The Constitutional Court in the 2020 Reform: Strengthened Structure and Defined Membership Criteria

المحكمة الدستورية في تعديل 2020: هيكل معزز ومعايير عضوية محددة



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Received: 24/03/2026 *Accepted:07/05/2026* *Published:22./05/2026*

Abstract:

The constitutional founder combined the method of appointment with the method of election in the formation of the Constitutional Court, which consists of twelve members: four members are appointed by the President of the Republic, including the President of the Court; one member is elected by the Supreme Court from among its members; one member is elected by the State Council from among its members; and the rest are elected from among professors specialized in constitutional law, with additional specific conditions that must be met.

Keywords: Constitutional Court; composition; independence; membership.

ملخص:

جمع المؤسس الدستوري بين أسلوب التعيين وأسلوب الانتخاب في تشكيلة المحكمة الدستورية، حيث تضم اثنا عشر عضوا:أربعة أعضاء يعينهم رئيس الجمهورية من بينهم

رئيس المحكمة، عضو واحد تنتخبه المحكمة العليا من بين أعضائها، وعضو واحد ينتخبه مجلس الدولة من بين أعضائه، والبقية منتخبين من بين الاساتذة المختصين في الدستوري،مع اضافة شروط خاصة يجب توافرها.

كلمات مفتاحية: : المحكمة الدستورية،التشكيلة،الاستقلالية،العضوية.

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INTRODUCTION

The mere existence of a constitution within the state, one that delineates the powers of each of the three branches and sets out the fundamental rights and freedoms to which individuals are entitled, as well as the duties incumbent upon them, is insufficient to ensure that each adheres to these constitutional provisions. The method by which constitutional review is conducted variesr: some have adopted a priori reviews directed at draft legislation, whereas others have embraced a posteriori reviews applied to legal texts after their promulgation. Such a review may also be judicial or political.This newly established authority in 2020 was allocated A whole chapter was devoted to this Court in Title IV of the Constitution under the heading "Oversight Institutions, comprising fifteen articles (Articles 185--198), which reflects the significance that the constitutional founding authority has attached to this institution.

Algerian constitutions prior to 2016 did not provide for special conditions governing membership of the Constitutional Council, and they likewise failed to require competence and legal expertise. However, with the 2016 amendment, the requirements of experience and specialisation in the legal field were stipulated for the first time. This was reaffirmed by the 2020 amendment, which also introduced substantive changes to the Constitutional Court's composition. The importance of this study lies in examining the composition of the

Constitutional Court and the conditions for membership therein and consequently in assessing the extent of this body's independence from the perspective of its membership. This, in turn, is reflected in its effectiveness in performing its functions as the guarantor of constitutional supremacy and the protector of fundamental rights and freedoms. Therefore, the principal research problem is as follows: What innovations were introduced by the 2020 constitutional amendment regarding the composition of the Constitutional Court? Moreover, what conditions did it lay down for membership to ensure the competence and independence of its members?

This study adopted a set of complementary methodologies to examine the composition of the Constitutional Court. The analytical method was employed to analyse the constitutional texts related to these texts. The comparative method was also used to compare the constitutional amendments of 2020 and 2016. In addition, the descriptive method was adopted to highlight the significance of the changes introduced by the 2020 constitutional amendment.

The subject will be examined in two sections. The first section addresses the composition of the Constitutional Court and the extent of its independence, whereas the second section addresses the new membership conditions pursuant to the 2020 constitutional amendment.

Section One: An Independent and High-Quality Composition of the Constitutional Court

The body responsible for reviewing the constitutionality of laws was altered following the 2020 constitutional amendment.[1] Pursuant to Article 185, the constitutional founding authority established a constitutional institution that replaced the Constitutional Council, termed the Constitutional Court, and regarded it as an independent institution tasked with ensuring compliance with the Constitution, as

had been the case for the Constitutional Council, with the additional function of regulating the operation of public institutions and the authorities of the state.

First Subsection: The Composition of the Constitutional Court as a Qualitative Composition

The Constitutional Court is composed of twelve (12) members: four members appointed by the President of the Republic, including the President of the Court; one member elected by the Supreme Court from among its members; one member elected by the Council of State from among its members; and six members elected from among professors of constitutional law, in accordance with the conditions and modalities laid down in Presidential Decree Nos. 21--304.[2]

First Branch: Appointed Members

The President of the Republic alone enjoys the power to appoint the four members of the Constitutional Court directly, without the involvement of the legislative and judicial branches. This is a broad and unconstrained appointing power, as no formal or substantive conditions govern the selection, which renders this method of appointment linked to subjective political considerations rather than objective criteria such as advanced academic qualifications, scholarly capacity, and professional experience.

The President of the Republic enjoys both quantitative and qualitative advantages within the Constitutional Court. This advantage cannot be explained merely by the fact that the head of the executive branch is represented by no fewer than four members within this body; instead, within this quota, a member occupies a distinguished position among the other members, namely, the President of the Constitutional Court.

The constitutional founding authority has conferred upon the President of the Republic the power to appoint the third-highest office in the state. The Constitutions of 1989 and 1996, as well as the constitutional amendments of 2016 and 2020, all entrenched this qualitative privilege in favour of the first judge in the country, thereby reaffirming the President's role as guardian of the Constitution. This privilege granted to the President of the Republic constitutes a qualitative dimension: it is not limited to appointing a significant number of members but also extends to the appointment of the President of the Court, who occupies a central position in the administration of the institution. The exercise of this prerogative may be decisive in tipping the balance in favour of the executive branch in the event of a dispute between it and other members concerning a legislative or regulatory text under review before the Constitutional Court. The President of the Court embodies moral authority, representing the Constitutional Court and speaking on its behalf, and holds an important constitutional function, namely, assuming the presidency of the state in the event of a vacancy in both the offices of the President of the Republic and the President of the Council of the Nation.

Although the President of the Court is subject to the same obligations and enjoys the same rights as the other members do, the sensitivity of this office necessitates additional safeguards to strengthen the holder's impartiality and independence and prevent undue influence arising from pressures exerted by the appointing authority. Among the proposals that would enhance the independence of this position and achieve a balance between the branches of power in relation to the manner of appointment is that the President of the Court should be chosen from among the Court's members by election, with both appointed and elected members participating.

Second Branch: Elected Members

The 2020[3] Constitutional amendment marked a qualitative leap in the Court's composition by relying on the principle of voting to select half of its members. This ensured the electoral body's representation in the Constitutional Court's composition, namely, professors of constitutional law. Presidential Decree Nos. 21--304 set out the conditions and procedures for their election under the supervision of a national electoral committee established within the National Conference of Universities.

With reference to Presidential Decree No. 21--304, which specifies the conditions and procedures for the election of professors of constitutional law as members of the Constitutional Court, all stages of the electoral process are regulated. It affirmed that the election of six (06) members from among professors of constitutional law is to be conducted under the supervision, administration, and oversight of a national electoral committee established within the National Conference of Universities.

On the other hand, a certain degree of divergence may be observed upon examining the wording used by the constitutional founding authority within the same article. It employed the term "appointment" in relation to the President of the Republic while using the term "election" in relation to the judicial bodies and professors of constitutional law. This distinction raises questions about its motives and underlying considerations, particularly when one considers the linguistic and terminological differences between "appointment" and "election". By its nature, an appointment grants the competent authority absolute freedom to choose individuals without prior constraints or conditions. In the case of an election, however, this freedom is reduced and becomes circumscribed, as the election must be confined to a predefined group, from which members are then selected.

For this reason, the constitutional founding authority combined appointment and election in the composition of the Constitutional Court to avoid the pressure to which the appointing authority may subject members if appointments were the sole method and the political pressure that may bear upon elected members if elections were the sole method.[4]

Notably, pursuant to the 2020 amendment, the constitutional founding authority excluded Parliament from the composition of the Constitutional Court, in contrast to the 2016 constitutional amendment, under which four members represented Parliament. This reflects an intention to remove the political character of the Court's composition on the one hand and to strengthen it with members possessing expertise and specialisation on the other hand.

The judicial branch is represented in the Constitutional Court by a judge from the Supreme Court and a judge from the Council of State. Pursuant to the 2020 amendment, the constitutional founding authority reduced judicial representation within the constitutional institution entrusted with reviewing the constitutionality of laws compared with the Constitutional Council under the 2016 amendment.[5] Constitutional amendment, in which the judicial branch was represented by four members: two members elected by the Supreme Court and two members elected by the Council of State.

This reduction is attributable to the introduction of a new component within the composition of the Constitutional Court, namely, the category of professors of constitutional law, who were allocated half of its membership, six members elected by ballot. This category is considered qualified by virtue of its legal specialisation, experience, and academic standing, which enables it to examine and adjudicate the constitutionality of laws, as well as to address technical issues that require legal competence acquired through practice and experience.

Judges have consistently been represented in the Constitutional Council; however, the judicial element has been declining. Under the 1963 Constitution, the judicial branch was represented by three judges out of the Council's seven members. Under the 1989 Constitution, the number of judges was reduced to two of a total of seven members. Under the 1996 Constitution, the judicial branch was represented by only two of the nine members. It then rose to four members in the 2016 constitutional amendment before being reduced once again to two members within the composition of the Constitutional Court under the 2020 constitutional amendment, thereby diminishing the Judiciary's contribution to the constitutional review of legislation.

Second Subsection: A more independent composition of the Constitutional Court

The 2020 constitutional amendment provides that the Constitutional Court is an independent institution. The constitutional founding authority established it; determined the number of its members, the applicable conditions, and the immunity of its members in criminal matters; and regulated its functions and defined its powers. This reflects an intention to insulate this institution from interference by, or influence of, the other branches of the state, whether through amendment or through the curtailment of its competences.

The election of half of the members of the Constitutional Court from among constitutional law professors constitutes a safeguard, affirmed for the first time in Algerian constitutions, and represents a fundamental pillar of democracy in the selection of Constitutional Court members. It aims to confer and strengthen the Court's independence and to reinforce it with specialised expertise in constitutional law, which positively contributes to the exercise of constitutional review of legislation and to the protection of constitutional supremacy. This safeguard has also been constitutionally and legislatively framed and regulated by identifying

the electoral body that selects half of the members from among professors of constitutional law.[6]

Presidential Decree No. 21--304, which sets out the conditions and procedures for the election of professors of constitutional law as members of the Constitutional Court, affirmed that the six (06) seats allocated to professors of constitutional law are to be distributed equally among the regional conferences of universities: two seats are allocated to the Central Regional Conference of Universities, two seats are allocated to the Western Regional Conference of Universities, and two seats are allocated to the Eastern Regional Conference of Universities. The election is conducted at the premises of higher education institutions affiliated with each regional conference of universities.

However, it may be observed that the constitutional founding authority conferred the power to complete the regulation and establishment of the Constitutional Court upon an authority that participates in the appointment of certain members of the Court, whose actions are subject to its oversight, and which holds the right to refer matters to it, rather than conferring that same power upon statute. This compensates Parliament for its exclusion, under the 2020 constitutional amendment, from participation in the formation of the Constitutional Court. In comparative law, the statute is widely recognised as the instrument most commonly relied upon to complete the regulation of constitutional courts and to define their operation and powers.[7]

Accordingly, the Constitutional Court enjoys greater independence than the Constitutional Council does, given the absence of a political majority and the Council's dominance over the Court. Moreover, the term of office of the Court's members is six years and is nonrenewable.[8] This condition renders the member more independent and less susceptible to pressure from the authority that nominates or selects them.

Section Two: From General Conditions to Specific and Defined Conditions for Membership of the Constitutional Court

With reference to previous Algerian constitutions, it is apparent that they did not specify special conditions for membership in the Constitutional Council, nor did they stipulate competence and experience as fundamental criteria for membership. As a result, the selection of Council members was carried out in accordance with the general constitutional conditions governing appointment and election.

For the first time, the 2016 constitutional amendment, in Article 184, stipulated a specific condition: that members of the Constitutional Council must have professional experience of at least fifteen (15) years in higher education in legal sciences, in the Judiciary, in the profession of lawyer before the Supreme Court or the Council of State, or in a senior state office. The 2020 constitutional amendment further expanded these special conditions.

First Subsection: Membership Conditions Common to Elected and Appointed Members

Article 187 of the 2020 constitutional amendment set out specific conditions that must be met by any elected or appointed member of the Constitutional Court, including having attained the full age of fifty (50) years on the date of election or appointment; possessing at least twenty (20) years of experience in the field of law; and having received training in constitutional law. It is also necessary that the member enjoy full civil and political rights, not have been convicted of a custodial sentence, and not belong to any political party.

In addition, once elected or appointed, the member ceases to hold any office or engage in any other activity to ensure their complete

availability and independence while performing their duties within the Constitutional Court.

First Branch: Raising the Legal Age for Membership of the Constitutional Court

In the 2020 amendment, the Algerian constitutional founding authority raised the legal age for membership of the Constitutional Court to the full age of fifty (50) years on the date of election or appointment. This requirement is relatively excessive compared with the 2016 constitutional amendment, which set the age at forty (40) years. This view is reinforced by the fact that the requirement of competence and experience also stipulated among the eligibility conditions is sufficient to guarantee a high level of qualification, without the need to increase the age of eligibility in a manner that may exclude significant legal competencies.

The President of the Republic appoints the President of the Constitutional Court for a single term of six (6) years, provided that the conditions set out in Article 87 of the Constitution are met, except for the age requirement. The members of the Constitutional Court serve a single term of six (6) years, subject to the principle of partial renewal, under which half of the members are renewed every three (3) years. The Constitutional Court's internal regulations determine the conditions and modalities for implementing this partial renewal.

Second Branch: The Requirement of at least Twenty (20) Years' Experience in Law and Training in Constitutional Law

The 2020 constitutional amendment required all members of the Constitutional Court to possess experience in law of no less than twenty (20) years and to have benefited from training in constitutional law. It is nevertheless notable that although it specified the duration of legal

experience, it did not clarify the fields in which such experience must have been acquired.[9]

The concept of "experience in law" is comprehensive. Does it refer to academic experience, judicial experience, legal practice as an advocate, or legal functions within public administration? For this reason, it was necessary to define precisely the nature and fields of such experience and to delimit them exhaustively, in a manner that does not leave room for discretionary power to exclude those possessing relevant experience.

Under the 2016 constitutional amendment, the fields of experience were specified, with a minimum duration of fifteen years, whether in higher education in legal sciences, in the Judiciary, in the profession of lawyer before the Supreme Court or the Council of State, or in a senior state office.

Moreover, prior to the 2016 constitutional amendment, the President of the Republic appointed members, and Parliament, through its two chambers (the People's National Assembly and the Council of the Nation), elected members who possessed advanced training and professional experience in law, notwithstanding that the Constitution did not expressly oblige them to do so. This reflects an implicit commitment to a specialised legal composition, even in the absence of a binding constitutional provision.

Third Branch: Prohibiting Party Affiliation for Members of the Constitutional Court

With respect to the requirement of nonaffiliation with a political party, which constitutes one of the fundamental safeguards for strengthening the independence of the Constitutional Court and distancing its members from any political influence or partisan pressure,

the 2020 constitutional amendment, in Article 187, expressly enshrined this requirement for the first time in the history of successive Algerian constitutions. This constitutional innovation constitutes an important step towards reinforcing the principle of institutional neutrality and enhancing citizens' confidence in this constitutional body's performance.

However, it is noteworthy that Presidential Decree No. 21--304, which lays down the conditions and modalities for the election of professors of constitutional law as members of the Constitutional Court, did not provide for an absolute prohibition on party affiliation. Instead, this regulatory instrument merely required that the candidate must not have been affiliated with any political party during the three (3) years preceding the date of their election. This finding indicates that the prohibition is neither permanent nor absolute but relatively temporary and time-bound, which may be interpreted as a partial restriction on party affiliation.

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Fourth Branch: Enjoyment of Civil and Political Rights and the Absence of a Custodial Sentence

Civil and political rights are among the most important categories of rights that protect individuals' freedom from violations emanating from the state, society, or other individuals. They also guarantee individuals' effective participation in civil and political life, free from discrimination or persecution. However, these rights are not absolute, as a person may be deprived of them wholly or partially within the framework of ancillary penalties imposed for certain offences. Consequently, a person who has lost rights such as the right to property or the right to vote and stand for election cannot, as a matter of law, be appointed or elected to senior positions such as membership in the Constitutional Court since the enjoyment of these rights constitutes a fundamental condition for exercising such duties of a sovereign and constitutional nature.

In addition to the requirement of enjoying full civil and political rights, the constitutional founding authority, in the 2020 amendment, added a further condition: that the member must not have been convicted of a crime resulting in a custodial sentence.

Second Subsection: Special Conditions Applicable

Selecting half of the staff of this institution from among specialists in their field is considered a gain., as affirmed for the first time in the Algerian constitution. It represents a fundamental pillar of democracy in the selection of Constitutional Court members. It aims to confer

independence on the Court and to reinforce it with specialised expertise in constitutional law.

The 2021 decree has set conditions for this category. Hence, there is differentiation in membership conditions within the Court between the elected or appointed professors and the other six members, all of whom are professors of constitutional law.

First Branch: Professor of Higher Education

Article 9 of Presidential Decree No. 21--304 requires, for the validity of a candidature by professors of constitutional law for membership in the Constitutional Court, that the candidate hold the rank of "Professor", which is the highest rank within the academic hierarchy. It further requires that the Professor be in active service at the time of candidature and not in other legal statuses, such as secondment, leave of absence, or sick leave.

Second Branch: Twenty Years' Experience in Higher Education

A candidate professor must have over twenty years of teaching experience at the university. This condition aims to ensure that the candidate possesses extensive experience and a long-standing record in teaching and research in the legal field, as reflected in their performance in the area of constitutional review of legislation.

In addition,The candidate, a professor specializing in constitutional law, must have studied for no less than five years.

The Algerian constitutional founding authority has emphasised the legal specialisation of its members by requiring the highest academic rank and extensive teaching experience, in addition to training in constitutional law. This enables them to contribute to constitutional

jurisprudence that supports the Constitutional Court in light of its new competences.[10]

CONCLUSION

the Constitutional Court is an independent institution, a significant constitutional guarantee intended to secure its impartiality and effectiveness in the performance of its constitutional functions. The constitutional founding authority determined its composition and the conditions for membership, including academic qualifications and professional experience, and guaranteed its members immunity from criminal liability. The role of the constitutional founding authority further extended to defining the Court's powers with precision so that they are not confined to the constitutional review of legislation but also encompass ensuring the proper functioning of constitutional institutions and regulating relations between the branches of power. Accordingly, the Constitutional Court becomes an effective instrument for safeguarding the supremacy of the Constitution and ensuring the balance of powers. Moreover, the adoption of an electoral method to select half of the members of the Constitutional Court constitutes a fundamental safeguard affirmed for the first time in Algerian constitutions and represents a qualitative step towards enhancing transparency and competence in the composition of this constitutional institution. The President of the Republic enjoys an exclusive power to appoint four members of the Constitutional Court. Under the 2020 amendment, the constitutional founding authority excluded Parliament from the composition of the Constitutional Court, in contrast to the 2016 amendment, under which four members represented Parliament. It also reduced the representation of the judicial branch to only two judges, a judge from the Supreme Court and a judge from the Council of State, while introducing a new category that holds half of the Court’s membership, namely, professors of constitutional law.

Successive constitutions prior to the 2016 constitutional amendment laid out only general conditions for membership without special conditions. However, beginning with the 2016 constitutional amendment, a requirement of competence and legal specialisation was stipulated for the first time. In Article 184, the constitutional founding authority affirmed the necessity for members of the Constitutional Council to possess professional experience of at least fifteen (15) years in higher education in legal sciences, in the Judiciary, in the profession of lawyer before the Supreme Court or the Council of State, or in a senior state office.

Following the promulgation of the 2020 constitutional amendment, particularly in light of the radical and far-reaching reforms it introduced affecting the conditions of membership of the Constitutional Court, more precise membership requirements were imposed to ensure independence and qualitative performance in the exercise of constitutional review.

Proposals

- This amendment aims to establish institutional balance by limiting the authority to directly appoint the President to only two members, while assigning the selection of two members to the Parliament through election. An electoral method was also approved for appointing the head of the court from among candidates proposed by the executive, legislative, and judicial authorities, with each authority presenting two candidates, and the final choice being decided by vote.
- Stipulating with precision the requirement of having benefited from training in constitutional law, whether in a statutory or regulatory instrument, by identifying the body

responsible for delivering such training, such as a university or the higher school for the Judiciary, and specifying the duration of the training, for example, six months or one year, together with the necessity of obtaining, at the conclusion of the training, a certificate accredited by the organising body to prevent evasion of training or the falsification of certificates.

Endnotes:

[1] Decree No. 20-442 issued by the President, on 15 Jumada al-Awwal 1442 / 30 December 2020, formalizing the constitutional revision endorsed by the 1 November 2020 referendum, as recorded in the Official Gazette, Issue No. 82 (30 December 2020).

[2] Decree No. 21-304 issued on 4 August 2021, which defines the criteria and mechanisms for selecting constitutional law professors to serve on the Constitutional Court, as published in the Official Gazette, Issue No. 60 (5 August 2021).

[3] Constitutional Amendment (2020), Article 186(4), cited in the preceding reference.

[4]Rahli, Souad. 2020. "The Independence of the Algerian Constitutional Council: An Analytical Study." Journal of Law and Society, Ahmed Draia University, Adrar

[5] Law No. 16-01 of 6 March 2016, containing the constitutional amendment, *Official Gazette*, No. 14, dated 7 March 2016.

[6] Debboucha, Farid. (2023, 7 May). The requirement of legal competence for membership of the Constitutional Court: "Between the condition of experience in law and specialisation in constitutional law. Paper presented at the Virtual National Symposium on "Developments of the 2020 Constitutional Amendment Relating to Constitutional Review of Legislation", Faculty of Law, University of Algiers 1, p. 64.

[7] Ben Malek, Bachir. n.d.. The motives and dimensions of establishing the Algerian Constitutional Court. In the Virtual National Symposium (Faculty of Law, University of Algiers 1 Benyoucef Benkhedda), "Developments of the

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[8] Constitutional Amendment (2020), Article 188(3), cited in the preceding reference.

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[10] Karoun, Mohamed Arzqi. 2023, 7 May. Paper presented at the Virtual National Symposium on "Developments of the 2020 Constitutional Amendment Relating to Constitutional Review of Legislation", Faculty of Law, University of Algiers 1, p. 34.

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