

THE OVERSIGHT ROLE OF THE CONSTITUTIONAL COURT IN ALGERIA

Prof. Samia Abdellaoui ^{*1}, Prof. tahar zouagri ², Prof. Sabrina Djebaili ³, Phd. Haddad Rania⁴, Phd. Tabet Meriem⁵

^{1, 2, 3, 4, 5} Laboratory for Legal, Political, and Jurisprudential Research, University Abbas Laghrour Khenchela

Emails: samia.abdellaoui@univ-khenchela.dz ¹, zouagritahar@univ-khenchela.dz ², sabrina.djebaili@univ-khenchela.dz ³, haddad.rania@univ-khenchela.dz ⁴, tabet.meriem@univ-khenchela.dz ⁵

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Abstract

This comprehensive abstract aims to shed light on the essence of the article, enticing readers to gain a clear understanding of the research problem, its primary objectives, and the achieved results. The focus is on the regulatory competencies of the Constitutional Court (Mahkama Dustouria) under the constitutional amendment of 2020. The establishment of the oversight mechanism for the constitutionality of laws is a crucial issue in various world constitutions, revealing the adoption of two distinct approaches. This involves either judicial oversight, where the judicial authority is responsible for examining the constitutionality of laws, known as subsequent oversight, or through a political body entrusted with this task, referred to as prior oversight. Algeria, like many other countries, has made significant strides practicing and establishing this oversight, starting with its first constitution in 1963 by establishing the Constitutional Council, which adopted political oversight as a fundamental principle. The set of rights and fundamental freedoms for individuals has gained international attention, leading to the signing of numerous international agreements to protect and enhance them. This prompted the Algerian constitutional founder's interest, leading to innovative ways to protect these rights by granting individuals the right to oversee the constitutionality of laws through appeals before judicial authorities, as established by the constitutional amendment of 2016. The research aims to demonstrate that despite the recent amendments regarding oversight of the constitutionality of laws, specifically the shift from the Constitutional Council to the Constitutional Court, the constitutional founder retained several elements of the Constitutional Council, especially in the supervisory role entrusted to the Constitutional Court, specifically the notifying authorities. The lack of granting the Constitutional Court the power of automatic notification makes it an entity with similar characteristics to the Constitutional Council. Moreover, the shift towards adopting judicial oversight will position the Constitutional Court as a primary judicial body with an active role in overseeing the constitutionality of laws. On another note, the Constitutional Court plays a prominent role in presidential and legislative elections, having full authority to decide on appeals, either accepting or rejecting them in whole or in part, and announcing the results.

Keywords: Oversight of the Constitutionality of Laws, Constitutional Council, Constitutional Court, Constitutional Amendment

I. INTRODUCTION:

The constitutional Founder established the Constitutional Court as an institution tasked with monitoring the constitutionality of laws, replacing the Constitutional Council in according to the constitutional amendment of 2020. It is regarded as one of the constitutional topics, revolving around verifying the conformity of the law with the provisions of the constitution in force.

On another note, elections in general, and the expression they provide for the will of the people, the sovereign, in selecting their representatives who oversee state affairs at the levels of power and parliament, assign the constitutional judiciary the responsibility of ensuring its validity. This is due to its impartiality and independence. The more these elections are free and fair, the more legitimacy and credence they confer upon the elected bodies.

In the logical context of understanding the oversight role of the Constitutional Court, we must delve into the question: What is the supervisory role that the Constitutional Court embodies in Algeria?

Examining this issue requires that we review the legal texts governing the Constitutional Court and analyze them to understand the regulatory competencies granted by the constitutional founder to the Constitutional Court under the constitutional amendment of 2020.

In doing so, we attempted to divide the subject into two main parts: the first addresses the Constitutional Court's power to oversee the constitutionality of laws, and the second discusses the Constitutional Court's powers as an elections judge.

II. The Legal System of the Constitutional Court

The oversight of the constitutionality of laws is a logical result of respecting the hierarchy of laws and the supremacy of the constitution. The rule of law is the foundation of governance in a state, and the rule of law requires that laws and regulations do not contravene the provisions of the constitution, which is considered the fundamental law. This ensures that the authorities of the state abide by its provisions in their legislative actions.

To ensure this, countries resort to establishing oversight of the constitutionality of laws. This oversight can take various forms, which can be determined based on several characteristics and classifications. Oversight may be conducted by a political body or by a judicial body. Therefore, we explore the legal nature of the constitutional court by examining both its judicial nature and its political nature

1.1 Judicial Nature

Assigning the task of overseeing the constitutionality of laws to a judicial body was necessitated by political and legal circumstances, given its arduous and complex nature. This task requires significant legal expertise due to the seriousness of the matter, which is to determine whether public authorities, in all their various forms, comply with the explicit and implicit provisions of the constitution and its texts in their legal actions. In this regard, there are two types of judicial oversight adopted by countries with different political systems: oversight through original jurisdiction and oversight through subsidiary jurisdiction to challenge the constitutionality of laws.

Furthermore, the judicial nature of the constitutional court can be examined based on formal criteria. This includes scrutinizing the designation of the body responsible for constitutional oversight, and assessing its level of independence

1.1.1. Determining the Judicial Nature of the Constitutional Court Based on Its Designation

The Algerian Constitutional Court is considered a judicial body, given that its founder has labelled it 'court' a term reserved for first-instance courts. Article 185 of the recent constitutional amendment for the year 2020 stipulates: “The Constitutional Court is an independent institution tasked with ensuring the respect of the constitution. The Constitutional Court guarantees the functioning of institutions and the activities of public authorities...”³ it is noteworthy that the constitutional founder did not explicitly specify the judicial nature of the court, instead referring to it as an 'independent institution' and leaving it at that¹

1.1.2 Determining the Judicial Nature of the Constitutional Court Based on Its Independence

Judicial independence means that courts function independently of other governmental bodies. No authority has the right to dictate to the court or influence its judgments in any case brought before it, nor alter or suspend the execution of a judgment issued by the judiciary².

Looking at the Constitutional Court, we find that its independence is guaranteed by constitutional provisions. Referring to the Algerian Constitution of 2020, we notice that the court derives its fundamental law from the constitution itself. **The latter** defines the principles of its composition, its jurisdiction, the number and method of appointing or electing its members, the term of office, and the impact of its opinions and decisions. This supports its independence from other authorities more than any other judicial body³. There is no judicial body enjoying such guarantees. Even the Supreme Court and the Council of State, the two highest judicial bodies in the Algerian judicial system, have not had their composition or jurisdiction specified by the constitution

2. Political Nature

Countries that opt for political oversight resort to assigning it to a special independent body that is responsible for overseeing the constitutionality of laws before their enactment. Through this preventive and obligatory oversight, the aim is to prevent the enactment of any legislation that contradicts the constitution. Thus, it is evident here that such oversight has a political rather than judicial character. The body entrusted with the task of exercising constitutional oversight does not have a purely judicial composition but rather consists of individuals affiliated with the political realm

2.1 Determining the Political Nature Based on the Powers and Procedures of the Constitutional Court

¹ Article 185, Amendment of the Constitution of the People's Democratic Republic of Algeria for the year 2020.

² Mohammed Amkran Boubchir, "Dawlat alkanoun [The Rule of Law]," Dar Al-Matbu'at Al-Jameia, Algeria, 1993(42).

³ Please refer to Articles 185-198, Amendment of the Constitution of the People's Democratic Republic of Algeria for the year 2020.

The Algerian Constitutional Court is a constitutional regulatory and advisory institution tasked with verifying the compliance of legislative and executive actions with the constitution. Additionally, it oversees the constitutionality of legal texts according to the conditions and procedures prescribed, after being notified by the authorized entities.

Notification serves as a means to protect the public interest, which is not bound by the same conditions as those in judicial matters. Otherwise, its actions would be unjustified and not fundamentally valid. In terms of exercising judicial oversight, it requires the presence of standing and interest in filing a lawsuit, as well as different litigation procedures before it compared to those used in regular courts. Furthermore, it does not require the presence of lawyers to defend the regulatory institutions. Moreover, the Constitutional Court does not have the authority to cancel what has been presented before it; instead, it must refer it back to the relevant authority for further consideration, along with any observations it may have regarding it⁴.

2.2 Defining the Political Nature of the Constitutional Court Based on Composition

Proponents of this perspective argue that the Algerian Constitutional Court is an entity with a political character in terms of its composition. This is because its appointed and elected members outnumber judges in quantity, and the manner of their selection inherently imbues the court with a political character. Given the fact that the President of the Republic has the authority to make appointments, it is inevitable that he will appoint members who share his political inclinations and affiliations, thereby allowing political factions to exert control over the court, and consequently infuse it with a political character.

Moreover, the use of the term "member" instead of "judge," as is the case, for example, in the Court of Auditors since 1995, demonstrates that the constitutional founder did not prioritize endowing the court with a purely and definitively judicial character.

Furthermore, the court has the authority to oversee the electoral process. This process falls within the realm of political activities, as it involves the selection of the President of the Republic, members and deputies of parliament, and ensuring that individuals adhere to legal conditions and methods to access power fairly and impartially without resorting to illegitimate means.

Proponents of this perspective consider the Constitutional Court a political entity due to its involvement in legislative matters, especially since what is brought before the Constitutional Court in this regard is not a dispute, as it usually intervenes in supervising actions that have not yet become final⁵.

III. Powers of the Constitutional Court Related to Oversight of the Constitutionality of Laws

1. Compliance Oversight

The Constitutional Court is the exclusive authority endowed with the power to oversee the constitutionality of laws, acting as the institution responsible for ensuring compliance with and interpreting the constitution. However, the Constitutional Court does not operate independently; it necessitates the initiation of oversight by a specific entity specified in the constitution, to which

⁴ Baya Safaa, "Almakana Adoustouria Lilmajlis Adoustouri Fi Aljazaer [The Legal Status of the Constitutional Council in Algeria]," Master's Thesis in Administrative Law, Mohamed Cherif Messaadia (University, Souk Ahras, 2020) 42.

⁵ Baya Safaa, *Ibid*, 43.

the constitutional founder grants the right to notify the Constitutional Court. Upon receiving a notification regarding a specific provision, the Constitutional Court must render a decision within the timeframes stipulated in the constitution, without being obligated to elaborate on its decision. The decision either confirms the conformity of the provision with the constitution or declares non-conformity. Regarding compliance oversight, it encompasses organic laws, the internal regulations of parliamentary chambers, and legislative orders.

1.1 Constitutional Court Oversight of Organic Laws in Algeria

The Algerian constitution has granted special consideration to organic laws concerning their subjects and preparation procedures, owing to the constitutional nature of these areas. Organic laws are subjected to voting procedures distinct from those for regular laws and are subject to mandatory prior scrutiny by the Constitutional Court, which ensures compliance with the constitution⁶. Article 190/05 of the 2020 constitutional amendment states: "...the President of the Republic shall notify the Constitutional Court of the necessity of examining the conformity of organic laws with the constitution after they have been approved by the Parliament. The Constitutional Court shall render a decision on the entire text." Additionally, Article 140, in its last paragraph, stipulates: "...an organic law, before its issuance, is subject to scrutiny for its conformity with the constitution by the Constitutional Court⁷," both in form and substance.

The extent of the Constitutional Court's oversight on the conformity of organic laws with the constitution, both formally and substantively, can be deduced by referring to the decision issued by the Constitutional Court under number: 04/Q.C.D/R.M.D/22 dated: 29/06/2022. This decision concerns the examination of the conformity of the organic law that specifies the procedures and mechanisms for notification and referral before the Constitutional Court⁸. The decision also addresses Article (07) of the system defined for the operational rules of the Constitutional Court⁹, published in the Official Gazette 51 on: 31/07/2022.

This type of oversight, as opposed to regular laws, involves mandatory prior or subsequent scrutiny procedures for organic laws. Article 140 specifies legislative areas subject to organic laws¹⁰, such as the regulation of public authorities,

- Electoral systems,
- Laws related to political parties,
- Media laws,
- The fundamental law of the judiciary,
- The fundamental law of the judiciary and judicial organization
- Laws related to finance .

1.2 Constitutional Court Oversight of the Internal Regulations of Parliament Chambers

⁶ Ahsan Gharbi, "Rakabat motabakat elkawanin elaoudwiya lidoustour [Oversight of the Compliance of Organic Laws with the Constitution]", *The Academic Journal of Legal Research*, № 1(2019)151.

⁷ Article 140 The constitutional amendment of the People's Democratic Republic of Algeria 2020, <https://www.joradp.dz/TRV/AConsti.pdf>.

⁸ Decision of the Constitutional Court 04/QM/D/RMD/22, related to monitoring the compliance of the organic law that specifies the procedures and methods for notifications and referrals presented before the Constitutional Court for the Constitution, *Official Journal*, 51/2022.

⁹ Article 07 of the regulations governing the rules of procedure of the Constitutional Court, published in *Official journal* 04(2022).

¹⁰ Article 140, Amendment to the Constitution, 2020.

Article 135/03 of the 2020 constitutional amendment states: "The National People's Assembly and the Council of the Nation shall establish their internal regulations and approve them." Additionally, Article 190/06 stipulates: "The Constitutional Court shall rule on the conformity of the internal regulations of both parliamentary chambers with the constitution"¹¹.

Under this constitutional provision, the National People's Assembly establishes and approves its internal regulations through voting. Similarly, the Council of the Nation also formulates and approves its internal regulations through voting. To ensure alignment with the provisions of the constitution, the constitutional founder subjects both sets of regulations to the oversight of conformity¹². The purpose of this oversight is to prevent the possibility of the parliament granting itself powers that may exceed the constitutional limits¹³.

1.2 Constitutional Court Oversight on Legislative Orders

The Algerian constitution grants the President of the Republic the authority to legislate through orders in specific cases outlined in Articles 142 and 146 of the latest constitutional amendment for the year 2020. Four scenarios are allowing the President to legislate through orders, including situations in ordinary circumstances and those associated with exceptional periods¹⁴.

In Ordinary circumstances, the President issues orders in urgent matters, during the vacancy of the National People's Assembly, and also during parliamentary recesses. Regarding legislating through orders in extraordinary circumstances, the constitutional founder outlined these powers in Articles 97 to 102 of the constitution, encompassing exceptional situations that the country may face. The President is granted broad powers to address these situations, including the authority to issue orders. However, the President cannot legislate through orders in all of these cases. The constitutional founder restricts this power during states of emergency and siege, reserving it for the exceptional situation specified in Article 98 of the constitution. Regarding the state of war, the constitution suspends its provisions, and the President assumes all powers, including legislative powers, becoming the sole legislator¹⁵.

The Constitutional founder has meticulously rationalized the orders through which the President of the Republic intervenes in the legislative realm specific to the parliament. This was achieved by imposing a set of formal and substantive conditions on the authority of the President. A notable development in this context is the subjecting of presidential orders to the oversight of the Constitutional Court¹⁶.

Article 142/2 of the 2020 constitutional amendment explicitly states: "The President of the Republic shall notify the Constitutional Court of the constitutionality of these orders, and the

¹¹ Articles 135(3) and 190(6), Amendment to the Constitution, 2020.

¹² Article 02(1), of Organic Law № 22/19, and Article 08, of the regulations specifying the rules of the Constitutional Court.

¹³ Jamal Ruwab, "ikhtisasat elmahkama edoustouriya fi majal rakabat edoustouriya wa rakabat elmoutabaka [The Jurisdiction of the Constitutional Court in the Field of Constitutional Oversight and Compliance Control]", Constitutional Council Journal, 17(2021):176.

¹⁴ Article 142, Amendment to the Constitution, 2020.

¹⁵ Article 02/01, Clause 01 of Organic Law 22/19.

¹⁶ Hasan Gharbi, "atashria biawamir fi dhil alkanoun adoustouri 2020[Legislation by Decrees Under the Constitutional Amendment of 2020]," Comprehensive Journal of Rights 01(2021).

Court shall rule on them within a maximum period of ten days"¹⁷. It is noteworthy that, for the first time, the constitutional founder has subjected legislating through orders to constitutional scrutiny.

2. The Content of the Constitutional Court's Jurisdiction in Exercising Constitutional Oversight

Constitutional oversight is a preemptive jurisdiction exercised regarding treaties and regular laws, and a subsequent oversight regarding regulations and the conformity of regulations and regular laws with treaties. The detailed aspects of this oversight are as follows:

2.1 Submission of Regulations to Constitutional Oversight

Article 190/03 of the 2020 constitutional amendment states: "The Constitutional Court can be notified regarding the constitutionality of regulations within one month from the date of their publication"¹⁸. Accordingly, adhering to the principle of the supremacy of the constitution, the constitutional founder subjected regulations¹⁹, without specifying their type, to the oversight of the Constitutional Court within one month from the date of their publication.

In The same context, Article 192 of the 2019 Egyptian constitutional amendment stipulates: "The Supreme Constitutional Court, without others, shall assume judicial oversight over the constitutionality of... regulations and the interpretation of legislative texts."

2.2 Oversight of the Conformity of Regular Laws and Regulations with Treaties

This Type of oversight combines both preemptive and subsequent jurisdiction, where the constitutional founder, in the 2020 constitutional amendment, subjected regulations (excluding orders issued by the President) and regular laws (excluding organic laws) to oversight for conformity with ratified treaties²⁰. The Constitutional Court reviews the extent of compliance of regulations and regular laws with ratified treaties. However, for this oversight to occur, the Constitutional Court must be notified by the entities authorized to do so within one month from the date of publication of the regulation. Additionally, notification to the Constitutional Court regarding a law must occur before its issuance; otherwise, the right to appeal to this oversight is forfeited²¹.

2.3 Constitutional Oversight of Regular Laws

Article 190/02 of the 2020 constitutional amendment states: "The Constitutional Court can be notified regarding the constitutionality of laws before their issuance."²² Thus, oversight of the constitutionality of regular laws is optional and occurs before their issuance by the President of the Republic, according to Article 148 of the constitution. If the law is issued, it becomes immune to oversight, except for the constitutional review of unconstitutionality after its issuance, according to Article 195 of the constitution. In this case, the text becomes subject to subsequent jurisdiction.

¹⁷ Article 142/02, Amendment to the Constitution, 2020.

¹⁸ Article 190(3), Amendment to the Constitution 2020.

¹⁹ Refer to Article 02(1)(1), Organic Law No 22/19.

²⁰ Ibid., 03.

²¹ Ahsan Gharbi, *ibid* 27.

²² Article 190(2), Amendment to the Constitution 2020.

In a similar context, Article 192 of the 2019 Egyptian constitutional amendment stipulates: "The Supreme Constitutional Court, without others, shall assume judicial oversight over the constitutionality of laws."

Referring to the French Constitutional Council, it is noted that the Fundamental Law of the Constitutional Council of 1958 only includes oversight over laws voted on by parliament, not the people. This is in line with the spirit of the constitution, as interpreted by the Constitutional Council, which cannot oversee the constitutionality of referendum laws approved by the people since these laws directly express popular will²³.

2.4 Constitutional Oversight of Treaties

Article 190/02 stipulates: "The Constitutional Court can be notified regarding the constitutionality of treaties before their ratification."²⁷ From this, it is understood that the mechanism of oversight for the constitutionality of the treaty can be activated before its ratification. This means that constitutional oversight encompasses only official treaties, and it is a preemptive jurisdiction provided that these treaties fall within the normal scope of the executive authority. In his capacity as the authority responsible for managing the country's international relations, the President has the exclusive role in the ratification process of these ordinary treaties endowed with self-executing force.

They are then presented to the Constitutional Court before ratification to examine their constitutionality, implying a review for any violation, and subsequent or subsequent oversight cannot be initiated after ratification of the treaty.²⁴

IV. Powers of the Constitutional Court as an Election Judge

1. The Role of the Constitutional Court in Supervising Presidential Elections

1.1 Adjudicating Appeals Related to the Validity of Nominations

With the establishment of the Constitutional Court to place of the Constitutional Council and the issuance of the new organic law on elections, the independent authority now makes decisions on the validity of presidential nominations through a legally reasoned decision within a maximum period of seven days from the date of submitting the candidacy declaration²⁵. The candidate is notified of the authority's decision immediately upon issuance, and in case of rejection, they have the right to appeal this decision to the Constitutional Court within a maximum period of forty-eight hours from the time of notification.

The independent authority sends its decisions regarding nominations, along with nomination files, to the Constitutional Court within a maximum period of twenty-four hours from the date of

²³ Omarsti Mohammed Amin, Mesarati Salima, "arakaba adoustouria ala tashriaat alistiftaia[Constitutional Oversight of Referendum Legislation]," - A Comparative Study Between the French Constitutional Council and the Egyptian Constitutional Court, Professor Research Journal of Legal and Political Studies, University of M'sila 6(2021) :1112.

²⁴ Mohammed Boussultan, "arakaba ala doustouriyat elmouahadat fi eljazaer[Oversight of the Constitutionality of Treaties in Algeria]," Constitutional Council Journal, 1(2013):40.

²⁵ Articles 55 to 60, Law No 22/19.

issuance. The Constitutional Court relies on the decision of the final list of presidential candidates, including the resolution of appeals, within a maximum period of seven days from the date of sending the last decision by the independent authority, taking into account the provisions of Article 95 of the Constitution.²⁶

1.2 Review of Appeals and Announcement of Results:

The constitution has also granted the Constitutional Court the authority to adjudicate on the validity of presidential election procedures and declare the election results²⁷. After recording the election results for the president in three copies at each voting office on original reports on special forms, the head of the independent authority announces the provisional results of the presidential elections within a maximum period of seventy-two hours²⁸. This period starts from the date of receiving the original reports from the regional electoral committees and the electoral committee for residents abroad.²⁹

Following the announcement of the provisional results, appeals shall be filed with the Constitutional Court Registry within the forty-eight hours. After that, The Constitutional Court shall notify the elected candidate who objected to his election to submit a written submission within seventy-two hours from the date of his communication

Appeals related to the provisional results must be submitted to the Constitutional Court at the Court's registry within forty-eight hours from the announcement of the provisional results. The Constitutional Court reviews these appeals within three days. If the appeals are found to be justified, the Court issues a reasoned decision to modify the prepared result reports. The final results of the presidential elections are then announced within ten days from the date the reports are received by the head of the National Independent Electoral Authority.³⁰

V. CONCLUSION

Despite the recent modifications concerning the oversight of the constitutionality of laws, with the shift from the Constitutional Council to the Constitutional Court, the constitutional founder has retained many elements of the Constitutional Council's supervisory role for the Constitutional Court. Based on this, we arrive at the following results:

The supervisory role of the Constitutional Court is manifested through direct notifications from the constitutional bodies representing the executive and legislative authorities, or indirect notifications for individuals through challenging constitutionality. The constitutional founder prioritized granting priority to judicial courts in addressing the constitutionality of a specific law on their initiative, a matter we hope will be rectified in future amendments.

²⁶ Article 252, Order No. 21(1), encompassing the Organic Law on Elections, of 2021, Official journal No. 17, and Article 95, Amendment to the Constitution 2020.

²⁷ Bachir Ben Malik, "nidham alintikhabat ariasia fi eljazair [The Presidential Electoral System in Algeria]," Thesis submitted for the Ph.D. degree in Political Science, (2012)445.

²⁸ Article 61. Law № 22(19).

²⁹ Article 259, Order №21(1), encompassing the Organic Law on Elections.

³⁰ Abid, Article 260.

The Constitutional Court adjudicates the constitutionality of legislation and regulations, making oversight mandatory for organic laws and the internal regulations of parliament chambers.

The constitutional amendment of 2020 added mandatory oversight of presidential decrees. Treaties and ordinary laws are subject to prior optional oversight, while regulations are subject to prior optional oversight, with subsequent oversight being optional provided it occurs within one month of their publication in the official gazette.

By the 2020 constitutional amendment, the constitutional founder subjected ordinary laws and regulations, along with treaties, to prior oversight.

The Constitutional Court adjudicates appeals related to presidential and legislative elections and referendum processes, with discretionary authority to accept or reject them in whole or in part. Additionally, it is responsible for announcing the election results.