# THE JUDICIAL LIQUIDATION OF THE EXCEPTION OF UNCONSTITUTIONALITY IN ALGERIA

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***Abstract:***
*The exception of unconstitutionality is an important development in the system of control of the constitutionality of laws in Algeria. It allows litigants to challenge legislative or regulatory provisions that violate rights guaranteed by the Constitution. Organic Law No. 22-19 provides the legal framework for the implementation of this mechanism through the double judicial resolution of the exception of unconstitutionality. The exception can be raised before the lower judicial authorities of the ordinary or administrative judiciary, which are responsible for verifying the formal and substantive conditions of the memorandum on the exception of unconstitutionality. It is then referred to higher judicial authorities, represented by the Supreme Court or the Council of State, depending on the case, to verify the seriousness of the exception of unconstitutionality. Finally, it is referred to the Constitutional Court to rule on the constitutionality of the legislative or regulatory provisions against which the exception has been raised.*
***Keywords:*** *Exception of unconstitutionality; double judicial liquidation, gravity; referral.*

## INTRODUCTION

The control of the constitutionality of laws is an important guarantee of the constitutional rights and freedoms of individuals. The authority responsible for monitoring this matter ensures the supremacy and sanctity of the Constitution and the non-violation of laws and regulations against its provisions. Otherwise, if these laws and regulations are found to be unconstitutional, their unconstitutionality must be established and they should be excluded or amended.

In Algeria, the constitutional amendment of 2020 established the Constitutional Court as an independent constitutional institution, replacing the Constitutional Council. The role of the Constitutional Court is to ensure respect for the Constitution, and its organic and functional organization has undergone several changes compared to the Constitutional Council. However, it does not act on its own initiative, but is linked to the power of notification, which is initiated by one of the authorities designated in Article 193 of the Constitution, whether it be for the control of conformity or for the control of constitutionality. In addition, notification may be made by referral from the Supreme Court or the Council of State, depending on the case, as provided for in Article 195 on the procedure for the derogation of unconstitutionality. The Constitutional Court may be notified of the exception of unconstitutionality on the basis of a referral from the Supreme Court or the Council of State, if one of the parties in a case before a judicial authority claims that the legislative or regulatory decision on which the outcome of the dispute depends violates his rights and freedoms guaranteed by the Constitution.

The establishment of the constitutional review mechanism in Algeria dates back to the 2016 constitutional reform, which introduced the exception of unconstitutionality mechanism. At that time, Organic Law No. 18-16 was issued on 2 September 2018, which defined the conditions and procedures for the exception of unconstitutionality. It entered into force on 7 March 2019[1]. With the adoption of the Constitutional Amendment 2020, Article 196 of the Constitution provided for the issuance of an organic law defining the procedures and methods of notification and referral to

[1]- Article 26 of Organic Law No. 18-16, which establishes the conditions and procedures for filing an action for unconstitutionality, Official Journal No. 54 of 5 September 2018, repealed.

the Constitutional Court. The draft of this law was submitted to Parliament for discussion and approval in 2022, and it was finally enacted as Organic Law No. 22-19, which establishes the procedures and methods of referral to the Constitutional Court[1]. It repealed Organic Law No. 18-16 and included provisions related to the procedure of the exception of unconstitutionality, as well as other provisions related to the jurisdiction exercised by the Constitutional Court.

The mechanism of the exception of unconstitutionality gives litigants the right to challenge the constitutionality of laws and regulations that a judge intends to apply in a dispute. This effectively allows the constitutionality of the legislative and regulatory system to be tested over time. On the other hand, it places a responsibility on judges to participate in this task through the cases and claims brought before them. This raises the question: **What is the judge's role in activating the mechanism of the exception of unconstitutionality in Algeria?**

We will try to answer this question by using an analytical and descriptive approach to analyses the provisions and legal texts related to the mechanism of the exception of unconstitutionality within the judicial bodies. Accordingly, this study will be divided into two axes. The first axis will deal with the criteria for exercising the exception of unconstitutionality before the judicial authorities, as it is raised before the judicial body in which the dispute is presented. The second axis will examine the levels of judicial settlement of the exception of unconstitutionality.

**1. Conditions for raising an objection of unconstitutionality before the judicial authorities**

Organic Law No. 22-19 contains the provisions relating to notification and referral to the Constitutional Court. Thus, this organic law not only concerns the plea of unconstitutionality, but also establishes the procedures and methods of notification in the field of constitutional review and conformity control, as well as the procedures and methods of notification in disputes between constitutional authorities and the interpretation of constitutional provisions.

Article 4 of Organic Law No. 22-19 sets out the procedures and methods of notification by referral used in the field of the plea of unconstitutionality. It contains the necessary requirements for the exercise of the plea of unconstitutionality, primarily concerning the formal conditions for the exercise of the plea, which relate to the parties entitled to raise the plea, the pleading and the judicial authority before which the plea is raised. In addition, it deals with the substantive conditions relating to the defective legislative or regulatory content.

**1-1 Formal requirements for raising a plea of unconstitutionality:**

A number of formal requirements must be met in order to initiate an action for unconstitutionality. These requirements mainly concern the parties entitled to raise the objection, the grounds of the objection and the judicial authority before which the objection is raised.

**1-1-1 Parties entitled to lodge a complaint:**

Article 195 of the Constitution provides that the Constitutional Court may be notified of a plea of unconstitutionality based on a referral from the Supreme Court or the Council of State. This can happen when one of the parties to a case before a judicial authority claims that the legislative or regulatory measure[2] on which the outcome of the dispute depends violates his rights and freedoms guaranteed by the Constitution. Accordingly, the provisions of this article specify the parties who may raise the objection, which includes anyone who has the legal capacity and interest according to the general rules of litigation. It should be noted that the founder of the Constitution and the legislator have linked the exercise of the right of appeal to the defense of the self-interest of the litigants, while at the same time creating a public interest resulting from the challenge of a legislative or regulatory provision that is contrary to the Constitution. Therefore, the exercise of the right to challenge unconstitutionality is not separate from the legal action associated with the resolution of a dispute between the parties. The parties who can exercise this right are those

[1]- Organic Law No. 22-19 establishing the procedures and methods to be followed before the Constitutional Court, Official Journal No. 51 of 31 July 2022.

[2]- Article 13 of Law No. 09-08 establishing the Code of Civil and Administrative Procedure, Official Journal No. 21 of 23 April 2008, amended and supplemented by Law No. 22-13, Official Journal No. 78 of 17 July 2022.

involved in the dispute or controversy, regardless of their position in the case, whether they are citizens or foreigners[1], natural or legal persons[2]. They can therefore be identified as follows:

**1-1-1-1 Claimant in civil cases:**

This includes the plaintiff, the defendant, whether in a personal capacity or represented by a special agent or lawyer, or the party to the dispute, or any interested party who is not a party to the dispute[3].The interest is considered an essential condition, so that a party cannot, for example, plead the interest of its opponents.It is worth noting that the Organic Law, which establishes the procedures and methods of notification and referral to the Constitutional Court, explicitly requires the condition of interest to be met in order to raise the plea of unconstitutionality[4].

**1-1-1-2 Parties entitled to raise an objection in criminal cases:**

These include the accused, the civil party, the civil plaintiff and the civil liable party. There are two opposing views on the question of the prosecution's right to raise the defense. The first view emphasizes the literal interpretation of the constitutional text, which states that the right to raise the plea of unconstitutionality is granted to any party to the judicial proceedings, including the Public Prosecutor's Office, if it is a party to the case[5]. The second view argues that the Public Prosecutor's Office cannot raise the plea because it initiates public litigation on behalf of society and seeks the application of the law, even considering it as a basis for criminal prosecution[6]. Therefore, the Public Prosecutor's Office is not allowed to raise the plea of unconstitutionality against a law[7]. This is stipulated in Article 17 of Organic Law No. 22-19, which states that the plea of unconstitutionality may not be raised automatically by the judge, the public prosecutor or the public prosecutor general.

The role of the Public Prosecutor's Office and the General Prosecutor's Office in this context can be seen in the fact that, at the request of the Constitutional Court, they submit written observations on the plea of unconstitutionality. Their role can also be seen in the fact that they express their opinions at all judicial levels where the plea is raised[8].

It should be noted that persons other than the parties to the case are prohibited from raising the plea of unconstitutionality. Furthermore, the judge is not allowed to raise the plea of unconstitutionality automatically, in accordance with the above-mentioned Article 17, as an obligation of neutrality[9]. Despite calls for this power to be granted to judges, the Commission considers that it is not permissible for a judge to remain silent on the application of a flawed legislative or regulatory provision, even if the judge is aware of the flaw, following the example of the Egyptian and Iraqi legislators[10].

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[1]- Bahi, Hisham and Mahi, Wassila. (2020). "Conditions for filing constitutional challenges according to Organic Law 18-16." Journal of Law and Political Science, Volume 07, Issue 02, pp. 221-237, Algeria, p. 224.

[2]- Mesrati, Salima. (2012). "The control system of legal constitutionality in Algeria in light of the 1996 Constitution and the jurisprudence of the Algerian Constitutional Council (1989-2010)". Dar Huma, Algeria, p. 99.

[3]- Bahi, Hisham and Mahi, Wassila op. cit, p. 224.

[4]- Article 22 of Organic Law No. 22-19.

[5]- Bahi, Hisham and Mahi, Wassila op. cit, p. 235.

[6]- Laidi, Khira and Houjé, Wafi. (2019). "Unconstitutionality claims before the subject judge." Journal of Real Estate and Environmental Law, Volume 07, Issue 02, pp. 54-93, Algeria, p. 68.

[7]- Abdelrachid Tabi, 2020, "The role of the judicial bodies in activating the mechanism of appeal of unconstitutionality", International seminar on "Protection of rights and freedoms", Constitutional Council, 23-24 February 2020, Algeria, published on the website of the Supreme Court: https://www.coursupreme.dz.

[8]- Article 20 of Organic Law No. 22-19.

[9]- Abdelrachid Tabi, op. cit.

[10]- Mazhoud Hanane, 2020, "The challenge of unconstitutionality under Organic Law No. 18-16: A New Challenge for the Control of the Constitutionality of Laws in Algeria", Al-Bahith Journal of Academic Studies, Volume 07, Issue 01, pp. 575-594, Algeria, p. 579.

**1-1-2 Conditions for challenging the constitution**

Organic Law No. 22-19 lays down the conditions for lodging a constitutional complaint. Firstly, the challenge must be linked to an original claim. This is a fundamental requirement, since the challenge cannot exist independently of any other claim. This is clearly stated in Article 195 of the Constitution[1]. In addition, this condition is fulfilled by the requirement that the parties making the challenge must be involved in an original action before a judicial authority.

Article 19 of the Organic Law contains another formal requirement for constitutional challenges. It stipulates that the challenge must be presented in a written and separate memorandum, so that it cannot be combined with other applications. This means that the memorandum must be prepared in accordance with the procedures applicable before the judicial authority before which the challenge is made. The requirement of written form means that the challenge must be presented in a written memorandum[2], even if the procedural rules do not require it[3]. Therefore, it is not permissible to raise the objection by oral argument, but it must be raised by a written memorandum.

The requirement that the memorandum be separate means that it must be distinct from the original memorandum of claim. It is not permitted to submit the constitutional challenge together with the original claim or with any other claim or payment that is different in nature and content[4]. This allows the judge to examine it immediately, independently and directly, and to declare its priority over the rest of the case[5].

The requirement that the memorandum must contain grounds means that it must demonstrate the unconstitutionality of the contested decision. The grounds must be sufficient and comprehensive to enable the judge to assess the seriousness of the challenge.

The memorandum should include aspects of the violation or infringement of rights provided for by the Constitution. It should also specify the provision challenged, whether it is an article, paragraph or clause, and the basis on which the challenge is based. This requirement facilitates the examination of the challenge and allows the judge to reach a decision in the shortest possible time[6].

Finally, Article 18 of Organic Law No. 22-19 stipulates that the procedures for submitting a constitutional challenge to the judicial authorities are governed by the provisions of the Code of Civil and Administrative Procedure and the Code of Criminal Procedure, depending on the judicial authority before which the challenge is submitted.

**1-1-3 Conditions relating to the judicial authority**

Article 15 of Organic Law No. 22-19 stipulates that a constitutional challenge may be lodged with the judicial authorities subject to the ordinary judicial system or with the judicial authorities subject to the administrative judicial system. Thus, the challenge may be lodged with the ordinary judicial authorities: civil, criminal and military, whether they are courts of first instance, the Council of the Judiciary or the Supreme Court.

According to the information provided, if the case is presented at the level of a court that includes civil, criminal or military sections, or if the case is presented at the level of the Judicial Council,

[1]- Oukil Mohamed Amine, 2018, "The Role of the Judiciary in Activating the Mechanism of Unconstitutionality Appeal in Algeria: A comparative study with the French model", Annals of the University of Algiers 1, Volume 32, Issue 02, pp. 100-125, Algeria, p. 106.

[2]- As in criminal cases.

[3]- Laïdi Khaira, Wafi Hajj, the above reference, p. 70.

[4]- Rahmouni Mohamed, Rahli Saad, "Individuals' Right to Unconstitutionality Appeal under the Specific Organic Law on the Application of Unconstitutionality Appeal", Dafatir Policy and Law Journal, Volume 11, Issue 01, Year 2019, p. 76.

[5]- Zouaïd Mourad, Addou Abdelkader, 2021, "Conditions for Exercising Unconstitutionality Appeal before Judicial Authorities: A Comparative Analytical Study between Algerian, French and Egyptian Laws", Ma'arif Journal, Volume 16, Issue 02, pp. 310-327, Algeria, p. 313.

[6]- Rahmouni Mohamed, Rahli Saad, the above reference, p. 76.

the challenge is raised before the judge or chamber to which the case file is submitted[1]. If the case is submitted to an investigating judge or an examining magistrate, the challenge shall be lodged before that judge and referred to the chamber of indictment for consideration[2].

The appeal may be lodged with the Court of First Instance or the Court of Appeal for consideration prior to the hearing. Under the provisions of Organic Law No. 18-16 (which has been repealed), the constitutional challenge was only raised before the Court of Appeal, accompanied by a certificate of appeal from the Court of First Instance. The Court of Appeal would examine it before opening the debate, without involving the jury (because it was a legal matter)[3]. This was due to the specificity of the procedure before the Court of First Instance and the possibility of appealing to the investigating authorities[4]. However, the new Organic Law provides for the possibility of raising the objection before both the Court of First Instance and the Court of Appeal, with the emphasis on considering the objection before opening the discussion.

The challenge may also be lodged with the administrative judicial authorities, i.e. the administrative courts, the administrative courts of appeal once they have been set up[5] and the Council of State.

The challenge may not be lodged with the arbitration and conciliation tribunals, nor with the Court of Disputes, nor with the Supreme State Court when it is established, since these bodies do not fall within the jurisdiction of the Supreme Court or of the Council of State, which may refer the challenge to the Constitutional Court[6]. Nor can the appeal be lodged with specialized administrative tribunals, such as the disciplinary committees of certain professional bodies or the Court of Auditors[7].

The constitutional challenge may be raised at any stage of the proceedings, even for the first time, before the Court of Appeal or the Court of Cassation[8].

Moreover, the constitutional challenge has priority, since it is decided before the original action[9]. The judicial authority before which the appeal is lodged shall postpone the decision on the original action until the constitutional appeal before it, before the Supreme Judicial Authority or before the Constitutional Court has been decided, unless the original action relates to one of the exceptional cases which, by virtue of their nature, may be decided.

**1-2 The objective conditions for initiating a constitutional challenge:**

The objective conditions relate to the defective legislative or regulatory provisions considered unconstitutional. Since Article 195 of the Constitution covers two types of texts, namely "legislative" or "regulatory", Organic Law No. 18-16 initially referred only to legislative provisions, i.e. legal provisions.

However, this issue was rectified by Organic Law No. 22-19, which recognized the inclusion of both legislative and regulatory provisions, in line with the provisions of Article 195 of the Constitution. Legislative provisions include all laws enacted by Parliament, including organic laws and ordinary laws, in accordance with Articles 139 and 140 of the Constitution. They also include presidential decrees issued before the constitutional amendment of 2020, as the amendment requires the President of the Republic to notify the Constitutional Court of such decrees when they are issued

[1]- Abdelrachid Tabi, op. cit.

[2]- Abdelrachid Tabi, op. cit.

[3]- Ibid.

[4]- Shawqi, Yaish Tamam, 2021, "Provisions for Submitting Constitutional Non-Conformity of Laws in the Algerian Constitutional Amendment of 2020: Between the Requirements of Constitutional Anchoring and Legal Framing (A Comparative Study)", Al-Ijtihad Al-Qada'i Journal, Volume 13, Issue 01, pp. 09-38, Algeria, p. 20.

[5]- Article 08 of Law No. 22-07 on the Division of Justice, Journal Official No. 32, of 14-05-2022.

[6]- See previous reference, p. 109.

[7]- Shawqi, Yaish Tamam, see previous reference, p. 21.

[8]- Tabi, Abdelrachid, op. cit

[9]- Hassani, Mohamed Monir, 2021, "Rules of Constitutional Jurisprudence for Deciding on Constitutional Non-Conformity", Al-Naqdiyya Journal of Law and Political Sciences, Volume 16, Issue 02, pp. 202-225, Algeria, p. 205.

during the recess of Parliament or when the National People's Assembly is vacant, as stipulated in Article 142 of the Constitution.

On the other hand, regulatory provisions include presidential decrees, as the President of the Republic exercises regulatory powers in matters not assigned to the law, as stated in Article 141 of the Constitution.

It should be noted that Organic Law No. 18-16 did not include regulatory provisions in the text of Article 2.Therefore, the application of the constitutional challenge to the presidential decrees was excluded, as stated by the Supreme Court in case no. 00005, decision of 26.04.2021, which decided not to accept the constitutional challenge to two executive decrees. In the reasoning of this decision, it was acknowledged that the constitutional challenge cannot be raised against presidential or executive decrees, despite the explicit provision of Article 195 of the Constitution. This decision was based on Article 225 of the Constitution, which stipulates that "the effects of the laws that must be modified or repealed in accordance with the provisions of this Constitution shall continue until new laws are prepared or modified within a reasonable period of time[1].Thus, Organic Law No. 22-19 now ensures that regulations are subject to the constitutional challenge mechanism.

When considering the legislative or regulatory provision on which the outcome of the dispute depends, the matter does not stop there. On the contrary, certain conditions set out in Article 21 of Organic Law No. 22-19 must be met. These conditions are as follows:

- The dispute must depend on or be based on the contested legislative or regulatory provision. In this case, the provision in question may be the text on which the original action was based[2]. It could also be the criminal provision on the basis of which the prosecution was initiated, since it is the text on the basis of which the prosecuting authority notified the defendant of the proceedings by means of an order, a decision to refer, an appeal, a direct summons or an immediate appearance. During the investigation phase, it is the text mentioned in the initial request or in the indictment. Alternatively, it may be the text relied on by the parties to the proceedings, i.e. the text on which the claimant bases his claims or on which the defendant relies in his defense. It may also be the text relied on by an intervening party in support of its position in the dispute[3].
- It may also be the text applied by the judge in the case. In civil cases, the civil judge may decide the case on the basis of a legal text other than the one invoked by the parties. Similarly, the criminal judge may reinterpret the facts of the case and apply a different text from that on which the case was based. In such cases, the law or regulation applied by the judge and on which his or her decision is based may be challenged as unconstitutional when the decision is challenged before the competent authority (opposition, appeal, third party objection, request for review, cassation). This is done on the basis that the law or regulation applied by the judge is unconstitutional[4].
- The challenged legislative or regulatory provision should not have been previously declared in conformity with the Constitution, except in cases where circumstances have changed. In accordance with Article 142 of the Constitution, treaties, organic laws and presidential decrees are excluded from the scope of this provision. Any legislative or regulatory provision or decision that has been subject to constitutional review is also excluded, except in cases where circumstances have changed. Such changes may be achieved by amending these provisions or by amending the rights and freedoms guaranteed by the Constitution on the basis of constitutional amendments. Furthermore, it is not permissible to raise unconstitutionality claims against referendum laws (such as the Law on Peace and National Reconciliation) because these laws were enacted after being submitted to a popular referendum[5].

[1]- Decision No. 00001, dated 17.07.2019, published on the website of the Supreme Court of Algeria https://www.coursupreme.dz.

[2]- Laïdi, Khaira and Haja, Wafi, the previous reference, p. 72.

[3]- Ibid, p. 72.

[4]- Ibid, p. 73.

[5]- Tabi, Abdelrachid, op. cit.

- The argument must be serious. The seriousness of the argument is judged by the judge[1].Seriousness can be assessed from a number of perspectives. Firstly, the argument should not aim to prolong the duration of the objective process[2].The judge is obliged to examine the reasoning of the argument and the extent to which he or she is convinced that there is a doubt as to the constitutionality of the challenged legislative or regulatory act, its relevance to the dispute[3] and its impact on the outcome[4] of the dispute. It should be in the interest of the applicant[5], be recent and the judge is not obliged to declare the constitutionality or unconstitutionality of the decision[6]. This is a matter for the Constitutional Court[7]. Seriousness may also be related to the fact that the decision violates the rights and freedoms laid down in the Constitution[8]. Therefore, it should be noted that constitutional rights and freedoms are not necessarily those explicitly mentioned in the first chapter of the second section of the Constitution[9]. Rather, they include all constitutional provisions through which one can enjoy the rights and freedoms guaranteed by the Constitution. An example is the right to a two-stage trial as provided for in Article 165 of the Constitution.

In its opinion on the review of the constitutionality of Organic Law No. 18-16, the Constitutional Council emphasized the requirement of seriousness. It stated that judges should confine themselves to assessing whether the conditions for accepting the allegation of unconstitutionality are met, without extending their assessment to the constitutionality of the legislative decision, since this falls within the exclusive competence of the Constitutional Council[10]. Some saw this as an extension of the discretionary power of judges in assessing the seriousness of the claim[11]. However, the Constitutional Court did not address this issue when it examined the constitutionality of Organic Law No. 22-19.

With regard to the French experience in this area, the assessment of the seriousness of the claim differs between judges of lower courts and judges of higher courts. In the lower courts, the judge is required to verify the absence of frivolity in the matter, which means that he should examine even the slightest indication of seriousness and ensure that it is not lacking. On the other hand, in higher courts, the judge is required to examine the confirmed elements of seriousness and provide evidence of it[12].

In addition to the above, the assessment of the element of gravity allows for the filtering out of claims before they are referred to the Constitutional Court, thus preventing it from being burdened with malicious claims or those aimed at obstructing the progress of the case[13].

**2. Levels of judicial filtering of unconstitutionality claims**

As mentioned above, the Constitutional Court does not initiate constitutional review on its own initiative. Therefore, the founder of the Constitution has granted the power of notification to initiate the procedure. However, this notification is not directly submitted to the Constitutional

[1]- Laïdi, Khaira and Haja, Wafi, the previous reference, p. 75.

[2]- Bahi, Hicham and Mahi, Wassila, the previous reference, p. 227.

[3]- Kaïs, Cherif, 2019, "The Seriousness Requirement in Submitting Constitutional Non-Conformity," Journal of the Constitutional Court, Volume 07, Issue 01, pp. 11-22, Algeria, p. 15.

[4]- Belal, Nora and Arabi, Bayazid, 2021, "The Authority of the Subject Judge in Assessing the Seriousness of Constitutional Non-Conformity", Dafater Al-Siyasiyya Wal-Qanun Journal, Volume 13, Issue 01, pp. 102-125, Algeria, p. 107.

[5]- Kaïs, Cherif, the previous reference, p. 15.

[6]- See previous reference, p. 18.

[7]- Laïdi, Khaira and Haja, Wafi, previous reference, p. 75.

[8]- Decision No. 00001, dated 17.07.2009.

[9]- Articles 34 to 77 of the Algerian Constitution, Journal Official No. 82, of 30 December 2022.

[10]- Opinion No. 03/R.Q.A./M.D./18, dated 20 Dhu al-Qa'dah 1439, corresponding to 2 August 2018, on the control of the conformity of the organic law determining the conditions and procedures for the implementation of the constitutional non-conformity, Journal Official No. 54, of 05-09-2018.

[11]- Kais, Cherif, the previous reference, p. 17.

[12]- Ibid, p. 18.

[13]- Tabi, Abdelrachid, op. cit.

Court by the parties to the case. Instead, it must be referred by the Supreme Court or the Council of State. The framers of the Constitution provided for the filtering of unconstitutionality claims at the level of the lower courts before they are submitted to the Constitutional Court. Once a complaint has been lodged with these lower courts, it is sent to the Supreme Court or the Council of State for review, depending on the case. If the claim is accepted, it is then referred to the Constitutional Court, thus achieving a double filtering of these claims[1].

Thus, the claim of unconstitutionality may undergo the first filtering at the lower judicial level, which includes courts and councils of justice or administrative courts or administrative courts of appeal. After verification of their seriousness and the fulfilment of their conditions, the claims go to the second filtering at the higher judicial level, which includes the Supreme Court and the Council of State, depending on the case[2]. At this level, the seriousness of the claims is checked again and the possibility of referral to the Constitutional Court is assessed[3].

**2-1 filtering at the lower judicial level**

Article 20 of Organic Law No. 22-19 provides that "The judicial authority before which the action is brought shall, after hearing the opinion of the Public Prosecutor or the State Counsellor, immediately decide on the action of unconstitutionality and shall, by means of a causal decision, refer it to the Supreme Court or to the Council of State. If the composition of the judicial authority includes non-judicial assistants, they shall not be present during the decision".

Therefore, the judicial authority before which the claim is lodged is obliged to examine the necessary conditions for accepting the claim. These conditions primarily relate to the formal requirements of the claim, the subject matter of the claim, which is related to the flawed legislative or regulatory provision and its violation of constitutionally guaranteed rights and freedoms, as well as the seriousness of the claim. Here, the judge's role in assessing the objective conditions becomes clear, since the assessment of the formal requirements does not pose any relative difficulties. The judge must assess the seriousness of the claim by taking into account the nature of the provision, the extent to which it infringes rights and freedoms and its connection with the case at hand.

The Organic Law does not specify the time limits for deciding on the claim at the lower court level. The legislator only mentions that the decision should be taken immediately, i.e. in the shortest possible time and as a matter of priority. This was confirmed by the Constitutional Council on the occasion of its review of Organic Law No. 18-16 (repealed) in accordance with the Constitution[4]. In this context, the discretionary power of the judge is evident in the determination of this time limit on the basis of factors related to the examination of the claim, taking into account the question of priority and urgency.

Any interested person may intervene in the action for unconstitutionality before the competent judicial authority by submitting a separate and reasoned written memorandum before the decision on the referral is taken. If the request is accepted, the intervening party will be subject to the same procedures as the parties[5].

The judicial authority shall decide on the request by means of a causal decision of acceptance or rejection, after having obtained the opinion of the Public Prosecutor or the State Counsellor, taking into account the non-participation of non-judicial assistants when it concerns courts in which they participate in the composition, such as the commercial section[6], the social section[1], the criminal court[2] or the events section[3].

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[1]- Ibid.

[2]- Abdelrachid Tabi, op. cit.

[3]- Hassani, Mohamed Monir, previous reference, p. 206.

[4]- Opinion No. 03/R.Q.A./M.D./18, dated 20 Dhu al-Qa'dah 1439, corresponding to 2 August 2018, regarding the control of the conformity of the organic law that determines the conditions and procedures for the implementation of the constitutional non-conformity, with the Constitution.

[5]- Article 22 of Organic Law No. 22-19.

[6]- Article 533 of Law No. 08-09, which incorporates the amended and supplemented Code of Civil and Administrative Procedure.

On the basis of the information provided, here is a summary of the two possible outcomes of the decision of the judicial authority on the referral of the unconstitutionality:

- Refusal of the referral of unconstitutionality: If the judicial authority decides to reject the referral of unconstitutionality, the decision of rejection should be communicated to the parties by the registry office within a maximum of 3 days of its issuance. No appeal may be lodged against this decision, except in the context of an appeal against the decision on the dispute or part of it. The appeal should be made by means of a separate written and reasoned memorandum. In the meantime[4], the judicial authority shall continue with the original proceedings.

- Acceptance of the merits of the claim: If the judicial authority accepts the seriousness of the claim, it sends its decision to the Supreme Court or to the Council of State, together with the submissions and memoranda of the parties, within a period of 10 days from the date of its issuance. The decision is notified to the parties and cannot be appealed against. In this case, the sending judicial authority suspends the resolution of the dispute until it receives the decision of the competent authorities (Supreme Court, Council of State or Constitutional Court) on the question of unconstitutionality. This suspension does not, however, entail the suspension of the investigation procedure. The referring judicial authority may also take the necessary provisional or precautionary measures[57] if the situation so requires. It should be noted that the referral of unconstitutionality does not suspend the resolution of the case if a person is deprived of his or her liberty as a result of the case or if the case is intended to put an end to the deprivation of liberty[5], unless the person concerned objects. In addition, there are cases where the law requires a prompt resolution of the case within a certain period of time[6].

If the lower court rules on the case without waiting for the decision on the referral and the decision is appealed, the Court of Appeal postpones the decision on the appeal until the decision on the referral is made by the Supreme Court or the Constitutional Court, depending on the case. However, the Court of Appeal shall not postpone the decision on the appeal if it falls under the cases where postponement is not mentioned above[7]. These provisions also apply in cases where a cassation appeal is lodged[8]. Once the judicial authority has received the decision of the Constitutional Court, the proceedings in the case shall be resumed in accordance with the provisions of the Code of Civil and Administrative Procedure, if the case is a civil case, or the Public Prosecutor's Office shall take steps to resume the proceedings in the public case[9].

If the action that gave rise to the referral of the unconstitutionality becomes obsolete, this shall not affect the decision of the Constitutional Court on the referral of the unconstitutionality, if it has been referred to it[10]. In this case, the decision of the Constitutional Court declaring the legislative or regulatory provision unconstitutional does not affect the case, based on the principle of res judicata, which protects the final judicial decision[11].

It should be noted that once the judge has established the existence of the claim, he cannot change his decision on the seriousness of the claim. If he confirms its existence, he is obliged to postpone the decision on the original claim until he receives the decision of the Supreme Court or the Constitutional Court. It should be noted that when the Constitutional Court is notified of the

[1]- Article 502 of Law No. 08-09, as amended and supplemented by the Code of Civil and Administrative Procedure.

[2]- Article 258 of Law No. 66-155, incorporating the amended and supplemented Code of Criminal Procedure, Journal Official No. 48, of 10-06-1966.

[3]- Article 80 of Law No. 15-12 on the Protection of Children, Journal Official No. 39, of 19-07-2015.

[4]- Article 24 of Organic Law No. 22-19, paragraph 01.

[5]- Article 25 of Organic Law No. 22-19.

[6]- Article 26 of Organic Law No. 22-19, paragraphs 1 and 2.

[7]- Article 26, paragraph 3, of Organic Law No. 22-19.

[8]- Article 27 of Organic Law No. 22-19.

[9]- Article 28 of Organic Law No. 22-19.

[10]- Article 42 of Organic Law No. 22-19.

[11]- Tabi, Abdelrachid, op. cit.

referral, it is not obliged to consider the original claim, but continues to rule on the constitutionality of the referred provision[1].

**2-2 Liquidation at the higher judicial level**

Decisions declaring a payment unconstitutional are sent to the head of the judicial hierarchy in each judicial system, either the Supreme Court or the Council of State, depending on the case. This is the second level of appeal for this payment and it can only be referred to the Constitutional Court through this route. Given that the re-examination of the seriousness of the claim by the higher judicial authority subjects it to stricter scrutiny, it facilitates the processing of numerous potential claims, and only the valid ones are referred to the Constitutional Court. This also contributes to the establishment of judicial precedents for these bodies, as well as to the constitutional jurisprudence issued by the Constitutional Court, and further contributes to the evaluation of the national legislative system[2].

Decisions declaring a payment unconstitutional are addressed to the Chief Justice of the Supreme Court or the President of the Council of State, who immediately request the opinion of the Prosecutor General or the Public Prosecutor, depending on the case. They submit their requests within a maximum of 5 days, and the parties may submit their written observations[3]. It should be noted that the legislator has used the plural form with regard to the parties, indicating that it is not limited to the party making the payment, but extends to the other parties involved in the dispute[4] or the payment. It is emphasised that the decision declaring the payment unconstitutional must be attached to the parties' submissions and memoranda.

At both the Supreme Court and the Council of State, a panel is set up to decide whether the case should be referred to the Constitutional Court. This panel is chaired by the Chief Justice of the Supreme Court or the President of the Council of State. If they are prevented from doing so, the Vice-President will preside. The panel is composed of the president of the chamber competent for the subject matter of the payment and three advisers appointed by the head of the relevant higher judicial body[5].

The higher judicial body decides on the referral of the unconstitutionality of the payment to the Constitutional Court within two months of receiving the referral from the lower judicial body. The body responsible for the payment issues a causative decision either accepting or rejecting the referral. In case of acceptance, the causative decision is sent to the Constitutional Court together with the memoranda and submissions of the parties[6].

The judicial body that made the referral is informed of the decision of the Supreme Court or the Council of State, including the acceptance or rejection of the referral. The parties shall be notified within a period of 10 days from the date of the decision[7].

If the Supreme Court or the Council of State does not take a decision within the two-month time limit, the referral of the unconstitutionality of the payment is automatically sent to the Constitutional Court[8]. If the referral is rejected, the Constitutional Court receives a copy of the reasoned rejection decision and the competent higher judicial bodies send the rejection decision to the judicial body before which the payment was raised. The latter is responsible for notifying the parties within a period not exceeding 5 days in order to take appropriate measures[9].

According to the above, the higher judicial authorities may rule on unconstitutionality in the following cases:

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[1]- Belal, Nora and Arabi, Bayazid, the previous reference, p. 115.

[2]- Samri, Samia, 2021, "Competences of the Constitutional Court in the field of constitutional non-conformity", Journal of the Constitutional Council, Issue 17, pp. 189-220, Algeria, p. 197.

[3]- Article 29 of Organic Law No. 22-19.

[4]- Laidi, Khaira and Haja, Wafi, op. cit., p. 77.

[5]- Rahmoni, Mohamed and Rahli, Saad, op. cit, p. 79.

[6]- Article 33 of Organic Law No. 22-19.

[7]- Article 35 of Organic Law No. 22-19.

[8]- Article 36 of Organic Law No. 22-19.

[9]- Article 37 of Organic Law No. 22-19.

A. By receiving a referral of unconstitutionality from lower judicial authorities (such as courts, councils, administrative courts or administrative courts of appeal) which have found the referral to be serious.

B. In the context of the exercise of the right of appeal (whether it is an appeal or a cassation), as follows:

- For the Supreme Court, it has jurisdiction over orders, judgments and decisions issued by the courts and judicial councils[1].

- For the Council of State, it has jurisdiction as a final appellate body for appeals against final judgments and decisions of the administrative judicial authorities[2]. It also acts as a final appellate body for appeals granted to it under specific provisions[3]. In addition, it acts as a decision-making body in appeals against decisions of the Administrative Court of Algiers in cases concerning the annulment, interpretation and assessment of the legality of administrative decisions issued by central administrative authorities, national public institutions and national professional organizations[4].

C. By receiving a direct referral as an expert judge. The decision on the referral is given as a matter of priority within a period of two months from the date of the referral. Each judicial authority has specific cases in which it acts as a specialized judge. Examples are cases concerning claims for compensation for unjustified pre-trial detention or cases concerning the investigation of criminal cases against privileged litigants (such as ministers, governors or certain categories of judges)[5] for the Supreme Court. As for the Council of State, it acts as a specialized judge in cases granted to it under specific provisions[6].

It should be noted that secondary referral through a constitutional complaint is the most common method of initiating a constitutional complaint[7]. According to the statistics provided by the President of the Supreme Court in 2020, since the introduction of this mechanism in 2019[8], more than 16 cases have been brought before the Supreme Court and one before the Council of State. A review of the Supreme Court's website shows that 12 decisions have been issued on constitutional challenges[9], covering various topics such as criminal and civil matters, appeals, conflict of laws, smuggling, freedom of movement, cassation appeals and the legal profession.

In this context, the Constitutional Council issued five decisions before it was abolished in November 2021.

Since its establishment, the Constitutional Court has shown some activity in this area, although it is worth noting that its decisions generally uphold the constitutionality of the challenged legislation.

Compared to other countries, Algerian legislation explicitly excludes direct constitutional challenges before the Constitutional Court. Instead, such challenges must go through the Supreme Court and the Council of State. This is in contrast to the German legislature, which allows

[1]- Article 03 of Organic Law No. 11-12 regulating the organization, functioning and jurisdiction of the Supreme Court, Journal Official, issue no. 42 of 31 July 2011.

[2]- Article 901 of Law No. 08-09, containing the amended and supplemented Code of Civil and Administrative Procedure.

[3]- Article 09 of Organic Law No. 98-01, relating to the organization, functioning and jurisdiction of the Council of State, Journal Official, issue no. 30, of 30 May 1998, as amended and supplemented by Organic Law No. 22-11, Journal Official, issue no. 41, of 16 June 2022.

[4]- Article 902 of Law No. 08-09 incorporating the amended and supplemented Code of Civil and Administrative Procedure.

[5]- Tabi, Abdelrachid op. cit.

[6]- Article 903 of Law No. 08-09, which includes the amended and supplemented Code of Civil and Administrative Procedures.

[7]- Hafizi, Saad, 2020, Mechanism of constitutional non-conformity guaranteeing the protection of rights and freedoms in the Algerian and French systems, Journal of Judicial Jurisprudence, Volume 12, Issue 02, pp. 45-72, Algeria, p. 45.

[8]- Tabi, Abdelrachid, op. cit.

[9]- http://www.coursupreme.dz, accessed on 12-06-2023, 15:30.

individuals to lodge a direct constitutional complaint with the Constitutional Court if their rights have been violated. Similarly, the Spanish Constitution, in Article 161(2), allows individuals to bring a constitutional challenge directly before the Spanish Constitutional Court if their rights and freedoms, as set out in Article 53(2) of the Constitution[1], have been violated. In Egypt, Article 29 of the Supreme Constitutional Court Law states that if, in the course of a case, a court or specialized judicial body considers that a provision of a law or regulation necessary for the settlement of the dispute is unconstitutional, the case shall be suspended and the matter shall be referred, free of charge, to the Supreme Constitutional Court for its decision.

## CONCLUSION

The Algerian constitutional amendment of 2020 strengthened the constitutional approach by introducing secondary referral through a constitutional challenge. It affirmed the right of individuals to challenge unconstitutional legislative and regulatory provisions during the stages of litigation and extended the scope of texts subject to review through this mechanism to include regulatory provisions in addition to legislative ones. The dual judicial review requirement for constitutional challenge has been maintained, whereby such provisions need only be referred to the Constitutional Court by the Supreme Court or the Council of State.

On the basis of the study, the following conclusions can be drawn:

* The mechanism of constitutional challenge is a genuine constitutional guarantee to exclude unconstitutional legislative and regulatory provisions by involving the judiciary in their identification.
* The constitutional challenge is subject to objective and formal conditions, including its association with an original action and the fulfilment of the requirement of seriousness.
* The requirement of seriousness is linked to several elements which the judge must examine in order to accept the constitutional challenge.
* The constitutional challenge is subject to double judicial control. While it can be raised at any stage of the proceedings, it can only be referred to the Constitutional Court via the Supreme Court or the Council of State, depending on the case, in accordance with Article 195 of the Constitution.
* Judicial control in the lower and higher courts focuses on the fulfilment of the requirement of seriousness of the constitutional challenge, without taking into account the constitutionality of the legislative or regulatory provision, which is the original jurisdiction of the Constitutional Court.

On the basis of this study, several proposals can be made:

*Clarify the elements of the seriousness requirement in a precise and explicit manner, as well as the condition of changing circumstances.
*Set a specific deadline for judges in the lower courts to rule on the constitutional challenge.
*Require the publication of the decision of the Supreme Court or the Council of State rejecting the constitutional challenge.
*Exempt the constitutional challenge from court fees, or at least the fees for accepted challenges.
*Provide training for judges in the field of constitutional justice in order to improve the strict monitoring of the seriousness element.
*Give judges the right to initiate a constitutional challenge on their own initiative.
*Grant individuals the right to lodge a constitutional complaint directly with the Constitutional Court, or at least provide for the possibility of lodging a complaint by referral from the judicial body before which the constitutional complaint was lodged.

## REFERENCES

***Legal Texts:***

*[1] The Algerian Constitution, Journal Official No. 82, of 30 December 2022.*

[1]- Hamrit, Kamal, 2017, The Mechanism of Declaring Laws Unconstitutional in the Algerian Constitutional Amendment of 2016: A Comparative Study, Journal of Legal and Social Sciences, Volume 03, Issue 01, pp. 442-454, Algeria, p. 449.

*[2] Organic Law No. 98-01, relating to the organization, functioning and jurisdiction of the Council of State, Journal Official, issue no. 30, of 30 May 1998, as amended and supplemented by Organic Law No. 22-11, Journal Official, issue no. 41, of 16 June 2022.*

*[3] Organic Law No. 11-12 regulating the organization, functioning and jurisdiction of the Supreme Court, Journal Official, issue no. 42 of 31 July 2011.*

*[4] Organic Law No. 18-16, which establishes the conditions and procedures for filing an action for unconstitutionality, Official Journal No. 54 of 5 September 2018, repealed.*

*[5] Organic Law No. 22-19 establishing the procedures and methods to be followed before the Constitutional Court, Official Journal No. 51 of 31 July 2022.*

*[6] Law No. 66-155, incorporating the amended and supplemented Code of Criminal Procedure, Journal Official No. 48, of 10-06-1966.*

*[7] Law No. 09-08 establishing the Code of Civil and Administrative Procedure, Official Journal No. 21 of 23 April 2008, amended and supplemented by Law No. 22-13, Official Journal No. 78 of 17 July 2022.*

*[8] Law No. 15-12 on the Protection of Children, Journal Official No. 39, of 19-07-2015.*

*[9] Law No. 22-07 on the Division of Justice, Journal Official No. 32, of 14-05-2022.*

*[10] Decision No. 00001, dated 17.07.2019, published on the website of the Supreme Court of Algeria https://www.coursupreme.dz.*

*[11] Opinion No. 03/R.Q.A./M.D./18, dated 20 Dhu al-Qa'dah 1439, corresponding to 2 August 2018, on the control of the conformity of the organic law determining the conditions and procedures for the implementation of the constitutional non-conformity, Journal Official No. 54, of 05-09-2018.*

***[12] Books:***

*[13] Mesrati, Salima. (2012). "The control system of legal constitutionality in Algeria in light of the 1996 Constitution and the jurisprudence of the Algerian Constitutional Council (1989-2010)". Dar Huma, Algeria.*

***[14] Articles:***

*[15] Bahi, Hisham and Mahi, Wassila. (2020). "Conditions for filing constitutional challenges according to Organic Law 18-16." Journal of Law and Political Science, Volume 07, Issue 02, pp. 221-237, Algeria.*

*[16] Belal, Nora and Arabi, Bayazid, 2021, "The Authority of the Subject Judge in Assessing the Seriousness of Constitutional Non-Conformity", Dafater Al-Siyasiyya Wal-Qanun Journal, Volume 13, Issue 01, pp. 102-125, Algeria.*

*[17] Hafizi, Saad, 2020, Mechanism of constitutional non-conformity guaranteeing the protection of rights and freedoms in the Algerian and French systems, Journal of Judicial Jurisprudence, Volume 12, Issue 02, pp. 45-72, Algeria.*

*[18] Hamrit, Kamal, 2017, The Mechanism of Declaring Laws Unconstitutional in the Algerian Constitutional Amendment of 2016: A Comparative Study, Journal of Legal and Social Sciences, Volume 03, Issue 01, pp. 442-454, Algeria.*

*[19] Hassani, Mohamed Monir, 2021, "Rules of Constitutional Jurisprudence for Deciding on Constitutional Non-Conformity", Al-Naqdiyya Journal of Law and Political Sciences, Volume 16, Issue 02, pp. 202-225, Algeria.*

*[20] Kaïs, Cherif, 2019, "The Seriousness Requirement in Submitting Constitutional Non-Conformity," Journal of the Constitutional Court, Volume 07, Issue 01, pp. 11-22, Algeria.*

*[21] Mazhoud Hanane, 2020, "The challenge of unconstitutionality under Organic Law No. 18-16: A New Challenge for the Control of the Constitutionality of Laws in Algeria", Al-Bahith Journal of Academic Studies, Volume 07, Issue 01, pp. 575-594, Algeria.*

*[22] Laidi, Khira and Houjé, Wafi. (2019). "Unconstitutionality claims before the subject judge." Journal of Real Estate and Environmental Law, Volume 07, Issue 02, pp. 54-93, Algeria.*

*[23] Oukil Mohamed Amine, 2018, "The Role of the Judiciary in Activating the Mechanism of Unconstitutionality Appeal in Algeria: A comparative study with the French model", Annals of the University of Algiers 1, Volume 32, Issue 02, pp. 100-125, Algeria.*

*[24] Rahmouni Mohamed, Rahli Saad, "Individuals' Right to Unconstitutionality Appeal under the Specific Organic Law on the Application of Unconstitutionality Appeal", Dafatir Policy and Law Journal, Volume 11, Issue 01, Year 201.*

*[25] Samri, Samia, 2021, "Competences of the Constitutional Court in the field of constitutional non-conformity", Journal of the Constitutional Council, Issue 17, pp. 189-220, Algeria..*

*[26] Shawqi, Yaish Tamam, 2021, "Provisions for Submitting Constitutional Non-Conformity of Laws in the Algerian Constitutional Amendment of 2020: Between the Requirements of Constitutional Anchoring and Legal Framing (A Comparative Study)", Al-Ijtihad Al-Qada'i Journal, Volume 13, Issue 01, pp. 09-38, Algeria.*

*[27] Zouaïd Mourad, Addou Abdelkader, 2021, "Conditions for Exercising Unconstitutionality Appeal before Judicial Authorities: A Comparative Analytical Study between Algerian, French and Egyptian Laws", Ma'arif Journal, Volume 16, Issue 02, pp. 310-327, Algeria*

***[28] Site web:***

*[29] Abdelrachid Tabi, 2020, "The role of the judicial bodies in activating the mechanism of appeal of unconstitutionality", International seminar on "Protection of rights and freedoms", Constitutional Council, 23-24 February 2020, Algeria, published on the website of the Supreme Court: https://www.coursupreme.dz., accessed on 12-06-2023, 15:30.*