

The mediator of the Republic in Algeria : Huge mission hostage to a weak legal status

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Abstract:

The mediator of the republic is has a major mission of mediation between the citizen and his administration it appeared for the first time in Algeria in 1996 with the arrival of the former president Liamine Zeroual , to be abandoned in 1999 with the arrival of the departed President Abdelaziz Bouteflika, then to reappear again in 2020 with the arrival of President Abdelmadjid Tebboune . However, it is noticeable that the legal status of this institution both in its organic and functional aspects is still weak compared to the huge mission entrusted to him and his local delegates, in addition to the continued refusal to constitutionalize this body, which makes its fate dependent on the arrival and departure of personalities .

Keywords :

Mediator of the republic , citizen , public administration , legal status , constitutionalization , prerogatives .

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Introduction

The current legal status of the mediator of the republic (hereinafter M-R) does not upgrade to its goals , as being a popular demand and a social gain. The legal instability that characterizes it, due to the constant rejection of the constitutionalization of this body , and its organization by presidential decree (hereinafter P- D) while a higher-level text (an organic law or at least an ordinary law) would have been more suitable , plus the ambiguity surrounding its legal nature, as it is neither a judicial nor an administrative body , all these factors made its system similar to that of the consultative bodies assigned to the President of the Republic PDR.

The M-R as a body known by its big tasks matched by very modest powers and resources compared to these huge duties despite the political will to valorize this body but this will has not been translated concretely

Delaying the reform and revaluing of the M-R in line with its mandate will inevitably lead to a loss of confidence in it and its powers on the part of citizens especially if we take in consideration that the number of petitions reached 10,000 in just ten months, compared to only 36,000 petitions between the year of 1996 and 1997.

All these quantitative indicators reflect the importance of reforming its legal status as a mechanism of humanizing the citizen-administration relationship, therefore, our contribution, took the form of points containing proposals for reforming the M-R, including those related to the organizational, functional, and financial aspects, as well as those related to the tasks and powers. We attempted, as much as possible, to summarize these elements:

The organic and functional aspect in addition to increase its powers and means above all the financial one

First: Reforming its legal status

The pivotal role assigned to the M-R by PD No. 20/45, namely "protecting citizens' rights and freedoms and ensuring the legality of the functioning of public institutions and administrations,"¹ requires reforming the legal framework within this vital body operates.

This reform as a response to popular demand and a social need, requires reforming the legal framework of this institution at three levels, which we summarize as follows:

- The need to constitutionalize this institution .
- The need to organize it by an organic law, or at least by an ordinary law, rather than a presidential decree
- The need to clearly define its nature, namely precisising that it is an independent administrative authority, and acknowledge the effects that comes with legal qualification as an independent authority .

A- Constitutionalizing the M-R

We should mention that we did not find any mention of the mediator, neither in the 1996 Constitution when it was first established, nor in the 2020 Constitution, when the body was reinstated, despite the fact that back then-President Liamine Zeroual had repeatedly hinted at adopting this body and the necessity of adopting it to improve citizen-administration relations, through his political platform for the presidential elections.

Therefore, when the republic mediator was reinstated in 2020, it was expected that it would be elevated to the ranks of constitutional institutions by being constitutionalized and mentioned in the constitutional text what did not happen.

We are surprised by this continued refusal to constitutionalize the mediator, given its pivotal importance in improving and protecting rights and freedoms this is particularly true given that its constitutionalization would protect it from a phenomenon that has long been known in Algeria: the

¹ Article 2 of PD 20/45 of February 12, 2020 establishing the mediator

dependence of institutions and their fate on men, as a body comes with arrival of a person and goes with his departure ².

This is what actually happened when it was first established in 1996 with the arrival of President Liamine Zeroual, but was abandoned in 1999 with the arrival of President Abdelaziz Bouteflika, then it reappeared in 2020 with the arrival of President Abdelmadjid Tebboune wherefore we consider that its constitutionalization is of paramount importance in ensuring the stability of even with the departure of persons or the change of general politics.

This body is not linked to any one person or party as much as it is linked to an ideology and the idea of fairness and humanization in this relationship. The best evidence of this is the French constitutional founder, who constitutionalized the Ombudsman's Office in 2008 through Article 71 in order to align with international standards in the field of citizen-administration mediation.

B- Regulating the mediator by a legislative norm :

When adopted for the first time ever in 1996, the M-R was institutionalized by an executive text, namely PD No. 96/11 of March 23, 1996, instead of issuing a legislative text, i.e., an organic law, or at least an ordinary law, this was despite the fact that the 1989 Constitution at the time of the issuance of the PD, contained legal provisions permitting its organization by law rather than a decree, especially since neighboring countries at the time had upgraded their legal organization to the level of organic laws ³.

C- Ambiguity regarding its legal nature :

In addition to the refusal to constitutionalize the mediator and to regulate it through a legislative text, we also noted another important issue, which is the ambiguity surrounding its legal nature.

The PD did not specify whether it is an administrative body or an independent authority, even though Art 2 explicitly declared it a non-judicial appeals body that contributes to protecting citizens' rights and freedoms and the law on the running of public institutions.

Professor Amar Awabdi believes that the Ombudsman's derives its administrative nature and characteristics from the nature of its function and jurisdiction, means, and objectives. It is an independent organization specialized in complex, mixed external oversight of the work of the state's administration, thus it is a new, scientific, and global administrative oversight system that came to fill the gaps and heal the deficiencies linked to the traditional oversight system, which consists of political, administrative and judicial oversight ⁴.

Under the silence of the current PD 20/45, and before it, PD 96/11, it can be concluded that the M-R has a unique legal qualification as it was supposed to be an independent administrative authority IAA, instead the PD has called it an "institution". This is similar to what happened in France, where describing the Ombudsman's as an authority opened the door to legal debate about whether it was an IAA or not, this

² GHABOUTI Souad, The mediator of the republic; The Algerian experience from 1996 to 1999, Annales de l'université d'Alger, volume 25, number 1, p 266.

³ GHABOUTI, op-cit, p 273

⁴ Awabdi, A Scientific Reading of the Legal Nature and Supervisory Function of the Ombudsman in the Algerian System, Idarah review, Volume 7, Issue 2, p. 11.

debate was settled in 1989 by virtue of the law of January 13, 1989, which explicitly affirmed it , art 69 of the current French Constitution stipulates that the Ombudsman is an IAA . Accordingly, he is (currently the French Protector of Rights FPR) and all its affiliated agencies fall under the system of IAA defined by Organic Law 54/2017 and Ordinary Law 2017/55 of January 20, 2017, and the resulting legal effects, most notably that this body enjoys the legal personality and financial autonomy recognized for such authorities ⁵.

Returning to the M-R in Algeria whose legal nature is shrouded in ambiguity due to the failure to explicitly define its legal nature whether it is an IAA or merely an administrative institution , we conclude that the current legal status makes it similar to the system of consultative bodies established within the Presidency of the Republic services .

Second: Reforming the organic aspect

It consists in ensuring the independence of both the head of this body and his local delegates , this is achievable by establishing several elements, including the method of appointing them .

PD 20/45 in its first art, affirms that the M-R is subordinate to the President in terms of appointment , this was confirmed by the PD including the appointing the mediator , however and in order to ensure the independence of the head of this body and his delegates, their autonomy must be guaranteed in terms of:

- The method of appointment
- Opting for the irrevocable, non-renewable mandate
- Enhancing their immunity while performing their duties .

A- The method of the appointing

This element calls for several observations, as it is well known that the method of appointment and revocation has a significant impact on their independence in performing their duties with full autonomy and without any pressure of any kind that may threat their performance in their positions ,therefore, it was expected when this institution was reinstated in 2020 that the method of their appointing would inevitably be amended than what it was stipulated under the PD 96/11 when they were appointed by the PDR by the virtue of a PD . The President had an absolute discretionary power to choose any person he also had the power to terminate his term at any time for any reason , given that this PD did not adopt the mandate system at that time.

Therefore, it was also expected in 2020 to reform this element however, the Algerian regulator once again defied all expectations when it re-adopted the same method of appointing in its organic aspect, maintaining the absolute discretionary power of the PDR to appoint and revoke him at any time, he also did not adopt the non-renewable term system, as stipulated in Art1 of PD 20/45 .

The mediation idea was imported from the Swedish Ombudsman system as it is based primarily on the idea of absolute independence of this ombudsman , as we find that the members of his administration are appointed by indirect legislative elections by members of Parliament in both chambers for a single term of four years, where the candidate for this position is required to have legal expertise and gather the

⁵ GhAOUTI , op-cit , p 274

conditions of morality, integrity, justice, and political and social neutrality⁶, the employment system for members in terms of salary, the privileges and immunities are the same as those of the Swedish Supreme Court Judges, the same applies to the FPR (formerly the M-R), when it was established in the French Constitution in 2008 and succeeded the M-R, the Protector of Children, the High Authority for the Fight against Racism and for Equality, and the National Commission for Ethics in the Security Forces. The FPR is organized by the virtue of the institutional Law No. 2011/333 and the ordinary Law No. 334/2011 of March 29, 2011, Art 13 of the French Constitution also stipulates that the FPR is appointed by the PDR, however, the President does not have absolute discretion in selecting him, as he is bound by the opinion of the relevant standing legal committee in each of the two chambers of Parliament, thus if the votes opposing the appointment of the name chosen by the PDR in each of the two committees are more than three-fifths of the total votes, in this case, it is impossible for the President to appoint this person as the Protector of Rights, and should propose another name to the legal committee in both chambers of the French parliament.

It is also noted at the same element that the local delegates are not organically linked to the M-R himself while their subordination should be established only to the head of this institution not to any other entity, not even the PDR himself, in order to enhance their independence in carrying out their duties. This is what the French legislature sought to establish when it approved, on the one hand, the system of a single, non-renewable four-year term, as well as for the delegates, on the other hand, the law stipulates that the end of the FPR's term for any reason, whether natural termination (i.e., the expiration of the four-year term) or due to death, resignation, or an impediment, automatically means the end of the term for his delegates, this would establish the delegates' organic subordination to the Protector of Rights, not to any other entity, not even the President or the Parliament, those factors will enhance the independence of this authority organically and will contribute to its performance away from any pressure.

B- Establishing a single, non-renewable term system:

It is also noted that the French constitutional founder adopted a single, non-revocable, non-renewable term system, whereby the PDR cannot put an end to the FPR duties before consuming his four-year term unless he himself submits a request to resign with his own free will, or in the event of an impediment, in this case a special council composed of: the Vice-President of the Council of State, the head of the Court of Cassation, and the head of the Court of Auditors.

This element is a fundamental guarantee for ensuring the independence of the mediator and his team, but the current system placed him in a position of subordination to the President who appoints him or dismiss him and his delegates at any time, for any reason, or even for no reason at all given that the irrevocable term system is not in effect.

Such a situation places them in a state of moral commitment to the President giving that this perception is further confirmed by the Art 1 of PD 20/45.

The French law precised the incompatibility with the position of the FPR, which consist in the positions of a member of the government, a member of the Constitutional Council, a member of the Supreme

⁶ Awabdi, op-cit, p. 21

Judicial Council, a member of the Economic, Social and Environmental Council, as well as the combination of an electoral term, , a professional activity, or the management of an institution.

T- Guarantying their Immunity:

In addition to the issue of appointment the issue of the immunity of the M-R and his local delegates is also essential to ensure their independence , and yet we did not find any reference to it in PD 20/45 and, before it, PD 96/11, nor in the PD including the appointing the M-R despite the fact that Art 12 of PD 20/45 specified his rank since he is appointed by PD to the honorary rank of Minister of State.

Once again, we wonder about the Algerian regulator refusal to grant them the, immunity which should be similar to the members of parliament despite the fact that it is a fundamental pillar in ensuring the independence of members of this body. On contrary to the French texts regulating the Office of the Protector of Rights, and before that, the Ombudsman, ensured the immunity once appointed so they do not receive any instructions or directives when performing their mission , nor can they be prosecuted, searched for, arrested, or prosecuted for their opinions or actions .

The issue of immunity is a fundamental especially since the PD regulating the M-R authorizes him only one means to express his opinions: either a special report or the annual report submitted to the PDR . Therefore, this guarantee must be explicitly stipulated, as it would enhance his autonomy .⁷

Third: Reforming the functional aspect

Reforming the legal status of this institution in its functional aspect encompasses several levels which we will attempt to summarize as follows:

- the functional independence
- Strengthening the powers
- Ensuring its Financial autonomy

A - Establishing the Functional Independence

In order to achieve the functional independence, it is necessary to establish a severance of ties between this body and the president so that it truly becomes an mediator for the Republic, not for the President , because its subordination as implied by PD 20/45 and, before it, PD 96/11, negates the functional independence of this body , thus , it is necessary to define the legal nature of this body as an IAA that does not work for any entity, not even the PDR .

This clear definition of its nature will have consequences on its independence, particularly in its functional aspect, in addition to several reforms to the functional aspect of this body, which we have attempted to address in the following elements :

1 - Adopting the concept of self-notification, because reading Art 3 of PD 20/45 and, before it, Art 3 of PD 96/11, implies that it prohibits the M-R from doing so , the possibility of self-notification is implicitly understood from the text of the two aforementioned articles:

⁷ Khelloufi Rachid, The Mediator of the Republic, Idara Review, volume 8, number 1; p. 45.

Maybe the young experience of the M-R and the the huge number of complaints it received in its early years explain why the self-notifying mechanism was not adopted ⁸ .

The French legislator preferred to adopt the self-notifying mechanism through Art 7 , we believe the time has come to activate this pivotal mechanism, especially since it aligns with its objectives as a complementary body to the judge, especially given the growing phenomenon of public force inflation so it was expected that the Algerian regulator would adopt this mechanism in 2020, what did not happen.

2 - Why did the PD limit the right to notify the M-R to the natural person only, as the Arti 3 precised that “*any natural person may...*” while the French text referred to persons including natural and moral persons and even foreigners, as it cannot be denied that there are persons other than natural persons who can resort to him such as associations, political parties, private legal persons such as economic operators in the field of investment giving that the public administration when dealing with others , is not limited to natural persons only but rather extends to other legal entities that may fall victim to injustice due to malfunctioning in the running of a public facility ⁹ .

Such a situation is likely to discourage associative and investment activities, especially since this approach has no legal or objective justification.

It is also noted that Art 3 of PD 20/45 stipulates the exhaustion of "all administrative and judicial appeals." Paragraph 2 of Art 4 of PD 20/45 also states that the M-R cannot interfere in any judicial procedure or reconsider any judicial decision given that the work of the judiciary and the mediator is supposed to be integrated and that his intervention was intended to be preventative rather than therapeutic by attempting to resolve the dispute through mediation and avoiding recourse to the judiciary, which is known for its burdensome judicial procedures and long deadlines, it is therefore surprising that all judicial appeals must be exhausted before the mediator can be notified.

3 - Petitions issued by administrative subordinates against their administrative superiors due to injustice suffered were also excluded, the same approach adopted by the French legislator, although the French text is more precise in this regard.

4 - Finally, it worth mentioning in this section that the drafters of PD 20/45 and, before it, PD 96/11, through Art 2 and 3 used the organic criterion when determining the scope of intervention of the M-R , as they referred to: public institutions, public administrations, and public utilities , however, this organic definition is likely to either expand or narrow the scope of intervention of the M-R.

On the other hand, it is known that public services are divided into two categories: administrative public services and industrial public services. , what, then, can be understood from the use of the term "public service" in the text of PD 20/45? Does it imply that public services of an industrial and commercial nature? ¹⁰ The term "public service," when first used by French legislators through Art 1 of the 1973 Law on the Ombudsman at the time, was a natural response to the standard used by French administrative law

⁸ Khelloufi, Ibid, p. 30.

⁹ Khelloufi , op-cit , p 20

¹⁰ Khelloufi, Ibid , p 20

in defining public services, which recognizes the organic criteria and, at the same time, the material criteria—that is, the activity criteria—recognizing the mission of private law entities to achieve a public service, a practice not found in Algerian administrative law. Such a situation, i.e., the use of the organic criteria, is fraught with ambiguity, as it would have been more appropriate to specify a list of public law entities in PD 20/45 as a form of amendment and correction to the error previously made in PD 96/11, and in line with the practice of the Code of Civil and Administrative Procedures .

B – Reinforcing their Prerogatives :

Mr. Karim Ben Younes, the former mediator has repeatedly expressed his dissatisfaction with the lack of cooperation from administrative institutions and with the fact that they do not receive sufficient cooperation from the relevant administrative authorities.

This statement indicates that this institution does not have the necessary powers to carry out its mission , hence, if we are to maintain the credibility this body, it has become necessary to strengthen its powers through series of reforms that must affect its powers , among the most important of these are:

- 1 - Setting deadlines for responding to the M-R along with setting penalties for failure to respond to them , these penalties are determined by him , including warnings, publishing a special report on the lack of cooperation from the relevant bodies, or penalties that may extend to notifying the emergency judge, if necessary, to determine appropriate measures .
- 2- Recognizing the M-R authority to note facts on the scene, thus recognizing his authority to inspect and investigate .
- 3- Establishing the possibility of initiating disciplinary sanctions against the actions of certain individuals who fail to cooperate with them .
- 4- Waiving the obligation of professional secrecy before the M-R and his delegates .
- 5- Establishing his authority to request studies from both the Court of auditors and the Council of State if necessary .
- 6- Enabling him to make recommendations to both the President and Parliament regarding amendments to existing laws and regulations in a manner that serves the interests of citizens.

C – Consecrating the financial autonomy

The qualification of the M-R as an IAA automatically entails the body's enjoyment of legal personality and, consequently, financial autonomy , this autonomy differs from that recognized for public legal entities. This financial autonomy assumes that its budget does no longer rely on subventions made by the Presidency of the Republic, but rather an independent budget allocated directly from the state's general budget. The M-R becomes then the authority authorizing its spending, provided that the body's expenditures are not subject to the established rules of public finance or to rules of prior and subsequent oversight, rather, the expenditures of this vital institution must exclusively be subject to the sole oversight of the Court of auditors .

All this specificity is intended to ensure the M-R financial autonomy as being an IAA , if it is recognized as such by law.

Conclusion

In conclusion, we may say that the M-R represents a true achievement for Algeria, first recognized in 1996 thanks to the political will to consolidate the philosophy of reforming the administration-citizen relationship, this body was reinstated in 2020 , however, if this will is not accompanied by serious legal reforms , citizens will inevitably lose confidence in it just as they have lost confidence in their administration.

For this reason, our intervention aims to contribute to the project to reform the M-R , as it is an essential mean of humanizing the administration-citizen relationship and achieving the concept of fairness in this relationship.

We have summarized the recommended reforms in the following points:

- The necessity of constitutionalizing the M-R so that its fate does not remain dependent on political personalities .
- Upgrading the legal norms organizing this institution instead of organizing it by a PD , i.e., a regulatory text, it must be organized by an organic law, especially since it was established to protect citizens' rights and freedoms from the arbitrariness of the administration and the public force.
- Expedite the definition its the legal nature as an IAA , and the resulting legal consequences related to its new legal status .
- Reforming its organic framework, i.e., the method of appointing the mediator himself and his local delegates, in addition to the establishment of a single, irrevocable, and non-renewable term, this should also eliminate their dependence on any entity and ensure that the delegates' dependence is solely on the mediator himself.
- Reforming its functional framework by strengthening the powers and resources placed in the hands of M-R to address the inflated public force and to align them with the nature of the tasks entrusted to them.

These were the summary of the recommendations to reform of this essential institution maybe it contribute to revaluing it so that citizens do not lose confidence in their mediator, and so that he becomes truly becomes the mediator for the Republic not the mediator for the President of the Republic.

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