2nd International Seminar

Conference of Constitutional Jurisdictions of Africa - CCJA

On the theme:

"Individual access to constitutional Justice"

Co-organized with

The Constitutional Council of Algeria

Algiers, from 24 to 27 November 2017

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Souvenir photo of the participants at the 2nd International Seminar of the CCJA

Algiers, 25 November 2017

History on the creation of the CCJA

On the initiative of Algeria, the African Union adopted at the fifteenth ordinary session of the Conference of Heads of State and Government held in Kampala, Uganda, from 25 to 27 July 2010, the Decision to create a space African Constitutional Justice.

The creation of this space responds to the imperative to federate the jurisdictions in charge of the control of constitutionality, having adopted African mechanisms of constitutional justice, in a continental space which allows them to participate in the field which is theirs, to the promotion and the dissemination of the universal values and principles of rule of law, democracy and human rights enshrined in the preamble of the Constitutive Act of the African Union.

A preparatory meeting of the Presidents of the Constitutional Justice Courts in Africa, held on the sidelines of the Second World Conference on Constitutional Justice in **Rio de Janeiro, Brazil, on 16 January 2011**, had instructed Algeria to lead the process of creating this space, to its end.

The Presidents and representatives of the Constitutional Courts and Councils and equivalent institutions in Africa held on **7 and 8 May 2011** at the headquarters of the Constitutional Council of Algeria the Constitutive Congress of the African Area of Constitutional Justice, which they called " Conference of Constitutional Jurisdictions of Africa "(CCJA).

Fifty-two participants (52) representing twenty-five (25) African constitutional courts took part in this Congress, enhanced by the presence of the Chairperson of the African Union Commission, and the President of the European Commission for Democracy through the right, better known as the "Venice Commission".

During the Congress, the participants examined and adopted the Statute of the Conference of Constitutional Jurisdictions of Africa (CCJA), and proceeded, at the election of the first Executive Bureau and the Secretary General. The Permanent Secretary General and the Treasurer are appointed by the country of the seat.

The headquarters of the general secretariat of the CCJA is set in **Algiers.**

The CCJA currently has forty-five **(45)** African constitutional court members, and **(3)** three non-African observer members, namely: Brazil, Russia and Turkey.

The CCJA holds a Congress every two year. Since its creation, four Congresses have been held respectively in **Algiers (2011), Cotonou (2013), Libreville (2015)** and **Cape Town (2017);** the fifth Congress will be held in **Luanda** - Angola, in June **2019**.

In order to promote constitutional justice in Africa and to promote the exchange of experiences, the CCJA holds an international seminar between two Congresses. The first seminar took place in **Cotonou in 2013** on the theme: **"the constitutional judge and the political power".** The second took place in **Algiers in 2017** on the theme of **"the access of individuals to constitutional justice".**

The proceedings of the seminars, grouped together and translated into several languages, are widely disseminated.

At the international level, CCJA enjoys "**Observer**" status with the African Union as an organization composed of institutions of AU Member States; she is also a member of the Bureau of the World Conference on Constitutional Justice (WCCJ) under the regional groups.

The conference links many cooperation agreements with regional and linguistic groups that are active in the field of constitutional justice, such as: Venice Commission, Asian Association for Constitutional Justice, Arab Union of Constitutional Courts, ...

The CCJA has a website (www.cjca-conf.org) which operates in the four working languages of the Conference, namely: Arabic, English, French and Portuguese.

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Photo showing the entrance of the CCJA headquarters

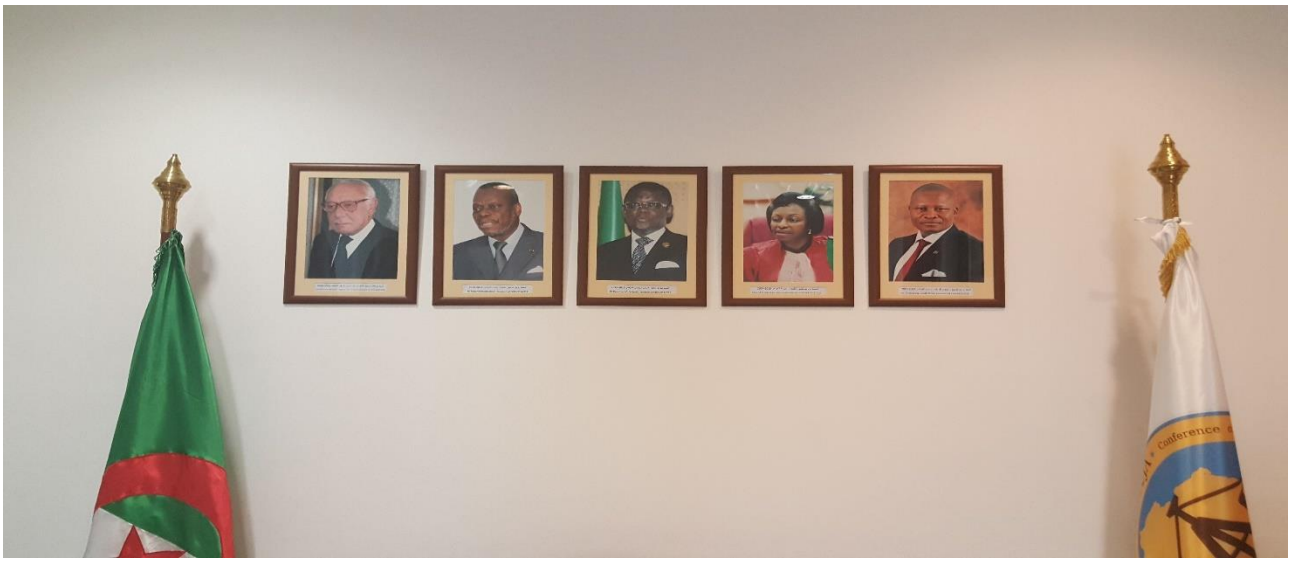


Photo showing the portraits of Presidents of CCJA, since its creation in 2011

From left to right:

*Mr. Boualem BESSAIH **(Algeria)**, Mr. Robert DOSSOU **(Benin)**, Mr. Theodore HOLO **(Benin)**, Ms. Marie Madeleine MBORANTSUO **(Gabon)**, Mr. Mogoeng Mogoeng **(South Africa).***

Lounge for guests

Photo showing the meeting room surrounded by the flags of CCJA member countries

PROGRAM

Friday 24 November 2017

- Arrival at the **Houari Boumediene** airport and welcome of the host delegations to the VIP guest lounge

- Transfer of the delegations to the El Madar Hotel, place of residence

19H00 : Welcoming - Reception hosted by **H.E. Mr. Mourad MEDELCI** President of the Constitutional Council of **Algeria.** Hôtel **El Madar – Beni Messous**

Second day **Saturday 25 Novembre 2017**
09:00 - 10:30 **Opening ceremony**

09H00: Arrival, reception and registration of participants.

09h30 - 10h30 Opening Ceremony

• Welcome address by **Mr. Mourad MEDELCI** President of the Constitutional Council of **Algeria.**

• Allocution of Mr. **Mogoeng Mogoeng,** Chief Justice of the Republic **of South Africa** and President of **the Conference of Constitutional Jurisdictions of Africa.**

• Speech of **Mr. Gianni BUQUICCHIO, Président of the Venice Commission**

11h00 - 12h00:

• **Photo session** at the entrance of the seat of the Constitutional Council.

• **Guided tour** of the seat of the Constitutional Council

• **Visit to the headquarters of** the Conference of Constitutional Jurisdictions of Africa**. (CCJA).**

• **Baptization** of the headquarters of the CCJA on behalf of the late **Boualem BESSAIAH**

14H00 - 17H00: First session

Auditorium El Madar Hotel

14H00 - 17H00: First session

Session Chair: Mr. M. MOGOENG, Chief Justice of the Republic of South Africa, President of the CCJA

Theme of the 1st session: Constitutional, legislative and regulatory framework linked to the exception of unconstitutionality.

14H00 - 15H30: Presentations by the representatives of the courts: (20 mn)

- Mr. Mohamed **HABCHI** / Vice President of the Constitutional Council of **Algeria**
- Mr. Mohamed Lamine **BANGOURA**/ Vice-President of the Constitutional court of **Guinéa**
- Mr. Aristides Raimundo **Lima** / Juge-Conseiller, Tribunal constitutionnel du **Cap Vert**
- Mr. Nadhir **El Moumeni** / Judge, Constitutional Court of **Morocco**
-

15h50 - 17h00:

- Mr. Laurent **FABIUS /** President of the constitutionnel Council of **French**
  Debate session of the 1st session.

19H00: Dinner hosted by**, H. E. Mogoeng Mogoeng, President of the CJCA** - hôtel **El Aurassi**.

Sunday 26 November 2017

9h30 – 12h00 : Second session

Session Chair: Mr. Mourad MEDELCI President of the Constitutional Council of Algeria

Theme of the 2nd session: Organization of the exception of unconstitutionality and the internal procedures at the level of each jurisdiction

9H30 - 10H50: Presentations by the representatives of the courts:

- Mr. Jean-Eric **RAKOTOARISOA** / Président of the High Constitutional Court of **Madagascar**

- Mme Marceline **AFOUDA** / President of the High Court of the Republic, Judge, Constitutional Court of **Benin**

- Mr. Adel **SCHERIF** / Vice-President of the High Constitutional Court of **Egypt.**

- Mr. Abdessalam El Mahdi **KRISSIA** / Vice-President of the provisional Instance of control of the constitutionality of draft laws (IPCCPL) – **Tunisia**

10H50 - 11H10: Coffee Break

11H10 - 12H00: Debate session of the second session.

14h00 – 17h00: Third and end session

Session Chair: Mr. Kassoum KAMBOU, President of the Constitutional Council of **Burkina Faso**

Theme of the 3rd session: Evaluation of the implementation of the exception of unconstitutionality and the recommendations that follow.

14H00 - 15H30: Presentations by the representatives of the courts: (20 mn)

- Mr. Wahbi Mohamed **MUKHTAR** / Président of the Constitutional Court of **Sudan**

- Mr. Malick **DIOP** / Vice-Président of the Constitutional Council of **Senegal**

- Mr. Mohamed **EL HAFI** / Président of the Supreme of Court of **Libya**

- - Mr. Robert **DOSSOU** / Honorary President of the **CJCA - Benin**

16H00 - 16H45: Guest Speaking

- Mr**. Zühtü ARSLAN** / President of the Constitutional Court of **Turkey**

- The Representative of the Constitutional Court of **Belgium**

- Mr Eric **Overvest** Coordinator / Resident of the **UNDP** in Algeria.

16H45 - 17H15: Debate session.

17H15 - 17H30: General Synthesis of the Works, by the Constitutional Court of **Togo**

17H30: Allocution of Mr. Mourad MEDELCI, President of the Constitutional Council of Algeria

17H45: Closing of the Second International Seminar of the CCJA by Mr. **Mogoeng Mogoeng,** Chief Justice of the Republic of South Africa and **President of the CJCA**

19H30: Farewell dinner hosted by **HE. M. Mourad MEDELCI,** President of the Constitutional Council of Algeria, at the **Sheraton Hotel – Club des Pins**

Opening Address

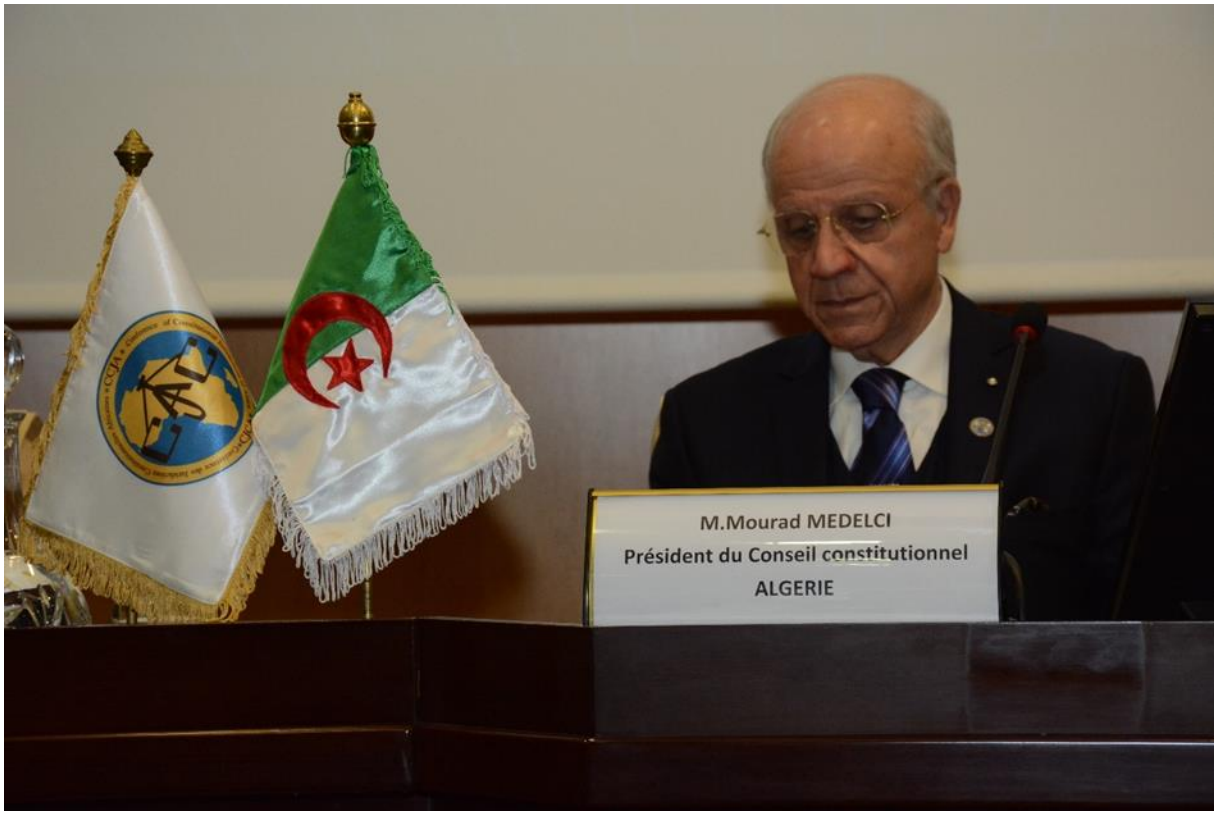
By H. E. Mr. Mourad MEDELCI,

President of the Constitutional Council of Algeria

2nd International seminar of

the Conference of Constitutional Jurisdictions of Africa- CCJA

Algiers, 25 – 27 November, 2017



Excellencies, Ladies and Gentlemen,

Welcome to Algiers, at the headquarters of the Constitutional Council.

Welcome to Algiers, permanent seat of the Conference of Constitutional Jurisdictions of Africa, with its 44-member countries, it gathers today the vast majority of the African Union countries.

We are honored to have you with us today, on the occasion of this Conference on "Individual access to constitutional justice in Africa".

Allow me, Ladies, Gentlemen, and dear colleagues, to thank on your behalf all those who participated, directly or indirectly, in the organization of our meeting in Algiers, with a particular reference to the CCJA and its President Mogoeng MOGOENG, Chief Justice of the Republic of South Africa, as well as the Venice Commission and its President Gianni BUQUICCHIO.

With this meeting, Algeria avails itself of the opportunity to express, once again, its gratitude for the efforts they have made to succeed the 4th edition of the World Conference held in Vilnius, the Bureau of which has elected Algeria to hold the next edition, Algeria honored to host this world event in 2020 *Inchallah*.

Our thanks go also to all our counterparts here present, Africans and our guests outside the Continent, whose presence, in number and quality, reveals the importance they grant to the chosen theme of this Conference, and confirms the universality of the qualitative changes experienced in the field of constitutional justice. We welcome together the Presidents of constitutional jurisdictions of France, Turkey and Belgium, here present.

Ladies and Gentlemen,

- On our Continent, the referral to our constitutional jurisdictions has kept pace with the particular political history of each and every one of our countries, and the majority of them are getting organized to involve the citizen in order to improve the content of legislative texts when they are not subject to a prior control of constitutionality.

- Indeed, even if the objective served is the same, the *modus operandi* had to borrow from the experiences of others while leaving to each country to take into account its proper situation.

- During three days, we will take the full measure of these evolutions in Africa, so that each country can learn from others experiences.

These evolutions bring a new constitutional culture, nurtured not only by the contribution of the political stakeholders to the constitutional process but also and mostly by that of the litigant citizen.

It must be emphasized that constitutional justice is not only a legal mechanism with its principles and procedures, it is also a culture, and therefore, it must be accessible to all. In the

same time, the achievement of this objective commanded us, as constitutional judges, to make an effort of outreach and pedagogy in writing and diffusion of our jurisprudence so that our different audiences can access, understand and react.

- In Algeria, the process has been boosted by setting the exception of unconstitutionality in the stone of the Algerian constitution which has witnessed noteworthy progress as a result of the revision of March 2016.

This constitutes a significant achievement for the citizen and a new dynamic that will help democracy, State of Law and human rights to move forward in our Continent and all over the world.

Ladies and Gentlemen,

The glance that we can throw today on this progress reassures us that the common challenges we face benefit from remarkable advances in scientific, legal and operational areas.

We can say without a shadow of doubt that this advances help consolidates peace in the world, although important progress has been made, but much remain to be done to anchor, definitively and everywhere, Law as a founding axis of governance at all levels.

- The observance of Law is also linked to the important efforts of formation and information, in order to improve the efficiency of our institutions and enable our societies to participate fully to the necessary systemic changes.

- The natural return of the citizen is, undoubtedly, a permanent and structural objective. To allow him to become a major constitutional actor and thus, guardian of our Constitutions, constitutes an absolute must for the expression of democracy.

- In Algeria, we must be proud of these new achievements and work tirelessly to properly organize the processes that will contribute to the successful implementation of Article 188 of the Constitution, amended in 2016.

- As a reminder, Article 188 stipulates, I quote "*The Constitutional Council may be referred to with regard to an exception of unconstitutionality pursuant to a request by the Supreme Court or the Council of State*".

This highlights the importance of these two supreme jurisdictions, which, according to the authority conferred upon them by the Constituent, consolidate their place in the constitutional organization of powers and put their extensive experience to participate actively in the protection and consolidation of rights and freedoms guaranteed by the Constitution.

Let me here pay tribute to them, in the hope that our cooperation, already structural, may record further success.

Opening the conference, I express the hope that our meeting will be stamped by collegiality that binds us and aspires to become an active solidarity to face the different challenges that lie ahead.

Thanks for your attention.

Algiers, world capital of constitutional justice in 2020.

Welcoming Remarks by:

Mr. Mogoeng Mogoeng

Chief Justice of the Republic of South Africa

President of the Conference of Constitutional Jurisdictions of Africa (CCJA)

It would make no sense whatsoever for us to be gathered in this manner at great expense to then deal with judicial independence and the rule of law in a manner that is quite divorced from the challenges that confront Africa right now.

Any genuine constitutional democracy has three Arms of the State. And the Judiciary is not merely an incidental or inconsequential arm, but a very critical component of any true democracy, as opposed to a fake democracy or a mobocracy. For that reason, when Judges in this great continent that is confronted by a wide range of challenges that are political, and socio-economic in nature, take so many days to deliberate upon something, those deliberations must be designed to contribute towards the resolution of the many challenges that confront Africa. And it is against this backdrop that whatever I say, whether it is immediately obvious to you or not what its relevance is to the theme of the conference, please pay attention because this message is indeed relevant. The dots will be connected in due course.

A man by the name of Loren Cunningham gave a breath-taking account of the breath-taking beauty of Africa and the wonders of her natural resources and tourist attractions, ranging from the Sahara Desert as the greatest in the world, with its rolling dunes, to the Kalahari natural reserve, the Nile River, the Congo River, and the 1600 miles long Zambezi River, the Victoria Falls, the Serengeti and Kilimanjaro, whereafter he had the following to say about our continent:

> *"Our great artist God has displayed these and other wonders in Africa. . . He hid more gold here, more diamonds, plutonium and copper than in any other place on earth. Africa has enough arable land to feed large portions of the earth. The continent has more hydro-electric potential than all the rest of the world put together as well as an abundance of coal and oil. Wisely used, by and for Africans, the continent's resources could contribute significantly to the new wealth and prosperity. Unfortunately, for too long Africa's people have been enslaved, raped, abused, dismissed by prejudice, hatred or just ignored. Their rich resources have been collected and used by others, even stolen with little, if any benefit going to the Africans. Instead their value has attracted foreign exploitation and enriching dictators and warlords, bringing bloodshed, starvation and even modern forms of black on black slavery".*

So, to address the critical challenges facing our continent, requires that we be alive to the possibility of our continent's best interests being compromised by foreign interests, by warlords and by modern day dictators in our midst. To give context to this, reference must be made to how Africa was viewed as far back as 1835. And for that, I turn to what Lord Macaulay said on the 2nd of February 1835, addressing Parliament in Britain:

> *"I have travelled across the length and breadth of Africa and I have not seen one person who is a beggar, who is a thief, such wealth I have seen in this country (by a country meaning Africa), such high moral values, people of such calibre that I do not think we would ever conquer this country, unless we break the very backbone of this nation which is her spiritual and cultural heritage and therefore I propose that we replace her old and ancient education system, her culture, for if the Africans think that all that is foreign and English is good and greater than their own, they will lose their self-esteem, their native culture and they will become what we want them, a truly dominated nation".*

What has this assertion, that is consistent with how Africa was in fact dealt with by colonial powers, got to do with African Judges? Until we are alive to the challenges that confront Africa, in much the same way as the German Judges understand matters of critical national significance, by exposing themselves to an orientation on effective and appropriate communication skills, economics and politics, we are going to be an irrelevant third Arm of the State. Let me just highlight some of the key issues that are required for any country and by extension, the Judiciary, to make a profound and meaningful contribution to the economic success of that nation.

When Loren Cunningham was invited by President Mathieu Kerekou of the Republic of Benin in 1996 to workshop him and his Cabinet on leadership, one of the Cabinet Ministers reportedly asked him, why the Republic of Benin was so poor? And the Cabinet Minister immediately answered himself and said it is because Benin only has five types of minerals and to a limited scale. But Cunningham said to him, and this applies to all of us, that Switzerland is just as small, and hardly has any mineral resources to boast about, and yet it is very rich. That he said, is so because the Swiss are men and women of integrity and of good character. Meaning, he said: "You need a

critical mass of people who have integrity, who have character. Benin will have prosperity when it has enough people with this kind of character."

It is out of people of integrity and a solid character that Judges are to be appointed. Until we get to the point where we, as Africans, can proudly say that a critical mass of our people in our respective countries and professions are a people of integrity and solid character, we will most likely have Judges whose independence and whose capacity to enhance our democracies is questionable.

I am in the habit of citing an example by one of the former Chief Justices of this country, Pius Langa, who was commissioned to look into the challenges of the Judiciary of one of the African countries. And he said, after a long period of silence one of the Judges said to him "why don't you ask us why we are corrupt?". He says Judges one by one, explained why they were corrupt. They obviously couldn't be corrupt and still be truly independent. And of course we are aware of some of our countries where Judges and Magistrates had to be interviewed all over again to test their integrity, their character and commitment to their oath of office or independence. So as the African continent, we should essentially be the way our forebears were reportedly seen by Lord Macaulay. He saw them as one. He referred to them as a nation, and as a country, for we are indeed one. We have got to ensure that integrity, high moral values, high calibre and good character defines who we really are.

For far too long we have been taken for granted as Cunningham said. We have been hated, ignored and marginalised. And it is only when the Judiciary of this continent assumes its rightful position as a third Arm of the State, at country, regional and continental level, that the lost glory of Africa would be restored. We know that Africa has not always been the so-called dark, beggarly and hungry continent.

To secure judicial independence and ensure that the rule of law is observed, it must never escape our memory that governments can be a threat to judicial independence. For example, I have learnt that in March 1904, when Theodore Roosevelt was the President of the United States of America, he won a case against JP Morgan's Northern Securities and proudly said the following: "The case

demonstrated the fact that the most powerful men in this country were held to accountability before the law". And that happens all the time. Whoever wins, even government, praises the Judiciary for being truly independent and impartial. But, in line with what we have become used to with almost all litigants, two years later, in 1906, he lost a different case. And this is what he did to ensure that he wins the case that he ultimately lost. The President had made sure that one of the new additions to the US Supreme Court was his old Harvard friend, Oliver Wendell Holmes Jr. And he was given the assurance by a certain Senator that the appointment of Justice Holmes Jr would ensure that the President always wins cases. The Senator effectively said that "Justice Holmes Jr is in our pocket, he is one of us, he is not independent". But Justice Holmes disappointed them. He held differently, thus denying the President the victory he desperately needed. Justice Holmes chose judicial independence, integrity and character over the favours that some politicians might dish out to a Judge who is weak and is prepared to have the justice compromised or corrupted to earn some approval.

And listen to what the same man who was praising the Judiciary not so long ago had to say this time around after the Judges had invalidated the Employer's Liability Act of 1906. President Rooseveldt in effect said of Justice Oliver Wendell Holmes Jr, "this new Judge is so weak and without a backbone that if I were to carve out a banana, I would find a Judge with a stronger backbone out of it". So some of the threats could come as I said, from unethical politicians, both in the Executive and the Legislative arms of Government. If they can find a Judge who is so hungry for power and prestige, that he or she is prepared to do anything to be elevated or praised, even if it means protecting the corrupt, they will zoom in on that one, and give him or her favors. The effect of that would be to compromise the oath of office and by extension justice or the Judiciary. And for as long as some among us are in cahoots with corruption practitioners for the sake of personal or sectional benefit, we will not be able to go back to that position that so impressed Lord Macaulay that he had to articulate it to the British Parliament in manner that he did. But vested sectional interests and neo-colonial or foreign interests that the likes of Kwame Nkrumah warned Africa about are another threat to our independence, the observance of the rule of law, peace, stability and our prosperity as a continent.

If you allow anybody to entice you with awards, speaking engagements in some of the prestigious institutions outside of your country, to profile you through easy-flowing praises and abundant media coverage, with the result that even if you say nothing of consequence, you are made to look like you have said something profound that nobody has ever said before, then the Judiciary of Africa will forever be less regarded and ignored. If you are that weak, as a Judge, you are a candidate for compromising judicial independence and the observance of the rule of law. You would effectively be complicit in the perpetration of corruption in your country. And even if you have one opportunity after the other to say no to undermining real justice and good governance, you would forget about the suffering of the millions of our people in Africa. Such is the conduct of a Judge who has sold his or her soul to the highest bidder.

As I close, let me just say this. Many years ago, I am told there was a man by the name of Jethro. He paid a visit to his son-in-law Moses, and discovered that Moses was the one handling every case or dispute in that nation. Jethro said to Moses no, no, no, more Judges have to be appointed so that justice can be delivered more efficiently and effectively. He also said to Moses that to have a credible Judiciary in place, he needed able men and women. In other words, competent people. You can never enjoy judicial independence if those in the Judiciary are incompetent or lack the critical capacity to deliver real justice. Two, in his own way he said, Judges must be people who fear God. But what does that mean if you don't believe in any God? It means Judges must be people who will uphold the Constitution and the law. Not people who will play games with the Constitution and the law. And the third requirement was people of truth. Not people who will corrupt facts and the truth. And finally, he said Judges should be people who hate bribes – who hate corruption and are impartial. The institution would lack the credibility that is so crucial for its survival if Judges are incompetent, lack integrity or are partial and corrupt. After all, we don't control the purse, we don't control the army but owe our authority only to the high ethical standards we uphold. It is our high moral values that ensure that clothe us with the responsibility that ensures that our orders are complied with. We have no real source of authority left without them.

One of those important issues that we must look at is what is it that must be done to ensure that only competent people get appointed to a judicial office? What remuneration package is accurate for Judges, regard being had to the economic muscle of a given country. Appointment mechanisms

that would ensure that only people who are committed to their affirmation or oath of office, only people who are unlikely to play games with the truth and only people who hate bribes and corruption are appointed. South Africa used to appoint in terms of an undisclosed criteria and all judicial independence and justice-inclined people resoundingly rejected that practice. It may well be that we should examine it very closely here and make appropriate proposals.

Ideally, and in line with the Bangalore Principles, there must be systems in place to authenticate the suitability of those who assume judicial office – their competence levels must be tested. And we have to look at the renewability of terms of office of Judges. If terms of office are renewable, the crucial question is how do Judges qualify for renewal? How are they expected to behave themselves to be favorably considered for the extension of their terms of office? Terms of office may arguably have to be fairly long and non-renewable.

We also have to look at the remuneration packages of Judges as well as their retirement benefits. If you earn far too less than your country can realistically afford to pay a Judge, that could be worrisome. And we might therefore have to articulate principles that would guide or point to the appropriate way Judges and Magistrates must be remunerated. This will reduce or eliminate the temptation or tendency to corrupt themselves.

This exercise entails a closer look at the institutional independence of the Judiciary. We have to examine any other aspect that is relevant to ensuring that the possibility of being beholden to other players in the State or outside of the State is reduced. We should not be naïve. When I visited Ghana, I was shown blood-stained stones somewhere in the court building, and was told that Judges were shot dead presumably because they were men of integrity who were beholden to principle and ethical standards. And their bodies were picked up somewhere at the river, and the blood-stained stones at the court building, bore the blood of those Judges who apparently refused to bow down to any form of pressure. Those are Judges who chose to be truly independent, knowing that they were there not to serve themselves and their families only or be lovers of money whose appetite is virtually insatiable, but they understood that they were there to serve the nation and by extension, the continent. So, when you become a Judge, know that there are risks to being principled that extend to physical consequences. Remember that most of the African countries are

politically free because other people had to die for that freedom as well as for a dignified and prosperous future for all of us. If you have to die for seeking to advance the interests of all, so be it – rather than corrupt yourself and live with a guilty conscience. People continue to suffer when we pretend to be Judges, when we are in fact puppets, toys of corrupt actors in the public and private sector. Stand ready to suffer with your family for being principled, it is worth it.

I trust that by the time we leave this place, we would have come up with principles that would undergird and guarantee fierce judicial independence in Africa. We are a very wealthy continent. To create an appropriate investor-friendly climate, we require stability in every sphere of life. And the Judiciary has a critical role to play in ensuring that the climate that will allow our economies and our constitutional democracies to thrive is created and maintained.

Adress delivered by:

Prof. Dr. Zühtü Arslan

President of the Turkish Constitutional Court

On the theme:

"Individual Access to Constitutional Justice in Turkey"

Honorable President of the Conference of the Constitutional Jurisdictions of Africa (CCJA),

Honorable President of the Constitutional Council of Algeria,

Distinguished Colleagues,

Ladies and gentlemen,

It is a great pleasure for me to participate in this seminar and address such eminent participants.

I would like to express my gratitude to Chief Justice Mogeng Mogeng and President Mourad Medelci for their kind invitation and warm hospitality. I would like to thank and congratulate Mr Mousa Laraba and his team for the successful organization of the seminar.

I also want to state that it is a source of great honor and pleasure for me and my colleagues that the Turkish Constitutional Court has recently acquired the status of an observer of the CCJA.

1. Aim of Constitutional Justice

Let me begin with a simple question. Why is it so important for individuals to have access to constitutional justice? The answer to this simple question lies in the purpose of constitutional justice itself.

The aim of constitutional justice is to uphold the principles of supremacy of constitution, rule of law and protection of human rights. Even though the form of constitutional means and institutions may vary depending on historical, political and cultural characteristics of countries, the gist of those principles is universal.

In fact, it is the concept of human dignity that lies at the root of the constitutional values such as rule of law, democracy and human rights.

As well known, Immanuel Kant's moral philosophy has played a significant role in shaping modern idea of human rights. His categorical imperative that "you should treat man as an end, not only as a means" refers to the importance of human dignity. Today we believe that we are entitled to rights, simply because we are human beings.

Centuries before Kant, a philosopher by the name Mawlana Celaluddin-i Rumi who lived in Konya, a province in the middle Anatolia, declared that "the aim of the creation of universe is man".

This was the expression of human being as the "*eşref-i mahlukat*" (the most dignified creature) in the Islamic discourse. It is revealed in Quran that "We have created man in the best composition". Of course, similar expressions may be found in Old and New Testaments.

What I am trying to say is that our aim is the same, that is to protect and promote human dignity as formulated in the form of basic rights and freedoms. The constitutional and supreme courts or

councils operate to realise this aim through various means such as concrete and abstract review of constitutionality and individual or constitutional complaint.

2. Turkey's Experience in Individual Access to Constitutional Justice

After these introductory remarks, I want to talk over the Turkish experience in individual access to constitutional justice which is the main theme of this seminar.

The Turkish Constitution provides two legal means for individuals to have access to constitutional justice. First is the exception of unconstitutionality, which is also known as concrete review of constitutionality. The other legal means is individual application, also known as constitutional complaint. While the concrete review involves an indirect access, the constitutional complaint provides a direct access to the constitutional justice.

Today, I will first explain the main features of exception of unconstitutionality in the Turkish legal system. Then I will briefly touch upon the individual application or constitutional complaint which was introduced to our system by the 2010 constitutional amendment. As both concrete review and constitutional complaint aim to facilitate individual access to constitutional justice, I will draw comparisons between these two legal means based on the Turkish experience.

2.1 Concrete review of constitutionality in Turkey

The constitutional review of laws was introduced into the Turkish legal system by 1961 Constitution. It established the Constitutional Court and incorporated both abstract review and exception of unconstitutionality. The 1982 Constitution preserved the legal regime of constitutionality review with minor changes.

Concrete review of constitutionality is laid down in Article 152 of the Turkish Constitution. Under the article, (a) if a court hearing a case considers that the law to be applied is unconstitutional, or (b) if it is convinced of the seriousness of a claim of unconstitutionality submitted by one of the parties, it shall refer the issue to the Constitutional Court. The hearing court must provide the grounds for unconstitutionality in its application. Also, it must suspend the case until the Constitutional Court decides on the issue.

Individuals are not entitled to direct access to the Constitutional court for concrete norm review. Their claims may reach the Constitutional Court only through the approval of the hearing courts. This rule is in place to prevent the parties from abusing the exception proceedings to prolong the case or for other purposes.

The Constitutional Court shall decide on the matter and declare its judgment within five months of receiving the contention. If no decision is reached within this period, the hearing court shall conclude the case in accordance with the existing provision.

One important feature of the Turkish concrete review is that only a legal provision that is applicable in an ongoing case can be contested before the Constitutional Court. In other words, it

does not suffice that the law is merely relevant in the case but it must be directly applicable in order to proceed or terminate the case.

Unlike the abstract review, laws may be subject to concrete review without any time-limit after their enactments. In the Turkish system, however, a ten-year bar is in place for reexamination of unconstitutionality of laws. Under the last paragraph of article 152, if the Constitutional Court examined constitutionality of a law and dismissed the case on the merits, the claim of unconstitutionality against the same legal provision cannot be raised until after 10 years of the dismissal.

In principle, the Constitutional Court reviews the merits of a claim over the case file without holding a hearing. Accordingly, the parties of the original case are not allowed to intervene before the Constitutional Court. However, the Court may order an oral statement from the relevant public authorities or individual experts at its discretion.

In the concrete norm review, the Constitutional Court makes an abstract review of the contested provision; that is, the Court does not confine its analysis to the basis of the facts of the original case. Taking into account the facts of the original case, the Court exercises an abstract and general review concerning the constitutionality of the contested law. If the Court finds the contested law unconstitutional, it is declared null and void. Therefore, the effect of annulment decision is not specific to the concrete case, it is of general effect.

The concrete review cases hold a substantial portion of constitutionality review of the laws by the Turkish Constitutional Court. In 2016, the Court received 114 concrete review cases whereas the number of annulment action was only 21. In 2017, the Court received 18 annulment actions and 155 concrete review cases so far.

The concrete review, accordingly, provides an important and efficient way within our constitutional jurisdiction. This is true not only in terms of quantity but also in terms of substantive aspect.

Concrete review allows a wider access to constitutional justice along with wider perspective. Under the Turkish Constitution, only certain political actors are entitled to bring annulment action within limited time after the enactment of the laws or decree laws. In contrast, concrete review makes it possible to identify or raise possible constitutional defects by judicial actors who apply the rule and specialize on the relevant area of law or by individuals who have real bearing on the application of the rule.

Moreover, constitutional defects may become more visible over time through the implementation of the laws or they may arise simple due to the change of social and legal dynamics in the long term. Thus, concrete review opens the way for a thorough constitutional review along with the input of judges and individual litigants.

2.2. Constitutional Complaint

Individual constitutional complaint before the Constitutional Court is another major legal tool in terms of individual access to constitutional justice and protection of human rights. There exist certain differences between concrete review and constitutional complaint, which make them complementary to each other rather than alternative in terms of ensuring constitutional justice.

Constitutional complaint may be lodged only against public actions or inactions allegedly violating one of the constitutional rights and freedoms, not against the laws or decree laws. The constitutional complaint enables the Constitutional Court to conduct human rights review based on the facts of a specific case rather than making an abstract constitutional review. This aspect of individual application allows the Court to employ more right-based approach and protect the rights of individual against the state power.

Since 2012, the Constitutional Court has received thousands of applications and had dealt with them in an efficient manner. Despite the high volume of applications, the individual appeal remedy followed a very successful track until mid-2016. The Constitutional Court had reached the level of addressing the applications within about a year after the application date. Besides, the Court had addressed key human rights issues and rendered violation judgments in the areas such as freedom of expression, freedom of religion and the right to security and freedom.

With respect to the violation judgments rendered within the scope of individual applications, the Constitutional Court has found violations in about 2.400 cases. The bulk of violations concerned the right to fair trial and the right to be tried in a reasonable time.

This successful track of individual application remedy, however, faced a major setback in terms of substance and numbers due to recent coup attempt. In July 15, 2016, Turkey has experienced a heinous and bloody coup attempt which constituted a heavy threat against the very existence of the State and Nation. The key state institutions and civilians were attacked by armored military vehicles, which resulted in bombing of the Parliament and Presidential Palace and thousands of casualties, including 249 dead and more than 2000 injured.

This violent attack was an assault on constitutional democracy, rule of law, and human rights. As the Council of Europe Commissioner for Human Rights has stressed in his Memorandum, “the success of (coup attempt) would have marked the end of democracy in Turkey and the defeat of all the values underlying the Council of Europe”. Likewise, the Venice Commission indicated in its opinion on emergency decrees that “[a] military coup against a democratic government, by definition, denies the values of democracy and the rule of law”.

The Republic of Turkey reacted swiftly against this deadly attack. The government declared state of emergency and derogated from the European Convention on Human Rights. Accordingly, the emergency measures were put in place in order to erase the existing threat against constitutional and democratic order.

The effect of these developments to constitutional complaint remedy had been drastic. First, the Constitutional Court faced a formidable challenge to maintain its well-established rights-based

approach in terms of the protection of constitutional rights and liberties. This situation inevitably stemmed from the shift from default human rights protection regime of Article 13 of the Constitution to the emergency regime of Article 15. During the state of emergency, the Court adjudicate complaints relating the emergency measures under Article 15, which allows greater limitation of human rights and freedoms.

Second, the complaints to the Constitutional Court skyrocketed following the July 15 coup attempt. The day before the coup attempt, the number of pending individual applications before the Court was about 22.500. After the emergency measures were put in place, the numbers of applications reached over 107.000 in a year. Accordingly, the Court has received about 80.000 applications relating to the emergency measures. Those applications practically paralyzed the functioning of the individual application system, considering that even just reception and registration of them required a tremendous volume of work.

In order to deal with these challenges, new measures are introduced by the state authorities. A special Commission has been established to examine the complaints on the measures and administrative acts introduced by or taken under the emergency decrees, most notably dismissals of public servants from office. Following this step, the Constitutional Court found about 70.000 complaints which remained within the jurisdiction of the Commission inadmissible, on the basis of failure to exhaust legal remedies. The Court thereby reduced the numbers of pending complaints to around 38.000.

The Constitutional Court makes a great effort to handle these cases in due time, as well as other non-emergency complaints.

Conclusion

In conclusion I would like to say that the individual access to constitutional justice is even more important during the state of emergency. This is so simply because individual rights and freedoms become more fragile during such times.

The heinous terrorist attack in Egypt during Friday prayer two days ago reminded us once again the fact that we live in an unfortunate age of terror. On the behalf of the Turkish Constitutional Court, I would like to share my sorrow and sadness with the Egyptian people and to strongly condemn this inhuman attack.

It goes without saying that terrorism has been a threat to democracy, rule of law and human rights. Therefore, it is of paramount importance to fight against terrorism without destroying these values.

I think at this moment we should remember Jacques Derrida, who was born in the city of El-Biar, Algeria. In an interview made only a few weeks after 9/11 terror attack, Derrida said that “We must more than ever stand on the side of human rights.” He continued to emphasize that "We

need human rights. We are in need of them and they are in need, for there is always a lack, a shortfall, a falling short, an insufficiency; human rights are never sufficient."

Yes, indeed we need human rights. But we also need a universal moral revolution in line with the discourse of Rumi. Let me conclude by recalling Rumi, who is known as the sage of human dignity, justice, freedom and tolerance.

In his words, “In anger and fury be like the dead/ In toleration be like the ocean”.

Thank you for your attention.

Algiers, world capital of constitutional justice in 2020.

(View of Casbah)

Adress delivred by:

Ms. Marcelline C. GBEHA-AFOUDA

President of the High Court of Justice

Judge at the Constitutional Court of Benin

On the theme:

«The Exception of unconstitutionality in Benin :

Organisation and internal procedures »

According to Pierre AVRIL and Jean GICQUEL, the *exception of unconstitutionality* is a "procedural issue in the course of a trial in which a litigant question the conformity of a law with the Constitution. After considering the seriousness of the issue, the judge, who is referred to on the merits, either decides himself (United States), or refers the matter to the Constitutional Court, as an preliminary question" (Italy, Germany).[1]

In Benin, Article 122 of the Constitution of 11 December 1990 addresses this matter:

"Any citizen may refer to the Constitutional Court on the constitutionality of laws, either directly, or through the procedure of exception of unconstitutionality invoked in a case involving him before a jurisdiction. The latter must stay until the Constitutional Court issues a decision, which must be taken within thirty days."

The Organic Law on the Constitutional Court confirms these provisions. Article 24 of that law provides that, "Every citizen […] may […] in a case concerning him invoke before a court the exception of unconstitutionality."

The case-law of the Constitutional Court attempted to supplement this somewhat summary regulation of the preliminary issue procedure or exception of unconstitutionality.[2]

Given that the political system established by Benin's Constitution of 11 December 1990 is a presidential one and the expression *"exception of unconstitutionality"* that it uses, there is a certain similarity with the American system. It is therefore necessary, prima facie, to demonstrate the clear difference between the American system and the Beninese one.

In the United States, when the litigant is involved in an ordinary (i.e. non-constitutional) trial, he may consider that the law likely to be applied to him is contrary to the Constitution. To defend himself, he may invoke an *exception of unconstitutionality*. He requests the judge who examines the matter not to consider the disputed provision in this case. The judge himself rules on the matter, and depending on his ruling, the disputed text may be applied or rejected.[3] This type of remedy is normal in a decentralized system of constitutional justice. It is indeed an *exception* in the strict sense of the term. The judge who is referred to on the issue of unconstitutionality rules on the matter. This is not exactly the system implemented in Benin, in any case, not under the same conditions.

The expression more suited to the Beninese situation should be the so-called *preliminary issue*, even though the expression *exception of unconstitutionality* is used in a generic sense. It has long been understood that a *preliminary issue* is an issue referred to [a judge] [and] that the judge

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[1] P. AVRIL, J. GICQUEL, *Lexique, droit constitutionnel*, Paris, P.U.F., 1986, p. 57.

[2] I. SOUMANOU, *Contribution de la Cour constitutionnelle à la consolidation de l'État de droit au Bénin*, Mémoire de DEA « Droit de la personne et Démocratie », Chaire UNESCO des droits de la personne et de la Démocratie, Faculté de droit et de sciences politiques de l'Université d'Abomey-Calavi, 2005-2006, pp. 71-73. ; I. SALAMI, « Le traitement discriminatoire des délits de mariage devant les cours constitutionnelles béninoise et congolaise », in, *« www.la-constitution-en-afrique.org ».* , pp. 8-12.

[3] L. FAVOREU "e.a", *Droit constitutionnel*, Paris, Dalloz, 2009, p.237 ; F. HAMON et C. WIENER, *La justice constitutionnelle : Présentation générale, France, États-Unis*, Paris, La documentation française, 2006, p. 3.

cannot settle himself.[4] Considering the above observations, in the Beninese model, the matter is simply *a preliminary issue*, which is known by the generic name of *exception of unconstitutionality*.

Another preliminary observation is that, in Benin, the exception of unconstitutionality occurs in an environment where direct action procedure against norms, in particular the law, is provided for, both a priori and posteriori. Indeed, Article 122, above mentioned, provides that, *"Any citizen may refer to the Constitutional Court on the constitutionality of laws, whether directly or through the procedure of exception of unconstitutionality […]."* In addition to this, there are mandatory prior checks. Pursuant to Article 117 of the Constitution, whose content is detailed, on the one hand, in Article 123 of the Constitution and, on the other hand, in Article 19 of Law No. 91-009 of 31 May 2001 on the Organic Law on the Constitutional Court: *"The organic laws adopted by the National Assembly are referred to the Constitutional Court by the President of the Republic for constitutionality check […]."* [5] It should be noted that the mandatory nature of prior checking of laws also applies to ordinary laws, since Article 117 of the Constitution makes no distinction between the different categories of laws, and provides that, *"The Constitutional Court: - shall rule on: The constitutionality of organic laws and laws in general before their promulgation […]."*

How did Benin manage to implement such a procedure for 25 years now?

To answer this question, we will examine the situation of the exception before the ordinary judge (I) and its situation before the Constitutional Court itself (II).

I- The exception before the ordinary judge

It appears that the two key actors here are, on the one hand, the parties to the ordinary lawsuit, assisted or not by their lawyers (A), and, on the other hand, the ordinary judge himself (B).

A- The parties and their lawyers

The litigant raises the issue before the ordinary judge: "Any citizen", says the provision, which means any individual, national or foreign. Several points need to be clarified in this regard.

1- The subject of the exception

According to the constant case-law of the Court, "the exception of unconstitutionality must deal with the issue of conformity to the Constitution of a law applicable to the current lawsuit" and not with another provision or the issue of the violation of a fundamental right. The 'law' means a piece of legislation voted by the National Assembly, promulgated by the President of the Republic or made enforceable by the Constitutional Court after the declaration of conformity to the

[4] C. CAMBIER, *Droit judiciaire civil*, Bruxelles, Larcier, 1974, p. 210. ; voir aussi, M-Fr. RIGAUX et B.RENAULD, *La cour constitutionnelle*, Bruxelles, Bruylant, 2008, p. 174.

[5] Besides, in accordance with Article 123 of the Constitution, which is detailed in Article 21 of the organic law of the Constitutional Court: *"The Rules of Procedure and amendments to the regulations of the National Assembly, of the High Authority of Audio-Visuals and Communication, and of the Economic and Social Council, before their enforcement, shall be submitted to the Constitutional Court by the president of each of the bodies concerned."*

Constitution. Therefore, the Court declared inadmissible an exception of unconstitutionality based on the violation of the right to defence, the refusal to submit documents to the opposing party, the production of documents written in English and not translated into the official working language, that is the French language.

In the case leading to Decision DCC 13-016 of 14 February 2013, the Constitutional Court recalled this fact once again. The lawyer of the litigant in the ordinary trial before the Judge of the Auction Chamber of the First Instance Court of Second Class of Abomey-Calavi invoked "an exception of unconstitutionality on the grounds that the rejection of his request for postponement of the auction for serious and legitimate reasons, based on Article 180 of the Code on Persons and Family, pursuant to Article 281 of the OHADA Uniform Act on enforcement procedures, was a breach of Articles 1 et seq. of the Constitution of 11 December 1990 and that the said provisions protect the family, the woman, and the child and give them the guarantee of family accommodation." The Court declared the appeal inadmissible.

2- <u>The time of the exception and its possible abuse.</u>

Article 39 of the Rules of Procedure of the Constitutional Court stipulates that the exception *"may be invoked at any time during the proceedings before the relevant court."* Therefore, it can be invoked both in first instance and in appeal. The current system does not preclude, for example, that a preliminary issue of unconstitutionality may be raised for the first time before the Supreme Court or when the judgement is reserved. In such a case, the ordinary judge is obliged to defer his ruling on these grounds.

Unfortunately, instead of sticking to its role of protecting fundamental rights, and because of the ease with which it is granted in Benin, some people use the exception of unconstitutionality as an instrument to slow down proceedings, and consequently prevent the observance of the reasonable time limits."[6] The preliminary referral on constitutionality is sometimes used by Beninese lawyers as delaying tactics in a system devoid of any deterrent filtering, which explains several decisions of the Court condemning this attitude of lawyers.[7] Indeed, these lawyers do not hesitate to create hurdles as soon as they realize that they are likely to lose the case.

An example of the Court's decisions on this subject is Decision DCC 13-016 of 14 February 2013. The lawyer, Maître Igor Cécil E. SACRAMENTO, invoked an exception of unconstitutionality at a first hearing of the Court's Auction Chamber on 14 September 2012. In its decision of 27 September 2012, the Court ruled that the exception was inadmissible. It noted that it was a delaying tactic and that it violated Article 35 of the Constitution. At the hearing of 11 January 2013, the judge having already rejected his request for adjournment of the auction for serious and legitimate reasons and presented and ordered the continuation of the auction procedure, Maître

[6] I. SALAMI, « Le traitement discriminatoire des délits de mariage devant les cours constitutionnelles béninoise et congolaise », in, *« www.la-constitution-en-afrique.org ».* , P. 12.
[7] I. SALAMI, « Les obstacles institutionnels aux droits de la défense », *Revue Droit et Lois,* n ° 16, juillet-août-septembre 2008, p. 34.

Igor Cécil E. SACRAMENTO raised another exception of unconstitutionality through handwritten conclusions dated 11 January 2013 on the same grounds. His desire to delay the proceedings was therefore clear. The Court ruled that his use of the exception of unconstitutionality, contrary to the previous decision of the Court, was an abuse and deserved to be punished. It therefore said that in doing so, he had again breached Article 35 of the Constitution, which states: "Citizens in charge of a public office or elected to a political office shall fulfil it with conscientiousness, competence, probity, dedication and loyalty in the interest and respect of the common good." On the basis of Article 114 of the Constitution, which states that the Constitutional Court is the regulating body for the functioning of the institutions, the Court ruled that, in this case, the judge shall reject any exception of unconstitutionality raised on the same basis and continue the proceedings. (Below are broad excerpts from the Court's decision):

"Considering that, on the basis of the evidence of the case, it is clear that Maître Igor Cécil E. SACRAMENTO, a legal official taking part in the public service of justice, blatantly used delaying tactics by raising again an exception of unconstitutionality in this circumstance and at this stage of the proceedings; that, indeed, at the hearing of 14 September 2012, he invoked an exception of unconstitutionality before the judge of the Auction Chamber of the Court of First Instance of Second Class of Abomey-Calavi on the grounds that, on the one hand, the Court "violated the Constitution which enshrines and protects the family, the woman and the child", and that, on the other hand, "Article 281 of the Uniform Act, on the basis of which the request of deferment of the auction was dismissed and deemed contrary to the Constitution"; that the High Jurisdiction, in its Decision DCC 12-174 of 27 September 2012 ruled that the exception was inadmissible; that, likewise, his haste in writing his "conclusions on the exception of unconstitutionality", in a handwritten document filed the same day of the hearing at the Secretariat of the President of the Court revealed his will to use delaying tactics and prevent the judge from rendering his decision within the time limit previously fixed, led the Court to conclude that by behaving in this way, he had violated Article 35 of the Constitution; and that the Court continued the proceedings;

Considering that at the hearing of 11 January 2013, while the judge had already, by Judgement ADD N°001/CRIEES, rejected the request of postponement of the auction for serious and legitimate reasons that he presented and ordered the continuation of the auction procedure, whereas the Board of Banque Atlantique Bénin SA was called upon, before the bailiff, to present the preliminary formalities of the auction and file the documents of the auction, Maître Igor Cécil E. SACRAMENTO, counsel of Mrs. Afiwa Elikplim KLUDZA, wife of Maurice ASSOGBA, once again invoked another exception of unconstitutionality by handwritten conclusions dated 11 January 2013; that he used the same grounds; that his desire to delay the normal course of proceedings was therefore clear; that his use of the exception of unconstitutionality, contrary to the previous decision of the Court, was an abuse and deserved to be punished; that the Court deemed that there was reason to state that in doing so that he had again breached Article 35 of the Constitution, which states: "Citizens in charge of a public office or elected to a political office shall fulfil it with conscientiousness, competence, probity, dedication and loyalty in the interest and respect of the common good.";
that furthermore, on the basis of Article 114, and in its capacity as a regulating body for the

functioning of the institutions, the Court ruled that, in this case, the judge shall reject any exception of unconstitutionality raised on the same basis and continue the proceedings;"

3- The optional dimension of the exception

Article 122 of the Constitution provides that: *"Any citizen may complain to the Constitutional Court about the constitutionality of laws, whether directly or by the procedure of the exception of unconstitutionality*." The Court has always recalled this optional dimension and stated that, in accordance with the alternative formulation of this constitutional provision, the applicant cannot combine direct action, the action for annulment, and the exception of unconstitutionality. Therefore, this article requires the applicant to choose between direct action and the procedure of the exception of unconstitutionality.

By decision DCC 04-023 of 4 March 2004, the Constitutional Court recalled the provisions that give grounds for direct recourse and the exception of unconstitutionality before ruling, "*that these articles require the applicant to choose between direct action and the procedure of exception of unconstitutionality; that Mr Moïse SAGBOHAN, having resorted concurrently to the procedure of the exception of unconstitutionality on 17 April 2001 and 24 July 2002 and to direct action on 20 October 2003, disregarded the aforementioned provisions; that, therefore, the procedure of exception of unconstitutionality is declared inadmissible."*

In its decision DCC 05-117 of 20 September 2005, the Court confirmed that, *"the applicants are required to choose between direct action and the exception of unconstitutionality; that in this case, having used the two procedures concurrently, it is necessary to say and to rule that the plea of unconstitutionality raised by the applicants is inadmissible."*

The court tirelessly repeats the same argument whenever the situation arises, as in the case of Decision DCC 06-076 of 27 July 2006 in which it ruled that, *"by resorting concurrently to direct action on 9 August 2004 and to the exception of unconstitutionality on 9 November 2005, the applicants did not comply with the provisions of Article 122 of the Constitution; that it follows that the objection of unconstitutionality raised by the applicants is declared inadmissible."*

The optional nature of the objection of unconstitutionality is thus a constant case law. The litigant must choose the type of appeal he prefers in a specific situation before the ordinary judge.

What about the judge? Can he deal with the exception raised by the litigant as he pleases?

B- The ordinary judge

Once a litigant invokes the unconstitutionality of a law that the ordinary judge is about to enforce, the latter is required to stay the proceedings and refer the matter to the Constitutional Court within eight (8) days of the invocation of unconstitutionality.[8] No discretion is conferred on the

[8] Article 24 (3) of the Organic Law on the Constitutional Court.

court appealed from, which is therefore not a party to the constitutional proceedings, but a mere communicator of an issue raised before it by the parties to the ordinary trial. The court before which the preliminary issue of unconstitutionality is raised does not have any power of review of its relevance or appropriateness.

A court decision that does not comply with this rule can be annulled by the Constitutional Court, as was the case of DCC 96-009 of 23 January 1996.
The Court considered in that case that the procedure of exception of unconstitutionality was intended not only to "*protect the rights of defence"*, but also, *"to consolidate the rule of law established by the Constitution of 11 December 1990."* Therefore, any court decision that does not comply with the requirements of this procedure, especially if does not refer the matter to the Constitutional Court, must be declared unconstitutional. If the court appealed from does not observe the eight-day transmission period, its conduct is declared unconstitutional, without regard to its alleged ignorance of the urgency of the procedure or of any increased burden of activity.[9] In this case, a preliminary issue submitted on 17 April 2001 to the Cotonou Court of Appeal was never transmitted. The applicant had to submit it a second time on 24 July 2002 before the Court of Appeal decided to transmit it on 7 August 2003.

This being said, the party to the lawsuit *a quo* cannot directly refer a preliminary issue or an exception of unconstitutionality to the Constitutional Court. This is a judge-to-judge procedure.[10] Only the ordinary judge to whom an exception of unconstitutionality is submitted has the power to appeal to the Constitutional Court on this point, except when the Constitutional Court is referred to because the ordinary judge refuses to transmit the exception. In such case, the appeal is not an exception of unconstitutionality but an appeal against the behaviour of a judge. (See DCC 96-009 of 23 January 1996.)

In any case, it is up to the Constitutional Court to deal with the exception and respond to it.

II- <u>The exception in the Constitutional Court</u>

The internal procedures followed for the exception of unconstitutionality are almost the same as those for other appeals (A). The decision, once made, will produce certain effects (B).
The internal procedures followed for the exception of unconstitutionality are almost the same as those for other appeals (A). Once taken, the decision produces certain effects (B).

A- <u>Internal procedures</u>

The Rules of Procedure of the Constitutional Court determine the decision-making process, in particular Articles 27, 28, and 29 thereof, which state, respectively:

[9] DCC 04-023 of 4 March 2004.
[10] Decisions DCC 97-042 of 6 December 1996 and 12 August 1997, DCC 01-030 of 17 May 2001 and DCC 07-151 of 22 November 2007.

"Cases are referred to the Constitutional Court through a petition. *The petition is filed with the General Secretariat, which records it according to the date of arrival"*;

"Proceedings in the Constitutional Court are written, free of charge and secret. *Proceedings follow an adversary system depending on the nature of the petition."*

"The file of the proceedings is assigned to a Rapporteur appointed by the President.

The Rapporteur examines the case and submits a written report to the Court.

He hears the parties, where appropriate; he may also hear any person whose hearing he considers opportune or request written opinions he considers necessary.

He sets deadlines for the parties to submit their case and orders investigations where necessary. The report analyses the case and sets out the issues to be decided. The report is filed with the General Secretariat, which transmits it without delay to the members of the Court. It is read at the hearing by the Rapporteur."

The internal circuit for processing an appeal as soon as it is registered with the Court is as follows:

- Registration of the referral at the General Secretariat;
- Transmission of the referral to the President;
- Assignment of the file concurrently to a reporting counsellor and to the director of legal studies and recourse management ;
- The director of legal studies assigns the file to a legal assistant ;
- The legal assistant exchanges views with the counsellor to validate the research and the process ;
- The legal assistant initiates the investigative measure for the signature of the president (presidents of constitutional institutions) or the Secretary-General (ministers and all the other recipients);
- The Secretary-General receives the response on the investigative measure or, if necessary, in connection with the reporting counsellor, orders or conducts a hearing of the respondent, or orders or carries out an on-site investigation;
- The reporting counsellor draws up the report and the draft decision with the support of a legal assistant and files them with the General Secretariat;
- The Secretary-General orders the production of various reports and draft decisions as well as all file documents (referral letter, letters of investigative measures, letters of answer to said measures, all other documents accompanying the referral or the answers to the investigative measures, reports of hearing or on-site investigations, etc.);
- The various files are then distributed to all the counsellors, as well as to the Secretary-General and his deputies;

- The Secretary General, in consultation with the President, prepares the register and convenes the hearing on behalf of the President.

In the case of the exception of unconstitutionality invoked before the ordinary judge, the file of the proceedings containing the conclusions of the lawyer and the interlocutory judgement signed by the judge is transmitted to the Court either by the President of the jurisdiction or by the clerk. This file registered at the Secretariat of the Court is considered as the referral and follows the circuit indicated above.

B- **The decision and its continuation**

The drafting of the decision on an exception of unconstitutionality, as any decision rendered by the Court, mutatis mutandi, is performed as follows:

- Opening Clause (Details on the referral, i.e. author, date, and subject of the request);
- Applicable legislation (list of applicable legal texts);
- Recitals on admissibility;
- Content of the appeal (complaint against one or more provisions of the law to applied at trial);
- Recourse analysis;
- Operative provisions :
    - Article 1: conclusion on a problem of admissibility (if any)
    - Article 2: Conclusion on the contentious point;
    - Article 3: Details on the addressees of the decision as notification and order of publication in the Official Journal.

The constitutional judge is given thirty (30) days to answer the question sent by the ordinary judge. Once he receives the response, the ordinary judge may resume the ordinary trial and use or reject the contentious legislation depending on the decision of the Constitutional Court.

One of the peculiarities of the exception of unconstitutionality in Benin is that, if the Constitutional Court confirms the unconstitutionality, the piece of legislation is nullified, not only for the case at hand that led to the decision of unconstitutionality, but also for any other case in which it could have been invoked. The impact of the finding of unconstitutionality is the same for direct action for annulment as for the case of exception of unconstitutionality.

As a matter of fact, the Constitution provides, without any procedural distinction, in Article 123, paragraph 1, that *"A provision that is declared unconstitutional cannot neither be promulgated nor*

enforced." [11] Besides, Article 40 of the Rules of Procedure of the Constitutional Court referring to the exception of unconstitutionality, states: "If the Constitutional Court declares the contested piece of legislation contrary to the Constitution, this piece of legislation ceases to have effect from the date of this decision."

Now that it's time to make an assessment, after a quarter of a century and nearly two hundred decisions rendered on this issue, it may be said that the function of protection of fundamental rights has been fulfilled by the exception of unconstitutionality. Indeed, one of the many decisions issued by the Court is the Decision DCC 09-081 of 30 July 2009 in which, the Constitutional Court reaffirmed equality in rights between men and women as provided for in Article 26 of the Constitution. Referred to by an interlocutory judgement of 15 May 2009 to rule on an exception of unconstitutionality invoked before the First Criminal Chamber of the Court of First Instance of Cotonou by Mrs. Nelly HOUSSOU and Mr. Akambi Kamarou AKALA, assisted by Mrs. Reine ALAPINI GANSOU substituted by Mr. Ibrahim SALAMI and Mr. Magloire YANSUNU, the Court ruled that, *"it follows from the reading of Articles 336 to 339 of the Penal Code that the legislator established a disparity of treatment between man and woman as regards the constituent elements of the offence; that in this case, while adultery by a husband can only be punished when it is committed in the marital home, adultery by a woman is punished regardless of the place of commission of the act; that incrimination or non-incrimination of adultery are not contrary to the Constitution, but that any difference in the treatment of adultery between men and women is contrary to Articles 26 of the Constitution, and 2 and 3 of the African Charter on Human and Peoples' Rights; consequently, Articles 336 to 339 of the Penal Code are contrary to the Constitution.".*

However, what needs to be corrected with regards to the implementation of the exception of unconstitutionality is, among others, the tendency of some lawyers to hijack the procedure by turning it into a dilatory instrument, or the resistance of some judges who have a strong wish to supplant the constitutional judge in assessing the conditions of admissibility and the relevance of the exception of unconstitutionality.

In this respect, while continuing to punish such behaviours, the Constitutional Court has undertaken to stage a "vast campaign to heighten awareness" among the members of the justice system about the outlines and utilities of the exception of unconstitutionality. For example, a seminar on this subject is scheduled to be held in mid-December 2017 for judges and lawyers to allow this procedure to keep its role of protection of fundamental rights.

Algiers, 26 November 2017

[11] Article 123, paragraph 1, of the Constitution.

Address delivered by:

Hon. M. Adel Omar CHERIF

Vice-president of

the Supreme constitutional Court of Egypt

On the theme:

"The exception of unconstitutionality in Egypt"

بسم الله الرحمن الرحيم

Thank you very much, Mr. President…

- His Excellency, Mr. Mourad MEDELCI, the President of the Constitutional Council of Algeria,
- The Honorable Mogeong MOGEONG, the Chief justice of South Africa; President of the Constitutional Court of South Africa and President of the CCJA;
- Our observers, who have taken the trouble to come and join us in this meeting from different parts of the world; especially the Chief Justice and President of the Constitutional Court of Turkey, Mr. ARSLAN; the Representatives from Belgium and Venice Commission;
- My fellow colleagues from different African jurisdictions;
- My fellow colleagues, members of the Constitutional Council of Algeria;
- His Excellency, the Secretary General of the CCJA, Mr. Moussa LARABA;
- Ladies and Gentlemen:

The theme of this morning's session has to do with the regulation of "the exception of unconstitutionality" and its recognized internal procedures at the concerned countries level. This topic is very dear to me, for being a constitutional judge myself, for about Twenty years, within a longer period of judicial experience in the judiciary of my country that has now extended for nearly Forty years. This is, indeed, a very technical subject-matter when you look into the unconstitutionality of a specific legislation, and how really you could raise the issue properly before constitutional courts, or courts of ordinary jurisdictions. We do belong, all of us, to different jurisdictions, all of them, somehow in one way or the other, do not encounter and deal with constitutional issues the same way, or at the same level. Some of us have adopted the mechanism of constitutional councils, whereas others have left the constitutional jurisdiction to be handled by courts of law; some of them, within this latter category, would entrust ordinary courts, while others empower specialized constitutional courts to do the job. Within all these arrangements, we would see that there is a need for somebody, at some stage, to raise a constitutional issue, either to alert the court, or to really bring about the seriousness of this issue to the realm of the constitutional adjudication.

When we look into the history and development of judicial review, as we all know it today, we always recall the profound experiences of Chief Justice John MARSHALL and the Supreme Court of the United States, that now go back for more than two hundred years ago. He was the one who had really articulated the concept of judicial review the way we know it today. He did very smartly realize, at that time, that the constitution should be looked at as the supreme law of the country, on the one hand, and there is a hierarchy of legal norms, on the other; therefore, he concluded that legislation and acts of government --whether those acts belong to the executive or the

legislature -- should not contradict the constitution. They should always come up in line with the constitution, and in case there is a contradiction, then the judge has to ignore them, or at least abstain from enforcing them in the cases brought before him. When this began, it didn't take the form of an 'exception of unconstitutionality'. Nobody went to John MARSHALL at that point and told him: "listen, there seems to be a contradiction between the legislation and the constitution and we would ask you to strike it down". Apparently, rising the constitutional issue was his own initiative, he felt it as a judge, he felt it as someone who is really interested in enforcing the law; and the constitution, the highest law of the country. Because of his judicial conscious and judicial feelings, he managed to establish that theory by elevating the constitution to the highest level of the legal norms and enforcing the constitution above all norms that are really brought before him at a court of law.

This gives us, Ladies and Gentlemen, an indication that 'the exception of unconstitutionality' is not the sole method or the only way to raise a constitutional issue before a court of law of a constitutional jurisdiction. In fact, there are so many other methods available for us in this respect. I mean on reflecting on my own experience from the Egyptian side of view, and basically because we are supposed to bring about our respective countries' experiences here; I will just very briefly reflect upon and show you how this sort of 'exception of unconstitutionality' has evolved and developed within the Egyptian jurisdiction.

In fact, Egypt has always recognized the concept of judicial review, including judicial review in constitutional issues, even before the foundation of its specialized constitutional court system in the Year 1969. At the beginning of the 20th century, many courts of law in Egypt at the time were very much aware of the situation wherein a piece of legislation, passed by the legislative authorities, could occasionally be in contradiction with the constitution. And in order to show respect to the constitution, on the one hand, and not to interfere in the legislative business, on the other; their jurisprudence was settled that all what the judiciary could do, at that time, is to abstain from implementing that contradictory legislation.

So, the Egyptian judiciary firmly recognized the concept of judicial review with the beginnings of the 20th century. Since then, it had been settled that judicial review should be performed and exercised by all courts of law, and that the constitution of the country should always be respected. Later on, the country just decided to adopt a mechanism of specialized judicial review.

There was a reason for such shift, and that reason had to do basically with the negative consequences of decentralizing judicial review the way the country had been experiencing at that time. Because all Egyptian courts of law were empowered to exercise judicial review, there was a potential that this exercise would lead to contradictions amongst legal theories and conclusions reached by different courts of law, that would lead some of them to finalize legal concepts in contradiction with those recognized by other courts of law within the same country at the same time. Therefore, there was a need to bring together the legal theory and practice. There was a need to merge the tradition, and the only way to do that was really by entrusting the power of judicial review to a single specialized court that would be having an exclusive jurisdiction over constitutional issues in a way that no other courts within the system would really get involved in

these issues. Because of that, about nearly Fifty years ago, in the Year 1969, the Supreme Court of Egypt (The Supreme Constitutional Court) was established. At the beginning, the only way to raise a constitutional issue, at the judicial level, used to be through 'the exception of unconstitutionality'.

So, it was really required by the Supreme Court's statute, in order to bring a case into constitutional adjudication, that those litigants who believe that a legislation being enforced on them is repugnant to the constitution, should bring the issue to the attention of the court of merits, being of a criminal, civil, commercial or otherwise jurisdiction; then this court of merits would refer the constitutional issue to the constitutional court.

This is a technical mechanism that is generally recognized within the francophone jurisdictions; let us say the civil law tradition. Wherein a situation when a court of law entertains no power over a specific issue; the court has to refer this issue to the competent court of law if it believes that finalizing or resolving this issue is necessary to resolve the case before the court of merits itself. So, it was really not something new; rather a method that was already fairly established within the civil law tradition: if the court does not entertain jurisdiction over a specific issue, the court will refer that issue to the court that really have the competence to resolve it.

It started like this, but it gradually developed into other mechanisms. At some point, judges believed that if the litigants themselves could raise the constitutional issue before them, why do not (we) the judges, bring about the constitutional issue if they believe this is necessary-- like what John MARSHALL did, more than two hundred years ago-- and send it to the constitutional court. So, it is unfair to confine this power to the litigant through 'the exception of unconstitutionality' and prevent the judge himself from raising the issue whenever he feels that raising this issue is fundamentally necessary to resolve the case of merit he is handling. Therefore, since the Year 1979, the Egyptian judicial system and the Egyptian legislation at that time recognized the power of all courts of merits to refer the constitutional issue to the constitutional court whenever they feel it is necessary to resolve the case brought before them.

Not only that! In Egypt today, the Constitutional Court, which is the Supreme Court of the country, has a unique power to take the initiative and raise a constitutional issue itself. So, whenever the Court is handling any issue brought before it; and the Court believes that a specific piece of legislation that has some link to that issue seems to be in contradiction with the constitution, the Court, after following specific procedures, would then be able to address the constitutionality issue within its judgment. Therefore, the Constitutional Court itself has the power to address constitutional issues without a request from other parties or actors. These are unique arrangements that you cannot easily find in other jurisdictions.

In all of these arrangements, whether you exercise judicial review through 'the exception of unconstitutionality', or by giving the power to the courts of merits to refer the issue to the Constitutional Court, or by entrusting the Constitutional Court to raise the constitutional issue itself; there are a lot of technical procedures that have to be observed and exercised by the parties and other actors involved. These procedures mainly have to do with the right to access the court,

the way the case or the issue is brought before the court and the time limitations that have to be always observed. There is also a consideration that has to be given to 'the exception of unconstitutionality' itself. It has to be serious. Not any 'exception of unconstitutionality' been addressed before a court of merits would always be welcome and admissible. Rather; it has to be serious. The seriousness of this exception has to be evaluated by the court of merits itself. Here the court of merit would, in fact, act as a gatekeeper in managing the flow of the cases to the constitutional court. If they are convinced that this defense or this exception is serious, they would allow the litigant to go to the constitutional court, otherwise they would not permit him/her to do so; rather, they would continue to adjudicate the case brought before them.

Well, now there are a lot of procedural requirements that I would have hoped to go through them, nevertheless, due to time limitations, I will not be able to address them. I would also have liked to address the issues of legal aid and the costs of litigation that we addressed briefly yesterday, but due to time limitations, once again, I find myself unable to do that. Nevertheless, I believe we will be having some time during the interaction period wherein I should be very happy to answer any questions in this regard.

At the conclusion, I just like to, once again, extend my gratitude to H.E. MEDELCI, the President of the Constitutional Council of Algeria for hosting this meeting in collaboration with the Honorable Mogeong, Chief Justice of South Africa, the President of the CCJA. It was a wonderful opportunity for all of us to get together and continue with our cooperation and support to each other.

I am very thankful to you for giving me, and all of us, such an opportunity. I am also very thankful to the government of Algeria for hosting this meeting in this beautiful land, and for the kindness being extended to all of us, and for the efforts being really exerted by the organizing committee and Mr. LARABA and his team to provide all of us of such unique hospitality. So, thank you very much, and God bless you all. Thank you…

Algiers, world capital of constitutional justice in 2020.

Address delivered by:

Hon. Tsegay Asmamaw

Deputy Chief Justice of the Supreme Court &

The Vice Chairman of the Council of Constitutional Inquiry (CCI) of Republic of Ethiopia

On the theme:

"Individual Access to Constitutional Justice:

Ethiopian Experience"

Honorable delegates to this historic Conference! Ladies and Gentlemen!

First of all, allow me to thank the organizers of this Conference for it serves as a bench- mark for experience sharing among African Countries as concerning their constitutional interpretation systems in general.

I am also highly honored and humbled to the leadership of CCJA (Conference of Constructional Jurisdictions of Africa) for it allows my Country to be the 35thmember state to CCJA, for it gives us an advantage to work in collaboration with constructional courts of Africa and other similar institutions engaged in constitutional interpretations.

General overview of Ethiopia and its legal system:

Next, I am to briefly introduce my country, Ethiopia, and its judicial system. It is located in the Horn of Africa and shares borders with:

- Eritrea to the North
- Kenya to the South
- Djibouti to the North East
- Somalia to the East
- Sudan to the West, and
- South Sudan to the South West.

It is the 2nd populous country in Africa next to Nigeria, i.e, with about 100,000,000. The size of the country is about 1,126,829 Km^2 (435,071 square miles). The topographic features of the County range from a high plateau with Central Mountains divided by the Great Rift Valley. The highest peak at mount Ras Dashen is 4,533 meters above sea level, down to the Dankil Depression at 110 meters below sea level. The climatic conditions vary between temperatures of 47 ˚C in the Afar depression to 10 ˚C in the highlands. Ethiopia is said to be a land of origins. It accommodates highly diversified societies. There are about 85 ethnic groups with different cultures, languages, and religions. It was one of the ancient civilizations in Africa and it has different historical sites to witness this fact. It is the first African country to make register about 11 heritages to the UNESCO. It is the origin for the only African alphabet. Africa is considered as the cradle of human being because the longest age human fossil in the world, with about 3.5 million years (LUCY), is found in Ethiopia. It is the origin of different plant species including one of life's great pleasures, coffee. It is also the source of the Blue Nile, the Great River whose power and fertility nurtured the origin of civilization itself. Ethiopia is wonderfully cited and given protection at the different versions of the Holly Bible and Holly Kurean. It was not only independent during the Era of Colonization, but also played a vital role for the freedom of other African Countries from their colonizers. Due to this fact, the Africans decided it to be the seat for the African Union (AU).

This by itself made the City of Addis Ababa to become one of the mostly known diplomatic Centers in the world.

Ethiopia has a very long political and legal history. In the history of modern constitution, the country had the 1931, 1955, and 1987 written constitutions: Now, it is also experiencing its 4thConstitution, the 1995 Constitution.

It had a long-standing history of domestic and foreign wars. The effect of these different forms of wars immersed the country to be economically the poorest and the people had faced to deep-rooted drought and famine.

Because of this bad history, our present Constitution takes as one basic objective to commit itself for the prevalence of lasting Peace. This objective is also considered as a basic precondition for the other two basic objectives, i.e., establishing reliable democracy and undertaking a fast development of all sorts. It also considers that achieving the latter objectives gives an effective (basic) precondition for achieving peace in the country. Because of this, every policies, strategies and laws are targeting to foster the achievement of these constitutional goals. Though Ethiopia had a unitary form of state in the previous constitutions, the 1995 constitution introduces the Federal form of State Structure as a solution to equally entertain the ethnic, religious and cultural diversifications it has, and to achieve the basic objectives the constitution sets. As a result, the Country is now successfully showing a continuously emerging dev't and is eradicating poverty to the benefit of the Ethiopian people.

The 1995 Constitution of Federal Democratic Republic Ethiopia, as it provides in Art. 50-52, divides state powers and functions between the Federal and the Regional (Federating) states. Not only the Federal states, but also the Regional States, have their own parliaments, executives and judiciaries so as to determine their proper self-rule. The parliament at the Federal level is bicameral:

1. **The House of Federation (HOF): The Upper House**
2. **The House of Peoples' Representatives (HPR): The Lower House.**

The House of People Representatives (HPR), pursuant to Art 50(3) is the highest authority of the Federal Government. But, the parliaments at the Regional levels are unicameral or bicameral depending on their internal situations.

The Constitution also gives much attention to human rights. About 1/3 of its contents are vested on this subject, i.e., 31 provisions are about human rights of the total 106 Articles of the constitution. It takes a strict stand that the past atrocities on human lives shouldn't be repeated again. Therefore, both private, group, and people's rights are recognized by our present Constitution.

Next, I want to put a brief description about the judicial system in my country. Ethiopia is the adherent of Continental Legal System. Almost all our codified laws (The Codes) originated from French Legal System in the 1950s. The country generally uses the written legal packages. Ones the

country is embarked to the Federal System by the 1995 Constitution, it has a dual judicial system with two parallel court structures: the Federal Courts and the State/Regional/ courts. These two constitutionally backed court tires are established to be independent together with their administration. As it is equally put under Article 79 of The Federal Democratic Republic of Ethiopia Constitution, courts of any level shall be free from any form of interferences or influence of any governmental body, governmental officials' or from any other source. Judges should exercise their judicial functions in full of independence and shall be directed by the law. Judges acquire assurance not to be removed from their duties except that they encounter disciplinary violations, gross incompetence or inefficiency or illness. These unpleasant situations are not taken arbitrarily, but needs the decision of specially established body, the Judicial Administration Council.

The decisions of the Councils are not final unless the Federal House Peoples' Representatives or The State /Regional/ Council approves such decisions by majority vote. The Constitution also signifies that the judiciary shall prepare and submit its budget directly to their respective parliaments for approval without the interference of the executive organ of the government. The appointments of both, Federal and Regional judges as well as the chief justices and deputy chief justices are undertaken by the Federal and Regional Parliaments respectively.

Both the Federal and the Regional Constitutions explicitly proclaimed that judicial powers are vested on courts. A special or an *adhoc* court, which does not follow legally prescribed procedures, has no legal existence in the country.

Detailed powers and functions as well as structure of courts, both Federal and Regional, are expressed by their respective establishing proclamations (a set of Laws hierarchically put next to Constitutions). Both the Federal and Regional court structures have their own First Instance Court, High Court and Supreme Courts. The Federal Supreme Court is at the top of the nation's judicial system

The power and functions as well as the structure of Regional courts are given by their respective regional constitutions, proclamations to establish the Regional courts, and by other special laws. They have also delegated Federal powers by the Federal constitution. Regional supreme Courts have also the Power of Cassation on fundamental errors of law on regional matters. This in effect creates a new practice in the world that Art.80 (3) (a) of the Constitution of the Federal Democratic Republic of Ethiopian allows the federal supreme court to entertain cassation over cassation of the regional matters.

Another set of court jurisdiction is structured for Addis Ababa, the capital city of the Federal State. As it is cited in Article 49 (2) of the Federal Constitution, the residents of Addis Ababa shall have a full measure of self- governance. Thus, the City Administration, by its Charter, established and organized its own Parliament, executive and judiciary. This City Court has its own first instance and appellate courts where by it generally views municipal issues related to the city service provision and developmental activities.

The Ethiopian judicial System, in its broad concept, accommodates social courts, religious courts, alternative dispute resolution mechanisms (ADR), and other quasi-judicial bodies. These all

systems are also working in the country with their own peculiar substantive and procedural mechanisms.

Legal and regulatory Frameworks linked to the exception of unconstitutionality:

Constitutional interpretation in Ethiopia follows different pattern. In the case of the 1995 FDRE Constitution, as it is put under Article 62, the power to interpret the constitution is not vested upon the regular courts up on constitutional court, but it is the power of the Upper House of the Federal parliament (The House of Federation).

The rationale for vesting the power of interpreting the Constitution in the HoF and not in the regular judiciary or a constitutional court, as can be gathered from the minutes of the Constitutional Assembly, emanate from two sources. One is related to the view of the framers regarding the 'nature' of the Constitution in general and to the role of the nationalities in particular. The framers think that the new federal dispensation is the outcome of the 'coming together' of the nationalities. Indeed, it is clearly stipulated in the preamble and Article 8 of the Constitution that the 'nations, nationalities and peoples are sovereign.' The Constitution is considered as the reflection of the 'free will and consent' of the nationalities. It is, in the words of the framers, 'a political contract' and therefore only the authors that are the nationalities should be the ones to be vested with the power of interpreting the Constitution. To this effect, the HoF, that is composed of the representatives of the various nationalities is expressly granted the power to review the constitutionality of laws and of course other essential powers as well.

The second reason is related to the first. The framers were well aware of the fact that empowering the judiciary or a constitutional court may result in unnecessary 'judicial adventurism' or what some prefer to call 'judicial activism' in which the judges would in the process of interpreting vague clauses of the Constitution put their own preferences and policy choices in the first place. Thus, the framers argued, this might result in hijacking the very document that contains the 'compact between the nationalities' to fit the judges' own personal philosophies. It is not difficult to understand the fears and concerns of the framers in light of the fact that the judiciary in Ethiopia has not yet won 'the hearts and minds' of the ordinary citizens.

The framers of the Constitution, however, recognized the fact that interpretation involves legal technicalities. As a result, the HoF is assisted by the Council of Constitutional Inquiry (CCI), consisting of eleven members that among others comprise the Chief Justice and the deputy chief justice of the Federal Supreme Court, who also serve respectively as chairman and vice chairman of the CCI. Six other legal experts are appointed by the President of the Republic with the recommendation of the lower house, as a matter of practice coming from different constituents, and three persons are designated by the HoF from among its members.

Establishment and Structure of Council of Constitutional Inquiry:

The Council of Constitutional Inquiry is established by virtue of Article 82 of the Constitution of the Federal Democratic Republic of Ethiopia. The Council is empowered to investigate constitutional

disputes as per Article 84 of the Constitution which necessitates to have better practice and structure to respond to issues related to the interpretation of the Constitution efficiently.

The term of office of the Chairperson and Deputy Chairperson of the council is the same as the term of their presidency and vice-presidency, respectively, at the Federal Supreme Court. The term of office of members of the Council designated by the House of the Federation shall be the same as the term of mandate of the House of the Federation. The term of office of members of the council appointed by the president of the Republic shall be six years. Members of the Council Designated by the House of the Federation and those appointed by the president of the Republic may be re-elected.

Powers and Duties of the council:

The Council has the power to investigate constitutional issues in accordance with Article 84(1) of the Constitution and should it, upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its recommendation of constitutional interpretation to the House of the Federation, and when it finds that the matter does not need constitutional interpretation, make a decision to that effect.

When the unconstitutionality of any law or customary practice or decision of government organ or decision of government official is submitted in writing to the Council, then the council considers the matter. Issues of constitutional interpretation to be submitted to the Council, if it is justiciable matter of court, when it has been brought to, and heard by, the court having jurisdiction, if it is justiciable matter of administrative organ, when a final decision has been rendered by the competent executive organ with due hierarchy to consider it, constitutional interpretation on any un-justiable matter may be submitted to the Council by one-third or more members of the federal or state councils or by federal or state executive organs.

When Constitutional interpretation on issues before courts of law arises, the court or the interested party may submit the issue to the Council. Any person who alleges that his fundamental right and freedom provided under the Constitution have been violated due to the final decision rendered by government organ or official may submit his case to the Council for constitutional interpretation. Issue of Constitutional interpretation may be submitted to the Council When a final decision has been rendered by government organ having competency to decide on the claim for violation of right with due hierarchy to consider it.

Persons Competent to Submit Questions of Constitutional Interpretation to CCI:

Where any law issued by federal government or state legislative organs is contested as being unconstitutional, the concerned court or interested party may submit the case to the council. The Council, after examining the application for constitutional interpretation, shall reject the application and notify same in writing to the applicant if it finds there is no need for constitutional interpretation.

Until the Council decides, after considering the matter on constitutional interpretation referred to it by court or by interested party, it may order the case to be pending at the court.

Unless the Chairperson of the Council decides for the prior examination of cases due to the existence of special circumstance, cases submitted to the Council shall be examined according to their order of precedence. The question presented for constitutional interpretation before the council has no period of limitation since the existence of the EFDR constitution of 1995. This makes a little bit cumbersome to the inquiry for handling cases appeared beginning from the last twenty or above years.

Deliberation and Decision-making Procedure of the CCI:

The procedure of deliberation and making decision or submitting recommendation is investigated before presented to the full plenum by the sub-committee of the council.

Sub-Inquiry Committee organize cases of constitutional interpretation in a manner suitable for decision, identify cases that need or not need constitutional interpretation, facts relevant for decision making, relevant laws, decisions and, to the extent necessary, relevant experiences and submit same to the Council along with study-based clarification.

Meeting and Decision-Making Procedure of the Council is in the presence of two-third of the members of the Council constitute quorum. The decision or recommendation of the Council shall be passed by a majority vote. In case of a tie, the Chairperson shall have a casting vote. The decision or recommendation of the Council include the full names of the members of the Council presented at the meeting, the applicants or their representatives and persons who give opinion as well as details of the case. Unless there has been a good cause, a case before the Council may not be postponed for repeated appointments. The Council may hear cases in a public transparent manner according to Article 12(1) of the Constitution.

The Council before it gives decision or submits its recommendation to the House of the Federation on cases submitted to it for constitutional interpretation, call upon pertinent institutions or professionals, to appear before it and give opinions. When it deems necessary for investigating constitutional cases, the Council may require the presentation of any evidence or professional and examine same. Any person requested by the Council to produce evidence have the obligation to give same immediately.

The decision of the Council clearly show the detailed description of the case, the reason it believes there is a need or no need for constitutional interpretation and its conclusion. Any case of constitutional interpretation submitted to the Council is free of service fee.

Deliberation and Decision-Making procedures of the House of Federation

The House establishes a standing committee, drawn from its members, which investigate the proposal submitted to it by the Council of the Constitutional Inquiry and an appeal lodged against the decisions of the Council of the Constitutional Inquiry. The committee may be mandated by the House to make a decision whether an appeal made against decisions of the Council of the Constitutional Inquiry should be presented to the general meeting of the House or not. According

to the proclamation no.251/2001 art.18 Particulars will be determined by the regulation to be issued by the House. But this regulation not yet enacted. Because of this such irregularities happened between the two institutions.

Applicability of Decision Rendered by House of Federation

The final decision of the House of Federation referred to it by CCI on constitutional interpretation have general effect which therefore have applicability on similar constitutional matters that may arise in the future. The House publicize the decision in a special publication to be issued for this purpose.

Conclusion.

The Value of a constitution should be measured against the extent to which individuals benefit from its guarantees, including through litigation. Access to Constitutional justice requires among others, an independent and reliable constitutional adjudication system. An independent Constitutional adjudication system is particularly important due to the absence of effective control mechanisms between the legislative and executive organs Emanating from the parliamentary form of government the constitution establishes. The constitutional adjudication system is the only possible avenue to challenge laws and policies and other administrative decisions based on constitutional standards. The entrenchment of justiciable rights and other substantive and procedural limits on government power, combined with the supremacy of the Constitution, provides the necessary normative basis for constitutional justice in Ethiopia. Despite this clear normative basis, and although the Council charges no service fees, the contribution of constitutional review in ensuring constitutional justice has been visible and almost totally relevant.

Access to constitutional justice in Ethiopia has been improved from time to time. Direct access to constitutional justice in Ethiopia is a very important tool to ensure respect for individual human rights at the constitutional level. The existing choices are broad and many possibilities coexist. But the persons filing complaints are usually not informed and have not legal skills to formulate a valid request. The council also serves as filters to avoid overburdening constitutional cases, selecting applications in order to leave aside unnecessary requests.

More than 20 years since the Constitution entered in to force in 1995, the total number of constitutional cases submitted to the Council has been rising to 2600. The council has so far referred for final determination by the HoF 43 cases relating, among others, to the right of women's and children the right of disabilities, the right to bail, the rights of farmers to own farm land and jurisdictional ouster clauses. Many of the cases challenged the constitutionality of court's decision,

Thank you very much.

Address delivered by

Mr. Mohamed HABCHI

Vice-President of

the Constitutional Council of Algeria

On the theme:

"The constitutional, legislative and regulatory framework related to the exception of unconstitutionality in Algeria"

Mr. President of the Conference of Constitutional Jurisdictions of Africa,

Excellencies the Presidents and Members of Constitutional Courts and Councils,

Honourable Guests,

Ladies and Gentlemen,

I would like to begin by saying how honoured I feel to address the eminent constitutional experts and practitioners of constitutional justice who are here to share their views on a theme which is at the heart of our constitutional missions.

The different experiences on the exception of unconstitutionality are certainly an irreplaceable source of inspiration and action for a good knowledge of this legal mechanism that seeks, in substance, to consolidate the guarantee of the supremacy of the Constitution in the internal legal order, to eliminate the provisions deemed to violate the rights and freedoms guaranteed by the Constitution and to allow the citizens to reclaim ownership of their Constitution."

With regard to the importance of this theme, which brings us together today, that is "Access of Individuals to Constitutional Justice", and the number of experts that are present, the debates are expected to be rich and fruitful.

In the constitutional, legislative and regulatory framework related to the exception of unconstitutionality in Algeria that I will deal with, this sub-theme inspires me two introductory remarks.

The first remark is that it is hardly easy or even dangerous, for the author of this intervention, in particular because of the obligations arising out of the exercise of his function, to deal with a subject linked to a future organic law, in other words, a law which is yet to exist legally, and which will eventually be submitted for assessment to the Constitutional Council, after being passed by Parliament and before its promulgation by the President of the Republic.

The second remark, which derives from the first, deals with the content of the presentation, which cannot claim to be exhaustive, since the exception of unconstitutionality in Algeria is a subject that has never been dealt with. This mechanism is new in our legal landscape, March 2016 only, and will not be implemented until March 2019.[12]

This three-year temporal barrier is, under Article 215 of the Constitution, devoted to the setting up of conditions to guarantee the effective management of this mechanism (drafting and adoption of the organic law and all other laws and regulations related to the exception of unconstitutionality, training of various judicial and other actors in the process of implementation of this mechanism, material preparation of the Constitutional Council and other actions, and so on).

[12] Constitutional revision of 6 March 2016

Having defined the broad outline of the sub-theme in its part relating to the constitutional framework of the exception of unconstitutionality in Algeria, I will deal in this presentation with two key areas:

I. The first area examines the current constitutional framework of the objection of unconstitutionality in Algeria. Taking into account previous observations, I shall, whenever necessary, make occasional remarks on comparative law and practice.

II. The second area focuses on the future prospects of the exception of unconstitutionality. We will briefly review expected changes in the implementation of this new constitutional mechanism, both in terms of the law in general and the legal framework in which it will evolve.

I. The Constitutional Framework linked to the exception of unconstitutionality.

Before delving in the heart of the matter, I would like to recall briefly some essential elements of the genesis of this mechanism.

1. Genesis of the exception of unconstitutionality: more than two centuries of existence and practice

The history of the exception of unconstitutionality is not recent. This mechanism has existed for more than two centuries. Its gradual evolution has kept pace with the great moments in the history of humanity and human rights.

The review of constitutionality in the form of the exception of unconstitutionality appeared for the first time in the USA in the absence of legal texts. As a matter of fact, no provision of the 1787 US Constitution refers to this mechanism. The Supreme Court, chaired by Judge John Marshall, in a particular political context, adopted the famous 1803 Marbury vs Madison decision, under which the Court recognized the right to assess the constitutionality of the Judicial Act of 1789.[13] This historical case law served as a basis for the Supreme Court to build gradually and by judicial decision the American model of constitutional justice. This model has its own characteristics. It is decentralized, concrete, principally incidental, and is exercised ex post facto. A decision rendered in this context has a relative authority of res judicata; in other words, it is valid only for the case at hand and the unconstitutional law is only set aside, it does not disappear from the legal order.

A little over a century later, in Europe, the review of constitutionality is reshaped and organized in a form different from that of the American system. The paternity of this great theoretical work belongs to the Master of Vienna, Professor Hans Kelsen, who, in his theory of the legal order in the 1920s, brilliantly demonstrated that the guarantee of the supremacy of the Constitution could not be guaranteed in the absence of a mechanism of judicial review of the constitutionality of laws; without such legal guarantee of the fundamental law by constitutional justice, the legal system would be lame and the entire pyramid of norms would collapse.

[13] D. Rousseau, Pierre-Yves Gahdoun, Julien Bonnet, Droit du contentieux constitutionnel, LGDJ, 2016, p. 20.

The birth of the Austrian Constitutional High Court marked, under the influence of Kelsen, the beginning of a constitutional justice movement that evolved and expanded to the tune of the great political sequences of Europe's history, especially World War II. The world witnessed afterwards the end of the dictatorships in southern Europe in the 1970s and the fall of the Berlin Wall in the late 1980s with its political and constitutional implications in the so-called socialist countries.

This European model influenced a large part of African constitution drafters, including the three Maghreb countries (Algeria, Morocco, and Tunisia).

Today, no one can dispute the universal character of constitutional justice and few countries have not etched in their constitutions the review of constitutionality.

The development of the exception of unconstitutionality in its various forms and its progressive generalization are reliable indicators as to its ultimate access to universality.
By enshrining the exception of unconstitutionality in the fundamental law in 2O16 the drafters of the Algerian Constitution confirmed their adherence to this universal movement.

2. The exception of unconstitutionality, a new procedure in the Algerian jurisdictional landscape.

Algeria effectively joined the universal movement of constitutional justice in the aftermath of the constitutional amendment of February 1989, which was a watershed in national political and constitutional life. This change was made through the establishment of centralized and abstract constitutional review. The review is exercised both a priori and a posteriori but only following legal proceedings and a referral exercised only by political authorities. It is also optional, except for organic laws and parliamentary rules of procedures which must be reviewed for constitutionality before they are promulgated.[14]

It should be noted that the 1996 constitutional revision did not bring about the expected changes that would have extended the power to refer to the Constitutional Council.[15]

In 2011, ambitious political reforms were announced by the President of the Republic, Mr. Abdelaziz Bouteflika. These reforms resulted in a significant revision of the Constitution of 6 March 2016, which renewed the Constitutional Council.

In this regard, two major innovations were made in the method of intervention of the Constitutional Council.

First, referral to the Constitutional Council can be made by fifty (50) deputies or thirty (30) members of the Council of the Nation.[16] By extending the power to refer to the Constitutional Council to a certain number of parliamentarians who may belong to the majority or the opposition, the drafters of the Constitution intended to give the latter constitutional status and

[14] Constitutional review was included in the first independent Constitution of Algeria of 10 September 1963, but never implemented.[14] It lived the life time of this Constitution, which was very short.
[15] The 1996 constitutional revision established a second parliamentary chamber, the Council of the Nation, and conferred on its president the right to appeal to the Constitutional Council (art.156).
[16] Art. 187 al. of the revised Constitution of 2016.

rights that allow it, under the mechanism of prior review, to challenge a law adopted by the majority in the period between its adoption and its promulgation by the President of the Republic, and thus to participate effectively in political life.

Experiences like the French one show that allowing a parliamentary minority to refer to the Constitutional Council not only reinforces this council but also gives substance to the pluralistic dimension of democracy, which contrasts with the famous formula of Laignel who argued that if you belong to the political minority you are on the wrong side of legal correctness.[17]

The second major innovation is the inclusion in the Constitution of the exception of unconstitutionality, which now allows any party to a lawsuit to challenge before a court any legislative provision that influences the outcome of the lawsuit and is likely to undermine the rights and freedoms guaranteed by the Constitution.

This mechanism is close to the exception of unconstitutionality adopted by the French, Moroccan and Tunisian Constitutions.[18][19][20] However, it differs from the system adopted by Benin (1990) and South Africa (1996), particularly as regards the screening and direct nature of individual appeals.

The Algerian Constitution has adopted the principle of the exception of unconstitutionality and the texts for its implementation are being drafted. Therefore, and for the reasons mentioned above, it is natural that the consideration of this issue can only take place in the constitutional framework.

3. The exception of unconstitutionality in the revised 2016 Constitution

The exception of unconstitutionality is governed by five (5) articles of the revised Constitution of March 2016. These articles can be classified in permanent provisions (Articles 187 paragraph in fine, 188, 189 paragraph 2, and 191 paragraphs 2 and 3 of the Constitution) and a transitional provision (Article 215 of the revised Constitution).

Article 188 of the Constitution is the foundation of this new legal action. The other articles provide that: the power to refer an exception of unconstitutionality provided for in Article 187 in fine of the Constitution does not extend to the constitutional and parliamentary authorities; the time given to the Constitutional Council to rule on the constitutionality of the legislative provision referred to it by either supreme court (Article 189); the date on which the provision deemed unconstitutional ceases to have effect: and, finally, the authority of the decision of the Constitutional Council (Article 191 paragraphs 2 and 3), respectively.

Let's start with the principle.

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[17] This famous sentence was uttered by MP André Laignel on 13 October 1981 during the debates on nationalisations at the National Assembly. See, the full report of the proceedings of the National Assembly, 2nd sitting, 13 October 1981, p. 1730, archive.

[18] Constitutional revision of 23 July 2008

[19] Constitutional revision of 30 July 2011

[20] Constitutional revision of 10 February 2014

The Constitution laid the founding principle of the exception of unconstitutionality in Article 188, which reads:

“An exception of unconstitutionality may be referred to the Constitutional Council by the Supreme Court or the Council of State, when a party to a lawsuit argues before a court that the legislative provision on which the outcome of the dispute depends undermines the rights and freedoms guaranteed by the Constitution. The conditions and procedures for implementing the above paragraph shall be established by an organic law.”

A careful reading of this article and articles 187, 189, and 191 of the Constitution on the same subject clarifies the key elements of the exception of unconstitutionality, which can be summarized as follows: who can invoke an exception of unconstitutionality? Under which conditions? Who can refer to the Constitutional Council? What is the time allowed to the Constitutional Council to rule? What are the legal effects of its rulings? And what authority do they have?

We will try and answer these Constitution-inspired questions one by one.

Who can raise an objection of unconstitutionality?

Actually, this question relates to the two levels of proceedings before the trial judge and the judge of referral to the Constitutional Council.

Under Article 188 above, any “party” to an ongoing lawsuit is entitled to exercise this legal remedy. The plaintiff and the defendant in first instance, the appellant and the respondent in appeal.

The requirement of a lawsuit is a prerequisite for raising an exception of unconstitutionality.

But what does “party to a lawsuit” mean?

Article 188 of the Constitution is not very elaborative on the subject. It gives no details as to what is meant by this term.

A priori the answer seems simple. This refers to any party in the proceedings, any litigant, in other words any citizen, natural or legal person, subject to public law or private law, including a foreign person recognized by Algerian law. The notion may also include a third party in the proceedings that has an interest in invoking the exception of unconstitutionality to defend its constitutional rights.

Another question deserves to be asked. Is the judge entitled to raise an objection of unconstitutionality ex officio?

In principle, the judge is not a “party” to the proceedings and his or her function, in view of the principle of neutrality that he or she must observe, prohibits him from interfering in the trial. Therefore, a judge cannot raise an exception of unconstitutionality ex officio.

In France,[21] Morocco and other countries, this possibility is not allowed. However, part of the constitutionalist doctrine holds that a judge should be able to do so. Constitutionalists do not admit that in a State governed by the rule of law, a judge cannot react with regard to a provision that is obviously unconstitutional and that he or she may have to implement it consciously and sometimes against his or her will.

Even if the prohibition of ex officio referral by a judge is expected to prevail in the organic law provided for in Article 188 of the Constitution, a reflection and a debate on this question would be welcome.

3.2 Before which jurisdiction can the citizen invoke the exception of unconstitutionality?

Article 188 of the Constitution is not accurate in this respect. The indefinite article "a" is used before the word "court", which could mean that the litigant may invoke the exception before any court under the jurisdiction of the Supreme Court or the Council of State.

Specialized courts and other bodies, whose decisions are subject to appeal before the supreme courts, can also use this mechanism.

However, the Constitution having only mentioned the Supreme Court and the Council of State as referral jurisdictions, the court of conflicts whose role, as defined by the Constitution, is to resolve conflicts of jurisdiction between law courts and administrative courts, cannot be referred to for an exception of unconstitutionality.[22]

4. Constitutional conditions of admissibility of the objection of unconstitutionality

Article 188 of the Constitution lists at least three conditions as follows: The provision must be of a legislative nature; it must bear on the outcome of the litigation and violate the rights and freedoms guaranteed by the Constitution. For the detailed conditions and methods of implementation of the exception, the Constitution refers to the organic law.

Let's examine each of these conditions.

4.1 The challenged provision must be of a legislative nature

By stating that the provision challenged by a litigant at his or her trial must be of a legislative nature, the Constitution excludes other standards that do not fulfil this condition.

Thus, treaties and international commitments are not expected to be subject to an exception of unconstitutionality because they do not have a legislative nature.

The second category concerns organic laws and all or part of an ordinary law that was previously the subject of constitutional review as part of the mandatory prior review and that cannot be challenged before a judge in the context of the exception of unconstitutionality. By excluding these texts, the Constitution intends to preserve the authority of the Constitutional Council's case

[21] Article 61-1 of the revised Constitution of 2008.

[22] Art. 171 al. In fine of the revised Constitution of 2016.

law. As a matter of fact, such texts, which were the subject of an opinion or a decision of conformity to the Constitution, are under this constitutional principle, definitive and erga omnes.

The third category of texts excluded from the scope of the exception of unconstitutionality concerns ordinances prior to their adoption by Parliament. Such texts adopted by the Executive in matters falling within the scope of Parliament can only acquire legislative value after their ratification by the latter. Once this condition fulfilled, the exception of unconstitutionality can be invoked by a litigant.

The fourth category of legal texts excluded from the scope of the exception of unconstitutionality relates to regulations. This heading covers presidential and executive decrees, orders and individual decisions that are not of legislative in nature. They may be challenged before administrative courts.

In addition, this category includes referendum laws and constitutional laws, which express the will of the people directly or through their representatives, and as such they are not concerned by the exception of unconstitutionality.

4.2 The challenged legislative provision determines the outcome of the dispute

For the objection of unconstitutionality to be admissible, it is necessary to establish a link between the legislative provision and the dispute. In other words, the impugned legislative provision must be applicable to the litigation and the proceedings or form the basis of the proceedings. This condition is intended to establish a link between the ordinary trial and the constitutional proceedings.

In addition, since the Constitution does not impose any particular conditions or temporal or formal restrictions for raising an exception of unconstitutionality, unless the organic law related to the latter provides otherwise, it could be understood that the litigant may raise it at any moment and at any stage of the proceedings. It may be raised at first instance, on appeal, or directly before the supreme courts.

The exception may be raised before civil and criminal courts, until the deliberations and before the administrative courts until the end of the investigation phase.

4.3 The legislative provision that is challenged must infringe the rights and freedoms guaranteed by the Constitution.

“Rights and freedoms guaranteed by the Constitution” means all the rights and freedoms enumerated in Chapter IV of Title Two of the Constitution, as well as those mentioned in the preamble, which is now an integral part of the Constitution, and those mentioned with regard to the judiciary, such as the right to defence (Article 169).

The exception of unconstitutionality is only admissible if it is established that the impugned legislative provision infringes the rights and freedoms guaranteed by the Constitution.

However, the rights and freedoms not guaranteed by the Constitution are not admissible under the exception of unconstitutionality. The court appealed from and the court referred to must ensure that there is a connection between the related right or liberty and the impugned legislation.

But there is uncertainty about the number of rights and freedoms guaranteed by the Constitution. Indeed, the Constitutional Council can discover principles by interpreting the Constitution. It happens, for example, when it interprets the principle of equality, often described as a piggyback principle, because it is broken down into an ever-changing multitude of principles.

4.4 Who can refer to the Constitutional Council?

Some countries have opted for direct referral to the Constitutional Court by any trial court. This is the case of the Belgian Court. In other countries, such as France and Morocco, only the supreme courts can refer to the Constitutional Council. The principle adopted by our Constitution is identical to that adopted by these two countries. The Constitutional Council can only be referred to by the Supreme Court or the Council of State.

After examining the admissibility of the individual claim of unconstitutionality transmitted to them by lower courts, taking into consideration the conditions and modalities provided for by the organic law, the competent supreme jurisdiction, may decide either to refer the claim to the Council or reject it.

These two supreme courts are a sort of second screen that filters appeals before referring them to the Constitutional Council or rejecting them. No other jurisdiction, nor natural or legal person, can interfere in this exclusively dual relationship between the Constitutional Council and these two supreme courts placed by the Constitution in a position of dialogue or even interaction.

By providing for a jurisdictional filter and restricting the decision to refer an exception to the Constitutional Council to the Supreme Court or the Council of State, as the case may be, or rejecting it, the drafters of the Constitution intended to limit delaying tactics and misleading or fanciful purposes intended to slow down the course of justice and thus prevent significant flows that would have clogged the supreme courts and the Constitutional Council. But these filters, which can be justified, should not turn into a log jam with overly rigid conditions or a large colander if the proceedings as a whole at the legal and practical levels are poorly managed.

It is important to point out that the courts of both types are not meant to conduct a pre-review of constitutionality, much less to assess the constitutionality of the impugned legislative provision as in the diffuse review system. By the same token, the Constitutional Council is not entitled to examine the dispute between the parties to the trial, which falls within the competence of the trial courts.

Thus, there are two distinct trials, a constitutional one and an ordinary one in which every jurisdictional actor performs the role assigned to them by the Constitution.

The judges that examine the admissibility of claims of unconstitutionality do not have jurisdiction to assess the constitutionality of the legislative provision at hand. They intervene as judges of admissibility of the exception of unconstitutionality, under the conditions provided for by the Constitution and subsequent texts, whereas the Constitutional Council judges intervene as judges of constitutionality of the legislative provision challenged by a party to the trial.

But in fact, things can unfold differently during the consideration of the conditions of admissibility of the claim of unconstitutionality. By way of illustration, in France and Morocco, one of the conditions of admissibility of the constitutional challenge deals with the seriousness of the challenge, which is examined by the trial judge and the supreme jurisdiction (France) and by the latter only in Morocco.

In France, the seriousness of the claim is examined twice: by the trial court and by the supreme courts. The former ensures that the claim is not devoid of seriousness and the second ensure that this claim is new or serious. In Morocco, this issue falls exclusively under the supreme jurisdiction.

This condition, which has an imprecise content, seems difficult to verify by the competent judges. Indeed, admissibility judges cannot assess the seriousness of the claim of unconstitutionality without referring to or examining, directly or indirectly, the constitutional aspects of the claim of unconstitutionality.

It is important to note that the litigation on the exception of unconstitutionality is objective. Therefore, when an appeal for an exception of unconstitutionality is brought before the Constitutional Council, this latter remains seized of the matter until the judgement of the case even if the public prosecution is terminated, for any reason whatsoever. It continues the procedure until the end.

5. Regarding the issue of deadlines

Article 189 (2) of the Constitution reads:

“When the Constitutional Council is referred to on the basis of Article 188 above, its decision is rendered within four (4) months from the date of the referral. This period may be extended once by a maximum of four (4) months, on a reasoned decision of the Council, notified to the court referred from. “

As a reminder, the Constitution only provided for the time for the Constitutional Council to decide on the exception of unconstitutionality referred to it by the Supreme Court or the Council of State. This period of four (04) months may be extended for the same duration by reasoned decision of the Constitutional Council notified to the court referred from (Article 189, paragraph 2).

The time-limits of the contentious procedure before the trial courts and the supreme courts, which are not fixed by the Constitution, are then determined by the organic law.

The issue of deadlines is dealt with in a comprehensive manner as it determines, in large part, the chances of success of this new mechanism. The time limits should not be too long or too short. There is a need to find the right balance between the citizens' expectations and constitutional

requirements; a balance that protects citizens' rights and freedoms and reinforces the citizens' belief in the benefits of this mechanism.

Now that the constitutional framework is delimited, it is important to note that the answers to several questions are found in the legislative and regulatory provisions according to the constitutional division of competences between the realm of law and the realm of regulation. These include other conditions of admissibility of the claim of unconstitutionality, time limits at various stages of the proceedings, the public nature of the sittings, the challenge, the stay of proceedings, the assistance of a lawyer, etc. On these questions, our honourable guests, who capitalize on their long experience, are kindly requested to share their experiences.

6. The authority of the decisions of the Constitutional Council.

According to Article 191 paragraph in fine, “The opinions and decisions of the Constitutional Council are final. They are binding on all public authorities and administrative and jurisdictional authorities. “

Being final, the decisions rendered in the framework of the exception of unconstitutionality cannot be appealed against except for the rectification of material errors not attributable to the applicant.

7. Temporal effects of the decisions of the Constitutional Council

The principle is laid down in Article 191 paragraph 2 of the Constitution. The Constitution gives the Constitutional Council the power to declare the unconstitutionality of a legislative provision and to specify, at the same time, in its decision the day on which the effects it produced are lost.

In this context, when the Constitutional Council declares the unconstitutionality of a legislative provision, such provision is repealed. It ceases to exist in the legislation. But its repeal does not mean that the effects it had produced when it was in force disappear.

A question is posed then regarding the management of the temporal effects of the decision of the Constitutional Council.

As a matter of principle, the Constitutional Council determines, in its decision, the moment at which the legislative provision deemed unconstitutional ceases to produce its legal effects.

The Council may use two options to determine the temporality of the provision found to be inconsistent with the Constitution.

It may, as the case may be, either pronounce the repeal of the statutory provision deemed unconstitutional with immediate effect, or postpone its repeal (deferred effect) to a date to be fixed in its decision. This deferred repeal is intended to give the legislator the necessary time to draw the consequences of the unconstitutionality and to decide on the appropriate solution that should be adopted to return to a situation in compliant with the Constitution, within the time limit it determined (correction of the unconstitutionality, resumption of the normative process, etc.).

These two possibilities, known in comparative constitutional case law, do not exclude future developments and the emergence of other possible solutions.

But the repeal of a provision, and therefore its disappearance from the legislation, may lead to the questioning of acquired rights. It would cause disruption because of the effects that were produced sometimes in a massive way and would have negative consequences for legal certainty.

Taking into account this situation, the Constitutional Council must keep control of the management of the temporal effects of its decisions. Its assessment of the time allowed to the legislator, depending on various cases, to correct the unconstitutionality or make a new amendment to the provision to make it compliant with the Constitution, must take into account the constraints likely to prevent or slow down the action of the legislator.

In this context, an in-depth study of comparative constitutional case law could usefully inform the work of our institution.

II. What prospects does the exception of unconstitutionality open in the future?

The exception of unconstitutionality is at the very core of a legal revolution and our legal system must change profoundly. Professor Dominique Rousseau, rightly states that with this new legal tool, "the Constitution becomes ‘res communes’ (the things belonging to all). Any party to a lawsuit may use the Constitution; all judges are involved in its protection; and it encompasses the founding principles of all laws, public and private.’’[23]

This revolution brings constitutional renewal, essential changes in the relationship of the citizen to the Constitution and its representatives, and the relationships of legal professionals and the Constitutional Council.

1. The change in the relationship of the citizens and their representatives with the Constitution

By conferring on the litigant, a natural or legal person, the right to challenge a legislative provision in force that it deems contrary to the rights and freedoms it guarantees, the Constitution gives the citizen the means to sanction the standard produced by his representatives and thus protect by law his constitutional space.

Over time, the practice of the exception of unconstitutionality is expected to change the mentalities and behaviours of the citizens. These will no longer feel disconnected with the constitutional provisions they identified with before adopting them by referendum or through their representatives and rapidly realized that once in force those constitutional provisions were no longer theirs. This is precisely what the exception of unconstitutionality aims to restore by re-establishing the direct link between the litigant, the citizen, and the Constitution and therefore allow him to reclaim it eventually.

[23] D. Rousseau, « Droit du contentieux constitutionnel », LGDJ, 2013.

The citizen's access to the Constitution and the implementation of the power it conferred on him to cancel a legislative provision voted by his representatives, not only reinforces the individual and collective belief in the virtues of the rule of law and democracy, but also compels the Nation's representatives to integrate in their reasoning and behaviour the constitutional resource.

2. More balanced relations between the three branches of government and the Constitutional Council

The institution of the exception of unconstitutionality appropriately corrects and restores the balance between the three constituted powers.

In this connection, it is worth recalling that the three powers have always been represented on the Constitutional Council. Although this representation had been for a long time unequally distributed among them, the constitutional revision of 2016 corrected this imbalance by conferring on each of them the power to designate or elect within it, as the case may be and according to the constitutional requirements of access to the function of member, the same number of members in the Constitutional Council.[24]

In addition to this correction, by instituting the exception of unconstitutionality, the drafters of the Constitution corrected another inconsistency. The judiciary was represented in the Constitutional Council but the supreme jurisdictions which compose it could not refer to the Council in the same way as the executive and legislative powers. They also gave greater sense to ex-post review, which, before the last constitutional revision, could only be set in motion by the political authorities.

By empowering the two supreme courts to refer to the Constitutional Council, once they deem that the exceptions are admissible, the Constitution connects all these jurisdictional actors and creates a space for dialogue between them, bringing about a renewal of the review of constitutionality and breakthrough in human rights.

3. The change in the relationship between legal professionals and the Constitutional Council and its impact on the branches of public and private law

With the exception of unconstitutionality, legal professionals will have to internalise the "constitutional reflex" in their working methods.[25] Nevertheless, as it examines the exceptions of unconstitutionality, the Constitutional Council will have to broaden its scope of intervention to all branches of law and to become familiar with the methods and techniques of legal professionals.

This interactive relationship will undoubtedly speed up the disappearance of the frontiers between public law and private law and the constitutionalising of all the branches of law, which

[24] In 1989, three members for the Executive, two for the Legislature, and two for the Judiciary; in 1996, three for the Executive, four for the Legislature, and two for the Judiciary; in 2016, the balance is established between the three powers with four members representing each power.

[25] M. Disant, « Droit de la question prioritaire de constitutionnalité. Cadre juridique, pratiques jurisprudentielles. », collection Lamy axa droit, année 2011.

will gradually be linked to the constitutional principles that underpin them and will therefore have, as Pr. D. Rousseau, rightly pointed out, a common matrix: the Constitution.

Conclusion

To conclude, I would like to say that to ensure the primacy of the Constitution and preserve its unity, it is imperative that the supreme courts and the Constitutional Council, in the field that they share - the exception of unconstitutionality - perceive the exercise of their constitutional missions in the perspective of complementarity harmonization of their case law.

The work we are doing is exciting. It allows us to contribute, as part of our constitutional competences, to the emergence of a new legal culture, the Constitutional one, particularly in its social dimension, the human rights dimension, which constitutes one of the major challenges of the 21st century.

Respect for human rights! Isn't this the dream of those who preceded us, citizens, jurists, political scientists ...? The dream of all humans to live together with their differences and respect them?

The exception of unconstitutionality, this new legal way, makes it possible today to pursue this dream to make it, thanks to the agreement and independence of the jurisdictional actors and the continuous action of the citizens that are to implement this mechanism, a reality by law, and a reality by constitutional justice.

Thank you for your attention.

View of the Kasbah of Algiers

Address delivered by:

Mr. Laurent Fabius,

President of

the Constitutional Council of the French Republic

On the theme:

"The constitutional, legislative, and regulatory framework in relation to the exception of constitutionality in France"

Algiers, 25 November 2017

Mr. President of Algerian Constitutional Council,

Mr. President of the Conference of Constitutional Jurisdictions of Africa,

Mr. President of the Venice Commission,

Ladies and Gentlemen,

I am pleased and honoured to address you today. I would like to warmly thank my counterpart and friend, President Medelci, for his invitation and warm welcome. Since I took office as President of the French Constitutional Council in 2016, I have taken particular care to strengthen the international activity of this institution. In an increasingly global and interconnected world, where problems are often shared, it seems to me essential that constitutional courts should open themselves up to each other. We should better share our working methods, better study partners' solutions, make our decisions better known: these are the imperatives of modern courts. Admittedly, there are national and regional specificities, but international dialogue of judges must become a common reflex, and this is what the Conference of Constitutional Jurisdictions of Africa is seeking to do. That is why I am so glad to take part in this meeting.

The general theme of our proceedings is "Access to Constitutional Justice for Individuals". Several round tables will address this major topic, beginning with our debate on the "constitutional, legislative and regulatory framework related to the exception of unconstitutionality". I was invited to make a presentation on the legal framework of the French mechanism known as the "Priority Question of Constitutionality", which we designate most often by its abbreviation 'QPC'. This is the topic of my address. I will mention the conditions in which it is implemented, because the legal framework is inseparable from the practice. And I will share with you the main lessons that we have learned in France since the introduction of this mechanism.

The idea of opening access to the Constitutional Council to all litigants to enable them to challenge the constitutionality of promulgated laws was proposed in the late 1980s by my predecessor and friend Robert Badinter, then President of the Constitutional Council. But, it was met with opposition from the Senate in 1990 and 1993. This reform was introduced in the French Constitution in a new article (61-1) nearly twenty years later following the constitutional revision of 23 July 2008. This article reads: *"If, in connection with pending court proceedings, it is argued that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the Constitutional Council may be referred to on this matter by a ruling of the Council of State or the Court of Cassation. An organic law shall determine the conditions of application of this provision."* Therefore, in 2008, the French framers of the Constitution offered two fundamental options concerning the general architecture of the QPC.

On the one hand, the QPC may not be invoked *in abstracto*, against any legislative provision. It shall be linked to pending proceedings before an administrative or judicial court: the litigant can challenge the conformity of a legislative provision with the *"rights and liberties that the Constitution guarantees"*, but only within the framework of a specific dispute to which he is a

party. From the technical point of view, the QPC is therefore a "means" - that is to say, a legal argument - raised by a litigant. This has led some jurists to dub the QPC a *"trial in the trial".*

The second major option set by the 2008 amendment of the Constitution deals with the "filtering" of QPCs. Our Constitution provides that the Constitutional Council may not be directly referred to by a litigant but by one of the two supreme courts, i.e. the Council of State, which is the administrative jurisdiction, or the Court of Cassation, which is the judicial branch. This filtering process is necessary, not only to avoid abuse of this procedure for delaying purposes, but also to protect the Council from a surge of questions that would overwhelm it.

On these two fundamental points, the French Constitution offers some options that experience has proven to be wise. Regarding the specific conditions of application, I will recall in a few words the main options offered by the Organic Law of 10 December 2009 on the application of Article 61-1 of our Constitution.

The Organic Law provides for a procedure with strict deadlines.
When a QPC is referred to an administrative or judicial court, in a separate and reasoned written document, it shall rule - I quote the Organic Law of 2009 - "without delay", which means that it shall take a decision to transmit or not the question to the Council of State or the Court of Cassation in a very short time. If the question is referred to either supreme court, both have the same deadline to rule: three (3) months. Finally, when the QPC is referred to the Constitutional Council, this court also has three (3) months, not a single additional day, to make its decision. In short, between the moment a QPC arrives at the Council of State or at the Court of Cassation and, if it is accepted, the moment when the Constitutional Council publishes its decision on its website, a maximum six-month period elapse. At the Constitutional Council, the average time for ruling on QPCs, since 2010, has been seventy-six (76) days, that is, two and a half months. The maximum period of three (3) months has only been exceeded once: when the Council referred an interlocutory question to the Court of Justice of the European Union. The speedy treatment of QPC's is a major feature of this procedure in France. It is an asset that has, to a large extent, contributed to the favourable opinion of litigants in this respect.

The 2009 Organic Law defines another key point concerning the conditions under which a QPC may be referred to the Constitutional Council. There are three (3) conditions: the challenged legislative provision applies to the dispute; it shall not have been declared compliant with the Constitution by a decision of the Constitutional Council - except if the circumstances of law or of fact have changed; finally, it shall be, according to the terms of the Organic Law, of a "*serious nature*." In practice, this third criterion is often decisive; the first two are generally met. These criteria are sufficiently accurate to avoid massive referrals to the Constitutional Council for delaying reasons or manifestly unfounded QPC's. But they are flexible enough not to make the filter too restrictive. Since 2010, the Council of State and the Court of Cassation rendered a total of 2,945 QPC decisions, of which 2,523 were non-referrals (i.e. almost 80%) and 689 referrals to the Constitutional Council (i.e. almost 20%) .

The 2009 Organic Law also specifies three major aspects of the QPC procedure.
On the one hand, it states that a QPC may not be raised by a judge ex officio - whereas this possibility is available in some countries as ex post constitutional review: in France, only litigants may claim that a legislative provision is contrary to the rights and freedoms guaranteed by the Constitution, so that they alone - and not the judges - have control over their litigation. On the other hand, the Organic Law emphasizes the "priority" character of the QPC as this option is preferred to the other two options namely, the "interlocutory question of constitutionality" and the "preliminary question of constitutionality". The word "priority" means that the question must be addressed before any other legal argument - including international "conventionality" means - and that the courts must stay the proceedings or, in less legal terms, "freeze" the main dispute as long as the final decision on the QPC has not been made: this priority reflects the supreme position of the Constitution in our hierarchy of norms - particularly in relation to European Union law and other conventional standards. Finally, the Organic Law specifies that a QPC can be raised at all stages of a dispute, in the first instance and also for the first time on appeal or cassation.

These are the main elements of the procedural framework in France, which I hope, have been summarized in clear terms.

The entry into force of the QPC on 1 March has had practical implications on the activity of the French Constitutional Council, which is the keystone of the entire mechanism.

The 2009 Organic Law expressly provides that the Constitutional Council must hold a public hearing to examine the QPC. Now, the Council does not have a courtroom because no hearing is held for a priori review of constitutionality. Prior checking of the laws was, up to the adoption of the QPC the main activity of the Council. Consequently, a courtroom was built. My colleagues and I sit there every week, usually on Tuesday morning, for a public hearing at which two to four QPC cases are examined. Then, come the pleadings of the parties' lawyers before the Constitutional Court members. The lawyers may be attached to the Council of State or the Court of Cassation, which is a specific category of barristers in France; or they may come from any other French jurisdiction. It is not mandatory to be represented by a lawyer to defend one's QPC before the Constitutional Council, where proceedings are free. Proceedings are free but not lawyer's fees. However, it is mandatory to be a lawyer to make oral submissions at the hearing. The lawyers are invited to speak by the President of the Constitutional Council for a maximum of fifteen minutes each. Then, the government representative, who is from the General Secretariat of the Government, takes the floor to defend, by construction, the constitutionality of the challenged provisions. In May 2016, shortly after taking office, I introduced an amendment: Council members may now interact with the parties by asking questions, which helps to make the hearing more lively and informative. Nevertheless, we do not overuse this possibility. It is worth noting that, a year and a half after this change, oral exchanges have played a useful role in the handling of cases: lawyers can enlighten us on particular points. And this can influence the orientation of our final decision. All the videos of QPC hearings since 2010 are available on our website. In recent months, hearings can be followed live.

In addition to the public hearing, owing to the QPC procedure, the Constitutional Council set up a permanent clerk's office and appointed two clerks. This unit, which plays a major role in the proceedings, is in charge of the material preparation of the cases. A choice has been made to follow a completely paperless procedure, "Zero Paper", which allows rapid exchanges through electronic means, a prerequisite to meet the maximum period of three (3) months.

Other notable changes relating to the implementation of the QPC, include the adoption in 2010 of the "Rules of Procedure to be followed before the Constitutional Council for Priority Questions of Constitutionality". These Rules of Procedure, issued by a Council decision, are both a kind of internal procedural charter for our members and agents, and externally a reference document for the government and lawyers.

Our website is also an important tool in the QPC process. It publishes the videos of the hearings in addition to a summary table of legislative provisions already found to be compliant with the Constitution, which is useful for verification by litigants and the courts of the second condition of admissibility. The website also posts: a table of non-referral cases, which ensures that neither supreme court has ever ruled on a provision; the list of pending QPCs; all QPC decisions that have been judged since 2010; and a legal commentary and a documentary file for each decision.

As for the QPC itself, the President of the Constitutional Council appoints a rapporteur to deal with it. The rapporteur examines the QPC, prepares a draft decision in conjunction with the legal team of the Council, submits his report during the deliberative session, which takes between fifteen minutes and several hours, then the members make their decision and publish it. The opinions of the members may be diverse, but we do not resort to the practice of "dissenting opinions". Our deliberations are held behind closed doors and made public twenty-five (25) years later.

Ladies and Gentlemen, Dear colleagues,

Seven and a half years after its entry into force, the QPC now accounts for most of the activity of the French Constitutional Council. In 2016, we made exactly 100 decisions on constitutional review: 19 constitutionality checks before promulgation and 81 QPC's. In total, since the entry into force of the QPC in 2010, nearly 595 QPC decisions have been issued by the Constitutional Council. In two-thirds of the cases, we deemed the legislative provisions submitted to us to be in conformity with the Constitution, sometimes with reservations. In one third of the cases, which is a significant proportion, we rendered partial or total non-compliance decisions, thus repealing the challenged provisions. In this regard, I would like to emphasize an important point: the repeal may be immediate, from the publication of our decision; but it may also be deferred by the Council itself, when it appears that an immediate repeal would lead to "manifestly excessive consequences", according to the phrase used in our decisions. For this purpose, we set a deadline, which is usually a few months but which can extend more than a year, to prevent any legal vacuum. The lawmakers can then adopt new provisions to "remedy the unconstitutionality". This ability to modulate the effect of our QPC decisions over time is provided for in Article 62 of the Constitution, and it is very useful. Experience has shown us that this clause is important: since

2010, two thirds of non-compliance decisions have been rendered with immediate effect, and one third with delayed effect.

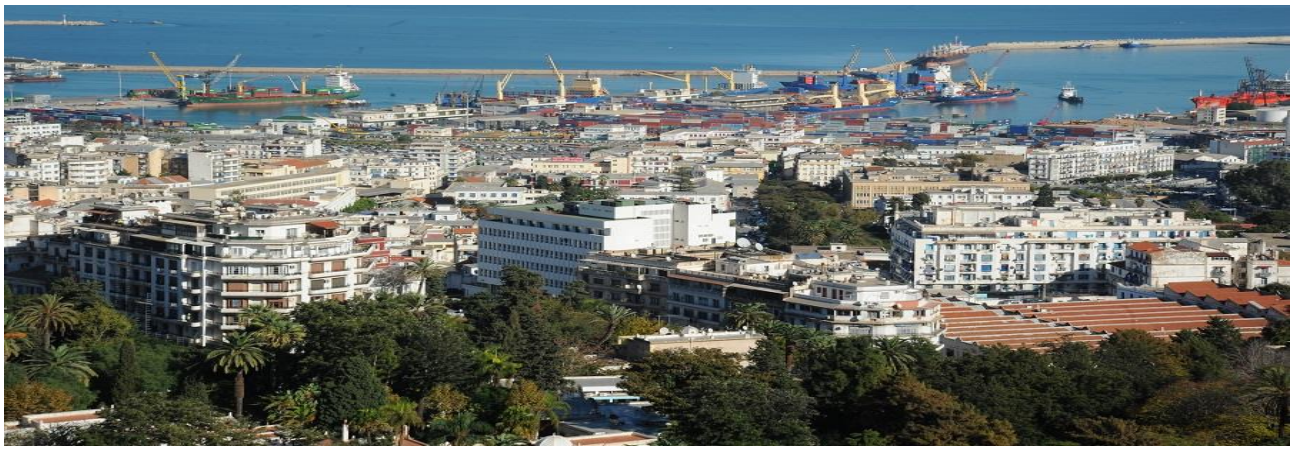
On the merits, our QPC decisions covering all branches of law and their effectiveness, which has recently been studied in a thesis, is on the whole satisfactory. Two areas stand out: criminal law and criminal procedure, and tax law. However, in other areas there has been a relatively small number of QPCs: health, the environment, local authorities law, and labour law, for example. This distribution whose causes are multiple, is not stationary, it could evolve in the future. The QPC is intended to cover all areas of law.

The record of the QPC, from the point of view of justice and in particular access of individuals to constitutional justice, appears so far very positive. Contrary to the fears that were originally expressed, the flow of QPCs has not dried up and the Constitutional Council has not been overwhelmed. The filters of ordinary jurisdictions such as the supreme courts, have been effective: the Court of Cassation sent us about half of the QPC, and the State Council the other half. The deadline for the processing of the QPC has been observed. The filters have generally prevented the QPC of being used as a delaying instrument. The time modulation of the effects of our decisions of non-compliance helped avoid destabilizing legal uncertainty.

I conclude.

Today, it is evident that the adoption of the QPC in France has been rapid and general, by the courts, by the lawyers, by the litigants, and by the legal professionals as a whole. The QPC procedure established itself as a major step forward for the rule of law and the guarantee of fundamental freedoms. Nobody has questioned it. In a country like France where major reforms are rarely consensual, this is quite a performance. When the QPC reaches its tenth anniversary in 2020, we will submit it to an overall review, involving an international perspective.

I hope that the elements that I have just developed will be useful. We are aware that each country has its legal specificities and constitutional identity. But, I believe in the dialogue of judges and our ability to share the lessons we learn from our national experiences.



Algiers, world capital of constitutional justice in 2020

Address delivered by:

H.E. Mohamed El Hafi,
President of the Supreme Court of Libya

On the theme:

"The power of the trial judge in assessing the seriousness of the exception of unconstitutionality"

Introduction

Law No. 6 of 1982, amended by Law No. 17 of 1994, relating to the reorganization of the Supreme Court, conferred in Article 23 at the Supreme Court and its assembled sections the power to rule on constitutional issues. Paragraph 2 of this article provides that the Supreme Court has exclusive jurisdiction to rule on any substantive legal question relating to the constitution or its interpretation, raised in a case pending before any court. The constitutional jurisdiction of the Supreme Court of Libya, defined by the aforementioned article, took two forms. The first form gives the possibility to any person with an interest to directly raise an action of unconstitutionality against any constitutional provision, according to the procedures defined by the corresponding resolution issued by the Supreme Court.

The second form is the one mentioned above, which entitles the person with an interest, to raise before the trial judge the unconstitutionality of a provision or a law which is applicable to him in an ongoing trial.

My intervention is strictly limited to this second form and will deal with the definition of the trial judge position with regard to an exception of unconstitutionality, whether to decide on its admissibility or rejection, because it is he who decides on the seriousness of the exception and whether or not his decision has any effect on the course of the trial and whether the decision is or is not necessary. In my intervention, I will refer to the basis on which the trial judge bases his decision in assessing the seriousness or otherwise of the exception of unconstitutionality.

- Chapter relating to the definition and criteria of the seriousness of the exception

<u>The way of exception of unconstitutionality:</u>

It is an important and effective means conferred by the legislature to individuals and groups to prevent justice from applying a legislative provision or a law, in its entirety, prejudicial to their interests, deemed to be in breach of the Constitution, in a trial in which they are parties, and the application of which would produce an effect which would affect their interests in the proceedings.

Thus, this means constitutes a first important defense leverage before the opposing party. The parties concerned thus request that the trial judge suspend the proceedings and refer the case back to the constitutional court. For them, it is a priority issue, necessary to decide on the substantive proceedings.

Recourse to this form of referral to the Constitutional Court is widespread. Since the general rule for raising the case is the existence of an interest in bringing proceedings, the correlation between the interest in raising the exception of unconstitutionality and the interest in the substantive proceeding implies to consider the criterion of seriousness and to question whether the competence of the trial judge to rule on the seriousness of the exception would mean that he would decide on the constitutionality of laws?

The criterion of seriousness of the exception:

The exception of unconstitutionality of a law or a legislative provision raises a priority issue that cannot be decided by the trial judge as long as this priority issue of compliance or non-compliance with the constitution has not been settled. The trial judge is not required to answer the exception of unconstitutionality unless he considers it to be of a serious nature.

The restrictive condition of the seriousness of the exception would be to allow the trial judge to dismiss the exceptions that would appear to be fanciful, dilatory, or those that seemingly have no effect on the proceeding or the law of which, subject matter of the exception, is not related to the dispute in the substantive proceedings.

The constitutional doctrine considers that the appreciation of the exception means that the trial judge must ascertain whether or not the law imputed to the Constitution. If he makes sure of his constitutionality, it is then his power to reject the request for exception. This is what we reject because this power belongs exclusively to the constitutional judge. It would be sufficient for the trial judge, through a formal examination of the text, to seize reasonable grounds which would lean towards unconstitutionality.

Dr Ramzi Echaar considers that the significance of the seriousness required to rule on the stay of proceedings and its referral to the Constitutional Court has two aspects. The first is that, to rule on the exception, it must be related to the subject of the dispute and have an effect on its outcome. The second is the existence of a possibility that the law contested for unconstitutionality, deviates from the provisions of the Constitution.

Chapter on the role of the trial judge in examining the seriousness of the exception of unconstitutionality

The mission of the judge dealing with a case with regard to unconstitutionality of a legislative provision or a law, the implementation of which is contested at a trial, is not easy. It is rather, very difficult.

He must first ascertain that the legislative provision or the law contested for being unconstitutional concerns the subject-matter of the dispute and that the court seized on the merits can only decide on the substance of the case unless he examined

based on this legal text to know the dispute. If the trial judge has the opportunity to rule on the conflict without having to examine the text, he dismisses the exception. Thus, the existence of the applicant's direct personal interest is necessary for the admissibility of the exception. The constitutional section in the Supreme Court stated that direct personal interest is a requirement for the admissibility of the unconstitutionality process, and that this must be related to the interest in the substantive proceedings. Therefore, to know about the constitutional issue, it is imperative to know the demands that are related to it. (His judgment on constitutional complaint No. 4 of 12 November 2008).

The judge then examines another aspect of the proceeding. He must ensure that the conformity of the law with the Constitution would have divergent points of view. In other words, if there is a doubt about the constitutionality of the law. Doubt is interpreted as unconstitutionality in the assessment of seriousness by the trial judge.

In addition, the trial judge must ensure that the Constitutional Court did not have to decide, in a previous judgment, on the constitutionality of the text subject to unconstitutionality. The constitutional judgment has acquired the force of a final decision. It is final and without appeal. If the Constitutional Court had already ruled on the unconstitutionality of the text, the trial judge takes this into account and renders his judgment on the basis of this case law. On the other hand, if the Court had rejected the exception by reasoned judgment on the merits, the trial judge takes it into consideration and acts under the contested text for unconstitutionality. If the judgment of the Constitutional Court concerns the form of the constitutional appeal and not the merits, this judgment has no effect. The trial judge uses other criteria to know the seriousness of the exception. On the basis of these requirements, the trial judge is required to be constantly aware of the Court's constitutional case-law so that he may examine the exceptions of unconstitutionality referred to him in the substantive proceedings.

The trial judge must effectively ensure that the exception of unconstitutionality is not fanciful or pursues the purpose of delaying intended to delay the outcome of the trial or to prejudice the other party. The trial judge may uncover the frivolous nature of the exception through the grievances presented in support of the trial and the evidence and documents raised by the applicant.

The trial judge must also ensure that the exception of unconstitutionality is of a fundamental nature and that it is necessary to rule on the grounds of unconstitutionality appeal in order to rule on the merits of the case. By virtue of his judgment No. 1/11, on the constitutional appeal referred to him rendered at his session of 1 June 1978, the Constitutional Section of the Supreme Court declares: "the appeal referred to the Court, although it is admissible from a legal point of view, but it is not of a fundamental nature and does not concern the Constitution or its interpretation, because it is a dispute between the parties over the publication of laws. This question, which is purely legal, relates to a reality on which the substantive court is required to decide on. Consequently, the exception of unconstitutionality is irrelevant; it should be dismissed and referred to the substantive court to be decided on."

The trial judge is obliged to enlist the exception in the minutes of the meeting in a clear way, by specifying the text, subject matter of the dispute on unconstitutionality and to mention in his minutes, the contents of the memory of the exception which must, basically, specify the text of the contested law as unconstitutional. In case the memory does not indicate or does not specify the text of the attacked law, the trial judge may dismiss the exception. By virtue of his judgment no. 3, year 58 concerning the constitutional appeal, rendered on December 13, 2013, the Constitutional Section of the Supreme Court states: "The applicant, in his constitutional appeal, was required to specify the constitutional norm on the basis of which the legislation rendered is considered contrary, as well as the means justifying this lack of knowledge of the constitutional

norm; that, if the grounds of the appeal do not satisfy these two conditions or fail to reach that conclusion; or that the norm alleged to be violated is not a constitutional norm, the appeal is in that case inadmissible.

If the trial judge reaches the seriousness of the exception of unconstitutionality, he decides to stay the initial proceedings. According to Article 19 of the Rules of Procedure of the Supreme Court of 28 July 2004 governing the organization of the Constitutional Section: “If a question of law relating to the Constitution or its interpretation is raised by one of the parties to the pending trial, before any court and which it considers fundamental, it adjourns its examination and sets the applicant in unconstitutionality a period not exceeding three months to bring an action for unconstitutionality before the Supreme Court.”

The action in unconstitutionality obeys, in this case, the procedures relating to the constitutional appeals fixed in the abovementioned rules of procedure.
If the action of unconstitutionality is not raised within the time fixed, it is deemed as if it had never existed.

Accordingly, if the trial judge finds that the person with an interest in bringing an action, did not raise the exception of unconstitutionality before the constitutional section within the three-month time limit, he resumes the trial and abandons the exception of unconstitutionality. On the other hand, if the petitioner carries out the constitutional appeal proceedings, the substantive proceedings remain suspended until the constitutional section decides on the constitutional appeal, dismissing it or accepting it under a judgment of unconstitutionality. This judgment is binding on the trial judge when ruling on the case on the merits.

The Supreme Court, in considering a constitutional appeal on public policy, had previously stated, in its decision on constitutional complaint No. 2 rendered at its session on 11 February 1961, the following:

“It is obvious that the rules of constitutional law are linked to public order, since they have a profound effect on the entity of the collectivity. Accordingly, if the defendant waives the exception of unconstitutionality, this does not exempt the constitutional section from considering and disposing of the exception.”

However, in a subsequent judgment on Constitutional Appeal No. 1/18, rendered at the session of 9 April 1982, the Supreme Court renounced this interpretation. It had, in fact, allowed the applicant to waive his appeal of unconstitutionality. It states in this regard: “As long as the right to sue is a constitutional right guaranteed to all citizens by the Constitution, each individual can resort to justice to protect and defend his rights. He also has absolute discretion to waive his legal action and litigation. This latitude is recognized, however, only if the other party does not have an interest in continuing the trial and has not attached itself to this right by expressing it in accordance with the provisions of Articles 262 and 263 relating to pleadings.”

The Supreme Court confirmed this trend in its Civil Judgment No. 1/47. It had considered that the objection of unconstitutionality did not concern public order since it had not authorized the

person with an interest in bringing proceedings to raise the exception for the first time before the Supreme Court. We consider that this trend is not appropriate since the interpretation of constitutional appeal No. 2 year 5 which considered the exception of unconstitutionality as a matter of public order, was made by the sections of the Supreme Court, while the judgment that renounced this interpretation was rendered by the civil section. In addition, the subject of the judgment on constitutional complaint No. 1, year 47, concerned the waiver of the contentious procedure which is available to the person with an interest in bringing proceedings. It did not concern a question of exception of unconstitutionality.

Conclusion:

The role of the trial judge when an exception is raised before him, to challenge the constitutionality of a statutory provision or a law is eminently important and effective in creating the legal standard that guarantees the interest of individuals and communities and preserves their freedoms and their rights. The trial judge is therefore bound to be concerned to examine any exception of unconstitutionality raised before him, to ascertain its seriousness and the intention of the applicant as well as its effects on the continuation of the trial because he must know whether or not it is necessary to rule on this trial. He must also ensure that a previous appeal concerning the same exception had not already been raised in order to guarantee the correctness of his decision and to put in the confidence of all those who take cognizance of it, assuring them that the Court has consent to decide in accordance with the Constitution and the law.

Algiers, world capital of constitutional justice in 2020.

Closing speech by:

Hon. Mr. Mogoeng Mogoeng

Chief Justice of the Republic of South Africa

President of the CCJA

For some time I wondered why the Lord Chief Justice of England and Wales, the President of the Federal Constitutional Court of Germany, the Chief Justice of Brazil, a Justice of the US Supreme Court all confirmed participation in this program only to withdraw virtually on the eleventh hour.

Now, I have the answer. And I am very happy that they withdrew. Within a very short space of time Colleagues from this continent stepped in to make presentations so powerful that one would be excused for incorrectly assuming that they had months within which to prepare thoroughly for their presentations. So, Africa was afforded the opportunity to showcase her impressive capacities within a short space of time. We have what it takes to excel and have demonstrably belied any notion that without outside augmentation, there would be nothing or very little of consequence we could achieve.

My profound gratitude goes to the former President of the CCJA, Members of the Executive Bureau, the broader Membership of the CCJA, all presenters, Chairpersons of sessions, rapporteurs and delegates.

I also want to single out for special appreciation the Deputy Chief Justice designate of the Republic of South Africa, Justice Ray Zondo, who is also the Chairperson of the Organising Committee, and Members, namely, Justices Khampepe, Jafta and Mhlantla, the Secretary General of the Office of the Chief Justice, Ms Sejosengwe and officials in that Office who played a critical role in organizing and executing the mandate of hosting this Congress.

Colleagues from the Judiciary of this great country who welcomed delegates at OR Tambo and Cape Town International airports and so warmly hosted them at the Sunday dinner in my absence, I say thank you, thank you and thank you Colleagues.

From **22 to 24 January 2009** Judges of Constitutional Courts or Councils and Courts with equivalent status met **in this very room**. Out of that meeting the World Conference of Constitutional Jurisdictions was birthed. And on the first day of that meeting **Chief Justice Pius Langa**, from nowhere, approached me with an instruction. He said "Mogoeng, I am going to be chairing a session that comes immediately after lunch. Because I will be on the podium, my chair will be vacant and I want you to occupy it. After lunch he again approached me and said, my chair will soon be empty, go and occupy it.

Little did I know that from **3 to 4 September 2011**, just over two years thereafter, I would be **interviewed** for the position of **Chief Justice in this same room**.

Here we are. Gathered together in this **historic room**, to open yet another chapter in the history of Africa that will make a **profound impact in the lives of many generations to come** in this continent and beyond. The venue and nature of this meetings signifies that something of profound generational significance is being birthed today. It is all symbolic of and probably ushers in the new birth or renaissance of Africa, the restoration of Africa's lost glory.

In recognition of the extremely important role that the Judiciary plays in sustaining a constitutional democracy, we have spent three days reflecting on judicial independence and the rule of law. All this is done to enhance the prospects of good governance, constitutionalism, accountability, free and fair elections, and the rooting out of corruption in our continent. It has the possibility to contribute meaningfully, to the renaissance of Africa.

Corruption must be rooted out urgently because as correctly observed by **Mr Kofi Annan, former UN Secretary General:**

"Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organised crime, terrorism and other threats to human security to flourish . . . Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign aids and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development."

To fight corruption, **you must yourself not be corrupt**. You must neither be afraid of corruption practitioners nor be friendly with them. If you release yourself into their hands, they will use you and dump you but will never really respect you. And we as Judges or as courts in this continent enjoy a singular honour of playing a critical role in the eradication of corruption. But we can only do so if we are ourselves clean and unencumbered. It takes the ethically-upright or uncorrupted to deal effectively with the corrupt. We need to reflect on just how effective the corruption-fighting agencies and measures are in our jurisdictions. Do we as Judges and African nations mollycoddle corruption and its practitioners? Do we eat from the same dish with the corrupt, using our legal expertise to cover up for them? Are we afraid of the corrupt, focusing only on the small man or small woman in our endeavours to look like we are serious about rooting out corruption, but when it's the high and mighty, we take cover or behave ourselves as they want us to.

We need to be men and women of integrity as was reiterated during this conference and a personification of solid character all the time. We should be predictably honest and principled. Then and only then, would it be known by all from afar, that these ones are incorruptible even if you threaten to kill them, like those Judges in Ghana whose bodies were found lying dead somewhere next to a river, they would not betray the cause. It is believed that those colleagues in Ghana died because they were principled and refused to sell their souls. Let us go back to the basics. Let us not seek to be politically correct. Let none of us pretend to be doing the right thing when they are in fact in the pockets of either the politicians in the Executive or in Parliament, or the powerful ones in the private sector. People in the private sector who can profile us through their newspapers, or television channels, or radio stations, or put money in our pockets, or organise free trips for us can also cause us to be beholden to them.

It is time to embrace the spirit of our forebears, the readiness to die for a just cause if death is the price we must pay just so that the African people can stop suffering when their continent is so, so rich. If members of the Judiciary are not willing to be used by those who are in the habit of

exploiting their economies, their people, the natural and mineral resources of our different countries, or the abusers of State power and resources, then there is hope for Africa. It cannot be repeated enough that **integrity** and a **solid character are indispensable prerequisites** for a truly independent Judge.

Best practices must be exchanged to address issues relating to judicial independence and the observance of the rule of law. This would reinforce our Judiciaries' position and effectiveness as the ultimate guardians of our constitutional democracies, able to enforce accountability and due compliance with our respective constitutional obligations.

There are best practices everywhere. It will be a sad day if we come here and make powerful presentations, but take nothing home with us that is seriously intended to be implemented. My hope is that the next time we meet, we will be talking about the progress we have since made, based on what we have now learned from one another here. For instance, I want to approach my brother in Ethiopia. I am told their court automation system is one of the best. I have also learnt that Tanzania is in the process of automating or has already automated its court system in the most impressive way.

I want to learn from all my other brothers and sisters from the continent. None of us should assume that they know it all. Let us not reduce our Congresses to forums for sheer intellectual stimulation or meaningless talk-shops. It bears repetition that the fundamental question we each have to ask ourselves is, what progress are you going to make with the lessons or best practices we have learnt from each other. What programme of action are we going to go home with individually and collectively?

Courts are the ultimate guardians of constitutional democracies. And we have the honour of ensuring that both members of the Executive and the Legislature carry out their constitutional obligations as dutifully as our respective Constitutions require of them. And we all know that no Constitution and no law self-actualises. I went to a certain country, very wealthy, beautiful Constitution, but nothing is being done in compliance with the terms of that Constitution. It is just a make-believe. They have the Judiciary, Constitutional Court, Supreme Court and they are well-funded and paid. They also have beautiful buildings, but they are not a constitutional democracy in a true sense but an masked executive State. All these other things are just a PR exercise.

Colleagues, we must consider implementing formal or informal peer review mechanisms, as the Judiciary. A credible and acceptable **peer review mechanism** must be in place to identify inefficiencies or corrupt elements so that they may be exposed and uprooted from our midst as the Judiciaries of Africa. We must not allow any jurisdiction to impose its preferences on us. We can't police each other. But, it has got to be open to us to say to a Colleague who is veering off the rails, that what they are doing is not right.

I was impressed to learn that in one country in East Africa, colleagues from two jurisdictions approached another colleague and said to him that what he was doing was not right. Similarly, in Southern Africa, when a particular colleague was not doing the right thing, we confronted him about the arguably unethical conduct he was apparently involved in. This thing of avoiding to

offend, even when principles are being compromised or are being trampled on, explains why Africa is where it is right now. Sadly, it has the potential to seriously undermine the good office of Judge. It is therefore important that we be principled through and through. Judges must be prepared to ruffle feathers or rock the boat whenever necessary, but within reason. We have been colonised and taken advantage of for too long and nothing much has happened, because we didn't and still aren't prepared to ruffle the feathers of those who were and are still exploiting Africa's wealth and don't seem to have any regard for human rights in Africa. Again, I say, let us be predictably principled as Judges.

Where threats or challenges are experienced by colleagues who operate in a system that does not allow them to voice their frustrations about and to the political arms of the State, we have got to take it as our responsibility to intervene. We may do so as individual jurisdictions, as regional structures and as this continental body without imposing ourselves. Challenged jurisdictions must please let us know of your unpleasant experiences, so that we can look for and find an effective and acceptable way of stepping in, when you are not able to speak for yourselves. When the Judiciary is under threat, we could approach the powers-that-be and propose a way out of that challenge that is consistent with an openly declared commitment by the political arms of the State to an independent Judiciary.

We should also consider the advisability of forging some kind of alliances with structures like the International Commission of Jurists, the organised attorneys and barristers or advocates' profession in our regions and in the continent. This would be for the purpose of ensuring that colleagues do not suffer the insecurity and humiliation of operating in an oppressive system, without there being anything they or anybody can do about it.

A way must be found to help address issues relating to **non-lawyers being Judges** particularly where it is widespread and intervention is called for. **Our Judicial academies** or **training institutes** must open their doors to jurisdictions that do not have these facilities.

When I went to the World Bank to make a presentation on what it is that judiciaries can do to incentivise foreign investors to come and invest in Africa, so that the lives of our people and Judges could be improved, some people in African countries were connected via satellite, and some of them were Judges without legal qualifications, who said that they have never been trained in law. They also said that they didn't know how to judge. That concerned me so much, that I now throw it to all of us as a challenge to grapple with.

Those jurisdictions with a number of retired Judges who are still strong and intellectually sound, what is it that can be done, relying on that resource, to help Judiciaries that lack critical capacities? Even if we have to send Judges there to play a mentorship role to our brothers and sisters, that would make a lot of difference? What system can a body like this come up with? Can we maybe agree that we take something out of our budgets to strengthen courts that are courts in name only, but are completely incapacitated to do what the populace deserves and requires of Judges to do? It must worry all of us. It is an African problem and we African Judges must proactively find a way to address it.

Another issue, and I want to be quite frontal about this one. Judges must never allow themselves to be formally trained by any NGO most of the time. They must never outsource their regular training responsibilities to any non-judicial structure even if it uses other Judges to offer that training. That is irreconcilable with judicial independence. **Judges should not surrender or give an appearance of surrendering their independence** to **private interests** or NGO's by allowing themselves to be trained all the time by or through foreign funded entities. This could give credence to the suspicion that we are independent only from our governments but not from foreign or other interests.

Why can't we as courts ask jurisdictions that have got training academies or institutes to accommodate you in their training programmes? Chief Justice Shivute is here, some of his Colleagues came to the South African Judicial Education Institute so that together we can share the judicial resources available to train ourselves as Judges. And we have also received requests from other jurisdictions. Why can't Judges organise training for other Judges under the auspices of an institution controlled by Judges? The quickest way for judicial independence to be compromised would be for us to surrender our own systems to some entity that receives funding from some foreign country or private entity whose vision about the Judiciary, Africa and our respective countries we don't even know. We dare not forget – there is no free lunch. None whatsoever. There is always something behind the apparent generosity and kindness displayed towards Judges. Pay-back-time will come. They will most likely remind you of what they have invested in you, and the affinity that you allowed to develop, would render it very difficult to turn down their or their friend's requests. Be warned and be vigilant.

Let us therefore avoid anything that has the potential to compromise the independence of the African Judiciary. I place it on record, because last week one colleague said to me that she was told that we are part of some arrangement where Judges are trained by some entity somewhere. The South African Judiciary has got its own training institute and programmes. We refuse to outsource our training responsibilities to anybody. We can be trained by another Judiciary, but not some private entity. It is not right.

Colleagues, something that was mentioned that applies to both regional structures and this structure is this: We must be true to the statutes and protocols that govern the manner in which people are elected to office. **Our statutes** or **practices** in relation to the election and rotational leaders must be observed. Let us not flout our own rules. Secret compilation of lists of leaders by only some un-identified members of our structures must come to an end. It often leads to counter-productive self-perpetuation.

I will not identify structures, but I am articulating a principle. I have come across a situation where Judges would be members of a structure or organisation, and somebody comes and say here are the names of Judges who are going to be in the leadership of an organisation of Judges like this one (CCJA). And you are a member of that structure but know nothing about it. You are not told what criteria was used to determine who should lead, who made that determination and why that had to be done. You, as a Judge are expected to accept that imposition without question. Some of us begin to wonder but who took the decision for me without our permission? Those announcing

the names tend to say “they” say so and so should be our leaders. Who are they? The Judiciary must never be made to look like there are some members within it who collude with some forces elsewhere to choose leadership of their organisation for them.

We must choose our own leaders as we did this morning. That is encouraging progress that we have made, because it never used to be like this even in the CCJA. This thing of a secret compilation of names is not right. We are not a secret organisation. In South Africa, the questionnaire for judicial appointment has a question as to whether you are a member of a secret organisation. This is to avoid a Judge delivering judgments imposed on him or her secretly somewhere.

There must be transparency in all we do. Judges ought not to advance or serve hidden interests or have an appearance of doing so. We are the ones who, when there is a dispute, have the ultimate say in the national elections that are held in our respective countries. We have a final say as to whether they were free or fair? We effectively oversee national elections in our countries. Our impartiality must be judged with reference to how we elect ourselves into leadership positions within our own structures or organisations. So, if we cannot ensure that there is freeness and fairness of elections in our own body of Judges, other people would be justified to assume that when there are elections in our own countries, they can be manipulated with our cooperation because we manipulate our own elections.

May we please, desist from creating the impression that we are not people of honour, people of integrity or people of solid character. We must resist the insatiable appetite for power, for approval or affirmation, for positions, for money and for media attention or fame, as Judges. All that “users of people” have to do is offer you an opportunity to be famous, campaign overtly or in a subtle way for you to become Chief Justice or President of a Court or Judge, as an investment in you. Or they may offer you money or some benefit to have you compromise core judicial ethical values.

I believe that the position of Chief Justice or a Judge belongs to the people of South Africa. The same applies to any other country. But because we cannot all be Chief Justice or a Judge, they have identified some of us to assume that responsibility on their behalf. So we cannot lord it over them. We cannot begin to behave as if we own our nation. We cannot behave anyhow as if we are not there to serve the people, or as if you we there to serve ourselves and our personal interests or those we have sold our souls to. It must be said again. We must check our love for power, positions, praises, fame and for money. Because if we fall in love with those things, we would be easy targets or candidates for manipulation by other interests to the detriment of our nations’ strategic objectives. And the bad thing about being used by any powerful entity or person, is that after they have used you, they will lose “respect” for you. Unsurprisingly because you would have displayed lack of self-respect. You will reach your sell-by-date, and they will dump you like a chewing gum that has lost its flavour or sweetness. I have seen it happen to a number of people.

We are familiar with the rich history of our beloved continent, Africa. We know how well-endowed it is with natural resources and mineral deposits. We also know that there is **nothing inherently wrong with or inferior** about being a person or of African descent**. Koffi Annan, Barrack Obama, Oprah Winfrey, Tiger Woods, the Williams Sisters, Nelson Mandela, Julius Nyerere, Kwame Nkrumah** are only a few of those who bear testimony to the reality that race does not determine one's inherent abilities. In a strange way, this is borne out by **Lord Macaulay's words** that I repeat as I conclude:

"I have travelled across the length and breadth of Africa and I have not seen one person who is a beggar , who is a thief such wealth I have seen in this country, such high moral values , people of such caliber , that I do not think we could ever conquer this country, unless we break the very backbone of this nation , which is her spiritual and cultural heritage and therefore , I propose that w replace her old and ancient education system , her culture for if the Africans think that all that is foreign and English is good and greater than their own, they will lose their self-esteem, their native culture and they will become what we want them , a truly dominated nation''

Let us stop **hero-worshipping our erstwhile colonial masters**. Much as we are not to hate, despise or plot evil against them, we have to define our own destiny and refuge to be tools of others. In reality we are one African nation in one big United States of Africa. When we see ourselves in that way, the petty toxic and corrosive progress-undermining competition about who is better, smarter or richer than who, will be a thing of the past. And what is in the best interests of Africa and her people ought to glue us together.

Our erstwhile colonial masters would probably want us to be too obsessed with being Commonwealth countries, Francophone countries or glorified Portuguese or Spanish "colonies". We are one people, one continent, if you like, one country. Let us forge unity among ourselves. We have been ignored for far too long with our acquiescence. We have been marginalised for far too long with our permission. We have opened ourselves up to be manipulated by other people, forces or countries, in the furtherance of their own interests.

I think the time has come, through the offices we occupy as the Judiciary of Africa to remember that the difference that we can make in turning the fortunes of Africa around, is incredibly huge. If the singular act of Martin Luther King Jr could give rise to the movement that culminated in the Presidency of Barack Obama, if Mother Theresa could do what she did for humanity, if Oprah Winfrey can reach out to many people in the manner that she has, building schools to empower young girls in the area of leadership, imagine how much we could achieve if a critical mass of us here could wake up to the opportunities we have to bring about the much-needed change in Africa and the world over. Just reflect on the profound impact that men and women of integrity could make individually and collectively to take African people out of the conditions of squalor they have almost become accustomed to or resigned themselves to, as their fate.

Let us keep our self-esteem intact, let us make sure at all times that we enjoy freedom from any form of self-serving domination by other interests as African people. Whenever we have differences, let us know that they are normal but need not be permanent or be allowed to drive a

wedge between us. This is so because even in a family, siblings or even your children will have misunderstandings. Even husband and wife. It is normal to have occasional differences because we are somewhat different.

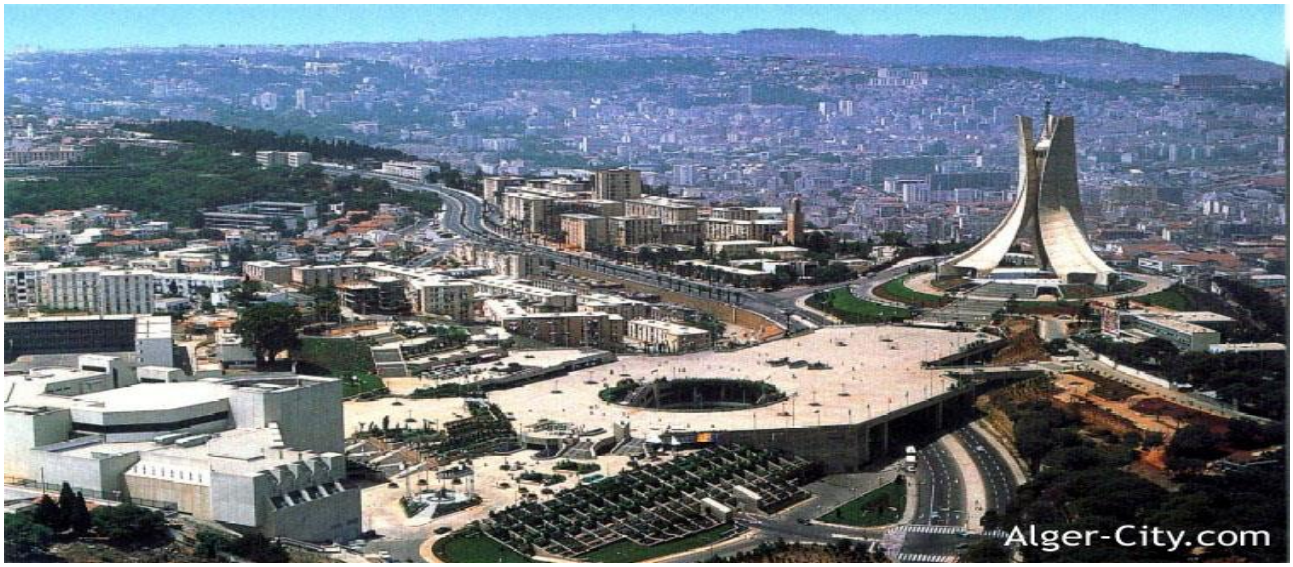
With that understanding, nobody will find it easy to exploit our artificial differences for the advancement of self or sectional interests, our self-esteem would be higher than ever and our freedom from any form of illegitimate domination will become a reality.

This was not a talk shop. It was a call to action in pursuit of the realisation of Africa's lost glory. It is a clarion call for the renaissance of Africa so that the status of Africa as a one-time leader in civilisation and economic development, as was evidenced by Egypt as a centre of technological and academic excellence through the Alexandria University and the construction of pyramids, Mali through the Sankore University and Timbuktu as a city of gold and unsurpassed literary treasure, the ruins of Zimbabwe and Mapungubwe in South Africa as economic hubs of note.

Whether Africa becomes a respectful, wholly developed, and truly committed to constitutional democracy with strong institutions in a politically stable environment, depends on what you and I are going to do from here.

We must adopt these points as a **programme of action** so that we can assess our progress and the impact of our programmes on a regular basis. Let us go to work.

Thank you all!



Algiers, world capital of constitutional justice in 2020.

Mr. M. Mogoeng President of CCJA with Mr. Medelci President of the Constitutional council of Algeria

The President of CCJA with the Algerian Head of Government Mr. Ahmed OUYAHIA

The President of CCJA with the Algerian Head of Government Mr. Ahmed OUYAHIA

The President of CCJA with Mr. LARABA from the General Secretariat

Mr. Mogoeng, in discussions with Mr. Fabius

Photo showing MM. Mohamed HABCHI, Laurent FABIUS and Tayeb LOUH

Photograph showing Mr. Tayeb BELAIZ, former President of the Constitutional Council of Algeria, in discussion with the President of the Constitutional Court of Turkey

Photo showing the opening ceremony of the 2nd International Seminar of the CCJA

Photo showing the members of the Constitutional Council of Algeria (first row)

Photograph showing, from left to right, the Vice-President of the C. C. Algerian, the President of C. C. of France, the Algerian Minister of Justice and the President of C. C. of Turkey

Mr. Mamadou KONE, President of the Constitutional Council of Cote d'Ivoire, accompanied by Mr. Camara his Chief of Staff

Delegates from Benin, Gabon and Guinea

The President of the High Constitutional Court of Madagascar and the delegation accompanying him

The President of the CCJA in discussion with the Algerian Minister of Justice, Mr. Louh

Mr. Kambou Kassim, President of the Constitutional Council of Burkina Faso

The Vice president of the Constitutional Court of Central Africa, Mr. **Jean-Pierre WABOE**

Mr. Mamadou KONE, President of the Constitutional Council of Cote d'Ivoire,

Photo showing the members of the Constitutional Council of Algeria (first row)

Ms. Louise Angue, Judge at the Constitutional Court of Gabon

The delegations of Mauritania and Mali

Photo showing the members of the Constitutional Council of Algeria (first row)

Mr. Moussa Issaka, from the Constitutional Court of Niger

Meeting between the President of the CCJA, Mr. Mogoeng and the former President of the Constitutional council of Algeria, Mr. Belaiz

Mr. Robert DOUSSOU, Honorary President of CCJA

Hon. B. Maphalala, Chief Justice of Swaziland

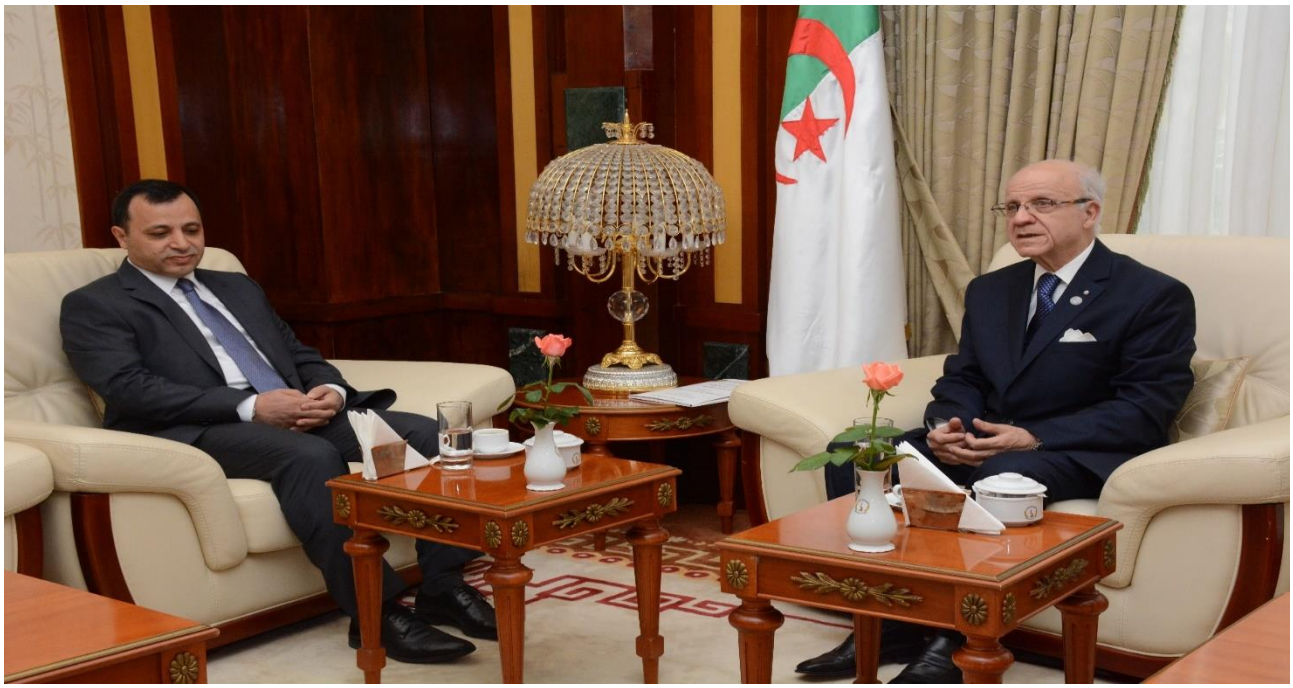
Mr. Durr Schnutz, Secretary General of the WCCJ

Photo showing members of the Constitutional Council of Algeria, from left to right:

MMrs. FENNICHE Kamel, BRAHMI El Hachemi and DIF Mohamed

Delegates from Central Africa, Djibouti and Ethiopia

Delegates from Mozambique and Senegal



Mr. Mourad MEDELCI with Mr. Zühtü ARSALAN, President of the Constitutional Court of Turkey

Mr. Brahim Boudkhil, Member of the Constitutional Council of Algeria

Mr. Saïd IHRAI, President of the Constitutional Court of the Kingdom of Morocco and the accompanying delegation

Ho. B. Maphalala, Chief Justice of **Swaziland**

Mr. ABOUDOU SALAMI, (Togo) from the secretariat general of CCJA

The Moroccan delegation during its audience with Mr. Medelci

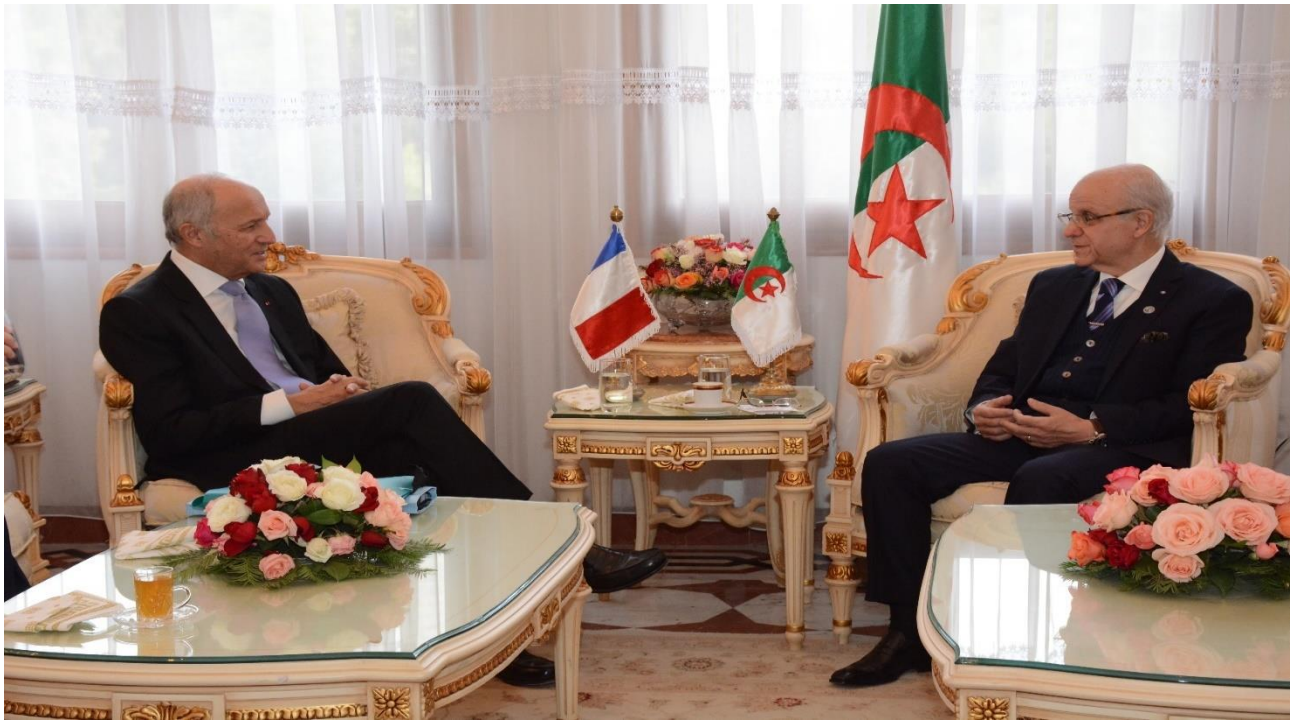
The President and the vice president of the Constitutional Council of Algeria

Mr. Medelci in discussion with Mr.Ihrai, President of the Constitutional Court of Morocco

Ms. Manassa DANIOKO, President of the Constitutional Court of Mali

Mr. Fabius during his audience with Mr. Medelci

Mr. Moussa LARABA, (Algeria) from the Secretariat General of CCJA



Mr. Medelci in discussion with Mr. Fabius

Meeting between Mr. Medelci and Mr. Buquiquio, President of the Venice Commission

Delegates during the visit of the International Conference Center

Delegates during the visit of the Sanctuary of the Martyrs

the participants, when they bid farewell by Mr. LARABA

Liste des participants / Participants list

2nd International Seminar of the CCJA

Juridiction / Pays	Noms et prénoms	Qualité/ Quality
1-Afrique du Sud / South Africa / Cour constitutionnelle – Constitutional Court	**M. Mogoeng Mogoeng** Mr. Sello Chiloane Mr. Allister Slingers	**Chief Justice / Président of the CCJA** Head of Office Director
Algeria/ Algerie /Conseil constitutionnel – Constitutional Council	**Mr. Mourad MEDELCI** **Mr. Mohamed HABCHI** Mme Hanifa BENCHABANE Mr. Abdeljalil BELALA Mr. DAOUD Kamel Mr. Brahim BOUTKHIL Mr. Abdenour GRAOUI Mr. Mohamed DIF Mme Fouzya BENGUELLA Mr. Smail BALIT Mr. FENNICHE Kamel Mr. BRAHMI El Hachemi	**Président** **Vice-Président** Membre Membre Membre Membre Membre Membre Membre Membre Membre Membre
3- Angola / Angola / Tribunal constitutionnel – Constitutional Tribunal	**Mr. Issac PAULO**	**Director** international cooperation
4- Bénin / Benin / Cour constitutionnelle – Constitutional Court	**Mr. Zimé Yérima Kora Yarou** Mme. Marcelline AFOUDA Mr. Giles BADET Mr. Abdulatif SIDI	**Vice-Président** Conseiller Secrétaire général Directeur Etudes

5- Burkina Faso / Conseil constitutionnel – Constitutional Council	**Mr. Kassoum KAMBOU** Mr. Bamitié Michel KARAMA	**Président** Membre
6- Cap Vert / Cap Verde / Tribunal constitutionnel – Constitutional Tribunal	**Mr. Aristides Raimundo Lima** Mr. João Borges	**Juge – Conseiller** Secrétaire général
7- Centrafrique / Central Africa / Cour constitutionnelle – Constitutional Court	**Jean-Pierre WABOE**	**Vice-Président**
8- Cote d'Ivoire / Ivory Cost / Conseil constitutionnel – Constitutional Council	**Mr. Mamadou KONE** Mr. Ibrahim COLIBALY Mr. Siaka CAMARA Mr. Bourahima ADE	**Président / President** Secrétaire General Chef de Cabinet Chargé de mission
9- Egypte / Egypt Hign Constitutional Court / Haute Cour constitutionnell	**Mr. Adel SHERIF**	**Vice-Président**
10- Ethiopia / Ethiopie Constitutional Council of Inquiry – Conseil pour l'Enquête constitutionnelle	**Hon. M. Tsegay Asmamaw** Mr.DESSALEGN W. Denta Mr. KEBEBE Tadesse Kebede Mr. ZELALEM Gudeta Beresa	**Deputy Chief Justice** Secretary General Special Assistant Senior International Relation Expert
11- Gabon / Cour constitutionnelle – Constitutional Court	**Mme Louise ANGUE** Mr. Jacques LEBAMA	**Juge - Judge** Juge
12- Guinée / Guinea / Cour constitutionnelle – Constitutional Court	**Mr. Kelifa SALL** Mr. Med Lamine BANGOURA Mr. Alia DIABY Mr. Mounir Hossein Mohamed Mr. Amadou DIALLO	**Président** Vice-Président Conseiller Conseiller Conseiller
13- Guinée Equatoriale / Equatorial Guinea / Tribunal constitutionnel – Constitutional Tribunal	**Mr. Salvador-ONDO NCUMU** MR. MACARIO NDONG MR. ANTONIO SANTANDER	**Président / President** MAGISTRATE SECRETARY General

14-Djibouti / Conseil constitutionnel – Constitutional Council	**Mr. Abdi Ibrahim ABSIEH** Mr. Aek Abdallah HASSEN	**Président** Membre
15- Libye / Libya / Cour suprême – Supreme Court	**Mr. Mohamed El Hafi** Mr. Mahmoud EZEITOUNI Mr. Aboubakr ELABANI	**Président / President** Conseiller / Councellor Conseiller / Councellor
16- Madagascar / Haute Cour constitutionnelle – High Constitutional Court	**Jean-Eric RAKOTOARISOA** Mme F. A. A. RAVELOARISOA, Mme V. J. D. RAMIANDRASOA, Mme RANDRIAMORASATA,	**Président / President** H.Conseillère-Doyenne H.Conseillère H.Conseillère.
17-Mali / Cour constitutionnelle – Constitutional Court	**Mme Manasa DANIOKO** Mr. M'pere DIARRA	**Président / President** Membre
18- Maroc / Morocco / Cour constitutionnelle – Constitutional Court	**Mr. Saïd IHRAI** Mr. Mohamed EL ANSARY Mr. Moulay Abdelaziz El Hafidhi EL ALAOUI Mr. Mohamed EL DJAWHARI Mr. Nadhir EL MOUMENI	**Président / President** Membre Membre Membre Membre
19- Mauritanie / Mauritania / Conseil constitutionnel – Constitutional Council	**Mr. Sy Adama**	**Secrétaire Général**
20- Mozambique / Tribunal constitutionnel	**Mrs. Lucia da Luz Ribeiro** Mr. Osvaldo Macksen	**Juge / Judge** Public Relation Officer
21- Niger / Cour constitutionnelle – Constitutional Court	**Mr. Moussa Issaka,**	**Conseiller / Councellor**

22- R. D. Congo / D. R. Congo / Constitutional Court - Cour constitutionnelle	**Mr. BANYAKU L. EPOTU Eugene** Mr. KILOMBA N. M. Noel Mr. Patrice NYAMANGALA L. Mme MBUKULA N. Nanou	**Juge / Judge** Juge / Judge Chef de Cabinet Assistante du Président
24- Sénégal / Conseil constitutionnel – Constitutional Council	**Mr. Malick Diop**	**Vice-Président**
25 -Soudan / Sudan / Cour constitutionnelle – Constitutional Court	**Mr. Wahbi Mohamed MUKHTAR**	**Président / President**
26 -Swaziland / Cour supreme – Supreme Court	**H. M. C. B. Maphalala**	**Chief Justice**
27- Togo / Cour constitutionnelle – Constitutional Court	**Mr. M. Sani ABOUDOU SALAMI**	**Juge / Secretariat gl of CJCA**
28- Tunisie / Tunisia / instance provisoire de contrôle de constitutionnalité des projets de lois - provisional Instance of control of the constitutionality of draft laws (IPCCPL)	**Mr. Abdessalam El Mahdi KRISSIA**	**1er Vice-Président de l'IPCCPL et 1er Président de la Cour Administrative**
29- Zambie / Zambia / Cour supreme – Supreme Court (2)	**H. Lady A. M. SITALI** Mrs. Annie Musonda Kawandami.	**Justice and a research advocate** Research Advocate

Au titre des invités / Under the Guests

Organism	Name	Quality
1- CJCA / CCJA	**Mr. Robert DOSSOU**	**Président d'Honneur / Honorary President**
2-Conseil de l'Europe / Council of Europe - Commission de Venise	**Mr. Gianni BUQUIQUIO**	**Président / President**
3-France / Conseil constitutionnel **/** Constitutional Council	**Mr. Laurent FABIUS**	**Président / President**
4-Turquie / Turkey / Cour constitutionnelle – Constitutional Court	**Mr. Zühtü ARSLAN** **Mr. Hicabi DURSUN**	**Président / President** Judge
5- PNUD / UNDP	**M. Eric Overvest**	**Coordonnateur / Résident** du PNUD en Algérie.
6- Belgique / Belgium / Cour constitutionnelle	**Mr. Jean Paul MOERMON**	**Juge**
7-WCCJ/CMJC	**Mr. Schnutz DURR**	**Secretary General**