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The Mechanism for Pleading Unconstitutionality in Algeria
آلية الدفع بعدم الدستورية في الجزائر

BOUKAHIL Leila *
Faculty of Law and Political Sciences
Badji Mokhtar-Annaba University
Maghreb Legal Studies laboratory,
leila.boukahil@univ-annaba.dz,

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Abstract:

The constitutional reform of 2016 marked a significant milestone in the evolution of constitutional review in Algeria. It introduced a system that allows either the Supreme Court or the Council of State to bring cases before the Constitutional Court. This framework was further enhanced by amendments made in 2020.

The unconstitutionality exception empowers any party involved in a dispute, to question the constitutionality of a legislative or regulatory measure that influences the resolution of their case, claiming it infringes the constitutional rights and freedoms. This process strengthens the rule of law, upholds the separation of powers, and safeguards rights and freedoms.

Keywords: Constitutional Court; Exception of unconstitutionality; Constitutional oversight.
Jel Classification Codes: XN1, XN2.

ملخص:

شكّل التعديل الدستوري سنة 2016 نقطة تحول مهمة في تاريخ الرقابة على دستورية القوانين في الجزائر. تم النص على آلية الدفع بعدم الدستورية كإجراء يقدّم أمام المحكمة الدستورية بناء على إحالة من المحكمة العليا أو مجلس الدولة. وقد تأكدت هذه الإجراءات، ضمن التغييرات التي اعتمدتها الدولة من خلال التعديل الدستوري لسنة 2020.

إن الدفع بعدم الدستورية هو حق لأيَّ طرف في النزاع ، بحيث يمكنه من الدفع أمام القضاء بعدم دستورية نصٍّ تشريعيٍّ أو تنظيمي يُحدِّد نتيجة النزاع، بحجة أنه يُخلُّ بالحقوق والحريات التي يكفلها الدستور. وإن هذا الإجراء يُرسِّخ دولة القانون، يجسد مبدأ الفصل السلطات، ناهيك عن كونه يحمي الحقوق والحريات.

كلمات مفتاحية: محكمة دستورية؛ دفع بعدم الدستورية؛ رقابة دستورية.

*** Corresponding author: Boukahil Leila,**

1. INTRODUCTION

The Constitution serves as the highest legal authority, protecting both individual and collective rights and freedoms. It guarantees the people's right to make free choices and legitimizes the exercise of public authority. Additionally, it establishes the framework for democratic transition through transparent and free and fair elections . It is indisputable that any legal text must comply with the Constitution under penalty of unconstitutionality.

Therefore, all legal documents must align with the Constitution, with any deviation resulting in a finding of unconstitutionality.

Constitutional control is a fundamental pillar of the rule of law; it safeguards the provisions of the Constitution and guarantees the principle of its supremacy.

Constitutional control may take two forms: political control and judicial review of the constitutionality of laws. These forms vary across legal systems. For example, in the United States, judicial review is exercised by an independent institution, not as the highest court of the State but as a specialized body for constitutional disputes.

Individuals can challenge any violation of their rights, and ordinary courts can refer questions of unconstitutionality to the Constitutional Court.

In contrast, France relies on political oversight of constitutionality. Algeria, throughout its constitutional history, has adopted political control over the constitutionality of laws. The Constitutional Court serves as the supreme institution ensuring respect for the Constitution; it also oversees legislative and presidential elections, as well as referendums .

The Court is an independent institution. It has administrative and financial autonomy .

Since 2016, the Algerian Constitution allows that, during proceedings before a court, if a legislative provision violates constitutionally guaranteed rights and freedoms, the Constitutional Court may be seized upon referral from the Council of State or the Supreme Court. The 2020 Constitution formalized this mechanism, known as the exception of unconstitutionality (Article 195), extending the 2016 provision (Article 188).

The importance of the subject,

The significance of the Study is that the exception of unconstitutionality aims to reinforce the rule of law, consolidate the State of law, and enhance the protection of human rights. It also enshrines the principle of separation of powers.

Issues of the study

The central research question is: To what extent can constitutional provisions be protected through the mechanism of pleading unconstitutionality?

The main problematic has some sub-questions, including the following:

- What does “the exception of unconstitutionality” mean?
- What are its main characteristics?

- How did constitutional review evolve in Algeria following the transition from a Constitutional Council to a Constitutional Court?
- What are the conditions and procedures for applying the exception of unconstitutionality?

Hypotheses

I can put forward two hypotheses for this study:

1. The exception of unconstitutionality balances the powers among the three branches of government and allows citizens to participate in constitutional review.

2. The exception may prolong disputes and may not fully protect the Constitution due to potential limitations in judicial independence.

Methodology

In our study, we relied on both the descriptive and analytical approaches when addressing the topic, complemented by a historical approach to trace the evolution of constitutional review.

General division of the study.

The research focuses on the referral of exceptions of unconstitutionality to the Constitutional Court via the Council of State or the Supreme Court. It examines the concept, mechanisms, procedures, and conditions for applying the exception of unconstitutionality. The study is divided as follows:

Section I: Conditions of the Exception of Unconstitutionality

Section II: Procedures of the Exception of Unconstitutionality.

Section I: Conditions of the Exception of Unconstitutionality

We will speak about the following point:

- Characteristics of the Exception of Unconstitutionality.
- Modalities of Implementation.
- Substantive Conditions.

A. Characteristics of the Exception of Unconstitutionality.

The exception of unconstitutionality may be raised during any proceedings before ordinary or administrative courts by a party claiming that the legislative or regulatory provision determining the outcome of the dispute violates constitutionally guaranteed rights and freedoms.

1. A Form of Constitutional Control.

Control of the constitutionality of laws can be exercised in two forms: political control and judicial control. It aims to ensure compliance of legal standards with the Constitution.

It is valid for both internal (laws and regulations) and international (international treaties) standards[1].

Control takes different forms and methods depending on the legal systems. There is a control of political constitutionality in the Latin legal system like France[2]. Furthermore, judicial review of constitutionality is in force in the Anglo-Saxon legal system, particularly in the United States "USA" [3].

The constitutionality Control in the USA is diffuse. All courts are empowered to verify that the law claimed by the parties to the proceedings is consistent with the Constitution. Conversely, this jurisdiction is not entrusted to a single court. It belongs to all the courts of the State[4].

The Algerian constituent has chosen political control since independence. He established the Constitutional Council as guarantor of the constitutionality of laws.

This Council has been renamed a Constitutional Court since 2020, which now exercises judicial review, particularly through the exception of unconstitutionality[5].

2. Historical Development.

The exception of unconstitutionality first appeared in England and was formalized in the United States through *Marbury v. Madison* (1803) [6]. It was later adopted in France (2008), Morocco (2011), Tunisia (2014) [7], and Algeria (2016), reflecting the need to protect rights and freedoms amid evolving legal and political contexts.

3. Consolidation of Fundamental Rights.

Fundamental rights are effective only if a control mechanism exists.

In Algeria, the exception of unconstitutionality strengthens constitutional protection by allowing judicial oversight over legislative and regulatory provisions.

4. Reinforcing the Rule of Law.

The exception supports democracy and the rule of law by enabling judicial intervention[8], ensuring judicial independence, and reinforcing the hierarchy of legal norms. Judges act as co-authors of the law, ensuring compliance with constitutional principles[9].

B. Modalities of Implementation.

The 2020 Constitution formalized a posteriori constitutional review via the exception of unconstitutionality, under Organic Law No. 22-19 (2022), replacing Organic Law No. 18-16.

1. Subject of the Exception.

Article 195 of the 2020 Constitution extends the exception to both legislative and regulatory provisions.

Legislative provisions originate from Parliament, while regulatory provisions come from the executive (e.g., President, Prime Minister) [10].

2. Time Limits.

The constitution sets time limits for exercising the right exception of unconstitutionality, as follow:

- The exception of unconstitutionality must be addressed to the Council of State within ten (10) days of its pronouncement, accompanied by the briefs and conclusions of the parties[11]. This is in contrast to the rejection decision, which is made within 3 days[12].

This decision is also notified to the parties. It is not subject to any appeal.

- Referral decisions by the Council of State must be made within two months[13].
- If no decision is rendered, the case is automatically referred to the Constitutional Court[14].
- The Constitutional Court must decide within four months, extendable once by four months[15].

In addition to these formal conditions, substantive conditions must be met.

C. Substantive Conditions.

In exercising the exception of unconstitutionality, the judge has many powers.

He carries out numerous checks[16].

• First of all, he verifies whether the examined legislative provision is applicable to the dispute or the procedure or constitutes the basis of the proceedings.

• He must also confirm whether the legislative or regulator provision has not already been declared to be in conformity with the Constitution in the reasons and operative part of a decision of the Constitutional Council except in the event of a change of circumstances.

• As a final point, he must ensure that the question is serious.

Litigants may invoke unconstitutionality only if the contested provision applies directly to the case, has not already been judged constitutional (unless circumstances have changed), and the constitutional question is serious[17].

Section II: Procedures of the Exception of Unconstitutionality

We will speak about the following points:

- The stages for exception of unconstitutionality,
- The functioning of the hearings of the Constitutional Court

- The effect of the decision of the Constitutional Court regarding the exercise of the exception of unconstitutionality.

A. Stages

1. Initial Examination.

The trial judge confirms the seriousness of the case.

We can say about the initiative of the procedure that the exception of unconstitutionality cannot be raised ex officio by the judge.

The exception of unconstitutionality is presented in a distinct and motivated writing[18].

The question arises: can the initiative be taken by the parties of the dispute, the intervener in the dispute, the Public Prosecution, or the state governor?

The initiative of the procedure is left to citizens engaged in a trial where the contested text should apply[19]. The public prosecution's opinion must also be sought.

This means that the request of unconstitutionality is raised in connection with a case pending before the court and not as an independent lawsuit.

It also takes place at any stage of the case.

2. Referral to Higher Courts.

The Supreme Court or Council of State examines the conditions and may refer the case to the Constitutional Court.

B. Functioning of the Constitutional Court Hearings

- Authorities (President, parliamentary presidents, Prime Minister) are immediately informed.
- Hearings are public unless exceptional cases arise.

Decisions are notified to the originating court and published in the official journal.

1. Immediate notification to the authorities.

The Constitutional Court immediately notifies the President of the Republic.

It also informs the President of the Council of the Nation, the President of the National People's Assembly and the Prime Minister. The latter may send their observations on the objection of unconstitutionality submitted to them to the Constitutional Court[20].

2. The public hearing of the constitutional court.

The hearing of the Constitutional Court is public, except in exceptional cases defined in the regulations establishing the rules for its operation[21].

The parties, represented by their lawyers, as well as the Government representative, are able to present their observations contradictorily[22].

The decision of the Constitutional Court is notified to the Council of State to inform the court before which the exception of unconstitutionality was raised[23].

It is also published in the official journal[24].

The decision of the Constitutional Court is rendered within four (4) months following the date of referral. This period may be extended once by a maximum of four (4) months, upon reasoned decision of the Council, notified to the referring court[25].

It should be noted that these procedures are supposed to be clarified in the Code of Civil Procedure, as they take place before judicial bodies.

C. Effect of the Constitutional Court Decision

- Unconstitutional provisions lose all effect from the date fixed by the Court.
- Decisions are final and binding on all authorities.
- We can mention some examples of decisions delivered by the Algerian Constitutional Court.

1. Unconstitutional provisions lose all effect from the date fixed by the Court.

When a legislative provision is judged unconstitutional on the basis of article 195 of the Algerian Constitution, it loses all effect from the date fixed by the decision of the Constitutional Court[26].

It cannot be applied again.

Meaning that it has an authority that transcends the opponents.

2. Decisions are final and binding on all authorities.

The decisions of the constitutional court are final.

They are binding on all public authorities and administrative and jurisdictional authorities[27].

When the Constitutional Court has been seized of the exception of unconstitutionality, the extinction, for whatever reason, of the action on the occasion of which the exception of unconstitutionality was raised has no consequence on the examination of the exception[28].

It means that the extinction of the underlying case does not affect the examination of the exception.

3. Some examples of decisions delivered by the Algerian Constitutional Court.

During the period from 2016 to the present, several cases were brought before the Constitutional Court in Algeria regarding the plea of unconstitutionality[29], so several decisions onwards illustrate the application of the exception, including rulings on the Code of Criminal Procedure and the Code of Civil and Administrative Procedures.

Despite these advances, Algeria has not fully transitioned to a system of judicial oversight of constitutional review.

Among the decisions of the Constitutional Court we can mention the following:

- Constitutional Council Decision No. 01/D.CC/EI/19 of 23 Rabi' al-Awwal 1441 corresponding to 20-11-2019. It affirmed the partial conformity of Article 416 of the Code of Criminal Procedure with the Constitution. It therefore ruled that some of the legislative provisions contained in the first paragraph were unconstitutional, as they infringe upon the right to litigation at two levels, which is inconsistent with Article 160 (paragraph 2) of the 2016 Constitution[30.]

- Constitutional Court Decision No. 01 dated on 06-05-20, ruled that Article 496 (point 6) of the Code of Criminal Procedure is constitutional[31].

- Constitutional Council Decision No. 02 dated 23 -12- 2020. He ruled that Article 419 of the Code of Criminal Procedure was constitutional[32].

Constitutional Council Decision No. 01 dated 27 Jumada al-Thani 1442 corresponding to February10, 2021. It ruled that Article 33 (paragraphs one and two) of the Code of Civil and Administrative Procedures was unconstitutional. This was based on the fact that the legislator in Article 33 (paragraphs one and two) of the Code of Civil and Administrative Procedures, when he required a first and last instance ruling in lawsuits whose value does not exceed two hundred thousand Algerian dinars (200,000 DZD) Because in doing so, he would have distinguished between litigants in exercising the right to litigation at two levels, which is not in line with what was explicitly enshrined by the constitutional founder in Article 165 of the Constitution.[33]

3. CONCLUSION

The exception of unconstitutionality represents a significant development in Algeria's constitutional review system. Enshrined in the 2016 and 2020 amendments and regulated by Organic Laws No. 18-16 and 22-19, it introduces a hybrid of political and judicial control.

The first hypothesis—balancing government powers and allowing citizen participation—is partially confirmed. The second hypothesis—potential prolongation of disputes—highlights the need for judicial independence.

The procedure guarantees rights and freedoms and strengthens the supremacy of the Constitution, provided judicial integrity and specialization are maintained.

Also through this study, we reached a set of results and recommendations, which we present below.

Results

- we appreciate the steps taken by the Algerian constitutional founder.
- The exception of unconstitutionality passes through "filters which aim to prevent fanciful or dilatory appeals.

Recommandations.

1. Amend the Civil and Administrative Procedure Code to detail the conditions and procedures of the exception.

2. Allow the Constitutional Court to exercise automatic oversight over constitutionality.

3. Incorporate the lawsuit method into constitutional review to strengthen judicial oversight.

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