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## **Constitutional promotion pleading unconstitutional in the 2020 constitution**

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### **Abstract:**

The unconstitutionality defense mechanism was introduced in the 2016 constitutional amendment for the first time, in order to protect rights and freedoms by the Constitutional Council, but it was subjected to a number of criticisms, and thus realizing the importance of this mechanism that achieves constitutional justice and seeks to build a state of right and law, the constitutional founder sought to Amending and developing it, in the 2020 constitutional amendment issued by Presidential Decree 20-442 amending it to the Constitutional Court and expanding the areas of payment, conditions and effects to ensure the building of the state of right and law.

**Keywords:** constitution of 2020; the plea is unconstitutional; protection of rights and freedoms; constitutional court.

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## **Introduction:**

Advocating the unconstitutionality of laws is a form of judicial oversight of the constitutionality of legal texts, which gives litigants the right to challenge the unlawful texts that have been judicially judged to enable the individual to enjoy all his constitutionally guaranteed rights and freedoms as an embodiment of a state of law that is based on establishing constitutional justice to enhance Legal and judicial protection of individual and collective rights and freedoms. As monitoring the constitutionality of laws is a legal act aimed at making sure that the law is in conformity with the provisions of the constitution and identifying whether the legislative authority adheres to or exceeds its jurisdiction.

Countries that have adopted payment differ in how the latter is applied, as preventive oversight in the United States of America by paying unconstitutionality is the oldest and most common method, in which a judicial dispute is assumed and the defendant argues that the law to be applied to the case is unconstitutional, so the court By examining the constitutionality of that law, if it finds it unconstitutional, it neglects it, refuses to implement it, and adjudicates the case.

The ruling that a law is unconstitutional does not entail repealing the law and its downfall for all, but the effect of this ruling is limited to excluding the application of that unconstitutional law in the case before the court, while the law remains for the time being amended and abolished by the competent legislative authority.<sup>1</sup>

The United States of America is the first to adopt the idea of judicial control over the constitutionality of laws through the Federal Supreme Court embarking on a process of examining the constitutionality of laws starting in the year 1976, to issue its

famous ruling in the Marbimadson case in 1803, which was the starting point in devoting the authority of the American judiciary to exercise control over the constitutionality Laws, for this model to be adopted for oversight in many countries, but this adoption was not strict, some countries have been granted the power to monitor for the various judicial bodies formed for its judicial system, and for its different degrees as in the case in America and other countries have chosen to delegate this task to the higher degree In the judicial organization represented in the Supreme Court as is the case in Colombia, and the creation of a judicial body specialized in constitutional oversight called the Constitutional Court as is the case in Italy and Egypt.<sup>2</sup>

The French constitutional founder also adopted the mechanism of judicial oversight by individual payment, which the legislator inserted into the 2008 constitutional amendment of February 23, 2008 in the first paragraph of Article 16 under the title of the primary issue of constitutionalism<sup>3</sup> or what is called the QPC acronym<sup>4</sup>. In 2009, the organic law was issued in France under No. 1523/2009 of history on December 10, 2009, it clarifies the modalities for the application of the first paragraph of Article 16 of the Constitutional Law 74/2008 of July 23, 2008, which adopted the same idea and the same aforementioned designation, as it granted the chapter on the payment that was raised before the judiciary to the Constitutional Council after being referred to it by The party of the higher judicial authorities.

In Algeria, the constitutional founder adopted judicial oversight by pushing unconstitutional in the constitutional amendment of March 7, 2016 in its Article 188 which states that "the Constitutional Council can be notified of the payment of unconstitutionality based on a referral from the Supreme Court or the State Council, when one of the parties claims In a trial before a judicial authority, the legislative ruling on which the

conflict depends on the rights and freedoms guaranteed by the constitution.

Thus, the constitutional founder included for the first time a mechanism that enables the protection of rights and freedoms by the court by enabling parties in the event of a legal dispute to gain access to the Constitutional Council in the event of unconstitutionality if the law that will be applied in the conflict violates the rights and freedoms guaranteed by the constitution.

Aware of the Algerian constitutional founder of the vital importance of this mechanism of oversight in achieving constitutional justice and ensuring individual rights and freedoms and building a modern state, Algeria has adopted the European style and adopted constitutional oversight as among the important gains that embody the principle of separation of powers, and devote political pluralism and the promotion of human and citizen rights in order to preserve The constitutional institutions that ensure the implementation of people's choices and express their aspirations and hopes.

Constitutional control was an inevitable result of the comprehensive political endeavor pursued by the country in order to keep pace with the political, economic, social and cultural developments that the world witnessed by building strong democratic institutions that derive their existence and validity from the will of the people expressed in the Basic Law of the Republic.

It should be noted that this mechanism, in accordance with the provisions of Article 215 of the constitutional amendment, is implemented after a period of 3 years from the entry into force of the provisions of this amendment that is, starting in the month of March 2016.

Organic Law 16-18 of September 2018 was issued defining the conditions and modalities for implementing the unconstitutionality in accordance with the provisions of Article 188 of the Constitution, and between the procedures that must be followed to make this payment.

So what is meant by the mechanism of payment of unconstitutionality and what are the provisions of this payment? To answer the problematic and sub-questions, we adopted a mixture of the analytical approach as among the most appropriate approaches for such studies, because this study needs to analyze legal texts and comment on them, especially organic law 18-16. As well as according to the new constitutional amendment 2020.<sup>5</sup>

We took the following plan, which is divided into two main topics, as follows:

**First Subtitle:** the conceptual framework to defend the unconstitutionality of laws.

**Second Subtitle:** the provisions of the payment of unconstitutionality of laws.

And therefore we turn to the analysis of the topic.

**The First Subtitle: the conceptual framework to defend the unconstitutionality of laws**

The most recent push for the unconstitutionality of laws is a new mechanism for monitoring the constitutionality of laws, which came as a guarantee to protect the rights and freedoms of people. Where does the judge verify laws that are in conformity with the constitution and the laws that violate it and issue a ruling to refrain from applying the law that violates the constitution but does not abolish it, but remains in place until it is repealed With another law, and thus this control opens the way to defend the interests of individuals and guarantees them to protect their constitutionally guaranteed rights and freedoms.

Thus, the founder expanded the cases of this oversight in order to fortify and protect the constitution from laws that violate it and as a simple consecration of the constitutional judiciary,<sup>6</sup> and from it the constitutional system acquires a democratic character except By guaranteeing all rights related to citizenship for individuals, including the right to litigate either by the judicial authority or the constitutional judge, since those rights and freedoms are subject to aggression by Parliament, which restricts it and an arbitrary authority to prevent its exercise and enjoyment on the basis of protecting public order, and thus has become The constitutional judiciary is one of the most important criteria considered in the state of rights and freedoms.<sup>7</sup>

Therefore, it has been stipulated in Article 188 of the 2016 constitutional amendment.<sup>8</sup> This is also felt by the content of organic law 18-16,<sup>9</sup> which defines the conditions and modalities for advancing unconstitutionality, and this is in order to establish the rule of law and ensure the principle of the supremacy of the constitution stipulated by the constitution.

the same applies to the constitutional amendment 2020 in its article 193.

### **The first requirement: the concept of advancing the constitutionality of laws**

Advocating the unconstitutionality of laws is a defense means granted by legislation to people to protect rights and freedoms according to limits and frameworks drawn up by legal rules that are in line with the philosophy of each country. In other words, under this system, there is no single court that monopolizes the power to control the constitutionality of laws,<sup>10</sup> and this differs from what is enshrined in Algeria.

## **The first branch: Defining the payment of unconstitutional laws**

By unconstitutionality, the law means that one of the parties submits the lawsuit that it violates a right or freedom from the freedoms guaranteed by the constitution: every requirement of a legislative nature to be applied in a case before the court, and one of its parties argues that its application will lead to a breach or violation or Deprivation of a right or freedom from the freedoms guaranteed by the constitution, so that the Constitutional Council can be notified by assignment.<sup>11</sup>

Defining the unconstitutionality of laws can be defined as: "the legal means raised by one of the litigants' opponents in a matter or legal requirement on the occasion of an existing dispute before the court of the subject in the absence of conformity of its provisions with the constitutional text if its application in the issue of the dispute would affect one of the rights or freedom of the guaranteed freedoms Constitutionally."<sup>12</sup>

And by reference to the provisions of Article 188 of the 2016 constitutional amendment, which states that:

"The Constitutional Council can be notified of the claim of unconstitutionality based on a referral to the Supreme Court or the State Council when one of the parties in the trial claims before a judicial authority that the legislative ruling on which the dispute depends depends on the rights and freedoms guaranteed by the constitution."

Through the aforementioned article, we conclude that the constitutional founder granted individuals the right to pay after the constitutionality of a legal text in the dispute before the ordinary judicial authorities and administrative judicial bodies. Laws, pushing unconstitutionality is a type of control that takes place after the law enters into force and is pushed by litigants in the case before the judiciary as a way to

defend itself in the event that it becomes clear to him that the legislative provisions that will be applied to his dispute are contrary to the constitution.

And from it, if the court finds that this payment is serious, the original case will be suspended until the constitutionality of the law is decided, and the referral will be by the Supreme Court or the State Council, depending on the nature of the dispute.<sup>13</sup>

We also see through the provisions of Article 2, Paragraph 1 of the Organic Law 18-16, which states that:

"Unconstitutionality can be raised in every trial before judicial bodies subject to the regular judicial system and judicial bodies subject to the administrative judicial system by one of the parties to the lawsuit who claims that the legislative ruling on which the dispute's money depends violates the rights and freedoms guaranteed by the constitution.

Accordingly, this article enshrines the course of democracy, in line with the 2016 constitutional amendment, and therefore we note that the legislator has engaged citizens in liquidating the legal system from unconstitutional requirements, as well as giving a new right that enables the litigant to defend his constitutionally guaranteed rights, through indirect access to the judiciary. Constitutional.<sup>14</sup>

It is also noted that there is enrichment at the level of entities that were authorized to carry out the notification process, taking advantage of the comparative constitutional legislation, as well as the criticisms leveled against the constitutional founder on the issue of the limitations of those entitled to notification.<sup>15</sup> As well as according to the new constitutional amendment 2020.



### **The second branch: the characteristics of the payment of unconstitutionality:**

The procedure for advancing unconstitutionality has characteristics that can be inferred through the provisions of Article 188 of the 2016 Constitutional Amendment and Organic Law 18-16, and they are as follows:

-The plea of unconstitutionality constitutes a separate case from the original lawsuit from the moment it was raised to the point of broadcasting it.

- The parties to the lawsuit are only entitled to plead unconstitutional, and accordingly, it is not permissible for a judge to raise it automatically, as it is not related to public order.

- The plea of unconstitutionality is considered a subordinate rather than a major lawsuit, and it becomes a major dispute when referred to the Constitutional Council.

- Since advancing unconstitutionality is an objective case, as the role of the Constitutional Council is limited to examining the extent to which legislative requirements conform to the constitution without deciding on the dispute between the parties.<sup>16</sup>

- Unconstitutionality can be raised at the level of all judicial bodies before ordinary judicial or administrative judicial bodies, even for the first time at the level of the appellate or cassation appeal.

- The claim of unconstitutionality cannot be raised before the criminal court of first instance due to the complexity of the procedures applied before it on the one hand and the litigant has an opportunity before the investigation to raise the payment to be decided by the accusation chamber, and the judge can also appeal the criminal ruling issued by the criminal court, and thus pay before the court Appellate.<sup>17</sup> and pending the issuance of the organic law amending law 16-18 in accordance with the 2020

constitutional amendment.

**The second requirement: the legal nature of the payment of constitutional uncl**

In comparison with the constitutional systems, we find that the procedures specified in the aforementioned Article 188 were not precisely included in the impeachment of unconstitutionality, which assumes that the ordinary judge competent to hear the original case is also competent to settle the constitutional case as is the case in the American system, while the Algerian constitutional system It is related to a sub-issue. We find that the first paragraph of Article 188 enabled every litigant, whether a natural or legal person, to see that the application of the law upon which the dispute depends upon violates the rights and freedoms guaranteed by the constitution from notifying the Constitutional Council based on a referral from the Supreme Court or Council of State.

The Constitutional Council is either the constitutionality of the text or its lack, because it is not possible for the judiciary to declare the constitutionality of the law contested as unconstitutional, but its competence is limited to refraining from its application in the dispute presented to it, because the issue of making the law ineffective or losing its effect will remain at the core of the competence of the Constitutional Council only.

In application of this Article, Organic Law 18-16 was issued, specifying the conditions and modalities for the application of payment, as it affirmed what was stated in Article 188.

Accordingly, judicial oversight is by a body affiliated with the judiciary and in front of all types of courts, regardless of their level in the judicial ladder, so applying their control to the constitutionality of laws in the event of unconstitutionality by relying on the method of sub-payment, by referring the payment to the Constitutional Council, which remains competent to make

a constitutional decision The law is the subject of notification or not.

Accordingly, constitutional oversight by payment is considered an innovative mechanism in the field of protecting the rights and freedoms guaranteed by the constitution, as it contributes to liquidating legal texts that violate it, and will make the work of the Constitutional Council more effective.<sup>18</sup>

**The second Subtitle : Provisions for submitting the constitutionality of laws:**

Devoting the path of advancing unconstitutionality leads to the emergence of the role of other parties within the framework of oversight of the constitutionality of laws, and this is evident through Article 188 of the 2016 constitutional amendment, where its content indicates that the appellant cannot raise the appeal of the unconstitutionality of the law directly before the Constitutional Council, but rather is done This is based on a referral from the Supreme Court or the State Council, according to the type of judicial body that considers the existing dispute. Or reject it if there are serious reasons that justify it. .the same applies to the constitutional amendment 2020 in its article 193.

**The first requirement: conditions for payment of unconstitutionality**

Article 188 (16-01) and 193 (2020) of the last amendment to the constitution defines the outlines of pushing unconstitutional, which represent the new powers of the Constitutional Council in the field of rights and freedoms included in the constitution, and the conditions for the practice of advancing unconstitutionality were defined in Chapter Two of the Organic Law 18-16 included starting from Article 07 until the end Article 13 thereof. Where he specified a set of rules and provisions that would balance the interest of individuals in stirring up the claim of unconstitutionality and ensuring the stability of the work of

judicial bodies, which are divided into formal and objective conditions.<sup>19</sup>

### **The first branch: formal conditions**

The mechanism for arguing that the law is unconstitutional is considered a defensive method by the person concerned, where the unconstitutionality is paid during the consideration of the case, and not by filing an original lawsuit against this law. To file a lawsuit, which consists in?

Persons involved in payment:

One of the parties to the trial, whether he is a natural or legal person, public or private, recognized in Algerian law, meaning that the constitutional founder and legislator is satisfied with stipulating that the payment of the unconstitutionality of the law be submitted by one of the parties to the case, and accordingly, those who have the right and interest only have the right to arouse This payment, without specifying whether these original parties are in the case only or whether this right also includes joining parties. Neither the judge nor members of the Constitutional Council have the right to make a motion that the laws are unconstitutional.

The payment is automatic and the appeal remains a right of the litigant only, and the judge is prevented from raising the payment because he is not a party to the trial after the notification process Reasoned within 10 days from the date of its issuance, and the decision to refuse to send the unconstitutionality may not be objectionable except on the occasion of an appeal against the decision that separates the dispute or part of it according to a written, independent, and reasoned note.

The legislator stipulates that sending the unconstitutionality to the Supreme Court or the Council of State shall postpone the adjudication of the dispute or the Algerian trial until the decision

of the Supreme Court, the Council of State or the Constitutional Council in the event of notification.

However, this does not mean stopping the progress of the investigation, but the judicial authority can take the necessary temporary and conservative measures, and the judicial authorities decide the case without waiting for the opinion of the Supreme Court, the Council of State or the Constitutional Council if notified, in the event of a criminal being present because of the lawsuit or if this is The latter aims to put an end to the deprivation of liberty, and when the law stipulates that the judicial authority must be separated in a specific time or expedient way, and in the event that the primary judicial authority is dismissed without waiting for the decision to pay and its decision has been resumed, the appeal must be postponed. Except in the cases stipulated in Article 12/10 of the Organic Law 18-16.

But if a cassation appeal has been filed and it has been decided by the judges of the matter without waiting for the decision of the Supreme Court or the Council of State or the decision of the Constitutional Council in the event of notification, the adjournment of the cassation appeal is postponed until the purpose of deciding the unconstitutionality. To submit the payment on the occasion of the consideration of the case to a judicial authority

In the text of Article 188 it is stated that the procedure for submitting unconstitutionality is carried out after a party in the trial claims before a judicial authority, and from it we conclude that moving the mechanism to pay for the unconstitutionality of a specific law is only possible in the presence of a case of conflict,<sup>20</sup> and therefore the claim for payment of unconstitutionality of the law is a subsidiary case that is not filed Unless there is an existing dispute and is before the judiciary,

this condition makes the constitutional dispute a real dispute because it is linked to a real dispute before the judicial authorities, whether it is before the first degree or the appeals or cassation parties, where the thrust of the unconstitutionality of the law can be raised in every trial and in front of all ordinary judicial bodies And the administrative, and thus the legislator has ruled out submitting the payment to the First Instance Criminal Court,<sup>21</sup> but he authorized it to be submitted in the event of its appeal. As for the dispute court, as the court is competent to adjudicate the conflict of jurisdiction only between the regular judiciary and the administrative judiciary, and that its decisions are not subject to any appeal, and therefore the parties cannot submit to it due to the unconstitutionality of the law, and the French experience shows that the dispute court did not accept Consider advancing the unconstitutionality of laws on the grounds that they do not separate the basis of the dispute and are not subject to the supervision of any other judicial body.<sup>22</sup>

- the shape

According to the provision of Article 06 of the Organic Law 18-16, submitting the unconstitutionality of the law is submitted through a written, separate and reasoned memo, and therefore the litigant cannot request the unconstitutionality orally, but must submit a special written memo related separately to the unconstitutional payment stating the reasons for submitting this memo Under penalty of non-acceptance.

### **The second branch: objective conditions**

By extrapolating the legal texts regulating the mechanism for submitting the unconstitutionality of laws in both text of Article 188 of the last constitutional amendment 16-01, as well as Article 2 and 8 of Organic Law 18-16, the conditions for submitting unconstitutionality of law can be specified in: that payment is based on a law, and that This law violates the rights

and freedoms guaranteed by the constitution.

That the unconstitutionality is focused on a law

According to the provisions of both Article 188 of Law 16-01 that includes constitutional amendment and Article 02 of Organic Law 18-16, the issue of the dispute of defending unconstitutionality is a legislative ruling, whether it is an ordinary or organic law or even legislative orders, given that both the constitutional founder and the legislator They have used the term legislative ruling, and therefore there is no room for placement of unconstitutionality, organizational texts and individual and organizational administrative decisions, as administrative activities that are subject to the supervision of the administrative judiciary. This has indicated Article 08 of the aforementioned organic law the conditions that must be met in the law in order for litigants to be able to raise the payment The unconstitutionality of a specific law, which is:

To be dependent on the presumed legislative provision for the dispute or to form the basis for follow-up

The judge has discretion in the payment to be submitted to him, if he considers that the dispute depends on these provisions raised by the judge. That is, Article 188 of the 2016 constitutional amendment explicitly stipulated the existence of a legislative provision upon which the content of the dispute depends, in violation of the rights and freedoms guaranteed by the constitution until the recourse to unconstitutionality is resorted to.

The legislative ruling must not have been previously declared in conformity with the constitution by the Constitutional Council

It must not have been preceded by a decision by the Constitutional Council on the subject of advancing unconstitutionality related to the subject of the case itself, and this is what we deduce from Article 191, the third paragraph of

the Constitution, in implementation of the principle of the authenticity of the matter that is stipulated in it, and this is from the premise that the decisions of the Constitutional Council are open Any aspect of the appeal, including a request for review, is binding on all administrative and judicial authorities.<sup>23</sup>

Except in the case of changing circumstances, the provisions for which the promulgation of unconstitutionality may be raised may have previously been declared by the Constitutional Council to be in conformity with the constitution, so the unconstitutionality cannot be submitted again.

In the event that there is a change in the material, the raised face must be serious and this is logical, because the matter cannot be addressed twice except in the case of changing circumstances and seriousness here subject to the discretionary authority of the judge as it is a matter of understanding from the circumstances of the invitation file and the circumstances of submitting the application and therefore it can be arbitrary More than an area of discretion.

The meaning of seriousness of payment is defined in two main issues:

That deciding on the constitutional issue be productive

That is, the law or system contested in its constitutionality is related to the issue of the dispute, and that the ruling of unconstitutionality benefits the stakeholder in the pending invitation. Without paying attention to the constitutional issue.

That there is a suspicion that the law or order is unconstitutional and suspicion explained in the unconstitutional aspect when deciding the seriousness of the payment.

The court's decision on seriousness is not final, but the person concerned has the right to appeal the methods established for the appeal.

- The contested law violates the rights and freedoms guaranteed



by the constitution

Article 188 of the last constitutional amendment stipulated that the legislative ruling on which the conflict depends depends on the rights and freedoms guaranteed by the constitution. It is noticeable that the constitutional founder has linked the argument to the unconstitutionality of a specific law that violates this law with fundamental rights and freedoms.

Considering that the purpose of censorship by submitting unconstitutionality is to protect the rights and freedoms of individuals, since the right and freedom are two sides of the same coin, and these rights may be individual or collective and by reference to the preamble to the constitution we find in paragraph 12 that the constitution is above all and is the basic law that It guarantees individual and collective rights and freedoms, and it is noticed in the last constitutional amendment that there has been expansion in the field of rights and freedoms and this is to support the state of right and law, as well as the spread of a culture of respect for rights and freedoms that occupied a prominent and distinguished place in various constitutions, Where special protection measures have been put in place in many national legislations, which has led to both the constitutional founder and the legislator, Algeria, following the example of comparative legislation.

Linking the argument of the unconstitutionality of a specific law to the infringement of rights and freedoms raises several questions about the concept and enumeration of these rights and freedoms, so is the matter limited to the list of freedoms that the constitutional founder has in its concept of form? Or does the total rights and freedoms guaranteed by the constitution extend in its materialistic concept, that is, all legal rules with constitutional content and its various degrees? And in what source of constitutional law? Especially since the Constitutional

Council had expanded the concept of censorship that it exercised on the occasion of its separation in many notifications addressed to it as the reference rules on which it was based to issue its decisions and opinions included a preamble which was confirmed by the constitutional founder in the last paragraph of the preamble of the constitution by stipulating that "these constitute The preamble is an integral part of the constitution "and extends to international treaties as well as diplomatic norms.

The legislative ruling contested in its constitutionality must also constitute a violation of the rights and freedoms guaranteed by the constitution, although the concept of these rights and freedoms is still vague and a source of differences between the jurists and has several implications, especially with regard to Cultural and religious particularities, which requires controlling this concept by the State Council and not leaving it to the discretion and personal discretion of the judges.<sup>24</sup> it was amended in the last constitutional amendment 2020, and this is in accordance with article 195 to article 198 and takes the aforementioned proposals.

### **The second requirement: procedures for payment of unconstitutionality**

The Algerian constitutional founder has created a new mechanism to monitor the constitutionality of laws, since the dangers have not become confined to the political class alone, but have become a right of litigants against laws that violate the constitution. This matter constituted a qualitative leap in the field of judicial oversight, as Article 188 of the 2016 constitutional amendment specified Organic Law 18-16 Procedures for submitting the unconstitutionality of laws that

are to be followed by litigants either before the Supreme Court or before the Council of State, and before the Constitutional Council, where after submitting unconstitutionality with a written and reasoned note and this is subject to the risk of non-acceptance, the judicial authority before it is detailed. The dispute immediately and with a reasoned decision to send the plea of unconstitutionality to either the Supreme Court or the State Council, after consulting the opinion of the Public Prosecution or the Governor of the State, and therefore we allocate the first request to the procedures applied before the Supreme Court and the State Council, while the second demand includes the procedures applied before the Constitutional Council, and in the third demand Effects arising from the payment of unconstitutionality of laws. . .the same applies to the constitutional amendment 2020 in its article 195.

### **The first branch: procedures applied before the Supreme Court and the State Council**

- How to practice unconstitutionality before the Supreme Court and the Council of State.

According to the text of Article 6 of the aforementioned organic law 16-1 8“Submission of unconstitutionality is submitted under penalty of failure to accept a written, separate and reasoned memo” where unconstitutional payment is made by a written memo and this petition must be separate from the main dispute that the unconstitutionality came on the occasion of Considering it and this petition includes various means of discussion that focus on constitutionalism only and do not go beyond the consideration of the main case and this so that the court can build its conviction about the seriousness of the dispute in the unconstitutionality of the legislative ruling to be applied to the main conflict, and the memorandum must be precisely caused so that it shows citizens Unconstitutionality in the legislative

provision to be applied to the main conflict and not be broad and vague.<sup>25</sup>

What must be emphasized is that the initial constitutional issue is related to a lawsuit published before the judiciary and the court or (the judiciary) cannot raise it on its own. As for its subject matter, it focuses on a legislative provision or a law intended to be applied to the dispute, and this law violates constitutionally protected rights.<sup>26</sup>

The judicial authority shall immediately adjudicate and with a reasoned decision to send the unconstitutionality to the Supreme Court or the State Council after seeking the opinion of the Public Prosecution or the State Governor, and the judicial authority that includes assistants other than judges will be dismissed without their presence.

The constitutional payment is sent to the Supreme Court or the State Council after the conditions are met:

- It depends on the legislative ruling of the contested object of the dispute or that it forms the basis for follow-up.

That the legislative rulings not have been previously declared in conformity with the Constitution by the Constitutional Council, unless circumstances change.

The face should be serious.

And by fulfilling these conditions, the decision to send the payment of unconstitutionality to the Supreme Court or the State Council will be made within a period of days as it is notified to the parties, and this decision is not subject to any appeal.

It is noticeable that Law 18-16 related to the conditions and modalities for submitting unconstitutionality did not specify the time or period of crisis to settle the request for unconstitutionality before the competent judicial authority.

In the case of the judicial authority before it rejecting the dispatch dispute, the decision is declared unconstitutional, the

decision shall be communicated to the parties, and there can be no objection except on the occasion of the appeal against the decision that separates the dispute or part of it. Submission of unconstitutionality The judicial authority before the dispute shall postpone the settlement of the dispute until the decision of the Supreme Court, the Council of State or the Constitutional Council is issued when referring the payment to it.

Stopping the settlement of the dispute does not mean stopping the progress of the investigation, as the judicial authority can proceed with the investigation and take the necessary temporary or conservative measures.

Although the original adjudication of the case is postponed until it has obtained a decision from the Supreme Court, the State Council, or the Constitutional Council when referring the payment to it, exceptions to this rule are made so that the judicial authority before the dispute does not postpone the settlement of the dispute, as it adjudicates it When a person is deprived of liberty because of the lawsuit, or when the latter aims to put an end to the deprivation of liberty, as well as in the case that the judicial authority must be separated within the specified deadlines or in cases of urgency, as the primary judicial authorities had separated without waiting for the decision regarding the payment of unconstitutionality and Appeal of its decision, and the appellate body postpones its adjudication as a general rule, but each rule has exceptions and the aforementioned exceptions also apply to the appellate bodies.

Article 12 of the Organic Law 16-16 states that if the cassation appeal is filed and the case judges have adjudicated the case before the decision of the Supreme Court, the Council of State or the Constitutional Council upon referral of payment to it, the adjudication of the cassation appeal is postponed to the

point of deciding that it is unconstitutional and does not take place Postponement of dismissal by the Supreme Court or the State Council when the person concerned is deprived of liberty due to the lawsuit or other previous exceptions .The same applies to the constitutional amendment 2020 in its article 195.

**The second branch: the payment provisions applied to the Supreme Court and the State Council.**

After the decision to send the payment of unconstitutionality with the petitions and notes of the parties is directed to the Supreme Court or the State Council, the Supreme Court and State Council judges perform two different tasks after receiving the unconstitutionality from the judges of the courts in the lower degree, they are on the one hand obligated to accept the case in accordance with the Civil Procedure and Administration Law and from On the other hand, they are liquidating judges, so that they can fulfill the requirements of the constitutional issue that is subject to notification for referral, either to the Constitutional Council or refusal to refer.<sup>27</sup>

The legislator has been granted the possibility to raise the unconstitutional payment before all judicial authorities, whether subject to the regular or administrative judiciary, where the Supreme Court or the State Council must, according to the affiliation of the judicial authority notified of the payment, decide on the referral of the payment within two months from the date of receiving the payment decision stipulated in the article 09 of the Organic Law 16/16, where the referral takes place if the conditions stipulated in Article 08 of the Organic Law 18/16 are fulfilled, and this is in accordance with the text of Article 13 of the same law, except that in the case of raising the claim of unconstitutionality directly before the Supreme Court and the State Council, They shall decide on this payment as a matter of priority and within the same deadlines stipulated in

Article 13 of the same law.

And after the unconstitutionality is raised before the Supreme Court or the Council of State by a written note that causes under penalty of inadmissibility the decision to send the unconstitutionality to the first president of the Supreme Court or the President of the Council of State who immediately seeks the opinion of the Attorney General or the governor of the state according to the case, and in this regard it is possible The parties provide their written comments.

By referring to the text of Article 16 of the same law, the President of both the Supreme Court and the Council of State issues a decision to push for unconstitutionality with the same previous formation, and when this is not possible, it is headed by the Vice President, and in this case it is formed by the President of the Chamber concerned and three advisers appointed by the first President of the Supreme Court or President State Council each according to the situation.

When referring the payment to the Constitutional Council, the decision that causes the Supreme Court or the Council of State must be sent to him attached to the notes and petitions of the parties. The two jurisdictions postpone the settlement of the dispute until a decision is made regarding the unconstitutionality, except in the exceptional cases mentioned previously, and this is what was stipulated in Articles 19,18,17 of the same previous law.

According to the text of Article 20 of the same law, the claim of unconstitutionality is automatically transferred to the Constitutional Council in the event that the Supreme Court and the Council of State are not separated within the deadlines stipulated in the aforementioned Article 13.

Section Two / Payment procedures applied to the Constitutional Council

How to refer the unconstitutionality to the Constitutional Council

After referring the unconstitutionality by the Supreme Court or the Council of State to the Constitutional Council, and according to the text of Article 188 of the 2016 constitutional amendment, the Constitutional Council informs the President of the Republic with a view to agreeing to his observations about the unconstitutionality before him, and he also informs all authorities who are entitled to notify the Council The Constitutional Council on the constitutionality of laws, they are the Speaker of the National Assembly, the Speaker of the National People's Assembly, as well as the Prime Minister and 50 deputies or 30 members according to the text of Article 187 of the 2016 constitutional amendment, who can direct their observations to him about advancing the unconstitutionality before him.

According to the text of Article 22 of Organic Law 18/16, the Constitutional Council separates by holding public and public hearings, and the parties represented by a lawyer, as well as the representative of the government, are empowered to present their observations in an appropriate manner, except in the exceptional cases specified in the system specified for its work rules. To the Supreme Court or the Council of State to inform the judicial authority that was raised before it because we are not satisfied with issuing the decision in the Official Gazette because it may It is one or two weeks late, and therefore, when the Constitutional Council issues the text of the law, it must inform the Supreme Court of the decision and report it to the Council of State for the purpose of informing the judicial authority that was raised against it of the unconstitutionality.

According to the text of Article 23 of the previous law, the expiry of the lawsuit that took place on the occasion of stirring



up the claim of unconstitutionality does not affect the expiry of the lawsuit, whatever the reason.

Payment provisions applied to the Constitutional Council

After studying the claim of unconstitutionality and referral to the Constitutional Council by the relevant judicial bodies, the constitutional founder set out the procedures to be followed by the Constitutional Council, where the second paragraph of Article 189 stipulated that when the Constitutional Council is notified on the basis of Article 188, its decision is issued within the four months that follow Notification This period may be extended once for a maximum period of four months, based on a reasoned decision by the Council, which is communicated to the judicial authority that has the notification. The Algerian constitutional founder took the same approach that the French constitutional founder took, as he set specific deadlines during which the Constitutional Council separates the issues raised before it.

It is also worth noting that the Algerian legislator omitted in the organic law 16-16 the mention of the deadline for deciding to pay the unconstitutionality despite the provisions of the constitutional amendment for the year 2016 and in the text of Article 189 of it specifying the period within which the council adjudicates the unconstitutional referred to it from the Supreme Court or the Council The state within four months after notifying him of the possibility of extending this period once, and the estimate in the extension here belongs to the Council, which decides that a reason or two or more requires extending the term and thus the constitutional founder is right that he granted an additional time to the Council to study the payment and justifications presented by the parties and conduct Inquiries and issuance of its decisions away from the rush, as it contributes to avoiding the accumulation of cases that constitute

a negative phenomenon known in the ordinary and administrative judiciary and finally left him the discretionary authority in determining the deadline for the entry into force of his decision and this is a protection for the owner of the payment and the preservation of his rights as well as to prevent any violation of the acquired rights.

The issuance of the Constitutional Council's decision to pay the unconstitutionality of the law, resulting in the loss of the legislative ruling subject to the challenge, will have its effect from the date of approval, and accordingly, the judicial bodies will stop applying this law in all disputes before it, contrary to what was stated by the American founder who made the decision to pay unconstitutionality. It is limited to the case in dispute before the judiciary, and, well, what the Algerian legislator did, in order to avoid the accumulation of cases on the judicial authorities and thus the disruption of interests.<sup>28</sup>

It is noted that when examining the law subject to appeal against unconstitutionality in accordance with the limits set by the constitution, it will be examining what was requested of him only i.e. consideration of the Constitutional Council in accordance with the appeals raised, if the declaration of the constitutionality of the law and its conformity with the constitution remains in effect, and there is an exception to this rule as if the Constitutional Council issues His view of constitutional or conservative conformity, and finally interpretative conformity.

Partial matching is for the Constitutional Council to declare that a clause, sentence or article is not in conformity with the constitution and proposes a reformulation of it with the presentation of the alternative and stipulates that the non-conforming articles, clauses or paragraph are separable from the rest of the provisions, while we find that conformance conserves

a means to which the Council resorts It repeals legal texts and maintains them subject to compliance For its interpretation, and finally explanatory matching, the supervisory body represented in the Constitutional Council approves texts with reservations on some of its provisions, which is a method used in remote control and is expected to be used in remote control.<sup>29</sup>

It is understood that the Algerian Constitutional Council from its inception until today relied on explanatory conformity in its various opinions and decisions related to oversight.<sup>30</sup> the same applies to the constitutional amendment 2020 in its article 195.

### **CONCLUSION:**

We can say that advancing the unconstitutionality of laws is considered a means of subsequent judicial oversight, as it was the first in the United States of America in the famous case of *Marbury v. Madison*, and then began to spread widely at the end of the last century. Jurisprudence also, but he tried to get acquainted with some of its characteristics, which gave a definition to him as a defensive means for the opponent during the course of judicial litigation, and the challenge to the law in it would violate their rights and freedoms.

We extract the following **results** to exercise the right to pay the unconstitutionality of litigants by individuals and to protect the principle of the constitution, as follows:

- It is not possible to exercise censorship in the manner of advancing unconstitutionality in the field of prior censorship of the issuance of legal texts, due to the lack of a guarantee by His Highness the Constitution of preventive oversight from the issuance of legislations contrary to the constitution, if this censorship is political control in relation to ordinary laws, regulations and treaties without organic laws, if The latter must monitor the extent of their conformity to the constitution and Juba before its promulgation and its enforceability and judicial

application. Preventing individuals from exercising notification regarding previous censorship in any way detracts from the democracy of the constitutional and supervisory system, as well as from building a state of law, because individuals were not allowed to protect the constitution that expresses Their foundational will to exercise prior notification of the promulgation of laws and could be in violation of the constitution, that is, the existence of preventive and preventive oversight in the field of voluntary prior censorship, is more embodiment of the principle of the supremacy of the constitution and its guarantee of the threat of constitutionally guaranteed rights and freedoms.

- Payment is considered as a mechanism for practicing curative control without supervision, and then the issuance of legal texts and provisions contrary to the constitution that lead to the establishment of specific political notification authorities from moving the Constitutional Council to exercise control that ensures respect for the constitution, and although this mechanism is remedial, we think that it will achieve its legal results and objectives.

- If the individual is pushing unconstitutional before the judiciary to provide judicial protection, then the judiciary is a third public authority in the state that specializes in protecting society and the individual in rights and freedoms. The judicial authority is not competent to decide on the constitutionality of legal provisions contested as unconstitutional, but the Constitutional Council is the competent in accordance with the constitution By examining the constitutionality of these provisions, then the political nature of oversight over the constitutionality of laws remains the rule of law.

- The judiciary cannot raise the argument of unconstitutionality or appeal in favor of the constitution. Those who have the right

to appeal in favor of the constitution are the specific political notification powers only in accordance with the first and second paragraphs of the text of Article 187 of the constitution, and since the litigant individual who can exercise this payment is challenged by payment in the interest of his rights And his freedoms and shows the aspects of their violation, and the appellant is not targeting the judiciary that the legislative ruling is unconstitutional without clarifying the various aspects of prejudice his constitutionally guaranteed rights and freedoms.

- By extrapolating the first paragraph of the aforementioned Article 188, we find that the scope of payment is precisely defined and is represented in the legislative ruling, and by extrapolating the second paragraph of Article 191 of the Constitution, we find that it is represented in the legislative text and therefore we conclude that the payment focuses on laws only without regulations, so litigants are not entitled to appeal. Unconstitutionality of regulatory texts.

The plea of unconstitutionality does not focus on the provisions that were previously decided upon, as litigants are not entitled to plead unconstitutional a ruling or legal text that the Constitutional Council previously monitored the extent of its constitutionality or its conformity to the constitution, so it cannot be appealed against a judgment or legal text that was monitored and issued a view on it Or a decision by the Constitutional Council, given the mandatory decisions and opinions of the latter.

Consequently, the judicial authority cannot notify the Constitutional Council of the status of payment raised in front of it relating to provisions and texts that were the subject of these decisions and opinions, just as if the Council looked again at a text or ruling previously separated in it as if it had retracted the supervisory jurisprudence that it had reached before and this was

considered a conflict And inconsistencies in his jurisprudence. Excluding treaties and agreements from the mechanism for advancing unconstitutionality. Control of the constitutionality of laws on treaties and agreements before the 2016 constitutional amendment was the subject of previous or subsequent supervision in accordance with the first paragraph of Article 165 of the Constitution, but after the 2016 constitutional amendment it became limited to previous censorship Only where Article 186 states: "... the Bray Constitutional Council shall decide on the constitutionality of treaties, laws and regulations."

By applying the mechanism for advancing unconstitutionality in accordance with the text of the aforementioned Article 188, the field of treaty monitoring has become only at the previous stage, without subsequent supervision because, according to Article 186, the Constitutional Council decides in my opinion without mentioning the decision, and the opinion is usually on the occasion of previous censorship, whether it comes to previous obligatory oversight or censorship Optional precedent.

It should be noted that the exclusion of treaties from the mechanism for advancing unconstitutionality is that treaties are an area of previous oversight and not others through the legal implications of the opinion of the Constitutional Council in accordance with the text of Article 190 of the Constitution, which states that: "If the Constitutional Council deems the constitutionality of a treaty, agreement or An agreement not to be ratified. "

Accordingly, ratification shall take place after taking the opinion of the Council bound by the constitutionality of the treaty and in the event of the opposite, it cannot be ratified, and therefore it cannot be a place to push for unconstitutionality before the judiciary, but the provisions of the treaty or agreement before the judiciary are invoked as a legal basis in

judicial cases, but without invoking the unconstitutionality Any of its rulings.

The mechanism for advancing the unconstitutionality of a treaty before the court is also excluded, as a result of which the litigating individuals cannot cause state responsibility as a party to the treaty and are excluded from application to cases before the court.

Excluding the regulatory texts from the aforementioned mechanism, and in accordance with the provisions of the second paragraph of Article 191 of the previous constitution, which states that: "If a legislative text is considered unconstitutional on the basis of Article 188 above, this text loses its effect starting from the day determined by the Council's decision Constitutional. "

According to this article, it is clear that it pertains to constitutional oversight by the aforementioned mechanism, as it is established on the basis of Article 188, and since the legislator mentioned the phrase legislative text, the latter concerns ordinary legislative texts and legislative orders that are approved or approved by Parliament, without the regulatory texts within the jurisdiction of The executive branch is in accordance with the provisions of Article 143 of the Constitution.

Accordingly, we conclude the following recommendations:

- Preventive and preventive oversight must be embodied in the field of voluntary pre-censorship, which is more embodied in the principle of the supremacy of the constitution and its guarantee of the threat of constitutionally guaranteed rights and freedoms.
- The scope of the mechanism for advancing unconstitutionality in the areas of provisions of regulatory texts must be expanded, and the matter remains for expanding the process of advancing the unconstitutionality of treaties to any prospective

constitutional amendment.

- The Constitutional Council must perform its supervisory role in order to protect the supreme constitution from legal violations, and then the process of protecting constitutionally guaranteed rights and freedoms takes place.

- Reducing the long and complicated procedures, as they reach four months, according to the constitutional founder in the last paragraph of Article 189.

- Finding solutions for legal stability and security after subjecting the law to cancellation due to the payment mechanism and its entry into force and prejudice to legal centers.

- Amendment of the procedures of the judicial authority to inform the Constitutional Council of the status of payment raised before it relating to provisions and provisions that were the subject of these decisions and opinions.

- Scientific and sensitivating forums and seminars should be established to understand and explain the unconstitutionality.

Accordingly, this constitutional allocation to the scope and scope of the use of this mechanism empowered to individuals as a democratic mechanism does not concern the protection and guarantee of the constitution by not being able to advance the unconstitutionality of treaties and organizational texts, and its restriction to legislative texts in the face of the legislative authority to which the President of the Republic is concerned, but is subject to final approval of Parliament and thus We find that the aforementioned mechanism does not mean guaranteeing the supremacy of the constitution in the various legal layers resulting from the constitution as the basic law and the highest legal classes.<sup>31</sup>

In the last constitutional amendment 2020 issued by virtue of presidential decree 20-442 , the constitutional founder tried to



adopt the previous criticisms and recommendations; but it is not clear until the issuance of the organic law amending the organic law 16-18 previous..

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