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The constitutional dimension in the competency of the urgent administrative judge

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Abstract:

This study aims at revealing the role of the urgent administrative justice in enshrining the constitutional bases in the light of its original tasks that include wide prerogatives to protect the basic rights and freedoms. Besides, the study sheds light on the contribution of the principle of supremacy of the constitution in their protection in front of the justice through the exception of constitutionality to strengthen the posteriori control on the law's constitutionality as a secondary field.

key words: urgent, basic rights, control, supremacy of the constitution, urgent protection.

introduction:

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The constitution is the highest frame and legal basis in the legal hierarchy. It protects the basic freedoms and rights and regulates the general bases, pillars, freedoms, and rights through various mechanisms. The justice is one of the main guarantees that maintain the balance between the authority and the freedom because it enforces the laws and the principle of legality that provides for the subjecting the rules and citizens to the law. This paper revolves around the role of the urgent administrative justice as one of the branches of the administrative justice, which turned into an efficient mechanism against the violations of the freedoms and rights by the administration. Historically speaking, the French legislator was the first to set this mechanism by the Law of the Urgent Issues No° 597 in 2000 that was integrated in the Law of the Administrative Justice in 2000. In this context, Touvet described it as a reform by the State Council with a giant effect regarding the authority or the enforcement of its provisions[1]. As for the Algerian Legislator, he enacted this mechanism in the Law of the Civil and Administrative Procedures[2].

Years after the reforms, many provisions were set to determine the method used by the urgent administrative justice to protect the basic freedoms and rights, mainly that the judge has wide prerogatives regarding the objective conditions of the considered case and the ruling to protect the freedoms and rights. Based on what was said, this study aims a identifying the methods of the urgent administrative judge in enforcing the constitutional rules and his discretion because both aim at protecting the basic freedoms and rights. In addition, it sheds light on a new aspect of the protection, that is known in the posteriori control as the priority constitutionality issue PQC, to show the contribution of the urgent administrative justice in enshrining the supremacy of the constitution.

In addition, the importance of the study lies within the employment of the discretion, flexibility, and speed of the urgent

[1] - Mohamed Bahi Abu Younes, the urgent judicial protection of the freedoms and rights, new university house, 2011, p. 05.

[2] - Law 08-09 of 25 February 2008 on the amended and supplemented law of the civil and administrative procedures.

administrative judge in determining the constitutional dimension despite the general characteristics of this justice. In this context, the answer to this problematic requires investigating the constitutional bases of the original competency of the urgent administrative judge (section 1) and the confirmation of the supremacy of the constitution in the secondary competency (section 2).

Section I: The constitutional bases in the original competency of the urgent administrative judge:

The original competency of the urgent administrative judge refers to the discretion and his prerogatives in settling the cases. In the light of the urgent protection of the basic freedoms, we find that they are getting wide because of the legislative employment of their conditions that are characterized with the generality and imprecision, making it take a special method in applying these conditions relying on a set of legal criteria, including the constitution, to serve the liberal nature of this procedure. Based on what was said, we shall tackle the types of enshrining the constitution as a source for the protection of the basic freedoms (A), and the range of the employment of the constitution to determine the basic freedoms (B).

A) subtitle: the explicit employment of the constitution as a source for the protection of the basic freedoms

The basic freedoms condition raised a jurisprudential debate about the criteria of determining its concept. This led to the emergence of many sources we can rely on, including the constitution (1). It is a main important source for the urgent administrative judge in determining the basic freedoms. However, we still find various sources for the urgent administrative judge (2). In this regard, through the examination of some orders for the urgent protection of the freedoms, we see he did not rely on the constitution (3).

1- **The constitution as the only source for the basic freedoms:**

This case manifests in organizing the freedom through the constitutional text and the absence of the regulating legislative text. Here, the constitution organizes the freedoms in a specific chapter, which alludes to the restriction of the protected freedom.

Nevertheless, the constitution as a source includes the freedoms through specific articles, in its preamble, or in its reference to previous constitutions. This is the case in France, mainly in the Constitution of 1958 whose preamble makes reference to the Constitution of 1946; i.e., the basic freedoms with the concept of Article 521-2 are those clearly provided for in the constitution, its preamble, its articles[1], and what it refers to.

In a decision by the French State Assembly on 18 January 2001 about the case of Commune de Venelles, it was provided for the freedom of the local communities administration based on Article 72 of the Constitution. Thus, it considered each freedom provided for by the constitution as a basic freedom[2]. Therefore, the freedoms and rights provided for in the constitutional documents may be considered basic such as the freedom of expression, asylum, movement, etc. In this regard, Mr. Jacques Henry pointed that the State Council can consider the right to strike a basic right because it is guaranteed by the preamble of the Constitution of 1949[3].

The French urgent administrative justice contributed to the recognition of many basic freedoms and considered the individual and public freedoms as basic for the locals, foreigners, and the natural and moral persons. In the 1st decision by the State Council, the freedom of the local communities was recognized despite they are a moral person[4]. In addition, the right of the foreigners to the movement and asylum was recognized. Thus, there is an enshrinement of equality between the classical rights and basic freedoms through reliance on the constitutional criterion in identifying the basic nature of the freedom.

The promotion of the basic rights to basic freedoms covered by the urgent protection as the right to asylum and strike is the outcome

[1] - Cherif Youcef Khater, the role of the urgent administrative justice in protecting the basic freedoms, Arab renaissance house, Cairo, 2007-2009, p. 67.

[2] - Conseil d'Etat, Section, du 18 janvier 2001, commune de Venelles, 229247, publié au recueil Lebon ; https://www.legifrance.gouv.fr.
For further, see: Mohamed Bahi Abu Younes, op. cit., p. 33.

[3] - Olivier LE BOT, La protection des libertés fondamentales par la procédure du référé liberté, L.G.D.J., 2007, p.172 .

[4] - CE, 18 janvier 2001, commune de Venelles, op. cit.

of the independent orientation of the French State Council that denies the jurisprudent trends that segregate them[1]. In this context, the decisions of the Council since 2001 have shown the inclusion of many rights in the basic freedoms, such as the right to asylum, property, and private life[2]. Moreover, the Council confirmed in the decisions issued in the light of Article 2-521 L the consideration of the constitutional rights as basic freedoms, such as the multiplicity, the quality of the users of the public facility, and the ordinary persistence of the education facilities[3].

2- **The various sources of the basic freedoms:**

In this case, the freedom finds its source in the constitution and legal texts; this case does not raise issue, but confirms its importance. In most cases, a given freedom is guaranteed by the conventions, constitution, and the laws. Thus, the urgent administrative judge can refer to them in the decisions when considering a given freedom or right as basic. This is the take of the Algerian administrative judge who, in a decision by the urgent department at the administrative court of Laghouat on 27 June 2013[4], considered that the honest electoral practice is one of the basic freedoms and rights guaranteed by the constitution. In this context, it was clear how he used many sources including the conventions, constitution, laws, and even a presidential order dated on 07/02/2004 about the presidential elections[5].

The diversity of the freedom sources may result in disharmony between these texts. In this case, the administrative judge commits to referring to the constitution and the related laws in making his decisions; such as the reference of the State Council to Article 04 of

[1] -There are various jurisprudent trends that segregate the freedom and right. The beginning of this jurisprudent disagreement was about the emergence of the theory of the transition in the ordinary French justice that returned after the reform of the urgent administrative justice in 2000.

[2] - Paul CASSIA, Les référés administratif d´urgence, L.G.D.J,2003,p114.

[3]- Paul CASSIA, Les référés administratif d´urgence, op cit, p 115 .

[4] - Administrative urgent order published in a Magister thesis, Helalbi Kheira, the emergency in the administrative field, Magister thesis, annex 13, University of Algiers, p. 236.

[5]- Refered to by : Helalbi Kheira, the emergency in the administrative field, op. cit, p. 236.

the constitution, which is related to Law of 30 June 1881 on the public meetings, to consider the right of a political party to hold meetings[1].

3-The absence of the constitutional text as a source for the basic freedoms:

In this case, the difficulty faced by the urgent administrative judge lies within the reliance on the legal texts alone to describe this freedom as basic. Thus, he relies on infra constitutional texts; i.e., the urgent administrative judge considers the constitution as the origin of the notion of the regulated freedom in the ordinary laws[2]. In this case, considering the freedom is about considering its interests that make its constitutional value[3], excluding the hierarchy of the legal texts. In this regard, the urgent administrative judge considered the union freedom, the meetings, the contraction, the personal freedom, and the freedom of job[4] despite they are provided for by normal laws.

B) subtitle: : The implicit use of the constitution in the original competency:

The urgent administrative judge can employ the constitutional rules according to a flexible method that enlarges the range of the urgent protection of the freedoms. This use includes integrating many public and individual freedoms and rights and the legal principles that have a constitutional value in the basic freedoms. In fact, this is not an explicit use of the constitutional rules in the urgent-freedom case. As for the other cases, mainly the urgent-suspension, the urgent administrative judge does not explicitly refer to the constitutional rules in his rulings. Thus, what is the basis of this flexible use of the constitution (1) and what is its range (2)?

[1] - Olivier LE BOT, La protection des libertés fondamentales par la procédure du référé liberté, op.cit, p172.
[2] - Olivier LE BOT, op.cit,p 173-174.
[3] - Mohamed Bahi Abu Younes, op. cit., pp. 34-35.
[4] - Mohamed Bahi Abu Younes, op. cit., p.35. See also:
François BRENET, La notion de liberté fondamentale au sens de l'article L 521-2 du CJA , R.D.P, 2003 , n° 06 , p. 1554 .

1- **The basis of the flexible use of the constitution in the urgent-suspension:**

In 1954, Vedel pointed that the constitution is a basis for the administrative law. Because the role of the State Council was meant for consultations in the beginning, its role was less than what it should had been before 1958[1]. Moreover, the role of the urgent administrative judge in suspending the old enforcement was little. Besides, due to his policy in the severe application of this measure, the ordinary judge got the title of "the protector of the freedoms and rights" in the light of his competency.

Nevertheless, this did not last long after the reforms on the administrative urgent justice after 2000. In this regard, he played a key role in protecting the freedoms and rights. Among the important reforms, we find the rejection of the old system to suspend the enforcement of the administrative decisions and its substitution with another system characterized with immediacy. It is the provision of the French legislator in Article 1-521L of the administrative justice law, which is considered an alternative of the classical case related to the suspension of the enforcement of the administrative decisions; it is the case provided for by Article 919 of the Algerian Administrative and Civil Procedures Law.

Despite that the posteriori control exercised by the urgent administrative judge is characterized with the temporary nature, does not affect the origin of right, and its authority is limited to suspending the administrative decisions, the discretion in researching the conditions of this case, mainly the serious doubt[2], allows exercising a hidden constitutional task that is deduced from the provisions. In this case, the urgent administrative judge examines the administrative

[1] - Bernard STIRN, Constitution et droit administratif, Nouveaux Cahiers du conseil constitutionnel n° 37, octobre 2012, https://www.conseil-constitutionnel.fr.

[2]- Article 919 of the Administrative and Civil Procedures Law provides: "whenever it is found out after verification that there is a special aspect that may raise a serious doubt about the legality of the decision…"
Article 1-521 L of the French Administrative Law provides that "Et qu'il fait état d' un moyen propre à créer, en l'état d'instruction un doute sérieux quant à la légalité de la décision".

decision to detect any internal or external flaws that may justify its suspension with declaration of its abolition[1], such as the incompetency, the form, the violation of the law, etc. Thus, the contested administrative decision may affect many constitutional freedoms and rights, such as the private life. In addition, the violation of these rights and freedoms may be contested by PQC[2].

For instance, we can raise the serious doubt of not respecting the rights of the defense, violating the private and family life[3], or suspending the enforcement of a decision due to the disrespect of the inter partes principle related to the rights of the citizens and their relation with the administration[4]. Besides, it may be related to the rights of the foreigners such as extending the residency, the asylum, and the family reunion.

2-The range of the implicit use of the constitutional rules:

Article 919 of the Algerian Administrative and Civil Procedures Law and Article 521-1 of the French Administrative Justice Law, on the suspension of the administrative decisions, focus on the appeal against an administrative decision, even by refusal, that violates or hinders the exercise of a right[5]. Thus, its range is related to the range of the administrative decisions whose scope includes many topics related to the regulation of a given right or freedom and the refusal decisions. The last are explicit where the administration shows its will with writing or verbally. On the other the other hand, it may be implicit by the silence of the administration towards the submitted

[1] - Berkayel Radia, the urgent administrative case according to the administrative and civil producers law, Richat al Silm house of publication, 2015, p. 83.

[2] - J-C Bonichot, P. Cassia, B.Poujade, Les grands arrêts du contentieux administratif, 3éme édition, Dalloz, 2011,p298.

[3] - Lahcen Ben Chikh Ath Melouia, letter in the administrative emergencies, Vol. 01, Houma house, 2015, pp. 68-69.

[4] - Ghani Amina, the emergency justice in the administrative articles, Houma house for printing, publication, and distribution, 2014, p. 62.

[5] - Laila Ait Oubli, the specificity of the urgent protection of the basic freedom in facing the misappropriation case and the suspension of enforcement case, proceedings of the 05th meeting on the justice of suspending the enforcement of the administrative decisions, on 25-26 May 2011 at the University of El Ouedi, Sakhri printing house, p. 67.

request. In addition, we must point that the old system of the suspension of the enforcement had not been applied on the refusal decisions, based on an ancient judicial effort by the French State Council in the case of AMOROS in 1970; thus, it had been used until 2000[1].

Despite that the administrative judge does not explicitly refer to the constitutional rules, he efficiently contributes to the protection of the constitutional freedoms and rights through the apparent review of the administration activities. Despite the temporary nature of his orders in this procedure, he contributes to the protection by guaranteeing the temporary stability of the legal positions of the litigants until the settlement of the abolition case.

Section II: The confirmation of the supremacy of the constitution in the secondary competency:

The amendments in the system of control over the constitutionality of the laws through the adoption of the posteriori control mechanisms allow the judge to rule the exception of constitutionality according to specific condition. This system is known in France as the primary question of constitutionality PQC. Thus, we raise questions about its content (A), and the role of the urgent administrative judge in its enshrinement (B).

A) subtitle: The content of the PQC:

The referral measure used in the posteriori control on the constitutionality of the laws allows the individuals to review the laws that affect their freedoms and rights in front of the courts that consider the dispute over them. Thus, we shall tackle the concept of the primary question of constitutionality (01) and its conditions (02).

[1] - Ghani Amina, the emergency justice in the administrative articles, op. cit., pp. 66-67.

1- **The concept of the PQC**

It is a measure provided for in the French constitutional amendment on 23 July 2008[1]. It allows the litigants over a freedom or a right to submit an appeal against the constitutionality of the law during the prosecution when they think the text violates the constitutional rights and freedoms. This is known as the priority issue and is handled without delay[2]. We can deduce the feature of priority from article 32-2 of the organic law 2009-1523 that applies Article 61-1 of the French Constitution[3].

As for the Algerian legislator, he provided for this measure in Article 188 in the constitutional amendment of 2016. In this regard, he kept it in Article 195 of the Constitution of 2020 that provides that it is possible to notify the Constitutional Council when one of the litigants in front of a judicial body claims that the legislative provision that governs the dispute violates the constitutional rights and freedoms. This is known as the exception of constitutionality.

2- **PQC conditions**

To accept the exception of constitutionality in the PQC in front of the judicial bodies, a set of conditions must be met, as provided by Article 61-1 of the Statute of the French constitutional amendment and applied by the organic law 2009-1523 of 10 December 2009. These conditions are shown in the organic law 18-16 of 02 September 2018 on the conditions and methods of applying the exception of constitutionality. In this line, the conditions are formal, procedural, and objective, as follows:

- The procedural formal conditions:

This includes the conditions regarding the form of the PQC, its methods, and the subjects who have the right to raise it, according to

[1]- Constitutional LAW No. 2008-724 of July 23, 2008 on the modernization of the institutions of the Fifth Republic, JORF n°0171 of July 24, 2008.

[2] - Hafdi Souad, the constitutional and legal organization of the basic freedoms and rights in Algeria and the methods of their guarantee, Houma house, Algeria, 2018, p. 232.

[3] - article 23-2, Organic LAW no. 2009-1523 of December 10, 2009 relating to the application of article 61-1 of the Constitution, JORF n°0287 of December 11, 2009

the legal texts. The PQC is guaranteed for the litigants only. They can submit it during the prosecution regardless the nature and degree of the case. The request must be written and independent from the rest of the defenses, even if the measures of the prosecution are oral. The litigants in this case are the plaintiff, the defendant, and any other part out of the dispute. Besides, it is guaranteed for all the people, be them citizens, foreigners, natural, or moral[1].

We must point that the judge cannot automatically raise the exception of constitutionality to maintain the principle of neutrality[2], unlike the case in Egypt where the judge can stop the case and refer it to the supreme constitutional court to consider the constitutionality of the text to be applied in the case[3]. This is a positive point that serves his role as a protector of freedoms and rights, unlike in Algeria and France.

-The objective conditions:

Article 23-2 of the previous law shows the objective conditions in France. They are related to the request and the legal text it revolves around. The 1st condition requires that the text is applied on the dispute or makes its basis. The 2nd is that the legislative text must affect the right or the freedom to be protected, mainly if it restricts it. The 3rd requires that the text is not a text that had already been considered by the Constitutional Council, and that the request must be serious. In this regard, the 1st condition that is about the connection of the legal text under dispute, its range must be determined because the administrative judge faces many texts and laws that the administration enforces such as the organic, ordinary, and procedural laws, the regulations, and the individual decisions. The French texts that regulate the PQC describe it as "Dispositions législative". Thus, its

[1] - Abd al Rashid Tabbi, the role of the judicial bodies in promoting the constitutionality mechanism, communication in the international seminar in the Constitutional Council on the protection of the rights and freedoms, https://www.coursupreme.dz

[2] - Abd al Rashid Tabbi, op. cit., pp.

[3] - Mostafa Mahmoud Ismail, PCI in the French law "comparative study with the Egyptian Legal system", the international journal of the jurisprudence, justice, and law, Vol. 02, No° 01, 2021, p. 14, https://ijdjl.journals.ekb.eg/article.

range is limited to all the ordinary laws issued by the parliament and the orders of the president. In addition, he has no authority on what is issued by the executive authority.

As for the 2nd condition, the rights and freedoms concerned with the posteriori control are all what is included in constitutional block in France. In this regard, it includes the freedoms and rights mentioned in the Constitution of 04 October 1958, its preamble, the texts that it refers to, the Human Rights Declaration, the Constitution of 1946, and the Environment Chart of 2004[1]. As for Algeria, there is no reference to any constitutional block, and the range of the freedoms and rights concerned with this control is the constitution. Through the last amendment of the Algerian constitution, the exception of constitutionality has been kept as a mechanism of the posteriori control in front of the judicial bodies; however, the constitutional council changed into the constitutional court in the 1st section of the 4th chapter "the control institutions".

The 3rd condition about the seriousness and risk of the demand is about the harm that emerges from the application of the law on the right or freedom in the original dispute, and the justifications that must be referred to in the demand. On the other hand, the aim of this condition is prohibiting the submission of requests arbitrarily with no solid ground.

B) subtitle: The range of the urgent administrative judge authority in the referral request:

Since the referral request system came into force on 01 March 2010, many requests have been submitted to the urgent administrative judge, not the Algerian legislator. Thus, we question the nature of the role of the urgent administrative judge (1) and the effect of settling the referral request on the dispute (2).

[1] - Dali Said, the priority constitutionality issue and the French constitutional council, the Algerian journal for laws and political sciences, Vol. 06, No° 02, 2021, p. 439.

1- settling the referral request:

Before referring the PQC by the urgent administrative judge to start the liquidation system, the judge can accept or refuse it. In this context, he can accept it if he sees it raises a serious doubt about the decision contested by the urgent-suspension procedure and that the dangerous and illegal violation of a basic freedom is met by the urgent-freedom. On the other hand, he may refuse it according to the law[1], such as when the case is not part of his competency or is not urgent.

Among the cases accepted by the French State Council, we find the case submitted by a resident under house arrest since a year due to the security emergency. In this context, he saw it violated his right to movement. Due to the risk of this case, the urgent administrative judge accepted its referral to the Constitutional Council to settle his case, against the Law of 16 December 2016 on the extension of the emergency state until 15 July 2017, within 03 months[2]. Besides, the French State Council refused a request asking to order the Prime Minister to delay the regional elections until the end of the security emergency. In this context, the plaintiff submitted a request in the light of the PQC against the Law of 15 January 215 on making regional elections before December 2015. In this case, the urgent administrative judge saw that the application of the emergency state by the Law of 2 November 2015 neither affects the freedom of casting votes nor raises any security issues that make it necessary to delay the regional elections on 06 and 13 December. Thus, because the case did not meet the conditions, the referral request was refused according to Article 2-521L[3].

Besides, the referral request in the case of Dieudonné was refused because it contested a previous judicial decision made by the State Council, while the referral request must be against a legal text according to Article 61-1 of the Constitution[4]. Despite that the referral

[1] - The cases of refusing the urgent request are determined by the legislator in Article 924 of the Administrative and civil Procedures law. As for the French legislator, he determined them in Article 3-522L.

[2] - CE , 16 janvier 2017, n° 406614, https://www.legifrance.gouv.fr.

[3] - CE,01 décembre 2015, n° 394888, https://www.legifrance.gouv.fr.

[4] - CE,11 janvier 2014, n° 37455, https://www.legifrance.gouv.fr.

request is a secondary case that is part of the original case, it is applicable in the exceptional circumstances. In this regard, 07 requests were made during the emergency state in France in 2015 against the house arrest and the use of the computer data that were confiscated during the inspections. In addition to ending the emergency state, two requests of PQC were sent to the urgent administrative judge[1].

2- The effect of the referral request on the authority of the urgent administrative judge:

The referral request in the light of PQC raises two important points. The first is about the fate of the case submitted to the judge because the referral request has the priority nature. The second is about the effect of the constitutional council on the dispute and the plaintiff. In this context, as for the effect on the request, Article 23-3 of the organic law 2009-1523 provides that the judge who receives a referral request of PQC suspends the case until the settlement of the request. However, he can continue the case in the urgent cases. Thus, the urgent administrative judge has a discretion to decide the continuity or delay of the case.

The decision of the state council on 22 July 2016 provides that in case of the referral to PQC, the judge can use his prerogatives provided for in Article 521-1 and call for taking the necessary procedures if the request meets the conditions[2]. In this context, the decision of 16 January 2017 No° 406614 shows that despite the judge accepted the referral request, he did not take any measures regarding the original dispute and waited for the decision of the constitutional council[3]. After the council makes sure of the seriousness of the request, he settles it within 08 days and then refers it to the constitutional council to settle it within 03 months. Thus, it shall rule that the legal text goes with the constitution and, thus, no effect shall

[1] - Maxime Charité, l'incompétence du juge du référé-liberté pour suspendre l'exécution d'une décision portant nomination d'un membre du conseil constitutionnel, RDLF 2022 chron. n°09, https://revuedlf.com.

[2] - CE, ord de référé,22 juillet 2016,n° 400913, https://www.legifrance.gouv.fr.

[3] - CE,16 janvier2017,n°406614, https://www.legifrance.gouv.fr.

rise on the original case, or rules the text is unconstitutional and, thus, the judge excludes it.

Conclusion

The study of the importance of the urgent administrative justice raises many questions that we can discover through the periodical examination of its provisions. Its importance is no more limited to investigating its competencies, procedures, or orders; rather, it has many dimensions such as the constitutional, the political, and the economic. The constitutional dimension shows many aspects that we discussed in the study. This is thanks to the developments imposed by the realistic practical requirements that aim at strengthening the protection of the freedoms and rights in the light of the ordinary judicial practice.

On the other hand, the French urgent administrative judge efficiently enshrined the supremacy of the constitutional rules through the referral request as a very important secondary case that protects the freedoms and rights and enshrines the law and legal security. In the end, we must point that the notion of the constitutional dimension is wide and is not limited by the role of the urgent administrative judge. In this context, it includes the other competencies of the administrative justice, such as the role of the consultation state council that has important constitutional dimensions, mainly in making the laws and the dialogue between the judges and the state institutions.

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