

The oversight of the constitutionality of laws as a mechanism for guaranteeing freedoms and rights according to the 2020 constitutional amendment in Algeria

PhD (c) Tahraoui Zahra ¹, Pr. Rekkache Djahida ²

¹: Hasiba Ben Bouali University of Chlef, Lab: Reform of Arab Policies in the Context of Globalization Challenges, (Algeria), z.tahraoui@univ-chlef.dz

²: Hasiba Ben Bouali University of Chlef (Algeria), d.rekkache@univ-chlef.dz

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ABSTRACT:

This study aims to explore the importance of the Constitutional Court and its role in overseeing the constitutionality of laws. The constitutional amendment of 2020 introduced a new approach in this regard, by establishing a Constitutional Court in place of the Constitutional Council. Much is expected from this court in terms of ensuring the constitutionality of laws. This can only be achieved through effective oversight that protects rights and freedoms and builds a state of law, utilizing a range of political and judicial oversight mechanisms and institutions that serve as a deterrent and ensure respect for the fundamental principles of the constitution.

Keywords:

Constitutional oversight, pushing for laws' unconstitutionality, constitutional rights and freedoms

Introduction

The supremacy of the Constitution over all legal norms is one of the most important foundations of the legal State. A state cannot be described as lawful unless the rules of the constitution have supremacy and sovereignty over all other rules and laws within the state. This supremacy reinforces and affirms the principle of legitimacy, expanding its scope to include, in addition to the respect for legislative legal rules issued by the legislative authority, the respect for constitutional rules. Thus, any action that violates these rules becomes illegitimate, even if it is issued by the competent state authorities themselves, as such actions lose their legitimacy and are stripped of their legal value. Therefore, it is necessary to

establish oversight of the constitutionality of laws, which is also one of the most important features of a state governed by the rule of law. This oversight stems from the concept of the hierarchy of laws, where higher laws supersede lower ones, ensuring the supremacy of the constitution, respecting rights and freedoms, and avoiding legislative disorder.

In Algeria, the system of overseeing the constitutionality of laws was adopted for the first time in the 1963 Constitution. However, the 1976 Constitution did not include or adopt this oversight system because it did not embrace the principle of the separation of powers, instead opting for the unity of authority and the multiplicity of functions. As for the 1989 and 1996 Constitutions, the Algerian Constitution stipulates an oversight system in the third chapter under the title "Oversight and Advisory Institutions."

This study, therefore, attempts to answer the following research question: Did the 2020 constitutional reform truly give significant importance to the Constitutional Court as a supervisory mechanism in ensuring the constitutional protection of rights and freedoms and in building a state based on justice and the rule of law?

To address this issue, we hypothesize that the establishment of the Constitutional Court through the 2020 constitutional reform, along with the provision of stringent supervisory mechanisms, has indeed provided sufficient guarantees to protect the constitutionally enshrined rights and freedoms, thereby contributing to the building of a state based on justice and the rule of law.

In our analysis of this study, we have employed the descriptive-analytical method. This approach involves presenting and analyzing the constitutional texts that address some of the new amendments introduced by the recent reforms.

To address our issue, this study will examine the nature of this oversight in general, its methods, and its importance, as well as the concept of rights and freedoms. Additionally, we will assess the effectiveness of this oversight in ensuring rights and freedoms through the constitutional reform of 2020 in Algeria.

I. Constitutional Oversight of Law: definition

Constitutional oversight is based on the supremacy of the constitution (2006, 6). Based on this principle, it is essential that all other legal rules conform to the constitution. Without such

review, the distinction between higher and lower rules would be meaningless. This distinction implies that any provisions contrary to the constitution must be nullified.

Constitutional oversight represents one of the essential guarantees for the implementation of the constitution, ensuring the achievement of legitimacy and legality in a manner consistent with the principles of constitutional supremacy and the hierarchy of laws. This constitutional oversight can be either judicial, known as *ex post* review, or political, known as *ex prior* oversight. We will address these two types as follows:

1. Political oversight of the constitutionality of laws

In the political systems prevalent in some countries, the constitution may grant the authority to oversee the constitutionality of laws to a body with a political character. The role of this body is to ensure that no legal provision is issued if it is found to be in violation of the constitutional document.

This is also known as preventive oversight, which precedes the enactment of a law and thereby prevents its issuance if it contravenes any provision of the constitution. This oversight is conducted by a political committee whose members are selected by the legislative authority or in conjunction with the executive authority (Salman, 2000, p.197).

The composition of this body varies according to how the constitution organizes this type of oversight. It is conceivable that the body may be formed either through appointment by the parliament or the executive authority, through election by the general populace, or by the body selecting its own members.

What distinguishes this body is that it is not required to include members from the judiciary. Countries that have adopted this type of oversight include France and former socialist states, although the constitutions of these countries vary in specifying the entity responsible for this task (Al-Am, 2006, p. 6).

2. Judicial Oversight of the Constitutionality of Laws

In judicial oversight, the fundamental principle is that it rests on the intervention of the judge, which is a logical means that imposes itself by virtue of the judge's function. This is because, in applying the law to the disputes presented before him, the judge is obliged, in case

of conflict between ordinary law and constitutional law, to set aside ordinary law and apply constitutional law. This is to implement the general principle governing the conflict and contradiction of laws before the judge, whereby he is bound, when faced with conflicting legal principles, to uphold the superior rule and discard the inferior one (Salman, 2000, p. 58).

Similarly, the basis of this approach is that this oversight constitutes part of the original function of the judicial authority, applicable before all types of courts. Thus, any court within the judicial hierarchy, regardless of its level, has the competence to examine the constitutionality of laws (Al-Am, 2006, p. 02).

Moreover, other constitutions specify assigning the task of constitutional oversight to a specific judicial body, either the jurisdiction of the Supreme Court within its ordinary judicial system or through a specialized court established for this purpose. The majority view favors adopting oversight through a constitutional court whose sole task is to monitor the constitutionality of laws. This lends seriousness to its actions and independence from other branches of the state.

This method is distinguished by ensuring judicial neutrality, keeping judges away from political currents and party whims. It also leverages the judge's specialized professional expertise along with the procedural guarantees inherent in judicial disputes to ensure the right to defense and to determine methods of evidence that protect the various interests involved in the dispute. Furthermore, it upholds the principle of separation of powers regarding judicial independence and judicial immunity, along with the guarantees designed to shield judges from interference by other authorities and attempts to influence their judgments. Judges are not obliged to accept laws and decisions that contradict the constitution and deviate from its provisions (Salman, 2000, p. 58).

Therefore, it is logical to assign this legal task to a judicial body whose members possess sound and deep theoretical and applied legal training and expertise. This body should also uphold neutrality, integrity, objectivity, impartiality, and independence. In addition to these qualities, the judiciary distinguishes itself by providing rights to defense and conducting sessions openly, ensuring that oversight of the constitutionality of laws is not just a guarantee but the primary and effective assurance that upholds respect for constitutional provisions.

The oversight of the constitutionality of laws can be approached through two methods: the action for annulment due to unconstitutionality (direct constitutional challenge), and oversight through incidental examination during the consideration of a case. In addition to these methods, the United States of America employs two other methods: the injunction method and the declaratory judgment method (Salman, 2000, p. 60).

The oversight of the constitutionality of laws, regardless of whether it is political or judicial in nature, must be conducted within a specific legal framework. The entity responsible for this task is limited to reviewing the constitutionality of laws by examining the extent to which the challenged law aligns with the constitutional texts, without exceeding this scope to assess the conformity between the law and the unwritten higher principles that transcend the constitution (natural rights or natural law). If such an overstep occurs, it would constitute exceeding the scope of constitutional oversight (Al-Am, 2006, p. 07).

3. Constitutional Oversight of Law: Significance

The importance of oversight of the constitutionality of laws lies in establishing rules that govern state authorities and to which everyone must adhere. This ensures preventing the abuse of power on one hand, and on the other hand, it reinforces the rule of law by protecting public rights and freedoms.

This oversight is based on a set of principles, including:

- **Ensuring respect for rights and freedoms:** this is affirmed by the Algerian Constitution, which embeds rights and freedoms at its core. This means that all state institutions must respect these rights and freedoms, and it is impermissible to infringe upon or diminish them. The aim of oversight systems is to protect and ensure personal freedoms and rights against governmental authority (Hamza, 2011, p. 68).
- **Protecting democracy and the rule of law:** legitimacy and constitutional oversight are realized through adherence to the constitution and laws, known as legal legitimacy. This ensures

protection for rights and the strength of freedoms within democracy, safeguarding them through constitutional and legal legitimacy. Oversight aims to verify the constitutionality of laws and thereby uphold their sovereignty, achieving democracy as a tangible reality (Hamza, 2011, p. 70). This gives legitimacy to oversight aimed at continuous recognition of constitutional sovereignty. No democratic state guarantees the rule of law without ensuring legitimacy and non-interference with rights and freedoms, which are essential components of a lawful state.

- **Achieving Legal Stability:** the constitution prevents chaos that could threaten legal stability by ensuring that all branches of law and their systems adhere to the sovereignty and principles of the constitution. Constitutional oversight guarantees this stability and ensures the achievement of legitimacy, thereby preventing infringement upon rights and freedoms. Therefore, the constitutional court verifies the validity of laws unless they are declared null and void or unconstitutional, thereby achieving legal security (Hamza, 2011, p. 73).
- **Highlighting Society and Its Development:** constitutional rules are more comprehensive and noble in expressing societal values compared to ordinary legal rules. Therefore, constitutional oversight is not bound by traditional rules in interpreting and applying legal norms. It is broader and more inclusive in interpretation, reflecting the needs and evolution of society.
- **Protection of Rights and Freedoms:** various democratic constitutional systems worldwide aim to achieve constitutional justice by enshrining legal guarantees to protect rights and freedoms, enabling individuals to exercise them. Chief among these guarantees is the right to access justice to seek redress for any infringement on their rights. Judges are expected to embody qualities of independence, competence, and neutrality, ensuring impartial adjudication (Mohammed, 2021, p. 268).

4. Constitutional Oversight in the Algerian Constitutions: development

Algeria, like other countries around the world, has enshrined this principle and adopted the French model. The initial outlines of this principle began to appear with the issuance of the 1963 Constitution through Articles 63 and 46, affirming the assignment of the function of oversight of the constitutionality of laws to the Constitutional Council. This council consists of 7 members, including 3 representing the judiciary: the Chief Justice of the Supreme Court, and the Presidents of the Civil and Administrative Chambers of the Supreme Court. Additionally, 3 deputies are chosen by the National Council, along with a member appointed by the President of the Republic. The President of the Council is elected from among these

members. This structure notably emphasizes balance in representation between the legislative and judicial branches over the executive authority.

However, the initial experience of constitutional oversight did not endure long due to the suspension of the constitution's enforcement under exceptional circumstances, in accordance with Article 59 of the 1963 Constitution. After the issuance of the 1976 Constitution, the establishment of oversight of the constitutionality of laws was neglected. This can be attributed to the nature of the constitution itself, as its amendment procedures are flexible, placing the constitutional text on the same level as legislative law, thereby lacking supremacy and grandeur (Dabousha, 2022, p. 131).

Under the 1989 Constitution of Algeria, which enshrined multiparty pluralism, ensured freedoms, and established the principle of separation of powers, there was also a reaffirmation of the principle of oversight of the constitutionality of laws through the Constitutional Council, as detailed in Articles 153 to 156. According to Article 153, the Constitutional Council consists of two members appointed by the President of the Republic, in addition to the President of the Constitutional Council. Two members are elected by the

National People's Assembly from among its members, and two members are elected from among the members of the Supreme Court. In contrast to the 1963 Constitution, where the President of the Republic's dominance in forming the Constitutional Council was evident through appointment of members in addition to the President of the Council (Obeidi, 2016, p. 2017).

The 1996 Constitution dedicated Articles 163 to 196 to the oversight of the constitutionality of laws, introducing amendments to the composition of the Constitutional Council. The number of council members was increased to nine, including three members appointed by the President of the Republic, two members elected by the National People's Assembly from among its members, two members elected by the Council of the Nation from among its members, one member elected by the Supreme Court from among its members, and one member elected by the Council of State from among its members.

Critically noted in this composition is that the constitutional reform of 1996 did not entirely address criticisms leveled against it under the 1989 Constitution. There remained a dominance of the President of the Republic in forming the Council, alongside limited representation of the judiciary, despite the requirement in constitutional oversight of laws for

members with legal expertise. This was an aspect that the constitutional amendment of 2016 attempted to rectify, introducing several innovations affecting the composition, competencies, and notification authorities of the Constitutional Council, as outlined in Articles 182 to 191 (Dabousha, 2022, p. 132).

Starting with the constitutional amendment of 2020, there was a shift towards establishing a constitutional court tasked with overseeing the constitutionality of laws. In this context, the explanatory statement accompanying the preliminary draft amendment to the constitution in May 2020 emphasized the importance of constitutional justice in upholding the supremacy of the constitution. The Algerian constitutional framework granted oversight of the constitutionality of laws to the Constitutional Council, which conducted an objective review of the compliance of agreements, laws, and regulations with the constitution. However, this oversight proved limited, as it was constrained by the will of notification authorities.

The explanatory statement also affirmed that to overcome these shortcomings, the constitutional amendment of 2016 empowered individuals to challenge the constitutionality of legislative provisions before the legislative body through the mechanism of constitutional review. This combination of types of oversight was sufficient reason for the committee responsible for drafting the constitution to propose transforming the Constitutional Council into a Constitutional Court. This proposal necessitated a reconsideration of the composition and powers of the Constitutional Court.

5. The Concept of Public rights and Freedoms

Public liberties hold significant importance, both within the core of constitutions and in declarations of rights, as they have been established over time. The concept of public liberties pertains to what distinguishes humans from others, allowing them to exercise their actions, words, and behaviors with will and choice, free from coercion or compulsion, within certain limits that necessitate neither excess nor misuse. The concept of liberties also refers to what has been established by Islamic legal rulings in various sources of Islamic jurisprudence. In this context, the scholar Abdul Hamid Ibn Badis notes that: "Every individual's right to freedom is as fundamental as their right to life. The extent of one's life is the extent of one's freedom. An assault on someone's freedom is akin to an assault on their life. God did not send messengers or legislate laws except to enable people to live freely..."

The classical traditional concept of freedom closely aligns with the notion of an individual who is not subjugated to a master. In the same vein, it represents the individual's ability to choose their own behavior.

From the perspective of constitutional jurisprudence, freedom is defined as the relationship between an entity and an individual's capability and ability to act upon it. Rivero defines freedom as "the power of self-determination, the authority that a person exercises over themselves" (Gharsallah, 2023, p. 30). Consequently, liberties must enjoy special legal protection guaranteed by the state, ensuring they are not infringed upon.

II. Oversight of the Constitutionality of Laws as a Mechanism to Enshrine Rights, Freedoms and the Rule of Law through Constitutional Reform 2020

The phrase "rights and freedoms guaranteed by the constitution, which cannot be subject to unconstitutionality claims unless the legislative provision affects them," is unclear. This ambiguity raises questions about the source and scope of these rights and freedoms. Are they the rights and freedoms enshrined in the preamble and the texts it refers to, representing a broad interpretation of constitutional texts? This broad interpretation would lead to significant and different outcomes compared to the narrower interpretation, including an increase in claims. We await future rulings from the Constitutional Court on this matter, especially since the former Constitutional Council adopted the idea of a formal reading, focusing specifically on the rights and freedoms listed in Articles 32 to 73 in Chapter Four of the Constitution under the title "Rights and Freedoms." The preamble of the Constitution is considered a source of the rights and freedoms it contains (Kherchi, 2022, p. 13).

1. Political and Administrative Oversight Mechanisms Established by the 2020 Constitutional Amendment

Oversight by the National Independent Electoral Authority: this is a newly established legal mechanism introduced through recent amendments to ensure the integrity and transparency of the electoral process. It was created in response to circumstances and developments in political life, particularly the peaceful popular movement on February 22, 2019, which called for the change and reform of the political system. This was enacted by Organic Law No. 19/07, which established the National Independent Electoral Authority for the first time, providing it with a set of guarantees to support its independence both in terms of its composition and its functions (Gharbi, 2020, p. 167).

Oversight by the National Council for Human Rights: This council serves as a constitutional advisory body to the President of the Republic, as stipulated by Article 211 of the latest constitutional amendment in 2020. The subsequent article outlines the duties and powers for which this advisory body was established, stating: "The council undertakes monitoring, early warning, and evaluation in the field of respecting human rights." Key tasks include initiating awareness, information, and communication activities to promote human rights. It also provides opinions, suggestions, and recommendations related to the promotion and protection of human rights. Additionally, the council monitors human rights violations, conducts investigations, and informs the competent authorities while conveying its opinions and suggestions.

Administrative oversight by the Court of Auditors: This oversight is one of the effective mechanisms in protecting newly established rights and freedoms and is considered one of the independent bodies responsible for administrative monitoring. It was established by Law No. 05-80 dated March 1, 1980, in accordance with Article 190 of the 1976 Constitution, and has been supported by all subsequent Algerian constitutions up to the 2020 constitutional amendment. Article 199, paragraph 1, states: "The Court of Auditors is a high, independent institution responsible for overseeing public property and funds. It is tasked with post-audit oversight of the finances of the state, local authorities, public institutions, and state-owned commercial capital."

Oversight by the High Authority for Transparency and Anti-Corruption: According to the 2020 constitutional amendment, this is an independent authority aimed at contributing to the moralization of public life, enhancing principles of transparency and good governance, and preventing and combating corruption to safeguard public rights and freedoms.

2. The Mechanism for Raising the Unconstitutionality of Laws According to the 2020 Amendment

Since the exception of unconstitutionality is a fundamental aspect of constitutional justice, it enhances the effectiveness of constitutional oversight beyond what political oversight can achieve. Political oversight is typically limited to specific political bodies and excludes the citizen's right to challenge the constitutionality of a legal provision that violates their rights and freedoms. To address this, some countries have reinforced political oversight by raising

the exception of unconstitutionality. This has expanded the role of the Constitutional Council from merely examining the constitutionality of laws to actively protecting constitutionally guaranteed rights and freedoms (Mohammed, 2021, p. 268).

Previous constitutions, before the 2020 constitutional amendment, allowed the Constitutional Court to oversee the constitutionality of laws primarily through notifications from constitutionally designated bodies. However, this mechanism is no longer the sole means by which the Constitutional Court can fulfill its duties. A particularly significant development for citizens is the introduction of referrals by higher judicial authorities, or the exception of unconstitutionality. This mechanism strengthens and activates the role of the Constitutional Court in post-enactment constitutional oversight of laws, contributing to the protection of constitutionally enshrined rights and freedoms.

This emphasis on protecting liberties is evident in Algerian constitutions, reflecting their commitment to being "constitutions of liberties." The 2020 constitutional amendment dedicated 44 articles (Articles 34 to 77) to public liberties. The establishment of a constitutional mechanism for protecting these liberties through the exception of unconstitutionality underscores this commitment (Debousha, 2022, p. 169).

The 2016 constitutional amendment indeed restricted the types of legal texts subject to the exception of unconstitutionality, particularly with the ambiguous use of the term "legislative acts." It would have been more appropriate to explicitly specify the types of texts eligible for the exception of unconstitutionality, especially concerning regulations which were previously subject solely to prior constitutional review. This practical challenge led to regulations largely escaping oversight by the Constitutional Council through the exception of unconstitutionality.

Therefore, the 2016 constitutional amendment did not clarify the possibility of challenging the constitutionality of regulatory texts through the exception of unconstitutionality. As a result, regulations effectively became exempt from oversight by the Constitutional Council.

Starting from the 2020 constitutional amendment, there has been a strengthened post-enactment constitutional oversight over regulations through the exception of unconstitutionality. The constitutional reform explicitly subjected regulations to this mechanism, affirming their inclusion under Article 195, paragraph 1, and Article 198,

paragraph 4 of this amendment. Consequently, plaintiffs have the right to challenge the constitutionality of regulatory texts that infringe upon their constitutionally guaranteed rights and freedoms (Debousha, 2022, p. 167).

3. The Sensitivity of Raising the Unconstitutionality before the Constitutional Court According to the 2020 Amendment

Or the beginning of the shift towards constitutional judiciary, the procedures of the Constitutional Council in adjudicating the plea of unconstitutionality referred to it by the higher judicial authorities specified in Organic Law No. 18-16 differ and are distinguished from its procedures in the notifications addressed to it by other bodies. This distinction is confirmed by the rules of procedure of the Constitutional Council for the year 2019 in Articles 26, 10, 4, and 29 (Khershi, 2022, page 18). The specificity of the procedures is evident in the method followed by the Constitutional Council in adjudicating the plea of unconstitutionality and through the guarantees enshrined in the Organic Law and the rules of procedure of the Constitutional Council, which can be considered an indicator towards the activation of a genuine constitutional judiciary. This is manifested through three stages: the stage of investigating the plea of unconstitutionality, the stage of organizing the principle of adversarial proceedings, and finally, the stage of issuing the decision.

The constitutional amendment of 2020 reaffirmed this in Article 195, adding the possibility of claiming against legislative or regulatory rulings. The review of the plea of unconstitutionality is a subsequent review following the publication of the regulatory or legislative text in the official gazette. The Constitutional Court is notified through referral by the Council of State or the Supreme Court, and the Constitutional Court issues a decision regarding the constitutionality or unconstitutionality of the referred text within four months from the date of notification. This period can be extended once for a maximum of four months based on a reasoned decision communicated to the judicial authority that made the referral (Mohamed, 2022, page 776). As for the effects resulting from the oversight of the unconstitutionality, we find:

- In case that the legislative or regulatory ruling is found to be constitutional, meaning it does not violate the Constitution, it remains in effect.
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- In case of unconstitutionality of the legislative or regulatory ruling, thus acknowledging its violation of the Constitution, the legislative or regulatory ruling is terminated and loses its effect from the date specified by the decision of the Constitutional Court, while ensuring the protection of acquired rights from the impact of this ruling. The judicial authority that made the referral is then notified, and it, in turn, excludes the application of the legislative or regulatory text that the Constitutional Court declared unconstitutional (Article 198, paragraph 4) (Mohamed, 2022, page 776).

Conclusion

All in all, the rights and freedoms in the successive Algerian constitutions have been increasingly strengthened from one constitution to the next, especially with the constitutional amendment of 2016. This amendment added more new provisions than any other, with a total of 42 articles dedicated to rights and freedoms, and other provisions were also reinforced. The 2020 amendment further enhanced these rights by adding several protections, including the protection of women from all forms of violence, among others. This matter could represent a qualitative leap towards achieving genuine constitutional justice. Furthermore, expanding the right to notify the Constitutional Council to citizens through unconstitutionality before the judiciary constitutes an additional protection for constitutionally guaranteed rights and freedoms. It also enhances constitutional oversight and serves as a means of its development. By extending the mechanism of notification to the parties involved in a lawsuit, the range of individuals who can submit a plea of unconstitutionality has been broadened to include (natural persons, legal entities, citizens, and foreigners). Consequently, this expansion will contribute to enabling individuals to secure their rights and protect them from legislative authority infringements, cleansing the legal system of unconstitutional laws. However, ambiguity still surrounds the phrase "constitutionally guaranteed rights and freedoms." It is unclear whether

this refers strictly to those enshrined in the official document (a narrow interpretation of the text) or to those established in the preamble and other referenced texts. It is hoped that decisions from the Constitutional Council, and subsequently the Constitutional Court, will provide clarification on this matter.

On the other hand, we find that the Algerian legislator has been keen to create independent constitutional oversight mechanisms as a guarantee to protect constitutionally granted public

rights and freedoms and to enforce their application in reality. These mechanisms include the Independent Election Authority, the National Human Rights Council, administrative oversight through the Court of Accounts, and the High Authority for Transparency, Prevention, and Combating Corruption. All these oversight mechanisms and legal efforts were not addressed in previous constitutions, aiming to protect the fundamental rights and freedoms of individuals from any violations.

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