

# The exception of unconstitutionality: A permissible a posteriori review under the 2020 constitutional Amendment

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**Abstract---**Through the 2020 constitutional amendment, the constitutional legislator established the Constitutional Court to replace the Constitutional Council. Among its assigned tasks is the review of the constitutionality of laws and regulations at a later stage after their promulgation. This mechanism guarantees, to some extent, the rights and freedoms of individuals, and its procedures are regulated by Organic Law 22-19. This research will examine the substantive and procedural requirements for filing an exception of unconstitutionality before the Constitutional Court, as well as the legal consequences of such an exception.

**Keywords---**Exception of Unconstitutionality, Constitutional Court, a posteriori Review.

## Introduction

Fundamental rights and public freedoms occupy a central position within the state's legal system, and constitutions have established mechanisms to strengthen their protection by granting individuals the right to challenge the unconstitutionality of laws. This procedure was introduced in the Algerian legal system through the constitutional amendment of 2016, pursuant to Article 188, which empowered the Constitutional Council with the authority over specific matters in which unconstitutionality can be invoked.

The plea of unconstitutionality is a means that enables parties to an existing case before a judicial authority to indirectly approach the Constitutional Council. Through this process, they may contest the constitutionality of a legislative provision applied in their case on the grounds that it violates or

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infringes upon fundamental rights and freedoms guaranteed by the Constitution<sup>1</sup>, although this definition does not fully align with the constitutional amendment of 2020, which replaced the competent body for reviewing constitutional challenges and expanded the scope of oversight to include regulatory texts, previously limited to legislative provisions only.

Review by plea of unconstitutionality is a posteriori control—applied after the promulgation of the regulatory or legislative text in the official gazette. The Constitutional Court may be notified by referral from the Council of State or the Supreme Court, stating that the legal text in question violates constitutionally guaranteed rights and freedoms. The Constitutional Court then issues a positive or negative decision regarding the constitutionality of the text.

It is no longer the exclusive prerogative of the political class to subject laws to constitutional oversight. Now, it is a right accorded to individuals, whether natural or legal persons, to raise the unconstitutionality of laws infringing upon the rights and freedoms enshrined in the Constitution during legal proceedings before judicial authorities. Upon accepting the plea, the judge refers the matter to the Supreme Court or the Council of State, as they are exclusively competent to refer the plea to the Constitutional Court.

It can be said that the constitutional legislator has enshrined the right of individuals to initiate constitutional review through judicial means, mirroring many comparative constitutional systems that recognize this approach. As such, this system closely resembles the judicial review of constitutional compliance that entrusts the task of reviewing the constitutionality of laws to a judicial body, either through a plea of unconstitutionality or an original action. The similarity lies in empowering individuals to challenge the constitutionality of laws before judicial authorities, despite differences in the conditions, procedures, and results.

This mechanism was established to create a legal relationship between the judiciary and the Constitutional Court, by granting the judiciary a new role in initiating constitutional review through referral to the Constitutional Court by the Supreme Court or Council of State, based on a direct plea of unconstitutionality before them or upon receiving a plea from various other judicial bodies adjudicating disputes before them. This change stemmed from the 2020 constitutional amendment as well as Organic Law No. 18-16 of September 2, 2018, outlining the conditions and modalities for applying the plea of unconstitutionality.

The subject of the plea of unconstitutionality raises the following issue:

**Did the 2020 constitutional amendment establish constitutional protection for rights and freedoms through the mechanism of the plea of unconstitutionality, and was this mechanism properly regulated?**

To answer this question, the analytical method was adopted, based on interpreting and analyzing constitutional, legal, and regulatory texts relevant to the study, without resorting to historical or comparative approaches. In order to fully address the topic and analyze its application in the Algerian legal system and to answer this issue, it is necessary to examine the substantive and formal conditions of the plea of unconstitutionality in the first section, and then to outline the effects resulting from the plea of unconstitutionality in the second section.

### **Section One: Conditions for Exercising the Right of Plea of Unconstitutionality**

The plea of unconstitutionality refers to those objections raised by a party in a judicial dispute before the court, and it is governed by procedural and substantive conditions.

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<sup>1</sup> Qazlan Salima, The Main Features of the Mechanism for Declaring Unconstitutionality in Light of the Recent Constitutional Review of 2016 (A comparative study: France as a model), Algerian Journal of Legal, Economic and Political Sciences, Volume No. 54, Issue No. 01, March 2017, pp. 103-104.

The Algerian constitutional legislator enshrined the right of individuals to raise the plea of unconstitutionality against legislative or regulatory provisions under Article 195 of the 2020 constitutional amendment.

### **Subsection 1: Substantive Conditions for the Plea of Unconstitutionality**

A legislative or regulatory provision may constitute a breach of constitutionally guaranteed rights and freedoms. However, the constitutional legislator, through the 2020 amendment and Organic Law 22-19, did not grant individuals absolute freedom to invoke constitutional rules; rather, it limited this right to rules that guarantee rights and freedoms, as per Article 195 of the 2020 constitutional amendment. The plea of unconstitutionality may only be brought before the Constitutional Court against a legislative or regulatory provision that directly affects the outcome of the dispute and impinges upon constitutional rights and freedoms. The preamble to the 2020 constitutional amendment clearly states that "the Algerian people affirm their commitment to the human rights provided for in the Universal Declaration of Human Rights of 1948 and the international conventions to which Algeria is a party." Furthermore, the amendment specifies fundamental rights and public freedoms in Section Two, Chapter One, Articles 34 to 77.

The constitutional amendment of 2020 also incorporated regulatory texts as potential subjects of challenge via the plea of unconstitutionality, given that such provisions may violate rights and freedoms. However, this is conditional upon the legislative or regulatory provision not having previously been declared in conformity with the Constitution, in accordance with the principle of *res judicata*, which grants such provisions a presumption of constitutionality concerning organic and ordinary laws according to their legal forms.

Regarding legislative provisions applied by the judge in a decision that have not been previously challenged for unconstitutionality, it is permissible to challenge these before appellate bodies—whether through opposition, appeal, or otherwise—if the challenged legislative provision determines the outcome of the dispute and constitutes the basis for action. Thus, if the judge finds that the law underlying the plea of unconstitutionality has no relevance to the dispute at hand, he may reject the plea.

The grounds raised by the party in the dispute must be of a serious nature; the judge must ascertain the seriousness of the plea and refer it to the higher judicial authority—either the Supreme Court or the Council of State, depending on the nature of the dispute. The judge examines the seriousness of the reasoning presented in the memorandum and its sufficiency, and may accept or refuse the plea of unconstitutionality, which constitutes a discretionary power, allowing the judge to assess the seriousness of the plea and the doubt regarding the constitutionality of the law.

### **Subsection 2: Formal Conditions for the Plea of Unconstitutionality**

According to the provisions of Organic Law No. 22-19 and Article 195 of the 2020 constitutional amendment, the formal conditions stipulate that the constitutional action is to be initiated separately from the original action. Additionally, the right to raise a plea of unconstitutionality is reserved for individuals and may not be raised *ex officio* by the judge, as it is not considered a matter of public order. In judicial disputes, the well-established principle dictates that the judge shall not rule on matters beyond those requested by the parties, and the plea of unconstitutionality becomes a principal action when referred to the Constitutional Court.

#### **1. The competent authority to consider the plea:**

The plea of unconstitutionality may be raised during proceedings before ordinary or administrative judicial bodies, as well as entities vested with the authority to resolve disputes, such as courts specializing in sports disputes, professional bodies, and independent national bodies regulating

economic activities. Decisions issued by these entities are subject to appeal before the Supreme Court or Council of State<sup>2</sup>.

The plea may be raised at any stage of judicial proceedings (appeal, cassation, etc.), except before the original criminal court; however, it may be raised before the appellate criminal court, which consists of professional judges without the presence of jurors or assistants, allowing judges alone to decide the plea<sup>3</sup>. A similar procedure applies to military courts.

In administrative proceedings, the plea of unconstitutionality is raised before the trial judge in the same manner as in ordinary courts, and if accepted, it is referred to the Council of State.

## **2. Entities Authorized to Raise the Plea:**

The plea of unconstitutionality may be raised by any party to the dispute during a hearing before ordinary or administrative courts—whether the plaintiff or defendant, an Algerian citizen or a foreign person recognized by Algerian law, a natural or legal person, either as an original party or as one joined to the proceedings (but not as an intervener), provided that the challenged legislative provision at the heart of the dispute violates constitutionally guaranteed rights and freedoms<sup>4</sup>.

The plea may be raised either by the concerned party or by legal counsel (if representation is mandatory). The Public Prosecution may also raise the plea in criminal cases and in cases where the law specifically grants the prosecution the right to file civil actions. Similarly, a civilly liable party may raise the plea in support of the defendant in criminal proceedings, or in support of the insured in civil litigation, with the aim of dismissing prosecution or liability.

Any interested person may intervene in proceedings involving the plea of unconstitutionality before the competent judicial authority, by submitting a separate, reasoned written memorandum before the issuance of a decision regarding the referral of the plea<sup>5</sup>.

Thus, Algerian legislation, through Organic Law 22-19, has broadened the scope of individuals entitled to raise the plea of unconstitutionality to include anyone with a legitimate interest or standing in the dispute before the court.

## **Section Two: Effects of Constitutional Court Decisions on Pleas of Unconstitutionality**

Once the substantive and formal requirements for raising the plea of unconstitutionality against a legislative or regulatory provision before the Supreme Court or Council of State have been met, the matter is adjudicated, and a decision is made regarding the constitutionality of the provision in question. Accordingly, this section reviews the effects flowing from decisions by the Constitutional Court on a plea of unconstitutionality. Paragraphs four and five of Article 198 clearly state:

"If the Constitutional Court decides that a legislative or regulatory provision is unconstitutional under Article 195 above, it ceases to have effect from the day determined by the decision of the Constitutional Court. Decisions of the Constitutional Court are final and binding on all public, administrative, and judicial authorities."

This means that a ruling of unconstitutionality results in the automatic abrogation of the legislative provision, but such abrogation does not have retroactive effect—instead, it takes effect as specified by the decision of the Constitutional Court.

Decisions related to the plea of unconstitutionality have an absolute authority to exclude the challenged legislative provision from application in all judicial disputes. The Constitutional Court has exclusive power to rule on such pleas. If the referring judge determines that the legal prerequisites for the plea are met, the matter is sent to the Supreme Court or Council of State, and after verifying the conditions, it is referred to the Constitutional Court for a public hearing<sup>6</sup>.

<sup>2</sup> Mohamed Bou Sultan, Unconstitutionality proceedings: new prospects for Algeria, *Journal of the Constitutional Council*, Issue 08, 2017, p. 14.

<sup>3</sup> Article 20 of Organic Law 22-19 specifies the procedures and methods of notification and referral to the Constitutional Court.

<sup>4</sup> Oukil Mohamed Amin, The Role of the Judiciary in Activating the Mechanism of Unconstitutionality in Algeria, A Comparative Study with the French Model, *Journal of the University of Algiers* 02, Issue 32, Part II, June 2018, pp. 100-125.

<sup>5</sup> Article 22 of Organic Law 22-19.

<sup>6</sup> Boumediene Mohamed, 2019, The Adequacy of the Plea of Unconstitutionality to Guarantee the Supremacy of the Algerian Constitution, *Journal of Jurisprudence and Law, Morocco*, Issue 86, p. 88.

### **Subsection 1: Loss of Legal Effect of the Legislative or Regulatory Provision**

If the Constitutional Court determines that a legislative or regulatory provision is unconstitutional, it loses its legal effect; i.e., it becomes devoid of legal significance, as stated in Article 198 (paragraph 4) of the 2020 constitutional amendment. Notably, the constitutional legislator chose the term "loss of legal effect" to express the principle that the Court does not intrude upon the powers of the legislature or regulatory authority, but rather isolates the effects of the challenged legislative or regulatory provision and renders them legally null.

Regarding the timing of the loss of legal effect, the date when a legislative provision loses its effect per a Constitutional Court decision is determined by the Court itself (in accordance with Article 198). The Constitutional Court retains broad discretion in choosing the date its decision takes effect—it may decide immediate effect, enforceable upon publication in the official gazette, or it may postpone the effect to a later date, depending on the specifics of the case. This discretion is intended to preserve legal security and acquired legal rights and to avoid disruptions in legal relations<sup>7</sup>.

Thus, the Constitutional Court maintains discretionary power in setting the date on which a legislative or regulatory provision ceases to have legal effect. This could coincide with, precede, or follow the Court's decision—for example, it could be the date the dispute was initially referred, or any other date deemed appropriate to protect constitutional rights, especially acquired rights.

### **Subsection 2: Effects on the Judiciary, Legislature, and Executive**

In all scenarios—whether the Constitutional Court rules a provision unconstitutional or upholds its constitutionality—Article 198, paragraph 5, of the 2020 amendment stipulates that the decision is final and binding on all public, administrative, and judicial authorities. The decision is communicated to the President, the Speaker of the Senate, the Speaker of the National Assembly, the Prime Minister, and the Supreme Court or Council of State as applicable, thereby notifying the relevant judicial authority according to Article 43 of Organic Law 22-19.

#### **1. Impact on the judiciary:**

Ordinary and administrative courts are direct partners of the Constitutional Court in giving binding effect to decisions on pleas of unconstitutionality. When the Constitutional Court declares a legislative provision unconstitutional, the relevant courts must:

Immediately implement the declaration of unconstitutionality in the dispute or trial in which the plea was raised, to resolve the original case according to the Constitutional Court's requirements.

Apply the declaration of unconstitutionality to similar disputes or cases pending before them at the time of the declaration, especially where procedural aspects are impacted and the principle of immediate effect applies. Reject application of the declared unconstitutional legislative or regulatory provision in future cases.

#### **2. Impact on the legislature and executive:**

A decision of unconstitutionality from the Constitutional Court creates a legal vacuum during the interval between the issuance of the ruling and its effective date, which persists until the legislature intervenes to address the situation—while preserving legal security and acquired legal positions.

A declaration of unconstitutionality should, as a rule, prompt the immediate abrogation of the legal rule in question. An unconstitutional law should not continue to operate and infringe constitutionally protected rights and freedoms. The Constitutional Court must anticipate the consequences of abrogation and weigh its legal, political, and administrative ramifications to safeguard the interests of the nation and individuals; any delay must be reasonable, and each case should be judged on its own merits<sup>8</sup>.

<sup>7</sup> El-Hashimi Brahim, *The Plea of Unconstitutionality as a Mechanism for Protecting Rights and Freedoms*, Journal of the Constitutional Council, Special Issue, Proceedings of the International Forum on: The Constitution in the Service of Citizens: Major Themes of the 2020 Constitutional Amendment, October 5 and 6, 2020, Issue 14, 2020, p. 56.

<sup>8</sup> El-Hashimi Brahim, *op. cit.*, p. 60.

### **Subsection 3: Legislative Provisions Exempted from the Plea of Unconstitutionality**

A legislative provision is any text issued by a body possessing legislative authority in the strict sense. However, certain legislative provisions are not subject to the plea of unconstitutionality:

#### **1. Legislative texts afforded constitutional authority:**

No plea of unconstitutionality may be raised against a legislative provision previously subjected to constitutional review<sup>9</sup>. This applies to organic laws, which require mandatory constitutional conformity checks before enactment and thus possess a presumption and authority of constitutionality. The same applies to ordinary laws undergoing optional constitutional review; decisions and opinions of constitutional courts or councils are binding.

#### **2. Treaties and international agreements:**

Article 198 of the 2020 amended Constitution states: "If the Constitutional Court determines a treaty, agreement, or convention to be unconstitutional, it shall not be ratified."

#### **3. Texts of a political nature:**

Acts of sovereignty originate in judicial proceedings but are usually considered legislative in nature in most political systems, and the legislator has clearly specified this in successive laws. Constitutional courts generally exclude such political acts from their jurisdiction and they are absolutely immune, not subject to challenge before the courts, whether by annulment or compensation<sup>10</sup>.

#### **4. Referendum laws:**

Laws approved by popular referendum possess unique legal status and may only be amended by another referendum law, according to the principle of parallel forms<sup>11</sup>. If a constitutional amendment broadens rights and freedoms—thus granting the possibility of raising the plea of unconstitutionality against a legislative text—Organic Law 22-19 (Article 22) specifies: "except in cases where circumstances change."

### **Conclusion:**

At the end of this study, titled "The Plea of Unconstitutionality: A Posterior and Discretionary Review under the 2020 Constitutional Amendment," it is concluded that the incorporation of the mechanism for raising a plea of unconstitutionality into the Algerian Constitution through the 2020 amendment, as well as Organic Law 22-19, marks a significant milestone in the history of constitutional review in Algeria. This development is highly important for upholding the supremacy of the Constitution and safeguarding rights and freedoms, as it broadened the scope of referral to the Constitutional Court in order to protect public rights and freedoms, and to rule on the constitutionality or unconstitutionality of both legislative and regulatory provisions.

Decisions by the Constitutional Court regarding the constitutionality of legislative or regulatory texts do not produce their effects, as they do not negatively impact the legal standing of the provision. In contrast, rulings declaring a provision unconstitutional do produce effects, terminating its legal impact both for the petitioner and other parties, and also establishing obligations for the state authorities.

Referral to the Constitutional Court to review legislative and regulatory provisions for unconstitutionality by the Supreme Court or Council of State, following a plea received from legally empowered entities, requires the fulfillment of substantive and formal requirements. These must be met before submitting the plea to competent judicial authorities as stipulated in the constitution, who in turn must consider the possibility of accepting and referring the plea to the Constitutional Court. This process enhances the judiciary's supervisory role over the constitutionality of legal and regulatory texts, prevents frivolous pleas, and ensures proper vetting before referral.

<sup>9</sup> Item 02, Article 21 of Organic Law 22-19.

<sup>10</sup> Ali Yasmine, 2019, *The Effectiveness of Constitutional Review of Presidential Decrees in Algeria*, Journal of Legal and Political Research, University of Jijel, p. 41.

<sup>11</sup> Zouaïd Mourad, Adou Abdelkader, 2021, *Conditions for Invoking Unconstitutionality before the Courts: A Comparative Analysis of Algerian, French, and Egyptian Law*, Maârif, Vol. 16, No. 02, p. 320.

It is essential to consider the nature of the regulatory provisions subject to subsequent review, distinguishing between presidential decrees—which concern areas not designated for statutory law—and executive decrees. Presidential decrees attain the status of legislation and are subject to constitutional review upon notification by Parliament or the President, whereas executive decrees are not subject to such review and fall under the jurisdiction of administrative courts under legality oversight.

Thus, regulatory provisions that acquire the character of legislative text—namely, presidential decrees—are subject to review through a plea of unconstitutionality, provided they have not previously undergone constitutional review.

In conclusion, the effectiveness of the plea of unconstitutionality is directly linked to the level of constitutional awareness among individuals in society. This involves, on the one hand, developing the legal culture among citizens to defend their constitutional rights and freedoms, and, on the other hand, fostering the practice of challenging legislation and regulation through the plea of unconstitutionality. Both aspects are crucial in activating the system of posterior review of laws and regulations.

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