

Promoting the role of exception to unconstitutionality in purifying the legal system before the Constitutional Court

ترقية دور الدفع بعدم الدستورية في تطهير المنظومة القانونية أمام المحكمة
الدستورية

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المخلص:

إن تطور آلية الدفع بعدم الدستورية واتساع أدواره مر بعدة مراحل منذ إقراره من طرف المؤسس الدستوري الجزائري سنة 2016 واستمرار العمل به بعد آخر تعديل، ليليه صدور القانون العضوي المحدد لإجراءات وكيفيات الاخطار والاحالة المتبعة أمام المحكمة الدستورية، والنظام الداخلي للمحكمة الدستورية المحدد لقواعد عملها، حيث تضاعفت مكانة الاجراء نظرا لأهميته في تحقيق ركائز دولة القانون وتطهير المنظومة القانونية الجزائرية من الأحكام التشريعية والتنظيمية المشوبة بعيب عدم الدستورية بعد توسيع مجالات تدخله، لذلك فإن اجراءات الدفع المتبعة أمام المحكمة الدستورية من شأنها تحقيق العديد من المزايا خاصة وأن حجية قرارات المؤسسة الرقابية الدستورية مطلقة وملزمة لجميع السلطات العمومية والسلطات الادارية والقضائية، وتلعب دورا محوريا في استمرار نفاذها، وهو ما يحقق مبدأ سمو الدستور وعلوه، وضمان عدم انتهاك النصوص المعيارية الدنيا لعمل المؤسس الدستوري.

الكلمات المفتاحية: دور، مجالات، حجية، شرعية، حماية.

Abstract:

The importance of the exception to unconstitutionality has been apparent since its approval by the Algerian constituent in 2016 and its continuation after the last amendment, The role of the procedure has doubled due to its contribution to achieving the pillars of the state of law and purging the Algerian legal system of unconstitutional legislative and regulatory provisions, Therefore, the exception procedures followed before the Constitutional Court would achieve many advantages, Especially since the validity of the decisions of the constitutional control institution is absolute and binding on all public, administrative and judicial authorities. plays a pivotal role in the enforcement of its work, which achieves the principle of the supremacy of the constitution and ensures that minimum laws do not violate the work of the Algerian constituent.

Key words: Role, areas, authority, legitimacy, protection.

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Introduction:

The Algerian constitutional founder, in Article 188 of the Constitutional Amendment of 2016, followed by Article 195 of the Constitutional Amendment of 2020, initiated the creation of a constitutional mechanism that would review the constitutionality of legislative and regulatory provisions, leading to their abolition from the date determined by the constitutional control institution, based on the availability of a set of legal conditions, the most prominent of which is the presence of A judicial dispute is brought before one of the regular judicial or administrative institutions, and the outcome of the dispute depends on the text being tainted by the defect of unconstitutionality, and the necessity of it affecting the rights and freedoms guaranteed by the Constitution, and the Constitutional Council or the Constitutional Court has not previously considered the constitutionality of the issue except in the event of a change in circumstances, By which the constitutional founder meant the lawsuit of constitutional amendments that would change some constitutional provisions and overthrow others in a manner consistent with the state's obligations internally and externally, and keeping pace with various political, economic and other developments, in addition to stopping the action of the judicial authority concerned with raising the exception of unconstitutionality from one of the parties to the lawsuit, and examining However serious it is, the measure cannot be automatically raised by judges.

The measures taken will not go against what is stipulated in the Constitution itself, and Organic Law 22-19 stipulated in Article 196 of the 2020 Constitutional Amendment, which specifies the procedures and methods of notification and referral followed before the Constitutional Court, as well as the internal regulations of the Constitutional Court specifying the rules of its work, all of this to be considered an exception. A procedure that allows ordinary judicial and administrative bodies to carry out a real filter before referring it to the Constitutional Court to extend its subsequent control over legislative and regulatory provisions tainted by the defect of unconstitutionality. It would achieve many advantages, most notably achieving the principle of the sovereignty of the Constitution and its supremacy over the rest of the normative texts, and enforcing respect and protection of the hierarchy followed for various matters. Official texts recognized in the hierarchy of Algerian laws, as a pillar of the state of law, provided that these provisions affect constitutional rights and freedoms and are kept away from political manipulation and narrow calculations.

Based on the above, the need to address the total of the procedures followed before the Constitutional Court until the issuance of its decision and its entry into force after its publication in the Official Gazette, and from it the importance of the study and the problem that we saw is the most appropriate for the presentation in this matter, which came as follows:

How did the unconstitutional exception contribute to purging the Algerian legal system of unconstitutional legislative and regulatory provisions before the Constitutional Court?

To answer the problem, we followed the descriptive and analytical approach in extrapolating and interrogating the provisions of the Constitution and Articles of Organic Law 22-19 related to the subject of the exception to unconstitutionality, in order to trace the procedures it goes through and the effects it has on the Algerian legal system, while relying in various places on the comparative approach to enrich the study with constitutional experiences. Comparison of the topic and differences in dealing with it, all of this was translated into two main axes:

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The first axis: Procedures for the exception of unconstitutionality before the Constitutional Court.

The second axis: The effectiveness of the exception to unconstitutionality in protecting the constitution.

1- Procedures for the exception of unconstitutionality before the Constitutional Court.

In this axis, we will discuss the various procedures used to refer the exception as unconstitutional and treat it before the Constitutional Court, by expanding the areas of exception to the unconstitutionality (Requirement 01), then notifying through the referral and the procedures followed before the Constitutional Court (Requirement 02).

1.1- expanding the areas of exception to unconstitutionality.

The recent constitutional amendment and the organic law specifying the procedures and methods of notification and referral followed before the Constitutional Court marked a qualitative breakthrough in terms of expanding the areas of intervention of the institution of control of the constitutionality of laws by means of exception (N01), as well as in terms of the comprehensiveness of the work of the judicial authorities affiliated with the regular and administrative judicial systems in matters of exceptions to unconstitutionality (N02).

A-Expanding the normative areas covered by control through the exception to unconstitutionality: Article 195, paragraph 01, of the 2020 Constitutional Amendment specifies the provisions concerned with the exception by stipulating: "...when a party in a trial before a judicial institution claims that the legislative or regulatory provision..." Contrary to what was stipulated in Article 188 of the 2016 Constitutional Amendment, which was limited to legislative provisions only, this expansion in extending the Constitutional Court's control over legislative and regulatory provisions referred to it by higher judicial institutions is an achievement in itself, and is considered a real guarantee for the protection of the rights and freedoms stipulated in The Constitution, and even an imposition of the principle of the supremacy of the Constitution and its supremacy over the rest of the standards in the state, If the term "legislative provision" includes all texts that have the value of legislation, and regulates one of the areas allocated exclusively to Parliament, including organic laws and ordinary laws, and in special cases presidential orders, the French Constitutional Council limited the texts that enter into the interpretation of the term "legislative provisions" and considered Texts that are subject to the exception of unconstitutionality (ordinary laws, organic laws, orders stipulated in Articles 38, 74/01 of the Constitution, laws relating to New Caledonia), while the meaning of legislative provisions is excluded from all of them (international and European provisions, laws relating to programs The state, laws related to ratifying agreements, laws changing the directions of the European Union, regulatory acts),¹ This exclusion is due, in our belief, to the connection of some texts with acts of sovereignty, while others are subject to the supervision of the French administrative judge (regulatory acts). As for international texts, they fall within the category of the constitutional bloc.

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The second category of normative texts subject to censorship by referral by means of an exception to unconstitutionality are the “regulatory provisions” that were subject in the 2016 Constitutional Amendment to permissible constitutional control prior to and subsequent to their entry into force. However, the 2020 Constitutional Amendment designated organizations with subsequent permissible control upon their publication, The notifying parties have the right to ask the Constitutional Court to examine the constitutionality of the regulations within a month from the date of their publication,² and what is understood from the article is that the regulatory texts are fortified after a month has passed without notifying the Constitutional Court, and after that the notifying authorities, represented by the President of the Republic, the President of the National Assembly, and the Speaker of the Council, have no right to The National People's Assembly, the Prime Minister or the Head of Government, as the case may be, forty deputies in the National People's Assembly or twenty-five members of the National Assembly, may submit a request to the Constitutional Court to examine its constitutionality. However, the President of the Republic or the Prime Minister who has the authority to set the regulatory text can cancel it with another.

The controversy that this issue raises is that the Algerian constitutional founder did not specify the field of “regulatory governance.” Does it mean presidential decrees issued by the President of the Republic only, because they are independent regulations issued within the framework of the independent regulatory authority of the President of the Republic in all areas that fall outside the legislative powers of Parliament, or It also includes “executive decrees” issued by the Prime Minister or Head of Government, as the case may be, in the context of his application of various laws and presidential decrees.

The Constitutional Court came to remove the ambiguity that occurred in the Algerian constitutional founder in not clarifying the texts included in the phrase “regulatory provisions,” in its opinion issued on January 16, 2024, based on the notification of 46 deputies of the National People’s Assembly, related to the interpretation of the phrase “regulatory provisions” mentioned in paragraph The first is from Article 195, as well as Article 141 of the Constitution, where its text includes dropping the executive regulatory provisions that are the responsibility of the Prime Minister or Head of Government, as the case may be, from constitutional control and making them subject only to the control of the administrative judge, since these provisions derive their existence from the legislative texts of Parliament and the independent regulatory texts issued On behalf of the President of the Republic in the context of his exercise of regulatory authority in matters not designated by law, which is the only one subject to constitutional control and the exception of unconstitutionality, in addition to legality control exercised by the administrative judiciary in other cases.³

The Constitution granted Parliament the power to legislate according to ordinary laws and organic laws in areas specific to it exclusively, leaving other areas outside the scope of legislation to independent regulation that falls within the jurisdiction of the President of the Republic in the context of his exercise of regulatory authority. Given the importance of the public legal positions that can be established in accordance with these texts, it may He subjected it to the control of the Constitutional Court, and ruled out subjecting the executive decrees that fall within the regulatory scope of Prime Minister or Head of Government, as the case may be, to constitutional control, given the nature of the role it plays and the goal aimed

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at ensuring the implementation of the legislative and executive texts issued by the authorities concerned with that.

Although in France, regulatory texts, in particular presidential decrees and executive decrees, are not subject to the exception of unconstitutionality, because they will be subject to the control of the administrative judge,⁴ there is a section of researchers in Egypt who support the idea of extending the scope of constitutional control to all types of regulatory texts and regulations issued by the authority. Executive, as the established rule is: “The general applies to its generality, and the absolute applies to its generality, so that it is not permissible to specify the general without specification, and since the word regulations or regulatory authority was mentioned in the constitution in the word general, then specifying it with regulations that have the force of law only would be in violation of the text of The explicit constitution, and expanding control of regulations is required by practical considerations in order to confirm the rule of law, because of the importance of some of these regulations, especially those that regulate the freedom and security of citizens.”⁵

B-The comprehensiveness of the jurisdiction of ordinary and administrative judicial institutions to accept the exception: It should be noted that Article 15 of Organic Law 22-19 stipulate the judicial institutions that are competent to consider and refer the exception to unconstitutionality, and they are the judicial institutions affiliated with the regular and administrative judicial systems, Thus excluding judicial institutions that are not affiliated with these two judicial systems, at least from the structural, functional and organic aspects, as they may participate in implementing the procedural aspect. These judicial institutions are represented by the Court of Conflict, the Supreme Court of the State, and the courts affiliated with the military judiciary.

This exclusion is unjustified, since the issues that concern these institutions, as well as the disputes brought before them, can result in violations and infringements of the rights and freedoms guaranteed by the Constitution, within the framework of the legislative and regulatory provisions that will be applied in the dispute or follow-up.

The expansion of the jurisdiction of the judicial authorities has also violated what was prohibited by Article Three, Paragraph 01 of the repealed Organic Law 18-16, which stipulated that it is not possible to raise the exception by unconstitutionality before the Criminal Court of First Instance, to be remedied by the organic legislator in Law 22-19 in its Article 16 when It stipulates the possibility of raising the exception as unconstitutional before the Criminal Court of First Instance, where the Criminal Court considers the exception as unconstitutional before opening the discussion. Article 20, paragraph 02, also excluded assistants other than judges from the composition of the judicial body when it decides on the exception, which is a procedure that we consider logical based on experience and knowledge, Judges in the legal field on the one hand, and their discussion of constitutional issues related to the legislative ruling in question on the other hand, and for technical and objective considerations that do not translate the reason for the presence of assistants in the deliberation session on the exception.

In addition to the absence of any justification for which the organic legislator in Law 18-16 excluded the Criminal Court of First Instance from considering exceptions to

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unconstitutionality, especially since the scope of its specific jurisdiction authorizes it primarily to exercise this jurisdiction by examining the seriousness of the exceptions submitted to legislative or regulatory provisions because they are directly related to fundamental freedoms guaranteed by the Constitution.

1.2- The procedures followed before the Constitutional Court.

To enable the Constitutional Court to protect the rights and freedoms guaranteed by the Constitution based on a referral from the Supreme Court or the Council of State, which are the two bodies that respectively evaluate the work of the regular judicial authorities and the administrative judicial authorities.

The countries of the world differed in terms of the methods they adopted to implement the mechanism of exception to unconstitutionality in terms of issuance and source. There are countries that adopt a method of referral from the trial court to the Constitutional Court to ensure its seriousness (such as Spain and Germany), and countries that adopt the method of the trial court issuing a decision that gives the person requesting the exception a period to submit the request. Before the Constitutional Court (such as Egypt and Bahrain), and other countries adopt the third method of referring the exception by the Court of Cassation to the Constitutional Court (such as Jordan) or to the Constitutional Council (such as France),⁶ and the direct or double filter system followed differed as a result, as well as the effects resulting from it.

It should be noted that the Algerian organic legislator regulated the referral procedures in Articles 13 and 20 of the repealed Organic Law 18-16, and Articles 02 point 02 and 04, 30, 36, 37, of the Organic Law 22-19 specifying the procedures and methods of notification and referral followed before the Constitutional Court, which was stipulated in Article 196 of the Constitutional Amendment of 2020.

Article 02 included the referral procedures followed before the Constitutional Court by notifying it of the unconstitutional exception based on a referral from the Supreme Court or the Council of State, as the case may be, and what is evident from this article is that the exclusive authority to refer exceptions to unconstitutionality is granted to both the Supreme Court and the Council of State alone. From the judicial authorities, these two authorities play the role of filtering the exceptions referred to them by the judicial authorities of first instance, before referring them to the Constitutional Court, in order to avoid overwhelming the Constitutional Control Authority with non-serious exceptions.

The Supreme Court and the State Council have a period of two full months, starting from the date of receiving the decision to send the exception as unconstitutional, from their affiliated judicial authorities, in order to decide whether to refer the exception to the Constitutional Court,⁷ after ensuring that a set of legal conditions are met for it to be accepted and referred. Here, the exception is subject to procedures. The double filtering, before the judicial authority of first instance raised before it, then before the Supreme Court or the Council of State, as the case may be, and these formal and substantive conditions are as follows:

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- It is considered a defensive lawsuit separate from the original lawsuit that is filed pursuant to a written, separate, and reasoned petition. It is a subsidiary exception that is initially dependent on the subject of the dispute, but is soon separated from it and becomes independent with its abstract lawsuit.
- The outcome of the dispute must depend on the legislative or regulatory provision being objected to or constitute the basis for follow-up.
- The objectionable legislative or regulatory provision must not have previously been declared compliant with the Constitution by the Constitutional Council or the Constitutional Court, except in the event of a change in circumstances.
- The aroused face must be serious.⁸

There is a direct filtering procedure that takes place directly before the supreme judicial authority, depending on the case, in the event that the exception is raised for the first time before the Supreme Court or the Council of State.

The Supreme Court or the Council of State informs the judicial authority that sent the exception through its decision, which informs the parties within a period of ten days from the date of its issuance, noting that this period cannot be controlled by the judicial authority, especially if it is informed of the decision after the deadline has passed.

It is important to note that the failure of the higher judicial authorities to decide on the issue of the unconstitutional exception within the period granted to them, which is estimated at two months from the date of receiving the decision to send the unconstitutional exception from the judicial authority raised before it, makes the exception immune from rejection, and it is referred directly to the Constitutional Court, and it is followed in the lawsuit. Automatic referral is the same as the procedures followed in regular referral.⁹

The Constitutional Court receives a copy of the decision of the Supreme Court or the Council of State, as the case may be, referring the judge to reject the referral of the exception as unconstitutional, and it is sent to the judicial authority before which the exception is raised, which is responsible for notifying the parties within a maximum period of five days, to allow the parties to take appropriate legal measures.¹⁰

What is interesting about this issue is that the Constitutional Court was notified of the decision to reject the referral from the Supreme Court or the State Council, which is the best evidence that it has the inherent jurisdiction and exclusive authority to decide on the constitutionality of legislative and regulatory provisions, in terms of the extent to which they affect the rights and freedoms guaranteed exclusively by the Constitution, in consecration of the principle Legal security, but the ambiguity in which the text occurred is that the exception will be deemed unconstitutional in the event that the Constitutional Court finds out that it is serious, violates rights and freedoms, and has not been previously decided upon! Here, will the Constitutional Court move on its own to extend its control and jurisdiction over the work of the highest judicial authorities in the field of Exceptions are unconstitutional, as long as they are not competent to decide on the exception, but rather to examine the availability of formal and substantive conditions for referral,¹¹ This is an opinion that supports the necessity of the intervention of the Constitutional Court to prove its jurisdiction to extend its control over legislative and regulatory provisions tainted by the defect of unconstitutionality, but with the silence of the constitutional founder and legislator. Therefore, we remain awaiting what

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the constitutional control exercise will produce if the Constitutional Court has the necessary courage to carry out its powers.

It is necessary to respect the referral procedures and deadlines by the Supreme Court and the Council of State, otherwise the exception will be automatically referred to the Constitutional Court, where the higher judicial authorities register the decision to refer the exception as unconstitutional in a special record of payment when writing the Constitutional Court record. It is also noted that the Algerian legislator used a record book. The Constitutional Council, then the Constitutional Court, is an interest known at the level of judicial institutions and was not known to the constitutional control body before the emergence of the exception mechanism. It is a previous indication of the transformation of the Constitutional Court into a judicial institution on the occasion of its ruling on the exception to unconstitutionality, unlike the lawsuit when it exercises previous control on the constitutionality of laws where it appears in the form of a quasi-judicial institution.¹²

After the decision to refer the exception as unconstitutional is received, the Constitutional Court informs the constitutional notifying parties without deputies and members of Parliament represented by the presidents of the two chambers. It sends the referral decision attached to the petitions and memorandums of the parties to the President of the Republic, the President of the Council of the Nation, the President of the National People's Assembly, the Prime Minister or the Leader of the government, as the case may be, in order to express their observations about the legislative or regulatory provision that is the subject of the exception that is tainted by the defect of unconstitutionality that affects fundamental rights and freedoms. Any interested person can also intervene in the procedure of the exception of unconstitutionality before the Constitutional Court, with a written and reasoned memorandum, respecting the conditions and controls mentioned in the law, Organic, and the legislator did not use the term "separate" because there is no file of the original lawsuit, as a result of which the exception was made at the level of the Constitutional Court. Rather, the exception of unconstitutionality is what turns into an original dispute, and if its request is accepted, the intervening party is subject to the same procedures to which the parties are subject. The Constitutional Court continues to consider and decide on the subject of the exception even if the dispute ends, which confirms the nature of the exception that it is an objective and abstract procedure, independent of lawsuits. It is a defense against a law or regulation that is tainted by the defect of unconstitutionality.

As for the procedures for examining the exception to unconstitutionality, the sessions of the Constitutional Court shall be public, except in exceptional cases specified in the internal regulations specifying the rules of its work, where the representative of the government and all parties, represented by their lawyers, are enabled to present their *ex parte* observations before the Constitutional Court,¹³ This is a procedure that adds transparency, credibility and responsibility to this lawsuit, which quickly turned into an original lawsuit before the Constitutional Court.

The Constitutional Court shall decide on the issue of the exception to unconstitutionality within the four months following the date of its notification. This period may be extended once for a maximum period of four months based on a reasoned decision from the court that is notified to the notifying judicial authority, In addition, the decision is

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notified to the Supreme Court or The Council of State, as the case may be, to inform the judicial authority before which the exception was raised of its unconstitutionality, and it shall be published in the Official Gazette of the People's Democratic Republic of Algeria, through the General Secretariat of the Government.

What can be raised in this area is that it was expected that the constitutional founder in 2020, who maintained the same deadlines stipulated in amending the constitution in 2016, would reconsider some matters, such as deciding to suspend implementation of the contested law until a decision was issued regarding its constitutionality or not. It is logical to continue implementing a text that turns out to be unconstitutional for a period of eight months. It would also have been better to unify the deadlines related to urgency to include the case of exception to unconstitutionality. If we assume that a law was submitted to notification by the President of the Republic, for example, and the matter required rushing it and reducing the deadline to ten days, in When the same law is referred by the Supreme Court or the Council of State, for example, and it is requested to expedite it, so it remains bound to a period of four months and is extended to eight months, it is unreasonable for the same institution to decide on the same law with such different deadlines.

It remains to point out that the deliberations of the Constitutional Court are signed by the members of the court and the clerk of the session under the supervision of the Secretary-General of the Constitutional Court, and its decisions are taken by a majority of its members present, and in the event of equal votes, the president's vote shall prevail, except for decisions related to the control of organic laws in which they are taken by an absolute majority of the members,¹⁴ This applies to the texts presented to it.

2. The effectiveness of the exception to unconstitutionality in protecting the constitution.

In this axis, we discuss the most important results that would contribute to upgrading the status of the exception to unconstitutionality and making it a fundamental pillar of achieving the principle of legality, by addressing the strength of the authority of the decisions of the Constitutional Court in the field of exception to unconstitutionality (the first requirement). Let us then go back to studying the contribution of the exception mechanism to Strengthening the foundations of the rule of law (the second requirement).

2.1- The validity of the decisions of the Constitutional Court in the field of exception.

In the 2020 amendment, the Algerian constitutional institution followed the same approach as the 2016 constitutional amendment in terms of the effects of the decisions of the Constitutional Court, and the extent of their authority towards public institutions and authorities, given the nature of this control constitutional institution that ensures the protection of the provisions of the Constitution from infringement, but its intervention is suspended. It depends on the notification and referral authorities, and it also depends on the limits set by the Constitution for it when interfering in the field of referral.

Article 198, Paragraph 04 of the 2020 Constitutional Amendment is clear in terms of the effects of the decisions of the Constitutional Court and the beginning of their effectiveness, as if the Constitutional Court decides that a legislative or regulatory text is unconstitutional

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based on the exception of unconstitutionality, it loses its effect starting from the day determined by the decision of the Constitutional Court, It becomes clear that the Constitutional Court is notified by referral to exercise subsequent control of the legislative or regulatory provisions that have entered into force and have legal effects resulting in acquired rights for the benefit of natural and legal persons. Therefore, declaring the legislative provision unconstitutional by a decision is a complete cancellation of the will of the legislator to produce the motivated provisions. The same applies to the regulatory ruling issued within the framework of the independent regulatory authority of the President of the Republic, of course, if it affects the issue of rights and freedoms guaranteed by the Constitution and subject to court control by exception.

The Constitutional Court was granted the power to determine the period of validity of the decision, It may be with retroactive effect, determining the acquired legal positions addressed to it, or with immediate effect to bring about an immediate amendment to the legislative or regulatory provision tainted by the defect of unconstitutionality, as well as with regard to the effects it has in the future, as is the case with Resolution No. 01 / C.C.D / D.E.U. /19, which abolished the minimum amount restriction on the right of appeal, on the issue of exception and cases that have not yet exhausted the deadline for appeal, as the legislative provisions determined to be unconstitutional above lose their effect immediately, so it stipulated that: "The effect of the declared unconstitutionality decision shall apply to all penal rulings that have not exhausted the deadlines for appeal when applying the provisions of Article 416 of the aforementioned law...", and the Constitutional Council previously withdrew this provision in Resolution No. 02 / C.C.D / D.E.U. /19, because the constitutionality of the same legislative provision had previously been decided, it stipulated: "Considering that some of the legislative provisions conflict with the Constitution contained in Article 416 of the Code of Criminal Procedure, declaring their immediate cessation would guarantee the rights of individuals to litigation on two levels immediately without exception".¹⁵

In addition, Article 33 of the Civil and Administrative Procedures Law was abolished in accordance with the decision issued by the Constitutional Council on 10/02/2021 to enshrine the principle of two-level litigation in the civil matter to conform with what was stipulated in Article 165 of the Constitution, as it stated in one of its paragraphs: "Considering that the legislator in Article 33, paragraphs 01 and 02 of the Code of Civil and Administrative Procedures, when it required the adjudication of the first and last degrees in cases whose value does not exceed two hundred thousand dinars, thus it discriminated between the litigants in exercising the right to litigate in two degrees, which is not in line with what was established by the constitutional founder."¹⁶

Thus, the constitutional regulatory institution addressed the risks of subsequent control in that issue only, by making the effects of declaring a decision unconstitutional only in the future, that is, stripping it of any retroactive effect, which contributes to consecrating and ensuring legal security, and at the same time purifying the legal system of unconstitutional provisions. Which was decided to be cancelled, but problems will arise in the future if its decision is ruled to be effective retroactively, affecting acquired rights, and causing legal effects that are difficult to remedy and deal with by compensating people and withdrawing legal and regulatory texts.

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As for the decisions of the Constitutional Court ruling the constitutionality of the legislative and regulatory provisions subject to the exception of unconstitutionality, it is responsible for affirming their constitutionality in the same decision, and there is no need to specify the date of its entry into force, since the law or regulation containing the legislative or regulatory provision in force produces its full legal effects. In addition to that, the decision of the Constitutional Court will grant him immunity from re-exercising control over its constitutionality through the exception mechanism, taking into account the exception in the event of a change in circumstances resulting from the issuance of a constitutional amendment as a result of many political, economic, social and international variables that inevitably lead to a reconsideration of unconstitutional texts and making them keep pace with developments, and during that period, the Constitutional Court, as well as various judicial bodies, will make exceptions to the unconstitutionality of laws and regulations applied to the dispute or follow-up.

Regarding the validity of the decisions of the Constitutional Court, Article 198, Paragraph 05 of the 2020 Constitutional Amendment stipulates: “The decisions of the Constitutional Court shall be final and binding on all public authorities and administrative and judicial authorities.” Thus, the Constitutional Founder established the Constitutional Court as a constitutional institution that monitors the work of all public authorities, and arbitrates their various actions, so that it becomes consistent with the Constitution and in accordance with the areas and cases of intervention specified by it.

The result of the Constitutional Court’s decision that a legislative or regulatory text is unconstitutional is the loss of its effect, that is, its cancellation by virtue of the fact that it has become useless in the legal system, by virtue of its violation of the rights and freedoms guaranteed in the Constitution.¹⁷

Abolishing the legislative and regulatory provisions that produced their legal effects may threaten the stability of the relationships based on them, and destabilize legal security, even if they are unconstitutional and affect rights and freedoms, because they will produce a legislative vacuum in the legal system regarding the situations related to them, until the legislator intervenes again and reorganizes them according to his vision. Constitutional jurisprudence for its validity,¹⁸ and there are countries that apply constitutional texts regulating the same issues regulated by legislative or regulatory provisions that contradict the Constitution, until its amendments are made that are consistent with the Constitution.

2.2- The contribution of the exception of unconstitutionality to strengthening the foundations of the State of law.

Coinciding with the emergence of the constitutionalization movement in the countries of the world following the American and French revolutions, written constitutions began to enjoy a distinguished position in the hierarchy of normative texts in countries, because the latter regulates the relationship between the ruler and the ruled, and defines the limits of the ruler’s powers and the scope of citizens’ enjoyment of various rights and freedoms. The nature of the topics it addresses made it the most sublime law in the broadest sense ever, and the constitutional founders began searching for effective control mechanisms to prevent its provisions from being compromised and violated by competing and inferior normative texts

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according to the countries under study, in order to ensure its supremacy as it is the primary source of all internal normative texts regulating the various fields for legal positions.

Consecrating the principle of legality, which means that the lower law is subject to the law that is higher in rank in the hierarchy of normative texts, is not sufficient to achieve the state of law, as the difference between the “legitimate state” and the “state of law” lies in that the former is definitely not concerned with the field of rights and freedoms, as it ensures Respecting legal texts, whatever their nature, regarding rights and freedoms, while the state of law is meant to be that state that subjects all legal actions and all activities carried out by people to the applicable law, in addition to including the legal framework in which the content and extent of rights and freedoms are conceptualized according to the system. The ideology adopted in the state, and with the spread of the phenomenon of globalization and the collapse of the socialist pole, and the influence of states by the constitutional experiences of liberal states whose constitutions included free democratic contents, known as constitutions of laws, the concept of the state of law became a unified concept that included the effects of globalization, and it became necessary to provide a set of elements to achieve it, which are:

- The supremacy of the constitution and the law of all kinds.
- The principle of gradation of normative texts, where lower texts are guaranteed to be respected by higher texts all the way to the constitution.
- Applying the principle of separation of powers, and the necessity of the independence of the judiciary.
- Constitutionalization of basic rights and freedoms.
- Control of the constitutionality of laws and establishing mechanisms for judicial control of the work of public administration.
- Equality before the law in privileges and burdens.¹⁹

The role of the Constitutional Court, which moves through the notification and referral mechanisms, appears in strengthening the consecration of the rule of law. What concerns us is the role of the Constitutional Court when it extends its control over texts through the referral mechanism for the exception to unconstitutionality.

The mechanism of exception to unconstitutionality plays an effective role in imposing the sovereignty of the Constitution over other normative texts tainted by the defect of unconstitutionality after they enter into force. Despite the possibility of its impact on legal security after the texts established legal positions under which many rights and freedoms were established, the principle of constitutional legitimacy It imposes itself on the necessity of respecting the lower law for the higher law, in order to uphold the principle of the supremacy of the Constitution, and to guarantee the rights and freedoms it guarantees. The Constitutional Court was granted the power to decide to cancel legislative or regulatory texts with retroactive or immediate effect.

However, some jurisprudential trends have emerged calling for the necessity of balancing the idea of legal security with the principle of constitutional legality, and many countries of the world have been affected by it, as it depends on the case of each individual lawsuit, For example the Bahraini constitution has adopted the direct effect of the ruling of unconstitutionality, thus prevailing over the idea of legal security over the principle. Legitimacy, Not only that, but he allowed the court to set a later date for the entry into force

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of its ruling, in order to further protect the legal relationships that actually existed at the time of considering the constitutional lawsuit, in order not to surprise its owners with the ruling and to give them sufficient opportunity to arrange their situations according to the new legal situation.²⁰

Regarding strengthening the consolidation of the principle of separation of powers, the mechanism of exception for unconstitutionality is considered an effective measure in the hands of the parties to the lawsuit to enable the judicial authority to contribute to eliminating the legal system from legislative and regulatory provisions that violate the rights and freedoms guaranteed by the Constitution. It does not move automatically, nor does it intervene directly to examine the texts, but rather it examines the availability of formal and substantive conditions for referring it to the constitutional control institution, which is also charged with resolving disputes arising between public authorities, enforcing respect for the constitution, and most important of all, interpreting the provisions of the constitution that can be given extremely important dimensions in its enjoyment of one of the powers of the constituent authority, as well as identifying the most important provisions and rules. The texts that go into defining the concept of the constitutional bloc in Algeria and enforcing its protection and not violating it are among the minimum standard texts based on its jurisprudence and decisions on various issues related to the constitutional field. It is also understood that the Constitutional Court was established as an arbitration institution between the executive and legislative authorities competent to issue laws and regulations.

In order to establish this, the Algerian Constitutional Founder allocated judicial immunity to members of the Constitutional Court to ensure their independence and the performance of their powers without restriction or influence from any party, as members enjoy judicial immunity in criminal matters as one of the most important constitutional guarantees, which means restricting the authority of the Public Prosecution to initiate a lawsuit, General Assembly against them only after the immunity is lifted, and that can only be done with an explicit waiver from them or with the permission of the Constitutional Court.²¹

This procedure would create a feeling of confidence and reassurance in the hearts of the members of the Constitutional Court and comfort among the citizens concerned with making the exception, as it guarantees the performance of their duties in full independence, and as a result, the protection of constitutionally guaranteed rights and freedoms.²²

The nature of the tasks of the Constitutional Court within the framework of the exception to unconstitutionality falls within the scope of strengthening the consecration of the state of law, given its expansion in addition to notifying the specific reference rules for the constitutional bloc, and relying on the constitution to extend control of the constitutionality of laws as a main basis and fundamental pillar of the state of law, in addition to being the protector. Fundamental rights and freedoms and can re-evaluate and review its decisions and jurisprudence in line with changing circumstances on the occasion of constitutional amendments that require keeping pace with political, economic, social and international changes, The retroactivity of the decisions it issues also has an important impact on the protection of the rights and freedoms guaranteed in the Constitution, despite their impact on legal security, in addition to The exception mechanism guarantees the equality of all natural and legal persons of all types in exercising the right to sue over the constitutionality of a

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legislative or regulatory text after it passes through the judicial filter mechanism, before the Constitutional Court, even against public institutions and administrations that watch over the application of the laws of the Republic, and the latter may affect guaranteed rights and freedoms Constitutionally.

Conclusion:

At the conclusion of this study, we can say that the mechanism of exception to unconstitutionality that established post-hoc control of the constitutionality of laws after its establishment in the 2016 Constitutional Amendment under the Constitutional Council, and its continued adoption in the 2020 Constitutional Amendment that created the Constitutional Court instead of the Constitutional Council, would achieve many goals. The advantages and positives that were discussed in this research, especially those related to consecrating the principle of the supremacy of the constitution and its protection, protecting basic rights and freedoms, respecting the principle of hierarchy of normative texts, purging the national legal system of legislative and regulatory texts that violate the constitution, equality of citizens before the law in privileges and burdens, consecrating the principle Separation of powers while respecting the field of specialization of the constitutional founder and not violating it, which, in our personal opinion, will lead to a kind of efficiency in work, quality in formulation, and effectiveness in control, given the quality of the formation it includes.

Results:

After restricting the exception to unconstitutionality with formal and substantive conditions for its acceptance at the level of the judicial institutions affiliated with the regular and administrative judicial systems, which are considered as qualitative filters and initial selection at the level of the judicial authorities of first instance and appellate, and a second filter at the level of the Supreme Court or the Council of State, as the case may be, the right will finally be granted to the authority. The judiciary to exercise the power of referral based on the request of the parties to the lawsuit, and does not move automatically, and is thus equal to the other two authorities in this issue, awaiting the hope of consecrating the system of self-notification and automatic movement of the Constitutional Court, in addition to its contribution to implementing forms of popular control over the constitutionality of legislative and regulatory texts in its capacity as the sovereign. In the state, by notifying the institution that has the inherent jurisdiction and the exclusive right to decide on the extent of its constitutionality through judicial channels by virtue of experience, expertise and training in the field of law for these institutions specified in the Constitution and Organic Law that specifies the procedures and methods of notification and referral before the Constitutional Court.

Expanding the areas of exception to unconstitutionality to also include regulatory texts after they enter into force would restrict public authorities and institutions in their application of legislative or regulatory texts, and this falls within the goals of the constitutional founder in consecrating the foundations and pillars on which the state of law is based.

Recommendations: In light of the above, we can make the following recommendations:

- Expanding the areas of intervention of the Constitutional Court through the mechanism of exception to the unconstitutionality of rules, provisions and texts that fall

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within the concept of the “constitutional bloc” in Algeria, which strengthens the protection of these normative texts, and is guaranteed by their supremacy over the laws and regulations covered by the exception by unconstitutionality.

- Enabling the Constitutional Court to move automatically to extend its control over the constitutionality of laws in relation to laws and regulatory texts by virtue of the fact that it has the inherent jurisdiction and the exclusive right to examine the constitutionality and protect basic rights and freedoms, before and after the texts enter into force.

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 - 2 -Article 190, Paragraph 03 of 2020 Constitutional Amendment.
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 - 4 -Ali Issa Al-Yaqoubi, *The July 23, 2008 amendment to the Constitution and its impact on the development of control of the constitutionality of laws in France*, *Journal of Legal Sciences*, University of Baghdad, Volume 27, Issue 02, 2012. pp. 390-391
 - 5- Attia Ahmed Mamdouh, *a comparative and analytical study on the Supreme Constitutional Court law promulgated by Law No. 48 of 1979*, *Contemporary Egypt Magazine*, Egyptian Society for Political Economy, Statistics and Legislation, Volume 70, No. 375, 1979. p. 32
 - 6 -Salima Ghizlane, *Supreme Judicial Institutions as a Partner of the Constitutional Council (currently the Constitutional Court) in exercising constitutional control as a referral judge in Algeria*, *Al-Ustad Al-Bahat Journal for Legal and Political Studies*, Volume 06, November 2021. p. 49
 - 7 -Article 30 of the Organic Law 22-19.
 - 8 -Article 21, *Ibid.*
 - 9- Article 36, *Ibid.*
 - 10 -Article 37, *Ibid.*
 - 11 -The rationale for the Constitutional Council's opinion included that: "...and taking into account the result, the task of ensuring respect for the Constitution stipulated in the first paragraph of Article 182 of the Constitution and the requirements of transparency require sending a copy of the reasoned decision through which the Supreme Court or the Council of State decides not to refer the exception." The unconstitutionality is referred to the Constitutional Council so that it can review the respect of these judicial authorities for their jurisdiction." See: Opinion No. 03/RCM/C/C/18 dated August 2, 2018 related to monitoring the conformity of the organic law specifying the conditions and methods for applying the exception to the non-constitutionality. *Constitutionalism, for the Constitution*, Official Gazette No 54 issued on September 5, 2018.
 - 12- Jamal Ben Salem, *Addressing the exception to unconstitutionality Before the Algerian Constitutional Council*, *Voice of Law Review*, Volume 07, Issue 02, November 2020. p78

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13 -Articles 40 and 41 of Organic Law 22-19.

14- Article 197 of the 2020 Constitutional Amendment.

15- It was stated in the considerations of the decision that when the constitutional founder stipulated that “the law guarantees litigation on two levels, he intended to oblige the legislator to guarantee the exercise of this right, by specifying for him the methods of its application, without those methods being emptied of its essence, nor restricting or excluding anyone from exercising it”, He continues in the following paragraphs: “Considering that, in accordance with Article 191, Paragraph 03 of the Constitution, the decisions of the Constitutional Council are binding on the judicial authority, and that the equality guaranteed by the Constitution for all citizens before the law and the judiciary requires enabling all parties to appeal rulings issued in criminal matters pursuant to the provisions of Article 416 of The Code of Criminal Procedure, without the limitations and exceptions that are the subject of the case decision”. Resolution No. 01 / C.C.D / D.E.U. / on November 20, 2019, Official Gazette No. 77, published on December 15, 2019, pp. 11-12.

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