

The Plea of Unconstitutionality in Algerian Law: An Analytical Reading in Light of the 2020 - Constitutional Amendment and Organic Law No. 22-19

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Abstract:

This study examines the plea of unconstitutionality in the Algerian legal system, from its introduction by Article 188 of the 2016 constitutional amendment and Organic Law No. 18-16, to its reorganization under Article 195 of the 2020 constitutional amendment and Organic Law No. 22-19. It asks to what extent the Algerian legislator has succeeded in making this mechanism an effective tool for litigants to protect their constitution alights and freedoms. Using an analytical method applied to constitutional and legislative texts and to constitutional case law, the study concludes that Organic Law 22-19 remedied several short comings of the previous regime, notably by extending the plea regulatory provisions, allowing it before the first-instance criminal court, and recognize in third-party intervention; yet the effectiveness of the mechanism still depends on the double filtering system, on the vagueness of the "seriousness" and "change of circumstances" criteria, and on the absence of a fixed time limit for the trial judge.

Keywords: Plea of unconstitutionality; Constitutional Court; Organic Law 22-19; a posteriori review; rights and freedoms.

Introduction

The principle of the supremacy of the Constitution is based on the subordination of all legal rules to the constitutional document. It is from this principle that the constitutional challenge derives its legal basis, as it makes the hierarchy of laws a criterion for examining the conformity of each legal provision with the higher-ranking provision, ultimately with the Constitution.² Comparative legal systems have adopted various forms of protection for this principle, including ex post judicial review through an incidental constitutional challenge, which seeks to prevent the application of a provision that is contrary to the Constitution to the dispute at hand. This mechanism is considered less stringent than review through a direct action, which aims to challenge the law itself and seek its annulment.³

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² Abd al-Rahman Souak, "The Constitutional Challenge in Criminal Matters," Journal of the Research Professor for Legal and Political Studies, Vol. 04, No. 01, 2019, pp. 276–290, p. 278.

³ Abd al-Razzaq Al-Wafi, "An Examination of Organic Law No. 18-16 Determining the Conditions and Procedures for Applying the Constitutional Challenge," Al-Sada Journal of Legal and Political Studies, University Center of Maghnia, Vol. 02, No. 02, March 2020, pp. 169–183, pp. 171–172.

Until relatively recently, the Algerian system relied on political review exercised by the Constitutional Council upon referral by specifically designated authorities. However, the 2016 Constitutional Amendment represented a qualitative shift by introducing, under Article 188 thereof, the mechanism of constitutional challenge, thereby allowing individuals to challenge legislative provisions that infringe upon their constitutionally guaranteed rights.⁴ Subsequently, Organic Law No. 18-16 was enacted to determine the conditions and procedures for implementing this mechanism, and it entered into force on 7 March 2019.⁵

The 2020 Constitutional Amendment retained this mechanism and strengthened it by establishing a Constitutional Court in place of the Constitutional Council and by broadening the scope of provisions subject to constitutional challenge.⁶ Article 195 thereof provides for the referral of a constitutional challenge to the Constitutional Court following a referral by the Supreme Court or the Council of State, where one of the parties claims that the legislative or regulatory provision upon which the outcome of the dispute depends infringes upon the rights and freedoms guaranteed by the Constitution.⁷ Article 196 refers to an organic law for determining the procedures governing notification and referral.⁸ Accordingly, Organic Law No. 22-19 was enacted, repealing Organic Law No. 18-16.⁹

The importance of this subject lies in the fact that the constitutional challenge transferred the right to initiate constitutional review from the political sphere to litigants themselves.¹⁰ Furthermore, the succession of two legal regimes within a relatively short period calls for an assessment of what the new regime has introduced and of the issues that have remained unresolved, as revealed by the initial applications of the Constitutional Council.

The subject has attracted considerable attention in Algerian legal scholarship since the enactment of Organic Law No. 18-16. Some studies have provided a general examination of its provisions and conditions, while others have focused on the specific features of the constitutional challenge in criminal matters or before the trial judge. Another study was devoted to commenting on the first decision issued by the Constitutional Council in this field. More recent studies have addressed the conditions and procedures of the constitutional challenge in light of Organic Law No. 22-19. However, most of these studies have focused on one of the two legal regimes rather than examining both. This is the gap that the present study seeks to address by examining the new regime in light of the issues revealed by the experience of the previous regime.

Accordingly, the study raises the following research question: To what extent has the Algerian legislator, through Article 195 of the 2020 Constitution and Organic Law No. 22-19, succeeded in making the constitutional challenge an effective mechanism for protecting the constitutional rights and freedoms of litigants?

To address this question, we have adopted the analytical method to examine constitutional and legislative provisions, as well as the opinions and decisions of constitutional courts, while drawing, where appropriate, on a comparison between the 2016 and 2020 regimes. The study is structured into two sections. The first examines the conceptual framework and constitutional foundations of the constitutional challenge, while the second is devoted to its conditions, procedures, and legal effects.

Section One: The Concept of the Plea of Unconstitutionality and Its Legal Nature

⁴ Awatif Louz, "Commentary on Constitutional Council Decision No. 19/01 Declaring the Provisions of Article 416 of the Code of Criminal Procedure Unconstitutional," *Journal of Rights and Freedoms*, Vol. 09, No. 02, 2021, pp. 1040–1059, p. 1041; and Law No. 16-01 of 6 March 2016, concerning the Constitutional Amendment, *Official Gazette of the People's Democratic Republic of Algeria*, No. 14, issued on 7 March 2016, Article 188.

⁵ Article 26 of Organic Law No. 18-16 of 22 Dhu al-Hijjah 1439 AH, corresponding to 2 September 2018, determining the conditions and procedures for applying the constitutional challenge, *Official Gazette of the People's Democratic Republic of Algeria*, No. 54, issued on 5 September 2018, pp. 10–12.

⁶ Awatif Louz, *op. cit.*, p. 1042.

⁷ Article 195 of the 2020 Constitution, promulgated pursuant to Presidential Decree No. 20-442 of 15 Jumada al-Awwal 1442 AH, corresponding to 30 December 2020, concerning the promulgation of the Constitutional Amendment approved by the referendum of 1 November 2020, *Official Gazette of the People's Democratic Republic of Algeria*, No. 82, issued on 30 December 2020, p. 41.

⁸ Article 196 of the 2020 Constitution, *ibid.*, p. 41.

⁹ Article 44 of Organic Law No. 22-19 of 26 Dhu al-Hijjah 1443 AH, corresponding to 25 July 2022, determining the procedures and modalities for notification and referral before the Constitutional Court, *Official Gazette of the People's Democratic Republic of Algeria*, No. 51, issued on 31 July 2022, pp. 7–11.

¹⁰ Abd al-Razzaq Al-Wafi, *op. cit.*, p. 170.

Subsection One: Definition of the Plea of Unconstitutionality

Neither Organic Law No. 18-16 nor Organic Law No. 22-19 provides a definition of the plea of unconstitutionality; rather, both laws merely set out its conditions and procedures.¹¹ The Algerian Constitutional Council defined it as “a right granted to every litigant who claims before a judicial authority that the legislative provision upon which the outcome of the dispute depends infringes the rights and freedoms guaranteed by the Constitution, by notifying the Constitutional Council through a referral from the Supreme Court or the Council of State.”¹² This definition is derived from the wording of Article 188 of the 2016 Constitution itself.

This concept is close to the definition adopted by the French Constitutional Council of the Priority Preliminary Ruling on Constitutionality (Question Prioritaire de Constitutionality – QPC) as a right granted to any party to proceedings before a civil, administrative, or criminal court to request an examination of the conformity of the law applicable to the proceedings with the Constitution, by means of a separate written submission, insofar as the judge does not have the authority to raise the issue on his or her own initiative.¹³ Among the comprehensive doctrinal definitions is the following: “a means of defence through which one of the parties seeks to challenge the legislative provision intended to be applied by a judicial authority on the grounds that it violates the Constitution.” This definition identifies the nature of the plea as a means of defence, specifies its holder, namely the litigants, and determines its subject matter, namely the provision alleged to be unconstitutional.¹⁴

In light of Article 195 of the 2020 Constitution, the plea of unconstitutionality may be defined as a procedural mechanism raised by one of the parties to proceedings pending before a judicial authority belonging to either the ordinary or administrative judicial system, by means of a written, separate, and reasoned submission, alleging that a legislative or regulatory provision upon which the outcome of the dispute depends, or which constitutes the basis for the proceedings, violates the rights and freedoms constitutionally guaranteed to that party. The purpose of such a plea is to have the matter referred, through the Supreme Court or the Council of State, to the Constitutional Court for a ruling on its constitutionality. This definition demonstrates that the plea constitutes a judicial procedure through which ex post constitutional review of legal provisions is exercised, whereas constitutional review had previously been conducted only prior to the enactment of the law.¹⁵

The Algerian model differs from constitutional review by way of a plea as understood in the American system, where the ordinary judge competent to hear the original case is also competent to rule on the constitutional issue. In Algeria, by contrast, the constitutional issue constitutes an incidental matter that requires the judge to suspend consideration of the original proceedings pending the decision of the authority competent to exercise constitutional review.¹⁶ Accordingly, the Algerian system constitutes a centralized model of ex post constitutional review, in which the constitutional judge has exclusive authority to declare a provision unconstitutional, while the role of the ordinary and administrative judge is limited to initiating the constitutional review procedure.

The plea of unconstitutionality pursues a number of objectives, the most prominent of which are: ensuring the supremacy of the constitutional rule; granting litigants a new right to defend their rights and freedoms through indirect access to constitutional adjudication; purifying the legal system of unconstitutional provisions; and overcoming the shortcomings associated with abstract prior review, which is confined to the political sphere¹⁷.

Subsection Two: The Legal Nature of the Plea of Unconstitutionality

First: The plea of unconstitutionality is not a matter of public policy.

The legislature has settled this issue through an explicit provision. Article 4 of Organic Law No. 18-16 stipulates that “the plea of unconstitutionality may not be raised ex officio by the judge.”¹⁸ Article

¹¹ Souak Abdelrahmane, op. cit., pp. 279–280.

¹² El-Wafi Abdelrazak, op. cit., p. 172, citing the website of the Constitutional Council.

¹³ Souak Abdelrahmane, op. cit., p. 280; and El-Wafi Abdelrazak, op. cit., p. 172.

¹⁴ El-Wafi Abdelrazak, op. cit., p. 173.

¹⁵ Laidi Khira and Wafi Hadja, “The Plea of Unconstitutionality before the Trial Judge,” *Journal of Real Estate Law and Environment*, Vol. 7, No. 13, June 2019, pp. 54–93, p. 56.

¹⁶ Laidi Khira and Wafi Hadja, op. cit., p. 58.

¹⁷ Ibid., p. 64.

¹⁸ Article 4 of Organic Law No. 18-16, op. cit., p. 10.

17 of Organic Law No. 22-19 reaffirmed the same rule and extended it to include trial judges, public prosecution judges, and State Counsel.¹⁹ It follows that this plea does not concern matters of public policy.²⁰

Legal scholarship notes that this rule appears, at first sight, to conflict with the admissibility of raising the plea for the first time on appeal or cassation, a feature that brings it close to pleas relating to matters of public policy.²¹ In our view, however, there is no contradiction between the two rules, since the admissibility of raising the plea at any stage is justified by the fact that the provision applicable to the case may not become apparent until the proceedings have progressed, whereas initiating the plea remains a personal right of the litigant, which cannot be exercised by the judge.

It is noteworthy, however, that under Organic Law No. 22-19, the legislature empowered members of the Public Prosecution and State Counsel to submit written observations concerning the plea, at the request of the Constitutional Court.²² This reflects the objective dimension of constitutional litigation.

Second: The plea of unconstitutionality is a substantive plea with an independent legal character.

Most legal scholars consider the plea of unconstitutionality to be a substantive plea that may be raised at all stages of the proceedings, unlike procedural pleas, which must be raised before any defense on the merits; otherwise, the right to invoke them is forfeited.²³

Nevertheless, the plea does not fall entirely within the general theory of pleas, because the trial judge does not rule on its substance, namely, the constitutionality of the provision. Rather, the judge's role is limited to determining whether the conditions for referring the plea have been satisfied. This was confirmed by the Constitutional Council in its interpretative reservation concerning the provision governing the conditions for referral, when it held that judges are bound by limits that allow them only to assess whether the relevant conditions are satisfied, "without extending this assessment to determining the constitutionality of the legislative provision challenged."²⁴

Thus, under this model, the ordinary and administrative courts serve merely as an intermediary between the litigant and the body entrusted with constitutional review.²⁵

Following the enactment of Organic Law No. 18-16, scholarly opinion became divided as to whether this plea should be regarded as a procedural or substantive plea. Some scholars considered it a substantive plea on the grounds that it may be raised at any stage of the proceedings. Others regarded it as a procedural plea because it results in deferring the adjudication of the case, in a manner similar to the pleas regulated under the procedural pleas provided for in the Code of Civil and Administrative Procedure. In our view, the more accurate characterization is that it constitutes a substantive action²⁶, rather than a personal action, since recourse to the constitutional judge preserves the abstract review of the legal provision without resolving the dispute pending between the parties.²⁷ Accordingly, classifying it as either a procedural or substantive plea in the traditional sense does not fully capture its specific legal nature; rather, certain rules governing both types of pleas may be applied to it to the extent that they do not conflict with the provisions of the Organic Law.

Third: The Plea of Unconstitutionality as an Incidental Matter

Once a decision has been made to refer the plea, the judicial authority is required to stay proceedings in the dispute until it receives the decision of the Supreme Court, the Council of State, or the Constitutional Court.²⁸ This gives the plea the character of a preliminary incidental matter that the criminal judge may not adjudicate and with respect to which he or she must await a ruling from the

¹⁹ Article 17 of Organic Law No. 22-19, op. cit., p. 9.

²⁰ El-Wafi, Abdelrazak, op. cit., p. 174.

²¹ Souak, Abderrahmane, op. cit., pp. 281–282.

²² Article 17, paragraph 2, of Organic Law No. 22-19, op. cit., p. 9.

²³ Souak, Abderrahmane, op. cit., p. 281; and El-Wafi, Abdelrazak, op. cit., p. 173.

²⁴ Opinion of the Constitutional Council No. 03/R.Q.C./C.C./18, dated 20 Dhu al-Qi'dah 1439 AH, corresponding to 2 August 2018, concerning the review of the conformity of the Organic Law determining the conditions and procedures for implementing the plea of unconstitutionality with the Constitution, Official Gazette of the People's Democratic Republic of Algeria, No. 54, issued on 5 September 2018, pp. 4–10, p. 6.

²⁵ El-Wafi, Abdelrazak, op. cit., p. 177.

²⁶ Kheira Laidi and Hadja Wafi, op. cit., p. 64.

²⁷ Ibid., same page.

²⁸ Article 25 of Organic Law No. 22-19, op. cit., p. 10.

competent authority. This is analogous to the preliminary matters provided for under Article 331 of the Code of Criminal Procedure.²⁹

Section Two: The Constitutional and Legislative Foundations of the Plea of Unconstitutionality

Subsection One: The Foundational Framework of the Plea under the 2016 Constitution and Organic Law No. 18-16

Prior to 2016, constitutional review by the Constitutional Council was limited to referrals made by the President of the Republic and subsequently by the Presidents of the two Houses of Parliament. Following the 2016 constitutional amendment, the right of referral was extended to the Prime Minister, fifty deputies, and thirty members of the Council of the Nation, pursuant to Article 187. The Constitution then provided, for the first time, in Article 188, for the plea of unconstitutionality, which may be raised by ordinary individuals in the course of judicial proceedings to which they are parties.³⁰

Organic Law No. 18-16 was enacted in five chapters, addressing general provisions; the conditions and procedures governing the exercise of the plea; the provisions applicable before the Supreme Court and the Council of State; the provisions applicable before the Constitutional Council; and the final provisions.³¹ Prior to its enactment, the law was subject to a conformity review, following which the Constitutional Council issued Opinion No. 03/18/, declaring several of its provisions to be in conformity with the Constitution, subject to interpretative reservations. Among these was the interpretation of the term “immediately,” used in relation to the judicial authority’s decision to transmit the plea, as meaning “without delay.” The Council also required replacing the word “independent” with the word “separate” when describing the plea memorandum, thereby meaning that it must be separate from the memorandum initiating the original proceedings.³² The Council held that an interpretative reservation likewise has the force of *res judicata* and is binding upon the authorities, which are required to apply it in accordance with the interpretation given by the Council.³³ Constitutional Council Decision No. 01/19/, dated 20 November 2019, concerning the plea of unconstitutionality of Article 416 of the Code of Criminal Procedure, Official Gazette of the People’s Democratic Republic of Algeria, No. 78, issued on 15 December 2019, pp. 26–29.

This plea went through all of its legally prescribed stages. On 12 June 2019, the Béjaïa Judicial Council issued a decision referring the plea to the Supreme Court. On 17 July 2019, the Supreme Court ruled to refer it to the Constitutional Council. The latter was notified on 23 July 2019 and rendered its decision on 20 November 2019, i.e. within the constitutionally prescribed four-month period. It held that Article 416 was partially constitutional and declared unconstitutional the provisions restricting the scope of appeals against criminal judgments.³⁴

Subsection Two: Developments Introduced by the 2020 Constitution and Organic Law No. 22-19

The 2020 constitutional amendment brought about an institutional transformation through the establishment of a Constitutional Court, which it described as “an independent institution entrusted with ensuring respect for the Constitution.”³⁵ It also maintained the plea of unconstitutionality as a mechanism distinct from political referral, providing that the power of referral exercised by public authorities and parliamentarians does not extend to the referral by way of a plea of unconstitutionality referred to in Article 195.³⁶ The main developments introduced by the new system may be summarized as follows:

1. Extending the subject matter of the plea to regulatory provisions:

Article 195 added the expression “or regulatory” to the subject matter of the plea. Under the 2016 constitutional framework, the plea was limited to legislative provisions. Legal scholarship attributes

²⁹ Abderrahmane Souak, *op. cit.*, p. 282.

³⁰ Abderrahmane Souak, *op. cit.*, p. 279.

³¹ Abdelrazak El-Wafi, *op. cit.*, p. 173.

³² Constitutional Council Opinion No. 03/18/, *op. cit.*, p. 5.

³³ *Ibid.*, p. 8.

³⁴ *Ibid.*, pp. 1044, 1051.

³⁵ Article 185 of the 2020 Constitution, *op. cit.*, p. 39.

³⁶ Article 193 of the 2020 Constitution, *ibid.*, pp. 40–41.

this limitation to two reasons: first, the Constitutional Council's previous experience, in which it did not effectively exercise its review of regulatory provisions despite the existence of constitutional provisions providing for such review; and second, the influence of the French model, which limits the priority constitutional question to legislative provisions.³⁷

However, this extension raises a question as to what is meant by regulatory provisions: does it refer exclusively to presidential decrees, or does it also encompass executive decrees issued by the Prime Minister or the Head of Government?³⁸ In our view, linking the plea to independent regulatory powers exercised by the President of the Republic in matters not reserved to statute is more consistent with the logic of Article 195, since executive decrees are, in principle, subject to review by the administrative judge.

2- Permitting the Raising of the Plea before the Trial Court of First Instance: Article 3 of Organic Law No. 18-16 prohibited raising the plea before the Trial Court of First Instance and permitted it only when appealing its judgment, by means of a memorandum attached to the declaration of appeal.³⁹ This provision was criticized by legal scholarship, which proposed extending the scope of the plea to include this court, given its connection with individual rights and freedoms.⁴⁰ The legislature responded to this criticism through Article 16 of Organic Law No. 22-19, which permitted the plea to be raised before both the Trial Court of First Instance and the Appellate Criminal Court, provided that it is examined before the opening of the proceedings on the merits.⁴¹

3- Recognition of the Right to Intervene: Organic Law No. 22-19 allows any person having an interest to intervene in the plea proceedings before the competent judicial authority prior to the issuance of its decision on referral, by submitting a separate and reasoned written memorandum.⁴² It also permits intervention before the Constitutional Court before the plea is put into deliberation.⁴³ In both cases, the intervener is subject to the same procedures applicable to the parties. This addition is consistent with the objective nature of constitutional litigation, since a ruling declaring a legal provision unconstitutional does not limit its effects to the parties to the dispute.

4- Giving Effect to the Detainee's Will Regarding the Stay of Proceedings: Organic Law No. 18-16 prohibited staying proceedings whenever a person was deprived of liberty in connection with the case.⁴⁴ Organic Law No. 22-19 added the phrase "unless the person concerned objects thereto,"⁴⁵ thereby allowing a detainee to choose to await a ruling on the plea rather than be deprived of its benefits by virtue of a rule that was originally established for his or her protection. Conversely, the new law imposed short time limits for notifying the parties of a decision refusing referral, which may not exceed three days,⁴⁶ and regulated the resumption of proceedings following receipt of the Constitutional Court's decision, providing that the resumption of public proceedings shall take place at the initiative of the Public Prosecution.⁴⁷

Organic Law No. 22-19 was likewise subject to constitutional conformity review. The Constitutional Court declared certain provisions to be partially compliant with the Constitution, including Article 15, which was redrafted to provide for the possibility of raising the plea by one of the parties to the proceedings before judicial authorities belonging to the ordinary or administrative judicial system, "in accordance with the provisions of Article 195 (paragraph 1) of the Constitution."⁴⁸

The main differences between the two legal regimes may be summarized in the following table:

³⁷ Nawal Laslaj and Lamia Hammamda, "Conditions and Procedures for Raising a Plea of Unconstitutionality in Light of Organic Law No. 22-19 Establishing the Procedures and Modalities of Referral and Transmission before the Constitutional Court," *Journal of Police and Legal Sciences*, Vol. 14, No. 1, 2023, Article 2, p. 10.

³⁸ *Ibid.*, p. 11.

³⁹ Article 3 of Organic Law No. 18-16, previously cited reference, p. 10.

⁴⁰ Al-Wafi, Abdelrazak, previously cited reference, pp. 179, 181.

⁴¹ Article 16 of Organic Law No. 22-19, previously cited reference, p. 9.

⁴² Article 22 of Organic Law No. 22-19, previously cited reference, p. 10.

⁴³ Article 39 of Organic Law No. 22-19, previously cited reference, p. 11.

⁴⁴ Article 11 of Organic Law No. 18-16, previously cited reference, p. 11.

⁴⁵ Articles 26 and 34 of Organic Law No. 22-19, previously cited reference, pp. 10–11.

⁴⁶ Article 24 of Organic Law No. 22-19, previously cited reference, p. 10.

⁴⁷ Article 28 of Organic Law No. 22-19, previously cited reference, p. 10.

⁴⁸ Decision of the Constitutional Court No. 04/Q.M.D/R.M.D/22 dated 29 Dhu al-Qi'dah 1443 AH, corresponding to June 29, 2022, concerning the review of the conformity with the Constitution of the Organic Law establishing the procedures and modalities for notification and referral before the Constitutional Court, *Official Gazette of the People's Democratic Republic of Algeria*, No. 51, published on July 31, 2022, pp. 5–7, p. 7.

Issue	Organic Law No. 18-16	Organic Law No. 22-19
Constitutional basis	Article 188 of the 2016 Constitution	Article 195 of the 2020 Constitution
Adjudicating body	The Constitutional Council	The Constitutional Court
Subject matter of the plea	Legislative provision (Art. 2)	Legislative or regulatory provision (Art. 21)
Trial Court of First Instance	The plea could not be raised before it (Art. 3)	The plea may be raised before it and before the appellate court (Art. 16)
Ex officio raising of the plea	Prohibited for the judge (Art. 4)	Prohibited for the trial judge, the Public Prosecution, and the Government Commissioner, while the Public Prosecution may submit written observations (Art. 17)
Intervention	Not provided for	Permitted before the trial judge (Art. 22) and before the Constitutional Court (Art. 39)
Notification of refusal of referral	No time limit specified (Art. 9)	Within three days from the date of receipt by the court registry (Art. 24)
Stay of proceedings in cases involving persons deprived of liberty	No stay (Arts. 11 and 18)	No stay unless the person concerned objects thereto (Arts. 26 and 34)
Refusal of referral by the higher judicial authority	Not provided for; its imposition resulted from a reservation expressed by the Constitutional Council	The Constitutional Court receives a reasoned copy and notifies the parties within five days (Art. 37)
Time limit for the higher judicial authority to rule	Two months (Art. 13)	Two months (Art. 30)

Section Two: Conditions, Procedures, and Effects of the Plea of Unconstitutionality

Organic Law No. 22-19 established a number of conditions for the admissibility of a plea of unconstitutionality (First Subsection), as well as procedures involving two stages of screening before the Constitutional Court rules on the plea by a decision producing specific legal effects (Second Subsection).

First Subsection: Conditions for the Admissibility of a Plea of Unconstitutionality

First Paragraph: Conditions Relating to the Person Raising the Plea, Its Form, and the Authority Before Which It Is Raised

First: The plea must be raised by one of the parties to the proceedings.

The plea is raised by one of the parties to the proceedings,⁴⁹ provided that such party has legal standing and an interest in the matter, such as the accused and the civil party in criminal proceedings.⁵⁰ The judge may not raise the plea ex officio, as previously explained. It should be noted that neither of the two organic laws specifies whether the memorandum raising the plea must be signed by a lawyer, unlike most legal systems that have adopted this mechanism and made such signature mandatory, subject to nullity in the event of non-compliance.⁵¹ However, the law requires the parties to be represented by their lawyers when submitting their observations orally before the Constitutional Court.⁵² In our view, legislative intervention to settle the issue of representation before the trial court is necessary in order to unify judicial practice.

⁴⁹ Article 15 of Organic Law No. 22-19, op. cit., p. 9.

⁵⁰ Souak Abdelrahmane, op. cit., p. 283.

⁵¹ El Wafi Abdelrazak, op. cit., pp. 175–176.

⁵² Article 41 of Organic Law No. 22-19, op. cit., p. 11.

Second: The plea must be submitted in a written, separate, and reasoned memorandum.

The plea must, under penalty of inadmissibility, be submitted in a written, separate, and reasoned memorandum.⁵³ Accordingly, an oral plea is inadmissible, nor may it be combined with another plea in a single memorandum. Rather, it must be set out in a memorandum independent from any other plea or defence, whether procedural or substantive.⁵⁴ The purpose of requiring such separation is to enable the judicial authority to rule on the plea promptly and to transmit it, together with the parties' memoranda, to the screening authority without confusing it with the subject matter of the dispute. This is what the Constitutional Council intended when it interpreted the requirement of separation as meaning that the memorandum must be separate from the memorandum initiating the original proceedings.⁵⁵

Third: The plea must be raised before an ordinary or administrative judicial authority and may be raised at any stage of the proceedings.

The plea may be raised before courts belonging to either the ordinary or administrative judicial systems, including for the first time on appeal or in cassation proceedings. Where the plea is raised during a judicial investigation, it shall be examined by the Indictment Chamber.⁵⁶ This excludes the Court of Conflicts, national and foreign arbitration tribunals, and administrative authorities, even where the latter are required to examine a mandatory administrative appeal.⁵⁷ The proceedings before the authority before which the plea is raised shall be governed by the provisions of the Code of Civil and Administrative Procedure and the Code of Criminal Procedure, subject to the provisions of the Organic Law.⁵⁸

Third: The ruling must not have previously been declared constitutional, except in the event of a change in circumstances.

The constitutional challenge shall be inadmissible if the contested provision has previously been declared constitutional by the Constitutional Council or the Constitutional Court in application of⁵⁹ the principle of *res judicata*, since the review of the constitutionality of a legal provision constitutes an objective dispute whose effects are binding upon all. However, the legislature has made an⁶⁰ exception for the situation of a "change in circumstances" without specifying what is meant by this expression. In contrast, French case law has adopted a broad interpretation of this concept to include legal changes, such as amendments to the Constitution, as well as changes in factual circumstances⁶¹. This exception is of particular importance in Algeria following the 2020 constitutional amendment, which expanded the catalogue of rights and freedoms, as the amendment of the constitutional framework itself may be regarded as a change in circumstances justifying the re-examination of provisions that had previously been declared constitutional.

Fourth: The ground raised must be serious.

The legislature has not defined what is meant by seriousness, nor has it established criteria for its assessment.⁶² In legal scholarship, seriousness is understood to mean that the constitutional challenge must be connected to the subject matter of the dispute, have a basis in the case file, and genuinely seek to challenge the conformity of the provision with the Constitution, with the claimant substantiating their position by sufficient grounds, in order to prevent the abusive use of the constitutional challenge to prolong the proceedings or interfere with their proper course.⁶³ A distinction must be made between assessing the seriousness of the challenge and assessing the constitutionality itself. The trial judge is merely required to ascertain that the challenge is not vexatious

⁵³ Article 19 of Organic Law No. 22-19, op. cit., p. 9.

⁵⁴ Souak Abdelrahmane, op. cit., p. 283.

⁵⁵ Opinion No. 03/R.Q.C./C.C./18 of the Constitutional Council, op. cit., p. 5.

⁵⁶ Article 15 of Organic Law No. 22-19, op. cit., p. 9.

⁵⁷ Nawal Lasladj and Lamia Hammamda, op. cit., p. 7.

⁵⁸ Article 18 of Organic Law No. 22-19, op. cit., p. 9.

⁵⁹ Article 21 of Organic Law No. 22-19, cited above, p. 9.

⁶⁰ Souak Abdelrahmane, cited above, p. 284.

⁶¹ Nawal Lasladj and Lamia Hammamda, cited above, p. 13.

⁶² Nawal Lasladj and Lamia Hammamda, cited above, p. 14.

⁶³ Souak Abdelrahmane, cited above, p. 284.

or manifestly unfounded, without extending their assessment to the constitutionality of the contested provision, in accordance with the restraint expressed by the Constitutional Council⁶⁴

Subsection Three: Specific Features of Raising a Constitutional Challenge in Criminal Matters

Raising a constitutional challenge in criminal proceedings has specific features imposed by the nature of such proceedings and their direct connection with individual liberty. These features may be summarized as follows:

First: Raising the challenge during the investigation stage.

If the constitutional challenge is raised during the judicial investigation, it shall be examined by the Indictment Chamber.⁶⁵ This implies that the provision refers to the investigation conducted by the investigating judge, rather than the supplementary investigation ordered by the trial court, since the Indictment Chamber is an investigative body of second instance and not a trial court.⁶⁶ Consequently, the investigating judge himself does not rule on the referral of the constitutional challenge; rather, jurisdiction lies with the higher body within the investigation hierarchy. This choice provides an additional safeguard for the accused, but it raises the issue of regulating the referral of the case file to the Indictment Chamber in the absence of a detailed procedural provision.

Second: Raising the Plea before the Criminal Court.

The Court of First Instance and the Court of Appeal sitting as Criminal Courts shall examine the plea before the commencement of the substantive proceedings.⁶⁷ Where the judicial panel includes non-judicial assessors, it shall adjudicate on the plea in their absence.⁶⁸ This means that lay jurors do not participate in deciding whether the plea should be referred.⁶⁹ The rationale is that the assessment of the conditions for referral is a purely legal matter, which falls outside the ordinary competence of jurors, whose role is limited to assessing the facts.

Third: The Position of the Public Prosecution with Regard to the Plea.

Under Organic Law No. 18-16, legal scholarship raised the question of whether the Public Prosecution, as a party to the public action, has the right to raise the plea. One view considered that it was permissible, relying on the literal wording of the provision granting the right to raise the plea to every party to the proceedings. Another view excluded such a possibility on the grounds that it would be inconceivable for the Public Prosecution to raise a plea challenging the constitutionality of a provision on which it had based the prosecution, and because it has no personal interest in raising such a plea.⁷⁰ It appears that Article 17 of Organic Law No. 22-19 adopted the latter view by prohibiting the Public Prosecutor from raising the plea *ex officio*, while merely allowing the Public Prosecution to submit written observations at the request of the Constitutional Court.⁷¹

Fourth: The Effect of the Plea on the Course of the Public Action.

The referral of the plea does not result in the suspension of the investigation. Accordingly, the judge may hear witnesses, order expert examinations, conduct on-site inspections, and take provisional or precautionary measures, such as judicial supervision or the seizure of evidence.⁷² Upon receipt of the Constitutional Court's decision, the public action shall resume at the initiative of the Public Prosecution.⁷³ As for actions and prosecutions initiated before the legal framework governing the plea entered into force, the plea may still be raised in respect thereof as long as they remain pending, since the plea may be raised at any stage of the proceedings and procedural law applies immediately.⁷⁴

Section Two: Procedures for Adjudicating the Plea of Unconstitutionality and Its Effects

Subsection One: The Dual Filtering System

⁶⁴ Opinion of the Constitutional Council No. 03/R.C.C/C.C/18, cited above, p. 6.

⁶⁵ Article 15 of Organic Law No. 22-19, cited above, p. 9.

⁶⁶ Laidi Kheira and Wafi Hadja, cited above, p. 76.

⁶⁷ Article 16 of Organic Law No. 22-19, cited above, p. 9.

⁶⁸ Article 20 of Organic Law No. 22-19, cited above, p. 9.

⁶⁹ Kheira Laidi and Hadja Wafi, cited above, p. 76; and Abderrahmane Souak, cited above, p. 281.

⁷⁰ Kheira Laidi and Hadja Wafi, cited above, p. 68.

⁷¹ Article 17 of Organic Law No. 22-19, cited above, p. 9.

⁷² Kheira Laidi and Hadja Wafi, cited above, p. 82; and Article 25 of Organic Law No. 22-19, cited above, p. 10.

⁷³ Article 28 of Organic Law No. 22-19, cited above, p. 10.

⁷⁴ Kheira Laidi and Hadja Wafi, cited above, p. 78.

The constitutional legislator excluded the option of direct referral to the Constitutional Court by litigants and provided instead that referral concerning the plea should take place indirectly through a referral by the Supreme Court or the Council of State, in order to prevent the Constitutional Court from being overwhelmed by vexatious pleas that could hinder its functioning.⁷⁵ Thus, the plea is subject to an initial screening before the trial judge. Where the requisite conditions are satisfied and the judge decides to refer it, the Supreme Court or the Council of State shall verify those conditions a second time before referring the plea to the Constitutional Court.⁷⁶

First: Review before the Judicial Body before Which the Plea Is Raised

The judicial body shall rule immediately, by a reasoned decision, on whether to refer the plea to the Supreme Court or the Council of State, after seeking the opinion of the Public Prosecutor's Office or the Government Commissioner, and without the presence of non-judicial assessors, where applicable.⁷⁷ The referral decision shall be transmitted, together with the parties' applications and memoranda, within ten days from the date on which it is issued, and no appeal shall be admissible against it.⁷⁸ As for the decision rejecting the referral, it shall be notified to the parties within a maximum period of three days. It may only be challenged in connection with an appeal against the decision ruling on the dispute, or on part thereof, by means of a separate, written and reasoned memorandum, while the judicial body shall continue to adjudicate the dispute.⁷⁹ This system has been criticized on the ground that the legislator did not establish a specific time limit within which the judicial body must rule on the referral, but merely used the expression "immediately."⁸⁰ This issue had already been highlighted by legal scholars under Organic Law No. 18-16,⁸¹ although the Constitutional Council interpreted this expression as meaning "at once."⁸²

Although the Organic Law does not expressly provide for enabling the other parties to discuss the plea before the trial judge, its reference to the Code of Civil and Administrative Procedure and the Code of Criminal Procedure requires compliance with the adversarial principle and allowing the parties to respond to the plea.⁸³ The decision ordering the referral must contain the information required to be included in a judgment, as well as the substance of the plea, the party who raised it, and the grounds relied upon. It must then set out the reasons on which the judge based the decision as to whether the statutory conditions are satisfied. If the judge decides to reject the plea, it is sufficient to examine the condition that is not satisfied; whereas, if the judge decides to refer it, all the conditions must be shown to be satisfied.⁸⁴ It should be noted that the new Organic Law has established a three-day period for notifying the decision rejecting the referral and entrusted this task to the Registry of the Court. However, it has not specified either a time limit or a particular form for notifying the parties of the referral decision. This constitutes a legislative gap that had already been identified by legal scholars under the repealed provision.⁸⁵

Where the plea is referred, the judicial body shall defer its ruling on the dispute, without this resulting in a stay of the investigation proceedings. It may, however, adopt the necessary interim or precautionary measures.⁸⁶ The judicial body shall not defer its ruling where the person is deprived of liberty on account of the proceedings, or where the proceedings seek to put an end to such deprivation of liberty, unless the person concerned objects thereto, or where the law requires a decision to be rendered within a specified period or under expedited proceedings.⁸⁷ If the trial judges rule on the dispute without awaiting the decision on the plea and their judgment is challenged by

⁷⁵ Nawal Lasladj and Lamia Hammamada, cited above, p. 15.

⁷⁶ Kheira Laidi and Hadja Wafi, cited above, pp. 56–57.

⁷⁷ Article 20 of Organic Law No. 22-19, op. cit., p. 9.

⁷⁸ Article 23 of Organic Law No. 22-19, op. cit., p. 10.

⁷⁹ Article 24 of Organic Law No. 22-19, op. cit., p. 10.

⁸⁰ Nawal Lasladj and Lamia Hammamada, op. cit., p. 16.

⁸¹ El Wafi Abdelrazak, op. cit., pp. 181–182.

⁸² Opinion of the Constitutional Council No. 03/R.Q.C./C.C./18, op. cit., p. 5.

⁸³ Laidi Khaira and Wafi Hadja, op. cit., p. 77; Article 18 of Organic Law No. 22-19, op. cit., p. 9.

⁸⁴ Laidi Khaira and Wafi Hadja, op. cit., p. 78.

⁸⁵ Laidi Khaira and Wafi Hadja, op. cit., p. 81.

⁸⁶ Article 25 of Organic Law No. 22-19, op. cit., p. 10.

⁸⁷ Article 26 of Organic Law No. 22-19, op. cit., p. 10.

cassation, the ruling on the cassation appeal shall be deferred until a decision has been rendered on the plea.⁸⁸

Second: Screening before the Supreme Court or the Council of State

Upon receiving the referral decision, the First President of the Supreme Court or the President of the Council of State shall immediately seek the opinion of the Public Prosecutor or the Government Commissioner, who shall submit their submissions within a maximum period of five days. The parties shall be allowed to submit their written observations.⁸⁹ The highest judicial authority shall rule on the referral within two months from the date of receipt of the referral decision. The referral shall be made where the conditions set forth in Article 21 are met,⁹⁰ by a panel presided over by the head of the judicial authority or his/her deputy and composed of the President of the relevant Chamber and three Counsellors.⁹¹ Where the plea is raised directly before it, the court shall give priority to ruling on it within the same period.⁹² If no decision is rendered within the prescribed period, the plea shall be automatically referred to the Constitutional Court,⁹³ thereby ensuring that the litigant's right is not impeded by the failure of the screening authority to rule. In the new legislation, the legislator addressed the observation made by the Constitutional Council by requiring, in the event of refusal to refer the plea, that the Constitutional Court receive a copy of the reasoned decision and that the decision be notified to the parties within a period not exceeding five days.⁹⁴

Subsection Two: Adjudication of the Plea before the Constitutional Court and the Effects of Its Decision

First: Adjudication Procedures

The Constitutional Court shall notify the President of the Republic immediately upon receiving the referral decision. It shall also notify the Presidents of the two Houses of Parliament and the Prime Minister or the Head of Government, who may submit their observations concerning the plea.⁹⁵ Its hearings shall be public, except in exceptional cases, and the Government representative and the parties, represented by their counsel, shall be permitted to present their observations orally.⁹⁶ The termination of the original proceedings for any reason whatsoever shall not affect the adjudication of the plea,⁹⁷ which confirms the independence of the constitutional dispute from the underlying dispute in connection with which the plea was raised.

The Constitutional Court shall issue its decision within four months following the date on which it is notified. This period may be extended once for a maximum period of four months by a reasoned decision, which shall be notified to the judicial authority that made the referral.⁹⁸ Its decisions shall be adopted by a majority of the members present, and, in the event of a tie, the President shall have the casting vote.⁹⁹

Second: Effects of the Decision

If the Constitutional Court rules that a legislative or regulatory provision is unconstitutional on the basis of Article 195, such provision shall cease to have effect from the date specified in its decision. Its decisions shall be final and binding upon all public authorities, as well as administrative and judicial authorities.¹⁰⁰ The decision shall be communicated to the Supreme Court or the Council of State in order to inform the judicial authority before which the plea was raised, and shall be published in the Official Gazette.¹⁰¹ Consequently, if the plea is rejected, the proceedings shall resume. However, if

⁸⁸ Article 27 of Organic Law No. 22-19, op. cit., p. 10.

⁸⁹ Article 29 of Organic Law No. 22-19, previously cited, p. 10.

⁹⁰ Article 30 of Organic Law No. 22-19, previously cited, p. 10.

⁹¹ Article 32 of Organic Law No. 22-19, previously cited, p. 10.

⁹² Article 31 of Organic Law No. 22-19, previously cited, p. 10.

⁹³ Article 36 of Organic Law No. 22-19, previously cited, p. 11.

⁹⁴ Article 37 of Organic Law No. 22-19, previously cited, p. 11; see also: Opinion No. 03/R.Q.C./C.C./18 of the Constitutional Council, previously cited, p. 7.

⁹⁵ Article 38 of Organic Law No. 22-19, previously cited, p. 11.

⁹⁶ Articles 40 and 41 of Organic Law No. 22-19, previously cited, p. 11.

⁹⁷ Article 42 of Organic Law No. 22-19, previously cited, p. 11.

⁹⁸ Article 195, paragraph 2, of the 2020 Constitution, previously cited, p. 41; and Article 43 of Organic Law No. 22-19, previously cited, p. 11.

⁹⁹ Article 197 of the 2020 Constitution, previously cited, p. 41.

¹⁰⁰ Article 198 (paragraphs 4 and 5) of the 2020 Constitution, op. cit., p. 41.

¹⁰¹ Article 43 of Organic Law No. 22-19, op. cit., p. 11.

the provision is declared unconstitutional, the trial court shall refrain from applying the provision declared unconstitutional as of the date specified in the decision. This effect shall apply erga omnes and not merely to the parties to the proceedings.¹⁰²

It should be noted that, in Article 198, the constitutional framers maintained the solution established under Article 191 of the 2016 Constitution, which grants the constitutional judge discretion to determine the date from which the unconstitutional provision shall cease to have effect. This effect¹⁰³ differs from that of a priori constitutional review, since it does not concern preventing the enactment of a provision that has not yet entered into force; rather, it concerns terminating the effect of a provision that has already been applied to existing legal situations. This requires the Constitutional Court to strike a balance between the immediate effect, which serves the interests of the party raising the plea and those in a similar situation, and the deferred effect, which grants the legislature a period of time to remedy the resulting legislative gap. Furthermore, given the binding nature of its decisions, the legislature itself is required to amend provisions declared unconstitutional, together with related provisions, thereby giving effect to the binding force of these decisions upon all authorities.¹⁰⁴

Third: Issues Arising from the Application in Light of Constitutional Council Decision No. 01/19

The first decision issued within the framework of this mechanism revealed three issues that remain relevant under the new system:

A- The limits of the constitutional judge's power to address provisions whose constitutionality has not been challenged: The Constitutional Council exceeded the scope of the plea brought before it by declaring unconstitutional the second part of the first paragraph of Article 416 concerning legal persons, as well as the second paragraph concerning the provisions relating to misdemeanours, even though these provisions had not been challenged on constitutional grounds.¹⁰⁵ The Council based its position on the amendment of Article 29 of its Rules of Procedure, adopted by deliberation of 17 October 2019, which authorized it to examine other legislative provisions related to the provision forming the subject matter of the plea.¹⁰⁶ Conversely, the Council did not extend its decision to Article 380 bis 5 of the Code of Criminal Procedure concerning the penal order, despite the fact that it violated the same principle. That provision therefore remained in force as a special provision restricting the application of the general provision.¹⁰⁷

It should be noted that Article 4 of Organic Law No. 22-19 settled this issue with regard to referral-based constitutional review, by prohibiting the Constitutional Court from examining provisions that had not been referred to it, even where there was a direct connection between such provisions.¹⁰⁸ However, this provision appears in the chapter dealing with constitutional review by referral and does not contain a similar rule in the chapter devoted to the constitutional plea. Consequently, the issue remains open and calls for explicit legislative intervention.

B- The Immediate Effect of the Decision and the Problem of Notification:

The Constitutional Council determined that the provisions declared unconstitutional would cease to have effect immediately, whereas the decision was not published in the Official Gazette until 15 December 2019, i.e., twenty-five days after its issuance. This resulted in the loss of the right of appeal for many convicted persons, as they were not aware of the decision in a timely manner.¹⁰⁹ This example highlights the importance of the discretionary power granted to the Constitutional Court under Article 198 to determine the date on which the provision ceases to produce legal effect. Such power should be exercised in a manner that reconciles the protection of rights with the requirements of legal certainty.

C- The Legislative Gap Following the Declaration of Unconstitutionality:

¹⁰² Souak Abdelrahmane, op. cit., pp. 286–287.

¹⁰³ Souak Abdelrahmane, op. cit., p. 285.

¹⁰⁴ Aouatif Louz, op. cit., p. 1054.

¹⁰⁵ Aouatif Louz, op. cit., p. 1048.

¹⁰⁶ Ibid., p. 1049.

¹⁰⁷ Ibid., pp. 1052–1053.

¹⁰⁸ Article 4 of Organic Law No. 22-19, op. cit., p. 8.

¹⁰⁹ Aouatif Louz, op. cit., pp. 1051–1052.

The Constitutional Council rejected the request to reformulate Article 416 after declaring part of it unconstitutional, ruling that it could not substitute itself for the legislature in enacting laws.¹¹⁰ At the same time, the legislature did not intervene to amend the article, despite having amended the Code of Criminal Procedure following the issuance of the decision pursuant to Ordinance No. 20-04, even though the decisions of the constitutional judge are binding on all authorities, including the legislative authority.¹¹¹ This situation calls for the establishment of a mechanism for legislative follow-up of the decisions of the Constitutional Court.

Conclusion

The study concluded that the plea of unconstitutionality constituted a qualitative transformation in the Algerian constitutional system, as it shifted the initiation of constitutional review from political bodies to litigants. It also found that Organic Law No. 22-19 introduced substantial improvements compared with Organic Law No. 18-16. The main findings can be summarized as follows:

The plea of unconstitutionality as a procedural defense of a special nature: It does not concern matters of public order, since the judge may not raise it *ex officio*. However, it may be invoked at any stage of the proceedings and takes the form of an incidental issue requiring the suspension of the proceedings pending its resolution.

The 2020 Constitution broadened the scope of the plea to include regulatory provisions. Organic Law No. 22-19 also permitted the plea to be raised before the Trial Criminal Court, recognized the right to intervene before the trial judge and the Constitutional Court, and linked the non-suspension of proceedings in cases involving detained persons to the absence of an objection by the person concerned.

The effectiveness of the mechanism remains contingent upon the dual filtering system, the lack of clarity surrounding the criteria of “seriousness” and “change in circumstances,” and the absence of a specific time limit for the trial judge to rule on the referral.

The Constitutional Council’s first decision, No. 01/19, revealed several issues relating to the limits of the power to raise constitutional issues *ex officio*, the immediate effect of the decision prior to its publication, and the legislative gap arising following the declaration of unconstitutionality.

In light of these findings, the study proposes the following:

Establishing an explicit time limit for the judicial authority before which the plea is raised to rule on the referral, similar to the time limit prescribed for the Supreme Court and the Council of State.

Defining the criterion of seriousness through objective standards, and clarifying the meaning of “change in circumstances” so as to expressly include amendments to the constitutional framework.

The text should expressly address, in the chapter devoted to the plea, the scope of the Constitutional Court’s authority to review provisions related to the judgment that is the subject matter of the plea.

The issue of the lawyer’s representation in the memorandum of the plea before the trial judge should be definitively settled.

A legislative follow-up mechanism should be established to require the Government to submit draft amendments to provisions declared unconstitutional within a reasonable period, while also shortening the period for publishing Constitutional Court decisions in the Official Gazette.

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¹¹⁰ Aouatif Louz, *op. cit.*, p. 1055.

¹¹¹ *Ibid.*, p. 1056.

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