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The Recourse to the Power of Constitutional Referral by Algerian Parliamentarians: Main Issues

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Abstract:
The Constitutional Court is a constitutional body whose main task is to review the constitutionality of legal texts, this process is carried out either automatically, as provided in the constitution, or by the way of constitutional referral in the eventual cases, the constitutional referral is considered as an essential means to guarantee the conformity of the texts with respect to the constitution, the recently established constitutional revision has brought alleged improvements in constitutional guarantees to ensure the rights and freedoms of individuals, the most important is the subject of the extension of the power of referral to some new authorities called parties, The Prime Minister, forty deputies, twenty five members of the Council of the Nation, and the litigants, in accordance with Articles 193-194 of the Constitution, this research paper attempts to clarify the obstacles that prevent parliamentarians from exercising the power of constitutional referral.

Keywords: Power of referral; Deputies; Senators; Limits; Obstacles.

1. INTRODUCTION

One of the most remarkable democratic and legal advances introduced by the constitutional revision approved by referendum is unquestionably the mechanism provided by Articles 193 and 194, while the first stipulates the extension of the power of referral to new authorities not provided in the constitutional text before, the Prime Minister, 40 deputies and 25 senators, who can refer to the Constitutional Court, the second deals with the right of ordinary citizens to raise the unconstitutionality of a legislative provision before the judge thus to abrogate its application. These two seemingly insignificant articles could bring Algeria into the coveted club of the great democracies that recognize and ensure the individual's rights and freedoms. Thus, we can say that we are getting closer to the Rule of Law.

Indeed, the implementation of these new constitutional provisions hinders certain problems, in terms of the power of referral attributed to Algerian parliamentarians, what obstacles and limitations prevent parliamentarians from referring the Constitutional Court? Is there a way to strengthen the referral mechanism among parliamentarians?

2. Constitutional Referral and Constitutional Review: Main Concepts

In the hierarchy of norms, the Constitution dominates laws, ordinances, regulations, and decrees. The constitutionality check ensures that the lower standards are in compliance with the Constitution; this control is carried out either automatically as provided by the constitution or by referral as the appropriate mechanism for constitutional review, we will first define the two concepts as follows:

2.1. The Conceptual Framework of Constitutional Referral

We will discuss the definition of referral and subsequently the categories of referral as follows:

a. Definition of the Constitutional Referral

In terms of succession, a very old adage says "*The dead seizes the quick by his hoir the nearest*"[1]. This adage means that the legitimate heirs and the natural heirs, the surviving spouse and in the absence of reserve heirs, the universal legatee apprehend the succession by the mere fact of the death of their author without their need, of obtain an order from the President of the High Court. On the other hand, the legatees and, when the succession is vacant, the State, must follow the procedure described above. It is said in these cases that they must "*be sent for possession*"[2].

The term "referral" is also used in procedural language to designate the apprehension of the subject of the dispute on which the judge will exercise his jurisdiction. At first instance, the "referral" of the jurisdiction results from the delivery to the secretariat registry, a copy of the act of bailiff by which the defendant is summoned to appear on the date fixed in this act. In the case where this mode of introduction of the trial is provided for by the new code of civil procedure, the court is seized by the submission of a request[3].

As far as the Court of Appeal is concerned, its referral is the result of an application for inclusion in the list and, as regards the Court of Cassation, it is seized by a statement of appeal which is a written act registered in the registry of that jurisdiction. The Court of Cassation also knows "*the referral for opinion*", consult the heading Opinion[4].

b. The Categories of Constitutional Referral

The Constitutional Court can exercise its control only if it is seized. This referral is mandatory for:

- The regulations of the parliamentary assemblies (National People's Assembly and Council of the Nation);
- Organic laws (laws complementing the Constitution).
- This referral is optional for:
- Ordinary laws (legislative provisions - acts of parliament including ordinances)[5];
- International commitments (treaties and conventions).

In the case of the optional audit, the Council may be seized by one of the following authorities:

- The President of the Republic: as executive power, the President of the Republic enjoys very important powers and prerogatives in matters of constitutional referral,
- The Prime Minister: he is endowed with the power of referral recently, on the occasion of the reform established by the constitutional revision.
- The President of the National Assembly;
- The President of the Council of the Nation;

- A group of 50 deputies: as part of the constitutional reforms, a group of fifty deputies in the National People's Assembly may appeal to the Constitutional Court.
- A group of 30 Senators: Idem[6].

The constitutionality check takes place after the vote of the law but before its promulgation, that is to say the signature of the texts by the President of the Republic. The Constitutional Court has a period of one month (reduced to ten days in case of emergency and at the request of the President of the Republic) to judge compliance with the Constitution[7].

Under French law[8], the appeal of unconstitutionality is validly introduced by any writing provided that it allows the identification (name, first names, date and place of birth, profession and location, address of the applicant) and is fairly explicit in the act or provision the unconstitutionality of which is alleged and the constitutional provision or norm invoked[9].

With regard to the dispute over the election of the President of the Republic[10], deputies and senators[11], the Constitutional Court can only be seized by written request addressed to its President. This request must be signed by the candidate or his representative, parties or political groupings.

2.2. The Constitutional Review

Giving the definition of constitutionality review and then its consequences:

a. Definition of Constitutionality Review

Constitutional review is a judicial review exercised to ensure that the legal norms (laws, regulations, treaties) of a State, respect the Constitution, placed at the top of the hierarchy of norms[12].

The system of constitutional review is generally presented as complex because of the multiplicity of missions entrusted to the Constitutional Court for historical reasons. This is both true and exaggerated, true because the various missions of the Constitutional Court lead to consider it as more than its classic missions (as in electoral matters for example) and exaggerated, because there is a clear distinction between these missions – judicial and non-judicial.

The question of how the legal power of a Constitutional Court to overturn acts of parliament can be justified by the central theoretical issue

in the field of constitutional review, this issue addresses the perennial problem of the relation between constitutional review and democracy.

Hans Kelsen treats the question of constitutional review as a question of the legislation's legality. The parliament is empowered by the constitution *qua* higher law to enact statutes, and if these laws are not issued in accordance with the procedural rules of the constitution or do not comport with substantive constitutional constraints, in particular, constitutional rights, then these purported laws are unlawful. In this situation constitutional review is said to be indispensable in order to secure "*complete legal bidingness*", required by the "*principle of the greatest legality possible*"[13].

Constitutional review means that the specific State's organs scrutinize and decide on the constitutionality of laws, regulations and documents of legal importance through statutory procedures and in the specific manner provided by the Constitution[14].

Constitutionality is a political principle, which partly finds expression in the normative function of law, partly in real social existence. It entails a mechanism of political relations and powers as well as legal counterweights and guarantees, by which the self- interest of power has to be limited. Constitutionality should not be treated statically, because it can change. Therefore we can speak about constitutionality and the constitution as a unique principle, which finds complete expression in the written constitution, material constitutionality is the structural essence of each democratic political system[15].

The Constitutional Court is the only legal body authorized to set aside statutory provisions. An ordinary court in civil or administrative matters cannot override a legal provision of unconstitutionality. The French system belongs to the group of countries that have adopted a concentrated system of constitutional review – or European model – and this is still true after the introduction of the PIC mechanism (*Priority Issue of Constitutionality*). Before it was introduced, a constitutional review could only take place before the promulgation of the adopted bills, which led to the impossibility of challenging the enacted legislation[16].

Constitutional review is a "*procedure or set of procedures designed to ensure the supremacy of the Constitution by nullifying or paralyzing the application of any act (usually a law), which would be contrary to it*"[17].

Two types of review are distinguished[18]:

- by "*a priori*", before the promulgation of a law,
- "*retrospectively*" when the constitutionality of a law already promulgated is challenged.

Constitutional review consists of a review of compliance with the Constitution, but also, since 16 July 1971 ("*Freedom of Association*" decision), all the principles of "*the constitutional bloc*"[19].

This includes the articles of the 1958 constitution, the Declaration of the Rights of Human and Citizen of 1789, the preamble to the 1946 Constitution and the environmental map since 2005[20].

Also included in the constitutionality block are the political, economic and social principles that are particularly necessary at present (right to health, freedom of association, right to strike, right to employment, etc.)[21].

Finally, this bloc includes the fundamental principles recognized by the Republic laws (freedom of association, freedom of conscience, respect for the rights of the defense, etc.)[22].

Constitutional review applies to internal standards[23], but also to external standards (treaties and international commitments)[24].

b. The Consequences of the Constitutional Review

One of the most important powers of the Constitutional Court is the interpretation of the fundamental meanings of the constitution, procedure, laws and treaties. The Court may declare provisions of laws contrary to the Constitution or the principles of constitutional value which it has deduced from the Constitution. It may also declare laws contrary to ratified conventions and treaties, and to declare a law contrary to constitutional or conventional provisions cancels it. The Court may also have reservations as to the interpretation of certain statutory provisions. Court decisions are binding on all authorities[25].

Under the *a priori* control, the Constitutional Court can declare the law in conformity with the Constitution. In this case, it is promulgated, the law may also be declared unconstitutional, in this case, it can't be

promulgated; often, the law is declared partly contrary to the Constitution, in this case, the law may be partially promulgated if the unconstitutional articles are separable from the whole law text[26].

When the controlled text suffers from a constitutional defect, instead of canceling it, the Court preserves it, for that it corrects it by attributing a certain interpretation or eliminating the element which vitiates it, and that is subject to compliance with this sole interpretation given by the Court that the text will be retained for having been in conformity with the Constitution. The text in question is therefore not in itself or "only in virtue", but in the condition of reservation to which the Court subjects it[27].

Also, the law can be declared in conformity with the Constitution subject to certain reservations of interpretation, either by specifying how it should be interpreted (neutralizing interpretation), by completing it (constructive interpretation), or by specifying how it should be interpreted, to be applied (directive interpretation)[28].

In the latter case, the law is promulgated, but the implementing decrees and the persons responsible for implementing the text must take into account these reservations[29].

If a treaty is declared unconstitutional, it can only be ratified after an amendment to the Constitution[30].

In the context of *ex post facto* review, the unconstitutional legislative provision is set aside for the current litigation and repealed for the future. The Constitutional Court determines the conditions under which the effects that the repealed provision has produced may be called into question[31].

Decisions are published in the Official Journal and have the authority of *res-judicata*. They "*impose themselves on the public authorities and on all the administrative and jurisdictional authorities*"[32].

3. Extending Constitutional Referral Power to Parliamentarians: Issues and limits

Among the advantageous novelties of the constitutional revision is the extension of the power of constitutional referral to new authorities, the Prime Minister, forty deputies, twenty five senators and litigants in litigation before the different jurisdictions, we will address the

constitutional basis of this extension, and its consequences, then the practice of referral to parliamentarians as follows:

3.1. The Constitutional and Legal Basis of the Extension and its Consequences

We will firstly consider the constitutional basis of the extension and its consequences:

a. The Constitutional Basis of the Extension of the Referral

Undoubtedly, the most unexpected innovation of the Algerian constituent of 2016 is the institution of the exception of unconstitutionality. Thus, France would not be the only country to constitutionalize such a right of litigants.

Article 193 of the Constitution stipulates: "*The Constitutional Court is seized by the President of the Republic, the President of the Council of the Nation, the President of the National People's Assembly or by the Prime Minister or the Head of Government, as the case may be.*

It may also be referred by forty (40) Members or twenty-five (25) Council members of the Nation.

The exercise of the referral set out in the previous two paragraphs does not extend to the referral in exception of unconstitutionality set out in Article 195 below. "[33].

In reality, the idea of the exception of unconstitutionality came from elsewhere. It finds its first roots in the systems of judicial review of the constitutionality of laws under, generally, the name of the preliminary question or the exception of unconstitutionality, before being adopted by the French constitution from the revision of 2008 under the acronym of the Priority Issue of Constitutionality PIC- (QPC[34]: *Question Prioritaire de Constitutionnalité*) [35].

b. The Consequences of the Extension of the Constitutional Referral

The questions of the referral to the Constitutional Court are one of the most salient aspects of constitutional litigation. Experience has shown that the conditions of this referral have evolved in the direction of an enlargement which is not yet closed, because it is not so simple to bring an effective condemnation of the current framework of the referral[36].

Before the parliamentary referral of the Constitutional Court took a highly political dimension, it seems that it was in its first moments a simple

legal device to allow an expansion of the number of laws controlled by the constitutional judge[37].

Technically, the procedure for examining exceptions to the constitutionality of statutes has three objectives. It is a question of giving a new right to the parliamentarians as well as to the litigants[38], the possibility to raise the question of the constitutionality of the law applicable to the litigation of which it is a part, to purge the legal order of the unconstitutional provisions, to ensure the preeminence of the Constitution in the internal order; it involves three actors in its implementation, the parties to the trial, the judicial and administrative courts that filter the referral and the Constitutional Court that decides on the issue raised[39].

As for the power of referral awarded to parliamentarians, this extension is fully in the process of the general will formation, and revives the Constitution; the legal debate succeeding the political debate, which gives the opposition an additional means to put forward its arguments. The word of the constituent people comes back to life and the constituent act is no longer fixed or silent, it is by this way mobilized permanently[40].

The Constitutional Court positions itself as an objective mediator between the political sphere and the public space of the debate. The fulfillment of democracy takes two forms: the first concerns the extension of the legislative debate before the Constitutional Court by means of the referral, the argumentation of the briefs in reply. The second is the updating of the constituent's word, constitutional decisions, the questioning of the Constitution, the Constitution effectiveness at the top of the hierarchy of norms[41].

Constitutional bloc means all the principles and rules of constitutional value, the respect of which is binding on the legislative and executive powers, and all other norms subject to the constitution must not make provisions contrary to it. The Constitutional Court can therefore exercise control over the norms submitted to it only by confronting them with these constitutional norms of reference.

These reference norms are certainly part of the constitution, but sometimes they need to be interpreted, which could make these norms, therefore, different from one country to another.

3.2. The Practice of Parliamentary Referral: Between Commitment and Hesitation

The fact that the Algerian constituent has established the extension of the constitutional referral to parliamentarians alongside the Prime Minister and the litigants, this improvement is considered a democratic achievement in the process of reforms and promotion of rights and freedoms[42], but when we evoke the practice of this power attributed to parliamentarians this will be faced to many obstacles that limit its implementation enormously, mainly for practical reasons related to the text in the first place, and to the reality in the second place, these limits can be examined as follows:

a. Partisan Membership and the Question of Loyalty to Power

After a reading of Article 193 of the Constitution which assigns the power of referral to forty (40) deputies of the National People's Assembly and twenty five (25) Senators of the Council of the Nation there are some difficulties, most of which are related essentially to the issue of partisan membership and loyalty to power.

When we perceive the formation of the People's National Assembly, we note that there is a parliamentary majority dominated by the ruling parties, the National Liberation Front; the National Democratic Rally, the other parties that share the rest of the seats, they are divided between loyalty to power and opposition, but what really prevents the opposition minority to implement mechanisms to defend itself is this domination.

Article 193 of the constitution made it clear that the number of deputies and senators who can seize the Constitutional Court, forty (40) deputies is an assumed number that cannot be practically achieved, as well as twenty five (25) senators, quorum in relation to the seats number in both assemblies, this is not the essential question, but rather the majority loyal to power. Practically, most members of Parliament are often reluctant to proceed; this strategy of retreat is well motivated by the instructions of the ruling parties in the political arena, not just the parliamentary majority.

Another very important reason is that most of the legislations in Algeria come from the Government as draft laws, whereas the initiative of parliamentarians in legislative matters has been reduced for several years, mainly due to the level and quality of parliamentarians, namely "the category" of women represented in parliament under the "quotas" system[43].

Thus, a majority in parliament who support the Government in all its activities that require parliamentary intervention, will never dare to resort to the referral after having voted the legislation presented, it is totally logical, in moreover, the fact that deputies and senators belong to the ruling parties prevents them from acting against the Government, the conduct codes of political parties penalize the "*un-obedience*" to party regulations, including policies to support the Government.

From a practical point of view, the recourse to the power of referral by the parliamentarians is enormously reduced, if we take into account "*the absolute and unconditioned loyalty*" to the power, motivated - very sure - by "*political favors*", relating essentially the positions of responsibility within the power, that is to say the path of parliamentarians loyal to power is already determined, regardless of their attitudes to the objectives of the mandate, say support the voters (the people).

In the French experience, the constitution stipulates in article 61 al-2 to confer the seizure power to the sixty (60) deputies and sixty (60) senators, recently established by the constitutional law n ° 08-724 of July 23rd, 2008[44], but the French Parliament consists a majority with reasonable power, thus, members can proceed to the referral without any constraint, because the objective is the democratization of the referral to the Council, by reintroducing directly the people's representatives in the process of controlling the constitutionality of laws, this objective will not only be achieved but it will have significant effects on the system of functioning between the various constitutional bodies and on the relations between the majority and the opposition[45].

Also, article 61 al-2 mentioned above mentions that "*before their promulgation*"[46], which is not specified in the Algerian text.

b. Inefficiency and Weakness of the Opposing Minority

Among the most important reasons that practically prevent parliamentarians from proceeding to the referral, in addition to the rashes already treated below, the inefficiency and weakness of the opposing minority. There is a majority[47] in power with a large representation in parliament; with a political power moreover close to the circles of power, consequently the opposing minority becomes weak and ineffective. Among 407 members of the National People's Assembly, it is practically difficult to

achieve a quorum of forty (40) deputies (who must be absolutely opposed) to just proceed to the referral to the Constitutional Court concerning the conformity of a legislative text (mainly presented in as a bill emanating from the Government), thus, as for the one hundred and seventy-four (174) members of the Council of the Nation, therefore, the quorum set by the provisions of Article 193 of the Constitution is well determined.

Indeed, when we talk about the opposition weakness, we see a very strong influence of power, according to the important prerogatives that are attributed to the administration concerning the control over political parties activities[48], the Minister of the interior as a power entrusted with of the political parties agreement has important attributions, essentially relating to the authorization to organize party congresses, as well as the process of forming a political party and precisely the control of its activities.

Another very important point is the role of the administration in splitting political parties, when it gives permission to a dissenting minority, this minority may have an independent organization to form of a new party, as a result, main parties will become weak after these cleavages, new parties loyal to power with rights and guarantees, these results confirm the weakening of the opposition.

Regarding the inefficiency of the opposition, it can be said that the differences between the opposing parties, prevent the possibility of ratifying alliances or coalitions to fight against the ruling majority, as well as the absence of strategies, objectives and cooperation, indeed the personal interests of the opposing parties members dominate the party's activity as an organization, at the end, the small number of opponents in the parliament is considered more reason for the inability to proceed to the constitutional referral and most of the activities of a minority opposed to the political scene.

4. CONCLUSION

As a conclusion through this research paper, we can say that the constituent has established a very important reform considered as an improvement concerning the promotion of the constitutional practice of the control of constitutionality, it entrusted the Parliament members a certain power to refer to the Constitutional Court, which is undoubtedly a very important point, because the Parliament as an institution endowed with the people representation is the most important space to express the general

will, but in reality, the parliament powers in several areas, have unfortunately been diminished by the provisions of the constitutional and legislative texts.

Thus, the formation, the degraded quality and the intellectual level of the Parliament members have a bad influence on the practice of the powers confided by the texts, the domination of the executive and the parliamentarians membership in ruling parties, all these reasons contributed greatly to diminish and limit the recourse to such an important power, it is then necessary that the parliamentarians must be responsible and conscious to carry out the tasks which are entrusted to them, within the framework of the practice of the parliamentary mandate, essentially expressing the people's will and the electorate, by promoting their trust and loyalty, this undoubtedly makes it possible to improve the constitutional practice in any democracy.

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