Judicial control of exceptional administrative regulation procedures

الرقابة القضائية على أعمال الضبط الإداري الاستثنائية

Slimani Hindoun

Faculty of Law, University of Algiers 1

slimanihindoun56@gmail.com

Received: 30 /12/2021 Accepted:21/05/2022 Published juin2022

Abstract:

By the fact that exceptional circumstances are unexpected events and pose a threat to the state, and in order to react to these circumstances, the legislator granted the administration some broad powers with the aim of maintaining public order, and thus has expanded the powers of administrative regulation bodies in an unusual way from what is the case under normal circumstances. However, despite the wide powers of the regulation organs, the administration is not entitled in any way; to abuse its power and authority. Therefore, judicial control is found as a guarantee that the administration would not deviate from the limits set for it, even under exceptional circumstances.

Key words: Exceptional circumstances –Public order –Exeptional powers –judicial control.

الملخص:

تعتبر الظروف الإستثنائية أحداثا غير متوقعة تشكل خطرا جسيما وغير إعتياديا على الدولة ككل؛ ومن أجل مجابهة هذه الظروف؛ منح المشرع للإدارة صلاحيات وسلطات واسعة جدا.

وأهم ما يميز الظروف الإستثنائية هو لجوء الإدارة إلى إستعمال إجراءات وتدابير لم تكن لتستعملها في ظل الظروف العادية. حيث تتسع سلطات الإدارة التقديرية بشكل كبير وهذا قد يسبب مساسا بالحقوق والحريات المكفولة دستوريا. ولكن رغم هذا التوسع في الصلاحيات فإنه لا يجوز لسلطات الضبط الإداري الخروج عن هدف المحافظة على النظام العام وتعتبر الرقابة القضائية ضمانا لذلك.

الكلمات المفتاحية: الظروف الاستثنائية – النظام العام – الصلاحيات الاستثنائية – الرقابة القضائية

*** corespondant author : Slimani Hindoun**

Introduction:

People's enjoyment of freedom is relative, which means that freedom ends where the Rights of the other person begin. From this basis, the administrative authorities work to regulate their practice in order to achieve what is required to maintain public order within the framework of the powers granted to them by law. In other words, if they exceed these drawn limits, their actions are illegal and may be revoked or annulled.

However, the circumstances of the state are not always of the same nature. Some exceptional circumstances may arise with multiple forms and different sources, and often involve a high degree of danger that affects the state and its whole system. Of course, these circumstances are an exception to the usual situation in the life of societies, which is characterized by stability, tranquility, and the application of normal legal rules prepared for normal circumstances. Also, the administrative authorities' compliance with the provisions of these rules under exceptional circumstances would make the law separate from reality and in violation of the fact that the law is a product of society .This is why the obstruction of the activities of the bodies, led to granting them permission to deviate from those rules and according them exceptional and broad powers to face the current circumstances.

The question that arises here is:

To what extent are the administrative control and regulation actions taken under exceptional circumstances subject to judicial control?

In order to answer this problematic, we will address the following sections:

First Section: The legal nature of the decisions issued under exceptional circumstances.

Second Section: The administrative judge's control over the legality of decisions issued in exceptional circumstances,

Section 1: The legal nature of the decisions issued under exceptional circumstances

The gravity of administrative regulation increases in exceptional circumstances, where the powers of the control authorities expand to the point of going beyond the principle of legality as it is in normal circumstances, so that the regulation organs find themselves facing exceptional legality. Accordingly, sufficient guarantees must be found to protect individual rights and freedoms.

Judicial control is the strongest of these guarantees, but the question that arises is the extent to which decisions announcing exceptional circumstances, as well as decisions issued under exceptional circumstances are subject to judicial control. We will limit ourselves in this article to the decisions announcing the states of emergency and siege (under section 1) or decisions issued in application of the declaration of states of emergency and siege (under section 2).

Under section 1: The decision to declare states of emergency and siege between acts of sovereignty and acts of administration

Exceptional circumstances require the administration to take exceptional measures to confront the emergency crisis, and exceptional circumstances are usually determined and controlled by a legislative text[1]or by a text in the constitution that authorizes the executive power represented in the person of the President of the

[1]This is what we find in France, since it was the first to introduce the state of emergency in 1955 by law 55-385 of 3 April 1955, after the outbreak of the Algerian revolution. As a result, the state of emergency in France is not constitutionalised, but organised according to a legislative text despite repeated attempts, the last one in 2016 by President François Hollande, but it failed. The state of siege is, for its part, consitunionalised.

أنظر كذلك د.أكرور ميريام ؛ نظام حالة الطوارئ في القانون الفرنسي ؛ المجلة الجزائرية للعلوم القانونية و السياسية ؛ كلية الحقوق جامعة الجزائر 1 ؛ المجلد 58 العدد 1 سنة 2021 ص 334-337

Republic to exercise the authority of control in exceptional circumstances; and this is what is enshrined in the Algerian constitution[1].

Accordingly, the two states of emergency and siege are announced by a presidential decree, and we know that the latter is an administrative decision and that it affects and restricts rights and freedoms. So, we wonder about the possibility of appeal in administrative court alleging abuse of authority?

The answer to this question requires first defining the legal nature of the decision to declare states of siege and emergency. In this regard, this issue has known a wide doctrinal controversy, as well as a divergence of the judiciary's attitude.

1- The position of jurisprudence on the legal nature of states of emergency and siege

Jurisprudence is divided into two currents. The first current considers that declaring a state of emergency is the exclusive authority of the President of the Republic and falls within the framework of acts of sovereignty, and thus outside from the jurisdiction of the judiciary. The decision (presidential decree) declaring a state of emergency cannot be subject to appeal on the pretext of overstepping the authority, and this is the prevailing opinion in national jurisprudence. For example, Professor "Massaoud Chihoub" sees that the President of the Republic, while he is in the process of exercising the authority to take every measure that deems appropriate to preserve national independence and the integrity of its territory and its constitutional institutions, he also exercises an act of the government and is therefore not subject to control[2].

As for the second current of jurisprudence, the decision to declare a state of siege and a state of emergency is not considered to be an act of sovereignty, as the latter is mainly related to diplomatic work and generally involves actions taken by the executive branch in its capacity as a representative of the state and as a legal person under international law[3].Accordingly, the decisions to declare a state of

---

[1] أنظر المرسوم الرئاسي 20-442 المؤرخ في 30 ديسمبر 2020 المتضمن التعديل الدستوري ؛ ج ر العدد 82 المؤرخة في 30 ديسمبر 2020

[2] أنظر د. مسعود شيهوب ؛ الحماية القضائية للحريات ؛ الحماية القضائية للحريات في الظروف الإستثنائية ؛ المجلة الجزائرية للعلوم القانونية و السياسية ؛ كلية الحقوق جامعة الجزائر 1 ؛ المجلد 35 العدد 1 ص 33

[3] خالد عبد الكريم الميعان ؛ نظرية أعمال السيادة ومدى مخالفتها لحق التقاضي في النظام القانوني الكويتي ؛ مجلة الجامعة الإسلامية للدراسات الشرعية و القانونية ؛ المجلد 28 سنة 2020 ؛ ص 399

emergency and siege are outside the sphere of sovereignty acts and are merely administrative acts that can be challenged under the pretext of overstepping the authority before the administrative judiciary, like other administrative decisions.

2- The legal nature of the decision to declare states of emergency and siege according to the judiciary

Exceptional circumstances are a judicial theory invented by the French Council of State on the occasion of its decision in the "Heyriès case" on June 28, 1918[1]. It recognized the administrative authority, in cases of necessity such as war and disasters, to exceed normal legality in the event that it is impossible to respect it .At the time, the Council of State refused to appeal the decision to declare a state of siege on the grounds that it is one of the acts of sovereignty and adopted this position in many cases, such as "the Palengat" resolution issued on May 13, 1932. After the decision of 1948 which included the state of siege, the French judge gradually considered decisions to declare a state of siege[2], and approved in his decision issued on 23October 1953in"Huckel case", that the decision to declare a state of siege is not an act of sovereignty, and it, therefore, can be appealed under the pretext of abuse of authority[3].

The state of emergency was recently known in France in 1955 during the Algerian liberation war. The state of emergency was introduced under Law 55-385 of April 3, 1955, and declared by a presidential decree. The state of emergency, like the state of siege, has also undergone a legal evolution, where the French Council of State refused to consider the lawsuits filed to cancel the decree of the state of emergency, as it is a sovereign act and thus departs from its attributions.

This is what the Council of State relied on in one of the reasons for its decision issued on December 9, 2005 in the case of "Ms. Allouech"[4], as it considered that the authority of the President of the Republic to declare a state of emergency was an exceptional authority and is,by its nature, outside the scope of the legality judge's

[1] Michel Guillot "The state of emergency in France: the administrative judge and the protection of freedoms, REVISTA ESMAT, ano10, n 15, Jan to June 2018, p 265.
[2] François saint-bonnet, "The state of emergency and legal qualification", research papers on fundamental rights (CRDF), n ° 06, 2007, p33.
[3]Pierre Tifine, « French administrative Law, part 2, REVUE Générale du droit on line no 19360, 2013
[4]Michel Guillot, Ibid, P 275.

control, but it abandoned this idea due to the negative consequences resulting from the launch of the application of the theory of acts of sovereignty. In order to ensure protection of individual rights and freedoms in the face of administration, it considered that declaring a state of emergency is an administrative act, and it, therefore, may be subject to the control of the administrative judge[1].

Therefore, we note that it has accepted the lawsuit in the case of“ Human Rights League”(la ligue des droits de l'homme) in 2015, where it demands the repeal of the Presidential Decree 1478-2015 issued on November 14, 2015, and this in itself constitutes an abandonment of the Sovereign Acts theory[2]. The French Council of State accepted the lawsuit in the case of .M B...D which aims to repeal Presidential Decree no. 2020-1257 of October 14, 2020 containing the declaration of a state of health emergency[3], and the case was rejected in the matter for lack of foundation, given that the decree in question was repealed by law No. 2020-1379 of November 14, 2020, that includes the extension of the state of emergency[4].

What we can say in this regard, is that the administrative judge exercises control over decisions declaring a state of emergency and siege on the grounds that they are actions based on the discretionary power of the President of the Republic.

As for Algeria, it tried to contain the political crisis that it witnessed following the vacancy of the post of President of the Republic, after the sudden resignation of“Chadli Ben djedid”, which led to the destabilisation of the political entity of the state and its entry into insecurity[5], necessitating to declare a state of siege by Presidential

---

[1] قرناش جمال و قنوش الطيب ؛ تأملات في أعمال السيادة على ضوء محطات القضاء الإداري ؛ مجلة نبراس للدراسات القانونية ؛ المجلد 5 العدد 1 مارس 2020 ؛ ص 99

[2]Michel Guillot, op. cit, P 275.

[3]CE (1ere et 4éme chambres réunies), n°445833,4/06/2021/

[4] The state of emergency system in France goes through two phases: the first gives the President of the Republic the authority to declare a state of emergency by a presidential decree in the Council of Ministers. In the second phase, if the extension of the state of emergency exceeds 12 days, it must, according to Article 2 of Law 55-385 regulating the state of emergency, take place under a legal text issued by Parliament, and becomes, then, subject to constitutional control.

[5]غضبان مبروك و غربي نجاح ؛ قراءة تحليلية للنصوص القانونية المنظمة لحالتي الحصار و الطوارئ ومدى تأثيرها على الحقوق و الحريات في الجزائر ؛ مجلة المفكر ؛ كلية الحقوق و العلوم السياسية جامعة محمد خيضر بسكرة ؛ العدد 10 ص 22

Decree 196-91 dated on 4 June, 1991[1].The state of siege was lifted after four months by Presidential Decree336-91 dated on September 22, 1991. Then, a state of emergency was declared by Presidential Decree 442-92 dated on February 09, 1992 and the state of emergency was extended by Legislative Decree 93-02 of January 06, 1993, and this state was lifted by Order 11-01 of February 23, 2011.

However, we cannot discern the position of the judiciary about the legal nature of the decisions to declare states of emergency and siege because, on the one hand, this problem did not arise before, and on the other hand, the announcement of these two cases was on the same occasion, So, we wonder about the possibility of appealing the control decisions issued in implementation of the announcement of these two cases, especially given that these decisions have a direct impact on the rights and freedoms of individuals, and this is what we will address in the second requirement of this topic.

Under section2: The nature of the decisions issued in application of the decisions to declare states of siege and emergency.

The declaration of a state of siege or a state of emergency will undoubtedly lead control authorities to take a number of measures and procedures that would infringe on the rights and freedoms of individuals. Thus, the administration was granted the power of arrest, which is essentially the jurisdiction of the judiciary, which means that the administration can place every adult person in the Police station if it finds that he committed an act that constitutes a danger to public order and security and the normal functioning of public utilities.

The decision to arrest affects human dignity, and constitutes a temporary deprivation of freedom. So, this procedure must only be adopted to face certain situations, such as cases of necessity, or exceptional circumstances, where the administration has only this exceptional measure to confront the situation .

In the event of arresting persons, the administration has discretionary authority, provided that there are serious considerations, such as if the person is considered a threat to public security, or if he violates public order and public morals.

1- The current that recognized the permissibility of appealing the decision to declare states of emergency and siege, given that they fall within the acts of the administration

[1] المرسوم الرئاسي 91-196 المؤرخ في 4 جوان 1991 المتضمن تقرير حالة الحصار ؛ ج ر العدد 29 المؤرخة في 12 جوان 1991 .

As is the case in France, the decisions issued implementation of the declaration of states of siege and emergency are also subject to judicial control, and this is what is explicitly stipulated by French Law No. 2015-1501 dated on November 20, 2015 in Article 4 that states that the measures taken within the framework of declaring a state of emergency are subject to the control of the administrative judiciary within the limits of the conditions set by the Administrative Judiciary Law, especially what is stated in its fifth book[1].

It should be also noted that the French administrative judge subjected such decisions to his control since the first declaration of the state of emergency in 1955, but in a narrow and limited manner, and it lasted until 2015 when he extended his control[2].This is due to the development of the control over the discretionary authority of the administration, where the judge was no longer satisfied with traditional oversight and control, but rather applies the conformity control in the field of administrative regulation in normal circumstances. The judge invented proportionality control on the occasion of his ruling in the BENJAMIN case in 1933[3], and then devoted it to regulation decisions in exceptional circumstances in 2015.

For its part, the French judiciary went to the possibility of appealing an arrest decision, even though the Egyptian judiciary considers the declaration of a state of emergency to be an act of sovereignty, and this is what the Egyptian Supreme Court went to, for example, in its decision No. 797 of May 27, 1978, in which the following was stated: "No one is justified in relying on civil liberties and infringing on the right of security and freedom of any citizen, and his or her established constitutional guarantees against arbitrary arrest and detention, so that the dignity and freedom of the individual are an indispensable pillar of the nation's reputation, strength and authority, and since the evidence from the plaintiff's papers that his arrest by a Republican Decree based on the emergency law does not correspond to any of the two cases for which the arrest is permitted, the arrest decision is then void because there are no reasons for arrest. Accordingly, decisions issued in application of states of emergency

[1] Michel Guillot, op.cit.p 276.
[2] Ibid.p 276.
[3] Ibid.p 280

and siege are administrative acts that can be challenged by cancellation before the State Council.

2- The legal nature of the decisions issued in application of states of emergency and siege in Algeria

Administrative detention in Algeria is organised according to Article 4 of Presidential Decree 91-196 containing the declaration of the state of siege, and Articles 4 and 5 of Presidential Decree No. 4492 of February 9, 1992 containing the declaration of state of emergency[1]. Article 4 of the decree declaring the state of siege granted to military authorities empowered with police powers the right to take administrative detention measures within the border conditions set by the government. This is of course ,if it appears to them that a person is engaging in an activity that poses a threat to public order and security, and impedes the proper functioning of public facilities. The article also restricted the competent authorities to consulting the Public Order Care Committee before taking any measures. As for Article 4 of the decree declaring the state of emergency, it assigned to the Minister of the Interior and local collectivities in all or part of the national territory, and also the Wali in his regional department, the power to take measures to preserve or establish public order through decisions in accordance with the provisions stipulated in the same decree and in the context of respecting government directives The Article 5 stipulates this measure and reads as follows: "The Minister of Interior and Local Collectivities may order the placement of any adult person whose activity is deemed to constitute a danger to public order and security or to the good conduct of public interests, in a security center in a specific location".

Through extrapolation of these articles, we will find that administrative detention is carried out in accordance with decisions regarding detention under a state of siege. The competent authority to

---

[1] المرسوم الرئاسي 92-44 المؤرخ 9 فيفري 1992 المتضمن الإعلان عن حالة الطوارئ؛ ج ر العدد 10 المؤرخة في 9 فيفري 1992

It should be noted that administrative detention was also organised according to Executive Decree No. 91-201 dated on June 25, 1991 containing the limits of placement in a security or police station in application of Article 04 of Presidential Decree 91-196 containing the state of emergency. The first article granted the authority to take measures of placement in security centers to military authorities, given that in the case of a state of siege, power shifts from civilian to military, and the military authorities are empowered carry by police powers and, thus, take arrest decisions.

issue an order to place a person in security centers is the three regional councils[1],Article 04 / paragraph 3 of the decree declaring the state of siege guaranteed the right of administrative appeal according to the hierarchy of competent authorities, and in the application of the latter. We note that Executive Decree 91-201 of 25 June, 1991[2] in its articles 2 and 3 limited these authorities to the regional council to maintain public order. The administrative appeal is lodged within 10 days from the date of the order of placement in a security center, and not from the date of notification of the decision, which may lead to an abuse of power by the administration[3], However, these articles did not refer to the possibility of a judicial appeal in the event of the administrative appeal being rejected.

As for the Executive Decree No. 92-75 of February 20, 1992 specifying the conditions for the application of some provisions of Presidential Decree No. 92-44 of February 9, 1992 declaring a state of emergency[4], it considers in its article 2 that placing in specific security centers is an administrative and preventive measure aimed at preventing the person of going back and forth, on the grounds that his activity poses a threat to public order or the proper functioning of the public facility. This authority to issue an arrest decision was authorized to the Minister of Interior and Local collectivities or any person authorized by the latter. As for article 4, it stipulates the possibility of administrative appeal against the decision of arrest to the Wali of the wilaya of residence of the concerned person, and the "Wali" is responsible for submitting the appeal to the regional council, but it did not specify the period for the administrative appeal, while Article 7 of the same executive decree granted a period of 15 days from the date of notifying the regional council to decide on the appeal, but it also did not address the possibility of judicial appeal.

In the light of the above, we implicitly conclude from the aforementioned legal texts that the administrative detention decisions are only administrative decisions, and can, therefore, be challenged on the grounds of cancellation before the administrative judiciary, after

---

[1] غضبان مبروك ؛ غربي نجاح ؛ مرجع سابق ؛ ص 69

[2] المرسوم التنفيذي 91-201 المؤرخ في 25 جوان 1991 المتعلق بضبط حدود الوضع في مركز الأمن و شروطه ؛ ج ر العدد 31 المؤرخة في 26 جوان 1991

[3] مسعود شيهوب ؛ مرجع سابق ؛ ص 37

[4] أنظر المرسوم التنفيذي 92-75 المؤرخ في 20 فيفري 1992؛ المحدد لشروط تطبيق بعض أحكام المرسوم الرئاسي 92-44 المؤرخ في 9 فيفري 1992 المتضمن إعلان حالة الطوارئ ج ر العدد 14 المؤرخة في 23 فيفري 1992 .

the deadlines for responding to the administrative grievance have been exceeded.

We also point out that administrative detention decisions are issued on the basis of the discretionary authority of the competent body which, alone, has the power to assess whether the activity practiced by a person poses a threat to public order and security, as well as if it impedes the proper functioning of public utilities. This is what we will discuss in the second topic.

Section 2 :The administrative judge's control over the legality of the regulation decisions issued in exceptional circumstances

Exceptional circumstances require administrative control bodies to be prevented with broad exceptional, discretionary powers and jurisdictions, which would be illegal if they were issued in normal circumstances.

However, these powers and authorities acquire the character of legitimacy in exceptional circumstances, which leads them to be freed from the constraints of ordinary legitimacy to be subject to exceptional legitimacy. However, this does not at all mean that they are absolute and unrestricted. Although regulation organs do have discretion in exceptional circumstances, they must respect rights and freedoms.

Therefore, a balance must be struck between the work of control and the respect for the rights and freedoms of individuals, by subjecting the work of administrative control in exceptional circumstances to judicial review. This is what French justice went to as the inventor of this theory.

In the beginning, the judge refused to exercise a control on the legality of the decisions taken in exceptional circumstances, as they were considered as acts of sovereignty, but he gradually changed his position.

This control has known several developments, as the French judge, when examining the case to cancel the regulation decision issued in exceptional circumstances, was satisfied with control of the external elements of the decision without examining its internal elements.

In the first step of control of the internal pillars of the regulation decision in exceptional circumstances, the judge began to monitor the cornerstone of the cause by extending his control over the material existence of the facts, and then expanding it to include the legal adaptation of the facts.

In this context, and with the increasing abuses committed by the administration's controlling power under exceptional circumstances, the French judge resorted to applying the proportionality control that he neglected when monitoring administrative control decisions taken in normal circumstances, and this is what we will see in the first topic .As for the second topic , we will address the powers of the administrative judge in deciding the administration's responsibility for the damages caused to individuals as a result of the exercise of the administrative control authority, and thus the entitlement of those affected by these actions to claim compensation. Additionally, we will examine the powers of the administrative judge in determining the basis of the control bodies' responsibility.

Under section 1 : Judicial control of the external pillars of administrative control decisions under exceptional circumstances

This topic will deal with the judge's control over the external elements of the decision of regulation issued in exceptional circumstances, and then it will address the judge's control over the internal elements of the administrative decision by focusing on the cornerstone of the cause.

1- Control of the legality of the pillar of jurisdiction

The pillar of jurisdiction is "the legal capacity or legal power that the legal rules governing jurisdiction in the State give to a specific person to act and make administrative decisions in the name and on behalf of the administrative function within the State in a legally reliable manner "[1], With reference to the legal texts governing exceptional circumstances, the authority competent to announce these texts is designated in advance, so that we find that the constitutional legislator in Article 97 of the Constitution of 2020 has exclusively granted the President of the Republic the authority to declare the state of siege and emergency by virtue of a presidential decree.

This was also announced by the French Constitution concerning the establishment of the state of siege, and the law 55-385 concerning the state of emergency. This law stipulates that only the President of the Republic can declare this exceptional situation, but that its extension falls within the competence of the Parliament.

As for the decisions taken in application of the declaration of the state of exceptional circumstances, we note that Presidential Decree 91-196

[1] عمار عوابدي؛ نظرية القرارات الإدارية بين علم الإدارة العامو و القانون الإداري؛ دار هومة للنشر و التوزيع ؛ الجزائر 1999 ؛ ص 69 .

containing the declaration of the state of siege grants the competent military authorities the power to issue arrest warrants. With regard to the state of emergency, the Minister of the Interior and Local collectivities is the competent party to issue the arrest warrant according to Article 5 of Presidential Decree 92-44

Consequently, the problem does not revolve around the pillar of jurisdiction in its personal aspect in relation to those cases provided for by law, but the problem arises in the case where measures are taken in the absence of a text specifying the competent authority. In which case, it is the exceptional circumstances that constitute the reason for the supervisory authorities not to apply the pillar of jurisdiction[1], and this is what the French judiciary stated in its decision of 07-01-1944 in the Fecamp case[2], where it recognised that the Mayor of Fecamp is competent to make decisions required by the circumstances in which the commune lives, considering that given the inability of the commune's revenues to meet needs, the Mayor can order the temporary collection of taxes from the town's traders and industrialists.

Algerian law addressed the control of the jurisdictional pillar in the decision of the Administrative Chamber of the Supreme Council dated on 02-07-1969, concerning the seizure by the National Liberation Front of a plot of land in July 1992. It is legally known that the Wali alone has the power to take a seizure decision, but the judges of the Council considered the seizure decision taken by the National Liberation Front to be legitimate in view of the exceptional circumstances that Algeria was living, and considered that the National Liberation Front was the only competent authority in this particular case[3].

2- Jurisdictional control over form and procedure:

With reference to the legal texts governing the state of siege and the state of emergency, Article 97 of the constitutional revision has drawn limits for the President of the Republic through a set of procedures, including the meeting of Supreme Security Council and the consultation of the President of the Council of the Nation, the

[1] مقدود مسعودة ؛ التوازن بين سلطات الضبط الإداري و الحريات العامة و القانون الإداري ؛ دار هومة للطباعة و النشر ؛ 2017؛ ص 257

[2] محمد عبد الحميد مسعود؛ إشكالية الرقابة القضائية على مشروعية قرارات الضبط الإداري؛ مطابع الشرطة للطباعة والنشر والتوزيع؛ القاهرة؛ 2007؛ ص 419

President of the National People's Assembly, the Prime Minister or the Head of Government as the case may be, and also the President of the Constitutional Court. When we discuss the legal nature of decisions to declare a state of emergency and a state of siege, and in the absence of the position of the judiciary, we have concluded that Algerian jurisprudence considers it a matter of acts of sovereignty.

The question that we are asking is: if the President of the Republic declares a state of siege or emergency, he will comply with the procedures laid down in the constitution. What is the fate of this decree? Will it always remain immune from scrutiny since it is an act of sovereignty? Or is it possible to challenge the illegality of this decision on the grounds of flawed procedures?

Some jurisprudence, notably Professor Messaoud Chahoub, has questioned whether a decision to declare a state of emergency could be subject to judicial review, because it was vitiated by a formal and procedural defect, even if the announcement of this state was an act of sovereignty[1], I consider that there is a contradiction, since if one considers that the decision to declare a state of emergency and a state of siege is an act of sovereignty, it is immune from judicial review even if it is taken in violation of the procedures, formalities and modalities provided for by the constitution.

As for the decision issued in application of the declaration of a state of emergency and state of siege, since it is of an administrative nature, it remains, in case of formal and procedural defects, subject to the control of the administrative judge who can annul it.

In this respect, we will find the decision of the Administrative Chamber of the Supreme Court no. 110145 dated on July 07, 1996 in the case of the Wali of Tlemcen against the vice-president of the Municipal people's assembly of Trani. The decision of the Wali to suspend the president of the Municipal people's assembly from exercising his functions was taken in exceptional circumstances after the declaration of the state of siege, and the purpose of issuing the decision was to put an end to the disorder caused by the political strike and to ensure protection of public order, in addition to the impossibility of applying Article 32 of the Municipal Law while the members of the People's Council were on strike and refused to meet. Therefore, exceptional circumstances would justify the Wali's

[1] مسعود شيهوب؛ مرجع سابق؛ ص 33

violation of the legal procedure of listening to the members of the Municipal People's Assembly[1].

It is noted in this decision that the judge considered that the exceptional circumstances are sufficient to make the Wali's decision legitimate, despite his violation of legal procedures.

Under section 2 : Judicial control of the internal pillars of administrative regulation decisions under exceptional circumstances

After the French judge has been content to extend his control over the external pillars which are, the pillar of the cause, the place and the purpose of the administrative decision, and after having refused to control the internal pillars on the grounds that they fall within the discretionary power of the administration[2], he gradually abandoned this position to extend his control over the internal pillars of the control decisions. In the beginning, the control was of traditional type on the pillar of the cause and limited to the control of the material existence of the facts, and beyond to the control of the legal adaptation of the facts, and since then he generalised his control by applying modern mechanisms to exercise it.

1 -The traditional control of the pillar of cause in regulatory decisions under exceptional circumstances:

As I mentioned earlier, this control consisted first of controlling the material existence of the facts and then their legal adaptation.

a- Control of the material existence of facts

This type of control allows the administrative judge to compare the grounds on which the administration has based its decisions with the grounds that are consistent and in line with reality[3], and therefore the administrative decision becomes liable to be annulled whenever it appears to the administrative judge that the administration has based its justification on incorrect facts from a material point of view. Thus, verifying the material existence of the facts is one of the aspects of control on the pillar of cause[4].

---

[1] راضية بركايل؛ مبدأ المشروعية في ظل الظروف الإستثنائية للدولة؛ أطروحة دكتوراه؛ كلية الحقوق والعلوم السياسية؛ جامعة مولود معمري تيزي وزو؛ 2020؛ ص 302

[3] Michel Guillot, op cit, p 60.

This was established by the French Council in the field of control in "the Grange case" of June 30, 1959[1]. The facts date back to the time when the French authorities in Algeria issued a decision to place lawyer Grange under house arrest, on the basis of the decree dated on March 16, 1956, on the grounds that he belonged to a secret organisation aimed at sowing unrest and insecurity and assisting the Algerian mujahedin. In this case, the judge checked the material existence of the facts on which the administration based its decision, and concluded that it was inaccurate, and decided to annul the house arrest decision. This is what the French Council of State stated in its decision of July 17, 1965 annulling the contested decision on the grounds of the inaccuracy of the facts on which the Minister of the Interior based his decision to arrest M. Magne de la croix[2].

The Council of State also devoted its control over the validity of the facts by virtue of a decision it issued, in addition to the decree no. 01192 dated on April 09, 2001[3], according to which the Council judges ruled that the legal description of the behavior that gave rise to the employee's involvement in a terrorist network was correct and valid, as this fact or behavior constituted a breach of the duty of reserve provided for in the Executive Decree no. 93-02 of February 06, 1993, which consecrated the extension of the state of emergency.

b- Control of legal adaptation of facts

The control of the legal adaptation of the facts means the ascertainment if this one meet and is in accordance with what the legislator wanted or not. This process requires a comparison between the decision's situation and the legal text. If it is proved that the justification on which the administration relied to make its decisions does not correspond to the legal description linked to it, the judge cancels the administrative decision[4].

---

[1]CE 30 juin 1959, Grange, Rec,85, concl. Chardeau: AJ 1959.2 .23.

[2] راضية بركاي ؛ مرجع سابق ؛ ص 310

[3]State Council Resolution No. 001192 of April 09, 2001, State Council Journal, No. 1, Sahel Publications, Algeria, 2002, pp. 119-121.

[4]محمود سلامة جبر ؛ رقابة مجلس الدولة على الغلط بين الإدارة -تكييف الوقائع و تقديرها – رسالة دكتوراه ؛ كلية الحقوق جامعة عين شمس ؛ مصر سنة 1992 ص 48

See also Dr. Ali Ahmed Hassan, "The Powers of the Administrative Judge Regarding the False legal adaptation for the facts in the field of employee discipline", Journal of the Faculty of Law, Al-Nahrain University, Iraq, Volume 13, N 2, 2011, p19.

In this context, the process of legal adaptation of facts requires subjecting a specific fact or a particular case to the legal rule related to it, and this by giving the latter, after it has been characterised by generality and abstraction, a particular status and a concretisation. Thus, the process of adaptation represents, in fact, a mental process[1]which changes the legal rule of law from a position of motionlessness to a position of movement[2].

The French Council of State laid down the basis for the control of the legal adaptation of the facts in cases where the administration has a discretionary power[3] on the occasion of its decision in the GOMEL Resolution dated on April 04, 1914[4], which concerns the exercise of the administration's control in normal circumstances. Concerning exceptional circumstances, the French judiciary established it in its decision rendered on November 10, 1958 in the "Mazéma" case[5].

2- Modern judicial control of regulatory decisions issued under exceptional circumstances:

Through this element, we will address the control of clear confusion and the control of proportionality. Indeed, the judge expanded the scope of his control to include the cases that he excluded from the review of the material existence of facts and the validity of their legal adaptation[6]. This kind of control was first called “the control of manifest error in qualification of facts”.

However, the judge quickly assessed the importance of the facts on which the administration based its decisions and their compatibility with the taken action, and qualified this type of control as "Control of manifest error of assessment"[7].

---

[1]Jean Michel GALLARDO, “the discretionary power of the administration and the excess of power”, PhD thesis, University of LAN ET PAYES DE L'ABRI, Faculty of law, economics and management, 2002, P131

[3]At first, the French Council of State was limited to control the legal adaptation of facts regarding the limited authority of the administration in several decisions, including the “Bennedication de Portiers” case of 7-7-1904,

[4]CE April 04, 1914, GOMEL, Rec 484, The major Decisions of administrative jurisprudence, 17th edition, DALLOZ, 2009, p 161 to 171.

[5]راضية بركابل؛ مرجع سابق؛ ص 45

[6]As we have already mentioned for cases related to issues of technical and scientific nature, and the regulation decisions related to the activity and residence of foreigners.

[7]It should be noted that control of manifest error knows several other names in the Arabic language, due to the richness of the Arabic dictionary.

The control of manifest error allows the judge to check whether the decision taken by the administration is manifestly proportionate to the facts on which it was based[1]. Furthermore, this control requires the administrator, before taking a decision, to comply with the need to be logical and objective in the process of estimating and adapting the facts on which he bases his discretionary decision[2], and this is what the French Council has established with regard to regulatory decisions in exceptional circumstances in the application of its decision dated on July 25, 1985 in the D'Agostini case[3].

As for Algeria, it has not obtained any decision concerning the review of the manifest error of the regulation in exceptional circumstances

a-The control of manifest error of assessment:

Controlling the apparent error in the assessment allows the judge to monitor whether the decision issued by the administration is clearly proportional to the facts on which it was based[4]. Furthermore, this control imposes on the administrator, before making his decision, to be logical and objective when carrying out the process of estimating and adapting the facts on which he bases his discretionary decision[5].

The control of manifest error is carried out in three levels:

- The first level: this level relates to the control exercised by the judge for errors that the administration makes when evaluating the facts, or in their legal description, especially in the absence of a legal text.
- The second level, relates to the control of a clear error based on the legal adaptation of the facts, and this in the case of specific legal texts, but in presence of technical reasons that prevent the possibility of implementing normal control, as it is the case with building permit disputes.
-The third level, in which the control of the obvious error focuses on the proportionality (appropriateness) between the reason of the decision and its place on the one hand, and on the other hand the field of applications of this level, especially in the control of administrative decisions in normal circumstances. This kind of control has, later,

---

[1] خلاف وردة؛ الرقابة القضائية على المشروعية الداخلية لقرارات الضبط الإداري؛ رسالة دكتوراه جامعة محمد لمين دباغين سطيف؛ 2014؛ ص 210 .

[2] العربي زروق؛ التطور القضائي لمجلس الدولة الفرنسي في رقابة السلطة التقديرية للإدارة ومدى تأثر القضاء الجزائري بها؛ مجلة مجلس الدولة؛ منشورات الساحل الجزائر؛ العدد 8 سنة 2006؛ ص 123.

[3] CEF 25 july 1985, M Dagostini Rec p 226.

[5] العربي زروق ؛ مرجع سابق ؛ ص 123

been extended to be applied under exceptional circumstances through the decision issued on July 25 1985 in the Mrs Dagostini case.

b- Proportionality **control**

The original rule is that the control of the administrative judge stops at the point of verifying the material existence of the facts, the accuracy of their legal adaptation, and the non-contravention of the object of the decision to the law, without going beyond the research of the importance of these facts and their seriousness. However, the judge broke these restrictions and allowed himself to control the seriousness and the importance of the facts and called it "proportionality control", and this means that the administrative judge examines the importance of the facts invoked by the administration to take its decisions, and its proportionality to the action undertaken on its basis.

Thus, the administrative judge is not satisfied with deciding administrative disputes on the basis of the law in force, but he also considers the circumstances and data surrounding the decision, and evaluates the administration's assessment of these conditions and data. In the area of public liberties, this was the case in the BENJAMIN case of May 19, 1933. The Council of State also applied the proportionality control in 2015 in the light of exceptional circumstances, by virtue of the decision dated on December11, 2015 concerning the case of Mr Domenjoud.

As for Algerian law, we do not discern its position in the absence of relevant judicial decisions.

Conclusion:

At the end of this research, we conclude that the review by the administrative judge of regulatory decisions pronounced in exceptional circumstances has undergone a remarkable evolution, particularly in France, which is the cradle of the theory of exceptional circumstances, for a time, the judge refrained from reviewing decisions declaring a state of emergency and a state of siege on the grounds that they are acts of sovereignty,

and therefore, immune from control, but he quickly abandoned this idea and began to consider decisions declaring a state of emergency and a state of siege as administrative decisions, which can therefore be challenged on the grounds of annulment.

As for Algeria, the judiciary is unknown as there is no case before it, but it suggests that decisions declaring a state of emergency and state of siege are considered as acts of sovereignty, while

decisions issued from the implementation of the decision declaring the state of emergency and state of siege, like the decision of administrative detention, are considered as administrative acts, and are consequently under the jurisdiction of the administrative judge.

When examining the mechanisms adopted by the French judge in his review of the legality of regulatory decisions in exceptional circumstances, we have seen his boldness in reviewing the grounds in ordinary circumstances and then in exceptional circumstances in 1985 and in 2015, the period when French law reached the height of development since it subjected seizure decisions made in exceptional circumstances to proportionality review on the occasion of its deferral in the M. Domenjoud case. As for Algerian case law, its position is not discernible. It has been content to apply the control of the validity of the facts and their legal adaptation in an appropriate manner for each case, which is why we note the scarcity of decisions in this field.

Bibliography:

A: Legal and Regulatory texts:

-المرسوم الرئاسي 20-442 المؤرخ في 30 ديسمبر 2020 المتضمن التعديل الدستوري ؛ ج ر العدد 82 المؤرخة في 30 ديسمبر 2020
- أنظر المرسوم التنفيذي 92-75 المؤرخ في 20 فيفري 1992؛ المحدد لشروط تطبيق بعض أحكام المرسوم الرئاسي 92–44 المؤرخ في 9 فيفري 1992 المتضمن إعلان حالة الطوارئ ج ر العدد 14 المؤرخة في 23 فيفري 1992.
– المرسوم الرئاسي 92-44 المؤرخ 9 فيفري 1992 المتضمن الإعلان عن حالة الطوارئ ج ر العدد 10 المؤرخة في 9 فيفري 1992.
- المرسوم التنفيذي 91-201 المؤرخ في 25 جوان 1991 المتعلق بضبط حدود الوضع في مركز الأمن و شروطه ؛ ج ر العدد 31 المؤرخة في 26 جوان 1991.
-المرسوم الرئاسي 91-196 المؤرخ في 4 جوان 1991 المتضمن تقرير حالة الحصار ؛ ج ر العدد 29 المؤرخة في 12 جوان 1991 .

B-Books:

-عمار عوابدي ؛ نظرية القرارات الإدارية بين علم الإدارة العامو و القانون الإداري ؛ دار هومة للنشر و التوزيع ؛ الجزائر 1999.
- محمد عبد الحميد مسعود ؛ إشكالية الرقابة القضائية على مشروعية قرارات الضبط الإداري ؛ مطابع الشرطة للطباعة و النشر و التوزيع ؛ القاهرة ؛ 2007.
-مقدود مسعودة؛ التوازن بين سلطات الضبط الإداري والحريات العامة؛ دار هومة االنشر والتوزيع 2017.

C-Theses:

-خلاف وردة ؛ الرقابة القضائية على المشروعية الداخلية لقرارات الضبط الإداري ؛ رسالة دكتوراه جامعة محمد لمين دباغين سطيف ؛ 2014.
- راضية بركايل؛ مبدأ المشروعية في ظل الظروف الإستثنائية للدولة؛ أطروحة دكتوراه؛ كلية الحقوق والعلوم السياسية؛ جامعة مولود معمري تيزي وزو؛ 2020.
- محمود سلامة جبر ؛ رقابة مجلس الدولة على الغلط بين الإدارة -تكييف الوقائع و تقديرها – رسالة دكتوراه ؛ كلية الحقوق جامعة عين شمس ؛ مصر سنة 1992 .

- Jean Michel GALLARDO, “the discretionary power of the administration and the judge of excess of power” , PhD thesis,University of LAN ET PAYES DE L'ABRI, Faculty of law, economics and management, 2002 .

D- Journal Articles

–أكرور ميريام؛ نظام حالة الطوارئ في القانون الفرنسي؛ المجلة الجزائرية للعلوم القانونية والسياسية؛ كلية الحقوق جامعة الجزائر 1؛ المجلد 58 العدد 1 سنة 2021.
-العربي زروق؛ التطور القضائي لمجلس الدولة الفرنسي في رقابة السلطة التقديرية للإدارة ومدى تأثر القضاء الجزائري بها؛ مجلة مجلس الدولة؛ منشورات الساحل الجزائر؛ العدد 8 سنة 2006.

-خالد عبد الكريم الميعان ؛ نظرية أعمال السيادة ومدى مخالفتها لحق التقاضي في النظام القانوني الكويتي ؛ مجلة الجامعة الإسلامية للدراسات الشرعية و القانونية ؛ المجلد 28 سنة 2020.
- غضبان مبروك و غربي نجاح ؛ قراءة تحليلية للنصوص القانونية المنظمة لحالتي الحصار و الطوارئ ومدى تأثيرها على الحقوق و الحريات في الجزائر ؛ مجلة المفكر ؛ كلية الحقوق و العلوم السياسية جامعة محمد خيضر بسكرة ؛ العدد 10 .
- قرناش جمال و قنوش الطيب ؛ تأملات في أعمال السيادة على ضوء محطات القضاء الإداري ؛ مجلة نبراس للدراسات القانونية ؛ المجلد 5 العدد 1 مارس 2020 .
– مسعود شيهوب ؛ الحماية القضائية للحريات ؛ الحماية القضائية للحريات في الظروف الإستثنائية ؛ المجلة الجزائرية للعلوم القانونية و السياسية ؛ كلية الحقوق جامعة الجزائر 1 ؛ المجلد 35 العدد

-François saint-bonnet, “The state of emergency and legal qualification”, research papers on fundamental rights (CRDF), n ° 06, 2007
-Michel Guillot “The state of emergency in France: the administrative judge and the protection of freedoms, REVISTA ESMAT, ano10, n 15, Jan to June 2018.
- Pierre Tifine, « French administrative Law, part 2, REVUE Générale du droit on line no 19360, 2013 .