

Analyzing the Exceptional Measures Adopted Following the Declaration of Martial Law in the United Arab Emirates: A Penal Perspective

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Abstract

The Emirati legislator of 1971 has provided for the Martial Law in article 146 thereof, as all modern constitutions did; to ensure the protection of the public order and safety of individuals in case the state is exposed to exceptional circumstances. Of course, the exceptional circumstances are the reason behind declaring martial law, accordingly, venturing into the exceptional circumstances requires a comprehensive study of the concept of the circumstances justify declaring martial law, the measures taken at that time, ensuring freedoms and rights in these periods, the crimes that may be committed, and the judicial authorities responsible for punishing offenders. Accordingly, this study shall shed light on the constitutional text as well as the legislative text for Federal Law No. 11 of 2009 concerning martial law.

Keywords: Martial Law, Penalties, Exceptional Measures

Introduction

Usually, constitutions are keen to ensure the rights and freedoms of individuals by stipulating these rights and freedoms in specific provisions. At the same time, the legislator expects a particular exceptional circumstance or a group of serious circumstances. Therefore, the legislator sets the appropriate regulations facing this or these circumstances, which may be considered as solutions for exceptional circumstances. These solutions may take the form of constitutional provisions, legislative ones, or both, for example, the declaration of the status of marital law, which grants the authority of the state. In case of danger, powers, and functions the authority does not have in normal circumstances. These powers and functions allow the authority to impose heavy restrictions on rights and freedoms granted by the Constitution.

Objectives of the Research:

This research aims to study the legal concepts related to the exceptional circumstances recall declaring the marital law and analyzing the legislative provisions related to the regulation of this status. In addition to studying the details, along with identifying the entities implementing the orders of the authority

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enforcing the martial law and prosecuting such committed crimes when the martial law is in force, and the role of the customary courts responsible for offences committed during this period.

Research Methodology

The research depends on the scientific descriptive and analytical approach for legislation in the UAE along with a comparison to comparative legislation. The research is divided into four sections as follows:

The First Section: The Concept of Martial Law

The Second Section: The Constitutional Framework for Martial Law

The Third Section: The Legislative Framework for Martial Law

The Fourth Section: The Competent Judicial Authority Prosecutes Such Committed Crimes.

The First Section: The Concept of Martial Law

The Emirati legislator defined Martial Law in the first article of Federal Law No. 11 of 2009 as a set of exceptional rules and procedures taken by the State in emergency circumstances; that allows the State to temporarily suspend all or some of the applicable laws to ward off the dangers affecting the State”.

A state may experience some exceptional circumstances that the executive authority fails to confront by the usual jurisdictions. Accordingly, increasing the jurisdiction’s competencies to contain such exceptional circumstances is indispensable to that state. During that time, and as stipulated in the Constitution, the emergency state may be declared. The declaration of the marital law status is an exceptional measure to which the executive authority seeks during strict necessity to defend the entity of the state or the governing regime if they were under grave danger as in the case of war, foreign invasion, armed revolution, rebellion, disobedience, or other serious disorders that oscillates the state at the cliff of danger. Martial law is used when those circumstances become challenging to usual authorities of the executive power.

The crisis that countries may go through differs in terms of nature; crises may occur due to natural causes such as earthquakes followed by mass destruction. In most cases, both political and social reasons usually light the fuse of crises. war, country unrest, armed rebellion, or coup attempts usually lead to crises. (Al-Bustani, 1962)

Accordingly, crises may differ in terms of seriousness. The lifespan of crises may be short, for a few days, or they may take years. Crises may be limited to some parts of the state, or they may include the entire territory of the state. Moreover, crises may lead to material losses. Some jurists have indicated that

emergency law and martial law are two synonymous terms, while other jurists differentiate between the two terms. However, most of them merely point out the existence of the differences without identifying their nature (El-Sherbiny, 1964).

According to them, it is evident that there are no differences between martial law and emergency law. Emergency law is just seen as a more modern legal system compared to martial law, which is prepared to deal with exceptional circumstances. (Al-Janabi, 1981)The emergency law has two concepts: a realistic concept and a legal one, but we should not get confused between both. The realistic concept is about an incident or more occurring or threatening the state, and this incident or threat may not be faced by the ordinary legal means (Jadallah, 2000).

These exceptional procedures and measures are also based on foundations that would further suspend public rights, freedoms, and constitutionally mandated legislative and judicial guarantees established in usual times. The most important characteristic of these measures is their speed and intensity when taking measures and implementing judgments. Unlike normal circumstances, the legislator empowers the government with exceptional powers upon declaring the state of martial law. These exceptional powers are determined by law, and the law determines whichever power shall apply it. Indeed, this may be done in a previous law that specifies the conditions of applying the state of martial law and the circumstance that led to the declaration of it in addition to the organization of special laws issued in every exceptional case (Al-Mawafi, 2004). Declaring the emergency state entails the president the right to take the measures he sees appropriate to keep the security and public order. This in turn leads to imposing many restrictions on the personal freedoms granted by the terms of the constitution to preserve the rights, freedoms, and public order in general (Al-Kuaiji, 2015).

Despite the powers entitled to the government in a state of emergency, they are subject to the principle of legality. Indeed, these powers come from the law and were stipulated in advance to confront exceptional circumstances. They are also applied under judicial supervision to demonstrate their legitimacy.

Originally, legislation lay within the jurisdiction of the legislative authority in the state. Yet, the necessity that emerges due to the nature of the circumstances requires granting the head of state the authority to declare a state of emergency to confront the imminent danger to preserve the entity and stability of the state. Therefore, all constitutions almost agree that the head of state shall be entitled to declare a state of emergency (Al-Qafi, 2006).

Indeed, countries differ in declaring a state of emergency, some of which are by decree and its extension is with the approval of Parliament. The French

Constitution of 1958 adopted that approach. A state of emergency shall not be declared unless there is a danger due to a foreign war or armed rebellion. Martial law shall be decreed subject to a decree issued by the Council of Ministers, and its extension beyond twelve days may be authorized only by Parliament.

French law - in addition to the state of emergency - also defines a state of urgency, which includes fewer restrictions on public freedoms. The state of urgency is regulated by the law issued on April 3, 1955, amended by the law issued on August 7, 1955, and the order issued on January 15, 1960. The state of urgency is declared by a decree issued by the Council of Ministers in the event of a grave danger resulting from a serious assault on public order or public unrest. Martial law shall be decreed by the Council of Ministers, and its extension beyond twelve days may be authorized only by Parliament (Al-Assar, 1992).

It is worth mention that the French Constitution only stipulates a state of emergency regarding the Constitutional Council. It has stipulated that the legislator's regulation of a state of emergency does not contradict the Constitution. Therefore, Resolution No. 85-87 on January 25, 1985, with the Council stipulating that "The legislator shall - through regulating the state of emergency – choose between the necessity of respecting freedoms and preserving public order."

The Second Section: The Constitutional Framework for Martial Law

Article 146 of the UAE Constitution of 1971 stipulates that: Martial law shall be declared by a decree promulgated with the assent of the Supreme Council based on a proposal made by the President of the Union with the agreement of the Council of Ministers of the Union in case of necessity which shall be defined by law. Any such decree shall be transmitted to the Union National Council at its next meeting."

Martial law shall be similarly lifted by decree with the assent of the Supreme Council when the need for which it was imposed no longer exists.

Based on this, the constitutional legislator stipulated procedural conditions for declaring martial law:

First: The existence of a case of necessity

The legislator stated an absolute text and did not specify the intended meaning of necessity. Consequently, returning to the general rules that define the case of necessity requires defining necessity comprehensively. This requires us to investigate the linguistic meaning of this term first. According to the linguistic meaning, scientists pointed out that the term "necessity" in Arabic "Deborah" is derived from the term "harm" in Arabic "Darar". The word harm "Darar" is the opposite of "benefit" in Arabic "Mafia". It is said that a man of necessity is a man

of need, and it is said that if a man is obliged to do something, it means that he resorts to it. Necessity is an exaggerated form of harm, a maximum of harm (Maraachli, N.D.).

As for the terminological meaning, we note that most comparative constitutions include texts that justify the application of the necessity case. Moreover, there may be laws that are only concerned with stating the theoretical applications of necessity and the provisions of this case without containing a clear definition upon which we shall rely. As a result, constitutional law jurists have developed a set of definitions. We will mention some of them as follows: After summarizing its conditions, a group of writers defined the case of necessity as “a - temporary- situation in which exceptional powers are granted to the State or one of its bodies, the executive body (the head of the state or the government) and allows the State to temporarily suspend all or some of the provisions of constitution laws and allow the executive authority to legislate and issue laws over some time. Applying this theory shall continue for a limited period to overcome the exceptional, compelling circumstances that affect the entity of the state or the public safety of society and return to ‘normalcy’ in case those circumstances disappear. Necessities are estimated according to their quantity (Qasim, 1981).

Another section of jurists defines necessity by explaining the nature and type of circumstances and dangers. A state of necessity in constitutional law is based on the existence of a danger and situation that threatens the entity and safety of the state especially when the powers provided by normal legislation do not suffice for overcoming the emergency. Indeed, this danger may be external, such as war, or internal, such as revolution, armed rebellion, turmoil, or disasters that the existing legislation does not suffice to overcome (Yusri, 1995).

This means that in exceptional circumstances, the state of necessity disrupts normal legitimacy and replaces it with a new legitimacy called (crisis legitimacy). The Emirati legislator also referred the definition of these circumstances to the law, this will be discussed in what flows.

Second: Procedural Conditions:

For Martial Law to be declared, procedural conditions related to the method of constitutional text for this shall be met. These measures are:

- 1- A federal decree is required upon the approval of the Federal Supreme Council, upon the proposal made by the President, and the approval of the Cabinet.
- 2- The decree is submitted before the Federal National Council at the first meeting convened.

The Third Section: The Legislative Framework for Martial Law

Federal Law No. 11 of 2009 regarding martial law was issued. It included legal texts related to the justifications for declaring martial law and the exceptional measures taken during that time. Therefore, the federal law mentioned precise details after the general lines stated in the Constitution. To study those details, this research will be divided into three parts:

Part One: Justifications for Declaring Case of Martial Law

The legal legislator sought to mention the justifications that allow the President of the Federation to declare martial law, and that is by way of limitation. Thus, the legislator may have settled the jurisprudential and legal debate regarding the cases of necessity stipulated by the constitutional legislator in Article 146 thereof. Cases of necessity were mentioned in the text of Article 2 of Federal Law 11 of 2009, which states that: Martial Law may be declared in the following cases:

- 1- If security or public order in the State or any part of it is compromised due to war or armed aggression or any other situation that represents a threat thereof, or in cases of occupation of a part of the State's lands.
- 2- Any internal or external turmoil that may spread inside the State, or significantly undermine its security or political or economic conditions.
- 3- In cases of disasters or pandemics.
- 4- The need to secure the safety of the State's Armed Forces, ensuring its supplies, protecting its transportation routes, or any other matter related to its movement or military actions in the State or abroad.

Based upon the aforementioned; we noted that the Emirati legislator was clever in setting the grounds for declaring martial law and granting the implementing authority the power to determine the appropriate measures to keep security and public order. Accordingly, the concept of "Public Order" is the main goal for administrative control, therefore, the administrative control meaning goes beyond its concept to being a tangible physical system, which becomes a realistic anti-chaos status. It also becomes a mental moral system related to beliefs and feelings, and that the powers of the administrative control shall take the appropriate measures whenever the breach of the moral and physical order takes a form threatens the public order, and in favor of the public order (Kan'an, 2008). The definitions set by jurists for public order were many², while lexically it said that: "The order of something is regulating an order. And regulating means writing and collecting something in one form so it becomes regulated and ordered. Order

² (Ali Alkali- Prof. Luma AlDhaeri, 2018,)

is the core of anything, and it means the system and approach (Ibn Manzour, 2002).

The term “public order” linguistically is a combination of two parts, the word “order” is described, and the adjective is “public”. Consequently, the word “order” is the origin, and the adjective was added just to limit its absolute meaning. On that basis, there is a deep need for other non-public orders. Therefore, it was the image of the existence of common and mixed orders combined between the characteristics of the public and common orders (ElShawarbi & GadAllah, 2000). Accordingly, by the word “order” it linguistically means submission to a certain rule in the economy, language, or the system of ruling, and likewise like the democratic system (Abbas, 2017).

Terminologically, public order was defined by many jurists including the jurist Charles Debauch, who defined it as “A variable concept summarizes the essence of civilization, a time era, and include a group of requirements that are fundamentals for protecting the social life (AlTamawi, 1967)”. While jurist Hariom thinks that public order is: “An anti-chaos realistic status, therefore, he puts the moral part related to the beliefs and thoughts apart from the concept of public order (Mokhtar, 2010)”.

On the other hand, both jurists George Bear doe and Marcel Wadline agree that the idea of public order is: “An idea has an expanded system that encompasses all images of order, it doesn’t include the materialistic order alone but also include the moral one (Rabie, 1981)”. The great French scholar set a phrasing for the idea of public order which is: “The order is each legal rule individuals may not violate or exclude its context in their legal acts, in other words; it’s each binding legal rule (ElSaid, 1992).”

Through the aforementioned definitions, we may notice that the public order is an order related to a society with evolving needs, therefore, the idea of public order may not be confined to a single and rigid idea; as it came out of the communal needs of individuals, consequently, confining it in one idea results in its stagnation and delay in keeping the pace with the society it tries to regulate (Soliman, 1997). Therefore, protecting the public order is the duty of the administration, and it must fulfill it through all authorities and means. It is also noted that these limits could differ in normal circumstances from exceptional ones. In this regard, the administrative authority may be able to take action outside the normal scope of legality required out of the necessity of maintaining public order and securing the functioning of public utilities, and that is where the theory of the exceptional circumstances came from (Naga, 1990). Additionally, there is the theory of the actual employee which is based on it, in this case, the actions taken by persons who lack a formal authority in such cases are considered legitimate

actions with the aim of the continuation, and non-cessation of the public utility (AlGhafloul, 2004).

Based on this, the public authority uses many means in the exercise of its competence to protect the public order, these means may be material, human, or legal (Prohibition, License, Previous Notice, Use of Force) (AlWakeel).

Part Two: Exceptional Measures Taken in the Event of Martial Law Being Declared

Federal Law No. 11 of 2009 granted the authorities and entities responsible for implementing the orders of the authority executing martial law, which were specified as (The Armed Forces, Police and Security Forces, or any other authority designated by the Executive Authority shall carry out the orders issued by the Executive Authority. Persons tasked with carrying out the orders of the Executive Authority act as legal officers, who are tasked with carrying out the orders of the Executive Authority may use suitable force if necessary. Within their powers, each employee or person should assist in the implementation of these orders) . With the right to take exceptional measures that fall within the scope of administrative control, which is one of the powers of the authorities to preserve the public in its four branches (public security, health, public morals, and Public peace) (AlFayad, 2014). The authority implementing martial law may take, by declaration or written orders, all or some of the following measures:

- 1- Restrict the freedom of gathering, movement, and residence, and prohibit passage of persons at specific places or at certain times; in addition to arresting suspects or detaining persons that pose a threat to security and public order; authorize inspection of people, venues, and transportation means at any time, day or night, regardless of any provisions or measures, except for those specified by the orders of the Executive Authority.
- 2- Prohibit gathering in crowds, protests, sit-ins, meetings, or general strikes; and may use the necessary force to disperse such activities if necessary.
- 3- Suspend or restrict the activities of any club, association, entity, organization, center, or group that may hurt security or public order.
- 4- Censor newspapers, publications, newsletters, graphics, and all means of expression, advertisement, and media, close publication houses, and seize and confiscate materials that encourage sedition or breach security and public order.
- 5- Censoring mail, packages, telegrams, telecommunications; including Internet, Intranet, or any other means of communication.
- 6- Define opening and closing hours of public establishments, and order closing of all or some shops.
- 7- Define prices of goods and prohibit monopolies.

- 8- Cancel import and export licenses of weapons, ammunition, and explosives in addition to suspending licenses to carry, keep, or possess firearms; and seize firearms and close warehouses.
- 9- Deport expatriates who pose a threat to the State's security, or detain them at a safe location, should they disturb security and public order.
- 10- Evacuate or isolate certain areas; organize, restrict, or limit transportation means.
- 11- Temporarily take over transportation means, or a facility, institution, company, shop, residence, property, or movable asset, considering the right to fair compensation for the owners.
- 12- Prohibit persons from carrying out certain activities or assigning them to carry out specific activities while maintaining their right to fair compensation or remuneration.
- 13- Enforce any measures that the Executive Authority deems suitable to maintain security and public order.

The Fourth Section: The Competent Judicial Authority for Committed Crimes

For crimes committed during the period of martial law, most constitutions indicated the need for an exceptional condition to have extraordinary courts. As for the Emirati legislator, he stipulates that a General Court-Martial shall be established, to consider offences committed during this period and as follows:

- a. General Court-Martial: presided by a judge of the Court of Appeal, and two jurists. The Court has the jurisdiction to investigate all crimes; settle grievances filed by persons who were arrested with arrest warrants; and extend the duration of custody.
- b. Special Court-Martial: presided by a judge of the Federal Supreme Court, and four members; two judges of the Appeal Court, and two jurists. The court has the jurisdiction to investigate crimes related to State security and other crimes specified in the orders of the Executive Authority.

2- All judges shall be assigned by the Executive Authority.

3- Sessions of both the above-mentioned Courts will not be considered valid unless a representative of the Public Prosecution; selected from the Public Prosecution by the Executive Authority and a court clerk (Article 6 of Federal Law No. 11 of 2009).

If necessary, the Executive Authority may order the establishment of Courts-Martial, to be formed of Armed Forces jurists. This Court shall apply the procedures set forth by the Executive Authority in the establishment order. The Public Prosecution shall be represented by one of the Armed Forces officers. The

mandate of such courts shall come to an end with the end of the purpose for which they were convened (Article 8 of Federal Law No. 11 of 2009).

Indeed, the Emirati did a good job when it determined the jurisdiction of these courts with the penal and not the civil jurisdiction, as the civil jurisdiction and compensations do not need privacy or speed in resolving cases before customary courts, as the aggrieved party may resort to the common courts.

It is worth noting that the jurisdiction of these courts is limited to criminal jurisdiction, as Courts-Martial shall not prosecute or defend a civil suit concerning compensation (Article 15 of Federal Law No. 11 of 2009).

According to the methods of appeal, it is known that judicial rulings are divided into final and non-final, given the ruling's resolution of the existing dispute in the matter in which the ruling was issued. Among the rulings that have this authority are the final ruling and the irreversible ruling. The final ruling is the ruling that has become final, either because it cannot be appealed or because the deadlines for appeal have been missed, therefore it has become final. As for the irreversible rulings (conclusive), they are the rulings that have exhausted all means of appeal. They have become final, and as we mentioned earlier, they are the rulings that have the force of a *res judicata* and become a title for the truth according to Article 16 (Article 16 of Federal Law No. 11 of 2009). Judgments of Courts-Martial cannot be appealed in any way, the rulings issued in felonies and crimes affecting the security of the state are final. Yet, they are not enforceable unless ratified by the executive authority. However, the legislator singled out the death sentence, which is not enforceable unless ratified by the head of state. Moreover, the legislator granted the head of state the right to pardon the convict or replace the death penalty with a lighter one, following the provisions of law included in the Constitution in paragraph 10 of Article 54, which stipulates that the president may grant pardon, commute punishment, and approve capital sentences under the provisions of the Constitution and federal laws (Article 54 of the unilateral constitution of 1971).

The legislator also stipulated that the Executive Authority is entitled to repeal verdicts of acquittal in criminal or state security cases; or order retrial by another Court-Martial composed of different judges. If the second Court renders a not guilty verdict, the Executive Authority (Article 17 of the Federal Constitution of 1971) shall approve the verdict. Indeed, this is considered one of the legal guarantees to protect public order and a way to indirectly monitor the rulings of martial courts.

These offences, which are committed in a normal situation, are under the jurisdiction of the Supreme Constitutional Court subject to the context of Article No.99, paragraph 6, of the Emirati Constitution: "Offences directly affecting the

Federation's interests such as offences related to its security at home or abroad and offences of forgery of editors or official seals of one of the federal authorities.”

As for crimes committed during the time of martial law, most constitutions indicated the need for extraordinary courts in exceptional circumstances, for example the English Emergency Law of 1920, stipulated that, “The regulations may provide for the trial, by courts of summary justice of persons guilty of offenses against the regulation...” The number of judges in the English summary courts reaches seven judges, and these courts exist under normal circumstances, but when a state of emergency is declared, these courts are supported by a set of laws, to speed up the issuance of rulings and not to overcrowd them. The number of courts in England is estimated at a thousand courts distributed among all British cities. In America, many presidents have formed military courts to trail those who violate the orders of the military forces. Indeed, The US Supreme Court got along with the security need for such courts. However, it established some controls that restrict these courts, stipulating that these courts should not be formed except when martial law is declared (Mohamed, 2017). Some prior constitutions are characterized by the establishment of military courts within their judicial formations, including Egypt Dec. 2004. The Military Judiciary is an independent judiciary that adjudicates exclusively in all crimes related to the armed forces, its officers, personnel, and their equals, and in the crimes committed by general intelligence personnel during and because of the service. Civilians cannot stand trial before military courts except for crimes that represent a direct assault against military facilities, military barracks, or whatever falls under their authority; stipulated military or border zones; its equipment, vehicles, weapons, ammunition, documents, military secrets, public funds or military factories; crimes related to conscription; or crimes that represent a direct assault against its officers or personnel because of the performance of their duties. The law defines such crimes and determines the other competencies of the Military Judiciary. Article Six of the Military Code also stipulates in its second paragraph that, upon declaration of a state of emergency, the President of the Republic may refer any crimes punishable under the Penal Code or any other law to the military judiciary.” This was challenge confirmed by the Administrative Judiciary Court, where it decided that “even if the martial law in Egypt is exceptional, it is not absolute, rather, it is a system subject to the law, and its establishment is under the constitution. The law clarifies its principles and provisions and sets limits and controls for it. The court concluded that if the measures and procedures applied exceed the limits and controls, then this is considered an illegal act and shall be subject to court supervision (Fa’qi).

Conclusion

From a legal perspective, the declaration of martial law is nothing but a direct application of the case of exceptional circumstances. Which means the situations in which risks and crises arise in any state and constitute a threat to the entity of the state. These exceptional circumstances necessarily require temporary suspension of normal rules applied under normal circumstances to ward off the dangers, preserve its entity, and protect the practice of public freedoms, the State shall temporarily suspend all or some of the applicable laws. The Emirati constitutional legislator adopted the text on declaring martial law and referred to the justifications for the state of necessity that permits resorting to its declaration, if necessary, the text includes absolute terms, while the Federal Legislation 11 of 2009 specified those circumstances and their number is limited, and this confirms the legal protection of the rights and freedoms of individuals. One of the procedural conditions for declaring martial law is that it shall be decreed by the President of the State which provides the executive authority with powers and measures stipulated in federal law. However, the executive authority has been determined by federal law as the body responsible for overseeing the legislative, judicial, and executive affairs in the State upon announcing the implementation of Martial Law, which shall be defined by a federal decree required for declaring Martial Law. Thus, the decree defines those bodies in the beginning and according to the reasons for the case of necessity. The legal legislator specified the jurisdiction of the crimes committed during that period as the jurisdiction of the martial courts, whose decisions are final.

Recommendations

- 1- A call for legislators to understand the importance of following the steps of the Emirati Legislator; as it identified the justifications for declaring martial law clearly, and imposed restrictions on the authority upon enforcing its exceptional functions.
- 2- Regarding the application of the declaration of martial law in comparative constitutions; the study calls for emergency laws to consider the universal and regional human rights conventions and treaties which include provisions regulate the emergency status, and follow the conditions thereof, as implementing this is a huge guarantee for the protection of the human rights.
- 3- And here, we have not to forget the importance of public awareness which assists the authorities during those periods to overcome exceptional circumstances.

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