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The President's Legislative Powers to Restrict Rights and Freedoms

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Abstract

This study examines the legislative and regulatory tools available to the President of the Republic under the Algerian constitutional system, as per the 2020 constitutional amendment, and his ability to restrict fundamental rights and freedoms through them. These tools include legislation by decree, independent regulatory authority, and exceptional measures. The study addresses the following central question: To what extent can the President of the Republic, as the executive authority, exercise legislative powers that affect rights and freedoms, and are constitutional and oversight safeguards sufficient to prevent such powers from devolving into arbitrariness under the current constitutional system? The study concludes that the 2020 Constitution maintained the procedural restrictions on decrees while strengthening the role of the Constitutional Court and mandatory prior review; however, the flexibility in the wording of the conditions for urgency and the independent regulatory authority reinforces the structural dominance of the executive branch over the legislative process. The study recommends strengthening the substantive criteria for Constitutional Court review and explicitly exempting freedoms from the scope of subordinate legislation.

Keywords: President of the Republic, legislation by decree, regulatory authority, rights and freedoms, 2020 constitutional amendment, Constitutional Court.

Abstract

This study examines the legislative and regulatory instruments available to the President of the Republic within Algeria's constitutional system under the 2020 constitutional amendment, and the President's capacity to restrict fundamental rights and freedoms through them. These instruments include legislation by ordinance, the autonomous regulatory authority, and exceptional measures. The study is structured around the following research question: To what extent can the President of the Republic, as the executive- -authority, exercise legislative powers that affect rights and freedoms, and are constitutional and oversight safeguards sufficient to prevent these powers from being abused under the current constitutional framework?

The study concludes that the framers of the 2020 Constitution retained the procedural restrictions on ordinances while strengthening the role of the Constitutional Court and mandating prior review. However, the flexible wording of the conditions for urgency and the autonomous regulatory power reinforce the structural dominance of the executive over legislative activity. The study recommends strengthening the substantive criteria governing the Constitutional Court's review and expressly excluding freedoms from the scope of subordinate legislation.

Keywords: President of the Republic, legislation by ordinance, regulatory power, rights and freedoms, 2020 constitutional amendment, Constitutional Court.

Introduction

Fundamental rights and freedoms are the essential pillar and the first building block upon which the rule of law is founded in contemporary constitutional thought, as constitutions strive to provide the necessary safeguards to protect them from any encroachment or abuse, Nevertheless, established legal doctrine affirms that these freedoms are not absolute; rather,

they are subject to restrictions imposed by the requirements of maintaining public order and state stability. In the Algerian constitutional system, it is noted that the President of the Republic holds a pivotal position and possesses broad legislative and regulatory powers that enable him to intervene directly to regulate or restrict these freedoms through the mechanism of legislation by presidential orders and decrees under normal circumstances—a regulatory framework whose contours were decisively shaped following the 2020 constitutional amendment.

The significance of this topic lies in the growing legislative role of the executive branch, represented by the President of the Republic, which undermines the classical concept of the separation of powers and raises questions about how to maintain a delicate balance between the effectiveness of government and the protection of rights. To address this question, the study employed both descriptive and analytical methodologies. The central research question is: What is the nature of the legislative powers granted to the President of the Republic to restrict rights and freedoms in Algeria under the 2020 amendment? And what are the constitutional and oversight limits and safeguards that protect these rights from presidential legislative arbitrariness, whether under normal or exceptional circumstances?

Section One: Legislative Practices of the President of the Republic That Restrict Rights and Freedoms Under Normal Circumstances

“Normal circumstances” here refer to situations other than exceptional ones, in which the President possesses two main tools: legislating by decree in the absence of Parliament, and regulatory authority through presidential decrees.

Section 1: Legislation by Decree in Cases of Parliamentary Absence (Inter-session Periods and Parliamentary Vacancies)

Section 1: Constitutional Conditions for the President of the Republic to Exercise Legislative Authority by Decree (Article 142 of the Constitution)

The fundamental principle in constitutional systems is that legislation is an inherent prerogative of the legislative branch, based on the principle of parliamentary sovereignty in establishing general rules, as affirmed by Article 114 of the Constitution. However, the Algerian Constitution grants the President the authority to legislate by decree pursuant to Article 142 of the 2020 Constitution, and the Constitution limits this authority to the following specific and exclusive cases: when the National People’s Assembly is vacant, during the intervals between parliamentary sessions (parliamentary recesses), in the exceptional case provided for in Article 98, as well as a fourth case mentioned in Article 146, which concerns the enactment of the finance law by decree if Parliament does not approve it within seventy-five days.ⁱ

The constitutional conditions for exercising this mechanism are divided into two types:

- **Substantive conditions:** These consist of the condition of urgency—which the constitutional framers left flexible without establishing a specific criterion for its assessment—and the condition of actual parliamentary absence, represented by a vacancy or recess.ⁱⁱ
- **Formal and procedural conditions:** These include the requirement to seek the opinion of the advisory Council of State, to adopt the decree in the Council of Ministers, and to subject the decree to mandatory prior review by the Constitutional Court, which rules on its constitutionality within ten days; furthermore, such decrees must be submitted to Parliament for approval during its first subsequent session, failing which they are deemed null and void.ⁱⁱⁱ

In this regard, constitutional practice in Algeria has involved the issuance of decrees containing organic laws during periods when Parliament is not in session; one of the most notable examples being Decree No. 21-01, which contains the organic law on the electoral system and was issued following the President of the Republic’s dissolution of the National People’s Assembly^{iv}. This practice raises legal controversy because organic laws are, in principle, subject to strict voting procedures and scrutiny, and their adoption via unilateral decrees constitutes an expansion of the exception that undermines their legal status.

Section II: The Permissibility and Justification of Presidential Decrees Affecting Rights and Freedoms

Article 139 of the 2020 Constitution grants Parliament exclusive jurisdiction to legislate on public freedoms and the protection of rights, and Article 34 explicitly stipulates that restrictions on rights and guarantees must be “by law”^v. However, Article 142 does not explicitly exclude the sphere of rights and freedoms from the scope of presidential decrees. Since a decree has the force of law and supersedes it, the sphere reserved for Parliament remains, in practice, within the President’s purview during periods when Parliament is not in session to ensure that no legislative vacuum occurs.

The primary justifications cited for the permissibility of such interference lie in the need to protect public health (such as during epidemics and pandemics), maintain public security and order, and ensure the institutional stability of the state during transitional periods. Algerian legislative practice has seen the issuance of presidential decrees that have sparked widespread human rights debate due to their direct impact on the system of freedoms, including Decree No. 06-01, which implemented the Charter for Peace and National Reconciliation and imposed punitive restrictions on freedom of expression^{vi}, as well as Decree No. 21-11, which amended and supplemented the Penal Code and, during a parliamentary recess, introduced stricter provisions related to counterterrorism, the classification of organizations, and the protection of administrative and supporting documents.^{vii}

Second Issue: Forms of Restriction Through Regulatory Authority and Presidential Decrees

Section One: Complementary Roles of Legislative Text and Presidential Decrees in Regulating Freedoms.

The division of jurisdiction between law and regulation in the Algerian system is based on the principle of reserved powers; Article 139 of the 2020 Constitution lists the matters on which Parliament legislates, including the system of public freedoms, while Article 141 stipulates that “other matters not covered by the jurisdiction of the law fall within the regulatory authority of the President of the Republic.”^{viii}

This division results in a theoretical complementarity between two functions:

- **The function of law:** establishing the general framework for rights, defining major restrictions, and setting penalties for violations in accordance with Article 34.
- **The function of decrees:** to specify the conditions for administrative implementation and procedural details (such as deadlines, permits, and competent authorities).

However, the boundaries between the elaboration of freedom and its restriction remain flexible in practice; when parliamentary law leaves ample room for regulation (such as a general delegation to a presidential decree to specify the conditions for engaging in media activities, the procedures for accrediting associations, or the procedures for authorizing demonstrations), the executive decree effectively becomes the text that defines the actual scope of freedom. Specialized academic literature describes this phenomenon as “implicit and disguised regulatory delegation,” whereby the regulatory authority can impose procedural restrictions that strip the original legislative text of its protective essence and make the exercise of a right contingent upon the administration’s consent.

Section Two: The Limits of Administrative Control and the Impact of Regulatory Decrees on the Exercise of Fundamental Rights.

Administrative control is the authority of the administration to impose restrictions on individual activity in order to preserve public order in its three components (public security, public tranquility, and public health). Its constitutional legitimacy is based on three principles: reliance on a prior legal basis; proportionality between the measure and the risk; and avoidance of absolute prohibition, which constitutes a nullification of the right and its essence as protected by Article 34.^{ix}

In practice, the executive branch tends to impose restrictions through purely regulatory means; an example is Executive Decree No. 20-69 on measures to prevent and combat the spread of the COVID-19 pandemic, which imposed severe restrictions on individuals’ freedom of movement, assembly, and commercial activity^x. Despite the nature of these restrictions on personal liberty, they were issued based on ordinary public health laws (notably Law No. 18-11 on Public Health) and were not enacted within the framework of constitutional states of emergency, thereby paving the way for the adoption of restrictions through independent administrative measures that go beyond the narrow concept of constitutional legitimacy.

These decrees are subject to constitutional review of their compliance with the Constitution before the Constitutional Court pursuant to Article 190, and to review for the annulment of regulatory decisions before the Council of State^{xi}.

Section II: The President’s Exceptional Legislative Powers in Response to Crises

Extraordinary circumstances are based on the idea of expanding the President’s authority at the expense of the usual safeguards for the protection of the state, and the 2020 Constitution has retained four time-limited situations.

Section I: Legislative Measures in Extraordinary Circumstances (State of Emergency, Blockade, and State of Exception)

Section One: The Legal Framework for the President’s Powers Upon Declaration of Exceptional Circumstances

The 2020 Constitution regulates extraordinary circumstances with strict time limits to prevent indefinite extensions; Article 97 sets the duration of a state of emergency or siege at thirty days, which may only be extended with the approval of both chambers of Parliament, and Article 98 limits the duration of a state of exception to sixty days, requiring mandatory consultation and an immediate session of Parliament to exercise oversight and ensure the elimination of imminent dangers.^{xii}

In terms of legal and legislative classification, a distinction is made in legal theory between two levels:

- ✓ **State of Emergency and State of Siege:** Article 142 does not mention them; therefore, the President of the Republic may not legislate by decree merely by declaring them, although he exercises very broad regulatory and enforcement powers within them, dictated by the necessity to preserve national unity.^{xiii}
- ✓ **State of Exception:** This is considered the most serious from a human rights perspective because it explicitly authorizes the President of the Republic to take exceptional measures to protect institutions, independence, and territorial integrity; Article 142 grants him the absolute power to legislate by decree in the areas of civil liberties and organic laws, thereby effectively concentrating both legislative and executive powers in his hands.^{xiv}

From a judicial perspective, measures taken under Articles 97 and 98 in Algeria effectively fall under “acts of sovereignty” (government decisions traditionally immune from review by the Algerian Council of State), thereby eliminating ex post judicial review of administrative legality regarding their substantive content and shifting the burden of protection entirely to the Constitutional Court through the mechanism of challenging constitutionality provided for in Article 195 when such measures infringe upon guaranteed rights.^{xv}

Section II: The Impact of Declaring a State of Emergency or a State of Siege on the Suspension and Restriction of Certain Rights (Such as Freedom of Movement and Assembly)

Historical experience in Algeria (the declaration of a state of emergency pursuant to Presidential Decree No. 92-44, which lasted nearly 19 years until its lifting by Order No. 11-01 in 2011) has shown that this exceptional constitutional

framework grants the executive authorities broad powers, including: restrictions on freedom of movement (curfews and restrictions on residence), restrictions on freedom of assembly and demonstration (banning gatherings or subjecting them to strict licensing requirements), infringements on personal liberty (detention in security centers based on independent administrative decisions), and restrictions on freedom of the press, publication, and the right to strike.^{xvi} Although Algeria is internationally bound, pursuant to Article 154 of the Constitution (which establishes the primacy of ratified treaties over national laws), by Article 4 of the International Covenant on Civil and Political Rights—which prohibits the suspension or impairment of the “hard core” of rights (such as the right to life, the prohibition of torture, the prohibition of slavery, and the principle of legality of crimes and punishments), the direct legislative impact is manifested in the broadening scope of executive regulations and the practical narrowing of the parliamentary institution’s oversight authority in favor of the immediate effectiveness and urgent speed of the executive branch.^{xvii}

Section Two: Constitutional and Oversight Safeguards to Protect Freedoms from Presidential Legislative Arbitrariness

Section One: The Principle of Non-Infringement of the Essence of a Right (Restrictions Do Not Abolish the Right Itself).

This fundamental constitutional safeguard, introduced in Article 34 of the 2020 Constitution, is based on the distinction between regulating a right and revoking it; A restriction imposed for the sake of public order must not diminish the essence of the right or strip it of its fundamental substance. This is a general provision binding on all public authorities and bodies of the state, including the presidential legislature and the decrees issued by it.^{xviii}

The effectiveness of this principle, both in legal theory and judicial practice, is based on the fulfillment of four complementary criteria: legality and legal basis for enforcement; purposeful legality; necessity and constitutional appropriateness; and proportionality in the strict sense—to ensure that the means of regulating a right do not lead to its deprivation or the stripping of its essence.

Section Two: Parliamentary Oversight and Constitutional Review (Constitutional Court)

First: Ex Post Parliamentary Oversight

Article 142 stipulates that presidential decrees must be submitted to both houses of Parliament during their first session for ratification; otherwise, they are deemed null and void. This oversight, however, faces legal and political limitations stemming from its formal nature—namely, the requirement for blanket acceptance or rejection without the possibility of amending provisions pertaining to civil liberties—and the influence of political consensus between the partisan parliamentary majority and the orientations of the Presidency of the Republic, which diminishes its effectiveness in curbing presidential arbitrariness.^{xix}

Second: Constitutional Oversight (the Constitutional Court)

The 2020 Constitution replaced the Constitutional Council with the Constitutional Court and granted it broader oversight powers, including mandatory prior review of legislative decrees issued pursuant to Article 142 within ten days (Article 142), and ex post review through the mechanism of challenging constitutionality based on notifications from individuals (Article 195). Nevertheless, its effectiveness remains hampered by structural challenges; most notably, the President of the Republic’s direct influence over its composition (appointing the Court’s president and three of the 12 members), in addition to the President of the Republic’s role as chair of the Supreme Judicial Council, as well as the tendency for prior review to amount to a mere formal, literal check that fails to scrutinize the appropriateness of the President’s discretionary authority or to objectively assess the “urgency” requirement based on the facts of the case.^{xx}

Conclusion

Based on the findings of this analytical study, it is evident that the debate over reconciling the powers of the executive branch with the protection of rights and freedoms within the Algerian constitutional system remains a central focus of constitutional development, particularly following the replacement of the previous oversight system with more specialized mechanisms under the 2020 constitutional amendment. The study has concluded with a set of specific findings and recommendations that reflect the current state and future prospects of the legislative and regulatory practices of the President of the Republic and their impact on the legal status of rights and freedoms.

First: Findings

- **Dual Legislative Tracks:** Although the 2020 Constitution established the principle of Parliament’s exclusive authority to restrict rights and freedoms pursuant to Articles 34 and 139, it has, in turn, established parallel and effective channels (such as the legislative exception through decrees under Article 142 and the independent regulatory authority under Article 141) that allow the executive branch to enter this domain reserved for Parliament and fill the legislative vacuum during periods when the legislative body is absent.
- **Flexibility of the “urgency” requirement and expansion of the exception:** Algerian legislative practice has revealed a continuous expansion in the scope of presidential decrees to include the regulation of issues of high human rights sensitivity (such as Decree 21-01 on the electoral system and Decree 21-11 amending the Penal Code), which is primarily due to the flexibility of the constitutional “urgency” requirement and the fact that its assessment is left to the discretion of the issuing authority without clear criteria.
- **The Erosion of Administrative Oversight in the Context of Exceptional Measures:** Exceptional measures and government decisions adopted under Articles 97 and 98 in extraordinary circumstances fall within the category of “acts of sovereignty,” which are traditionally immune from judicial review of legality (by the

Algerian Council of State), thereby shifting the full burden of oversight to the Constitutional Court through the mechanism of challenging constitutionality provided for in Article 195.

- **The Evolution of the Institutional Transformation of Constitutional Review:** The replacement of the Constitutional Council by the Constitutional Court and the granting of the authority to conduct mandatory prior review of legislative decrees constitutes an important procedural safeguard; however, its substantive effectiveness in examining the appropriateness of restrictions and the standards of proportionality remains contingent upon overcoming the structural obstacles associated with the executive branch's direct influence over its composition.

Second: Recommendations

- **Constitutionalizing the Core Rights:** Explicitly stipulate in the core of the constitutional document a prohibition on suspending or restricting rights inherent to the human person (such as the right to life, the prohibition of torture, and fundamental guarantees of due process) under all circumstances, in line with international standards and the obligations arising from Article 4 of the International Covenant on Civil and Political Rights.
- **Legislative Regulation of the "State of Emergency" Provision:** A call for the legislature to define the concept, circumstances, and justifications for a "state of emergency" through objective, well-defined provisions and clear safeguards, to prevent the President's discretionary authority from becoming a pretext for enacting decrees beyond the scope of absolute necessity threatening national security.
- **Prohibition on Restricting Freedoms Through Subsidiary Instruments:** Explicitly and categorically exclude the scope of public rights and freedoms from the purview of Articles 141 and 142, and limit their absolute regulation and temporary restriction to laws enacted by the People's Representatives and debated publicly in Parliament.
- **Expanding the Jurisdiction of the Independent Administrative Judiciary:** Subjecting decisions and regulatory decrees issued by the administration and the executive branch in exceptional cases to review for annulment and abuse of authority, and removing measures that restrict individual freedoms from the category of sovereign acts to enshrine the concept of the rule of law.
- **Enforcing the criteria of substantive proportionality:** Requiring the constitutional judge, when reviewing the constitutionality of orders or ruling on incidental objections, to conduct a thorough review of appropriateness and necessity, and to apply the criteria of proportionality in the strict sense to ensure that a regulatory measure does not result in the deprivation of a right or the erosion of its essence.

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ⁱⁱ **Ibid.**, para. 1, Articles 142

ⁱⁱⁱ **Ibid.**, 2020, Articles 142 and 146

^{iv} Decree No. 21-01 dated March 10, 2021: **Contains the Organic Law on the Electoral System**, Official Gazette of the People's Democratic Republic of Algeria, Issue No. 17, published on March 11, 2021.

^v **Ibid.**, Articles 34 and 139

^{vi} Decree No. 06-01 **implementing the Charter for Peace and National Reconciliation**, Official Gazette of the Republic of Algeria, No. 11, published in 2006

^{vii} **Decree No. 21-11 dated June 18, 2021:** Amending and Supplementing Decree No. 66-156 on the Penal Code (Combating Terrorism and Crimes Committed in the Absence of Parliament), Official Gazette of the Republic of Algeria, No. 49, published on June 20, 2021

^{viii} **Ibid.**, Articles 139 and 141

^{ix} **Ibid.**, Article 34.

^x **Executive Decree No. 20-69 dated March 21, 2020:** Concerning Measures to Prevent and Combat the Spread of the Coronavirus (COVID-19) Pandemic, Official Gazette of the Republic of Algeria, Issue No. 15, published on March 22, 2020.

^{xi} **Ibid.**, Articles 190

^{xii} **Ibid.**, Articles 97 and 98.

^{xiii} **Ibid.**, Articles 97 and 142.

^{xiv} **Ibid.**, Articles 98 and 142.

^{xv} **Ibid.**, Article 195.

^{xvi} **Presidential Decree No. 92-44 dated February 9, 1992:** declaring a state of emergency throughout the national territory, Official Gazette of the Algerian Republic, Issue No. 10, published on February 9, 1992.

^{xvii} **Ibid.**, Article 154.

^{xviii} **Ibid.**, Article 34.

^{xix} **Ibid.**, Article 142.

^{xx} **Ibid.**, Articles 142 and 195.