



ANALYSING THE EXERCISE OF EXECUTIVE ORDERS IN THE UNITED STATES AND BENIN: FOR A CONSIDERATION OF ITS VIRTUES AND EXCESSESⁱ

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Abstract:

Governing by executive orders is becoming more and more common in the exercise of executive power in democratic States and is giving rise to lively debates on whether it is essentially prejudicial or protective of fundamental human rights and freedoms. Using a qualitative approach, based on a contextual and thematic analysis of executive orders issued in the United States - an old democracy - and in Benin - a young democracy, this paper shows that governing by executive orders is both a dynamics of breach of democratic norms and a logic of protection/promotion, or even strengthening of human rights. In particular, it highlights the most notable excesses of restriction or suppression of individual liberties, private property rights and organic laws, while at the same time allowing the promotion of equality, justice and fairness and the abolition of certain servile and discriminatory provisions. Moreover, it proves to be a remedy against the political instrumentalization of constitutional checks and balances, in this case, the legislative branch. Finally, the article suggests that the opportunities and challenges in executive orders should contribute to the debate on strengthening the control of the president's exceptional powers in a democratic regime.

Keywords: executive order, exceptional powers, democracy, United States, Benin

Résumé :

La gouvernance par les ordonnances se systématisent, de plus en plus, dans le cadre de l'exercice du pouvoir exécutif au sein des Etats démocratiques et suscitent de vifs débats dont celui sur la nature essentiellement attentatoire ou protectrice des libertés et droits fondamentaux de la personne humaine. Munie d'une démarche qualitative, basée sur une analyse contextuelle et thématique des ordonnances exécutives prises aux Etats-Unis – vieille démocratie – et au Bénin – jeune démocratie - cette contribution montre que la gouvernance par ordonnances exécutives relève à la fois d'une dynamique d'infraction

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aux normes démocratiques et d'une logique de protection/promotion, voire de renforcement des droits de la personne humaine. Notamment, elle met en évidence les dérives notoires de restriction ou de suppression de libertés individuelles, droits de propriété privée et lois organiques, en même temps qu'elle permet de promouvoir l'égalité, la justice et l'équité et d'abolir certaines dispositions serviles et discriminatoires. En outre, elle se révèle comme un remède contre l'instrumentalisation politique des contre-pouvoirs constitutionnels – en l'occurrence le pouvoir législatif. Enfin, l'article suggère que les opportunités et menaces qu'elle recèle soient mises à contribution dans le débat sur le renforcement du contrôle des pouvoirs exceptionnels du président en régime démocratique.

Mots-clés : ordonnance exécutive, pouvoirs exceptionnels, démocratie, Etats-Unis, Bénin

1. Introduction

"What is left of the faltering virtue of democracies, if they sacrifice fundamental rights to exceptional circumstances?" (Decaux, 2007, p.11). In other words, are not exceptional powers the very negation of the democratic principle or principles?

The first thing to recognize is that, from its Athenian origins, the edifice of democracy has been solidly developed on a triptych foundation, which is the three key principles that must absolutely be taken into account in political and even legal matters: isomy, isegory and philanthropy (Bako-Arifari, 2021). The first implies the equality of all before the law, while the second refers to the democratic principle of the freedom of opinion or expression of all, and the last, the absolute respect for the opinion of others. Thus, whether it is elitist - considering the introduction of the fourth principle, citizenship - or popular - the democracy of African essence claimed by Afro-centric theories - the first three principles, namely equality, freedom and respect for others, constitute fundamental inalienable rights recognized, proclaimed and enshrined in the conventional, constitutional and legal provisions of modern States, at least those that claim to be democratic.

To these fundamental principles must be added the no less important ones of sovereignty and separation of powers which continue to fuel current philosophical and legal debates whose perspectives generally oscillate between two, now classic, theories: absolutism and separatism. Without going into a lengthy review of the content of each of these great theories, one must nevertheless emphasize that modern democracy, as it is practiced, has settled on and adopted the principle of separation of powers, enshrined in gold letter form in almost all democratic constitutions, whether they are historically old or of recent times. Basically, it postulates the principle of the control of power, and therefore of the counterweight of the legislative and judicial powers to the executive power in the overall functioning of the State.

However, when we look back at the political history of democratic States, we quickly realize that there is a desire to circumvent, weaken or undermine the

constitutional legislative and judicial powers in favor of the executive. Governance by executive orders is one of these exceptional modes of government which are included in almost all constitutional texts and whose recurrence raises the question of the crisis of the rule of law.

More precisely, do exceptional powers, in this case recourse to executive orders, fall solely within the scope of the violation of constitutional or conventional norms? Are there no virtues in the exercise of exceptional powers? This qualitative contribution, based on the cases of the United States and Benin, and relying on the thematic analysis of the content of several physical and electronic documents and the systematic triangulation of data collected through various sources, attempts to elucidate this problem. Governing by executive orders has many virtues or constitutes an opportunity to strengthen human rights well beyond the notorious legal excesses or violations of the arsenal of fundamental human rights and the sacrosanct democratic principles of separation of powers in perilous situations. The purpose of this presentation is firstly to review the state of the debate on the issue of governance by executive order (I); then, it will look at excesses or abuses of the rights enshrined in the law (II) and the notable progress made in strengthening the rule of law for the benefit of populations that were previously treated as commodities (III). Finally, it will look at the possibility of the executive branch to circumvent certain institutional obstacles inherent in the parliamentary mechanism or the abuse of power by the holders of legislative power to the detriment of the regular functioning of the public authorities (IV), before concluding with a discussion of the prospects.

2. Background on Exceptional Powers and Governance by Executive Orders

2.1 A Brief Overview of Exceptional Powers and Executive Orders

Constitutions - also referred to as supreme norms - in democratic regimes, all define a special, if not exceptional, a mechanism called the state of exception. To put it better, Bot and Philippe (2017, p.1), quoting Jean-Jacques Rousseau, wrote: every State where great crises have not been foreseen is in danger of perishing in every storm. This corresponds to a decreed period during which the legal regime of ordinary times is susceptible to legitimate violation by the public powers under the leadership of the government. This is reflected in Mastor (2007) when he writes that: "*Some constitutions ... have explicitly provided for restrictions on fundamental rights in the event of a serious crisis and the implementation of exceptional powers.*"

Rightly or wrongly described by some as a lawless zone, as indicated above, it generally takes three forms: exceptional powers, a state of emergency and a state of siege. In the context of this reflection, we will focus on the exceptional powers vested in the president of the republic on behalf of which he can govern in times of crisis or not by executive order. In other words, he gives himself the prerogatives of the legislative power that he exercises according to more or less precise modalities, defined in the constitution.

And when these modalities are not observed, the orders are qualified as arbitrary and liable to be rejected by the constitutional judge.

2.2 Theoretical Perspectives on Governance by Executive Order

Two classic approaches fuel the debate on the legitimacy, exercise and control of the implementation of exceptional powers: absolutism and separatism. Defining exceptional powers as indicative of political regimes that restrict freedoms and not simply as legal parentheses necessitated by some circumstances, however perilous, absolutists consider the exercise of exceptional powers to be the very essence of State sovereignty and, in fact, the absolute nature of the power of the person who embodies it, the President of the Republic. Thus, the proponents of this school of thought - such as Schmitt and Agamben - rejecting any possibility of counterbalance, checks and balances or limitation of sovereign power, consider that the recurrence of executive orders or the crises that give rise to them is more a matter of the march of States towards the consecration of absolute executive power or absolutist regimes, judging their opponents as utopians disconnected from reality (Le Coustumer, 2007, p.20). This idea is reflected in this statement: "*The balance of power is only an ideal type. It, therefore, has a hypothetical and utopian dimension in that it can never be fully realized even in the context of so-called advanced democracies*" (Fokou, 2020).

For separatists, checks and balances are a necessity and a guarantee against the potential abuses of which the holder of State power may be capable. Some adulators of this position argue that exceptional powers do not constitute a no-man's land or an absence of legal safeguards for executive abuse, contrary to commonly held views. They argue that warning, referral or recourse are possible and guaranteed by international and regional conventions, covenants and treaties, as well as national mechanisms whose dissuasive effects constitute a constraint on the exercise of this type of power (Decaux, 2007).

Moreover, they define exceptional powers as an obvious necessity or a requirement of circumstances in order to address emerging pressures, to curb the peril that would otherwise be fatal. This posture constitutes the official justification written in the gold letter in almost all modern constitutions: "*(...) exceptional measures required by the circumstances (...)*" (Constitution of Benin, 2019). It is abundantly solicited by politicians to justify not only the exceptional measures taken but also the triggering and duration of states of exception. Moreover, when victims appeal against the remaining in force or the effects of these measures, the constitutional and administrative judges use the same argument to qualify the act (Saint-Bonnet, 2008). Even if the author questions the objective control of this argument used, often after the fact, it is remarkable that exceptional powers are only exercised within the limits of extreme necessity when the circumstances require it.

Moreover, a glance at the abundant literature devoted to the question of exceptional powers makes it possible to realize that, on the one hand, they (the powers) are conceived as breaching fundamental human rights - this is the position defended by

Mastor (2007) in his invitation addressed to scientists in an article on the USA PATRIOT Act, to "*reflect on the limits to which its content is destructive of freedom*" - and on the other, as virtuous and beneficial to human rights.

Addressing the latter case, in a published study on the normative push and presidential executive orders in France, Guillaume (2005, p.14) argues that "*executive orders are not the adversaries of the law but its necessary complement*". Thus, for the author, far from meaning an act violating democratic principles, full constitutional powers have advantages for the normative or legal framework, especially in terms of modernization and further humanization of their content by avoiding the constraints of the lengthy parliamentary procedure or "*plenary deliberations*", in his own words. This is what this statement makes clear:

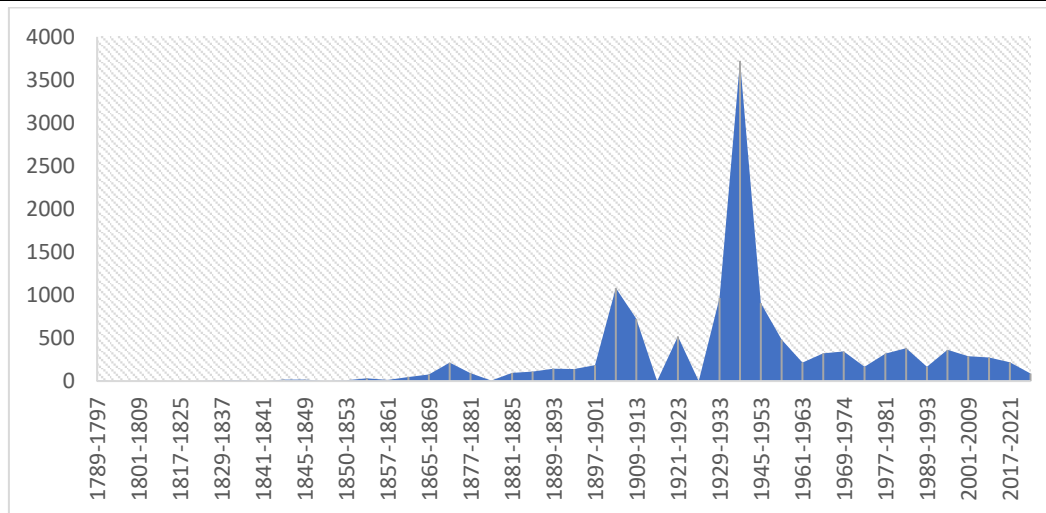
"Faced with a situation that normal times mechanisms are not able to deal with, extraordinary methods seem to have to be employed that allows to bypass the tempo of debates and discussions, compromises and conciliations, which usually pace political time. Recourse to states of exception is necessary." (Laure & Gainche, 2013).

3. Democratic Opportunities and Excesses of Governance by Executive Order in the United States and Benin

The overview of the literature on exceptional powers highlights the strict bipolarization of essentialist and teleological readings of the phenomenon. This section reports, based on the analysis of concrete cases in the United States of America and Benin, on the opportunities and threats that executive orders represent for human rights.

3.1 Executive Orders between Strengthening the Rule of Law and Violating the Legal Order: the Virtues and Vices of a Democratic Governance Practice in the United States

The United States has been particularly successful in governing by executive order. From George Washington (1789-1793) to Donald Trump (2017-2021), an average of just over 296 executive orders are issued each year by the federal executive branch, according to data from Federal Register (2022). A diachronic analysis of this data shows that while the first six presidents showed restraint (an average of three executive orders each during their term), the practice has since become more systematic, reaching unprecedented peaks of more than 1,200 orders per term. And yet, this is not for lack of limitation of this presidential privilege, which must in no case interfere with the prerogatives of the legislative branch - and subsidiarily of the judicial branch - unless empowered by the parliament (Gaziano, 2001). The following graph shows the evolution over time of governance by executive orders in the United States of America.



Graph 1: Evolution of governance by executive orders in the USA from 1789 to 2021

The graph shows two highly sensitive periods - 1901 to 1909 and 1933 to 1945 - where peaks were reached, including the record of 3721 executive orders, held by Franklin Roosevelt (Benzina, 2020, p.4).

When we look at the contexts and the objects of these orders, the evidence of their virtues is undoubtedly striking and leads us to recognize that beyond the breaches of democracy, at least in its dominant sense, much justice has been done and the rule of human rights has been strengthened.

The question of the virtues of the practice of executive orders runs through the history of the United States. Historically, the issue of slave emancipation held sway and even led to secessionist impulses that resulted in the deadly four-year Civil War of Secession between the pro-slavery South and the anti-slavery North (Laitain, 2002). It took an executive order from Abraham Lincoln - the 95th dated January 1, 1863 - to abolish this denial of the natural right to equality and freedom as well as the commodification of a part of humanity. It was not until December 1865 that this provision was ratified by Congress into the 13th amendment, following long political journeys between Republicans and Democrats. This acquired right was later reinforced by the vote of the 14th amendment which sacralized the right to vote and the equality of all before the law.

Beyond the multitude of cases that have reinforced or established measures favorable to the disadvantaged social strata, it is easy to highlight, in the repertory of American executive orders, one last striking case; that of Executive Order No. 9981 signed on July 26, 1948, by which President Truman abolished segregation and all forms of discrimination in the United States army. This order gave everyone, regardless of race, gender, religion, etc., the opportunity to be promoted to various positions of responsibility in the armed forces. In order to achieve this, he had to resort to the mechanism of executive orders due to the threat of systematic obstruction of the bill related to the issue by the Southern Senators (Gaziano, 2001).

These two remarkable uses, among the many issued, show that executive orders are not systematically harmful or restrictive of human rights; moreover, of the fundamental rights enshrined in international conventions and treaties and registered or ratified by all democratic States.

On the contrary, many of the executive orders issued throughout the 230 years of democracy - which have earned it the title of the "oldest democracy" - are far from confirming the virtuous character presented above. Presidential orders concerning the involvement of US military forces in foreign wars or conflicts illustrate the flagrant violations of the organic laws defining the roles of each institution.

In 1950, after the Second World War, Truman committed the US army to the Korean War on June 30, without the express authorization of Congress and in violation of the Constitution, which confers this role on legislators. The same situation occurred again when, in order to prevent a shortage of arms, and therefore the peril of the United States defense system - engaged alongside the allies in the Korean conflict - President Harry Truman, faced with the imminence of a generalized strike of the workers upon the call of the United Steelworkers of America union, unilaterally ordered by executive order No.10340 dated April 8, 1952 to take possession of the plants and facilities of steel companies - private property - throughout the American territory with firm instructions to operate them (Tunc, 1952), (Gaziano, 2001). More than constitutional principles of prior authorization of the executive power being broken, it is the right to private property that suffers from despotic excesses- how noble the determining cause is whatsoever - of a democratic head of state.

And History is rife with eloquent cases. One of the darkest executive orders in the history of the United States in terms of human rights violations - which can rightly be called a crime against humanity - is Executive Order No. 9066, issued unilaterally on February 19, 1942, where President Franklin Roosevelt decreed and authorized the forced removal of all persons deemed a threat to national security. This resulted in a total of 117,000 Japanese Americans being evacuated from the West Coast and interned in relocation centers during World War II (Benzina, 2020). Whether this is to be put on the account of racism or xenophobia, these exceptional wartime powers were used by Roosevelt to deprive thousands of families of their property and freedom without any obvious and immediate perilous situation justifying its relevance.

It thus appears clear, in the light of these few relevant cases, that no measure tending to redistribute or restrict exceptional powers, in this case, executive orders, should fail to take into account both parameters with a view to endowing or reinforcing the decision-making and action capacities of contemporary democratic States prey to many tensions or crises of all kinds. For is it necessary to recall that the world is in crisis? About the United States, Tendil (2013) wrote that: "*... the vertiginous depressions into which this country (the USA) has been plunged many times are equalled only by the prodigious rise of its vertical cities*". What about institutional crises?

3.2 Executive Orders as a Constitutional Remedy Against the Assaults of a "Rebellious" Legislative Power: Benin Case Study

Governing by means of executive orders rests on two eminently relational legal foundations: the constitution and/or the enabling law. As a result, the nature or state of the political relations between the two institutions - legislative and executive - requires particular attention in analyzing the increasingly frequent use of presidential executive orders.

Compared to the United States, Benin has a relatively small number of executive orders. In the 30 years of democratic life with four presidents - Soglo (1991-1996), Kérékou (1996-2006), Yayi (2006-2016) and Talon (2016-2021) - only 18 executive orders in total have been issued. However, their cognitive dimension remains no less important in terms of political relations between democratic institutions or checks and balances in the exercise of state governance. The table below shows the status of executive orders in Benin.

Table 1: Statistics on executive orders issued in Benin

President	Number of executive orders	Years
Soglo, D. Nicéphore	06	1994 and 1996
Kerekou, Mathieu	05	2002
Boni, Yayi	07	2008, 2010

The table provides an overview of the number of executive orders individually issued and also the total covering the period from March 1991 to April 2016. This time limit seems justified since from 2016 to 2022, no executive order was issued. The analysis of the contexts in which these executive orders are used highlights the institutional dynamics that generate them.

This being said, Benin, like the United States, was quick to use exceptional powers in the exercise of executive power in a democratic regime. The first executive orders were issued on August 1 and September 16, 1994 - four years after the first government of the democratic era was established - to implement the conflicting budget of that year, in a tense political context between the executive and a hostile parliament. The tension stemmed from a disappointing September 1993 cabinet reshuffle for the collective of parliamentarians supporting the executive and a disagreement between the two institutions over the new electoral code, a disagreement in which the constitutional judge ruled in favor of the parliament. In order to legitimize the use of the executive order, which later proved unsuccessful, the President sent a message to the nation, the substance of which is as follows:

"The budget, as voted by the National Assembly, does not respect the international commitments already made by Benin. This is why, in order to allow the regular functioning of the public and constitutional powers, I have decided to implement by executive order the budget prepared by the government as of August 1, 1994, in accordance with articles 41, 147 and 68 of the Constitution." (Gazibo, 2005).

A closer look at the context of the conflict surrounding the vote on the budget reveals that, in addition to the budgetary restrictions imposed as part of the structural adjustment program, the issue at stake was the supposedly partisan and opportunistic amendments made by parliamentarians to the initial draft, which the President did not intend to agree to in order to promote the re-election of hostile parliamentarians in the imminent legislative elections of 1995. In such a context, the constitutional judge, on the basis of the control of the constitutionality of the executive act, established that the executive order was not valid. This situation shows that the initiative to exercise exceptional powers is part of a clumsy logic of avoiding the parliamentary vote in contexts of tense relations between the legislative and executive powers.

On the contrary, in other situations, governance by executive orders is not always the result of the executive's intention to override the prerogatives of the legislative branch. Sometimes institutional crises arising from legislators' opportunism lead the executive to use exceptional powers. The work of Delfosse (1994) on the justification of the use of full presidential powers in the Belgian context leads to the same conclusions: "(...) it appears that the justification for this governmental demand lies in the instability of relations between majority and opposition and in the lack of cohesion of the majorities themselves."

In the same vein, another article by René Rémond on the issue of the influence of the institutional climate on the solicitation of executive orders in France, quoted by Delfosse (1994) in his reflection, mentions that: ... it was "*recalcitrant majorities*" that, in France, pushed governments to use exceptional powers, to lock them into the dilemma of swallowing their objections or opening a crisis...

In this respect, the analysis of the 2008 executive order in Benin highlights the implication of the political games of the legislative power on the initiative of executive orders by the executive power. On July 28, 2008, President Yayi issued four executive orders, including three (03) authorizing the ratification of a loan agreement in the framework of the fight against coastal erosion and one (01) on the investment code. These executive orders are the result of a protest by the Parliament against the non-installation of certain communal councils and they used indefinite postponement of the examination and adoption of these bills - although beneficial to the country because they are intended to combat coastal erosion, which is a major threat to the east of Cotonou - as a punitive or negotiating weapon, or even as a means of imposing their will on the executive. Here is the substance of President Yayi's message to the nation, dated July 28, 2008, where he notified the institutional deadlock in which the country finds itself and which justifies his use of executive orders:

"Faced with these emergencies, our parliamentary institution has several times postponed sine die the adoption of all these bills. The Constitutional Court, referred to against such successive postponements, issued the decision DCC 08-072 of 25 July 2008, where it declared these postponements contrary to our Constitution. My dear compatriots, in view of this decision of the seven wise men of our constitutional institution, we find ourselves in a deadlock." (Bolle, 2008)

Here, it must be recognized that, contrary to the use made of it in 1994, the institutional game has led the country into a deadlock, the only constitutionally possible way out is through exceptional powers. Governance by executive orders, rather than political luxury, is a vital tool for democratic States, whatever they may be.

4. Conclusion

The systematization of the use of executive orders in both old and new democracies, far from meaning a transition from democratic political systems to absolutist sovereignty systems, is not systematically a *justified breach* of human or fundamental rights. At the same time as they have demonstrated sometimes ignominious breaches of freedom, equality and dignity of a significant part of humanity, there are also executive orders that have worked for the benefit of the establishment and strengthening of the legal and constitutional systems of democratic States.

In contrast to the slightly Manichean and extremist readings, this contribution rehabilitates executive orders in their human and negative aspects. If the pessimists, reacting to the virtuous perspectives of the exceptional powers, find them complacent, the conciliatory or balancing point of view advocated here does not harm either the adulators of the Cassandras whose positions are expressed so well in the following textual statement:

“This thesis falls under a complacent reading of American history from which are evacuated the various injustices that occurred in times of crisis, whether it be the removal and incarceration of Chinese-Americans during World War II (Korematsu) or the political harassment to which some citizens were subjected during the Cold War.” (Brodeur, 2008)

The contextual analysis of governance by executive orders in the United States and Benin has made it possible to understand this problem in democracies that are more than 230 years old, as well as in young democracies that have been in existence for more or less than 30 years. While renewing the perception of executive orders, this contribution suggests that taking into account and drawing lessons from their benefits and harms, more daring and innovative reflections are carried out for setting adequate operational safeguards for a framework for the exercise of this power within democracies.

Conflict of Interest Statement

The author declares no conflicts of interest.

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Peace and Development and Social Justice in the United States and Africa. With the worry about the use of executive orders and the desire to limit or even abolish this modality of governance in democratic regimes, this article aims to inform and clarify political-institutional decisions and legal-constitutional debates, well beyond negative aspects, on their tangible virtues which must necessarily be taken into account in these times of multiple and multifaceted crises. Concretely, this contribution seeks to draw the attention of politicians, constitutionalists, jurists and researchers to the remarkable contributions of governance by executives' orders to the arsenal of human rights and to democracy.

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