

# The limitation of the independence of the Algerian Constitutional Court

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## Abstract :

The establishment of the Constitutional Court pursuant to the November 2020 amendment to the Constitution opened a broad discussion about the reasons and objectives for establishing this constitutional body, the method of its formation and the powers assigned to it, and whether it will have an effectiveness and a fundamental role that differs from the role that the Constitutional Council played previously. Among the most important problems raised by the issue of the Constitutional Court is the search for the extent of the independence of this body from both the organic and functional aspects, as stipulated in the 2020 Constitutional Amendment in Article 185 thereof, to form a body that guarantees respect for the Constitution, including the preservation of the rights and freedoms of individuals, the proper functioning of institutions, and the activities of public authorities. The court's formation is linked to the intervention of the executive authority, and the limitation of its working mechanism to "notification" makes the court's independence limited, and it is a topic that needs deep discussion in order for it to have an effective role and achieve the goal for which it was established.

**Keywords:** Constitutional Court; the independence; Constitution, Algeria.

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## . Introduction:

On February 22, 2019, Algeria saw a real and successful breakthrough in the form of a popular movement that proposed numerous reforms pertaining to different facets of the citizenry's public life. These reforms were intended to establish the national state within the legal framework that resulted from a genuine popular will that reflected the aspirations and hopes of the Algerian people.

Since the Algerian Constitution is the cornerstone and fundamental law that contains the numerous principles that govern the life of the citizen, rewriting it through a popular referendum on November 1, 2020, was the first of these reforms that affected various political, economic, social, legal, etc. aspects.

A number of constitutional rights and freedoms were reformed as part of the changes, which centered on the overarching ideas that guide Algerian society. They also talked about how public authorities are set up inside the state, how new constitutional institutions are established, and how old ones are replaced. The 2020 constitutional amendment has permitted the establishment of new institutions, including the replacement of the A new constitutional body established by the Constitutional Council is named the "Constitutional Court," and it is modeled after the constitutions of numerous Arab nations.

The Constitutional Court assumed responsibility for safeguarding rights and freedoms, upholding the law, and maintaining the stability of state institutions after the Constitutional Council, which was established during the party pluralistic era, was given this task. Because of the significance of this body's creation, the founding father of the constitution originally paid attention to it. Even though the constitution made this clear, I was aware of the interest of academics and researchers in presenting it as clearly as possible and avoiding the issues Algeria faced as a result of the Constitutional Council's existence.

The Constitutional Court in Algeria constitutes one of the basic guarantees for the proper application of the law, the stability of state institutions, and the preservation of the rights and freedoms of individuals, which in turn leads to the preservation of the existence and survival of the state. In order for this guarantee, which was introduced by the constitutional amendment of 2020, to be achieved, it requires that it enjoy a sufficient degree of organic and functional independence.

That inspired us to investigate the topic in our research using a crucial query: How independent is the Algerian Constitutional Court, both structurally and operationally? How does this affect how the government

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operates, how the political system is structured, and how state institutions are constructed?

We will try to answer this through two main axes: Through the first we examine the organic independence of the court, and through the second we examine the functional independence of the court.

### **2- The organic independence of the Algerian Constitutional Court:**

The success of any constitutional institution, whether or not, requires the necessity of it enjoying independence in order to perform the tasks assigned to it and achieve the goals and objectives for which it was established. Therefore, studying the independence of the Constitutional Court in Algeria in terms of its organic structure is of importance because of its close connection to the nature of the democratic political system as a political and social option and its realization. The state of law, rights and freedoms, which requires us to research the organic structure of the court in terms of its formation, the method of selecting its members, and the influence of the executive authority in particular on this structure.

#### **2-1- Formation of the Constitutional Court:**

Based on the text of the 2020 constitutional amendment, we find that the Algerian constitutional founder limited the number of members of the court to twelve, and along with it determined the method by which members are selected and the conditions they must meet. And this is what the constitutional founder stipulated under Articles 186, 187, 188 of the constitutional amendment issued by Presidential Decree No. 20-442 in the Official Gazette, No. 82 - December 30, 2020, as members belonging to the Constitutional Court can be classified into three levels: (Gherbi, 2020, P 566)

-Four (04) members selected and appointed by the executive authority as a constitutional power granted to the President of the Republic.

-Two (02) members are chosen by the judicial authority through election, where the State Council elects a representative member, and the Supreme Court elects a representative member.

-Six (06) members are chosen by election from among professors of constitutional law who meet the conditions stipulated in the Constitutional Amendment and Presidential Decree No. 21-304 by professors of public law.

What is noticeable about the composition of the court is that despite maintaining the same number that we knew in the Constitutional Council, the members appointed by the President of the Republic were retained, and representatives of the judicial authority were also retained, while the number was reduced to two instead of four members, and the absence of representation of the legislative authority was recorded. A new representation was introduced, represented by professors with advanced university degrees in the field of constitutional law, which constitutes a qualitative shift in the composition of this constitutional institution.

## **2-2- Conditions for selecting members of the Constitutional Court:**

The legitimacy of the tasks entrusted to the Algerian Constitutional Court and a number of other requirements that its members must fulfill for the formation to be deemed valid form the basis of the court's organization. There are two categories of conditions that we can discern:

- a. Common conditions
- b. specific conditions

The general conditions are those that the founder of the constitution approved in Article 187 of the Constitutional Amendment of 2020. He did not differentiate between elected and appointed members when he approved certain requirements, like the age requirement of fifty years and the need for at least twenty years of benefitted experience in the legal field. Apart from the need to be free from imprisonment and to have civil and political rights, there should also be training in constitutional law. Additionally, the text specifies that non-party affiliation is required. (Gherbi, 2020, P 3, P 570, P 573. Jamal Ben Salem, 2021, PP 308, 309).

All of these conditions were created pursuant to the constitutional amendment of 2020, which was not in effect in the previous body (the Constitutional Council).

As for the special conditions, we can classify them into two parts:

- Conditions relating to the President of the Constitutional Court
- Conditions relating to the elected members of constitutional law professors.

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As for the President of the Constitutional Court, in addition to the conditions stipulated in Article 187 of the Constitutional Amendment, he also stipulated that he must meet the conditions stipulated in Article 87 of the Constitutional Amendment (Article 87), with the exception of the age requirement (which is what Article 188 of the Algerian Constitution Amendment stipulated).

As for the six elected members (The method set by the Constitutional Founder for the selection of the six members from among the professors of the law is the universal, secret and direct election, as further explained by Presidential Decree 21-304 of the Official Gazette, No. 60 of 05 Ot 2021, containing the conditions and procedures for the election of the professors of constitutional law, members of the Constitutional Court, p. 3.P 5 - 10) who are professors of constitutional law, we also distinguish between two types of special conditions:

- Conditions required of the voter.
- Conditions that must be met by the candidate.

As for the first - voter conditions - were stipulated in Presidential Decree No. 21-304 containing the conditions and methods for electing professors of constitutional law and members of the Constitutional Court dated August 4, 2021, which are :( article 08 of Presidential Decree 21/304, containing the conditions and procedures for the election of professors of constitutional law, members of the Constitutional Court).

- . The voting professor must be in an active position.
- . The elected professor must be among the public law professors.

As for the conditions for candidacy, they were stipulated in Article 9 of the same decree: "Every professor who meets the legal conditions specified below may run for election as members of the Constitutional Court:

- He must be fifty (50) years old on the day of the election.
- To have the rank of professor.
- He must be a professor of constitutional law for at least five (05) years, and have scientific contributions in this field.

– To be active in higher education institutions at the time of candidacy.

– He must have at least twenty (20) years of law experience in a higher education institution.

– To enjoy his civil and political rights.

– He must not have been permanently sentenced to a custodial penalty for committing a felony or misdemeanor and has not been rehabilitated, with the exception of unintentional misdemeanors.

– He must not be involved in a political party, at least during the three (3) years preceding the election.”

What can be noted among the conditions that must be met by an elected or appointed member of the Constitutional Court?

– New conditions were introduced pursuant to the 2020 constitutional amendment.

– Despite the admissibility of the requirement of experience in the field of law for twenty years or more; Unless linking this to the necessity of benefiting from special training in constitutional law makes this condition an exclusionary condition and not a selective condition, especially since the work of the court, at least in the field of conforming the law with the constitution, is not limited only to knowledge and special training in constitutional law, but rather includes other areas of public law. In addition to the areas of private law, the latter is the most extensive because it is linked to the diverse activities of individuals and the large number of links that they create among them (the large number of private transactions as opposed to transactions in which the state is a party).

– Limiting the right to vote and run for office to public law professors only also represents an exclusionary and not a selective condition, given that the work of the court includes topics of law in its various branches, both public and private.

– What can also be noted from the set of conditions that must be met by members of the court is the allocation of the president of the court with

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special conditions that are the same that must be met by a candidate for the position of President of the Republic, which we believe is logical and practical, considering that the president of the court is like a second reserve president of the state.

– We also noted that the constitutional text did not require any special conditions for the members to be elected for the Supreme Court and the Council of State, and was content only with stipulating general conditions. This is also noted for the members appointed by the President of the Republic, with the exception of the President of the Court.

From these observations, we can come to a basic conclusion: strictness in the conditions for selecting members of the court, which suggests that the Algerian constitutional founder gave it great importance among all other constitutional institutions in order to guarantee its independence, impartiality, and integrity.

#### **2-3- The interference of the executive authority in selecting the members of the court affects its independence:**

The Algerian Constitution grants the executive authority, through the President of the Republic, the authority to appoint and install members of the Constitutional Court, an issue that raises the question about the extent of this body's independence or its subordination to the executive authority apparatus (Ben Ali, 2021, P 306).

According to Article 186 of the 2020 Constitutional Amendment, the President of the Republic selects and appoints four members, including the President of the Court, meaning that the executive authority assumes the task of appointing a third (Gherbi, 2021, PP 68 – 69) of the members.

If we return to the two judges who are elected from the Supreme Court and the State Council, their appointment is by presidential decree, which suggests that the executive authority appoints half of the members of the court and not just a third, given that the President of the Republic (the appointor) has the power to terminate the duties of judges (the power to dismiss) in application of the rule Parallelism of forms. If we assume that the President of the Republic terminates the duties of one of the two elected members of the judiciary, or both of them together, then the member's loss of his judicial capacity will cause him to lose his capacity as a member of

the Constitutional Court, and here the influence of the executive authority in the formation and formation of the members of the court becomes clear.

Accordingly, we can conclude that the formation of the Constitutional Court in Algeria is distributed between the executive authority and the members who are chosen by election from among the professors of constitutional law, which brings us to another conclusion that the Algerian constitutional system indirectly abolished the representation of the legislative and judicial authorities, which is the matter that It will inevitably affect the work of the court.

The influence of the executive authority on the formation of the court also appears through the authority of the President of the Republic to appoint the president of the court. Thus, he did not leave the freedom to the members of the court to choose its president (Jamal Ben Salem, P 307) which is inevitably linked to the idea of “loyalty,” especially if the court’s convening takes place only upon an invitation from Its president, who will become a hostage of the executive authority, may hinder and obstruct the work of the court, especially in the field of monitoring the work of public authorities.

In addition to the above, the court is installed by the President of the Republic himself, and this is another issue that raises the idea of diminishing the independence of the Constitutional Court, since the President of the Republic can delay its installation, which hinders the achievement of the purposes for which it was established.

As a result of the above, it can be said that although the constitutional amendment stipulates the independence of the Constitutional Court, it, like other constitutional institutions, remains linked in terms of its existence and formation to the will of the executive authority, and this is what prompts us to say that the intervention of the executive authority in choosing the members of the court affects its independence.

### **3- The functional independence of the Algerian Constitutional Court:**

The organic independence of the Constitutional Court is not enough to rule with its independence and impartiality, but this independence must also include its functional independence, by which we mean that the court has



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the actual and real authority to exercise its tasks assigned to it constitutionally without any restriction or obstruction, which is what we will try to track in this axis by choosing three points. We believe that it deserves study and may be sufficient to judge the extent of the independence of the Constitutional Court in Algeria from a functional standpoint.

#### **3-1- Notification and defense of unconstitutionality are tools for regulating or disrupting the work of the court:**

The Algerian constitutional founder maintained the same mechanism that was used before the Constitutional Council, which is the notification mechanism (Gherbi, 2021, P 70) and the defense of unconstitutionality through referral from the Supreme Court or the Council of State. Here we wonder whether the constitutional founder maintained these same tools that drive the work of the court. Was the constitutionality aimed at regulating it or is it a restriction on the exercise of its powers? Especially since the independence of the bodies requires that they choose for themselves the appropriate mechanism for their work, on the one hand, and that they act on their own initiative, on the other hand, as a true guarantee of the independence of the court in exercising its constitutional powers, and we will address this through the following points:

- . Limitation of notification authority
- . Optionality of notification authority
- . Restricting the practice of claiming unconstitutionality

##### **3-1-1- Limitations on the notification authority:**

Pursuant to the constitutional amendment of 2020, the Algerian constitutional founder maintained the same bodies that he gave the right to exercise the authority to notify the Constitutional Court, which are:

- . President of the Republic
- . President of the senate
- . President of National People's Assembly
- . The Prime Minister or Prime Minister, as the case may be
- . 40 representatives of the National People's Assembly
- . 25 representatives of the senate
- . Notification by referral by the Supreme Court or the Council of State

The confinement and confinement of the notification authority to the above-mentioned bodies makes the court only have the authority to adjudicate without the authority to move. In other words, the court does not carry out its activities automatically and automatically, which negatively affects its work, which extends to rights and freedoms, especially if the matter is related to rights and freedoms. Of a political nature, which loses one of the most important reasons for which the court was established, which is a guarantee enshrined in the Constitution to protect the basic rights and freedoms of individuals.

Confining the notification authority to the previously mentioned bodies constitutes a restriction on the work of the Constitutional Court, which makes it lose part of its independence (restricted in terms of movement and independent in terms of adjudication).

In this regard, we believe that it would have been better for the constitutional founder to grant the court the authority to move automatically to exercise the tasks assigned to it in the field of monitoring laws and regulations and the validity of the work of public authorities, even within the framework of post-monitoring of the issuance of legal texts or the work of the public authority in the state, which would give it independence. Actual and real, expressing what is stipulated in Article 185, as it is the body constitutionally charged with ensuring respect for the Constitution, which of course reflects positively on the rights and freedoms of individuals (Madani, Salimi, 2021, PP 228, 229).

The continuation of the court's work depends on notification of one of the bodies specified by the constitution, which affects its independence and gives us the idea that the court's oversight is of a political nature with a judicial cover.

### **3-1-2- optionality of the notification authority:**

With the exception of organic laws, the internal regulations of Parliament, and legislation by orders in which the constitutional founder required notification before issuance, the notification process is permissible in the rest of the other matters in which the Constitutional Court can exercise its duties.

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Returning to the constitutional text, we find that the constitutional founder always uses the phrase “may”, which indicates the permissibility of the issue of notification, which makes the work of the court dependent on one of the constitutionally authorized bodies exercising its right to notification, and this constitutes a restriction on the work of the court, especially in the field of monitoring the constitutionality of laws and regulations. This is indirectly a restriction of its functional independence, which remains dependent on the extent of the movement of the bodies that have the right to notify.

### **3-1-3- Restricting the practice of claiming unconstitutionality:**

This is demonstrated by restricting this mechanism to the Supreme Court and the State Council alone, in accordance with what was specified in Article 195 of the Constitutional Amendment, which were given the right to notify the court by referral (Madani, Salimi, 2021, PP 228, 229) and this is contrary to what is practiced in many different political systems, which were not limited to The mechanism of defending unconstitutionality in one form or body; Rather, it went beyond defending unconstitutionality through the original lawsuit or the declaratory ruling (Bin Odeh Haskar, 2019, P 155) comparable to the process used by judges to review laws for constitutionality, as is the case in the American legal system. This raises questions regarding the structure of the Algerian Constitutional Court's supervision. Is it political or judicial? Another aspect that we feel diminishes the independence of the Constitutional Court is the permitted referral system that the Supreme Court and the Council of State are granted.

### **3-2- Integration or restriction between the work of the Constitutional Court and the independent national authority to monitor elections:**

The founder of the constitution granted the Independent National Authority for Elections the power to coordinate, oversee, and keep an eye on all electoral and referendum procedures. In earlier constitutions, these functions were under the purview of the Constitutional Council, which was supplanted by the Constitutional Court. The Independent National Authority for Elections was established as a constitutional body in response to the November 2020 amendment to the Constitution. This begs the question of whether the authority was given these powers. Does

independent work enhance the Constitutional Court's authority or does it interfere with and limit its operations?

This question was based on the link stipulated by the constitutional founder under Article 191 of the 2020 Constitutional Amendment, which constitutes a meeting point between two independent constitutional institutions as stipulated in the Constitution.

By referring to the text of Article 202, especially Paragraph 03, which granted the independent authority to exercise its duties from the date of summoning the electoral body until the announcement of the provisional results of the vote, the work of the Constitutional Court granted to it under Article 191 was made complementary to the work of the independent authority by announcing the final results after studying the appeals, and this is what makes The court is in a subordinate position to the Independent Election Authority, which opens the door to the idea of a conflict of jurisdiction between the two bodies, especially since the constitutional founder stipulated that each body is independent from the other (Articles 185, 200). On the other hand, it reduces the role of the court in confronting the authority. The court does not have the right to consider or review the validity of electoral lists, nor has it any involvement in the preparations for the electoral process, nor does it have the authority to monitor the voting and counting process and decide on electoral disputes, especially related to the validity of nominations, as is the case in some other systems. Rather, its role is limited to Studying appeals related to the provisional results of the electoral processes and announcing the final results only.

This gives the court a formal or formal character in exercising oversight over the various electoral processes, and we, for our part, see that exercising the right to vote and run for office is one of the basic and important rights that the Constitutional Court should have been granted the right to follow from its beginning to its end, in other words, involving the Constitutional Court. In all electoral processes without exception, as it is the body that guarantees respect for the Constitution and one of the basic guarantees for protecting the rights and freedoms of individuals, the work

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of the independent authority is an act that restricts the court in its right to look into the electoral processes.

#### **3-3- The role of the court in monitoring the work of public authorities:**

The constitutional text of Article 185/02: “The Constitutional Court regulates the functioning of institutions and the activity of public authorities. The Constitutional Court determines the rules of its work.”

Through this text, the Algerian constitutional founder granted the Constitutional Court the right to control and monitor the activity of public authorities in the state, which is the latest qualitative shift in the constitutional text. However, it did not specify the mechanisms, tools, and areas in which the Constitutional Court exercises this authority, leaving the matter to it to determine through its internal system. .

However, by following the articles of the constitutional amendment, we can identify areas in which the Constitutional Court can intervene in order to control and monitor the activity of public authorities in an effective manner:

**In the field of executive authority:** We can say that the court intervenes in accordance with the text of Article 94 of the 2020 Constitution Amendment, which relates to the impossibility of the President of the Republic to exercise his duties due to serious or chronic illness, or in the event of his resignation or death (in the event of a vacancy in the position of the President of the Republic). Here, the Constitutional Court obligatorily intervenes and meets to investigate. The situations and procedures set forth in Article 94, and this constitutes a case of controlling and monitoring the work of the executive authority (noting that it is the only case in which the court meets without notification/spontaneously initiating the work of the court).

The Constitutional Court also interferes in the work of the executive authority by controlling and monitoring it through the situation stipulated in Article 95.

The court's exercise of this role is also documented, specifically with regard to the application of Article 98/07, which mandates that the President of the Republic present the decisions made during the exceptional state to the Constitutional Court for an opinion after the period of the state

has ended. At this point, the issue of the court's opinion's legal value—that is, the degree to which it is required—can be brought up.

The court also intervenes after being obligated to consider the constitutionality of orders issued by the President of the Republic on urgent matters in the event of a vacancy in the National People's Assembly or during a parliamentary recess.

**In the field of legislative authority:** The Constitutional Court intervenes through what was stipulated in Article 120/02 with regard to declaring a vacancy in a seat in the National People's Assembly or the Assembly of Nations after being obligatorily notified by the president of the concerned chamber. The court may also intervene by issuing a decision to lift the immunity of a member of Parliament who is being prosecuted in the event of failure to do so. Waiving immunity, the court's interference in the work of the legislative authority appears through monitoring the conformity of organic laws with the constitution before issuing them under Article 140/02.

**As for the judiciary:** This is demonstrated by the obligation of the decisions of the Constitutional Court for judges on the occasion of the exercise of their functions (Article 171).

What can be recorded in this role played by the Constitutional Court is the question about the mechanisms and tools that the court will use to extend its mission to control and monitor the work of public authorities, and whether there is anything that forces public authorities to obey its decisions, especially the executive authority, which we indicated in the first axis of this study that it has an impact. He exaggerated the composition of the members of the court, which may affect its independence on the one hand, and on the other hand, the court's intervention in exercising this function remains dependent on the extent of the exercise of the notification authority, as indicated in the second axis of this study.

#### **4-Conclusion:**

After this brief study of the issue of the limited independence of the Constitutional Court in Algeria, we can reach a basic conclusion that although the Constitutional Founder stipulates the independence of the

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Constitutional Court in accordance with Article 185/01, by tracing the manifestations of this independence from both the organic and functional aspects, we have come to the conclusion that The independence of the court is limited and not absolute, given that in terms of its organic organization it is greatly and clearly affected by the interference of the executive authority in its formation and establishment, especially with regard to the selection of the president of the court. On the other hand, its functional organization is also restricted in terms of adopting post-constitutional notification and payment mechanisms and confining them to the same authorities. stipulated in previous constitutions, in addition to the fact that the notification mechanism is mostly a matter of permissibility that is left to the body authorized to do so, and the mechanism of defending unconstitutionality through referral remains incomplete and insufficient, as was demonstrated through the subject of the study, in addition to that the limited The independence of the Algerian Constitutional Court vis-à-vis the national authority to monitor elections as well as the work of public authorities in the state.

The limited independence of the Constitutional Court in Algeria will reduce its role for which it was established, especially the task of maintaining respect for the Constitution, protecting rights and freedoms, and achieving the rule of law, which makes us say that its role is not much different from the role previously performed by the Constitutional Council.

In this area, we can offer some suggestions to achieve effective and real independence of the court:

- Reducing the appointment power granted to the executive authority and expanding the selection of members through election, given that election constitutes a more democratic means, which will positively affect the work of the court.

- Expanding the circle of bodies concerned with exercising the right to notification.

- Adopting new mechanisms for the work of the court in addition to notification and payment after the constitutionality through referral, such as the original lawsuit or the declaratory ruling.

– Adopting the automatic intervention of the Constitutional Court and not being satisfied with exercising the notification authority only.

– Returning the traditional role of the court in organizing and monitoring elections.

– Expanding the representation of law professors to include professors of private and public law and not being limited to professors of constitutional law only.

– Limiting the areas in which the court intervenes in organizing and controlling the work of public authorities in accordance with a constitutional text.

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