

Rights and Freedoms in Algeria according to the 2016 constitutional amendment

الحقوق و الحريات الأساسية في الجزائر حسب التعديل الدستوري لسنة
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Abstract :

The topic of fundamental rights and freedoms is one of the most important topics that received the most attention of men of law . many western and Arab countries have taken the initiative to accede to international conventions. Algeria will have in turn followed the development and promotion of human rights and their protection and this has become clear through its successive constitutions, so that it is noticeable that there is an evolution in fundamental rights and freedoms and surrounding it with a set of principles and mechanisms for its safeguarding.

Keywords: Fundamental rights and freedoms ; The Principe of legality; The constitutional protection of human rights ; The Principe of separation of powers ; The principle of equality.

المخلص:

لقد نال موضوع الحقوق و الحريات اهتماما واسعا من قبل رجال القانون و اختلفوا في تحديد مفهومه لاتساع مجالاته. و نظرا لأهمية هذا الموضوع على الصعيدين الوطني و الدولي ؛ بادرت العديد من الدول للانضمام إلى الاتفاقيات و المعاهدات الدولية و منها الجزائر ؛ و قد بات هذا واضحا من خلال الدساتير المتعاقبة التي كفلت و أوجبت احترامها وذلك بإحاطتها بمجموعة من المبادئ و الآليات التي تضمن تعزيزها و عدم الاعتداء عليها و منها التعديل الدستوري لسنة 2016 .
 فقد اهتم المشرع الدستوري بموضوع الحقوق و الحريات و لا يزال يجتهد من أجل ترقيتها رغم أن التطبيق الفعلي لها يجد صعوبات تؤدي إلى تقييدها .
الكلمات المفتاحية : الحقوق و الحريات الأساسية ؛ مبدأ المشروعية ؛ الحماية الدستورية لحقوق الإنسان و حرياته الأساسية ؛ مبدأ الفصل بين السلطات ؛ مبدأ المساواة .

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INTRODUCTION

The topic of human rights and fundamental freedoms is one of the most important and oldest topics, and at the same time it is still one of the vital and varied topics that deserve research by intellectuals and men of law, so what it seems of essential importance in the present context.

Hundreds of conferences have been held concerning this issue, and many international and regional treaties and conventions have been signed for the purpose of promoting and protecting those fundamental rights and freedoms, the most important of which was the Universal Declaration of Human Rights. So, with many countries joining these treaties and conventions related to human rights and fundamental freedoms, these countries had to enshrine

these rights and freedoms in their constitutions based on the supremacy of the constitution other legal rules.

Therefore, the constitution constitutes the basic guarantee for the establishment of the rule of law on the one hand and the protector of human rights and fundamental freedoms on the other hand. Consequently, most Arab constitutions have included legal texts in which they talked about the basic rights and freedoms of the citizen, so that in these texts, they touched on various rights and freedoms, whether individual or collective. Indeed, these constitutions went to protect these rights and freedoms by imposing constitutional principles for their safeguarding. Algeria is one of the Arab countries whose constitutions contain a number of rights and freedoms, and it has adopted a set of principles to protect and promote those rights.

This is evident from the constitution of 1963 to the last constitutional amendment that Algeria experienced in 2016.

The importance of this topic lies in knowing the extent of the constitutional protection for human rights and fundamental freedoms through the constitutional principles adopted by the Algerian legislator to protect those rights and freedoms. On this basis, the following problematic can be adopted:

To what extent are constitutional guarantees available to protect rights and freedoms in the light of Algerian legislation?

To study this problematic, we relied on a research plan composed of 2 themes, in the first theme we deal with the principle of

legitimacy, and in the second theme the principle of separation of powers, as follows:

1. Title : Rule of law (principle of legitimacy)

In order to apply legal status for all countries, all governing bodies in these countries must comply the legal rules in effect, like the governed persons, and this principle has become a principle recognized in all democratic constitutions and requires that all members of society and state authorities alike respect The law as a basis for the legitimacy of acts, whatever the source of this law, and whatever its level in the legal system of the state¹.

However, the rule of law does not mean only a commitment to respect its provisions, but rather the supremacy of the law over the state, which requires that this sovereignty appear in the content of the law and not only in the commitment to its provisions, and in terms of content the law must guarantee the rights and freedoms of individuals, because this content is the basis Rule of law.

The law is not only a tool for the act of the state, but also a guarantee that provides the rights of individuals vis-a-vis the state. There is no doubt that the principle of the supremacy of the constitution and the inclusion of legal rules are the main principles that guarantee the rule of law, that is, individuals and bodies are subject to the law.

1.1 First Subtitle: the principle of supremacy of the Constitution

It means that the public authorities are subject to the rules and provisions of the constitution and accordingly, any authority of the state can only exercise the powers conferred upon it by the constitution and the limits that it has drawn, and with regard to the legislative authority, this principle means that constitutional rules are superior to other legal rules applied in the Country, so Any law issued by the Country must not be in violation of the constitution².

The principle of supremacy has currently become a recognized principle whether it is stipulated in constitutions or not³.

It means also that even if it is not stipulated or mentioned in the body of the constitutional document. The supremacy of the constitution is either an objective supreme or supreme in terms of form and that what we will explain as follows .

The basis of the material supremacy of the constitution is the legal system in the country based primarily on the constitution, that means that the laws find its source in it, meaning that they work to apply the basic principles and general provisions in it in various fields, as they derive its value from it as permitting its existence and shows how they should be.

According to the constitution, state organs and institutions are established and their jurisdictions and activities are determined, depending on what the constitution allows, and from there the results of the supremacy of the constitution strengthen the legality and legitimacy in the country⁴.

One of the results of the formal supremacy of the constitution is the stability of the constitutional rule, which means that the constitution cannot be amended except by following special procedures to ensure that it is not tampered with in accordance with the whims of the rulers or governors. Also, this amendment or abolition is only by laws having the same degree and rank with similar constitutional rules⁵. Consequently, formal supremacy permits ensuring respect for the constitution and regulating the constitutionality of laws, and Dr. Abdal-Ghani Bassiouni concluded the following conclusion: Therefore, if the objective supremacy of the constitution is achieved for all rigid and flexible constitutions, then the formal supremacy is only achieved for rigid constitutions. Because rigid constitutions differ from flexible constitutions ... in the absence of the possibility of amending them except by following special procedures different from what is followed in amending the ordinary laws issued by the legislative authority.

1.2 Second subtitle : the principle of hierarchy of laws

The Respect for the constitution by all contemporary regimes is linked to the principle of hierarchy of laws and availability of guarantees for the supremacy of the constitution and respect for it. The principle of hierarchy of laws requires that the lower rule be subject to the highest rule, and since the constitution comes at the top of the legal hierarchy, the legislator must adhere to its actions as the highest or supreme rule, so that the actions of the

government must be in conformity with what is specified in the constitution⁶". The Austrian jurist "Hans kelsen" is considered as the first who explained the theory of hierarchy of legislation or the process of legal reproduction, according to which the legal rules take the form of layers that constitute the constitutional rules at the top of it being issued by its constituent authority and followed by the legislative rules issued by the legislative authority and then the regulations and organizational decisions, and the link between these rules is a hierarchical dependency link.

This close interconnection between legal rules resulting from the hierarchy of legal norms and their association with the constitution is a formal guarantee of human rights and freedoms⁷.

2.Title : the principle of separation of powers

The principle of separation of the three powers is considered as one of the most important constitutional guarantees to protect human rights and fundamental freedoms. This principle includes dividing the state's organs into three bodies, a special body for legislation, a special body for executive branch, and a third body for the judiciary, and each of them has a specific jurisdiction that must not be deviated⁸.

This principle finds its origin in Greek philosophy, it took at the beginning a political aspect, and it was mentioned by Plato and Aristotle before being used by "Luke", "Montesquieu" and "Rousseau" and transferred to the field of application after the American and French revolutions⁹. But this principle was

associated with the name of the French jurist Montesquieu, who was credited with highlighting it as a basic principle for regulating the relationship between public authorities in the state and preventing authoritarianism or tyranny by power¹⁰

2.1 First Subtitle: estimating the principle of separation of powers

One of the most important justifications which led to the introduction of the principle of separation of powers is the prevention of authoritarianism and the preservation of public freedoms and the creation of mutual control between the authorities. In addition, the main initiators who call for the application of this principle regard it as a means by which the work of the authorities can be mastered by sharing it among themselves, but this did not prevent criticism of this principle.

The most important advantages of this principle can be summarized as follows:

1- Safeguarding freedom and preventing authoritarianism: so that the principle of separation of powers is considered an essential guarantee of freedom and safeguarding it against any aggression, and an important means to prevent against authoritarianism and abuse of public authorities.

2- Contribute to the realization of the rule of law: the principle guarantees that the legislative and executive powers must not be combined in a single body, and the same applies to the legislative and judicial powers, and this separation entails the enjoyment of the laws enacted by the legislative authority with a public and

abstraction character, which can be well respected by all the bodies¹¹.

3- Reaping the benefits of dividing the State functions: This division results in mastering each authority to its work, and doing it to the fullest, as well as achieving in the end the proper progress of work in all major fields of the state, legislative, executive and judicial¹².

The separation attributed to Montesquieu misses the mark because he used the word division instead of separation, which is a formal criticism that does not violate the political truth that Montesquieu wanted to mention, and which consists in distinguishing the three authorities in terms of organs and specialties.

It is impossible to apply the separation of powers in to real situations, and in the event that it was applied, it leads to the break-up of the state's unity and integrity.

However, reality confirms that the principle of the separation of powers has not come to break the unity of the State, but we see rather that the most coherent countries are those which fully apply this principle¹³, and that "Montesquieu" stressed the cooperation between the authorities which represent the State.

The distribution of powers to separate bodies from each other can lead to prejudice to the sovereignty of the state, and the jurist, Kari Malberg, believes that the authority of the state is one, but that its functions and organs are multiple¹⁴.

2.2 Second Subtitle: the principle of separation of powers in the Algerian constitution

By referring to the provisions of the Algerian constitution, we find that the Algerian constitutional founder has adopted the principle of separation of powers in cooperation between the executive and legislative branches, which mainly confirms the legislative work that was considered as one of the powers of the legislative authority in accordance with Article 140 of the 2016 constitutional amendment, and other articles, but the President of The Republic can also exercise the legislative process by order or decree in accordance with Article 142 of the 2016 constitutional amendment¹⁵, and the independence of the judiciary has been explicitly mentioned¹⁶. The Constitutional Council also stressed the principle of separation of powers in some of the decisions and opinions it has issued. Through the adoption of the principle of separation of powers by the constitutions of 1989 and 1996, the constitutional founder has attempted to highlight, symbolically, the will of the Algerian authorities to promote the rights of citizens, eliminate the state bureaucracy, which was embodied in the one-party state, and strengthen state organs in confronting it¹⁷.

At the level of organic separation, the Algerian constitutional legislator has made a rigid separation, envisaging the required effectiveness in the performance of each constitutional function.

At the functional level he has preferred making a flexible separation between the authorities, from the text on mutual oversight to mutual cooperation, so that an authority does not

seize the powers of another authority, with a clear advantage for the President of the Republic, who embodies the executive power, and rises to the level of The Arbiter between the powers and brings in his hand all the powers in exceptional situations, which is an periodic necessity¹⁸. If the legislative function is within the jurisdiction of Parliament in the fields specified by the law in accordance with Article 140 of the 2016 constitutional amendment as well as Article 141, which entrusts Parliament with the task of legislating under organic laws in certain fields, the legislative authority may in certain cases fail to exercise its functions as is the matter in exceptional circumstances such as wars, floods ... or in cases of a vacancy, or between the two sessions of Parliament, this is according to Article 142 of the 2016 constitutional amendment that granted the power to enact laws to the President of the Republic to confront these conditions .

This article affirmed that the enactment of ordinances by orders in the aforementioned cases and after taking the opinion of the Council of State, provided that those texts taken are presented to a chamber of Parliament in its first session for approval, and if it is not approved, those orders are canceled by the text of Article 142 of the constitutional amendment.

The last paragraph of the same article states that the President of the Republic can legislate by orders in the exceptional case mentioned in Article 107 of the Constitution. This article highlights an aspect of cooperation between the executive and legislative branches. Through Article 94 of the Constitutional

Amendment of 2016, whereby the Prime Minister submits the government's work plan to the National People's Assembly for approval, before proceeding to its implementation, and after that the Prime Minister makes a presentation on the government's business plan before the Council of the Nation as approved by the National People's Assembly, as well as discussing about general politic in accordance with Article 98 of the constitutional amendment.

The Parliament is also concerned by discussing and approving the Finance Law, and this is in accordance with the text of Article 8/138 of the constitutional amendment.

Likewise, the Parliament votes the law for budgetary adjustment of the financial year in question through an annual presentation about government's uses of financial allocations approved by Parliament for each financial year in accordance with Article 179 of the constitutional amendment.

“The two authorities also have constitutional means to influence each other by establishing a rule of balance of terror, so the President of the Republic can dissolve the National People's Assembly in exchange for the political responsibility of the government in front of him, either by withdrawing the confidence or by voting for a motion of control focused on the responsibility of the government¹⁹”.

As for their relations with the legislative authority, judges cannot interfere in the work of the legislature authority, either by issuing decisions that contain legislative texts by preventing or

suspending the enforcement of one or several laws, and there is no text to prevent the legislator from interfering in the work of the judiciary, and also no organ has been established that can bind the legislative authority to not interfere in the judicial work²⁰. However, the legislature can influence, directly or indirectly, the judicial authority through the following points:

1- When voting on the Basic Law of the Judiciary, and the texts related to its regulation.

2- The legislature affects the progress of cases before the judiciary by issuing laws that apply to it.

3- The Parliament votes on the applicant of censure, which means the resignation of the government, along with the Minister of Justice.

4- Depriving the judiciary of controlling the constitutionality of laws, so that the Algerian constitutional legislator has settled on the adoption of the Algerian Constitutional Council as a guarantee of oversight of the constitutionality of laws instead of the Constitutional Court.

However, reference can be made to the text of Article 188 of the 2016 Constitutional Amendment, which came to defend the constitutionality based on a referral from the Supreme Court or the Council of State, but this is in the case that the parties in the trial claim that the legislative provision on which the outcome of the conflict depends violates the rights and freedoms contained in the constitution. From it we conclude that the principle of separation of powers in Algeria has taken a flexible separation between the

authorities in terms of function and rigid separation in terms of organs with the presence of cooperation and mutual control between the state authorities, in particular the legislative and executive authority with the presence of the judiciary, which is the third authority in the state where it ensures the application of laws issued to the legislative authority, as well as orders issued by the executive authority, which are at the same time a protector of fundamental rights and freedoms, as expressly mentioned in the article 157 of the constitutional amendment, and with a relationship between them and between legislative and executive authority, and through some interference among them, and this in order to protect the rights and freedoms of individuals and society.

Hence, the principle of separation of powers is an important guarantee for the protection of rights and freedoms in contemporary political systems.

CONCLUSION

In light of what we reached upon when putting forward the subject of the principle of fundamental rights and freedoms that the Algerian legislator touched upon, we find that the legislator expanded the field of rights and freedoms through its successive constitutions, and the legislator went to more than that, he worked on devoting those rights and freedoms through a set of guarantees represented in the most important Constitutional principles, which are among the most important pillars for the consecration of rights and freedoms. The Algerian legislator did not stop there, but he

supported these fundamental rights and freedoms for the citizen with a series of constitutional mechanisms which give them constitutional protection, represented by the Constitutional Council and its role in the judicial protection of rights and freedoms, in particular through the role of the ordinary and administrative judge as well as the constitutional body recently created to protect rights and freedoms which is the National Council for Human Rights, through the text of article 198 of the constitutional amendment of 2016.

The Algerian legislator has followed international developments in the field of rights and freedoms. What draws attention in this field is that, despite his interest, we can make some observations, perhaps the most important of which lie with the following points:

- Referring some exercise of basic rights and freedoms to the organization without setting specific standards that must be observed regarding the issuance of these regulations or laws, where those basic rights and freedoms should not be stipulated in the texts of the articles, but rather in the specific and necessary lines and detailed provisions revolving around the matter and how to organize that right or that freedom.
- Despite the application of the principle of separation of powers within the state and with the presence of interference and cooperation between those authorities, especially the legislative

and executive branches, it is noticed the dominance and broad powers granted to the executive authority .

- It is noticed that there are many efforts in finding a special body for human rights and fundamental freedoms, starting from the delegated ministry in charge of human rights in 1991 to the end of the last body established in the National Council for Human Rights in 2016, but these efforts did not last much and soon expired for one reason or another .

From these results that were reached through this modest study, we can suggest some recommendations that we can summarize in the following points:

- Clarify specific features when referring to organic laws and how to apply some rights and freedoms, so that there is no collision or interference between the legislative text and the constitutional text.

- Ensure the application of control tools between legislative and executive authority to guarantee the fundamental rights and freedoms of individuals.

- Activating the role of the judiciary in the field of protecting rights and freedoms, by granting it the necessary independence in order to fully perform its role.

- The participation of all state bodies in the monitoring process, and strengthening their control role, which means activating and devoting the oversight process, and this is through the

Constitutional Council with regard to constitutional control of laws or by the Independent Supreme Commission for Elections Observation, the National Council for Human Rights ...

- Ensure the concretization and activation of the role of the National Council for Human Rights, created by the constitutional amendment of 2016, and that on the ground, in accordance with its powers defined by law.

Finally, it can be said that basic rights and freedoms contribute to the achievement constitutional institutions based on activating the oversight role among the authorities and the participation of all individuals in the conduct of public affairs, and the ability to achieve equality and justice among all individuals in society and ensure their freedoms.

Marginalization :

- Said Bouchair, 2002, Constitutional Law and Comparative Political Systems, University Publications Office, 5th Edition, Algeria, p. 192.

-Hani Ali Tahrawi, 2006, Political Systems and Constitutional Law, The House of Culture for Publishing and Distribution, Amman, p. 352.

- Norman Ahmad Al-Khatib, 1999, Mediator in Political Systems and Constitutional Law, Dar Al-Thaqafa for Publishing and Distribution, Amman, Jordan, p. 533.

Al-amine Cheriati, 1999, the brief in Constitutional Law and Comparative Political Institutions, University Press Office, Algeria, p. 139.

Said Bouchair, op.cit, P.84.⁵

Boukra Idris, 2005, The evolution of constitutional institutions in Algeria⁶ since independence through official documents and texts, Part 1, University Press Office, Algeria, , p. 97.

Said Bouchair, *op.cit*, p. 85⁷

Jaber Ibrahim Al-Rawi, 1999, *Human Rights and Fundamental Freedoms in International Law and Islamic Law*, Wael House for Printing and Publishing, First Edition, , p. 211.

Said Bouchair, *op.cit*, P.164⁹

Abdullah Abdul-Ghani Bassiouni, 2001, *Political Systems and constitutional law*; AL Maaref Foundation for Printing and Publishing , p 185

Abdullah Abdul-Ghani Basyouni, *op.cit* , pp. 264, 265.¹¹

Mouloud Didan, 2005, *Investigator in Constitutional Law and Political Systems*, Dar Al-Najah, 1st edition, Algeria, , p. 126

Miloud Zabih, 2007, *Separation of Powers in the Algerian Constitutional Experience*, Dar al-Huda, Ain Melila, Algeria, p. 22.

Abbar Ammar, 2009, *Reading in the Constitutional Amendment of 2008*,¹⁴ Algerian Journal of Legal, Economic and Political Sciences , p. 24.

Abdelkader Githawi, Ibrahim Tou Nasir, 11-12 March 2015 ,“The Principle of Separation of Powers and Its Impact on Rights and Freedoms”, an intervention delivered within the activities of the International Forum on the role of constitutional institutions in protecting rights and freedoms held on at the Faculty of Law and Political Science, Adrar University, p. 316.

Article 156 of Law 16-01 of March 6 ; 2016 ; containing the constitutional amendment ; official Gazette N°14 dated March 2016

Ammar Abbas, *op.cit* , p. 62¹⁷

AbdelHakim Merzouki, Salih Benchouri, *op.cit* , P.62¹⁸

Ammar Abbas, *op. Cit.*, P. 37.¹⁹

Boubchir Mohand Amokran, 2002 ,*The Judicial Authority in Algeria*, Dar²⁰ Al-Amal for Printing, Publishing and Distribution, Tizi Ouzou, Algeria, , p. 37.

Bibliography List :

1.Books:

- Said Bouchair, 2002, Constitutional Law and Comparative Political Systems, University Publications Office, 5th Edition, Algeria.
- Hani Ali Tahrawi, Political Systems and Constitutional Law, 2006, The House of Culture for Publishing and Distribution, Amman.
- Norman Ahmad Al-Khatib, 1999, Mediator in Political Systems and Constitutional Law, Dar Al-Thaqafa for Publishing and Distribution, Amman, Jordan.
- Al-amine Cheriati, 1999, the brief in Constitutional Law and Comparative Political Institutions, University Press Office, Algeria.
- Boukra Idris, 2005, The evolution of constitutional institutions in Algeria since independence through official documents and texts, Part 1, University Press Office, Algeria.
- Jaber Ibrahim Al-Rawi, 1999, Human Rights and Fundamental Freedoms in International Law and Islamic Law, Wael House for Printing and Publishing, First Edition
- . Abdullah Abdul-Ghani Bassiouni, 2001, Political Systems and constitutional law; AL Maaref Foundation for Printing and Publishing
- Mouloud Didan, 2005, Investigator in Constitutional Law and Political Systems, Dar Al-Najah, 1st edition, Algeria.
- Miloud Zabih, 2007, Separation of Powers in the Algerian Constitutional Experience, Dar al-Huda, Ain Melila.
- Boubchir Mohand Amokran, 2002 ,The Judicial Authority in Algeria, Dar Al-Amal for Printing, Publishing and Distribution, Tizi Ouzou, Algeria.

2. Journal article:

- Abbar Ammar, 2009, Reading in the Constitutional Amendment of 2008, Algerian Journal of Legal, Economic and Political Sciences.

3. Seminar article

Abdelkader Githawi, Ibrahim Tou Nasir, 11-12 March 2015 ,“The Principle of Separation of Powers and Its Impact on Rights and Freedoms”, an intervention

delivered within the activities of the International Forum on the role of constitutional institutions in protecting rights and freedoms held on at the Faculty of Law and Political Science, Adrar University.

4. Legal texts

-Law16-01 of March 6 ; 2016 ; containing the constitutional amendment ; official Gazette N°14 dated March 2016.