

Judicial independence as a reflection of good governance

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Introduction:

The judiciary is one of the institutions of good governance, as it ensures the rule of law and provides security and certainty in social, political, and economic relations. Therefore, the independence of this authority from the legislative and executive branches has become a matter of course in the modern era, in accordance with the principle of separation of powers. The principle of separation of powers has become the main axis around which the organization of public authorities in a modern democratic state revolves. There is no doubt that the judiciary is the center of justice and the guarantor of freedoms, preventing any injustice or abuse that may befall them. Therefore, it was necessary for the constitution to provide specific guarantees for its independence.

The independence of the judiciary is a crucial element in strong and sound economic development (which is the goal of good governance). In societies with increasingly complex economies, the independence of the judiciary can help ensure the rule of law and avoid inefficiency, injustice, and arbitrary rule. This independence has also become part of the human conscience and an indicator that the state is operating on a democratic basis. States are therefore working to achieve this independence in order to deliver justice among people, guarantee rights and freedoms, and protect citizens from the arbitrariness of public authorities. All of this is fundamental to the growth, development, and achievement of peace, security, and tranquility in society.

In Algeria, the Constitution of February 23, 1989, by enshrining the principle of separation of powers, brought about several profound changes in the organization of state institutions. The second chapter of the Constitution was entitled "Regulation of authorities" This concerns the establishment of an executive, legislative, and judicial authority. This has been confirmed in various subsequent constitutional amendments.

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What is noticeable in the various legal texts governing the judiciary, whether constitutional or legislative, is the frequent raising of questions about the extent to which the judiciary is truly independent. This leads to the following question: **Did the Algerian constitutional framers embody the independence of the judiciary and make it a fundamental pillar and cornerstone of the construction of the institutional state? Do the various legal texts issued, from the constitution to organic and ordinary laws, as well as various regulatory texts, reflect this independence?**

To answer this question, the following plan will be adopted.

First Section: The legal framework for the organization of the judiciary in Algeria

First requirement: The judicial function under the 1976 Constitution

Second requirement: The judiciary under the 1989 Constitution and subsequent constitutional amendments

Second Section: Guarantees of judicial independence in Algerian law.

First requirement: Guarantees relating to the judiciary (institutional independence)

Second requirement: Guarantees relating to the exercise of judicial functions (functional independence)

First Section: The legal framework for the organization of the judiciary in Algeria

The organization of the judiciary in Algeria has undergone a qualitative development that has had a profound impact on the principle of its independence, transforming it from a mere judicial function in the 1976 Constitution (first requirement) to an independent authority in its own right since the promulgation of the 1989 Constitution and its subsequent constitutional amendments (second requirement).

First requirement: The judicial function under the 1976 Constitution

The 1963 Constitution described the judiciary as “justice” in the section on the judiciary, while describing the executive branch as “authority.” Article 62 of the 1963 Constitution explicitly stated that “judges are subject only to the law and the interests of the socialist revolution in the exercise of their functions” ^[1], which is considered a restriction on the freedom of judges, as judges are subject not only to the law but also to the interests of the socialist revolution. Consequently, judges serve the interests of this revolution in the judgments they issue. ^[2]

On June 19, 1965, a new concept of state organization emerged, based on the sole authority embodied in the Revolutionary Council (after the revolutionary correction).

Decree No. 69/27 of July 19, 1969, containing the basic law of the judiciary, rejected the idea of separation of powers, affirming the function of the judiciary, according to its preamble, under the supervision of the revolutionary authority in defense of the principles of socialism.

The 1976 Constitution referred to the judiciary as the judicial function and, according to Article 172, the judiciary is independent, as stated in the text of this article: “Judges are subject only to the law,” and according to Article 173/2, judges are protected from all forms of pressure and manipulation that could interfere with the performance of their duties or affect their integrity.^[3]

Judges are not accountable to the executive or legislative branches, but are accountable to the Supreme Judicial Council, whose role is limited to approving and ratifying decisions issued by the president of the Supreme Judicial Council.^[4]

Second requirement: Judicial power under the 1989 Constitution and subsequent constitutional amendments

Undoubtedly, the 1989 Constitution brought about a radical change in the system of government adopted since independence by establishing the principle of separation of powers, particularly the judiciary, which Article 129 affirmed as independent and entrusted with broad powers in the protection of public and individual freedoms and the fundamental rights of citizens. It did not allow for any restriction on the exercise of these powers except with the permission of the judiciary or under its supervision, and it also made decisions subject to

The administration of judicial oversight and obliged all state agencies to implement judicial rulings, emphasized the protection of judges from all forms of pressure, and obliged them to apply the law alone, thereby freeing them from ideological baggage and the oath of allegiance to the socialist revolution.^[5]

The constitution also stipulated that the law protects litigants from judicial arbitrariness or misconduct, and made judges accountable to the Supreme Judicial Council, which was given the authority to make decisions on all matters relating to the career of judges.^[6]

The 1996 Algerian Constitution also organized the judiciary in a separate chapter^[7], which is Chapter III of the Constitution, “The Judiciary.”, and included constitutional provisions separate from those on the executive and legislative branches, addressing them in twenty-one articles from Article 138 to Article 158, which suggests the independence of the judiciary, at least in terms of the form of the constitution.^[8]

The 1989 Constitution increased the importance of the judiciary by removing the function of protecting the revolution, as did the 1996 Constitution, which established the principle of legality and sought to enshrine justice by promoting the judiciary and judges and working to ensure their independence.

It is rare for any other constitution to refer so clearly to the three powers of the state, as confirmed by Article 138 of the 1996 Constitution, which states: “The judiciary is independent and exercises its powers within the framework of the law.” Article 147 of the Constitution also states: “Judges are subject only to the law.”

The administration must also comply with judicial rulings in accordance with the provisions of Article 145 of the Constitution, which states: " All competent state agencies shall, at all times, in all places, and under all circumstances, enforce judicial rulings. The concept of judicial authority is explained in

the functions performed by the judiciary, as specified in the Constitution and the laws governing relations between individuals, all of which revolve around the principle of legality and its relationship to the executive and legislative branches.^[9]

However, the 2016 constitutional amendment, in addition to the text in the first paragraph of Article 156, states that: “The judiciary is independent and exercises its powers within the framework of the law.”^[10] It added in the second paragraph the phrase “the President of the Republic is the guarantor of the independence of the judiciary.” This is considered a setback, a contradiction, and a violation of the principle of separation of powers. How can the head of the executive branch be the guarantor of the independence of the judiciary, which is supposed to be parallel to the executive branch and not subordinate to it?

This is despite the explicit text enshrining the principle of separation of powers in the preamble, which states: “The Constitution guarantees the separation of public powers in a society governed by the rule of law, in which human beings are fulfilled in all dimensions.” Article 15 of the Constitution states that “the State is based on the principles of democratic organization, separation of powers, and social justice.”

Second Section: Guarantees of Judicial Independence in Algerian Law.

First Requirement: Guarantees Relating to Judicial Power

1 – Independence of the Judiciary from the Executive Branch.

Experience has shown that concentrating the various powers, whether executive, legislative, or judicial, in one hand can lead to numerous abuses, arbitrariness, and tyranny in some cases. This has prompted democratic systems around the world to distribute the three powers among different bodies that are independent of each other so that no one power dominates another.

Therefore, the independence of the judiciary from the executive and legislative branches must be embodied, so that all members of the judiciary, especially judges, enjoy absolute independence from the other branches of government. They are subject only to the law and their professional conscience, and no one may interfere in the work of judges or their professional careers except the Supreme Judicial Council.

In this regard, we find that Article 71 of Algeria's Basic Law on the Judiciary 04-11 grants the Minister of Justice the right to issue warnings to judges^[11], which violates the principle of functional independence outlined above.

The laws governing the work of the judiciary must also embody this functional independence, in particular the law governing the Supreme Judicial Council and the law on judicial organization. In this regard, it is noted that in Algeria, the Supreme Judicial Council has been assigned the task of appointing judges without selecting them, which has been entrusted to the executive authority.

Furthermore, according to Article 154 of the Constitution, the Supreme Judicial Council in Algeria is chaired by the President of the Republic, and in his absence, by the Minister of Justice^[12], which is completely contrary to the principle of functional independence of the judiciary.

According to Executive Decrees Nos. 04-332 and 04-333, which define the powers of the Minister of Justice and the administrative organization of the Ministry of Justice, the Minister of Justice is responsible for coordinating and activating public prosecution, which negatively affects the functional independence of the judiciary. Added to this is the principle of hierarchical subordination, which makes prosecutors in Algeria subject to the Code of Criminal Procedure. The Minister of Justice even has the right to transfer prosecutors outside the jurisdiction of the Supreme Judicial Council under the vague term of “necessity of interest” in accordance with Article 26(4) of the Basic Law on the Judiciary 04 – 11.

In terms of functional independence, we also find that the principle of subjecting administrative actions to judicial oversight is somewhat ineffective in the absence of clear and precise legal provisions that allow for the enforcement of judicial rulings and decisions against the administration.

2 – Independence of the judiciary from the legislature.

Within the concept of the functional independence of the judiciary, it must be ensured that the legislative authority does not interfere in the work of the judiciary, for example by enacting laws that would limit this independence, and in particular by not introducing provisions that would establish special courts, given that the judiciary has general jurisdiction to adjudicate all disputes, or by adopting provisions that would restrict the judiciary's jurisdiction in certain disputes but not others, for example.^[13]

In this regard, the constitutional framers must stipulate that the legislative branch does not have the power to interfere in the work of judges, and that this branch cannot overturn judicial rulings. An example of this is Article 122 of the Algerian Constitution, which gives Parliament powers to regulate the judiciary, establish judicial bodies, and enact organic laws concerning the High Council of the Judiciary and judicial organization. It would have been preferable to grant this power to the High Council of the Judiciary, which proposes these laws.

Organic Law No. 98-01, which sets out the powers of the Council of State, grants it an advisory role in relation to laws, and Executive Decree No. 98-261 specifies the manner in which the Council of State may intervene in its advisory role.

3 – Inspection of the work of judges.

The principle of judicial independence does not mean leaving judges unchecked in the performance of their duties, to ensure that they do not neglect or compromise them. Therefore, it is necessary to establish a body to supervise the judicial authorities. In this regard, there has been considerable jurisprudential disagreement about the extent to which it is possible to inspect the work of judges, and in particular about who should be responsible for this inspection and whether it should be linked to the Ministry of Justice.

Therefore, it must be emphasized that the function of judicial inspection relates exclusively to administrative and functional matters, since judicial acts are subject to appeal in terms of their substance.

Therefore, it must be emphasized that the function of judicial inspection relates exclusively to administrative and functional matters, since judicial acts are subject to appeal procedures. In Algeria, Executive Decree No. 04-333 was issued to regulate the central administration of the Ministry of Justice, placing the General Inspectorate under the authority of the Minister of Justice, in accordance with Article 1 thereof. Executive Decree No. 05-322 was issued to regulate the General Inspectorate of the Ministry of Justice, its functioning, and its tasks. An examination of the latter clearly reveals the broad powers vested in the General Inspectorate, which extend to the point of participating in the evaluation of judges, thereby inevitably undermining the independence of the judiciary in Algeria.

4 – Principle of Judicial Impartiality:

Among the structural guarantees of judicial independence, it is essential to ensure the principle of judicial impartiality, as it constitutes one of the primary reasons why individuals turn to the judiciary, confident in the judges' neutrality and integrity.^[14]

Integrity is a fundamental principle related to the judicial system in a state of dormancy, whereas impartiality is more closely linked to the actual exercise or performance of judicial functions.^[15]

International instruments have been keen to affirm the principle of judicial impartiality. It is enshrined in the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966.

The principle of judicial impartiality does not aim to serve personal interests, since the objective value of the law depends on its neutral application. Consequently, judicial impartiality presupposes freedom from bias, prejudice, favoritism, emotional influence, or bad faith. One corollary of judicial impartiality is the prohibition of political activity. For example, Article 14 of Algeria's Fundamental Law on the Judiciary No. 04-11 obliges judges not to belong to any political party or engage in any political activity.

Other corollaries include the judge's duty of loyalty and fairness, integrity, adherence to the principles of justice, and the continuous improvement of the judge's legal knowledge, as stipulated in Article 17 of the Fundamental Law on the Judiciary.^[16] Judicial impartiality also entails the duty to maintain the confidentiality of deliberations and judicial information, the prohibition from holding any public or private office, and the prohibition against participating in strikes.

Thus, I turn to the functional guarantees of the principle of judicial independence.

Second Section: Guarantees Related to the Exercise of Judicial Functions

The principle of judicial independence necessitates functional guarantees, primarily concerning the irrevocability of judges, the establishment of a Supreme Council of the Judiciary as a high authority representing the judicial power, the enactment of a Fundamental Law on the Judiciary and a Code of Judicial Ethics, as well as the establishment of mechanisms to ensure the professional career of judges, particularly regarding disciplinary oversight.

1 – Irrevocability of Judges:

The principle of judicial irrevocability constitutes the most significant safeguard of functional judicial independence. Judges are subject to the law, and therefore must be protected administratively from the authority that appointed them. Accordingly, a judge cannot be removed based on a unilateral administrative decision. Legal provisions should limit the powers of the executive authority to dismiss a judge from office, even under the pretext of a transfer to a higher or more advantageous position, such as secondment.

Despite the importance of this principle, the Algerian Constitution does not explicitly enshrine it, except for the judge's right to stability and the irrevocability of trial judges, as provided by Article 166 of the 2016 Constitutional Amendment.^[17]

2 – Composition of the Supreme Council of the Judiciary:

The Supreme Council of the Judiciary is composed of twenty members and is chaired by the President of the Republic, in accordance with Article 173 of the Constitution. The position of vice-president is held by the Minister of Justice, pursuant to Article 3 of its governing law. The remaining members are as follows:

- The First President of the Supreme Court
- The Attorney General at the Supreme Court
- Ten judges elected by their peers
- Six individuals chosen by the President of the Republic for their competence, from outside the judiciary

What is immediately noticeable about the composition of the Council is the absolute dominance of the executive authority over it. This is evident in the Council being chaired by the head of the executive, with the vice-presidency held by the Minister of Justice in his government, and the Attorney General of the Supreme Court being subordinated by statute to the Minister of Justice, in accordance with Article 30 of the Code of Criminal Procedure. Additionally, the six individuals selected by the President of the Republic are chosen primarily based on personal loyalty, which constitutes, in our view, a blatant violation of the independence of the judiciary. Such a structure does not encourage the judiciary to combat corruption, especially at the higher echelons of the state.

It is also noteworthy that the administrative judiciary is absent from the Council, despite the considerable time that has elapsed since the formal establishment of judicial duality in Algeria.

3 – The Fundamental Law on the Judiciary and the Code of Judicial Ethics

The Organic Law No. 04–11 regulates the Fundamental Law on the Judiciary, which includes provisions concerning the rights, duties, and professional careers of judges. However, it has been noted that the law overlooks the most important principle safeguarding judicial independence, namely the irrevocability of judges, and does not detail the various protections afforded to judges while exercising their duties, as enshrined in the Constitution.

This law, however, recognizes the right of judicial trade union representation in Article 32. On 23 December 2006, the Supreme Council of the Judiciary approved the Code of Judicial Ethics, which was published in the Official Journal of 2007, No. 17.

4 – Guarantees for the Management of Judges' Professional Careers

It is essential to establish specific legal provisions regulating the professional careers of judges as a guarantee of their independence and stability. Such provisions should clearly outline the procedures for the appointment, promotion, transfer, secondment, retirement, suspension, dismissal, and disciplinary measures for judges.

The Algerian legislator included these provisions in Organic Law No. 04–11, which constitutes the Fundamental Law on the Judiciary. Furthermore, the 2016 Constitutional Amendment, enacted under Law No. 16–01, reaffirmed the principle that trial judges may not be transferred except under legally prescribed conditions, pursuant to Article 166.

In this regard, the Constitution makes certain exceptions for public prosecutors, state magistrates, and judges attached to ministries. Specifically, Article 26, paragraph 4 of the Fundamental Law on the Judiciary allows the Minister of Justice to transfer public prosecutors for reasons of necessity, provided the Supreme Council of the Judiciary is notified at its next session.

Judges have the right to contest all decisions affecting them. Concerning disciplinary matters, the First President of the Supreme Court presides over the disciplinary session of the Supreme Council of the Judiciary, according to Article 12 of Organic Law No. 04–12, which governs the composition and powers of the Council. Disciplinary proceedings may only be initiated by the Minister of Justice, under Article 22 of the same law.

A preliminary investigation must be conducted against the judge, and the disciplinary file is then referred to the President of the Supreme Council of the Judiciary in its disciplinary composition. Judges continue to receive their salary during the period of suspension, according to Article 66, for a duration of six months, after which the Council determines the salary until the conclusion of the disciplinary proceedings.

Disciplinary proceedings must be concluded within six months, failing which the judge is automatically reinstated. Unlike Egyptian legislation, Algerian law does not provide for a statute of limitations on disciplinary actions. Nor does it provide for the possibility of annulment appeals against decisions of the Supreme Council of the Judiciary, which has led the Council of State to establish that such decisions are subject to appeal only until the issuance of a unified decision of the Supreme Court, which confirmed that decisions of the Supreme Council of the Judiciary are judicial in nature and can only be challenged through cassation.^[18]

Conclusion:

From the foregoing, it is evident that the foundation of judicial independence lies in the principle of the separation of powers. The concentration of all powers in a single authority constitutes a violation of this principle, which is a cornerstone of the rule of law and the embodiment of good governance.

While the existence of a legal framework to safeguard judicial independence is necessary, no matter how precise the statutory provisions are, their effectiveness depends on the presence of a genuine political will to implement them in practice and to prevent practices that undermine their substance and credibility.

Accordingly, the following recommendations are proposed to achieve genuine judicial independence:

- Repeal the second paragraph of Article 156 of the 2016 Constitution, which designates the President of the Republic as the guarantor of judicial independence. This contradicts the first paragraph, which considers the judiciary an independent authority, and implies that the judiciary is subordinate to the executive, thereby opening the door to executive domination and interference.
- End the intervention of the executive authority, represented by the President of the Republic, in the judiciary, particularly in the chairmanship of the Supreme Council of the Judiciary. The chair should instead be held by a judge elected by their peers, thereby strengthening the independence of the judicial authority.
- Transfer the authority to appoint judges from the President of the Republic, currently exercised upon the proposal of the Minister of Justice, to the Supreme Council of the Judiciary, to ensure the structural independence of the judiciary.
- Establish a Supreme State Court and codify procedures for holding the President of the Republic and the Prime Minister accountable, by promptly enacting the corresponding organic law.
- Remove executive representatives from the composition of the Supreme Council of the Judiciary, making it exclusively judicial through elections, with permanent membership for the President of the Supreme Court and the Council of State.
- Review the Organic Law constituting the Fundamental Law on the Judiciary and the judicial organization, in order to strengthen both the structural and functional independence of judges.

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