

The Consitutionality of Acts of Sovereignty and Immune Laws

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Abstract

There is No. doubt that the Administrative Decisions should be issued in conformity with the provisions of the law to be described as legitimate, but for certain circumstances some decisions failed to be subject to the Judicial Review because of its nature, such as Acts of Sovereignty where some acts are immunized and out of judicial control. Literature and the judicial system have cooperated on a specific position on these decisions, whether they are Acts of Sovereignty or Immune Decisions. Accordingly, the researchers saw the need to set terms and regulations over Administrative Acts. The decisions taken must adhere to the elements and bases of the right Administrative Decision. Especially that Administrative Decisions constitute a violation of the rights and freedoms of individuals.

Keywords: Constitutional, Administrative Decision, Immunization, Appeal, Acts of Sovereignty, Laws, Legitimacy.

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1. Introduction

It is known that the legal state is the state where the governors and the governed are subject to Judicial Review. Whereas governors do not intend heads of state only, but also the three powers (Legislative, Executive and Judicial). These powers can therefore be a party to the legal relationship with individuals. Our concern is the Executive Power. Whereas the existence of the Executive Power as a party to the relationship with individuals with many privileges will often lead to violating of this power and mistakes committing when issuing decisions without further scrutiny, which will lead to harming these individuals. Hence, we note that the Executive Power is the most controlled power, as it is subject to public control, self-regulation, parliamentary/political control and judicial review.

Hence, this research tackles the subjection of administration to judicial control by the administrative courts, namely the Administrative Court and the Supreme Administrative Court in Jordan. In this research, we will present the justiciability of Immune Laws to control laws, the constitutionality of these laws, and then we will attempt to identify Sovereignty Acts and its justiciability to judicial control through an introduction on the subject. Furthermore, research scholars attempt to identify Immune Laws to Administrative Decisions and to make a distinction between Immune Laws and Acts of Sovereignty by reviewing the implications of immunizing Administrative Decisions from Judicial Appeal, the constitutionality of immune administrative laws to Administrative Decisions. The research is concluded with a conclusion, recommendations and references.

2. Preface

There are limitations to the scope of Administrative Justice control over administration. The impact of these limitations might be limited to the restriction of justice authorities without eliminating judicial control. These limitations are, the limitations which restrict the scope of application of the principle of legitimacy, namely the discretionary power theory and the exceptional circumstances theory¹. However, there are other limitations which prevent the judiciary from controlling some administrative acts completely or partially for reasons related to the nature of those acts or following a legal text. such limitations might eliminate the application of the principle of legitimacy, namely Acts of Sovereignty and Administrative Decisions governed by a legislative text².

Based on the aforementioned, the decisions made by the executive power are divided in terms of its justiciability to judicial control as follows;

First: decisions subject to the Administrative Justice control; this is the original implementation of the principle of legitimacy³ where Judicial control over administrative acts is considered one of the most significant forms of control⁴, and it constitutes the a safeguard for rights of individuals and their freedoms due its

¹ Omran. Ali, *Judicial Administration*, Redwan Publishing and Distributing, Amman, 2016, p.54.

² Masa'da. Abed Al Mahdi, *Judicial Review of Administrative Action in The Jordanian Legal System, A comparative Study*, p.94.

³ Abu Al A'tham. Fahd, *Administrative Justice between Theory and Practice*, Dar Al Thaqafa, Amman, 2005. P.94

⁴ Omran. Ali, *Administrative Justice*, p.59.

its independence, neutrality, integrity and subjectivity, and the powerful and authoritative judicial decisions which requires everyone to implement and respect¹.

Second; decisions Not subject to the Administrative Justice control, namely Acts of Sovereignty and Administrative Decisions which the legislator protects from judicial control upon Legislative Texts for especial considerations².

It is Noteworthy that these decisions differ in many ways from acts of sovereignty, but they are similar in terms of violating the principle of legitimacy. The provisions which safeguards the Administrative Decisions are considered more serious since the last one is relatively precise while the first is unframed and doesn't have a defined standard. The legislator might decide to immune/ protect some Administrative Decisions with disregard of its nature, where Acts of Sovereignty might come up with political and historical justifications or so. However, the legislative immunization is Not justified, therefore, this orientation of some legislators makes administration infallible, which makes commenting on its acts and decisions Not possible. As is known, the Right of Litigation is an important safeguard of achieving justice³ and protecting civil rights and freedoms. Therefore, the detriment of this right is the result of obstructing human being and their inherent right to apply to the courts in order to seek legal redress, since Administrative Justice is a safe haven to individuals from the intransigence of administrative power, the last is infallible. So there has to be an independent authority for rescission of Administrative Decisions or to claim compensation according to the damage individuals suffered by these unlawful decisions⁴.

This leads us to conclude that, in principle, all administrative acts shall be subject to Judicial Review regardless of their nature. However, this principle might be subject to exceptions many people consider a derogation of the principle of legitimacy⁵ and a violation of a state of law, namely the theory of Acts of Sovereignty and the theory of legal immunity of Administrative Decisions. Both of which represents a denial of a state of law. These acts escape the scrutiny of the judiciary and liable to cancellation and compensation. Therefore, immunizing Administrative Decisions of judicial appeal is baseless and unjustified, and the approach legislators pursue which prevents imposing judicial control over some decisions have No. justification but referring to the police state.

3. How to immunize Administrative Decisions from judicial appeal

This point will address the concept of immunizing Administrative Decisions from judicial appeal, the distinction between legal immunity and theory of the principle of acts of sovereignty, the implications of immunizing Administrative Decisions from judicial appeal, the Administrative Justice attitude towards legal texts which immunize Administrative Decisions, the constitutionality of Immune Laws to Administrative Decisions, as follows;

3.1. The concept of immunizing Administrative Decisions from judicial appeal;

Immunizing Administrative Decisions from judicial appeal means, that the legislation should prohibit hearing of proceedings before the judicial authorities to shield the decision issued in conformity with the law⁶. Therefore, the immunization process should be concluded by the legislator i.e. the legislative power⁷. Administrative Decisions shouldn't be immunized without legislative texts. The impact of immunizing these laws from appeal is the inadmissibility of appeal against the immunized decision and to have the decision overturned before the court, leading to the suppression of individual's rights of litigation. Appealing against such decisions violates the divine Right of Litigation guaranteed under constitutions. The Right of Litigation is safeguarded and guaranteed for all individuals⁸. Texts of constitution safeguard the Right of Litigation and prevent violations of this right directly, it is a protected right which the constitution affirms its sanctity, ensuring that individuals have equal opportunities to seek legal redress. Article 6/1 from the Jordanian constitution states that "Jordanians shall be equal before the law. There shall be No. discrimination between them as regards to their rights and duties". Article 6/2 states that "the Government shall ensure a state of tranquility and equal opportunities to all Jordanians". Article 97 states that "judges are independent, and in the exercise of their judicial functions they are subject to No. authority other than that of the law". Finally, article 27 states that "The Judicial Power shall be exercised by the courts of law in their varying types and degrees. All judgments shall be given in accordance with the law and pronounced in the name of the King".

¹ Radi.L. Mazin, Handbook of Administrative Law, 2006, p.27

² Al Khalayleh. Mohammad, Handbook of Administrative Law, 2018, Dar Al Thaqafa, Amman, p.298.

³ Abu Al A'tham. Fahd, Administrative Justice between Theory and Practice, p.116

⁴ Masa'da. Abed Al Mahdi, Judicial Review of Administrative Action in The Jordanian Legal System, p.86.

⁵ Ahmad Adnan Qasem, immunizing acts of public administration against judicial review, PhD Thesis, Ain Shams University, 2016, p.76

⁶ Ali shantawi, The immunization of Administrative Decisions, Journal of Administrative science, King Saud University, Al Riyadh, p.1.

⁷ shantawi .Ali, Administrative Justice Encyclopedia, Chapter one, Dar Al Thaqafa, 2004, pp.127-126.

⁸ Abu Al A'tham .F, Administrative Justice between Theory and Practice, p.116

Therefore, the government shall enable the judiciary of hearing individual's complaint and claim, and any act or administrative decision immune from Judicial Review shall be null and void. Judicial Review over administrative acts became one of the cornerstones of the legal system of any legal state which seeks to reinforce rights and freedoms, especially since the practical reality affirms that administration is fallible and that the most effective way to ensure the non-diversion of administrative acts is by the subjection of those acts to Judicial Review without exception¹.

Examples of the legislations which immunized Administrative Decisions from appeal:

Article 11 of the Political Parties Law, article 28/1 of the City, Village and Building Planning Law, article 59 of the Medical Association Law, article 99 of the Law of Bar Association and article 16 of the Publication Law.

And when the legislative authority issues such laws, it favors the executive power in confronting judicial power, though preventing the judiciary from exposure to acts of executive authority which encourages the executive authority to take advantage of legal loopholes by derogating from its basic aim of law implementation².

Moreover, article 5,a,7 of the Jordanian law of Administrative Justice states that "The administrative court exclusively is competent to deal with all appeals concerning final Administrative Decisions including the appeals made by individuals aggrieved by the decision even if immune by the law issued thereunder."

3.2. The distinction between legal immunity and the theory of acts of sovereignty:

Acts of Sovereignty are defined as a range of executive authority acts which were beyond the Judicial Review as cancellation and compensation, it is an exception to the principle of legitimacy³. It is a judicial theory which relays on implementing the legislation. Where it is stated in the Jordanian law of Administrative Justice (Law No.. 27, Article 5/d of 2014) that the administrative court does not have jurisdiction over applications or appeals related to acts of sovereignty.

Thereupon, the Supreme Court of Justice (administrative court) issued numerous court decisions in this regard including the following:

Decisions related to Acts of Sovereignty are the decisions issued by the executive authority concerning state sovereignty in relation with the implementation of the basic constitutional laws and the relation between other authorities, such as the government's associations with parliaments and the state's ties with foreign countries. Thereof, the administrative decision issued by an administrative authority is not considered an implementation of laws and regulations to create a certain legal status if legally possible, such a decision is subject to appeal before the Supreme Court of Justice⁴. Another decision states that "each decision made in the application of international conventions is a political matter and is considered as an act of sovereignty unrecognized by the government. The Supreme Court of Justice doesn't have the jurisdiction to hear the claims related to acts of sovereignty"⁵.

3.3. It is worth mentioning that, attempts of doctrine and jurisprudence in finding criteria to distinguish between legal immunity and the theory of Acts of Sovereignty were not successful as they invented numerous criteria's in this regard, such as political motivation, the nature of work itself and a distribution of courts criterion. That is to say, legal redress to determine what is considered a sovereign act by establishing a list of these acts is unstable. However, the agreement was reached on a certain number of these acts, such as acts related to the government's relation with the parliament, acts of an international nature and acts of external war and internal scrutiny⁶.

Some scholars consider that these Acts of Sovereignty are not immune to judicial review. This is confirmed by article (5), paragraph (d) of the Jordanian administrative law No.. (27) of 2014, which states that "the administrative court does not have jurisdiction over applications or appeals related to acts of sovereignty". Meaning that, it is the jurisdiction of other judicial authority other than Administrative Justice which is the regular courts. The aforementioned is confirmed by article (102) of the Jordanian constitution, which states that "The Civil Courts in the Hashemite Kingdom of Jordan shall have jurisdiction over all persons in all matters, civil and criminal, including cases brought by or against the Government, except those matters in respect of which jurisdiction is vested in Religious or Special Courts in accordance with the provisions of the present Constitution or any other legislation in force."

3.4. Implications of immunizing Administrative Decisions from judicial appeal:

¹ Abed Al Ghani Basoni, *Administrative Justice* (3rd ed.), MONCHAAT AL MAAREF, Alexandria, 2006, pp. 213-215.

² Suliman Al Timawi, *Administrative Justice: Annulment Proceedings*, Dar Elfikir Elarabi, Cairo, 1967, p.463.

³ Jamal Al Din.S., *Judicial Review Over Administrative Acts*, Monchaat Al Maaref, Alexandria, 2003, pp.293-294.

⁴ Decision No.. 42,981 (1983), *Bar Association Journal*, p.660.

⁵ Decision No.. 64,106 (1965), *Bar Association Journal*, p.561.

⁶ Omran. A, *Administrative Justice*, p.68.

Immune decision will become final and stable; the decision will be beyond Judicial Review and is implemented directly regardless of the basic laws of decisions validity and enforceability. The entry into force of administrative decision is subject to the rule of prompt entry into force. Meaning that, the adoption of the decision which is ratified by competent authorities and in its proper form and integrated terms and conditions, is deemed effective from the minute its terms and conditions have been realized, without the need for any other action provided that there is No. serious defect¹.

However, the general rules of jurisprudence see that the Non-retroactivity of the administrative decision, means that it shouldn't be applied on previous proceedings. Instead, it will become effective in the future, although there are exceptions to this rule, such as the existence of a legal provision that allows the retroactive effect of the decision or the application of disciplinary decisions best for the accused².

In dismissing the appeal of the immune decision and before embarking on the subject: the immunization of Administrative Decisions from judicial appeal leads to the inability of the judicial system to examine the legality of the decision. The reason for this is, overturning the appeal of the immune decision by the judicial system for want of jurisdiction in terms of discussing the plaintiff's claim and the legal underpinnings. Thereof, the decision is vulnerable and is implemented without examining its legality.

4. The position of Administrative Justice to Legislative Texts which immune Administrative Decisions:

The Supreme Court of Justice (administrative justice) found that Legislative Texts which immune Administrative Decisions in numerous cases are constitutional. The court stated in case No.41/55 that "As to claim of the constitutionality of article 46/1 of the Independence of the Judiciary Act, that this article does Not contradict article 100 of the constitution. This article stated the presence of a Supreme Court of Justice without determination of jurisdiction. Thereafter, the law of Regular Courts formation emerged and identified the Supreme Court of Justice jurisdiction. Hence, there is No. reason why the legislator can Not develop another law to extend or restrict this power. In article 46/1, the legislator made the decision of the committee established under this article is Not subject to judicial review³."

Case No. 41/74, confirmed the constitutionality of laws which immune Administrative Decisions: "Constitutionally speaking, the deprivation of all individuals from access to justice is impermissible and is considered a confiscation of the Right of Litigation which is guaranteed by the constitution. However, it should Not be confused with the determination of jurisdiction by extended or restricted. Because, constitutional texts finds stipulate that the law is the one that arranges the judiciary and appoints their jurisdictions in pursuance of article 100 of the Constitution. Hence, Building on this constitutional origin extended and restricted legislations were issued. There is No. doubt about the constitutionality of these legislations as long as the law is the tool which has the power to determine jurisdictions. This principle has been affirmed by the legislative rule "the judiciary is meant with time and space with the exception of some litigations"⁴.

We wonder what is the aim of the legislator from preventing appeal of Administrative Decisions issued in application of some laws as long as the state is a judicial state which adopts the principle of legality. Then, why the judiciary did Not get the right to review these decisions? Considering that it is a neutral authority which safeguards rights and freedoms.

4.1. The Constitutionality of Immune Laws to Administrative Decisions:

We believe that the legislations which immune Administrative Decisions constitutes a violation of the principle of the Right of Litigation. It is an unjustified exception to the idea of subjecting acts of Administrative Justice to the review of the judiciary. Therefore, it is necessary to examine the constitutionality of these legislations and if they constitute a violation of the constitution whereby legislative proceeding should be taken to guarantee the supremacy of the constitution and to protect it against violations. As the constitution stipulates the formation of a constitutional court to look into the constitutionality of laws and regulations in force. The court is competent to examine the constitutionality of legislations which immune Administrative Decisions, and is responsible to overturn any legislation which immune any administrative decision from appeal. However, the decisions of the Supreme Court of Justice (the Administrative Court) confirmed the constitutionality of laws to immune decisions based on Article 100 of the Constitution, which gives the Normal legislator authority and jurisdiction in determining the types, levels, sections of courts and their jurisdictions and how to manage them by law. The Supreme Court of Justice (Administrative Court) believes that the confiscation of Right of Litigation means the absolute confiscation of this right, namely, depriving all individuals from seeking legal redress. It is Not considered a confiscation of the right to litigation, but is a constitutional procedure, as the Constitution stated in Article 100 that the law is the one that arranges the judiciary and appoints their jurisdictions in compliance with

¹ Kanaan. N. (2005), Administrative Justice (2nd e.d), Dar Al Thaqafa, p.291

² Al Timawi. S. (1984), The General Theory of Administrative Decisions, a comparative study, Dar Elfikir Elarabi, Cairo, pp. 219-324.

³ Case No. 41/55, Jordanian Bar Association Journal, 9th e.d, p.492.

⁴ Case No. 41/74, Bar Association Journal, 9-10, p.1011

time and space and the exception of some litigations but this position was strongly criticized by many scholars¹

5. Conclusion

This study can be concluded as follows; the principle of legitimacy means that all authorities of the state are subject to the provisions of the law. Separation of powers is one of the requirements of this principle which helps all authorities in recognizing their boundaries. All jurisprudential opinions agree on that the subjection of every authority to the provisions of the law and recognizing their boundaries is what gives its action legitimization, and considers it a legal state. Balancing between the requirements of public interest and protecting rights and freedoms of individuals from arbitrary Administrative Decisions which violates these rights is the responsibility of the administrative justice.

Through this study, we were able to tackle the justiciability of acts of sovereignty, immunized Administrative Decisions and the constitutionality of protective laws. Therefore, the rights and freedoms which are Not subject to all legislation and the provisions of the law have No. value.

6. Recommendations

This study led the researchers to come up with the following recommendations:

1. Continue to work on reducing Immune Laws to Administrative Decisions, even though the Jordanian law of Administrative Justice states that they are subject to Judicial Review.
2. To apply to the constitutional court through jurisdictions to resolve disagreement over the constitutionality of Immune Laws to Administrative Decisions.
3. Continue to work on eliminating the so called Acts of Sovereignty to a limited extent which enables reconciliation of the incompatible interests.
4. To guide Regular Courts, to constitutional and legal provisions which enables the imposition of Judicial Review over Acts of Sovereignty.

We are all hopes that this research will be a great success.

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7. References and Resources

- Abu Al A'tham. F. (2005), Administrative Justice between Theory and Practice, Dar Al Thaqafa, Amman.
- Adnan Qasem, A. (2016), Immunizing Acts of Public Administration against judicial review, PhD Thesis, Ain Shams University, 2016.
- Al Jabari. A. (2001), the Constitutionality of Legislative Texts which immunizes Administrative Decisions.
- Al Khalayleh. M. (2018), Handbook of Administrative Law, Dar Al Thaqafa, Amman.
- Al Timawi, S. (1967), Administrative Justice: annulment proceedings, Dar Elfkir Elarabi, Cairo.
- Al Timawi. S. (1984), The General Theory of Administrative Decisions, a comparative study, Dar Elfkir Elarabi, Cairo.
- Al Timawi. S. (1967), Administrative Justice: Annulment Proceedings, Dar Elfkir Elarabi, Cairo.
- Basioni. Abed Al Ghani. (2006), Administrative Justice (3rded.), MONCHAAT Al MAAREF, Alexandria,
- Jamal Al Din.S. (2003), Administrative Acts Review, Monchaat Al Maaref, Alexandria.
- Kana'an.N. (2005), Administrative law (2nd ed.), Dar Al Thaqafa, Amman.
- Masa'da. Abed Al Mahdi, Judicial Review of Administrative Action in The Jordanian Legal System, A comparative Study.
- Omrn. A. (2016), Judicial Administration, Redwan Publishing and Distributing, Amman.
- Radi.Lelo.M. (2006), Handbook of Administrative Law.
- Shantawi.A, The Immunization of Administrative Decisions, Journal of Administrative science, King Saud University, Al Riyadh.
- Shantawi .A.(2004), Administrative Justice Encyclopedia, Chapter one, Dar Al Thaqafa.

¹ Al Jabari. A. (2001), 4.1. The constitutionality of Immune Laws to administrative decisions, p.67