

The Foundation of the Review of the Constitutionality of Laws in Algeria

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Abstract:

There is a consensus today on the lofty status occupied by constitutions at the apex of a state's legal system. However, this consensus is only meaningful if there are mechanisms capable of ensuring this supremacy. These mechanisms are divided into preventive mechanisms, which consist of formal and procedural guarantees, and corrective mechanisms, which consist of the review of the constitutionality of laws. This latter mechanism aims to purify the legal system of constitutional flaws in the service of the law. Studying this mechanism requires us to examine its evolution within the Algerian constitutional system, starting from the 1963 Constitution up to the 2020 Constitutional Amendment, and to analyze how the constitutional founder transitioned from political oversight, embodied by the adoption of the Constitutional Council, to judicial oversight, through the establishment of a Constitutional Court.

Keywords: Control; Court; Constitutional; Council; Algeria.

INTRODUCTION

There is no doubt that the constitution, in a state governed by the rule of law, is considered the supreme law within its legislative hierarchy. On one hand, it determines the political orientation of the state, by laying down the general political and legal foundations upon which it is established. On the other hand, it embodies the rights-oriented approach of society.

Furthermore, the importance of this document stems from its role in framing the fundamental rights and freedoms of citizens. Based on this social and legal value, which the basic law holds in particular, respect for its provisions is the responsibility of everyone within

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society, and especially the governing authority, given that it possesses the material and legal means to do so. The status afforded to this document also derives from the legal concept of the legislative hierarchy of laws.

According to this jurisprudential theory – introduced by the scholar Hans Kelsen – the legal system of a state contains a set of forms of laws, with differing methods of enactment determining the supremacy of one rule over another. We find the constitution at the apex of the state's legal pyramid, followed by legislative rules, then subordinate laws, followed by regulatory and individual decisions issued by the executive authority (1). This was enshrined by the 2020 constitutional amendment, which considered the constitutionality of laws and the necessity of their hierarchy as binding principles.

Based on this rights-based, social, and legal status enjoyed by the constitution, it was necessary and essential to create rules and institutions that ensure respect for its supreme provisions. The legal need of society to protect the constitution led, in turn, to the creation of bodies that ensure all legislation within the state complies with the constitution. Accordingly, a number of political systems have tended to establish different methods for determining the authority competent to review the constitutionality of laws. Some have entrusted this task to a judicial body, as in the United States of America, while others have entrusted it to a political body, such as the French Constitutional Council, which has a composition of a purely political nature. It is worth noting that some states did not adopt this review, such as the Belgian Constitution of 1831 and the Polish Constitution of 1921. Conversely, other constitutions explicitly stipulated the invalidity of laws that contravene its provisions, such as the Japanese Constitution in its Article 98. It must also be noted at the outset that flexible constitutions, which are on par with ordinary laws procedurally, do not adopt judicial review of the constitutionality of laws. **(Liorente, 1988, p. 12)**

Furthermore, there is the specific nature of the role of the constitutional judge when tasked with examining the constitutionality of draft legislation. This is a review whose primary and original purpose is to cleanse the legislative text of unconstitutional flaws and prevent the infiltration of rules that are unconstitutional, i.e., that violate the text of the supreme law of the land, the constitution, the core of the state's

legal system. The review of draft laws is characterized by its objective nature, given that the matter does not pertain to a dispute between parties with conflicting interests, but rather to raising the unconstitutionality of a draft law by various referral bodies. These bodies are not fundamentally seeking a personal interest in challenging the law, but are permitted to exercise this competence as they are concerned with the necessity of legislative rules respecting the provisions of the constitution. **(McWHINNEY, 1986, p. 6)**

The fact that the constitutional judge is established as an objective guardian of the Constitution in a dispute of a special and exceptional nature may appear to some as open to criticism, on the grounds that it opens the door to "government by judges" and diverts the judge from the limits of their powers strictly defined by the Constitution and the organic law governing the Constitutional Court. However, this same debate has arisen in France concerning the automatic referral mechanism, known as the "means raised sua sponte" by the French Constitutional Council. **(Sweet, 1992, p. 62)**

It seems that the initial prevailing view—that the French Constitutional Council was a guardian of Parliament—has been overtaken by an acknowledgment that the Constitutional Council is the guardian of the Constitution. Furthermore, the predominant trend among judicial bodies (despite the unique nature of the French Constitutional Council) is the desire to expand their scope of review and intervention whenever this does not conflict with the letter and spirit of the texts governing them.

Moreover, some judicial bodies in France have used judicial and procedural techniques akin to automatic referral, such as raising issues pertaining to public policy on their own motion, even for the first time before a court of cassation. This is, of course, while acknowledging the difference in the nature of constitutional disputes compared to ordinary or administrative disputes, and the specificity of the scope of intervention of each judge.

What is the adopted model of constitutional review of laws in Algeria?

To address the legal issue, we adopted the descriptive analytical method by analyzing the legal texts relevant to the study.

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Title I: Constitutional review of legislation prior to the 2016 constitutional revision

Algeria was known for constitutional texts during the colonial period, as evidenced by the 1947 Algerian Constitution, which can be classified among the granted constitutions. In the aftermath of independence, the Algerian state witnessed several constitutions resulting from the convergence of factors experienced by Algeria. These constitutions were a response to these developments, beginning with the first constitution in 1963, ratified by the National Constituent Assembly, followed by the 1976 constitution. Accordingly, in addressing the topic of the evolution of constitutional review of laws in Algerian constitutions, we will examine constitutional review under the 1963 constitution, ratified by the Constituent Assembly, and the 1976 constitution in a first section. Then, we will address constitutional review under the 1986 and 1996 constitutions

First Subtitle :Constitutional Review under the 1963 and 1976 Constitutions.

The first constitution of the Algerian Republic, issued on September 8, 1963, provided for the establishment of a body tasked with the constitutional review of laws, named the Constitutional Council. However, we know that this provision did not extend beyond the papers of the 1963 constitution, due to President Ahmed Ben Bella's use of Article 59 concerning imminent danger, which allowed him as President of the Republic to take exceptional measures. Subsequently, the constitution was suspended 23 days after its issuance, on October 3, 1963 (**Constitution of 1963, dated September 10, 1963, Official Gazette of the Algerian Republic, No. 64.**). Consequently, there is no decree or decision organizing the Constitutional Council or defining its procedures of operation. Referring to the 1963 constitution, it is noted that there are only two articles, namely Article 63 and Article 64, which stipulate the Constitutional Council and its competences related to constitutional review. Its membership consisted of seven (7) members... Its competences were limited, confined to reviewing the constitutionality of laws enacted by the National Assembly and legislative orders issued by the President of the Republic based on a delegation from the National Assembly for a limited period. Its competence did not extend to monitoring referendums, presidential and legislative elections, and announcing their results. Furthermore, its intervention occurred only upon notification by the President of the

Republic or the President of the National Assembly, which constrained the Council in exercising its review functions. This restriction on the right of referral could lead to the implementation of laws and orders even if they violated constitutional provisions, as long as the head of the legislative authority or the President of the Republic did not notify the Council on the matter, thereby diminishing the importance and authority of that institution.

Following the suspension of the 1963 Algerian Constitution, this situation lasted until 1965, precisely until June 19, 1965, when the late President Mohamed Boukharouba, known as Houari Boumediene, then Minister of Defense, carried out a political correction of President Ben Bella's rule. Consequently, the provisions of the constitution were abrogated, taking with it all constitutional principles and provisions. That text was replaced for an indefinite transitional period lasting about ten years by an ordinance, namely Ordinance No. 65-182 issued on July 10, 1965. This ordinance became the supreme text of the state pending the adoption of a new constitution. Thus, one could not speak of constitutional review of laws since the constitutional text itself was non-existent.

Since the Constitutional Council was never formed due to the freezing of the constitution's application 23 days after its adoption, Algeria remained without a mechanism for constitutional review of laws throughout the period preceding the 1976 constitution. **(Constitution of 1976, issued pursuant to Order No. 76-97, dated November 22, 1976, Official Gazette of the Algerian Republic, No. 94.)**

When drafting the 1976 constitution, its drafters explicitly avoided stipulating the "principle of constitutional review of laws was omitted in the constitution issued on July 7, 1976, due to the perceived contradiction of this principle with the nature of the political system prevailing in Algeria during the period dominated by the single party.

Second Subtitle: Constitutional Review under the 1989 and 1996 Constitutions.

The 1989 and 1996 constitutions adopted the system of constitutional review of laws as a legal and logical consequence of the principle of the hierarchy of legal norms, the supremacy of the constitution, and the stability of constitutional texts compared to ordinary laws, and the adoption of the separation of powers enshrined in the constitutions of free systems. **(Constitution of 1989, issued**

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pursuant to Presidential Decree No. 89-18, dated February 28, 1989, Official Gazette of the Algerian Republic, dated March 1, 1989, No. 9.) (Constitution of 1996, issued pursuant to Presidential Decree No. 96-438, dated December 7, 1996, Official Gazette of the Algerian Republic, dated December 8, 1996, No. 76.)

It is noteworthy that the Constitutional Council was granted broad competences. In addition to ensuring respect for the supremacy of the constitution, it oversees the validity of referendum operations, presidential and legislative elections, and announces their results. The Constitutional Council also rules on the constitutionality of treaties, laws, and regulations upon referral by the President of the Republic or the President of the National People's Assembly. It is observed that most of the provisions formulated by the 1989 constitution were reinstated by the 1996 constitution with some amendments.

It is observed the reason behind restricting referral competence, according to some commentators, was to prevent the Council from engaging in intensive activity that would upset the political balance, given the novelty of the democratic experience in Algeria at the time. (Mesrati, 2012, p. 12)

The 1989 constitution was amended and supplemented by the decree issued on November 28, 1996, whereby the legislator attempted to address the shortcomings present in the 1989 constitution. It maintained the principle of constitutional review of laws, but the subject of review witnessed significant development in terms of the composition of the Constitutional Council and also in terms of competence. This will be explained as follows:

Several amendments were made concerning the number of members of the Constitutional Council, which became nine (09) according to Article 164 of the 1996 constitution.

The 1996 constitution also introduced some changes to the position of the President of the Republic, restored balance within the legislative institution by creating a second chamber, and reconsidered the unified judicial system by adopting a dual judiciary and establishing the Council of State and the Conflicts Court. (Boualchaouir, 2012, p. 6)

It is noted that the number of members comprising the Constitutional Council expanded from seven (07) members under the 1989 constitution to nine (09) members in the 1996 constitution.

The review role of the Constitutional Council in the 1996 constitution is manifested in the review of the constitutionality of treaties, organic laws, and regulations. It also exercises review of the conformity of the internal regulations of the two parliamentary chambers with the constitution. This constitution dedicated six (06) articles, from Article 163 to Article 169 in Chapter One of Title Two entitled "Review and Advisory Institutions," to the subject of review, in addition to other articles scattered throughout the chapters and titles of the constitution, namely Articles 87, 88, 90, 93, 96, 97, 176, and 180.

Title 2: Constitutional review of laws from the Constitutional Council to the Constitutional Court.

This section will be studied through two subsections. In the first subsection, we will address the innovations of the 2016 constitutional amendment regarding the composition of the Constitutional Council. In the second subsection, we will address the shift towards a Constitutional Court system in the 2020 constitutional amendment. Then, we will address the innovations related to review in a third subsection.

First Subtitle: Composition of the Constitutional Council under the 2016 Constitutional Amendment

The 2016 constitutional amendment introduced fundamental modifications to the organization and operation of the Constitutional Council, due to the numerous shortcomings and changes that prevailed in both the 1989 and 1996 constitutions, which caused the limited functioning of the Constitutional Council and the low level of its review of the constitutionality of laws.) **Law No. 16-01 of 26 Jumada al-Awwal 1437 corresponding to March 6, 2016, containing the constitutional amendment, published in the Official Journal of the People's Democratic Republic of Algeria, Issue No. 14.)**

The Algerian constitutional founder did not address in the 2002 and 2008 constitutional amendments any procedure related to the constitutional rules governing the functioning of the Constitutional Council. However, the 2016 constitutional amendment introduced important provisions concerning the organization of this body, particularly in terms of composition. Following criticism regarding the extent of representation held by each of the three powers and the inequality, especially at the expense of the judicial authority after the 1996 constitution, the Algerian constitutional founder, by virtue of the 2016 constitutional amendment, raised the number of members of the

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Constitutional Council from nine (09) members to twelve (12) members. This is evident from Article 183/1,

Thus, the executive authority, represented by the President of the Republic alone, has the right to appoint (04) members, including the President and the Vice-President. The legislative authority maintained the same number of members with two (02) representatives elected from each chamber. Two new members were added to the previous two members of the judicial authority, elected by the Council of State and the Supreme Court. Thus, the constitutional founder addressed a point of controversy since the establishment of the Constitutional Council in Algeria, which had not reached the point of equal representation among all powers in the Council's membership, ranging from the theoretical dominance of parliament at the beginning of its establishment.

Also, new conditions for membership were stipulated by adding Article 184, setting conditions of age, qualification, competence, and experience for assuming the function of member of the Constitutional Council, consisting of reaching 40 years of age at the time of appointment or election. Additionally, it was limited to specific categories: extensive experience in higher education, the judiciary, the legal profession, or high-level state functions. Judicial immunity in criminal matters was also granted to members of the Constitutional Council during their tenure.

These new provisions aim to strengthen the independence of the function of a member of the Constitutional Council, placing it beyond any form of pressure that hinders its independence in exercising its constitutional competences.

Second Subtitle: The Shift towards a Constitutional Court System under the 2020 Constitutional Amendment.

By virtue of the 2020 constitutional amendment, political review was dispensed with, moving towards judicial review by establishing a Constitutional Court. This provision is considered an important step towards building a state of law and guaranteeing rights and freedoms. The Constitutional Court was included in Title Four concerning oversight institutions, Chapter One: The Constitutional Court, although we would have preferred its inclusion within the chapter on the judicial authority.) **Presidential Decree No. 20-442 of 15 Jumada al-Awwal 1442 corresponding to December 30, 2020, relating to the constitutional**

amendment, Official Journal of the People's Democratic Republic of Algeria, Issue No. 82 dated December 30, 2020.)

The Court is characterized by many features, combining prior review of draft laws and subsequent review through the plea of unconstitutionality. The 2020 constitutional amendment also assigned it, under Article 192, the task of organizing, monitoring, and settling disputes between state authorities, granting it mechanisms that ensure its independence and effectiveness.

Article 187 stipulates that elected or appointed members must have reached fifty (50) years of age on the day of election or appointment; possess legal experience of no less than twenty (20) years; have benefited from training in constitutional law; enjoy civil and political rights; not have been sentenced to a penalty depriving liberty; and not hold partisan affiliation.

It is noted that requiring experience in constitutional law is considered a qualitative addition in the field of the Constitutional Court's competence, given what specialists can add. It was defined according to an objective criterion: 20 years of experience in law and having benefited from training in constitutional law. This means the Court is composed primarily of legal professionals because it is a judicial body, not a political one. The nature of the Constitutional Court's functions assumes competence in the field of constitutional law, but this does not mean that judges must be experts in constitutional law; it is sufficient that they possess adequate knowledge in the field of constitutional law.

The Constitutional Court rules by decision on the constitutionality of treaties, laws, and regulations. It can be notified regarding the constitutionality of treaties before ratification and laws before promulgation. It can also be notified regarding the constitutionality of regulations within one month of their publication. The President of the Republic must refer organic laws of the constitution to it after their ratification by Parliament.

The 2016 constitutional amendment contributed to a qualitative shift in the field of strengthening constitutional review of laws, which was confirmed by the 2020 constitutional amendment in Article 195, not only because it granted the right of referral to other official bodies (the Prime Minister, members of the two parliamentary chambers), but also because it assigned to the former Constitutional Council (now the

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Constitutional Court) a new competence consisting of ruling on any plea relating to the unconstitutionality of a specific law raised by one of the parties during proceedings in a case before the ordinary or administrative judiciary, on the grounds that the law to be applied in the dispute violates the rights and freedoms guaranteed by the constitution. We note here that the approach of the Algerian constitutional founder in adopting the system of constitutional review through a plea was influenced by its French counterpart.

The mechanism of the plea of unconstitutionality is a subsequent review after the issuance and entry into force of the law, and it is the most important guarantee ensuring the protection of rights and freedoms.

Comparing the 2016 constitutional amendment with the 2020 constitutional amendment, it is noted that members of Parliament were excluded from membership in the Constitutional Court, expertise in constitutional law was required, the number allocated to the judicial authority was reduced, and elected professors of law were included for the first time in the Algerian constitutional experience, which is a qualitative addition to the Constitutional Court. The age requirement for membership was raised to fifty years instead of forty. The term was reduced from 8 years to 6 years. The interpretation of constitutional texts was added to the Court's competences. Ordinances were subjected to mandatory review. The number of deputies of the National People's Assembly and members of the Council of the Nation empowered to make referrals was reduced. The Court was also assigned the task of reviewing the conformity of laws and regulations with treaties.

Amendments Related to Control Mechanisms.

Achieving the organic independence of constitutional judiciary members alone is insufficient; they must perform their duties by ensuring respect for the Constitution and protecting rights and freedoms. This requires establishing rules to remove all obstacles that limit the effectiveness of the constitutional judiciary, obstacles previously highlighted by many constitutional law scholars in Algeria, particularly concerning the referral authority and the authority of its decisions

Initiating constitutional review depends on a referral from the constitutionally designated authorities. Consequently, the constitutional

judiciary cannot examine the constitutionality of laws on its own motion, even in cases of mandatory conformity review. Referral is the sole means of initiating the review of the constitutionality of laws. The term "referral" means "a request or message from the authority competent to refer the matter, addressed to the constitutional judiciary to request examination of the constitutionality of laws."

Accordingly, the referral process is carried out by a message addressed to the President of the Constitutional Court. This referral message is accompanied by the text submitted to the Constitutional Court for an opinion or a decision.

The referral message is recorded with the General Secretariat of the Constitutional Court in the referral register, and an acknowledgment of receipt is issued. This is done to calculate the legal deadlines set by the Constitution for the Constitutional Court's review. The Constitutional Court does not have discretionary power to decide whether or not to examine the constitutionality of the submitted text; rather, upon receipt of the referral message, it is obligated to commence its review.

The jurisdiction of the constitutional judiciary to review the constitutionality of laws is not automatic; it must be activated through a referral by the authorities constitutionally entitled to exercise this right. Under the Algerian constitutional amendment of 1996, this right was limited to the President of the Republic, the President of the National People's Assembly, and the President of the Council of the Nation. Here, it becomes evident that the constitutional founder restricted the referral authorities to only three bodies, leading to many legal and regulatory texts escaping prior constitutional review if these designated authorities did not initiate the process.

However, examining the provisions of the 2016 constitutional amendment reveals that the constitutional founder addressed these shortcomings by expanding the referral authorities (). This is evident from Article 187 thereof, which expanded referral powers to include the Prime Minister, fifty (50) members of the National People's Assembly, or thirty (30) members of the Council of the Nation.

Subsequently, under Article 193 of the 2020 constitutional amendment, the number of deputies of the National People's Assembly and members of the Council of the Nation required to exercise referral was reduced, stipulating forty (40) deputies of the National People's

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Assembly or twenty-five (25) members of the Council of the Nation. Furthermore, the right of individuals to raise an exception of unconstitutionality through referral by the Supreme Court or the Council of State was affirmed, a matter that will be addressed in detail in the second chapter of this study.

The 2016 constitutional amendment contributed to a qualitative leap in strengthening the review of the constitutionality of laws, a point emphasized by the 2020 constitutional amendment in Article 195. This is not only because it granted the right of referral to other official bodies – "the Prime Minister, members of the two chambers of Parliament" – but also because it assigned to the former Constitutional Council, now the Constitutional Court, a new jurisdiction: deciding on any plea concerning the unconstitutionality of a specific law raised by a party during proceedings before ordinary or administrative courts. This applies when the law to be applied to the dispute allegedly violates the rights and freedoms guaranteed by the Constitution. It is noteworthy here that the approach of the Algerian constitutional founder in adopting the system of constitutional review by way of exception was influenced by the French model.

The mechanism of the exception of unconstitutionality constitutes a posteriori review, occurring after the law's promulgation and entry into force. It is also considered the most important guarantee for the protection of rights and freedoms.

A comparison between the 2016 constitutional amendment and the 2020 constitutional amendment reveals several changes: members of Parliament were excluded from membership in the Constitutional Court; specialization in constitutional law became a requirement; the number of members allocated to the judicial authority was reduced; elected law professors were included for the first time in Algeria's constitutional experience, representing a qualitative addition to the Constitutional Court; the minimum age for membership was raised from 40 to 50 years; the term of office was reduced from 8 years to 6 years; the interpretation of constitutional provisions was added to the Court's competencies; ordinances were made subject to mandatory review; the number of deputies and Council members required for referral was reduced; and the Court was tasked with monitoring the conformity of laws and regulations with treaties.

CONCLUSION:

The trajectory of Algerian constitutional justice, intrinsically linked to the history of Algerian constitutions as previously discussed in the first chapter, has evolved in a cross-cutting manner. Following the failure to establish it in the first Algerian constitution, its absence in the second, and through successive amendments, it re-emerged in the third constitution. Today, after more than twenty years of its existence, it seeks to assert its presence within the country's political and institutional landscape.

Algerian constitutional history reveals that the path which gave rise to the current form of constitutional adjudication—in terms of its jurisdiction, composition, organization, and functioning—has progressed through five distinct stages:

Beginning with the initial phase in 1963, followed by the second phase under the Constitution of November 26, 1976, which did not provide for a body responsible for constitutional review. This led to the third phase, where the concept of constitutional review resurfaced in political discussions—notably during the fifth congress of the National Liberation Front (FLN) party. Subsequently, the fourth phase coincided with the constitutional revision of 1989, which established a Constitutional Council endowed with broader and more extensive powers.

The rebirth of constitutional review marked a significant step in the process of building a state based on the rule of law. This step was further reinforced by the constitutional revision of November 28, 1996, which expanded the jurisdiction of the constitutional judiciary, opened the right of referral to new constitutional authorities, and increased the number of constitutional justices.

The constitutional revision of March 2016—constituting the fifth phase—re-examined the organization of the Constitutional Council, particularly its composition, to ensure balanced representation of the three branches of power within it. It also strengthened the legal status of Constitutional Council members by extending their term of office in line with international standards.

Pursuant to the 2020 constitutional revision, political control over the constitutionality of laws was definitively abandoned in favor of establishing judicial review. This was achieved by dissolving the Constitutional Council and replacing it with the Constitutional Court,

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marking a significant leap forward in the court's composition, both in terms of member qualifications and the methods of their election and appointment.

In addition to the foregoing, the revision confirmed the expansion of referral rights and retained the mechanism of the exception of unconstitutionality (constitutional appeal), which had been introduced in the 2016 constitutional amendment. This mechanism demonstrated the intent of the constitutional framer to move towards judicial review of the constitutionality of laws.

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