

Challenges of Judicial Independence in Algeria

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Abstract---Investigating the concept of judicial independence in Algeria involves more than just examining a controversial issue; it requires an objective analysis of the relationship between the judiciary and the executive authority, represented by the President of the Republic, and the extent to which the judiciary is subordinate to the executive. Addressing the limitations of the judiciary is essential to justify the need for a relationship between the executive and judicial branches. To elaborate on these boundaries, it is essential to evaluate the effectiveness of the judicial system itself, including an assessment of its legal frameworks, as well as evaluating the judiciary from material and moral perspectives. Furthermore, it is important to evaluate the professionalism and independence of judges, who are a fundamental and active element in this equation.

Keywords---Executive Authority, Judiciary, Principle of Independence, Domination, Integration, President of the Republic.

Introduction

The judiciary cannot fulfil its desired mission of establishing truth, demonstrating justice, achieving the rule of law and ensuring its sustainability without a judicial body that resolves disputes and possesses organic and functional independence from the executive authority. This independence is essential for enforcing the rule of law and strengthening institutions.

Despite the constitutional founders' unwavering commitment to enshrining the independence of the judiciary in constitutional texts, closer inspection reveals that this independence is merely ink on paper. Judicial independence cannot be realised simply by being enshrined in the constitution due to the disparity between the content of these texts and their practical applications. Consequently, the independence of the judiciary remains relative and has not been fully realised.

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This raises the following problematic question:

What is the nature of the relationship between the executive and judicial authorities? In other words, given their limitations, does the constitutional founder seek to integrate the executive and judiciary, or does he seek to reinforce the dominance of the executive over the judiciary?

To answer this question, we will adopt the following approach:

Chapter One: The Relationship Between the Executive Authority and the Judiciary

The relationship between the executive authority and the judiciary is deep and complex, with manifestations and impacts that extend to two main aspects of the judicial structure and its operations. Firstly, the executive authority influences the organic aspect of the judiciary, including the formation of the judicial structure, the appointment of judges, and their promotions or transfers. This gives the executive indirect control over the composition of the judicial apparatus and its personnel.

Secondly, the executive authority's influence on the judiciary's functional aspect is evident, as it can intervene in the course of justice through various judicial mechanisms exclusively granted to the President of the Republic by the constitutional founder.

Section One: Aspects of the Relationship Between the President of the Republic and the Organic Aspect of the Judiciary

The organic aspect of the judiciary encompasses not only the organisational structure of the courts and judicial councils, but also the career progression of judges in terms of appointment, promotion, and disciplinary actions.

From this standpoint, it is essential to analyse the constitutional and legal texts that define the President's powers in this area and consider how these powers may affect the independence of the judiciary and its role in establishing the rule of law.

Subsection One: The Authority to Appoint Judges

Appointments of judges by the executive authority are one of the most controversial issues regarding the independence of the judiciary. This mechanism calls judicial independence into question, as the executive authority's involvement in the appointment process is seen as direct interference in judicial affairs. This could result in the executive authority controlling a judge's professional life from start to finish.

The privileges granted to the executive authority, represented by the President of the Republic, with regard to appointment powers can be inferred from various constitutional and legal texts. These include:

Article 92 of the Constitution¹ (fourth, fifth and eighth paragraphs) states that the President of the Republic shall appoint the following individuals in the specified order: the President of the Supreme Court; the Chairman of the State Council; and judges.

Article 181 of the Constitution stipulates that appointments to specific judicial positions are made by presidential decree following a favourable opinion from the High Council of the Judiciary.

Article 3 of Organic Law No. 04-11 (the Basic Law of the Judiciary) states that judges are appointed² by presidential decree upon the proposal of the Minister of Justice and following deliberation by the High Council of the Judiciary.

In the same context, Article 49 of the same law also stipulates that appointments to specific judicial positions are made by presidential decree.

¹- Constitutional Amendment of 2020, issued by Presidential Decree No. 20-442 on 15 Jumada I 1442 (30 December 2020), concerning the issuance of the constitutional amendment approved in the 1 November 2020 referendum. Official Gazette, No. 82.

²- Organic Law No. 04-11 concerning the Basic Law of the Judiciary, dated 6 September 2004. Official Gazette of the People's Democratic Republic of Algeria, No. 57.

Additionally, Articles 7 and 8 of Organic Law No. 98/03, which relate to the jurisdiction, organisation and functioning of the Court of Conflicts, stipulate that the appointment of its judges follows the aforementioned procedure.

The same presidential appointment provision is found in Article 39 of Law 01-08, which includes the Criminal Procedure Code, regarding the appointment of an investigating judge.

Subsection Two: The Presidency of the Republic over the High Council of the Judiciary

The constitutional basis for the presidency of the Republic over the High Council of the Judiciary can be found in Article 180/2 of the 2020 constitutional amendment, which states: ‘The President of the Republic shall preside over the High Council of the Judiciary.’ This has been established in all of Algeria’s constitutions, specifically in Articles 45, 181, 145 and 154 of the following constitutions: 1963, 1976, 1989 and 1996, as well as Article 3 of Organic Law No. 04-12, which concerns the formation, functioning and powers of the High Council of the Judiciary.

The High Council of the Judiciary is responsible for the appointment and transfer of judges, overseeing their career progression, ensuring compliance with the basic law of the judiciary and monitoring their discipline, as stipulated by constitutional texts.

The composition of the High Council of the Judiciary was first enshrined in the 2020 constitutional amendment, which introduced changes to its membership by appointing the President of the Supreme Court as deputy in place of the Minister of Justice. Additionally, the new composition is mixed, combining judges appointed or elected with figures from outside the judicial system.

Subsection Three: The Minister of Justice’s Oversight of the Public Prosecution

Aside from its judicial powers, the Public Prosecution also represents an executive arm within the judiciary. It is led by the Minister of Justice, who is a member of the executive branch and is subject to its authority. This highlights the subordination of the Public Prosecution to executive authority, particularly given the complete absence of the concept of prosecutorial independence in light of their subjection to presidential authority. This makes the Public Prosecution dependent rather than independent.

The lack of independence of the Public Prosecution, and its subordination to the Minister of Justice, has a negative impact on its ability to initiate public action. This ability is restricted by the law to either a complaint, a request, or authorisation. However, Instruction No. 21/0003, issued by the Minister of Justice on 15 March 2021, limits the inherent powers of the Public Prosecution. Through this instruction, the Ministry of Justice, represented by the Directorate of Criminal Affairs, exercises prior control over judicial actions by requiring the Public Prosecution to obtain prior authorisation from the Ministry of Justice before it can initiate proceedings in corruption cases, or more specifically, cases relating to management and public funds. We therefore conclude that this instruction undermines the principle of judicial independence by enabling the executive authority to indirectly encroach upon the judiciary, an action for which we cannot conceive of any logical justification.

Section Two: Aspects of the Relationship Between the President of the Republic and the Functional Aspect of the Judiciary

The relationship between the President of the Republic and the judiciary is a fundamental issue in any constitutional system, with several constitutional and legal intersections, particularly with regard to the functional aspect. Therefore, it is essential to clarify the points of connection between the presidential role and the functional aspect of the judiciary, highlighting the areas where they overlap.

Subsection One: Narrowing the Scope of Judicial Authority

This is evident in the refusal to enforce judicial rulings and decisions, and in the prohibition against issuing orders to the administration. However, Article 168 of the Constitution states: ‘The judiciary considers appeals against the decisions of administrative authorities’, administrative authorities’ influence and supremacy enable them to exercise discretionary powers when setting limits that the judiciary cannot exceed when overseeing the administration.. Acts of the executive authority are

immune from all forms of judicial oversight, including annulment, compensation and legality review³. This clearly illustrates the executive's dominance over the judiciary's role.

Furthermore, the President of the Republic possesses unlimited and potentially dangerous powers during times of crisis, disaster, exceptional circumstances and war, effectively becoming both the executor and overseer, as outlined in Article 101 of the Constitution.

Subsection Two: Substituting Judicial Authority and Removing Its Jurisdiction

The substitution of judicial authority and the removal of its jurisdiction are realised through multiple mechanisms placed in the hands of the executive authority by the constitutional founder, represented by the President of the Republic. The most prominent of these is the right to grant pardons and reduce or replace penalties, as stated in Article 91/8 of the Constitution. The President of the Republic thus possesses unconditional and unrestricted authority to issue pardons while considering the advisory role of the High Council of the Judiciary, as stipulated in Article 182 of the Constitution. However, this role is merely formal and consultative, as the President is not bound by the Council's opinion, which he has full discretionary power to accept or disregard. This clearly highlights the executive authority's control over this aspect of the justice process.

Subsection Three: The Immunity of the President of the Republic from Civil and Criminal Liability

Modern constitutional texts in both France and Algeria are characterised by the fundamental principle that the President of the Republic is immune from civil and criminal liability during their term of office. This principle of immunity ensures the stability of the presidency and is evident in various aspects of both the French and Algerian systems.

First: Regarding the French Constitution

Historically, the principle of presidential immunity in French constitutions was justified by the need for the Prime Minister or ministers to sign the President's decisions, thereby making them responsible. However, the Constitution of the Fifth Republic of 1958 changed this situation radically, as it gave the President specific powers that he could exercise independently, without needing the government's approval.

To ensure this independence, Article 67 of the French Constitution explicitly states that the President of the Republic is not liable for actions taken in the course of exercising his powers. This includes actions performed individually by the President or those delegated to the Prime Minister. Conversely, responsibility shifts to the Prime Minister and the relevant ministers in accordance with Article 19 of the Constitution. This distinction reinforces the idea that the president acts as a symbol of the state while the government bears political responsibility for its decisions.

Secondly, regarding the Algerian Constitution:

By virtue of his constitutional powers, the President of the Republic plays a positive and active role as the primary and actual authority in the country, making him the central figure in managing state affairs. Although legal logic generally links power with responsibility, the 2020 amendment to the Algerian Constitution, specifically Article 183, presents a clear exception to this rule.

This constitutional article reveals that the President enjoys complete immunity from civil and criminal liability for his actions, except for acts that can be classified as high treason committed during his term. In this exceptional case, the matter is referred to the State Supreme Court, a special judicial body whose composition, organisation and procedures are defined by subsequent organic law. This ensures that the president is held accountable under the narrowest possible conditions and according to precisely defined judicial procedures.

³- Mahfouz, M. (1993). *Administrative Judiciary in Egyptian and Comparative Law*, 1st ed., Dar Al-Nahda Al-Arabiya, Cairo, Egypt, p. 53.

Chapter Two: Limitations of Judicial Authority

The judiciary is a fundamental pillar in establishing a legal state and its institutions. It guarantees rights and freedoms, and acts as a safeguard against abuse and deviation. However, despite its importance, the judiciary faces many challenges that limit its effectiveness and raise questions about its independence and neutrality. Discussing these limitations does not diminish the judiciary's role; rather, it is an attempt to assess its ability to deliver justice effectively and comprehensively amid rapidly changing social and political circumstances.

Section One: Assessing the Effectiveness of the Judicial System

The effectiveness of the judicial system is measured by its ability to deliver justice promptly, run smoothly, and enjoy the trust of society. Therefore, evaluating this effectiveness requires consideration of several factors, the most important of which are as follows:

Subsection One: The fragility of the legal framework relating to the judiciary.

The legal framework governing the judiciary can take various forms. On the one hand, it can be overly broad in its organisation; on the other hand, it may be excessively narrow. In both cases, the organisation of judicial authority is ambiguous, as seen in Article 163 of the 2020 constitutional amendment, which contains phrases affirming the independence of judges and their subjection to the law. However, these phrases are brief and vague, lacking the necessary specificity to clearly indicate the absolute independence of judges while performing their duties.

Meanwhile, the constitutional founder introduced Article 172 of the 2020 constitutional amendment, which enshrined the principle that a judge may only be transferred with their consent, in accordance with procedures specified by organic law. Article 26 of Organic Law No. 04-11, which forms part of the Basic Law of the Judiciary, enshrines the right to job security and states that a judge should not be transferred or appointed to a new position without their agreement.

However, the same article, specifically its second paragraph, includes an exception to this, allowing for the transfer of judges when public interest or the proper functioning of justice requires it. The validity of these terms cannot be assured, especially considering the authority of the High Council of the Judiciary, which reviews appeals submitted by transferred judges. This council is notably executive in nature as it is presided over by the President of the Republic.

Ultimately, an in-depth analysis of texts related to the judiciary, including constitutional and organic legal texts, leads us to conclude that they are largely susceptible to executive interference in the work of the judiciary, either implicitly or explicitly.

Subsection Two: The Marginalisation of the Judicial System, Materially and Morally

The judicial sector has recently witnessed significant improvements, both material and moral, with increased financial allocations and the development of infrastructure for judicial institutions. However, although this progress is positive, it remains limited compared to other government sectors.

Furthermore, providing adequate workplaces for carrying out judicial duties has not received sufficient attention, raising questions about the level of commitment to this issue. The continued material marginalisation of the judicial system, evidenced by the lack of adequate resources, confirms that the executive authority does not prioritise improving its financial and moral conditions. This reflects a lack of political will to enhance the independence and vitality of this body. The lack of suitable workplaces can undermine judges' morale and diminish the stature of the judiciary.

Section Two: Assessing the Independence and Neutrality of Judges

Assessing the independence and neutrality of judges is not just a slogan or a theoretical principle; it is an ongoing process that requires an awareness of their importance, as well as efforts to strengthen and protect them in practice. Without judicial independence and neutrality, the judiciary becomes a tool of the authorities, and rulings become political or personal decisions, undermining citizens' trust in the judicial system and leading to injustice and chaos. Therefore, studying and analysing these two

principles is crucial to understanding the challenges they face and finding ways to ensure they are realised.

Subsection One: The Barrier of Salary to Judicial Independence

The financial management of judicial facilities is of great importance and plays a fundamental role in providing effective services to citizens. However, the salary that judges receive can pose a barrier to judicial independence. Despite recent revisions, the salary remains insufficient given the magnitude of the tasks and responsibilities that judges face. In order to prevent judges from being preoccupied with everyday life issues, it is crucial that they are financially secure, with salaries and rewards that guarantee their neutrality and the independence of the judiciary.

A judge's salary is fundamental to the proper functioning of the judiciary⁴; it must be substantial enough to cover the costs of living and reflect the dignity of the role and the importance of their mission. The Algerian legislator has emphasised this in Article 27 of the Basic Law of the Judiciary.

Furthermore, a meagre salary can create dependency, leading to a lack of trust in the state and negatively impacting judges' duties and satisfaction. To ensure judicial independence, the state must provide judges with a dignified living that preserves their independence, integrity and dignity. This is particularly important given that they are prohibited from engaging in activities that are incompatible with their judicial roles, such as commerce or other professions.

Based on the above, it is essential to establish an independent budget specifically allocated to the High Council of the Judiciary. This would separate judges from the 'employee-employer' relationship with the executive authority, clarifying any ambiguity regarding their independence. Consequently, judges should not feel that their livelihood depends on their loyalty to or compliance with the executive authority that pays their salary. This measure is fundamental to building an independent judiciary capable of administering justice without influence or pressure from any party.

Section Two: Factors Affecting Judges' Neutrality

Several factors influence neutrality, both directly and indirectly. These include:

First: Public opinion and the press.

The impact of public opinion is often evident in high-profile cases, which dominate the media landscape through traditional and social media. This can create preconceived judgements in the minds of audiences regarding the issues raised in the media, without them delving into the details. It can also foster a desire for revenge and the imposition of harsh penalties. If public opinion leans in this direction, it can affect the judge's decision, leading to hasty rulings without careful consideration of the case. This can result in unjust and severe outcomes that alter the course of the case, all in response to public demands⁵.

The law is explicit in this regard: Article 147 of the Algerian Penal Code criminalises any act, statement or written material intended to influence a judge during judicial proceedings. Furthermore, any action that diminishes the authority of judicial rulings is considered a crime⁶, as is the publication or broadcasting of judicial deliberations⁷. Consequently, public opinion and the press can have a significant impact on the work of judicial authorities, potentially affecting their independence and how they operate.

Secondly, we will consider the involvement of politics in the judicial system.

This refers to the management of the justice system becoming entangled in political conflicts and disputes in order to settle scores between political factions. Consequently, the judicial system may align

⁴- Abid, M. K. (1991). *Independence of the Judiciary: A Comparative Study*, p. 378.

⁵- Abdeli, S. (2011). *Guarantees of Judicial Independence between Algeria and France*, 1st edition, Algeria, p. 105.

⁶- Article 147 of the Penal Code: 'The following acts expose their perpetrators to the penalties prescribed in paragraphs 1 and 3 of Article 144: "Public actions, statements and writings intended to influence the rulings of judges as long as the case has not been definitively decided".'

⁷- Article 147, paragraph 2: 'Public actions, statements and writings intended to undermine the authority of judicial rulings or which inherently affect the independence of the judiciary.'

with one political current at the expense of another, thereby deviating from its fundamental role and core principles — particularly the principles of neutrality and the rule of law. There are numerous examples in our own judicial system of how it has been drawn into political conflicts, with clear intervention from the executive in directing judicial rulings. This has a direct negative impact on the neutrality of judges and affects the independence of the judiciary, undermining its essential role in upholding the principle of legality and establishing a state governed by law.

Thirdly, there is a lack of specialisation among judges.

The lack of specialisation among judges can lead them to deviate from the correct path necessary for resolving disputes and rendering judgements. This is because they may struggle to analyse issues thoroughly or grasp the legal aspects of matters due to their insufficient expertise and legal knowledge in such topics. This can lead to them unintentionally undermining the concept of neutrality.

Given the aforementioned points, specialising judges in specific fields offers numerous benefits, making it essential for legislators to focus on this aspect. Training judges to be specialists, particularly in administrative justice, has a positive effect on the realisation of the rule of law, ensuring its sustainability and protecting the principle of legality.

A specialised judge is better equipped to understand the intricacies of the cases before them. This understanding fosters a balance between the judiciary's powers in implementing the law and the idea of public interest, while also safeguarding the rights and freedoms of individuals whose rights have been violated.

Conclusion

It is futile to discuss the state of institutions and the rule of law in a country without an independent judiciary, as all matters are closely interconnected. Judicial independence requires two essential pillars: the independence of judges as individuals and the independence of the judiciary as an authority. This enables the judiciary to avoid the deficiencies and limitations that characterise it.

It is inconceivable to have an independent judiciary in the face of executive dominance if the constitution consists of merely unimplemented articles. In such a case, the principle of the rule of law is not respected. Consequently, judicial independence can only be achieved through a well-organised separation of powers, where each branch of government complements the others within a strict constitutional and legal framework. In modern states, this has made the exercise of judicial power a focal point of continuous conflict due to the executive authority's control, represented by the President of the Republic.

Comparative constitutional systems have recognised this situation and sought to establish boundaries between the powers to ensure the independence of each. Independence is a constitutional right and the primary condition for establishing the rule of law. The perceived dominance of the executive authority over the judiciary, particularly with regard to the allocation of key judicial responsibilities to the President of the Republic, is logically justified and constitutionally framed by the provisions of the 2020 constitutional amendment. Article 166 of the Constitution states that the judiciary issues rulings in the name of the people, thereby reinforcing the principle of popular sovereignty as the source of justice. Additionally, Article 85 states that the President of the Republic is elected by an absolute majority of votes through a direct, secret ballot, thereby making him the legitimate representative of the people.

This representation therefore grants him the right to assume the judicial responsibilities assigned to him. This can be interpreted as the President exercising these tasks indirectly in the name of the people themselves, thereby linking the two authorities within a constitutional framework aimed at achieving balance while ensuring effective governance.

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