstitutionality may lead to an increase in the number of cases brought before the Constitutional Court, where the seriousness, interest and purpose of these cases may be lacking and the sole aim is to prolong the duration of the dispute and delay its resolution¹.

In order to avoid this, the process of filtering or screening the plea of unconstitutionality, which makes it possible to avoid burdening the Constitutional Court, is carried out in two stages. The first filtering takes place when the territorial jurisdiction, after ensuring that the conditions for the plea are met, refers the case to the higher judicial authority, which may be either the Supreme Court or the Council of State, depending on the nature of the dispute. The higher judicial authority then carries out a second review of the plea of unconstitutionality in order to decide whether to refer the case to the Constitutional Court, which is the sole and competent authority to rule on the plea of unconstitutionality. It should be noted that the Algerian legislator has adopted the principle of filtering, similar to other comparative laws such as France. We will also examine the Algerian experience with this mechanism.

First application: Procedure for filtering the plea of unconstitutionality.

Organic Law No. 22/19 defines the competence of the judicial authority before which the plea of unconstitutionality is raised to examine and process the plea. Once this judicial authority has verified that the conditions for a complaint of unconstitutionality are met, it refers the complaint to the higher judicial bodies, either the Supreme Court or the Council of State. The constitutional legislator granted these higher judicial bodies the exclusive power to refer the appeal to the Constitutional Court, after their final and conclusive filtering of the appeal, before it is referred to the Constitutional Court for a decision. This law sought to remedy the shortcomings of Organic Law No. 18/16. It is worth noting that the Algerian system of filtering unconstitutionality appeals can be divided into two types: a two-stage filtering system, in which the appeal is first submitted to lower judicial bodies, such as the Supreme Court or the Council of State, and a single-stage filtering system, in which the appeal is first submitted to the Supreme Court or the Council of State. This will be further clarified by the following statement:

First: Procedure for the treatment of the plea of unconstitutionality before the judicial authorities - First filtering -.

¹ - Farid daboucha, The Previous Reference, p. 178.

Organic Law No. 22/19 defines the competence of the judicial authority before which the complaint of unconstitutionality is lodged to examine and process the complaint. It also stipulates that the plea of unconstitutionality must be submitted either to the Supreme Court or to the Council of State, depending on the nature of the dispute or the original action.

Once the judicial authority before which the dispute is brought has verified that the conditions for the plea of unconstitutionality are met, in accordance with the provisions of Organic Law No. 22/19 on the procedures for notification and referral to the Constitutional Court, it must immediately issue a decision to refer the plea to the Supreme Court or the Council of State, after obtaining the opinion of the public prosecutor or the representative of the State.

After ensuring that the conditions for the appeal have been met, the decision to refer the plea of unconstitutionality, together with the submissions and memoranda of the parties, shall be sent to the Supreme Court or the Council of State within 10 days of the decision being issued, and the parties shall be notified accordingly. The decision may not be appealed.

If, on the other hand, the appeal is rejected by the judicial authority, the parties are notified of the decision to reject the appeal. This decision can only be challenged by means of an appeal against the final decision on the dispute or part of it and must be submitted in the form of a separate and reasoned written memorandum¹.

Organic Law No. 22/19 provides for the possibility for one of the parties to the dispute to raise a plea of unconstitutionality before the judicial authorities belonging to the ordinary judicial system or the judicial authorities belonging to the administrative judicial system, in accordance with the provisions of Article 195, paragraph 1, of the Constitution. This plea may be raised for the first time at the appeal or cassation stage. If the plea of unconstitutionality is raised during the judicial investigation, it is examined by the Indictment Chamber².

In addition, the plea of unconstitutionality can be raised before the Court of First Instance, since Organic Law No. 18/16 did not allow the plea of unconstitutionality to be raised before the Court of First Instance on the basis of Article 3 of that law. It can also be raised before the Court of Appeal, and the Court of First Instance examines the plea of unconstitutionality before opening the debate³.

In summary, the plea of unconstitutionality can be raised before various judicial bodies, including the Court of Appeal and the Court of First Instance, depending on the stage of the proceedings.

¹ - Article 24 of Organic Law 22/19 states: "The decision to refuse to transmit the constitutional challenge to the parties shall be communicated by the Registry within a maximum period of three (3) days from the date of its issuance. It may be challenged only in the context of an appeal against the decision to settle the dispute or part of it, and must be submitted by means of a written, separate and reasoned memorandum. If the constitutional challenge is not referred to the Supreme Court or the Council of State, the judicial body shall continue to rule on the dispute, as the case may be.

² - Article 15 of Organic Law No. 22/19

³ - Article 16 of the same organic law

If the plea of unconstitutionality is raised directly before the Supreme Court or the Council of State, they will give priority to the referral of the plea to the Constitutional Court. This should be done within a period of two months from the date of receipt of the referral, as stated in Article 23 of Organic Law No. 22/19 - the one-tier liquidation system.

However, the referral of the plea of unconstitutionality to the Supreme Court or the Council of State does not affect the original action. The judicial authority postpones the decision on the dispute until it receives the decision of the Supreme Court, the Council of State or the Constitutional Court following the referral of the appeal to them. However, this does not mean that the proceedings are suspended and the judicial authority may take the necessary provisional or precautionary measures¹.

Of course, the judicial authority does not postpone the decision on the appeal in three cases:

1. The first is when a person is deprived of his liberty as a result of the action.
2. The second case is when the purpose of the action is to put an end to the deprivation of liberty, unless the person concerned objects.
3. The third case is when the law requires a decision to be taken within a certain period of time or on an urgent basis.

If the court of first instance makes a decision without waiting for the decision on the plea of unconstitutionality and the decision is appealed, the court of appeal postpones the decision on the appeal, except in exceptional cases. This is specified in Article 26 of Organic Law No. 22/19.

If a cassation appeal is filed and the judges of the case have already ruled on the case without waiting for the Supreme Court, the Council of State or the Constitutional Court to rule on the appeal, the decision on the cassation appeal is postponed until the decision on the appeal of unconstitutionality has been made. However, the Supreme Court or the Council of State, as the case may be, shall not postpone the decision if the person concerned is deprived of his liberty as a result of the appeal, or if the purpose of the appeal is to put an end to the deprivation of liberty, unless the person concerned objects to this, or if the law requires them to make a decision within a certain period or as a matter of urgency. This is confirmed in article 27 of the same Organic Law.

Second, the second review of the constitutionality by the Supreme Court or the Council of State.

It is important to note that the second review of a constitutional challenge takes place when the case is referred for constitutional review to lower judicial bodies under the Supreme Court or the Council of State. This is discussed further in this section. If the unconstitutionality is challenged before the Supreme Court or the Council of State, there is a single review before these higher judicial authorities - the Supreme Court and the Council of State.

¹- Article 25 of Organic Law No. 22/19

The fourth chapter of Organic Law No. 22/19 contains the provisions applicable before the Supreme Court and the Council of State, from Article 29 to Article 37. On the basis of these articles, we can deduce the following procedures:

If the lower judicial authority, i.e. the Supreme Court or the Council of State, where the plea of unconstitutionality is raised, finds that the conditions for such a plea are met, the case is referred to the higher judicial authorities. Both the Council of State and the Supreme Court immediately request the opinion of the Prosecutor General or the Public Prosecutor, in accordance with Article 29 of the aforementioned organic law. The Attorney General submits a request to the Supreme Court or the Public Prosecutor submits a request to the Council of State within a maximum of five (5) days.

The parties may submit their written observations on the plea of unconstitutionality submitted to the Supreme Court or the Council of State. These authorities will then examine whether the appeal meets the conditions laid down in the aforementioned Organic Law No. 22/19. They then decide whether to refer the case to the Constitutional Court.

Pursuant to Article 30 of the same Organic Law, the Supreme Court or the Council of State, as the case may be, shall decide on the referral of the complaint of unconstitutionality to the Constitutional Court within a period of two (2) months from the date of receipt of the decision to refer the complaint of unconstitutionality referred to in Article 23 of the same Organic Law.

The referral shall be made if the legal conditions referred to in Article 21 of this Organic Law are fulfilled.

If the plea of unconstitutionality is raised directly before the Supreme Court or the Council of State, the judicial authority concerned shall decide, as a matter of priority, to refer it to the Constitutional Court within the same time limit¹.

The decision of the Supreme Court or the Council of State², together with the memoranda and submissions of the parties, shall be issued and transmitted to the Constitutional Court in accordance with Article 33 of Organic Law No. 22/19.

Once the plea of unconstitutionality has been referred to the Constitutional Court, the Supreme Court or the Council of State, as the case may be, must postpone the judgment until the plea of unconstitutionality has been decided, unless the person is deprived of his liberty as a result of the action or if the latter is intended to put an end to the deprivation of liberty, unless the person concerned objects, or if they are obliged to give a judgment within a certain period or on an urgent basis.

¹ - Article 31 of Organic Law No. 22/19

² - Article 32 of the same law states that the Supreme Court or the Council of State, as the case may be, shall form a panel presided over by the Chief Justice of each judicial body. If the Chief Justice is unavailable, the Deputy Chief Justice presides. The panel shall be composed of the President of the relevant chamber and three (3) advisors appointed by the Chief Justice or the President of the Council of State, as the case may be.

The decision of the Supreme Court or the Council of State, as the case may be, shall be notified to the judicial authority that lodged the complaint of unconstitutionality, which shall be responsible for notifying the parties within ten (10) days of the date of its delivery.

If the Supreme Court or the Council of State, as the case may be, does not issue a ruling within the time limit specified in Article 30 above, the plea of unconstitutionality shall be automatically referred to the Constitutional Court. This automatic referral shall be subject to the same provisions as those applicable to the regular referral provided for in this Organic Law, as stated in Article 36 of the same Organic Law.

If the Supreme Court or the Council of State, as the case may be, refuses to refer the plea of unconstitutionality to the Constitutional Court, the latter shall receive a copy of the decision and the reasons for it. The Supreme Court or the Council of State, as the case may be, shall send the decision refusing referral of the plea of unconstitutionality to the judicial authority before which the plea was raised, which shall be responsible for notifying the parties to the case within a maximum of five (5) days so that they may take the appropriate legal measures¹.

In fact, the legislator addressed this issue in Law No. 19/22, unlike Organic Law No. 18/16, which did not mention the scenario in which the higher judicial authorities reject the referral of the plea of unconstitutionality. It only established the time frame within which the referral should be made².

The second issue: The procedure for the adjudication of the plea of unconstitutionality by the Constitutional Court.

The adjudication of the plea of unconstitutionality is an inherent competence of a single body, namely the Constitutional Court (formerly known as the Constitutional Council). After the Supreme Court or the Council of State has completed the second review of the objection of unconstitutionality by ensuring that the established legal conditions are met, the objection is referred to the Constitutional Court, which makes a final decision on the constitutionality or unconstitutionality of the objection.

This process is subject to a set of procedures and regulations aimed at establishing this constitutional mechanism. These procedures and regulations are laid down in the Constitutional Amendment of 2020 and in Organic Law No. 22/19, from Article 38 to Article 43, as well as in the specific rules governing the functioning of the Constitutional Court, issued in January 2023³. These rules outline the procedures for the plea of unconstitutionality, which are divided into two sections. The first section deals with the procedures for the plea of unconstitutionality, from Article 18 to Article 35, while the second section deals with the

¹ - According to article 37 of the same organic law.

² - However, the Regulation on the functioning of the Constitutional Council of Algeria, published in the Official Gazette No. 42 of 30 June 2019, affirms that the provisions applicable to ordinary referrals are the same as those applicable to automatic referrals, as stated in Article 15 of the Regulation.

³ - The system outlined for the rules of operation of the Constitutional Court is found in Official Gazette No. 4 issued on January 22, 2023.

decisions of the Constitutional Court on the plea of unconstitutionality, from Article 36 to Article 42.

With reference to these legal texts, it is noted that the regular or automatic referral decision issued by the Supreme Court or the Council of State, depending on the case, on the plea of unconstitutionality is recorded in the register of the plea of unconstitutionality at the Secretariat.

According to Article 18 of the Rules of Procedure of the Constitutional Court¹, the Court examines the plea of unconstitutionality together with the submissions and memoranda of the parties and, if necessary, the supporting documents. The rapporteur may request the necessary documents to strengthen the case.

As soon as the Constitutional Court receives the referral decision on the complaint of unconstitutionality from the Supreme Court or the Council of State, in accordance with the provisions of Article 195 of the Constitution, Pursuant to Article 18 of the Rules of Procedure of the Constitutional Court, the referral decision shall be accompanied by the submissions and memoranda of the parties and, if necessary, by supporting documents. The rapporteur may request the necessary documents to strengthen the case.

As soon as the Constitutional Court receives the referral decision on the plea of unconstitutionality from the Supreme Court or the Council of State, in accordance with the provisions of Article 195 of the Constitution, it immediately notifies the President of the Republic. On, it shall immediately inform the President of the Republic.

The President of the Council of the Nation (the upper house of Parliament), the President of the People's National Assembly (the lower house of Parliament) and the Prime Minister or the Head of Government, as the case may be, are also informed of the referral decision, together with the submissions and memoranda of the parties. They shall have the opportunity to submit their observations to the Constitutional Court on the allegation of unconstitutionality under consideration. The authorities and the parties are required to submit their written observations within twenty (20) days from the date of notification. The observations shall then be communicated to the authorities and parties, who shall have the right to reply in writing within ten (10) days from the date of receipt. The President of the Constitutional Court may extend this period at the request of the authorities or parties concerned². Furthermore, any observations and supporting documents sent after the specified time limit shall be excluded from consideration.

In addition, any interested party shall have the right to intervene in the proceedings of the Constitutional Court in respect of a complaint of unconstitutionality by submitting a written and reasoned memorandum, in accordance with the provisions of Article 21 of this Organic

¹ - It corresponds to Article 11 of the regulations specified for the rules of operation of the Constitutional Council for the year 2019, dated June 30, 2019, and published in Official Gazette No. 42 issued on June 30, 2019.

² - Articles 20 and 21 of the above-mentioned system for the functioning of the Constitutional Court should be consulted.

Law, prior to the hearing of the complaint. If the request is accepted, the intervening party shall be subject to the same procedures as the parties involved.

The sessions of the Constitutional Court are open to the public, except in the exceptional cases provided for in the rules governing its work, in accordance with Article 40 of Organic Law No. 22/19¹. The representatives of the Government and of the parties, represented by their lawyers, may present their arguments orally before the Constitutional Court, in accordance with Article 40 of Organic Law No. 22/19.

With reference to Article 43 of Organic Law No. 22/19, the Constitutional Court rules on matters of unconstitutionality within the time limits and procedures laid down in Article 195 (2) of the Constitution. The decision of the Constitutional Court is notified to the President of the Republic, the President of the Council of the Nation (upper house of Parliament), the President of the National People's Assembly (lower house of Parliament) and the Prime Minister or the Head of Government, as the case may be. In addition, the decision of the Constitutional Court is also notified to the Supreme Court or the Council of State, as the case may be, in order to inform the judicial body before which the plea of unconstitutionality was raised. The decision of the Constitutional Court is published in the Official Journal of the Democratic People's Republic of Algeria. It should be noted that article 197 of the constitutional amendment of 2020 stipulates that the decisions of the Constitutional Court shall be taken by a majority of the members present and, in the event of a tied vote, the President shall have the casting vote.

"In accordance with Article 43 of Organic Law No. 22/19, it can be noted that the law does not contain any provisions on the consequences of the Constitutional Court's decision on the unconstitutionality of legislative or regulatory texts. This is confirmed by the aforementioned Article 43, which states: "If the Constitutional Court notifies on the above basis, its decision shall be issued within four months from the date of notification. This period may be extended once for a maximum of four months, by a reasoned decision of the Court, which shall be communicated to the judicial body that made the notification. However, it should also be noted that the Rules of Procedure of the Constitutional Court for the year 2023 only stipulate that the Court shall take a decision on the legislative or regulatory text which is the subject of the plea of unconstitutionality and, in the event of a declaration of unconstitutionality, it shall determine the date on which the text ceases to have effect, in accordance with Article 198, paragraph 4, which states that If the Constitutional Court decides that a legislative or regulatory text is unconstitutional on the basis of the aforementioned Article 195, it shall lose its effect from the date determined by the decision of the Constitutional Court. This provision makes it clear that the legislative or regulatory text declared unconstitutional by the Constitutional Court loses its effect from the date determined by the Court's decision, and not from the date of the Court's decision or from the date of publication of the text. The loss of effect of the text is directly linked to the date determined by the decision of the Constitutional Court. This is the exercise of the discretionary power of the Constitutional Court to determine

¹ - Article 28 of the aforementioned system of the functioning of the Constitutional Court states that "The President of the Constitutional Court may, either spontaneously or at the request of one of the parties, convene a closed session if publicity would be detrimental to public order and morality.

the timeframe for the loss of effect of the legislative or regulatory text, in order to safeguard the acquired rights of individuals in the light of the text declared unconstitutional¹.

The third aspect: The Algerian experience of constitutional revision.

The Algerian experience of constitutional review is characterised by:

1- The examination and judgement of the appeals submitted to it:

The plea of unconstitutionality is a tool that the Algerian Constitution of 2016 makes available to litigants, enabling them to assert their fundamental rights and freedoms before the judiciary by challenging legislative provisions whenever they consider them contrary to their rights and freedoms. Article 215 of the Constitution establishes a minimum period of three years for the implementation of the constitutional review mechanism. Subsequently, Organic Law No. 18/16, which outlines the procedures for the implementation of this mechanism, was enacted and published in the Official Gazette on 5 September 2018, and its provisions will enter into force on 7 March 2019. The first decision by the Supreme Court to refer a case to the Constitutional Council was issued on 17 July 2019, under index number 00003/19. The Constitutional Council then ruled on this referral on 20 November 2019, regarding the partial unconstitutionality of Article 416 of the Code of Criminal Procedure².

The recent amendment of the Algerian constitution in 2020 introduced new provisions on this mechanism. It allows litigants to challenge not only legislative provisions but also regulatory provisions if they believe they contradict rights and freedoms. However, this recent constitutional amendment sets a maximum deadline of one year for the compensation of institutions and bodies affected by the amendment or its annulment. However, it does not set a deadline for laws that need to be amended, only stating that these new laws or amendments should be made within a reasonable period of time. The Supreme Court received a dossier from the lower court, which included an acceptance of a plea of unconstitutionality against executive decrees. However, the Supreme Court rejected the referral on the grounds that the organic law on the implementation of the constitutional review mechanism had not yet been adopted. This decision was issued on 26 April 2021 under number 2³.

The Constitutional Court was set up in December 2021 and issued 31 decisions published in the Official Journal of the Republic of Algeria by 31 January 2023. The attainment of the

¹ - The reference to Farid Dabouche, page 191

² - is related to the decision of the Constitutional Council No. 01/Q.M.D/D.C/D.D/19 of 23 November 2019, corresponding to 20 November 2019, on the unconstitutionality of Article 416 of the Code of Criminal Procedure. This decision was published in the Official Gazette No. 77 of 15 December 2019.

³ - Hadi Loeuil, an advisor to the Supreme Court and a member of the body that decides on constitutionality, will discuss "The role of the declaration of unconstitutionality in the protection of rights and freedoms" in an intervention at the National Forum of the Constitutional Court of Algeria on 21 and 22 June 2022. This information is available on the website www.coursupreme.dz, which will be accessed at 9:00 on 1 March 2023.

www.coursupreme.dz

objectives of this institution is only affected by the positive actions of the parties involved in the equation, as regulated by Organic Law No. 16/18 and subsequently by Law No. 22/18. These parties include, on the one hand, the litigant and his defence and, on the other, the judge before whom the dispute is brought. While excessive recourse to unconstitutionality has been seen as a delaying tactic to impede the progress of legal disputes, the opposite has occurred. For example, after one year of implementation of the unconstitutionality mechanism, from 7 March 2019 to February 2020, a decrease in the number of complaints filed can be observed compared to the application of this mechanism in other countries, particularly France. At the level of the Supreme Court, 16 cases of unconstitutionality were registered, 3 of which were referred to the Constitutional Council in relation to Article 416, paragraphs 1 and 2 of the Code of Criminal Procedure and Article 496, paragraph 6 of the same Code. One case was referred to the Council of State, but the referral was rejected¹.

What can be said is that Algeria's experience with this mechanism is still very recent, and it will take at least a decade to evaluate the role played by this mechanism in guaranteeing rights and freedoms. However, one year after the establishment of the Constitutional Court in December 2021 and until 31 January 2023, 31 decisions have been issued. These decisions were taken following referrals from the Supreme Court and twice from the Council of State. The Constitutional Court issued its first decision until Decision No. 22 on the unconstitutionality of Article 73-4 of Law No. 90/11 regulating labour relations, as amended and supplemented, in which it affirmed its constitutionality in the first decision and issued subsequent decisions from Decision No. 2 to Decision No. 22, declaring the priority of the decision on the constitutionality of the same Article². With regard to Decision No. 23, the Court, in its Decision No. 02/Q.D.M./D.D./21 of 5 December 2021, declared the precedence of

¹- Mr Tabi Abdelrachid discusses "The role of the judicial bodies in activating the mechanism of declaring unconstitutionality" in his intervention during the international seminar on the protection of rights and freedoms held at the Constitutional Council on 23 and 24 February 2020. This intervention will be published on the website www.coursupreme.dz, which will be accessed on 20 February 2023 at 17:00. www.coursupreme.dz

Mr Rachid Tabi, the current President of the High Court of Justice, compares Algeria with France during the first year of application of Law No. 2009-1532 in France, which includes the constitutional priority referral system. He notes that during that year, the French Court of Cassation and the Council of State issued 527 decisions on the matter, including the referral of 124 cases. Comparing the number of cases referred with the number of cases not referred (403), the Constitutional Council considers that the filtering system introduced in France by the founder of the Constitution constitutes an obstacle to French citizens' access to constitutional justice.

²- Constitutional Court Decision No. 01/Q.M.D/D.C/D.D/22 of 26 January 2022 (corresponding to 23 Jumada al-Thani 1443) concerns the unconstitutionality of Article 73-4 of Law No. 90-11 of 21 April 1990 on labour relations, as amended. All subsequent decisions up to Decision No. 22 were published in the same Official Gazette, No. 34, published on 19 May 2021. www.coursupreme.dz

ruling on the constitutionality of Article 633, paragraph 1, of the Code of Civil and Administrative Procedure¹.

With regard to Decision No. 24, the Constitutional Court decided to give precedence to the decision on the constitutionality of Article 73-4 of Law No. 90/11 and the constitutionality of Article 21 of Law No. 90/4 of 6 February 1990 concerning the settlement of individual disputes at the workplace. The same applies to Decisions Nos. 25, 26 and 27, in which the Constitutional Court decided to give priority to the decision on the constitutionality of Article 73-4 and Article 21 of Law No. 90/04. With regard to Decision No. 28, it decided to declare the precedence of the decision on the constitutionality of Article 21².

With regard to Decision No. 29, it relates to the declaration of the unconstitutionality of Article 20 of Decree No. 96/09³ of 10 January 1996 on leasehold tenure. The Constitutional Court ruled that Article 20 of Decree No. 96/09 was unconstitutional. All these decisions have been referred to the Supreme Court. As regards Decisions Nos. 30 and 31, they were referred by the Council of State. With regard to Decision No. 30, it relates to the declaration of unconstitutionality of Articles 815, 826, 904, 905 and 906 of Law No. 08/09 of 25 February 2008, which includes the Civil and Administrative Procedure Code. The Constitutional Court made the following decisions: Firstly, it declared that the unconstitutionality of Articles 815 and 826 of Law No. 08/09, as amended and supplemented by Law No. 22/13, was no longer relevant following the amendment of the former and the complete repeal of the latter. It also declared that it would not rule on the unconstitutionality of Article 904 of Law No. 08/09, as amended by Law No. 22/13, by referring to Article 815, which no longer requires representation by a lawyer before the Administrative Court. It also declared Articles 905 and 906 of Law No. 08/09, as amended and supplemented⁴, to be constitutional. With regard to

¹- The decision of the Constitutional Court, Decision No. 23/Q.D.M./D.D./22, dated 23rd Jumada al-Thani 1443, corresponding to 26th January 2022, established the precedence of ruling on the constitutionality of Article 633, Paragraph 1 of the Civil and Administrative Procedures Code, based on its Decision No. 02/Q.D.M./D.D./21, dated 5th December 2021. This decision was published in the Official Gazette, number 34, dated 19 May 2021.

²- Constitutional Court Decision No. 29/Q.M.D/D.C/D.D/22, dated 25 May 2022 (corresponding to 24 Shawwal 1443), deals with the unconstitutionality of Article 20 of Decree No. 96/09, dated 10 January 1996, concerning leasing contracts. The Constitutional Court ruled on the constitutionality of Article 20 of Decree No. 96/09. This decision was published in Official Gazette No. 55 of 18 August 2002.

³- Constitutional Court Decision No. 29/Q.M.D/D.C/D.D/22, dated 25 May 2022 (corresponding to 24 Shawwal 1443), addresses the unconstitutionality of Article 20 of Order No. 96/09, dated 10 January 1996, concerning leasing contracts. The Constitutional Court ruled on the constitutionality of Article 20 of Order No. 96/09. This decision was published in Official Gazette No. 55 issued on 18 August 2022.

⁴- Constitutional Court Decision No. 30/Q.M.D/D.C/D.D/22, dated 26 October 2022 (corresponding to the first day of Rabi' al-Thani 1444), pertains to the declaration of unconstitutionality of Articles 815, 826, 904, 905, and 906 of Law No. 08/09, dated 25 February 2008, which includes the Civil and Administrative Procedure Code. This decision was published in Official Gazette No. 6 issued on 31 January 2023.

Decision No. 31, which relates to the declaration of the unconstitutionality of Article 43 of Law No. 11-10, the Constitutional Court ruled that Article 43 of the Municipal Law¹ is constitutional.

Decision No. 01/ of 12 July 2023, issued by the Constitutional Court, concerns the declaration of the unconstitutionality of Article 643 of Law No. 08-09 of 25 February 2008, which includes the Civil and Administrative Procedures Act. This decision was made on the basis of a referral from the Supreme Court of Justice and it declares the unconstitutionality of the said article².

In view of the variety of arguments put forward, some of which relate to procedural issues and others to substantive issues, it is clear that the use of constitutional review mechanisms remains quite limited compared with the number of disputes brought before the courts. It is therefore necessary to encourage everyone to make use of this mechanism and to apply it in such a way as to achieve its intended purpose before the ordinary or administrative courts, particularly in view of the fact that the possibility of constitutional review in Algeria is available only to litigants in specific cases brought before the judicial authorities. This limitation poses a challenge to the protection of the rights and freedoms of all citizens.

2- Meetings and workshops have been convened as part of the constitutional review process:

The Constitutional Court, in collaboration with the United Nations Development Programme (UNDP) in Algeria, organised two workshops on 15 and 16 March on "Constitutional complaints" and "Mechanisms for dealing with constitutional complaints". These workshops were organised within the framework of the partnership between the Constitutional Court and the UNDP in Algeria, more specifically within the framework of the project entitled "The Constitution at the service of citizens".

Conclusion:

Finally, we affirm that the constitutional review mechanism established by the Algerian constitutional founder through the 2016 constitutional amendment and further developed through the 2020 constitutional amendment represents a qualitative leap in the promotion of human rights and freedoms by ensuring the review of the constitutionality of laws and regulations. Previously, individuals in Algeria were deprived of their right to challenge laws, as the individual should be at the centre of all legislation. The mechanism serves as a means for citizens to have access to constitutional justice and to effectively defend their rights and

¹ - Constitutional Court Decision No. 31/Q.M.D/D.C/D.D/22, dated 26 October 2022 (corresponding to the first day of Rabi' al-Thani 1444), addresses the unconstitutionality of Article 43 of Law No. 11-10, dated 22 June 2011, related to municipalities. This decision was published in Official Gazette No. 6 issued on 31 January 2023.

² - Constitutional Court Decision No. 01/Q.M.D/D.C/D.D/23 of 12 July 2023 concerns the declaration of unconstitutionality of Article 643 of Law No. 08-09 of 25 February 2008, which includes the Civil and Administrative Procedures Code. This decision was published in the Official Journal no. 55 of 27 August 2023.

freedoms, thereby preserving the dignity of the Constitution on the one hand, and safeguarding the system of rights and freedoms and ensuring the conformity of laws and regulations with the Constitution on the other.

This is achieved by extending the practice of constitutional review to regulatory texts within the framework of the recent constitutional amendment. It helps to cleanse the legal system of laws and regulations that violate rights and freedoms. As a result, citizens become participants in the protection of rights and freedoms through this indirect instrument of access to constitutional justice. It also ensures the effective consolidation of legal certainty, as provided for in the last paragraph of Article 34 of the 2020 Constitutional Amendment.

This was further strengthened by the enactment of Organic Law No. 22/19, which updated and amended its provisions. The Algerian legislature sought to remedy the shortcomings of Organic Law No. 18/16, particularly with regard to the submission of constitutional complaints to the Court of First Instance and the procedures applied before the Constitutional Court, in accordance with the provisions of the Constitution, the specific system governing its functioning and its internal regulations. It also repealed Organic Law No. 18/16, which established the conditions and procedures for filing constitutional complaints.

In the light of the above, we propose the following recommendations:

- We commend the Algerian legislature for enacting Organic Law No. 22/19, which is a specialised procedural law that defines the procedures and methods for submissions and referrals to the Constitutional Court. Despite some shortcomings, it specifically and accurately identifies the types of provisions subject to constitutional review and outlines the procedures for submitting and referring constitutional complaints. However, we recommend that
- It is essential to empower the judicial authorities in Algeria to exercise constitutional review when considering a judicial dispute where legislative or regulatory provisions that violate human rights and freedoms are likely to be applied. These judicial authorities are responsible for the protection of society and the rights and freedoms of citizens, as set out in Article 164 of the Constitutional Amendment 2020.
- Emphasis should be placed on training and capacity building for judicial bodies responsible for constitutional review, and the establishment of specialised constitutional review bodies could be considered.
- Members of Parliament and the Council of the Nation should be allowed to express their opinions and observations on constitutional complaints submitted to the Constitutional Court.
- We hope that the defence community will play a role in consolidating this mechanism, which aims to purify the legal system of legislative and regulatory provisions that violate established rights and freedoms.

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