Ilkogretim Online - Elementary Education Online, Year; Vol 19 (Issue 3): pp. 1977-1984
http://ilkogretim-online.org
doi: 10.17051/ilkonline.2020.03.735351

Exceptions to the principle of prohibiting the administrative judge from directing orders to the administration

Dr. Rasha Shakir Hamid, College of Law, University of Karbala – Iraq

Abstract- The principle of prohibition of directing orders to the administration and the prohibition of substituting them dates back to the date of the French Council of State turning to the stage of the outright judiciary or the commissioner. Before that date, the Council of State used to direct orders to the administration and replace them in practicing its competence because it was only an advisory body to the administration. Therefore, the Council practiced the authority to direct orders to the administration and to replace them based on the direct subordination to the head of state. But, after the independence from the administration and possessing final judicial authority, the council voluntarily chose to restrict its powers in the cancellation lawsuit with a number of restrictions, including its abstention from directing orders to the administration and replacing it with practicing its administrative function without any explicit and clear provision that obliges the Council to this type of restriction.

Keywords: The attacking decision , Substantive judiciary, Administrative investigation; Judicial order

I. Introduction

The idea of the topic

The administrative judiciary did not implement the ban on directing orders and the prohibition of replacement in absolute terms although the traditional trend in France and Egypt restricted its powers to this ban as there are exceptions to the general principle.

The significance of the present study

The present study is significant as it seeks to reduce the severity of the general principle by granting the administrative judge the power to issue orders to the administration as an exception

The problem of the present study

The problem of the present study is reflected in the departure of the administrative judge from the traditional role in managing and conducting the proceedings and ruling in the case to directing orders to the administration and replacing it in some cases, which is inconsistent with the principle of separation of powers.

The objectives of the present study

The present study aims to reveal the reasons of the exceptional authority granted to the administrative judge with the accompanying guarantees that the administrative judge has.

II. The study methodology

The present study adopts the analytical approach for legal texts and inductive jurisprudential jurisprudence with reliance on some rulings and judicial decisions.

The study plan

The binary method is adopted in dividing the present study into two sections. Each section is divided into two subsections. Each subsection is divided into two points.The present study ends with a set of results and recommendations. Section one tackles the concept of the principle of prohibiting directing orders to the administration and prohibiting the administrative judge from replacing the administration. This section is divided into two subsections. The first one is devoted to the content of the principle of prohibiting directing orders to the administration. The second is devoted to the legislative content of the principle of prohibiting directing orders. In section two, the researcher deals with exceptions to the two principles of prohibiting the judge in directing orders and prohibiting replacement. It is divided into two subsections. In the first, the limits of the powers of the administrative judge in issuing orders to the administration are discussed. The second requirement presents examples of administrative judge replacing administration.

Section one

The concept of the principle of prohibiting directing orders to the administration and prohibiting replacement the Administrative judge in place of the administration

To find out the content of the principle of prohibiting directing orders from the administrative judge to the administration, this section is divided into two subsections. The first is devoted to the content of the principle from the jurisprudential aspect. The second is devoted to the content of the principle from the legislative point of view.

The content of the principle of prohibiting directing orders to the administration from the jurisprudential and legislative point of view

The administrative judge decides and does not administer since his work is limited to the judicial position. So, this subsection is divided into two points. In the first, the researcher deals with the content of the principle from the jurisprudential aspect. The second deals with the principle from the legislative point of view.

The content of the principle of prohibiting directing orders from the jurisprudential point of view

The principle of prohibition is defined as that the administrative judge cannot order the administration to perform a specific act or refrain from performing a specific action, whether it is in connection with the cancellation lawsuit or the full court case (Al-Attar,2000: 7).

The administrative judge settles the case before him without replacing the administration authority in carrying out any of the acts that fall within its jurisdiction because the judge's role is limited to practicing his judicial function of imposing the rule of law on the dispute before him without exceeding this role (Hamdi, and Silia: 9). As for the compensation lawsuit, the administrative judge's powers are broad. He can cancel the illegal administrative act and determine the rights of the plaintiff if he finds out that the administrative acts have injured and harm him/her (Al-Banna,286).

In France, since the beginning of the twentieth century and the subsequent period, the opinions of the French jurists are divided into three main directions. The first trend, which is the traditional trend, supported the course of the French Council of State in restricting the principle of prohibiting directing orders to the administration and prohibiting replacing it (Al-Banna: 286).

The second trend emphasized the need for the French Council of State to review its position on the principle of prohibiting directing orders and replacement, which leads to the council abandoning its policy of refraining from directing orders to the administration while continuing to implement the policy of non-replacement (Amal, 2011: 42).

The third trend decided that the State Council has the right to direct orders to the administration and to replace it (Amal, 2011: 44).Since its establishment in 1946, the administrative judiciary in Egypt has always been keen to implement the principle of prohibiting directing orders. It has many provisions that affirm this principle. Among its applications in this regard is what was stated in the ruling of the Administrative Court issued on 15 / 12/1948.

The position of the Iraqi jurisprudence on the principle of prohibiting directing orders and prohibiting replacing it has not been clear in its two parts. There are jurists who opposed the behavior of the administrative judiciary in directing orders to the administration and replacing it. Other very few Iraqi jurists who express their opinion about this principle.Some of the jurists have addressed the principle of prohibiting directing orders to the administration and prohibiting replacing it in their studies. Dr. Ghazi Faisal Mahdi stands in favor of this principle. Thus, he criticizes the position of the legislator and the Iraqi administrative judiciary, which is to give the administrative judiciary the authority to direct orders to the administration and the authority to replace it by modifying the contested administrative decision. He believes that this departure by the Iraqi administrative judiciary in this principle is considered interference in the part of The administrative judiciary in areas that fall within the core of the administration's jurisdiction (Mahdi, 2001: 100).

The legislative content of the principle of prohibiting directing orders

In order to reduce the scope of this prohibition, the French administrative judiciary has practiced the authority to direct orders to the administration according to Article (3/8) of the administrative courts and administrative courts of appeal and Article (77) of Law No. 125 of 1995, which was added to Article (6/1) From the fine law No. 539 of 1980 of the State Council state that administrative courts, administrative courts of appeal, and the State Council can direct orders to the administration (Shati, 2014: 53).

In Egypt, since its establishment in 1946, the Egyptian State Council has been affected by what the French State Council has taken regarding the prohibition of directing orders from the administrative judge to the administration without any clear and explicit legislative text defining the judiciary's powers with this type of restrictions. Thus, the rulings of the administrative judiciary refuse to direct orders to the administration (Othman, 2005: 125).

In Iraq, the Iraqi judiciary legislator authorized the administrativejudiciary to direct orders to the administration as Article (7 / second / I) of the amended State Council Law No. 65 of 1979 states that "The court shall decide on the appeal submitted to it and it may decide to dismiss the appeal, cancel, or amend the order or decision with ruling for compensation if it is necessary" (Sakar, 2017: 151).

The content of the principle of prohibiting the replacement of administration by an administrative judge

The administrative function is considered independent in comparison with the judicial position. The nature of the administrative judge's job is to settle the dispute presented to him. Therefore, the content of the principle of prohibiting the replacement of the administration by the administrative judge from the jurisprudential and legislative sides will be explained in details in the following two points.

First : The content of the principle of prohibiting replacement from the jurisprudential point of view.

The principle of prohibition of replacement means that the administrative judge, when deciding on the case, does not have the right to replace the administration in issuing administrative decisions and to amend or change its content. It is not his right or authority to arrange the effects away from the administration. Based on this principle, the administrative judge does not have the right to replace the administration or performs a work within its competence. He does not have the right to do the work that the administration refrained from doing or which it refused when it was issued against individuals (Shati, 2014: 55).

Second: The content of the principle of prohibiting replacement from the legislative point of view.

There is no legal or theoretical basis for the principle of prohibition of replacing the administration by the administrative judge neither in French nor Egyptian legislation. But, the state Council in France has restricted itself against the administration with this restriction. This policy returns To historical circumstances that accompanied the emergence and development of the French administrative judiciary. The Egyptian administrative judiciary transferred this principle despite the different historical circumstances that accompanied the emergence of the Egyptian administrative judiciary (Kassal: 64).

In Iraq, specifically after the establishment of the administrative judiciary represented by the State Council and the issuance of the Second Amendment of the Law of the Iraqi State Consultative Council No. 106 of 1989,

the Iraqi legislator refused what the Egyptian and French legislators followed. The Iraqi legislator supported the administrative judge's replacement of the administration. The Iraqi State Council Law stipulated in Article 7 of the Fifth Amendment No. 17 of 2013 states that "The Administrative Court decides on the appeal submitted to it. It may decide to dismiss the appeal, cancel, or amend the appealed order or decision with compensation if it is required based on the plaintiff's request (Iraqi State Council Law No. 65 of 1979, Fifth Amendment No. 17 of 2013).

Section two

Exceptions to the principle of prohibiting the administrative judge from directing orders and replacing the administration

The administrative judiciary has not applied the principle of prohibiting directing orders from the administrative judge to the administration and replacing it absolutely although the traditional trend in both France and Egypt is to restrict his powers with this prohibition. There are cases in which the administrative judge directs orders to the administration body as an exception to the aforementioned principle, which contributed to mitigate this principle.Therefore, this section is divided into two subsections. The first is devoted to discussing the limits of the powers of the administrative judge in issuing orders to the administration. The second is devoted to examining the forms of the judge's replacement of the administration.

Limits of the powers of the administrative judge in issuing orders to the administration

For the purpose of examining these exceptions, it is necessary to divide this subsection into two points.The authority of the administrative judge in issuing administrative orders is examined in the first point.The second point examines the authority of the administrative judge to amend administrative decisions.

First : The authority of the administrative judge to issue orders to the administration

The circumstances in which the cancellation lawsuit arose by the French administrative judiciary had a great impact on the role of the judge, the limits of his authority, and his relationship with the administration. However, there are exceptions to this general rule in which the judge issues orders to the administration addressed as follows:

1. Obliging the administration to present the documents or files in its possession to prove the case

The laws of evidence in the scope of civil and commercial articles include a number of general rules that the judiciary is bound by and considers them the basis of the proof process. Among the most prominent of these rules is the rule that the burden of proof of the case falls on the plaintiff and the rule that the litigant is not compelled to present evidence against him/herself except in the cases stipulated (Pursuant to Article 9 of the Iraqi Evidence Law No. 107 of 1979, which stipulates that (the judge may order any of the litigants to present the evidence in his/her possession, and if he/she refuses to present it, his/her abstention may be considered evidence against him/her).

2.The order to stop implementation

The suspension of the implementation of the administrative decision means that it is (the authority according to which the judge can decide to suspend the implementation of the administrative decision when the cancellation is appealed against by a request by the appellant in the case that the necessary conditions to stop the implementation are met(Al-Dulaimi: 132).

3. Requiring an administrative investigation

Criminal investigation is defined as "the set of legitimate means and procedures that the investigator uses in order to reach the truth. It aims to establish the occurrence of the crime, how it occurred, the reason for its commission, and the identification of the perpetrator. The subject of the investigation is the crime and the criminal" (A lecture by Miss. Israa Muhammad, published on the website: uobabylon.edu.iq).It is also defined as "a preliminary procedure aiming at revealing the truth of the relationship between the accused and the

accusation (Al-Rubaie Ahmad: 4, published on the website: https://almerja.com). It is also defined as "a set of procedures aiming at identifying disciplinary violations and those responsible for them. The investigation is usually conducted after the discovery of the violation" (ibid).

Second: The authority of the administrative judge to amend administrative decisions

To precisely tackle this issue, this subsection is divided into two parts. The first part deals with the definition of amending the administrative decision. The second part distinguishes the amendment of the administrative decision from the replacement of the legal reason.

1.Defining the amendment of the administrative decision

The amendment of the administrative decision means making a change in it preventing from ending it or removing its effects. The change does not affect its essence. In this regard, it is not conceivable that there will be a complete amendment of the administrative decision since the amendment is based on changes in a part of the administrative decision without changing it entirely to prevent it from being terminated. A complete amendment of the administrative decision means making a change that affects the entire administrative decision and then leads to its termination (Ibrahim, and Al-Azzawi: 59).

2.The distinction between the amendment of the administrative decision and the replacement of reasons or legal basis

The idea of replacing the reasons or replacing the legal basis is not considered as an amendment of administrative decisions. The idea of replacing the reasons is summarized in the fact that the principle is that the administrative judge has to rule to cancel the decision when it is proven that the reasons relied on are invalid (Al-Jiza, 1970: 304).

A valid reason that is suitable as a basis for the contested decision and replaces the reason on which the administration relied is looked for.This authority is not owned by the administrative judge whose authority is limited to examining the reasons for the decision and ruling to revoke it when it is proven unlawful (Al-Nuaimi: 149).

The French Council of State replaces reasons when the administration cancels an administrative decision issued void even if the annulment decision is issued based on incorrect reasons (Al-Jiza: 307).The idea of the legal basis is achieved when the defendant administrative body has taken the contested decision according to the sound legal formulas and forms and it is the competent authority to make the decision, but it has established it on an incorrect legal basis or text (Al-Nuaimi: 148).

Third : Examples of the administrative judge replacing the administration

Replacing the administration’s by the administrative judge in cancellation cases is a consequence of performing his work in which, he does not violate the scope of legality even if his authority extends to the elements of the administrative decision in which the administration has discretionary power (Amal, 2011: 149). The majority of administrative law jurists consider the principle of prohibiting the replacement of the administration by the administrative judge as a criterion for distinguishing between abolition claims and full judicial cases (Al-Ani, 2015: 190).

The annulment judge has limited powers to cancel the unlawful decision without having the right to arrange the results of this cancellation. The judge in full court cases, in addition to ruling that the act is illegitimate, he can modify the administration’s behavior or award compensation to the administration (Shati, 2014: 35).

This subsection is divided into three parts. The first part deals with the partial cancellation of administrative decisions. The second part deals with amending the legal basis for administrative decisions. The third part addresses the transfer of the administrative decision.

First: Partial cancellation of administrative decisions

The administrative judge, if he decides in the cancellation lawsuit, does not have the right to amend the administrative decision, but his authority is restricted to revocation or confirmation without preventingfrom implementing partial cancellation of some administrative decisions at the request of the plaintiff (Al-Shati: 31).

The cancellation may be partial if the decision is partly correct and in another part, it is incorrect. The cancellation may also be complete if it becomes evident that the illegality takes up the whole decision (Essam, 2012: 18).The administrative judge can cancel the illegal part of the attacking administrative decision (Amal, 2015: 37).

In partial cancellation of the administrative decision, it is required that the violation of the law be partial, that is, part of its provisions or part of its effects violate the law. It is also stipulated that the partial cancellation does not affect the purpose of the decision. The administrative judiciary has applied the case of partial cancellation of the administrative decision as an exception from the general principle. The authority of the judge of annulment is that he shall rule in the failure to replace the administration. In France, the French Council of State ruled on March 12, 1993 in the case of (Yilmaz) when the decision regarding the deportation of a foreigner to a specific country that it was partially canceled as not determining the country to which the foreigner was deported.

In Iraq, the legislator has granted the administrative judiciary the authority to amend the administrative decision, which is considered a partial annulment of the administrative decision and a departure from its authority in the cancellation lawsuit. An example of this is the ruling of the General Discipline Council (that the penalty that is commensurate with the subordinates' lack of respect for their superiors takes into account progression and deterrence and gives the employee an opportunity To improve his/her behavior. Therefore,it decided to amend the penalty by reducing it to the warning penalty (Al-Shati: 32-33- 34).

Second: Amending the legal basis for the administrative decision

The amendment of the legal basis of the administrative decision or its causes shall be through the administrative judge replacing the basis, cause, or fault on which the administration relied in its decision with another valid legal basis or reason. That will be explained in the following two points:

1.Amending the legal basis for the administrative decision

The amendment of the legal basis for the administrative decision shall be in cases in which the administration issues an administrative decision according to the formalities, procedures, and correct legal reasons for issuing it within the framework of its restricted authority that obliges it to issue it, but it relies on a wrong legal basis in that it is not authorized to issue such a decision. In such a case, the administrative judgereplaces the correct basis instead of the incorrect one inserted without a legal basis, which is what the French administrative judiciary has applied (Amal, 2012: 157).

2. Replacing the correct reason for the administrative decision instead of the wrong reason

It is the second way in which the administrative judge intervenes by replacing the incorrect or wrong cause except that his authority in that is restricted by controls. The administrative judge cannot replace the correct reason for the administrative decision instead of the wrong reason except when the administration is in the process of practicing a restricted authority, that is, it is obligated to issue this decision. The judge replaces the unlawful cause with the legitimate one (Al-Shati, 2014: 76).

Third: Transferring the administrative decision

The transformation of the administrative decision means the announcement of the administrative judge that the place of the administrative decision has been transferred if the declared place is unachievable if the elements of the new decision are available.The idea of transforming the administrative decision is a clear application of the authority of the administrative judge to overcome the defect of violating the law. Under this idea, the administrative judge confronts a valid decision tainted by the defect of nullity or lack of absence, or

to give it the status of nullity and legitimacy to convert it into another decision that fulfills all its legal requirements by changing its location. The administrative judiciary took this idea from (the theory of contract transformation known in civil law (Al-Aboudi, 2005: 106).

In Iraq, although the legislator granted the administrative judge the authority to amend the administrative decision in Article (7 / VIII / A) of the depleted State Council Law, there is no text containing the theory of the transformation of the administrative decision. But, the Iraqi administrative judiciary applied the theory of transforming the administrative decision even if it is not declared so through the ruling of the Administrative Court in Case No. 218 / Administrative Judiciary / 2010 on 05/18/2011 when the decision of the Governor of Baghdad to dismiss the director of the new Baghdad district due to the falsification of his academic document to an exclusion from the position. "Since dismissal from the position differs in terms of legal effects from exclusion, including the inability to appoint the dismissed employee, unlike the employee who is excluded from the job (Al-Shati: 80).

III. The results

1. Exceptions to the authority of the administrative judge may relate to the prohibition of issuing orders to the administration or the prohibition of replacing it.

2.A negative decision is an order that is indirectly directed to the administration.

3. The relationship between the administrative judge and the administration is limited to examining the legality of the decision.

4. An administrative investigation differs from a criminal investigation.

5. The Iraqi legislature has given the Administrative Judiciary Court the power to amend administrative decisions.

6. The administrative decision remains in place without modification in light of the two ideas of replacement of reasons and replacement of legal reasons.

7. The general principle is that the administrative judge shall not replace the administration in the cancellation lawsuit.

8. Partial cancellation of the decision may focus on part of it or it may be a complete annulment of the decision.

9. Unlawful reasons are decisive or resolute reasons.

10. The Iraqi State Council Law does not include texts regarding the theory of administrative decision transformation.

IV. Suggestions

1.The Iraqi legislator should disengage from the executive branch of the State Council, represented by the Ministry of Justice, as it includes administrative courts, which undoubtedly violates the principle of separation of powers stipulated in the Iraqi constitution in force of 2005.

2.The Iraqi legislator should strengthen the practice of the Iraqi judiciary by directing orders to the administration by stipulating that the administrative judge be granted the authority to issue orders to the administration and obligate it to do so.

3.The Iraqi legislator should grant the administrative judge the authority to rule on the threatening fine in order to force the administration to implement his ruling.

4.The administrative judiciary in Iraq should reverse its refusal to consider the appeal to cancel the negative decision represented by the administration's refusal to implement the judgments issued by it in implementation of Article (7/6) of State Council amended Law No. (65) of 1979.

5. The Iraqi legislator should stipulate in the Law of Discipline of State and Public Sector Employees No. 14 of (1991) the harshest disciplinary penalties for the employee who refuses to implement the judgment.

V. Conclusions

The administrative judge has exceeded the normal limits of his authority to make the correct adjustment to the decision subject of the lawsuit and not be satisfied with the description added by the administration. There are clear solutions for the administrative judge in charge of the administration to issue the appropriate decision.

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