

## The Judicial Role of the Administrative Judge in the Absence of Legal Texts

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Received: 05/04/2024

Published: 25/10/2024

### Abstract:

Given the unique nature of administrative law and the historical circumstances of its emergence, as well as the lack of codification of all its legal rules due to the vastness and diversity of its fields of activity, all these factors have led the administrative judge to play a distinctive role in creating rules of administrative law in the absence of a legal text governing the dispute presented to him. The administrative judge effectively becomes a legislator, with his rulings substituting for the law through the exercise of judicial interpretation. Thus, the administrative judge's establishment of appropriate legal rules for the dispute before him imparts a practical character to the rules of administrative law that aligns with the needs of administrative work and the requirements for the proper functioning of public services.

**Keywords:** Administrative judge, judicial interpretation, legislative gap, administrative law, Council of State.

### Introduction:

It is conceivable that administrative judges may encounter disputes that lack a ruling in legislation or in other sources of positive law. Nevertheless, the administrative judge must resolve the dispute and cannot evade making a judgment on the grounds of the absence of an applicable provision; otherwise, they would be committing an

offense of denying justice and would have deviated from the requirements of their judicial role, which they are obligated to perform even in the absence of a legal provision applicable to the case presented to them.

Given the distinctive characteristics of administrative law rules, particularly as it is an uncodified and rapidly evolving law, as well as the historical circumstances of its emergence, the administrative judge plays a unique role in creating administrative law rules when there is no legal text governing the dispute before them. Thus, the administrative judge becomes a legislator whose rulings substitute for the law through the exercise of judicial interpretation.

To what extent has the administrative judge in Algeria contributed to enriching the legal framework through the exercise of their interpretative role, especially in the absence of legal provisions?

To address this issue, we have decided to divide this study into two sections as follows:

## **Chapter One: The Conceptual Foundation of the Study**

Judicial activism is a practical necessity dictated by the nature of legal texts and the judicial function, as legal texts are characterized by abstraction and limitation, while the demands of life and the circumstances surrounding individuals are constantly renewed and developed. Therefore, it is essential to exert effort to issue appropriate judicial rulings for each dispute.

To encompass the conceptual framework of our study, we will attempt to define the concept of administrative judicial activism in general, and then shed light on the reality of judicial activism in administrative matters in Algeria.

### **Section One: The Concept of Administrative Judicial Activism**

We will clarify the concept of judicial activism by defining what it entails and explaining the reasons for the administrative judge's reliance on judicial activism.

#### **1/ Defining Judicial Jurisprudence**

Judicial jurisprudence, in general, is the contribution of the judiciary, or the additions made by judges and the results of their efforts in interpreting the law, filling existing

gaps, completing it, and resolving contradictions between legal rules or clarifying the meanings of rules if they are ambiguous.<sup>1</sup>

Administrative judicial jurisprudence is the effort exerted by the administrative judge in finding and deriving legal solutions and rulings to apply them to the dispute presented to him within the framework of public law, where the judge operates based on exceptional rules that are not commonly found in private law.<sup>2</sup>

## **2 Reasons for the Administrative Judge's Application of Judicial Jurisprudence**

Given the distinctive characteristics of administrative law rules, particularly its nature as an uncodified and rapidly evolving law, as well as the historical circumstances of its emergence, the administrative judge plays a unique role in creating administrative law rules in the absence of a legal text governing the dispute before him. In such cases, the administrative judge becomes a legislator, with his rulings substituting for the law through the exercise of judicial jurisprudence.

The reasons that drive the administrative judge to perform the function of jurisprudence can be summarized as follows:<sup>3</sup>

### **First/ Absence of Legal Text**

The administrative judge, unlike the ordinary judge, not only applies and interprets the rules of administrative law in a manner suitable for the dispute before him, but also plays a more serious and bold positive role in the field of creating the legal rule itself in the absence of legislative text.

Therefore, the administrative judge has been and continues to be a creator of legal rules in the field of administrative law, as there are many solutions provided by the administrative judiciary in the absence of legal text, which are more extensive and further than mere interpretation of the text.

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<sup>1</sup> Abdeljalil Miftah, *The Role of the Administrative Judge: Establishing the Legal Rule or Applying It?*, Journal of Judicial Interpretation, Issue 2, Mohamed Kheider University of Biskra, p. 116.

<sup>2</sup> Mahdi Khaldi, *Judicial Interpretation in Administrative Matters*, Doctoral Thesis, Faculty of Law, University of Algiers, 2017/2018, p. 30.

<sup>3</sup> Hassan Mahmoud Mohamed Hassan, *The Role of the Administrative Judge in Creating the Legal Rule*, Doctoral Thesis, Faculty of Law, Assiut University, Egypt, 2005, p. 287 and beyond.

Thus, we find that the legislator is content with drafting some provisions that regulate the various aspects of administrative life, whether in the field of organization or disputes, leaving the space for the judge to exercise his discretion and innovate to reach a solution for the dispute presented to him, thereby embodying the role of both the legislator and the judge at the same time.

### **Secondly / The Ambiguity of the Legal Text:**

The original text should be clear in its meaning, so the administrative judge does not need to exert effort in searching for what is intended by the text, as the legislator clearly indicates what he means and wants through its issuance. However, there are legal texts that are characterized by ambiguity, and those who apply them must strive to remove that ambiguity. Judicial interpretation is an essential element in the application of the law and is necessary for applying the legal rule to the reality of the dispute presented to the administrative judge.

Thus, the administrative judge plays a crucial role in establishing the rules and provisions of administrative law. Despite the multiplicity of legislations, there are many gaps, loopholes, and ambiguities that compel the administrative judge to confront the dispute before him and devise an appropriate solution based on balancing public interest and individual interests.

### **The second requirement: Judicial Jurisprudence in Administrative Matters in Algeria**

We will attempt to clarify the reality of judicial jurisprudence in administrative matters in Algeria by highlighting the role of the Council of State as the body authorized to unify judicial jurisprudence in Algeria, through the following points:

#### **Branch One: The Council of State as the Body Authorized for Judicial Jurisprudence in Administrative Matters in Algeria**

The Council of State in Algeria is responsible for unifying judicial jurisprudence according to Article 179 of the constitutional amendment of 2020<sup>4</sup>, which states in its third paragraph: "The Supreme Court and the Council of State ensure the unification of judicial jurisprudence throughout the country and oversee respect for the law."

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<sup>4</sup> Presidential Decree No. 20/442 dated December 30, 2020, concerning the issuance of the constitutional amendment, Algerian Official Gazette, No. 82.

This is confirmed by the organic law of the Council of State No. 98/01<sup>5</sup> in its second article, which states: "The Council of State is a body that evaluates the work of administrative judicial bodies and is affiliated with the judiciary, ensuring the unification of administrative jurisprudence in the country and overseeing respect for the law..."

Through the judicial task it performs, the Council of State ensures the application of the law in its broadest sense, whether through the direct application of the decisions it issues or through the interpretation it provides of laws, which it raises to the administration and citizens in the form of jurisprudence. Thus, the Council of State participates in evaluating the work of the public administration.<sup>6</sup>

With this judicial authority, the Council of State has assigned itself its natural function, being the highest judicial body in the administrative judiciary, working to evaluate final judicial decisions issued by administrative judicial bodies<sup>7</sup>, which are represented according to the administrative judicial system in Algeria by administrative courts and the Council of State.

## **Section Two: The Extent of the Algerian Council of State's Jurisprudence in Resolving Administrative Disputes**

While we initially accepted the pioneering role of the Council of State's judicial jurisprudence in resolving administrative disputes and enriching the administrative legal framework, there are some reservations regarding this matter. It is impossible to speak of an Algerian administrative judicial law, neither in its foundations nor in its techniques. This is due to the dominance of legislative rules in Algerian administrative law and the lack of an administrative judge capable of innovating legal rules outside of legislative texts. The judicial decisions issued by administrative courts do not contain jurisprudence of creative value, as the administrative legal framework is influenced by a written rule rather than a judicial tendency. This has led judges to shy away from

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<sup>5</sup> Organic Law No. 98/01, dated May 30, 1998, concerning the competencies of the Council of State and its organization and operation, amended and supplemented by Organic Law 22/11, Algerian Official Gazette, No. 41.

<sup>6</sup> From the speech of the President of the State Council on the occasion of the opening of the judicial year 98/99, quoted in: Ammar Boudeyf, *Administrative Justice in Algeria*, 2nd edition, Bridges for Publishing and Distribution, Algeria, 2008, p. 162.

<sup>7</sup> Laagoun Afaf, Cherif Walid, *The Contribution of the Administrative Judge to Enriching the Legal Rule*, *Annals of the University of Algiers* 01, Volume 35, Issue 01, 2020, p. 377.

jurisprudence and innovation, opting instead to apply civil law rules or, at times, resorting to foreign jurisprudence.<sup>8</sup>

The role of the Council of State in judicial interpretation requires its liberation and exemption from the tasks of primary and final jurisdiction and appeals alike, while maintaining its function solely as a court of cassation. According to Article 11 of Organic Law 98/01, amended by Organic Law 22/11, the Council of State is competent to rule on cases assigned to it by specific texts. This implies that the legislator still grants the Council of State the jurisdiction to decide as a primary and final authority in certain disputes, such as banking disputes assigned to the administrative judiciary, which consist of decisions issued by the Monetary and Loan Council, as stated in Article 65 of the Monetary and Loan Law. The Council of State adjudicates cancellation lawsuits filed by the Minister of Finance. On the other hand, according to Article 10 of the Organic Law of the Council of State, amended by Organic Law 22/11, it is competent to rule on appeals against decisions issued by the Administrative Court of Appeal for Algiers in cases of cancellation, interpretation, and assessment of legality in decisions issued by central administrative authorities, national professional organizations, and national public bodies. Thus, how can the Algerian Council of State exercise the function of interpretation at the administrative level and contribute to the codification and development of the rules and principles of administrative law if the judicial competencies entrusted to it are numerous and diverse?

## **Chapter Two: Judicial Applications of Administrative Judicial Jurisprudence in the Absence of Legal Texts**

### **Section One: Jurisprudence of the Algerian Administrative Judge in the Field of Administrative Liability**

The administrative judiciary in Algeria has worked to establish the principles of administrative law in general, including the provisions on liability, whether based on fault or not. Among these is:

- Its determination of the basis for the hospital's liability: through the decision issued by the Council of State on 11/03/2003 in the case of (M. H) against the hospital of Bejaia and others, where the decision stated: "...whereas the appellant failed in his

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<sup>8</sup> Same reference, p. 378.

duty to take the necessary precautions to ensure the physical safety of the patient under his responsibility.

And that the failure to monitor the machines used by his agents constitutes a fault of the public facility.

Consequently, since the appellant contributed to the existence of the damage due to his negligence in monitoring the surgical machines used during the medical procedure, he is obliged to compensate for the damage incurred by the appellant.

And that the appellant, therefore, has the right to obtain compensation for the damage..."<sup>9</sup>

- Liability of the police facility: through the decision issued by the Council of State on 25/07/2007 in the case of the Social Security Fund against the heirs of the deceased, which stated: "...the incident occurring within the security center leading to the killing of an officer due to the mistaken use of his colleague's service weapon establishes the liability of the security facility and opens the door for the heirs of the victim to demand compensation for the material and moral damages incurred, without prejudice to their right to a death grant..."<sup>10</sup>

### **Second Requirement: The Jurisprudential Efforts of the Algerian Administrative Judge Regarding the Establishment of the Rules for the Annulment Action**

Judicial jurisprudence has worked to establish the principles of the annulment action as a means of protecting the rights and freedoms of individuals from administrative abuse, and it has defined the nature of the administrative decision that can be challenged, all in the absence of specific legal texts governing this action, influenced by the stance of French judicial jurisprudence. Among the judicial decisions in which the administrative judge explicitly relied on jurisprudence to justify his decisions, we mention:

- What was established regarding the impossibility of withdrawing a valid administrative decision made by the administrative authority that creates rights for individuals, as stated in the grounds of the decision dated November 27, 1982, under number 29432, concerning the issuance by the municipality of El-Madania of an administrative decision to revoke a building permit on land purchased by an individual

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<sup>9</sup> Journal of the State Council, Issue 05, 2004, p. 208.

<sup>10</sup> Journal of the State Council, Issue 09, 2009, p. 98  
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under an official contract. Based on this, the administrative chamber annulled the administrative decision and justified the annulment with the following reasoning: "Regardless of the circumstances, it should be noted that established jurisprudence has enshrined the application of the general principle of law, which is the impossibility of withdrawing a valid decision made by the authority that creates rights."<sup>11</sup>

- What was established regarding the principle of non-retroactivity of administrative decisions: It was stated in a decision issued by the administrative chamber of the Supreme Council: "... whenever it is established and based on applicable principles that individual decisions harmful to individuals are not applied retroactively but rather take effect from the date of notification of the penalty decision, therefore, the administrative decision imposing a disciplinary penalty contrary to the provisions of this principle is considered unlawful..."

- What was established regarding the condition of attaching the contested decision for the acceptance of the annulment claim: On 28/06/2006, the Council of State issued a decision stating that: "... the annulment claim filed before the administrative judiciary does not require the existence of an administrative decision, and therefore the plaintiff is not obliged to present the administrative decision as long as the defendant administration refuses to provide it. The plaintiff must prove the fact of the refusal so that the judge can compel the administration to provide the concerned party with a copy of the decision under judicial supervision..."<sup>12</sup> bThe Algerian legislator later enshrined this judicial interpretation through the text of Article 819 of the Code of Civil Procedure, which addressed the same provisions.

### **Conclusion:**

In conclusion, it can be said that the administrative judge has contributed alongside the legislative authority to establish the foundations of administrative law. The administrative judge finds himself required to find solutions to resolve the administrative dispute presented to him, in light of the lack of administrative law or in the case of legislative gaps, to avoid the crime of denial of justice.

Through our research on this topic, we reached the following conclusions:

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<sup>11</sup> Judicial Magazine, Supreme Court, Issue 01, 1990, p. 188

<sup>12</sup> Journal of the State Council, Issue 05, 2004, p. 48.



- The reason for the judicial role of the administrative judge in the absence of legal text is the characteristics of administrative law rules (lack of codification and rapid development) as well as the differing positions of the parties in the case.
- The Council of State in Algeria performs the task of unifying judicial interpretation in accordance with the provisions of the constitution and the organic law regulating the competencies of the Council of State.
- The administrative judge plays a fundamental role in establishing rules and provisions of administrative law, as there are many solutions provided by the administrative judiciary in the absence of legal text, such as rulings on administrative liability and rules for annulment actions.
- Despite the reliance of administrative judicial bodies on judicial interpretation rules to establish principles of administrative liability, the administrative judge has not abandoned the provisions of private law due to the absence of the idea of specialization (judges specializing in administrative matters).

Based on the above, we propose the following:

- Alleviating the burden on the Council of State to enable it to perform its function of judicial interpretation in administrative matters.
- The necessity for judges to receive specialized training in administrative issues, enabling them to effectively resolve administrative lawsuits and exercise their innovative role in creating appropriate rules in administrative matters in the absence of legislative text.

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<sup>1</sup> Presidential Decree No. 20/442 dated December 30, 2020, concerning the issuance of the constitutional amendment, Algerian Official Gazette, No. 82.

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