

## The Perception of Unconstitutionality: a Comparative and Analytic Approach

تصور عدم الدستورية : مقارنة تحليلية مقارنة

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### Abstract:

The Control of exception of unconstitutionality is a form of judicial oversight of constitutionality of legislations, under which a judicial authority examines the constitutionality of a law. The United States of America was one of the pioneers of this system since 1803, whereby one of the litigants, in the case of a dispute before the courts, raise the unconstitutionality of the law to be applied on the dispute. Here the judge works to verify if the laws are in conformity with the Constitution and the laws in violation of the Constitution. And if the US Constitution has been silent on judicial control, it has not explicitly sanctioned it and has not prevented it. The French constitutions initially prohibited the judiciary from monitoring the constitutionality of the laws until the constitutional amendment of 2008 under the Priority Preliminary Rulings Procedure. That so, Algeria was affected by the French experience, by providing the establishment of the Constitutional Council in the first stage (in 1963), to adopt later, the method of exception of unconstitutionality in the last constitutional amendment of 2016, and do its first practical application after four years ( in 2019), and between the different Western experiences and the different attitude of the Algerian constitutional institution of this kind of control at different stages, and the idea of a future amendment to the constitution, highlights the features of theory and practice of the control of unconstitutionality in Algeria .

**Key words:** Unconstitutionality, constitutional court, Algerian legislation, foreign legislation, judicial review.

### المخلص:

تأخذ رقابة الامتناع أو ما يسمى بالدفع بعدم الدستورية، شكلا من أشكال الرقابة القضائية على دستورية القوانين، أين تقوم بموجبه هيئة قضائية بفحص دستورية القوانين. ظهر هذا النظام بداية في الولايات المتحدة الأمريكية سنة 1803، مضاده أن يدفع أحد الخصوم بعدم دستورية ذلك القانون المراد تطبيقه على النزاع، وهنا يعمل القاضي على التحقق من القوانين المطابقة للدستور والقوانين المخالفة له. وإذا كان الدستور الأمريكي قد سكت عن الرقابة القضائية، فلم يجزها صراحة و لم يمنعها، فإن الدساتير الفرنسية منعت في البداية على القضاء أن يراقب دستورية القوانين، إلى غاية التعديل الدستوري لسنة 2008 تحت طائلة أولوية الدستور، وقد تأثرت الجزائر بالتجربة الفرنسية، عن طريق النص على إنشاء المجلس الدستوري في مرحلة أولى سنة 1963، لتقوم في التعديل الدستوري لسنة 2016 بتبني طريقة الدفع بعدم الدستورية، والقيام بأول تطبيق عملي لها بعد أربع سنوات. فبين اختلاف التجارب الغربية وتباين موقف المؤسس الدستوري الجزائري من هذا النوع من الرقابة على مراحل مختلفة، وظهور فكره التعديل المستقبلي للدستور تبرز معالم النظرية و التطبيقية للدفع بعدم الدستورية في الجزائر.

**الكلمات المفتاحية:** الدفع بعدم الدستورية، الرقابة القضائية، دستورية القوانين، القضاء الدستوري،

الإحالة، النظم المقارنة.

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### **Introduction:**

The exception of unconstitutional laws, also known as abstinence control, is considered as a form of judicial control, which is carried out by a body of judicial authority. Therefore, and after the issuance of the law, the censorship is practiced by means of invocation, and all judicial institutions are entitled to examine the constitutionality of laws<sup>1</sup>. This is the most common and important method in the control of constitutionality of laws in the United States of America, where the famous judgment of the Federal Supreme Court of Justice "*John Marshall*" in 1803 in the case of "*Marbury Madison*" stipulates that: "Anyone who sets up a written constitution is undoubtedly aimed at To make it the supreme law and the main of the nation .... And where the conflict in the case of the issue of law and the Constitution ... And as long as the Constitution is stronger than any ordinary law is to be applied"<sup>2</sup>, In the event of a dispute before the judiciary, one of the litigants shall be liable to the unconstitutionality of that law to be applied on the dispute. Here, the judge shall work to verify the laws that are in conformity with the Constitution, and the laws that contravene the Constitution, and issue a decision to refrain from applying the law that violates the constitution, to be repealed by another law<sup>3</sup>.

However, Algeria adopted the same approach taken by France, in the field of constitutional control over the laws, with the establishment of the Constitutional Council, as a means to paint the supreme legal status binding to the Constitution. Indeed, the new amendment of the 2016 Constitution of Algeria referred to the Constitutional Council as an institution responsible for ensuring compliance with the Constitution. In accordance with Articles 182 and 188 of that constitution, it opened for the first time the way of pushing unconstitutionality of laws before the judicial institutions, adapting to what was approved by the French constitutional experience after the constitutional amendment of 2008 in the so-called "*question of the constitutional priority*"<sup>4</sup>.

In light of the modernity of this method of control in Algeria, we raise the following problem: *How the exception of unconstitutionality in Algeria could be applied and percept, compared to the experiences of Western countries?*

In order to answer this problem, our research will be based on the following plan:

**The first topic:** This section includes the applications of exception of unconstitutionality in the experiences of leading countries in this field, the United States of America as an example for countries that have adopted judicial control,

and France as the most prominent example for countries that followed the central political control over the constitutionality of laws.

**The second topic:** we will discuss the evolution of the control of the constitutionality of laws in Algeria in the various constitutions in the first requirement, and the resumption of the exception of unconstitutionality in the recent constitutional amendment of 2016 in the second requirement.

### **Hypothesis**

- Who may raise the issue of unconstitutionality?
- Could the judicial courts announce that the legislation is unconstitutional
- Did the other countries adopt the same judicial review as the Algerian legislator?

### **Objectives**

The aim objective of this research is to discuss and analyze how the Algerian legislator opened for the first time – in the recent constitutional amendment of 2016- the possibility for parties in a lawsuit to invoke the unconformity of a law to the constitution, In light of the comparative study with leaders-system in the field.

## **Section I: Applications of exception of unconstitutionality in Western countries**

It is agreed that the effectiveness of judicial control over the constitutionality of laws is linked to granting it to an independent body from the issuing authority. However, the countries differed in the body charged with monitoring, some countries adopted judicial control, while others adopted political control. This is why the common denominator of States is to give litigants the opportunity to invoke unconstitutional laws. In this context, we will address the first subtitle to the application of non-constitutionalism in the Anglo-Saxon systems in general and the United States of America as an example, the second subtitle would be the application of unconstitutionality in the Francophone systems and the most prominent example of France.

### **A) Exception of unconstitutionality in the American model**

The control over the constitutionality of laws in the United States is not limited to a single method, but three methods of censorship are defined: the method of injunctions, the method of reporting, and the method of invocation. From this point of view, this requirement will be addressed to the nature of the

unconstitutionality of laws in the United States of America firstable, and then we will discuss the conditions for exception of unconstitutionality in a secondly<sup>5</sup>.

### **1- exception of unconstitutionality in USA: nature and history:**

Since the 19th century and the beginning of the 20th century, the United States has held a monopoly on the constitutionality of legislations. In fact, this method does not need a special constitutional text to approve it, because it relates to the nature of the judge's work. When the opponent in the lawsuit invoke that the law is unconstitutional for violating the constitution, it is the nature of the judge's job to overbalance the Constitution -as the supreme legislation-, when it is incompatible with the code below.

And yet, the exception of unconstitutionality has been established by the Federal Supreme Court as a judicial principle, based on the idea of a rigid constitution. Then, US courts followed the sub-invocation method and applied it later in 1803, in the case of "*Marbury v. Madison*", a judgment was issued to establish the principle of sub-invocation control and the height of the Constitution<sup>6</sup>.

On the first hand, the nature and function of the judiciary when it displays a dispute in which a lower text contradicts a higher text, tends to favor and prevail over the provision of the higher text and exclude the application of the lower text. On the other hand, the US Constitution implicitly encouraged the adoption of this type of censorship, as stated in the article 6/2 of the American Constitution of 1787, that: " This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." And the Article 3/2 of the same Constitution provides for jurisdiction in which it states that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution"<sup>7</sup>.

### **2- Terms to invoke the unconstitutionality in USA:**

The conditions necessary to accept unconstitutionality are the same as in the other cases, namely two important conditions, the existence of an objective dispute and the need to guarantee the applicant's personal position and his interest in unconstitutional laws, and so we find the confirmation of the first condition in the article 3 of the US Constitution, which states that the judicial function includes all disputes arising from the provisions of the Constitution. And in

accordance with the Supreme Court, adversaries are required to submit their dispute before the courts.

As for the second condition, the Supreme Court aimed at narrowing the scope of censorship by means of non-constitutionalism. The Court decided that the appeal was accepted only by a person who had a standing and a personal interest. And the applicant must prove that the application of the law involves a conflict with the Constitution. It also requires that the damage be imminent<sup>8</sup>.

### **B) The promotion of unconstitutionality in the Francophone systems:**

The Francophone countries, mainly France, exercised political control over the constitutionality of the laws, by granting it to a non-judicial body, often of political composition, already provided by the constitution.

It should be noted that political oversight takes the task of determining the constitutionality of legislations before issuing the order to implement the law. In this sense, we will be looking at previous control, so that the law will be removed from the unconstitutional requirements and before it is issued. The censorship adopted by the French Constitutional Council is therefore the closest example of political control. It should also be noted that the consolidation of central control is due to the establishment of a Supreme Constitutional Court in Austria in 1920. Hence, we will address this subtitle to study the evolution and the promotion of unconstitutionality in France in the stage, as well as its procedures in the second one.

### **1- Promotion of unconstitutionality in France:**

France has followed the central control over the constitutionality of laws through the Constitutional Council<sup>9</sup>. And if the US Constitution was silent on judicial review, it didn't sanction or prevent it. Contrary to the French constitution, which prevented the judiciary from controlling the constitutionality of the laws, since the law reflects the expression of the public will, this control will eliminate it<sup>10</sup>.

Historically, the exception of unconstitutionality wasn't known till the constitutional amendment of 2008<sup>11</sup>, under the priority of the Constitution. And so the article 61 of the constitutional amendment, establishes in its first paragraph the possibility of making the law subject to dispute its unconstitutionality. It follows from this article that if any ordinary law is contrary to the Constitution and violates the rights and freedoms protected by the Constitution, the Constitutional Council must be notified on the basis of a referral from the Council of State or the Court of Cassation within a specified time, which makes the

difference from the American system, but the application of the article was from 2009 after the issuance of Organic Law n° 09-1523<sup>12</sup>.

## **2- Procedures for the exception of unconstitutionality in France:**

The article 61 of the French constitutional amendment of 2008<sup>13</sup> stipulates that, if any ordinary law violates the Constitution and violates the rights and freedoms it protects, the Constitutional Council must be notified on the basis of a referral from the Council of State or the Court of Cassation, at a specified time. Thus, the Constitutional Council must decide on the provisions within a month in accordance with the same article. It is therefore possible to say that the inclusion of the legal pyramid plays a major role in the protection of the Constitution, the criterion by which constitutional control is measured<sup>14</sup>.

The French constitutional founder, when he adopted the control of constitutionality in the 2008 constitutional amendment, has determined how to proceed with the procedure of challenging the constitutionality of laws, which is called the subsequent revision when that time is required. The most important way is the referral of the Court of Cassation and the Council of State in the practice of liquidation, either by accepting the submission, where the file is referred to the Constitutional Council. The Constitutional Court of France exercises a system of liquidation on the constitutionality of laws, and the court that raises the question of unconstitutionality does not have the right to adjudicate the case. Or by refusing the submission, the file is referred to the court for reconsideration. The procedures before the Constitutional Council are written in nature, that why the oral proceedings are not allowed before the Board. Also, all Council discussions are closed and confidential, the reason why the opponents are not allowed to attend the sitting in persons or through lawyers<sup>15</sup>.

## **Section II: The Algerian experience in adopting exception for unconstitutionality**

Since the independence, Algeria has known four constitutions, all of which have been characterized by instability on the constitutionality of laws. Since the first Constitution of 1963<sup>16</sup>, it has been influenced by the French experience, through the establishment of the Constitutional Council for this purpose. However, the freezing of the Constitution prevented the implementation of the article on the establishment of the Constitutional Council, while the Constitution of 1976<sup>17</sup> omitted the subject of monitoring the constitutionality of laws. Contrary to the 1989<sup>18</sup> Constitution that sets the foundation stone for the establishment of

the Constitutional Council aimed at ensuring respect for the Constitution, as reinforced by the 1996 Constitution. However, the new constitutional amendment of 2016 extended the notification mechanisms in this area and provided for the invocation of unconstitutionality in article 188<sup>19</sup>. And despite the apparent congruence with the practice of the French experience, the difference is manifested by the two nomenclatures.

Therefore, we will discuss in this section the evolution and the promotion of unconstitutionality before the Constitution of 2016 in the first requirement, and after the new constitutional amendment in the second requirement.

#### **A) Promotion and Position of the Algerian legislator over the control:**

Algeria has known several stages in the field of control of the constitutionality of legislations in general, and in the absence of adoption of the drive to unconstitutionality through successive constitutions until 2016, we will address the first section to the development from Constitution of 1963 to the Constitution of 1976, and the second phase in the Constitution of 1989 and Constitution of 1996 in the second section. And the reason for our dependence on the historical approach, in line with what has been mentioned in the American and French experiences, also the primary and secondary sources in the past, contribute to the prospect of the future and anticipate a number of things that can occur and emphasize the importance of a number of interactions, which Updated in the past time, and its impact on the present historical events.

##### **1- The first phase from 1963 to 1976:**

The first constitution in Algeria was granted in 1963 to supervise the constitutionality of laws of the Constitutional Council. Its constitution, composition and powers are set out in Articles 63, 64 and 65 of the same constitution. It consists of 70 members, namely the President of the Supreme Court and the Speaker of the National Assembly, three deputies appointed by the National Council, The Constitutional Council's powers were represented in the judgment on the constitutionality of writ and legislative orders at the request of the President of the Republic or the President of the National Assembly. Despite the provision for the establishment of a constitutional council in that period, the article remains a dead letter due to the political circumstances that led to the freezing of the constitution and compensation by order of 10 July 1965. It is noted at this stage the limited area of control and doesn't adopt censorship through to push of unconstitutionality<sup>20</sup>. Also the 1976 Constitution did not

provide for the establishment of any supervisory body, probably because the Algerian founder did not adopt the principle of separation of powers.

## **2- Second phase from 1989 to 1996:**

At this stage, the idea of constitutional control in the constitutional amendment of 1989 was re-established as stated in the article 153 that: "establishes a constitutional council and is charged with ensuring respect for the Constitution" the same article contains the composition of the Council, consisting of 70 members, : Two appointed by the President of the Republic, two elected by the National People's Assembly, two elected by the Supreme Court from among its members, and upon election or appointment they cease to exercise any membership, post or other functions. The members of the Constitutional Council shall carry out their functions only once, non-renewable, for a period of six years, renew every three years and appoint the President of the Constitutional Council for a term of six years, not renewable. It has more control over the constitutionality of treaties and regulations, followed by the 1996 Constitution to strengthen the provisions of the previous Constitution. In spite of this, there was no provision for unconstitutionality at this stage<sup>21</sup>.

## **B) The introduction of exception of unconstitutionality in 2016:**

Among the gains made by Law No° 16-01, which includes the institutionalization of the mechanism of invocation -by the litigant- the unconstitutionality of every legal provision affecting rights and freedoms through Article 188, which states: "The Constitutional Council may be notified on the basis of a referral from the Supreme Court or the State Council, When one of the parties to the trial claims before the judicial body that the legislative provision on which the dispute is based violates the rights and freedoms guaranteed by the Constitution. "The terms and modalities of the application of this paragraph shall be determined by organic law."

It is noted through this article, that the Algerian founder adopted the same phrase used by the French founder, *legislative provision*, which reflects the wide field of payment to include all what holds the status of legislation.

From this point of view, we divide this requirement into determining the terms of payment of unconstitutionality in Section I, and the perception of the application of control by payment in Algeria in Section II.

## **1- Conditions for invoking the exception of unconstitutionality:**

In addition to the article n°188 in constitutional amendment in 2016, the Algerian legislator published an organic law n°18-16<sup>22</sup> in order to analyze and



**explain the procedures to be followed to invoke the unconstitutionality of the laws before judicial authorities, which undermines the liberties and rights of individuals.**

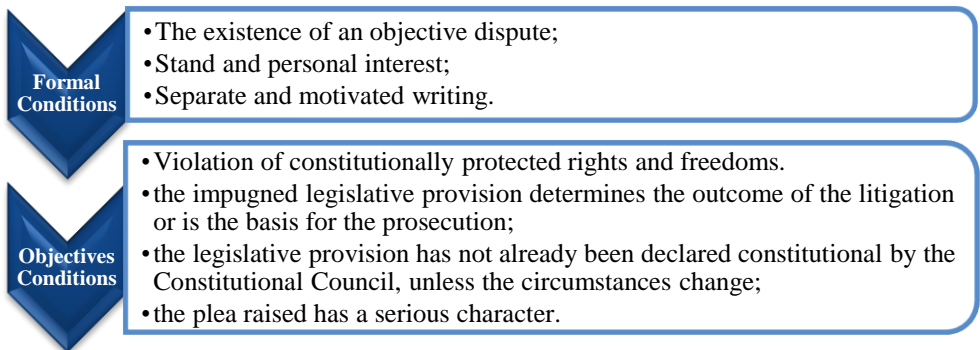
The step he took allowed litigants to rise in any proceedings before the ordinary courts and the courts of the administrative judiciary the case, arguing that the statutory provision of which the outcome of the dispute violates the rights and freedoms guaranteed by the Constitution, and it can also be raised for the first time on appeal or in cassation<sup>23</sup>. We can say at this point that the Algerian founder stipulated in article 188 that the payment should be made by one of the parties in the lawsuit, contrary to the provisions of article 61 of the French Constitution and article 23 of the organic law, which opened the way for all parties in the conflict, regardless of their status, to raise the constitutionality of the law.

The court decides, after consulting the public prosecutor or the state commissioner, on the transmission of the exception of unconstitutionality to the Supreme Court or the Council of State, without delay, by a reasoned decision. If the court includes non-magistrate assessors, it rules without their presence<sup>24</sup>.

Although the Algerian founder granted the right to raise the constitutionality of laws before all judicial bodies, the French founder initially excluded the criminal court from this power except on the occasion of appealing or appealing decisions, in accordance with Article 23.1 of Organic Law 09-1523.

And down below in the explanatory diagrams of the necessary conditions to invoke the objection of unconstitutionality and the procedures to be followed:

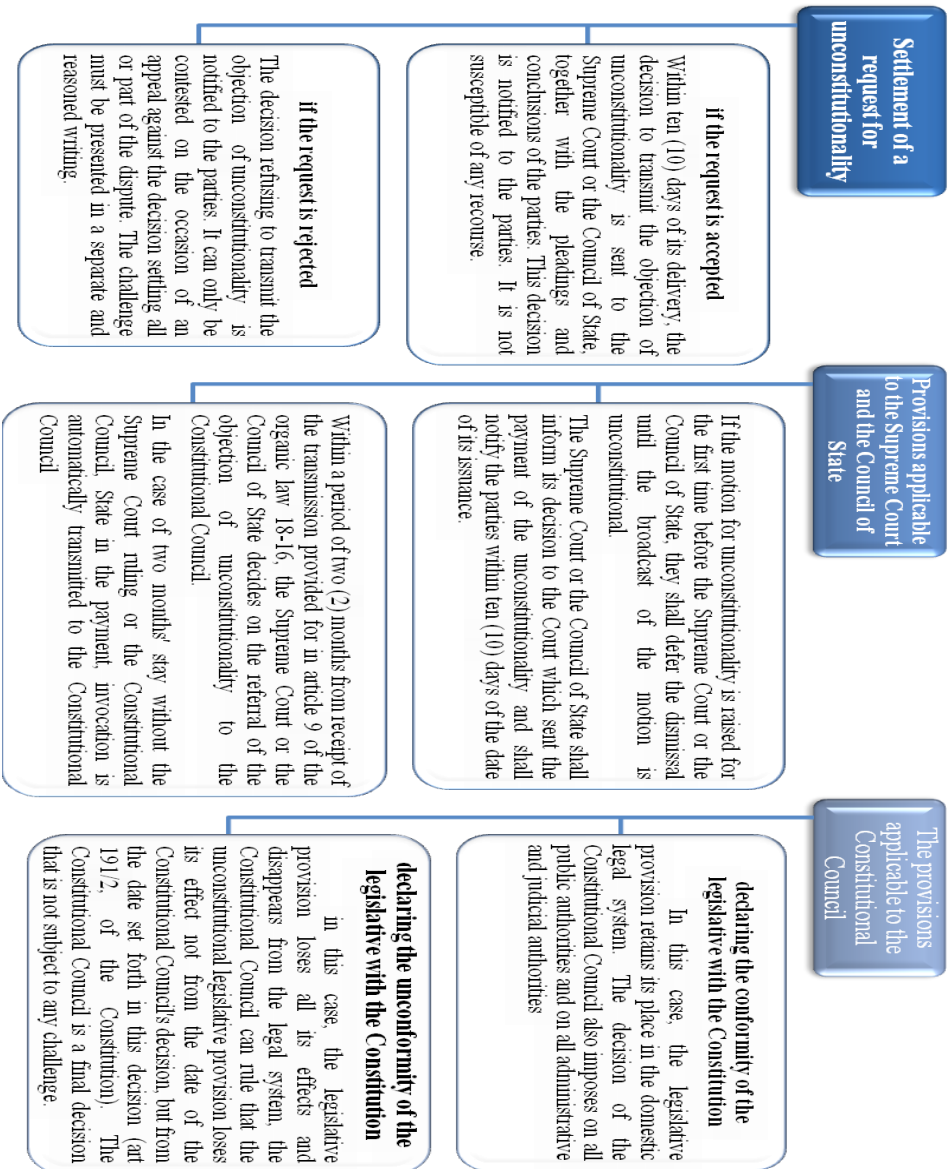
**Conditions to invoke the exception of unconstitutionality**



With regard to the deadline, the Algerian Constitutional Council adopted the same French approach, setting the period to 04 months and could be extended for a further period of 04 months on the basis of a reasoned decision by the

Council and reporting to the judicial body giving notice as provided for in the Constitution<sup>25</sup>.

### Procedures to be followed



## **2- Application of the control over constitutionality in Algeria:**

The jurisprudence differed about invoking the constitutional control, where some of them believe that informing the Constitutional Council is a referral, is intended to grant the right to move control to the designated parties, and knowing that the countries differ in their handling of the referral. Some of the others refer to the exception of unconstitutionality by raising the constitutional lawsuit, including Egypt, which did not take the method of referral, which led to deal with the means of exception to move the constitutional control.

While others went on to make the notification a means of mobilizing the Constitutional Council, it was requested by one of the authorities that had the right to verify the constitutionality of a text subject to constitutional control.

From the above it can be noted that the legal adjustment in the matter of constitutional control varies from one system to another according to the way each country adopts the method of constitutional control. We note that the notification in Algeria was the only constitutional control engine. There are no other methods that depend on it for contacting the Constitutional Council.

### **Conclusion:**

Based on the above, it can be said that censorship by invoking the unconstitutionality is considered as a step towards enabling the citizen to move the control over the constitutionality of the laws and constitutes a qualitative leap towards achieving constitutional justice.

As for the Algerian experience, the French model, the Constitutional Council, as a constitutional institution that monitors the constitutionality of the laws in addition to its other competencies, has adopted this supervision as not obligatory on all legal and regulatory texts (except the organic laws and internal regulations of the two houses of parliament and the amendments thereto) Making the risk of infringement of rights and freedoms exist.

Therefore, the Algerian constitutional institution, by virtue of the 2016 amendment, recognized the mechanism of "exception of unconstitutionality" in accordance with Article 188 of Law No. 16-01, and the relevant organic law allow us to see the extent of their conformity with the provisions adopted by the French founder, which have shown their effectiveness, to give us an idea of the competence of the judicial authorities to activate this mechanism., and this way Algeria is a beneficiary of the legal system because the aim is to guarantee the rights and freedoms of individuals. The mechanism of exception of unconstitutionality is considered in Algeria as a nascent institution, and for its

success there is a political will to achieve a quantum leap in the legal system of referral.

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<sup>23</sup> - Article n°2 from the organic law 18-16 Op Cit.

<sup>24</sup> - In case of transmission of the objection of unconstitutionality, the court seised shall stay in the matter of the dispute until the decision of the Supreme Court or the Council of State or that of the Constitutional Council has been received when the exception been sent back.

<sup>25</sup> - Article 189/2 from the Algerian constitutional amendment of 2016.

