

Formation of Constitutional Courts: A Comparative Study (Algeria - France - United States)

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Abstract :

The supremacy of the constitution is considered the basic rule for most free democracies, and it needs a guarantee of its implementation and an effective means of implementing it, as the guarantee for this is oversight of the constitutionality of laws. It is no longer sufficient to guarantee rights and freedoms for constitutions to include texts regarding them, as constitutions leave the matter of regulating the majority of these to the laws. Rights and freedoms, and therefore constitutional oversight is a legal result emanating from the principle of the supremacy of the constitution, which is the highest law in the state.

It is considered the highest hierarchy of power and everyone must respect it and not violate it. It joins and regulates the relationship between the state and the people and guarantees them their rights and freedoms by enacting a set of laws and rulings whose legality and validity are agreed upon, and includes a set of peremptory orders and orders.

Keywords: *constitution, control, constitutional justice, rights and freedoms*

La formation des cours constitutionnelles : Une étude comparative (Algérie - France - États-Unis)

Résumé :

La suprématie de la constitution est considérée comme la règle de base de la plupart des démocraties libres, et elle a besoin d'une garantie de sa mise en œuvre et d'un moyen efficace de la mettre en œuvre, la garantie de cette mise en œuvre étant le contrôle de la constitutionnalité des lois. Il ne suffit plus de garantir les droits et libertés pour que les constitutions contiennent des textes les concernant, car les constitutions laissent à la loi le soin de réglementer la plupart d'entre eux. Les droits et libertés, et donc le contrôle constitutionnel, sont un résultat juridique émanant du principe de la suprématie de la constitution, qui est la loi la plus élevée de l'État.

Elle est considérée comme la plus haute hiérarchie du pouvoir et chacun doit la respecter et ne pas la violer. Elle unit et régule les relations entre l'État et le peuple et leur garantit leurs droits et libertés en édictant un ensemble de lois et de règlements dont la légalité et la validité sont reconnues, et comprend un ensemble d'ordonnances et d'ordres impératifs.

Mots-clés : *constitution, contrôle, justice constitutionnelle, droits et libertés*

Introduction

Respecting laws and regulations and adhering to the provisions of the constitution cannot be achieved unless there are oversight mechanisms that ensure this respect and protect the principle of the supremacy of the constitution over other legal rules. This necessity has led various countries to establish bodies and councils tasked with monitoring and preserving constitutional principles from violation, giving rise to what is known as the review of the constitutionality of laws.

And if flexible constitutions enjoy substantive supremacy, they lack formal supremacy, and they can be amended using the same procedure as ordinary laws. Issuing an ordinary law by the legislative authority using the ordinary procedure can cancel or amend a constitutional rule. It follows that constitutional review is fundamentally linked to rigid constitutions distinguished by their objective and formal supremacy, which establish the supremacy of the constitution and legal territory, making the constitutional document the highest law in the state. Rigid constitutions cannot be amended except by a special authority and through a distinct procedure from ordinary laws, and lower-ranking laws cannot contradict or annul constitutional rules. To embody the supremacy of the constitution, most political systems establish the review of the constitutionality of laws, the protection of constitutional freedoms from the arbitrary actions of the ordinary legislator, the monitoring of the legality of elections and referendums, and the commitment to respecting the distribution of powers between the government and parliament, or between the federal

authority and the state authorities that make up the federal state.

Historically, the constitutional review of laws first occurred in the United States in 1803 with the *Marbury v. Madison* decision, where the Supreme Court ruled that it had the authority to review the constitutionality of laws. The constitutional review of laws then appeared in Europe in 1920 in Austria, thanks to the great legal scholar Hans Kelsen, and in Italy in 1947, Germany in 1949, Spain and Portugal in 1990. In France, the constitutional review of laws was established in the 1958 Constitution after the experience with the Constitutional Committee in the Fourth Republic, and the idea was renewed in 1974. (Y. Guichet, 1996)

The constitution includes the rules related to the philosophical and ideological foundation on which the state's system is based, as well as the rules related to the establishment and determination of the powers of the governing bodies.

Constitutional justice - as an idea and application - is closely linked, on one hand, to the growth and development of the new constitutionalism movement, which aims to subject the actions of public authorities to a set of controls established within the constitutional text. On the other hand, constitutional justice emerged as a "result" concurrent and compatible with the qualitative leap experienced by democracy, and also as an "institutional remedy" against regimes characterized by the reinforcement and strengthening of the executive authority. (D. Rousseau, 1991)

And if "the constitutionality of laws" was established on parameters that take writing as a guarantee for respecting the provisions of the constitutional document, and view the

constitutional document merely as a "formal superstructure" presented to justify the authority of the "ruling oligarchy," then from the beginning of the twentieth century, these parameters will erode due to the existence of a gap between the base text and political situations that the constitutional document finds difficult to frame. Therefore, a new idea will emerge, considering the content of the constitutional text as "an open contract for continuous creation and formation," and a text in the process of construction, through the mechanism of constitutional interpretation that will make the constitutional document open to the developments occurring in its working environment.

Thus, the content of the constitutional text has transitioned "through modern constitutional waves" from the question of institutions, where the concern was to ensure the expression of the general will, "to the idea of establishing the rule of law," and this was achieved through the process of "material and legal enrichment of constitutional texts with a reference to human rights, and on the other hand, by opening new horizons for the concept of jurisprudence in the constitutional field."

This new reading of constitutional documents has "reconsidered the structure of constitutional and political power" and changed the nature of constitutional law, which is no longer just a space for framing state and authority issues, but also a fundamental document for defining the relationships between the state and society, based on guaranteeing and protecting freedoms, after it traditionally served the function of "curbing the tyranny of power." On the other hand, it has established the transition from the "political constitution" to the "social constitution" by

founding a public space for citizenship outside the state's guardianship. (D. Rousseau, 1992, p 378)

The first question regarding the Algerian experience of constitutional review of laws in light of the 2020 Constitution, compared to the French experience, is at the level of the nature of the body responsible for constitutional review of laws and then at the level of the nature of the jurisdiction of this body.

This leads us to consider what the Constitutional Court is composed of, what guarantees its members have, and what powers are entrusted to it. To study the subject, we followed the descriptive-analytical method since we are in the field of describing and analyzing pure legal materials, alongside the comparative method to identify the similarities and differences in the formation of the constitutional court, its competencies, and the guarantees for its members. And to answer the question We divided our study into two sections, where the first section addresses the formation of the Constitutional Court in the French and American systems, and then we discuss the formation of the Constitutional Court in Algeria in the second section. (Favoreu Louis, 1990)

1. The Review of the Constitutionality of Laws in France

The analysis of constitutional court decisions has seen significant growth in recent years. After the initial work carried out in the United States since the 1990s, several studies have been conducted in Europe to understand the determinants of constitutional judges' decisions. These statistical investigations have highlighted the bias in constitutional decisions, the lack of independence of these

courts, and the necessity to rethink the mechanisms for appointing judges. Many European works by N. Garoupa (N. Garoupa, F. Gomez-Pomar, V. Grembi, 2011, pp. 513-534) have also contributed to questioning the Kelsenian doctrine, which assumes that judges decide only on the law: judges from civil law countries are likely to be influenced by their political opinions just like their American counterparts.

The Constitutional Council is no exception, and its appointment mechanisms are criticized more than in neighboring countries to France. Even with the recent reforms (2008), the unchecked appointments of judges to the French Constitutional Council by the three highest officials in the state—excluding the Prime Minister—have left the door open for more politicized appointments.¹ The political nature of the body, like in France, where all members are chosen by political authorities (the head of state and parliamentary assemblies), is less so in Italy and Spain, where some members are appointed by judicial authorities.

As for the appointment conditions in France, the political authorities have complete freedom in selecting the members, but in Germany, Spain, and Italy, only members with legal qualifications (judges, lawyers, law professors) can be appointed. (D. Lochak, 2008)

As for the members' terms, they have the same authority as judges, as the constitutional legislator intended their independence from political power. In the United States, for

¹ Since the 2008 reform, appointments to the Constitutional Council can be blocked by a three-fifths majority in the legislative chambers (both chambers for the President of the Republic's appointments and their respective chamber for the Presidents of the Senate and the National Assembly).

example, Supreme Court justices are appointed for life. In Austria, the term of Constitutional Court members is limited by the retirement age, which is 70 years. In other countries, Constitutional Court members are appointed for long terms (nine years in France, Spain, and Italy, and twelve years in Germany).

In Italy, the President of the Constitutional Court is appointed by the members, while in Germany, he is appointed by the parliament and the head of state in France and the United States. Algeria was influenced by France's approach and adopted in its constitutions the method of political oversight through constitutional councils and the formation and membership conditions for constitutional justice bodies.

Respecting laws and regulations and adhering to the provisions of the constitution cannot be achieved unless there are oversight mechanisms that ensure this respect and protect the principle of the supremacy of the constitution over other legal rules. This has led various countries to establish bodies and councils tasked with monitoring and safeguarding constitutional principles from violation, giving rise to what is known as the review of the constitutionality of laws.

And if flexible constitutions enjoy substantive supremacy, they lack formal supremacy, and they can be amended using the same procedure as ordinary laws. The issuance of an ordinary law by the legislative authority following an ordinary procedure can cancel or amend a constitutional provision. (Amin Cheriat, 2002)

1.1. The first requirement: The composition of the Constitutional Council in France

The Constitution of France of October 4, 1958 entrusted the Constitutional Council with the task of overseeing the constitutionality of laws. The Constitutional Council consists of two types of members.

1.1.1. Members by the force of law:

They are the former presidents of the republic who are considered lifelong members by law, in order to benefit from their political and constitutional experience gained during their tenure as heads of state.

Accordingly, several presidents of the Fourth and Fifth Republics have participated in the French Council since its establishment in 1958. For example, "René Coty," who was President of the Republic from 1953 to 1958, held a seat in the council from 1958 to 1962. Former presidents of the republic have the opportunity to serve as full members for life.

- 1- Nine members are appointed for a term of nine years.
- 2- lifetime membership cases

In addition to these nine appointed members, former presidents of the republic are, by virtue of their positions, members of the Constitutional Council. However, not everyone decides to take a seat.¹

¹ And to this day, the former presidents of the republic who have decided to sit are:

- Vincent Auriol and René Coty, both of whom were presidents during the Fourth Republic.
- Valéry Giscard d'Estaing between 2004 and 2020;
- Jacques Chirac between 2007 and 2011;

1.1.2. Appointed members

Until today, the former presidents of the Republic who have decided to sit are: Vincent Auriol and René Coty, both presidents under the Fourth Republic; Valéry Giscard d'Estaing. The appointment of members of the Constitutional Council is stipulated in Article 56 of the French Constitution of 1958, which states: "The Constitutional Council consists of nine members, with a term of nine years that is not renewable. The Constitutional Council is renewed by one-third every three years. Three members are appointed by the President of the Republic, three by the President of the National Assembly, and three by the President of the Senate. The procedure provided for in the last paragraph of Article 13 applies to these appointments. The appointments made by the President of each Assembly are subject only to the opinion of the permanent committee concerned." In addition to the nine members mentioned above, former presidents of the republic are automatically members of the Constitutional Council for life. "The president is appointed by the President of the Republic. He has the deciding vote in case of a tie." The last paragraph of Article 13 of the Constitution, referred to in Article 56, states the following: The Basic Law defines the functions or positions, other than those mentioned in paragraph three, which, due to their importance in ensuring the rights and freedoms or the economic and social life of the nation, have the authority to

• Nicolas Sarkozy between 2012 and January 2013.
François Hollande announced that he does not wish to join the Constitutional Council.

appoint the president exercised by the republic after public notification from the specialized permanent committee in each council. The president of the republic may not make an appointment if the sum of the negative votes in each committee represents three-fifths of the votes cast in the two committees at least. The law defines the specialized permanent committees according to the relevant functions or competencies.

Finally, Article 3 of Law No. 838-2010, dated July 23, 2010, concerning the implementation of the fifth paragraph of Article 13 of the Constitution, states the following: "In every parliamentary council, there is a permanent committee specialized in giving opinions on the appointments of its members." The members of the Constitutional Council, based on the first paragraph of Article 56 of the Constitution, are the committee responsible for constitutional laws. The Constitutional Council consists of nine members (three appointed by the President of the Republic, three appointed by the President of the National Assembly, and three appointed by the President of the Senate). Their term is for nine years, non-renewable, and incompatible with many other positions (Member of Parliament, European Economic and Social Committee, etc.).

The Federal Republic of Germany is one of the leading countries in the field of constitutional review of laws by a judicial body, as a Federal Constitutional Court was established in the 1949 Constitution to carry out this task. The Federal Constitutional Court consists of two chambers; each chamber is composed of eight judges elected by the Bundestag and Bundesrat with a two-thirds majority in each council for an 11-year non-renewable term. The two-thirds

requirement allows for the opposition's participation in the election of the court's judges, who must meet several conditions, including being at least forty years old, possessing the same qualifications required for judicial positions in Germany, and selecting six judges from among the five federal court judges, who have at least three years of experience.

The Constitutional Court enjoys financial and administrative independence, placing it on the same level and degree as the government in relation to the parliament, and it continues to perform its functions in the event of a state of emergency being declared.¹

The German Constitutional Court exercises important functions, which are as follows: Considering the constitutionality of political parties and their compatibility with the liberal system, in this context, the Nazi Party was banned in 1952, and the German Communist Party in 1956. Constitutional review of laws and judgments issued by the courts. Broadcasting in electoral appeals. Broadcasting the attention directed towards the President of the Republic or the judges regarding their violation of the constitution. Resolving constitutional disputes between state institutions and the states. Interpretation of the constitution. (Fawzi Ousdiq, 2003)

As for the entities entitled to resort to the Federal Court and file lawsuits before it, they are numerous and vary according to the subject of the lawsuit. They can be summarized into seven entities: the President of the Republic, the Federal Government, the Bundestag, the Bundesrat, the states or local communities to defend their

¹ French Constitution October 4, 1958.

self-governance, judges who can bring a case to the court to rule on the constitutionality of a law, and citizens who can litigate before the court after exhausting all ordinary appeals.

The Federal Constitutional Court exercises subsequent judicial review, and due to the numerous parties allowed to resort to it and its broad competencies, it plays an important role in overseeing the constitutionality of laws, especially since the court's declaration of the unconstitutionality of the challenged law leads to its annulment. Spain adopted the model of judicial review of the constitutionality of laws in its 1978 Constitution, which entrusted this task to the Constitutional Court. The Constitutional Court consists of 12 members appointed by the king, four of whom are proposed by the House of Representatives with a three-fifths majority of the members, four others proposed by the Senate, two proposed by the government, and two proposed by the General Assembly of the Judiciary Authority, for a term of nine years, with one-third of the members renewed every three years. The president of the court is appointed from among its members by the king, based on the proposal of its members for a term of three years.¹ The judges of the Constitutional Court are selected from among "judges, advisors, public prosecutors, university professors, public servants, and lawyers, all of whom possess recognized expertise and competencies, and have more than fifteen years of practice."

¹ The French Constitutional Council exercises oversight over the constitutionality of laws either mandatorily and compulsorily in the case of organic laws and the internal regulations of the Assembly.

Professionalism.

According to Article 161 of the Constitution, the court is competent to hear the following cases: Constitutional review of laws and rulings that have legal force.

Conflict of jurisdiction between the state and independent groups or between these groups themselves. Considering the appeal for annulment related to protection due to violations of the rights and freedoms stipulated in the constitution.

Other matters assigned to the court by the constitution and organic laws. The ruling of unconstitutionality of the law leads to its annulment. Article 162 of the constitution specifies the entities that have the right to resort to the court in the following areas: Prime Minister. The defender of the people El defensor del pueblo. Fifty deputies. The executive bodies of independent groups. Every natural or legal person raises a legitimate interest. The Attorney General. Unlike the American system where appointments are initiated by the president - under the control of the Senate - the appointment of Portuguese judges is made by parliament with a two-thirds majority for ten of them, while three other judges are elected by their peers. Similar to the liberal-conservative debate, S. Amaral Garcia and his colleagues questioned the division between right and left (6 of the judges elected by parliament were marked as left and 6 as right). Their study of cases handled between 1983 and 2007 concluded that Portuguese judges are also subject to ideological and/or political voting, with control over the characteristics of the laws examined by the court. In other words, judges appointed by the left (i.e., the right) are less

likely to vote against laws from the left (the right) compared to laws passed by the right (the left).

1.2. Requirement Two: Judicial Review of the Constitutionality of Laws in the United States of America

The Constitution of the United States did not provide for judicial review of laws, and the Supreme Court played a key role in its inception and development. If the Supreme Court has led in judicial review since 1796 in the case "Hilton" v. United States, in which it ruled on the constitutionality of the federal law in question, as well as in its 1798 ruling in the case In "Calder" v. "Bull," most scholars attribute the origin of constitutional review in the United States to the Supreme Court's ruling in 1803 in the case of "Marbury" v. "Madison," where the court affirmed the judiciary's right to review the constitutionality of laws and not to apply any law that contradicts the Constitution, if it finds such a contradiction. Despite the efforts made by the Supreme Court to establish constitutional oversight and to expand it to include the alignment of laws with the higher principles inspired by the spirit of the Constitution, and with constitutional amendments, "it has not been free from criticism," both within the United States and outside of it. (Yves Guichet, 1996)

The composition of the Supreme Court of the United States In principle, the Chief Justice is merely a primus inter pares among his peers. In practice, however, the character of the officeholders gives the position, depending on the case, a very particular focus. Great Chief Justices leave their names attached to the period corresponding to their presidency.

The greatest Chief Justice remains John Marshall (1755-1835), who presided over the Court from 1801 to 1835 and entered history as the judicial architect of national unity. In the twentieth century, Earl Warren (1891-1974), who presided over the Court from 1953 to 1969, was the instigator of dynamic judicial activism that not only disrupted the old traditions of the Southern states but also some aspects of American society in general, especially in the field of protecting rights and freedoms. The President of the United States has a great deal of freedom in selecting candidates he wishes to propose to the Senate for the role of judge (Associate Justice), or, if the seat is vacant, for the position of Chief Justice of the Supreme Court. The Constitution does not impose any specific qualifications, age, or even training.

1.3. Methods of constitutional review in the United States of America

The United States of America recognizes three methods of constitutional review:

1.3.1. Payment method The exceptional path:

"Constitutional review by objection" refers to the review exercised by the judge when a case is presented before him, raised by one of the litigants with an interest, claiming the unconstitutionality of the law to be applied, and demanding its exclusion and non-application in the presented case, whether this case is civil, commercial, administrative, or criminal.¹

¹ Salma Majmaj, Oversight of the Constitutionality of Laws in Light of the 2020 Constitutional Amendment, a thesis submitted for a Master's

The United States of America is considered a model for judicial review through litigation, as Americans have the right to challenge the constitutionality of laws in a specific case before the ordinary state courts regarding the conformity of the contested law with the state constitution or the federal constitution, or before the Supreme Court regarding the rulings of these courts, and regarding the conformity of the contested federal law with the federal constitution. In the event that the Supreme Court issues a ruling declaring the law unconstitutional, all state courts are obliged to refrain from applying it, due to the United States adopting the system of "stare decisis," and the federal court is also bound by it.

1.3.2. The style of the judicial order:

The method of the judicial order is a supervisory approach that allows individuals to challenge the law before it is applied to them on the grounds of its unconstitutionality, and to avoid the damages that may befall them if the law is unconstitutional. The review of the constitutionality of laws is conducted in this manner by American courts, whether federal or local, based on a lawsuit filed by an individual challenging a law before its application, on the grounds that it is unconstitutional and that its application would cause harm to them. The court examines this lawsuit, and if it finds the

degree, Public Law, Faculty of Law and Political Science, Mohamed Seddik Ben Yahia University, 2020/2021, p. 55. Paragraph 2 of Article 24 of Presidential Decree No. 21-304

plaintiff's claim to be valid, it issues a judicial order to the relevant official or officials to refrain from applying the contested law. If the law has already been applied, the court orders the situation to be reverted to its original state; for example, if the plaintiff has paid taxes under this provision, their money would be returned. Given the importance of this method in monitoring the constitutionality of laws, the legislator has surrounded it "with a set of conditions," among which are: The order cannot be used to avoid the enforcement of criminal penalties. Since 1937, the judicial matter has been under the jurisdiction of a special federal court, composed of several judges. The possibility of appealing the decisions of this court directly to the Supreme Court.

Issuing a judicial order is not permissible except after hearing the parties to the dispute. These conditions have occurred due to the effectiveness of this method.

1.3.3. The declaratory judgment style the procedure of declaratory judgments:

The declaratory judgment method is considered one of the modern methods of constitutional review of laws in the United States of America. It involves a specific person submitting a request to the court to examine whether the law in question is constitutional or not. As a result, the official tasked with enforcing the contested law must refrain from doing so until the court issues its ruling. If the court upholds the law's constitutionality, the official continues to enforce it. However, if the court rules it unconstitutional, the official must refrain from enforcing it. The Supreme Court has linked the application of this method to the fulfillment of

two conditions: the existence of a genuine dispute and personal interest.

2. Constitutional Review in Algeria

The principle of the supremacy of the constitution (Principe de la suprématie de la constitution) refers to the superiority of constitutional rules over all other legal rules in countries. This principle dictates that legislation is bound by legislation of a higher degree. Ordinary legislation cannot contradict constitutional provisions. Similarly, subordinate legislation (issued by the executive authority) cannot contradict the provisions of ordinary legislation issued by the legislative authority. This means that there is a hierarchy (or gradation) among different types of legislation, where lower-level legislation is subject to higher-level legislation in the hierarchical scale of the legal system. (In general, the principle of the supremacy of the constitution dictates that everyone – rulers and ruled – must adhere to its provisions), and this achieves the principle of legality, which means that rulers are subject to "the supremacy of the law" and must comply with its provisions so that their actions are not rendered void. (M. S. Boussada, 2014)

All these rules constitute the main pillars upon which the system of governance in the state is built. On this basis, the constitution (in the material sense) serves as the legal reference for various authorities, as it is the origin and source of all legal activities in the state. This is what makes it superior to other legal rules. Thus, the will to regulate through the constitution has transcended the game of "constitutional institutions" and has reached "human rights policies," which will evolve with the development of

international human rights legitimacy. The latter - after stipulation and affirmation

In the constitutional document, a new concept called "fundamental rights and freedoms" will be adopted, not only because they have become supreme standards in the legal system, but also as a system of values that are neither "reducible nor simplifiable nor subject to revision." As a result, public authorities are obliged not only to respect, preserve, and not violate them, but also to promote, strengthen, and make them more effective. This new body has been established to monitor the constitutionality of laws, regulations, and orders that violate constitutional texts and to examine their constitutionality and legality. Therefore, the oversight of the constitutionality of laws is one of the most important means employed by the constitutional founder to ensure the alignment of legislative and executive actions with the provisions of the constitution. In this section, we will address the composition of the Constitutional Court (first subsection), and then its membership (second subsection).

2.1. The composition of the Constitutional Court and the conditions for membership in it

Article 186 stipulates that the Constitutional Court consists of 12 members: Four (04) members appointed by the President of the Republic, including the Chief Justice. One member (01) is elected by the Supreme Court from among its members, and one member (01) is elected by the Council of State from among its members. Six (06) members are elected by direct vote from constitutional law professors, the President of the Republic determines the conditions and

methods for the election of these members. The President of the Republic appoints the President of the Constitutional Court for a single term of 6 years, and the members of the Constitutional Court perform their duties for a single term of 3 years, with the members of the Constitutional Court being renewed every three years.¹ The most important observation that can be made in this context is that the constitutional founder maintained the same number in the composition of the Constitutional Court compared to the Constitutional Council in the 2016 amendment. However, the new aspect in the composition of the Constitutional Court is the election of 6 members by general vote from constitutional law professors, which is a positive development as it is likely to provide a strong impetus for the review of the constitutionality of laws, given the expertise these elected professors possess in the constitutional field. The members of the Constitutional Court, before assuming their duties, take an oath before the Chief Justice of the Supreme Court, according to the following text: "I swear by Almighty God that I will perform my duties with integrity and impartiality, maintain the confidentiality of deliberations, and refrain from taking a public stance in a case within the jurisdiction of the Constitutional Court." (G. Ahsan, 2020)

Article 187 has stipulated certain conditions for the members, whether elected or appointed, in the

¹ Article 188 of the 2020 Draft Constitutional Amendment, op. cit., p. 57.

Constitutional Court, which are as follows:¹ Reaching the age of fifty (50) years on the day of his election or appointment. Possessing at least twenty (20) years of legal experience and having benefited from training in constitutional law. Enjoyment of civil and political rights and not being sentenced to a custodial penalty. Non-partisanship.

Once the members of the Constitutional Court are elected or appointed, they cease to hold any membership, position, assignment in another task, or any other activity or free profession.

Through the interpretation of Article 187 of the 2020 constitutional amendment, it is clear that the constitutional maker has reconsidered the conditions for the reappointed or elected members of the Constitutional Court compared to the conditions for the members of the Constitutional Council in the 2016 amendment.

Where the age requirement for assuming the position of a member of the Constitutional Court has become 50 years instead of 40 years, and the experience requirement has increased to 20 years instead of 15 years. The constitutional founder also added two other conditions: the enjoyment of civil and political rights and not having been sentenced to a prison term, as well as non-partisanship, so that the Constitutional Court remains free from any considerations. This is considered a new addition brought by the recent amendment regarding the composition of the Constitutional

¹ Article 187 of the 2020 Draft Constitutional Amendment, *op. cit.*, p. 39.

Court.

In addition to the conditions that must be met by a member of the Constitutional Court, there are specific conditions that must be met by the President of the Constitutional Court, which are as follows: The President of the Constitutional Court must hold only Algerian nationality by origin, and the original Algerian nationality must be proven for both the father and the mother. To embrace Islam. To grant Algerian nationality by origin only to the wife. To establish his residence in Algeria alone for at least 10 years before being appointed as the President of the Constitutional Court. He proves his participation in the November 1, 1954 Revolution if he was born before July 1942. To be performing national service or to have a legal justification for not performing it. To prove that his parents were not involved in actions against the November 1954 Revolution if he was born after July 1942. To provide a declaration of movable and immovable properties inside and outside the country. The stipulation of the necessity for special conditions for the President of the Constitutional Court is due to the sensitive position of the court's president, as he may assume the duties of the head of state in the event of a vacancy in the presidency coinciding with a vacancy in the position of the court's president. Mohamed Said is capable.

The National Assembly, as the President of the Constitutional Court provides numerous consultations to the President of the Republic as stipulated by the constitution.

The constitutional founder determined the term of the presidency of the Constitutional Court, which is a single term of six (6) years, and thus it is not renewable.

Additionally, the position of the President of the Court is not subject to partial renewal every three years, which applies to the members of the Constitutional Court. In general, the term of membership in the Constitutional Court is six (6) years, with half of the composition renewed every three years. Article 188 of the Constitution stipulates that the internal regulations of the Constitutional Court shall determine the conditions and methods of partial renewal, which is considered a guarantee of the independence of the Constitutional Court.¹

2.2. The Scope of Judicial Review of the Constitutionality of Laws

The oversight exercised by the Constitutional Court on legal texts varies, whether the texts are in the form of treaties, organic laws, ordinary laws, decrees, or regulations, to mandatory prior oversight regarding some legal texts and discretionary oversight regarding others. And referring to Article 190 of the 2020 constitutional amendment, which states: "In addition to the powers explicitly granted to it by other provisions in the constitution, the Constitutional Court shall decide on the constitutionality of treaties, laws, and regulations."

¹ Article 187 of the 2020 Draft Constitutional Amendment, op. cit., p. 39.

The second requirement: The method of appointment and election for the Constitutional Court

The political nature of the body, like in France, where all members are chosen by political authorities (the head of state and parliamentary assemblies), is less so in Italy and Spain, where some members are appointed by judicial authorities.

As for the appointment conditions in France, the political authorities have complete freedom in choosing the members, but in Germany, Spain, and Italy, only members with legal qualifications (judges, lawyers, law professors) can be appointed.

As for the members' terms, they have the same authority as judges, as the constitutional legislator wanted their independence from political power. In the United States, for example, Supreme Court justices are appointed for life. In Austria, the term of Constitutional Court members is limited by the retirement age, which is 70 years. In other countries, Constitutional Court members are appointed for long terms (nine years in France, Spain, and Italy, and twelve years in Germany).

In Italy, the President of the Constitutional Court is appointed by the members, while in Germany, he is appointed by the parliament and the head of state in France and the United States.

If it is a requirement for the independence of the Constitutional Court as an institution from the other public authorities in the state that the constitution itself specifies the composition of the court, it should also address this composition in such a way that no single authority

dominates it. Among the new developments brought by the 2020 constitutional amendment is what is related to the structural aspect of the Constitutional Court. In terms of the composition of the court, it combined the methods of appointment and election as follows:

Appointment style:

The President of the Republic appoints four members, including the head of the Constitutional Court. Despite the previous criticisms directed at the Constitutional Council regarding the appointment of its members, the 2020 amendment did not completely break away from this nature of formation. The President of the Republic still has the authority to appoint a significant number of members of the Constitutional Court and also plays a role in appointing its head, who must meet the constitutional conditions related to the President of the Republic, except for the age requirement renewed in Article 87 of the 2020 amendment. Perhaps these conditions for the presidency of the Constitutional Court are imposed to give importance to this position, considering it the third most significant role in the Algerian state, as it is qualified to assume the position of Head of State in the event of a double vacancy of the Head of State and the Speaker of the Council of the Nation. The appointment of the court's president by the President of the Republic is seen as consolidating the latter's dominance over the Constitutional Court, unlike the Tunisian model where the members of the Constitutional Court elect the court's president and vice president from among themselves, ensuring they are among the legal experts.

Voting method:

The Constitutional Court is also composed of two other members. The Supreme Court elects the first member from among its members, and the State Council also elects the second member from among its members. Here, the constitutional founder opted for election instead of appointment. However, despite adopting the election method, the constitutional founder did not clarify in Article 186 how they would be elected. Additionally, the number of judicial representatives in the court's composition was reduced. This is a significant regression that will certainly affect the court's work, which is characterized by legal precision. In reality, judges are the ones with experience and a deep understanding of procedural aspects. It would have been better if the founder had retained four judges as members, as was the case under the 2016 constitutional amendment.

The Constitutional Court is composed of six members elected by ballot from constitutional law professors, and the President of the Republic determines the conditions and procedures for the election of these members. Presidential Decree No. 21/304 organized the election process for constitutional law professors under the supervision, management, and oversight of a national electoral committee established at the level of the regional university conference, which is composed of: A judge with the rank of advisor at the Supreme Court is appointed by the Chief Justice of the Supreme Court. Two members appointed by the President of the National Conference of Universities from among the non-candidate voting professors. Electoral committees are also established at the level of

regional conferences, with a total of three committees. Each committee is composed of: A judge with the rank of advisor in the judicial council, at least appointed by the head of the regionally competent judicial council. Three professors are chosen by the president of the regional university conference from among the non-candidate voting professors.¹ The electoral committee of the regional university conference verifies the validity of the nominations after receiving files from the university institutions immediately upon the expiration of the nomination submission period set by Presidential Decree No. 21/304, which is 40 full days before the election date. The nomination declaration is submitted personally by the candidate to the university institution to which they belong, and the latter is accompanied by The principal or before a public officer. The winners are the candidates who received the highest number of expressed votes in each regional conference. In case of a tie in votes, the candidate with the higher rank is declared. If that is not possible, the one with the earlier employment date, and if that is also not possible, the older candidate. And based on the statement issued by the National Electoral Committee², the first electoral process for the membership of the first Constitutional Court resulted in the victory of the following professors distributed among the regional university seminars: 1st Regional Conference for Central Universities: Fatiha Ben Abbo (University of Algiers), Abdelwahab Kherif (University of Blida)

¹ Ammar Abbas, The Role of the Algerian Constitutional Council in Ensuring the Principle of Supremacy of the Constitution, Journal of the Constitutional Council, Issue 309

² Statement of the National Electoral Commission at the National University Conference issued on 17/10/2021

2nd Regional Conference of Eastern Universities: Ammar Boudeyf (University of Tebessa), Mohamed Boutarfass (University of Constantine) 3rd Regional Conference of Western Universities: Abbas Ammar (University of Mascara), Abdelhafid Asoukin (University of Oran) A second election for membership in the Constitutional Court will be held for constitutional law professors, with the final list of nominations for each regional university conference announced to elect constitutional law professors – members of the Constitutional Court – scheduled for December 7, 2024¹.

Conclusion

The Constitutional Court was established by the 2020 constitutional amendment as an independent oversight institution that regulates the functioning of institutions and the activities of public authorities, replacing the Constitutional Council while retaining all its powers, especially those related to constitutional oversight, as well as the power to rule on the constitutionality of laws, issue opinions, and adjudicate electoral disputes, in addition to introducing a new authority to resolve conflicts between authorities and interpret constitutional texts. From the above, it becomes clear that the Algerian legislator has carefully established the principle of constitutional review of laws, which serves as a guarantee for ensuring

¹ Statement of the National Electoral Commission at the National University Conference issued on 11/13/2024

respect for the constitution and protecting it from violations by public authorities. This principle has gone through several stages in Algerian constitutions, the most notable of which is the 2020 constitutional amendment, which changed the course of previous Algerian constitutions by transforming the Constitutional Council into a Constitutional Court.

Formal constitutions emerged in Western countries with the aim of putting an end to absolute and despotic rule, on the one hand, and enshrining and guaranteeing rights and freedoms, on the other. Therefore, a mechanism for monitoring the constitutionality of laws was established to impose the supremacy of the constitution over various laws. And despite that, this oversight still needs some amendments and reforms to be effective in enforcing the true protection of the constitution and ensuring rights and freedoms, especially the issue of notification and its deadlines according to Article 195 of the 2020 constitutional amendment.

As the 2020 constitutional amendment neglected the issue of the legislative authority, it was excluded from the appointment of members. It can be said that the Constitutional Court is independent from the parliament in appointments, unlike the executive and judicial authorities. Previously, the legislative authority intervened in the formation of the Constitutional Council according to Article 183 of the 2016 amendment. The scope of regulations that can be subject to the Constitutional Court's review is general, encompassing all areas of regulation related to the President of the Republic, as well as the Prime Minister or Head of Government, as applicable. The constitutional review of

regulations, based on the notification mechanism, is ex post but is limited to a period of one month from the date of their publication in the official gazette. However, the 2020 constitutional amendment, despite being recently introduced during a short and critical period, has been characterized by several positives, the most important of which are ensuring the subjection of orders to oversight for the first time, subjecting regulations to subsequent oversight instead of prior oversight as was customary before the amendment, and extending the scope of the unconstitutionality plea to regulations. Among the issues that have also gained attention in this amendment is the attempt to restore the importance of constitutional oversight by enshrining certain legal guarantees, thereby enabling it to perform its role in the best possible manner and with the necessary effectiveness. From a personal perspective, the 2020 constitutional amendment is an inevitable mechanism imposed by the critical circumstances faced by the Algerian state, with the establishment of a constitutional court as an authority that ensures the supremacy of the constitution and its respect, considering it a symbol of credibility and legitimacy in both its national and international aspects. However, it overlooked some important points that could affect the effectiveness and status of the constitutional court, the most notable being the method of appointing the president of the constitutional court, which could be addressed by electing him independently instead of appointing him to uphold the principle of oversight in the best possible way.

References

- Burdeau Georges, *Constitutional Law and Political Institutions*, L.G.D.J, Paris, 1969.
- Burdeau Georges, *Treatise on Political Science, Volume II*, L.G.D.J, Paris, 1980.
- FAVOREU Louis, et al., *Constitutional Law*, Dalloz, Paris, 1998.
- HAMON Francis, TROPER Michel, *Constitutional Law*, 34th edition,
- YVES GUICHET, *Constitutional Law*; ellipes, Paris, 1996.
- Mahfoudh Laachab: *The Constitutional Experiment in Algeria*, Algiers: Modern Printing House for Printing Arts, 2000
- Mouloud Didan: *Studies in Constitutional Law and Political Systems*, Algeria: Dar Al-Najah for Books, 2005
- Said Bou Chaïr, *The Algerian Political System*, Second Edition, Dar Al-Huda, Algeria 1993.
- Said Bouchaïr, *Constitutional Law and Comparative Systems*, Vol. 2, Algeria: University Publications Bureau, 1994
- Fouzi Oussadek, *Al-Wafi in Explaining Algerian Constitutional Law*, University Publications Bureau, Algeria 2003.
- Aji Abdel Nour, *Introduction to Political Science*, Algeria: Dar Al-Uloom, 2007

Laws and constitutions:**Constitutional texts**

The Constitution of the People's Democratic Republic of Algeria, issued on February 28, 1996, Official Gazette No. 76, dated December 8, 1996, amended and supplemented by: Law No. 02/03, dated April 10, 2002, concerning the issuance of the constitutional amendment.

Law No. 08/19, dated November 15, 2008, concerning the issuance of the constitutional amendment.

Law No. 16/01, dated March 6, 2016, concerning the issuance of the constitutional amendment.

Presidential Decree No. 20/244, dated 30/12/2020, concerning the issuance of the constitutional amendment, approved in the referendum of November 1, 2020.

1. Official Gazette, Issue 48, Year 2007

2. The organic law No. 21-01 dated 26 Rajab 1442 corresponding to March 10, 2021, concerning the electoral system.