

Bridging the Gaps: Deconstructing the Legal Nature of Presidential Ordinances in the Algerian and Egyptian Context

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Abstract: Article 142 of the Algerian Constitution and Article 156 of the Egyptian Constitution authorize the President of each country to issue ordinances within legally prescribed areas under specified conditions. In Algeria, this authority extends to diverse domains, including financial matters and exceptional circumstances, while in Egypt; it is invoked primarily during parliamentary recesses or in urgent situations. The classification of these ordinances—whether as administrative or legislative acts—affects the form and extent of judicial oversight applicable to them. This study analyzes the legal nature of presidential ordinances in both Algeria and Egypt, comparing the constitutional frameworks and judicial approaches in each country, calling for clearer constitutional definitions to address ambiguities in their legal status, and recommending reforms for enhanced oversight and clarity.

Keywords: President of republic; ordinance; legal nature, legislation

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Introduction:

The issuance of presidential decrees is one of the most significant legal mechanisms available to the executive authority, specifically the President of the Republic, as outlined in Article 141 of the Algerian Constitution and Article 156 of the Egyptian Constitution¹. This mechanism is part of the broader constitutional framework that grants the executive extensive powers, especially in situations involving parliamentary rationalization in Algeria and during parliamentary recess or urgent situations in Egypt. Article 142 of the Algerian Constitution further empowers the President to issue ordinances within certain legally defined areas, subject to specific conditions and procedures, while in Egypt, ordinances can be issued when the legislative body is not in session, and the need for immediate action arises².

In Algeria, presidential ordinances gain legal force immediately upon issuance, without initial parliamentary scrutiny. The Parliament's role is limited to a binary decision of approval or rejection, without debate, during its subsequent session. Despite the limited parliamentary involvement, its approval is crucial in shaping the legal character of these ordinances. In Egypt, however, Article 156 mandates that presidential ordinances be presented to the Parliament for approval within 15 days of its reconvening. The failure to approve the ordinance results in its retroactive nullification, distinguishing it from the Algerian process where the ordinance takes immediate effect³.

This paper examines whether presidential ordinances in both Algeria and Egypt retain their nature as administrative acts or whether they assume legislative force due to their incorporation of general and abstract rules typically reserved for legislative enactments. The central problematic addressed is: To what extent do presidential ordinances in the Algerian and Egyptian constitutional systems blur the line between administrative and legislative authority, and what criteria determine their legal nature?

Understanding the legal nature of ordinances is critical for determining appropriate judicial oversight mechanisms. The nature of the ordinance influences its rank within the legal hierarchy and the extent of judicial review it is subject to. This study aims to explore the criteria that differentiate ordinances from other legal instruments in both Algeria and Egypt, analyzing their nature before and after parliamentary approval.

The paper is structured as follows: The first section will assess the impact of parliamentary approval on the legal nature of ordinances, while the second section will analyze the nature of ordinances under both normal and exceptional circumstances in Algeria and Egypt.

¹ -Constitution of the People's Democratic Republic of Algeria (amended 2020);Constitution of the Arab Republic of Egypt (2014)

² - Duguit, L. (1923). *Treatise on Constitutional Law*. Paris: Librairie de la Société du Recueil Sirey,Jèze, G. (1934). *Course on Administrative Law*. Paris: Librairie Générale de Droit et de Jurisprudence ;Rousseau, D. (2016). *Constitutional Litigation Law*. 11th ed., Paris: Montchrestien.

³ Troper, M. (1994). *Constitutional Law on Ordinances*. Paris: PUF ;Pactet, P. (2018). *Political Institutions and Constitutional Law*. 37th ed., Paris: Armand Colin.

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TITLE 1: The Impact of Parliamentary Approval on the Nature of Ordinances

The legal nature of presidential ordinances is significantly influenced by the role of parliamentary approval. In both Algeria and Egypt, the transition of ordinances from administrative acts to legislative acts hinges on whether they receive formal endorsement from the legislative body. This approval process is not merely procedural but fundamentally alters the legal character and enforceability of ordinances. Understanding how parliamentary oversight shapes the legal status of these executive instruments is crucial for analyzing their position within the constitutional framework of each country. This title explores the criteria that determine the legal transformation of ordinances before and after parliamentary action, highlighting key distinctions between the Algerian and Egyptian systems.

First Subsection: The Legal Nature of Ordinances before Parliamentary Approval

In considering whether ordinances issued before parliamentary approval are administrative or legislative acts, it is essential to distinguish between the two. Administrative decisions, unlike laws, can be challenged before administrative courts for annulment and compensation. Laws, by contrast, can only be contested through constitutional means.

This distinction has generated significant jurisprudential controversy, owing to the division of powers within the state and the flexible concept of separation of powers. Most contemporary governance systems prevent a strict organic and functional separation of powers; thus, the legislative and executive branches must work in concert. As a result, distinguishing administrative decisions from legislative acts is imperative to clarify the legal character of ordinances. Jurisprudence has oscillated between two standards: the organic criterion, discussed in the first section, and the objective or material criterion, elaborated in the second.

First Subtitle: The Organic Criterion for Distinguishing Between Administrative and Legislative Acts

The organic criterion classifies legal acts based on the entity responsible for issuing them. Under this standard, legislative acts are those issued by the Parliament, while acts issued by the executive authority are considered administrative decisions. The classification of an act, the legal system governing it, and its legal significance are all determined by the entity that issues it. If an act is issued by the executive, it is considered administrative; if issued by the legislature, it is deemed legislative. A key aspect of the organic criterion lies in the procedural distinction between the issuance of legislative acts and administrative decisions. Legislative acts follow a specific procedure that is distinct from the process for issuing administrative decisions. In Algeria, Article 142 of the 2020 Constitutional Amendment mandates that the President of the Republic consult with the Council of State before submitting the draft ordinance to both chambers of Parliament for approval, without discussion. These procedures closely resemble the legislative process, particularly due to the requirement of parliamentary approval, distinguishing them from ordinary presidential decrees⁴.

⁴ GIRARD Didier, *Les « actes de Gouvernement » demeurent insusceptibles de tout recours juridictionnel en France*, RGD ; BON Pierre, *Les substituts à la loi : les actes législatifs de l'exécutif*, *Annuaire international de justice constitutionnelle*, presses universitaires d'Aix Marseille, 2004.

Second Subtitle: Distinguishing legislative and administrative acts according to the objective criteria

The objective or material criterion classifies acts based on their content rather than the body issuing them. This approach emphasizes the substance of the act, irrespective of the issuing authority or the procedures followed. Under this standard, legislative acts are not confined to those issued by the Parliament; the executive authority may also issue general and abstract rules that are legislative in nature, even if not formally enacted by the legislature. This is particularly relevant for ordinances after parliamentary approval, as they acquire legislative force even if initially considered administrative acts⁵.

1- The Formal Approval of Parliament

The formal approval of ordinances by Parliament significantly influences their legal nature. Once Parliament approves an ordinance, it assumes the same rank as laws passed by the legislature. However, the approval process itself is constrained, as the Constitution limits parliamentary oversight by obligating Parliament to either accept or reject the ordinance without discussion. While Parliament's role in this process is minimal, its approval fundamentally alters the legal status of ordinances, elevating them from administrative acts to legislative acts. It is necessary to examine the legal nature of Parliament's decision regarding ordinances, as this decision serves as the catalyst for the transformation of ordinances into legislative acts. Several questions arise in this context: Is parliamentary approval a legislative act or a purely parliamentary function? What is the fate of ordinances that are not presented to Parliament? If the Constitution specifies only approval or rejection, what happens if Parliament remains silent?

2- The Nature of Parliament's Decision

Parliament's decision to approve or reject an ordinance can be classified as either a parliamentary or legislative act. This distinction is vital in determining the scope of judicial oversight. In some legal systems, such as Egypt, judicial review of parliamentary decisions regarding ordinances is limited, considering them immune from judicial control. However, when Parliament approves an ordinance, it exercises a legislative function, thereby subjecting the ordinance to constitutional oversight rather than administrative judicial review⁶.

TITLE 2: The Legal Nature of Ordinances Under All Circumstances

This title will address the legal nature of ordinance in normal circumstances and exceptional one along with Egyptian constitutional position, in the first subtitle and the second subtitle following the same order.

⁵ - Belkadi, A. (2022). "Constitutional Amendments in Algeria: An Analysis of Presidential Term Limits and Parliamentary Powers Post-2020." *Middle East Law Journal*, 35(4), pp. 345-367. Bendimerad, S. (2021). "The Role of Judiciary in Algeria's Constitutional Transition." *Constitutional Law Review*, 40(5), pp. 154-169.

⁶ Democracy Reporting International (2020). "Algeria's Constitutional Revision of 2020: An Analysis of the Process and Outcomes." DRI Algeria Report.

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First Subtitle: The Legal Nature of Ordinances in Normal Circumstances

This section will address the legal nature of ordinances issued under normal circumstances in both constitutional systems, the Algerian and the Egyptian.

In Algeria, and particularly when Parliament is either in recess or when the National People's Assembly is vacant. In such cases, ordinances retain their administrative character until they receive parliamentary approval, at which point they assume legislative force⁷.

While in Egypt, from the review of judgments and texts, it is evident that we are dealing with a parliamentary, rather than legislative, act. This is supported by several arguments as follows:

1- The regulation of the Egyptian House of Representatives classifies them as parliamentary acts, governed by the same procedures that apply to other parliamentary actions. Article 195, paragraph one, states, "Proposals submitted by members to amend certain provisions of the presidential decree are considered proposals for laws and are subject to the procedures outlined in these Rules."

2- The Supreme Constitutional Court has declared that the Parliamentary approval of a presidential decree does not alter its nature; it remains, as it was prior to the approval, an administrative action.⁸

3- Article 121 of the Constitution specifies, in its second paragraph, that the quorum for approving decisions, including parliamentary decisions, is the absolute majority of the members present.⁹ In contrast, the approval of laws, according to the following paragraph, requires a majority of no less than one-third of the council's members. This reinforces the understanding that we are not dealing with a legislative act, as stipulated by Article 194 of the internal regulations of the House of Representatives, which states, "The council's decision to reject a presidential decree is made by an absolute majority of those present." Thus, the majority applicable to decisions does not pertain to legislative actions. Moreover, a presidential decree, if rejected, is not subject to the President's objection, as stipulated in the Constitution for legislative acts. Even in cases where a presidential decree is approved, it does not conclude the legislative process.¹⁰

The judiciary has upheld this interpretation, as the Supreme Constitutional Court rejected the challenge to the House of Representatives' Decision No. 1 of 2016, which declined the presidential decree regarding civil service of 2015, stating: "The House of Representatives'

⁷ Al-Badawi, Tarek (2016). "Constitutional Review of Presidential Ordinances in Egypt: An Analytical Study," *Journal of Constitutional Law*, 10(2), 150-172.

Shalaby, Ahmed (2021). "The Role of the Egyptian Supreme Constitutional Court in Protecting Democratic Governance," *Cairo University Law Review*, 35(4), 205-228.

El-Morsi, Nabil (2019). "The Evolution of Presidential Powers in the Egyptian Constitution of 2014," *Middle Eastern Constitutional Studies*, 12(1), 75-98. Hegazy, Mona (2015). "The Judiciary and the Rule of Law in Post-Revolution Egypt," *Egyptian Journal of Legal Studies*, 28(3), 45-67

⁸ Dr. Fathy Fikry, *State Responsibility for Non-Contractual Acts* – 1995 – p. 64 and following.

⁹ Article 177 of the internal regulations of the People's Assembly of 1972 unreasonably restricted the assembly's rejection of the presidential decree by requiring a special majority of the members. This restriction was further emphasized in the 1958 Constitution, where Article 53 linked the rejection of presidential decrees to the agreement of two-thirds of the members of Parliament.

¹⁰ Article 122 of the Egyptian Constitution regulates the objection to and issuance of draft laws, stating: "The President of the Republic has the right to issue laws or object to them. If the President objects to a draft law approved by the House of Representatives, he must return it within thirty days of notifying the council. If the draft law is not returned within this period, it is considered law and issued"

choice not to approve the presidential decree and to recognize its implementation during the previous period does not, in itself, constitute a legislative act subject to judicial review of its constitutionality by this court under Article 192 of the Constitution. Rather, it is a parliamentary act performed by the House of Representatives, within a jurisdiction reserved for the council to assess the appropriateness of enacting legislation and recognizing its validity during the previous period, which represents the essence of the legislative authority entrusted to it under Articles 101 and 156 of the Constitution. Consequently, this decision resolves into a distinct parliamentary instrument, independent in its nature and separate in its classification, shedding its ties to the procedural and substantive provisions contained within the presidential decree itself. This necessitates that the aforementioned decision of the House of Representatives remains beyond the scope of constitutional judicial review, in adherence to the principle of separation of powers and balance among them, as outlined in Article 5 of the Constitution.¹¹

Second Subtitle: The Legal Nature of Ordinances in Exceptional Circumstances

The Constitution grants the President of the Republic the authority to issue ordinances in exceptional circumstances. These ordinances are temporary in nature, and designed to address urgent situations. However, their legal status raises important questions regarding their duration and the extent of judicial oversight. In cases where ordinances extend beyond the exceptional circumstances under which they were issued, constitutional safeguards are necessary to ensure that they do not infringe upon fundamental rights and freedoms.

On another hand we cannot deny that Presidential ordinances represent a significant test to the traditional doctrine of separation of powers, which seeks to prevent the concentration of legislative, executive, and judicial functions within a single branch of government. In both Algeria and Egypt, the issuance of ordinances by the executive branch raises critical questions about the balance of power between the branches of government¹².

1. Algeria: Executive Dominance and Parliamentary Marginalization

In Algeria, **Articles 141 and 142** of the Constitution grant the President substantial authority to issue ordinances, especially during times of parliamentary recess or in exceptional circumstances. This executive power is often exercised without prior parliamentary consultation, effectively sidelining the legislative branch. The ability of ordinances to take immediate effect, even before parliamentary approval, blurs the line between executive and legislative authority.

- **Impact on Legislative Power:** The fact that ordinances can bypass initial parliamentary scrutiny diminishes the role of the National People's Assembly in the legislative process. This executive dominance challenges the separation of powers by allowing the President to unilaterally enact measures that carry the force of law.

¹¹ Supreme Constitutional Court – 2/7/2022 – Official Gazette on 4/7/2022 – No. 26 (repeated).

¹² - Benyoucef, A. (2021). Mechanisms of Judicial Control Over Ordinances in Algerian Law. *Journal of Legal Studies*, 30(2), 15-3

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- **Judicial Oversight:** While the Algerian Constitutional Council can review the constitutionality of ordinances, its role is limited, as the President's actions are often justified under the broad definition of "exceptional circumstances."

2. Egypt: Balancing Executive Flexibility with Legislative Control

The Egyptian Constitution, particularly **Article 156**, takes a more restrictive approach by requiring that ordinances issued during parliamentary recess must be presented for approval within 15 days of Parliament's reconvening. If the ordinance is not approved, it is retroactively nullified.

- **Tension between Speed and Oversight:** The requirement for swift parliamentary approval introduces a check on executive power but also poses challenges in urgent situations where immediate action is necessary. The retroactive nullification of unapproved ordinances serves as a safeguard against executive overreach, preserving the legislative branch's authority.
- **Judicial Review:** The Supreme Constitutional Court in Egypt plays a crucial role in ensuring that the executive does not overstep its bounds. The Court has the authority to strike down ordinances that exceed the scope of what is constitutionally permissible, thus reinforcing the principle of separation of powers.

3. Comparative Implications

- **Executive Overreach:** In both Algeria and Egypt, the use of ordinances highlights the potential for executive overreach, particularly when checks and balances are weak or poorly enforced. The ability of the President to enact laws through ordinances challenges the core principle of legislative supremacy.

And in order to simplify the concepts of ordinances in the Algerian and the Egyptian a comparison table is set down below.

4. Legal Framework Comparison Table

To highlight the differences and similarities between the Algerian and Egyptian constitutional approaches to presidential ordinances, the following table provides a comparative overview:

Aspect	Algeria	Egypt
Relevant Constitutional Articles	Article 141, 142 of the Algerian Constitution	Article 156 of the Egyptian Constitution

Scope of Ordinances	Broad powers, including financial matters and exceptional circumstances	Limited to urgent situations during parliamentary recess
Parliamentary Oversight	Ordinances take immediate effect, with Parliament given the option to approve or reject without debate	Ordinances must be approved within 15 days of Parliament's reconvening, or they become nullified
Judicial Review	Subject to review by the Algerian Constitutional Court	Reviewable by the Egyptian Supreme Constitutional Court, especially regarding constitutionality
Legal Status Before Approval	Considered administrative acts prior to parliamentary approval	Treated as administrative actions unless ratified by Parliament
Impact of Rejection	No retroactive nullification; ordinances remain effective until explicitly repealed by Parliament	Retroactively nullified if not approved by Parliament

Discussion on Recent Constitutional Reforms

The Algerian and Egyptian constitutional frameworks have undergone significant amendments in recent years, particularly in response to political pressures and demands for greater accountability.

1. Algeria:

- The 2020 Constitutional Amendment introduced additional checks on executive power, such as requiring the President to consult the Council of State before issuing certain ordinances. However, ambiguities remain regarding the definition of "exceptional circumstances" under which these powers can be invoked.
- Recommendations for further reforms include the introduction of a mandatory parliamentary debate on ordinances and enhanced judicial oversight mechanisms to review the constitutionality of such executive actions.

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2. Egypt:

- The 2014 Constitution introduced a more restrictive approach to presidential ordinances, limiting their use to urgent situations when Parliament is not in session. This reflects an attempt to curtail executive overreach witnessed during previous regimes.
- Despite these restrictions, there are calls for reforms to clarify the scope of "urgent circumstances" and to strengthen the role of the Egyptian Supreme Constitutional Court in reviewing the validity of ordinances. Such reforms would enhance legal certainty and protect democratic governance.

Conclusion:

This study has demonstrated that presidential ordinances whether issued under normal or exceptional circumstances, initially function as administrative decisions but can acquire legislative force upon parliamentary approval. However, the lack of clear constitutional guidance on the consequences of parliamentary inaction or rejection introduces significant ambiguities regarding the legal status of these ordinances. Therefore, further constitutional clarification is essential to delineate the precise nature and implications of ordinances at different stages of the legislative process.

Key Findings and Recommendations

1. Need for Explicit Constitutional Definitions:

- The constitutional text should clearly define the legal nature of presidential ordinances to eliminate existing ambiguities. For instance, ordinances issued during exceptional circumstances should be subject to administrative judicial oversight during the extraordinary period and constitutional oversight thereafter.
- It is recommended that interpretative legislation clarify the term "urgent cases" in Article 142 of the Algerian Constitution to prevent its discretionary use by the President.

2. Legal Consequences of Parliamentary Approval or Rejection:

- The constitutional framework should address the legal effects of ordinances issued before parliamentary approval and those that face rejection or non-action by Parliament. This will provide clearer guidelines on the status and enforceability of such ordinances.

Comparative Analysis of the Algerian and Egyptian Frameworks

The Algerian Constitution grants the President the authority to issue ordinances under exceptional circumstances, offering flexibility in governance during crises or significant national needs. Conversely, the Egyptian legal framework allows the President to issue similar ordinances only during parliamentary recess or in urgent situations when the legislative body is absent. This distinction reflects fundamental differences in how each country balances executive authority with legislative oversight in exceptional circumstances.

• Algerian Context:

The Algerian constitutional framework is relatively more detailed, explicitly differentiating between ordinary legislative actions and extraordinary measures. However, despite this

differentiation, the provisions remain vague, leaving room for varied interpretations of what constitutes an "exceptional circumstance." This lack of precision may result in inconsistencies in the application of ordinances, potentially undermining the rule of law and democratic governance.

- **Egyptian Context:**

The Egyptian Constitution provides a singular condition under which the President may issue ordinances—namely, the dissolution of Parliament combined with an urgent need for action. While this condition offers a clear legal basis, it is inherently restrictive. The requirement that Parliament must be dissolved could delay swift governmental responses to critical issues that arise while the legislative body is in session, thereby raising concerns about the effectiveness of the executive branch.

Implications for Democratic Governance

Both the Algerian and Egyptian systems reveal a pressing need for more detailed constitutional elaboration to clarify the specific conditions under which the President may exercise ordinance powers. Given that such powers inherently challenge the principle of separation of powers, there is a risk of concentration of authority in the executive, which could undermine legislative oversight and accountability. Therefore, it is crucial for constitutional frameworks to impose limitations on the exercise of such extraordinary powers.

Additionally, the legal consequences of issuing ordinances must be clearly articulated within the constitutional text. Establishing clear guidelines on oversight, accountability, and the duration of these measures will not only reinforce the rule of law but also enhance public trust in the political system. By adopting a robust legal framework, both Algeria and Egypt can ensure that the exercise of executive authority remains transparent, accountable, and aligned with democratic principles.