

Constitutional Judiciary in Maghreb Countries: The Algerian and Tunisian Constitutional Courts as Models :Tradition or Transformation in Constitutional Justice?

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Abstract

This article aims to shed light on the most important constitutional bodies tasked with ensuring and safeguarding the protection and respect of the constitutional legal rule. It is observed from the outset that the spread of judicial review over the constitutionality of laws is accompanied by a decline in political oversight, which may give the impression that judicial oversight is better than political oversight. This prompted us to conduct this study, through which we highlight the two most important constitutional courts in the Maghreb, namely the Algerian Constitutional Court and its Tunisian counterpart, by addressing the founding texts of these courts, as well as their composition and the powers granted to them, in order to confirm or deny the ability of these bodies to perform their assigned role.

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Introduction

The oversight of the constitutionality of laws constitutes one of the pillars upon which the rule of law is based. Therefore, hardly any constitution fails to assign this role to a neutral institution whose main task is to ensure the supremacy of the constitutional rule, and the resulting respect by the public authorities of the state for their competencies, as well as the guarantee and respect of rights and freedoms, which are the ultimate goal of any democratic system.

The process of building Algerian state institutions culminated in the provision for the establishment of constitutional courts, which means the adoption of the judicial review model-a model now preferred by most countries due to its advantages compared to political oversight, which, over time, has proven suitable only in certain environments and is certainly no longer appropriate in Algeria, especially after the profound transformations that those in power in Algeria are seeking to achieve. This conviction is reinforced by reports prepared by experts of the European Commission for Democracy through Law, which have confirmed the preference for following constitutional courts.

Through this study, we will attempt to examine the Algerian Constitutional Court by addressing the texts governing its establishment, composition, and competencies, what distinguishes it from the oversight body that previously existed-the Constitutional Council-and by comparing it with its Tunisian counterpart, based on the Maghreb geographical dimension of the two countries and the extent to which each constitutional founder has influenced the other regarding the constitutional court.

Accordingly, the study's problem will focus on the extent to which the Algerian Constitutional Court, based on the texts establishing and regulating its work, is capable of achieving the intended goal of its creation, namely, the effective protection of the provisions of the Constitution as well as rights and freedoms, in comparison with the Tunisian Constitutional Court as provided for in Article 118 and subsequent articles of the Tunisian Constitution.

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The Algerian Constitutional Court

The Algerian constitution, after independence, recognized the supremacy of constitutional law, granting it the value and status it deserves. It often placed constitutional law at the apex of the legal system. Like other constitutions, it entrusted the task of protecting its respect to bodies and institutions whose primary function is to monitor the conformity of legal rules with constitutional principles. Any deviation from this is considered null and void. For example, the legislative authority, when enacting legal rules, must adhere to the supreme principle, as must the government. Thus, the constitutionality of laws is subject to judicial review.⁽¹⁾

After this task had been entrusted to the Constitutional Council, the 2020 Constitution established a successor to it, namely the Constitutional Court, as stated in Chapter Four, Section One, which is a new section under the constitutional amendment.⁽²⁾ Article 185 of the 2020 Constitution states: "The Constitutional Court is an independent institution tasked with ensuring respect for the Constitution."

The Composition of the Algerian Constitutional Court

Referring to the text of Article 186 of the 2020 Constitution, the Constitutional Court consists of 12 members, four of whom are chosen by the President of the Republic, including the President, one of whom is elected by the Supreme Court from among its members, one member is elected by the Council of State from among its members, and six members are elected by general vote from among professors of constitutional law. Before commencing their duties, the members of the Constitutional Court take the oath before the First President of the Supreme Court.

According to Article 188 of the 2020 Constitution, the President of the Republic appoints the President of the Constitutional Court for a single term of six years, and the same applies to the members of the Constitutional Court, also for a single term of six years, with half of its members to be renewed every three years. This is a change from the 2016 Constitution, which stipulated an eight-year term with half the members being renewed every four years. The justification for the longer term was to strengthen the legal standing of the members of the Constitutional Council and to adopt international standards in this area.⁽¹⁾

However, the reason for reducing the term is not understood, given its implications for the stability of this constitutional institution. As for the appointment of the head of the court by the President of the Republic, it would have been better, in order to remove the influence and interference of the President of the Republic in the Constitutional Court through the appointment of the head, to adopt what the Tunisian constitutional founder stipulated through Article 118 of the Tunisian Constitution, which stipulated that the members of the court elect from among themselves a president and a deputy president from among those who are specialists in law.

Analysis of the provisions governing the Algerian Constitutional Court

The most notable thing to note is the absence of representation of the legislative authority in the formation, after it was represented in the Constitution, after it was represented in the Constitutional Council in the 2016 Constitution by four members, two elected by the National People's Assembly and two elected by the Council of the Nation.

⁽¹⁾Ahmed Wafi, Boukra Idris, *The General Theory of the State and the Algerian Political System under the 1989 Constitution*, Algeria, Algerian Printing Corporation, 1992, p. 99.

⁽²⁾Ammar Boudiaf, *Constitution of the People's Democratic Republic of Algeria 2020*, Jousour Publishing and Distribution, 2021, p. 133.

⁽¹⁾Fatima Zahra Ramdani, *A Study on the New Constitutional Amendments in Algeria 2016*, New University Publishing, 2016, p. 210.

The justification for this is unknown, as the wording of Article 185 of the 2020 Constitution, which stipulated that "the Constitutional Court is an independent institution tasked with ensuring respect for the Constitution," did not specify the judicial nature of the institution despite its name as a court. If the constitutional founder had considered it a judicial body and had not opened membership in it to anyone other than the judiciary, then the lack of representation of the legislative authority would have been acceptable. In addition, excluding the legislative authority from representation in the court diminishes its credibility, as it is one of the public authorities in the state. On the one hand, it is given the right to notify and is prevented from being represented.

Similarly, regarding the representation of the judiciary, it is now represented in the Constitutional Court by one judge elected from the Supreme Court and one from the Council of State, whereas previously it was represented in the Constitutional Council by two judges from each. This means that after the founder adopted judicial oversight by designating the body responsible for oversight as the Court, he is now making what he considers a fundamental amendment: reducing the number of judges representing the judiciary! This is especially significant considering that the Court was established for the advantages it offers; in addition to adjudicating disputes equally between the parties, the judge possesses the necessary technical qualifications and experience to perform this function.⁽¹⁾

Furthermore, the role of judges in the Constitutional Court is strengthened by the jurisdiction established by the 2016 Constitution and enshrined in the 2020 Constitution through Article 195, which finds its roots in the French constitutional amendment of July 23, 2008, through Article 61. This amendment allowed, for the first time, appeals against legislative rulings before the ordinary courts.⁽¹⁾

Likewise, the issue of the swearing-in of the members of the Constitutional Court under the 2020 Constitution has become before the First President of the Supreme Court, after it was, according to Article 183 of the 2016 Constitution, before the President of the Republic. This can be interpreted as diminishing the value of the Constitutional Court, since how, after the oath was taken before the President of the Republic, the President of the Constitutional Court now takes it before the President of the Supreme Court? Why not take the oath before the people, as is the case for the President of the Republic, since the President of the Republic takes the oath before the people in the presence of all the supreme bodies of the nation during the week following his election, according to Article 89 of the 2020 Constitution.

Regarding the age requirement for appointed or elected members, the 2020 constitution raised it to 50 years, after the 2016 constitution stipulated only 40 years, and it increased the period of experience in law, from 15 to 20 years.

The condition introduced by the 2020 Constitution is the enjoyment of civil and political rights, and the absence of any prior convictions for a custodial sentence. The condition of non-affiliation with any political party is also a new requirement under the 2020 Constitution.

This condition raises a problem with its wording: is the intention to avoid party affiliation during appointment or election to the Supreme Court or during its course? Whatever the intention, it is unacceptable, even if it is understood that this text came to distance the Constitutional Court from all suspicion, on the other hand it may lead to the exclusion of competencies needed by the court and prevent individuals from exercising their constitutionally guaranteed rights, especially since the establishment and membership in political parties is guaranteed by constitutional texts, and the 2020 Constitution came to expand and enshrine rights and freedoms, not to restrict them, according to the justifications and motives that were put forward and behind its existence in the first place.

The absence of the position of Vice President in the formation of the court, which was stipulated in the 2016 Constitution for the formation of the Constitutional Council, and whose purpose was to run the body

⁽¹⁾Mawloud Mansour, *Research in Constitutional Law*, Mufum PublishingRAAlgeria, 2010, p. 116.

⁽²⁾Ammar Koussa, *Research in Constitutional Law*, Dar Houma, Algeria, 2018, p. 137.

smoothly and to deal with new circumstances in an organized manner, raises the question of what is the motive for not stipulating the position of Vice President, especially since the experience of the 2016 Constitution is short and insufficient to evaluate this provision and to say that it is not useful and to refute the justifications and reasons that were behind stipulating it.

The Jurisdiction of the Algerian Constitutional Court

Regarding its powers, Article 190 of the 2020 Constitution stipulates that, in addition to the powers expressly conferred upon it by other provisions of the Constitution, the Constitutional Court shall rule on the constitutionality of treaties, laws, and regulations. The Constitutional Court may be notified of the constitutionality of treaties before their ratification, laws before their promulgation, and regulations within one month of their publication.

The Constitutional Court issues a ruling on the conformity of laws and regulations with treaties, under the conditions specified in paragraphs 2 and 3 above. Mandatory review requires the President of the Republic to notify the Constitutional Court of the conformity of organic laws with the Constitution after their ratification by Parliament. The Constitutional Court issues a ruling on the entire text.

The Constitutional Court decides on the conformity of the internal regulations of each of the two chambers of Parliament with the Constitution, according to the procedures mentioned in the previous paragraph.

Defining the scope of constitutional review by limiting the texts that fall within it does not mean that all texts are subject to mandatory constitutional review in all cases. From this perspective, it is necessary to distinguish between texts whose constitutional review is mandatory, and texts that may or may not be subject to this review; that is, a distinction must be made between mandatory constitutional review and optional review.⁽¹⁾This is evident from the aforementioned articles. The Constitutional Court may be notified by the bodies specified in Article 193 below regarding any disputes that may arise between constitutional authorities. These bodies may also notify the Constitutional Court concerning the interpretation of one or more constitutional provisions, and the Constitutional Court will issue an opinion on the matter.

The Constitutional Court intervenes after being notified by the President of the Republic, the Speaker of the Council of the Nation, the Speaker of the National People's Assembly, the Prime Minister, or the Head of Government, as the case may be. The Constitutional Court deliberates in closed session and issues its decision within 30 days of being notified. In the event of an emergency, and at the request of the President of the Republic, this period is reduced to ten days.

The Constitutional Court may be notified of a plea of unconstitutionality based on a referral from the Supreme Court or the Council of State, when a party to a trial before a judicial body claims that the legislative or regulatory provision on which the outcome of the dispute depends violates his rights and freedoms guaranteed by the Constitution.

When the Constitutional Court is notified based on the above paragraph, its decision shall be issued within four months of the date of notification. This period may be extended once for a maximum of four months, by a reasoned decision of the Court, which shall be communicated to the notifying judicial authorities.

The Constitutional Court makes its decisions by a majority vote of its members present, and in the event of a tie, the president's vote is decisive. Decisions concerning the review of organic laws are made by an absolute majority of the members.

⁽¹⁾Saleh Belhadj, *Political Institutions and Constitutional Law in Algeria from Independence to the Present Day*, University Publications Office, 2010, p. 318.

It is noticeable from the jurisdiction of the Constitutional Court and the bodies to which it is notified that the constitutional framers approached this newly established institution with caution. Perhaps this apprehension stemmed from what happened with the US Supreme Court, which overstepped its bounds in its oversight of the constitutionality of laws issued by the US Congress, to the point that it provoked both the legislative and executive branches against it. It even opposed the reform program proposed by President Roosevelt in the 1930s, leading some legal scholars to refer to it as a "government of judges," and to Chief Justice Marshall as the second framer of the Constitution.⁽¹⁾

The most important controls that the US Supreme Court adheres to in exercising oversight are:

Firstly The court shall not address the constitutional issue unless it is necessary to resolve the original dispute.

secondly: The principle is that all laws issued by the legislative authority are presumed to be within the limits set by the constitution for that authority. When examining the constitutionality of laws, the judiciary must not deviate from this principle unless the conflict between the law and the constitution is clear and explicit. This means that the court will not rule a law unconstitutional unless the unconstitutionality is beyond any reasonable doubt. Furthermore, if a law can be interpreted in more than one way, and one of these interpretations makes it consistent with the constitution, the court must adhere to that interpretation as long as the wording of the law allows for it.

Third The court does not exercise oversight of laws except for technical oversight of a purely legal nature, and excludes every unconstitutional element from this oversight. It does not discuss the necessity or lack thereof of legislation, nor does it monitor its suitability or wisdom, and it takes the appearance of the legislative text as a basis for examining its constitutionality without investigating its true motives.

Fourth: Excluding political issues from the scope of legal oversight⁽¹⁾ This is the approach that the Supreme Constitutional Court in Egypt has followed, and which the Algerian Constitutional Court should follow if it wants to achieve the purpose for which it was established without getting bogged down in the labyrinth of political disputes between the public authorities in the state.

The Tunisian Constitutional Court

Before the January Revolution, Tunisia had a Constitutional Council, which is the body that oversees the constitutionality of laws. However, this council was unable to perform its constitutional oversight because the Constitutional Council was not independent of the executive authority, and the President of the Republic was the only one who had the right to challenge the constitutionality of laws.

Composition of the Tunisian Constitutional Court

The Tunisian constitutional founder included the Constitutional Court within the chapter on the judiciary, and the second section entitled "Constitutional Court" was allocated in Article 118 of the 2014 Constitution. The Constitutional Court is an independent judicial body composed of twelve competent members, three-quarters of whom are legal experts with no less than twenty years of experience.

The President of the Republic, the Assembly of the Representatives of the People, and the Supreme Judicial Council each appoint four members, three-quarters of whom must be legal experts. Appointments are for a single nine-year term. One-third of the members of the Constitutional Court are replaced every three years, and any vacancies are filled using the same procedures as when the Court was established, taking into

⁽¹⁾Mouloud Didane, *Studies in Constitutional Law and Political Systems*, Dar Belqis, Algeria, 2020, p. 88.

⁽¹⁾Farouk Abdel-Barr, *The Role of the Egyptian Constitutional Court in Protecting Rights and Freedoms*, Golden Eagle Printing, Cairo, 2004, p. 21.

account the appointing authority and the required expertise. The members of the Court elect from among themselves a President and a Vice-President, both of whom must be legal experts.

This makes the court, in principle, subject to the judicial system, to be a part of it, and subject to the general principles that govern this authority, while acknowledging its structural and functional distinctiveness, which makes it an independent body from the rest of the components of the judicial authority.⁽¹⁾

Analysis of the provisions governing the Tunisian Constitutional Court

The contribution of the three branches of the state in forming the Constitutional Court, where the President of the Republic appoints four members, the Assembly of the Representatives of the People appoints four, and the Supreme Judicial Council appoints four. If the term "appoints" is used for the members appointed by the President of the Republic, the use of the term "appointment" raises the question of how the appointment is made or whether it means election.

The addition of the condition that three-quarters of them must be specialists in law raises a problem regarding the application of this condition, especially knowing that the appointing authority is not unified, nor is the timing of the appointments.

Otherwise, the intention of the constitutional founder is that each body with the right of appointment is obliged to appoint three specialists in law out of the four. The matter of electing the president by the members of the court means that the court is sovereign in this choice, and no body has the authority to appoint the president, and the same applies to the vice-president. This is a positive point in favor of the Tunisian constitutional founder, as it puts all members on the same level, with no fundamental difference between the members and the president, so that any member can become president if approved by their colleagues.

The organic law also enabled the Constitutional Court to recruit assistants specialized in law, with the possibility of resorting to competent experts for assistance in matters brought before it.⁽¹⁾

The Jurisdiction of the Tunisian Constitutional Court

According to Article 120 of the Tunisian Constitution, the Constitutional Court alone has jurisdiction over constitutional review:

Draft laws, at the request of the President of the Republic, the Head of Government, or 30 members of the House of Representatives, shall be submitted to it within a maximum period of seven days from the date of the House's approval of the draft law or from the date of its approval of a draft law in an amended form after it has been returned by the President of the Republic.

Constitutional bills submitted to it by the Speaker of the House of Representatives, as stipulated in Article 144, or to monitor compliance with the procedures for amending the Constitution.

Treaties that are presented to her by the President of the Republic before the draft law approving them is finalized,

It reviews laws referred to it by the courts following a plea of unconstitutionality raised by one of the litigants, in accordance with the procedures established by law, and the internal regulations of the House of

⁽¹⁾Linda Ounissi, The Constitutional Court in Algeria: A Comparative Study of Composition and Jurisdictions, *Journal of Judicial Reasoning*, Volume 13, Issue 28, 2021, p. 108.

⁽¹⁾Azhar Laabidi, Mabrouka Mahrez, Constitutional Oversight in the Maghreb Countries under Constitutional Reforms: Algeria, Tunisia, and the West as Examples, *Journal of Legal and Political Sciences*, Issue 14, 2016, p. 225.

Representatives submitted to it by the Speaker. It also undertakes other tasks assigned to it by the Constitution.

According to Article 121, the court issues its decision within 45 days from the date of the challenge to the constitutionality of its members.

The court's decision states that the rulings under appeal are constitutional or unconstitutional, and its decision is reasoned and binding on all authorities, and is published in the Official Gazette of the Republic of Tunisia.

If the deadline stipulated in the first paragraph expires without the court issuing its decision, it is obligated to immediately refer the draft law to the President of the Republic. Article 122 of the Tunisian Constitution stipulates that an unconstitutional draft law shall be referred to the President of the Republic and from there to the Assembly of the Representatives of the People for further deliberation in accordance with the Constitutional Court's decision. The President of the Republic must, before promulgating the draft law, return it to the Constitutional Court for review of its constitutionality.

In the event that the Assembly of the Representatives of the People approves a draft law in an amended form after its return, and the court has previously declared its constitutionality or referred it to the President of the Republic due to the expiration of deadlines without issuing a decision on it, the President of the Republic must refer it to the Constitutional Court before promulgation.

Article 123 added that when the Constitutional Court is seized following a plea of unconstitutionality of a law, its review is limited to the objections raised, and it shall rule on them within three months, extendable once for the same period, by a reasoned decision. If the Constitutional Court rules that the law is unconstitutional, the application of the law shall be suspended to the extent decided by the court.

Conclusion:

Through an extensive study of the constitutional texts regulating the constitutional courts in both countries, we note that there are many fundamental differences between the two systems, although at first glance the student believes, especially through the names, that both the constitutional founders in both countries adopted the method of judicial review. This belief quickly fades, as the Algerian constitutional founder appears to still have a long way to go to bring the constitutional court to safety and adopt judicial review in letter and spirit, because through our study of the texts establishing and regulating the constitutional court, we found that after he named the court as an independent institution and made its mission to protect the constitution, he could not declare the judicial nature of the court, unlike the Tunisian constitutional founder, who settled the matter by stipulating that “the Constitutional Court is a judicial body.”

Another advantage of the Tunisian Constitutional Court is that its president is chosen by its members, unlike the Algerian Constitutional Court, whose president is appointed by the President of the Republic, which puts it in a position of being influenced and loyal to the appointing authority.

Likewise, the issue of appointing a vice president for the Algerian constitutional founder, which he backtracked on despite its advantages, is unjustified. Therefore, one of the new shortcomings is the reversal of the gains achieved under the 2016 constitution.

Likewise, the main conclusion is that the Tunisian constitutional founder's excessive raising of the ceiling of ambition by putting in place texts without taking into account the reality of constitutional balances and actors is met with realism on the part of the Algerian constitutional founder, and the proof is the establishment and installation of the Constitutional Court in Algeria, while it remains ink on paper for our brothers in Tunisia.