العنوان:	The Competent Court To Hear The Disputes Of Administrative Contracts
المصدر:	مجلة العلوم القانونية والسياسية
الناشر:	الجمعية العلمية للبحوث والدراسات الاستراتيجية
المؤلف الرئيسي:	Almomni, Sabah Mousa
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المجلد/العدد:	س9, ع2
محكمة:	نعم
التاريخ الميلادي:	2019
الشهر:	حزيران
الصفحات:	246 - 284
رقم MD:	962194
نوع المحتوى:	بحوث ومقالات
اللغة:	English
قواعد المعلومات:	EcoLink, IslamicInfo
مواضيع:	القانون الإدارى، العقود الإدارية، القضاء الإداري، منازعات العقود الإدارية
رابط:	http://search.mandumah.com/Record/962194

JOURNAL OF LAW AND POLITICAL SCIENCES

THE COMPETENT COURT TO HEAR THE DISPUTES OF ADMINISTRATIVE CONTRACTS

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Vol. 19, issue 2- 2019 Print ISSN 2222-7288 Online ISSN 2518-5551

Abstract

This study aims to examine the jurisdiction over the disputes arising out of the administrative contracts, explain position of the legislator and the Jordanian administrative court on such jurisdiction and compare it with the position of comparative legislator and judiciary.

In light of failure to include looking into the disputes arising out of the within jurisdiction of the Jordanian administrative court, the study shows that the Jordanian administrative judiciary argues that looking into such disputes is beyond its jurisdiction. This means that looking into such disputes is attributed to the civil court which results in prejudice to privacy of such contracts which are concluded by the State with the aim of managing the public utilities steadily and regularly.

Keywords: administrative contracts, administrative judiciary, competent courts, disputes of administrative contracts.

Introduction

The expansion of the functions of the state and the diversion of its responsibilities and its transformation from a custodial state to an intervening state in order to secure the life requirements of

individuals and to manage public utilities played a major role in the state's conclusion of contracts to achieve these objectives.

However, contracts entered into by the administration with a contacting party may take the form of private contracts where the State becomes of par with the other contracting party, so that such contracts become subject the private courts. Yet, sometimes the State may contract with the other party as a public authority, where it stipulates conditions in the contract that are unusual in private law, with the aims of achieving the public interest and running the public utility regularly and steadily, which necessitates that these contracts are subject to the administrative judiciary.

This has been adopted by the comparative countries in France and Egypt. However, the Jordanian administrative legislator did not refer to the jurisdiction of administrative courts over these contracts. This method has been adopted by the Jordanian administrative judiciary, namely the former High Court of Justice and the current administrative court.

In many decisions, the administrative judiciary stressed that it is not competent to look into the disputes arising out of administrative contracts, and the problem of the study lies in this. This study is significant since it highlights the effectiveness of subjecting the disputes arising out of the administrative contracts

to the administrative judiciary that is most knowledgeable in resolving these disputes. This is because such contracts have their own privacy that distinguishes them from private contracts, in terms of their connection to the public utility and targeting the public interest.

Significance of the Study and Research Methodology

The question that arises here is why has not the Jordanian administrative legislator required jurisdiction of the administrative judiciary over the disputes arising out of the administrative contracts? And why has not he adopted approach of the comparative countries that expanded jurisdiction of the administrative courts over disputes of the administrative contracts after it has been clear that such contracts are a kind of administrative works in nature? Hence, the administrative judiciary must have jurisdiction over the disputes arising out of the administrative contracts.

This study, therefore, aims to explain effectiveness of expansion of jurisdiction of the administrative contracts to include looking into the disputes arising out of the administrative contracts concluded by the State to manage the public utilities regularly and steadily, which are different from the private contracts.

To achieve the aims of the current study, the study uses the comparative analytical approach that is based on analyzing the provisions governing the administrative contracts and comparing between them with the guidance of the decisions of the administrative judiciary concerning administrative contracts in Jordan and the comparative countries.

To realize the desired findings, nature of this study requires use of a certain approach that combines the descriptive approach to define the concepts contained in the study and the analytical approach to analyze the provisions in connection with the administrative contracts in Jordan and the comparative countries.

In order to achieve objectives of the study, this study is divided into two topics. The first one explains nature of administrative contracts and the standards that distinguish them from the private contacts. The second topic examines the competent body to look into the disputes of administrative contacts in France, Egypt and Jordan.

Vol. 19, issue 2- 2019 Print ISSN 2222-7288 Online ISSN 2518-5551

FIRST PART

NATURE AND STANDARDS OF ADMINISTRATIVE CONTRACTS

Theory of Administrative Contracts is relatively new in the administrative Law; it emerged the early twentieth century. The idea of administrative contracts is that a State concludes contracts with subjects of the private or public law to regularly and steadily manage a public utility. What do administrative contracts mean? What are the standards that distinguish them from the private contracts? This will be discussed in two requirements as follows:

First: Definition of Administrative Contracts

The administration tends to enter into contracts with the individuals to achieve its objectives, so that a contract that defines rights and obligations of both parties is concluded.

However, contracts made between the administration and individuals are neither of the same nature nor are they subject to the same legal system. Such contracts are divided into two categories: category 1: civil contracts which are called administration contracts. Such contracts are made by the administration with individuals where both parties have equal rights and obligations, and dispositions of both parties are dealt

with on the same footing. Hence, the disputes that may arise of such contracts are resolved by the ordinary courts. Category 2: administrative contracts made by the administration with individuals, entities or other managements, where the administration has preferential status. Such contracts contain conditions that are different from those contained in the private law contracts, where the administration under which has privileges that are not found in the private contracts. In such contracts, the administration can impose its conditions on the other party. Hence, the principle of equality between the contracting parties, which is known in the private law, does not apply to these contracts.[1]

A contract is generally defined as "an agreement between two wills to create a certain legal effect by establishment, transfer, amendment or removal of an obligation".[2]

As to the administrative contract, it is defined as "a contract made by a public legal person with the aim of managing or regulating of

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[1] Sarayrah, Mesleh. (1996), Provisions of Private Administrative Contracts of the Public Works Regulation No. (71) of 1986, p.3, Mutah Journal for Research and Studies, vol 11, issue 1, Mutah University, Jordan.

[2] Sultan, Anwar. (1987), Sources of Obligation in the Jordanian Civil Code, a comparative study with the Islamic jurisprudence, edition 1, Publications of the University of Jordan, Jordan, p.10,

a public utility, and in which the administration intends to apply the provisions of the public law. To this end, such contract contains exceptional conditions that are not found in the private law, or under which the other party is authorized to directly participate in managing the public utility".[1]

According to the Egyptian Supreme Administrative Court, the administrative contract is "a contract made by a legal person with subjects of the public law with a view to managing or facilitating a public utility, where such person demonstrates its intent to adopt style of the public law by including conditions in the contract that are uncommon to be listed in contracts of the private law".[2]

Moreover, with the emergence of e-government, the so-called electronic administrative contracts have emerged. Such contracts are defined by the Jordanian Electronic Transactions Law No. 15 of 2015 as "an agreement that is concluded wholly or partially by electronic means ".

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[1] Tammawi, Sulaiman. (1984), General Principles of Administrative Contracts, no edition, Dar Fekr Arabi, Cairo, p.74,

[2] A decision issued on 30.12.1967, The Set of Legal Principles Established by the Egyptian Supreme Administrative Court, part 2, edition 1983, Egyptian Authority.

Hence, these contracts, as shown in the abovementioned definition, are administrative contracts in the usual sense, but the difference is in the means of contracting where the modern technological means are used instead of paper and documents.

Upon the foregoing definitions of the administrative contracts, it seems that it is established in both administrative jurisprudence and judiciary that there are a number of standards to differentiate between the administrative and private contracts, which will be discussed in Requirement 2.

Second: Standards for Distinction of the Administrative Contract

It is established in both administrative jurisprudence and judiciary that what distinguishes the administrative contracts from the private law contracts is a formal standard that a subject of the public law is party to such contract, and two other necessary standards that the contract is for a public utility and that the administration uses means of the public law concerning the contract.[1]

[1]Abbadi, Mohammad. (2001), Jurisdiction over Disputes of Administrative Contracts, a comparative study, Manarah Journal for Research and Studies, vol.7, issue 3, Jordan, p.13.

I. a party to the contact is a subject of the public law

A contact is considered an administrative contract only if a party to such contact is a subject of the public law, whether it relates to the central administration or to a decentralized public legal person, regional or local.

Concept of the public figure has expended to include the organizations that organize economic or professional activities such as the trade associations and chambers of industry and commerce.

This trend was adopted by the repealed Law of the High Court of Justice No. 12 of 1992, where Article (9/a) of the said Law provides for decisions of such entities are governed by jurisdiction of the High Court of Justice. This approach has been adopted by the Jordanian Administrative Judiciary Law No. 27 of 2014, where Article (5/a/1) provides for the exclusive jurisdiction of the administrative court over the challenges to results of elections of councils of chambers of industry and commerce, unions, associations and clubs registered in the Kingdom…."

It should be mentioned that this legal principle has been established for a number of decades in the French and Egyptian administrative jurisprudence and judiciary in accordance with the French and Egyptian Councils of the State.

As to the other party to the contract, it may be either a public legal person like another administration or a private legal person like a company- which is mostly seen- and it may be a natural person.

Further, it should be noted that an administrative contract is still valid if it is made by a natural person or a private company as long as such person works for the management. An example of this is the contracts made for distribution of goods and basic needs performed by private entities on behalf of the administration in times of crisis, since such entities seek to fulfill needs of individuals on behalf of the administration to ensure smooth functioning of the public utilities.[1]

This has been adopted by the French and Egyptian administrative judiciary, where the Egyptian Supreme Administrative Court ruled that "it goes without saying that a contract to which the administration is not a party will not be deemed to be an administrative contract, where rules of the public law has been developed to control activity of the administration not activity of individuals or private entities….. However, if it is discovered that an individual or a private entity has indeed entered into a contract

[1] Jabouri, Mahmoud. (2007), Administrative Contracts, edition 2, Dar Thaqafa for Publication and Distribution, Amman, Jordan, p.40.

for the administration and its interest, then such contract is deemed to be an administrative contract if it contains the other elements under which the standard for distinction of an administrative contact is built".[1]

Moreover, it is to be noticed that the fact that the administration is a party to the contract does not necessarily mean that the contract is administrative. The administration may make a contract as a private individual, where it behaves in this case as an individual without capacity of the public authority where this, in certain circumstances, would be in its own interest that is required by nature and type of the activity it exercises. In this case, the contract made by the administration will be governed by rules of the private law.[2]

II. The contract is for activity of the public utility

[1] A decision issued by the Egyptian Supreme Administrative Court, referred to in Dr. Khalaileh, Mohammad Ali (2017), the Administrative Law, 2nd book, edition 3, Dar Thaqafa for Publication and Distribution, Amman, p.266, taken from Dr. Mousa Shehadeh, the Administrative Law, publications of Al-Quds Open University (1996) p.154.

[2] Alhelo, Majed. (2004), Administrative Contracts and Arbitration, no edition, Dar Jama Jadida, Alexandria, Egypt, p.18.

Theory of public utility is the cornerstone in the administrative law and a basis for most of its principles and theories that are based on the idea that the public utility and requirements of its regular and steady proper functioning, and realization of the public interest of society is the only basis for existence of a legal system that justifies contents of the administrative contract that are deemed to be anomaly in the private law.[1]

The Jordanian High Court of Justice defines the public utility as "a collective need whose necessity requires intervention of the government to provide it to others using means of the public law. In other words, the essential element of the public utility is existence of a necessary service the legislator requires to be provided directly by the government". [2]

Thus, the subject matter of the contract must be associated with a public utility whether in terms of regulation, running, administration or utilization of such public utility, or in terms of aiding in or contribution to it, or achievement of one of the public

[1] Tammawi, Sulaiman. (1984), General Principles of Administrative Contracts, ibid, p.73.

[2]High Court of Justice, a decision issued on 30.4.1969, Bar Association Journal, 1969, p.321.

utilities, to be deemed an administrative contract. A contract that is not associated with one of the following principles that govern the public utilities will not be an administrative contract:

1. Principle of regular and steady functioning of the public utility,
2. Principle of equal access to the public utility, and
3. Principle of changeability of the public utility according to circumstances.[1]

Association of the contract with the public utility is decided by the court. If a contract ceases to be associated with the public utility, it will be determined by the court as a private contract. Hence, if a public authority enters into a contract that is not associated with running of a public utility, then such contract is not administrative but private.

III. Use of the public law methods in the contract

Selection of the public law methods by the administration is the precondition in distinguishing the administrative contracts from the private ones, which is sufficient to infer the administrative nature of the contact. Though it is a prerequisite for the contract

[1] Jabouri, Mahmoud. (2017), Administrative Contracts, ibid, p.43 and beyond.

to be administrative, association of the contract made by the administration with the public utility is not sufficient alone for the contract to be considered administrative.

Indeed, use of the public law methods is one of the most important elements for distinction between the administrative contract and other contracts. If the administration assumes capacity of individuals and enters into contracts as they do, then such contracts shall be deemed to be private.

On the contrary, if the State acts in its public capacity and requires conditions that are uncommon in the private law with a view to realizing the public interest, then the contract is question is administrative.

An example of this is what decided by the Egyptian Supreme Administrative Court where it states "….. The administrative contract is characterized by the fact that the administration acts, when concluding it, in its capacity as a public authority with rights and privileges that are not available to the other contracting party with the aim of realizing a public interest or interest of a public utility. It also differs from the civil contract in that the public legal

person depends, when concluding and executing it, on the public law methods and means…."[1]

In the decision above, it is found that the Egyptian administrative court required that the contract should contain exceptional conditions that are uncommon to be contained in the private law in order to be considered an administrative contract, and that the objective of such contract is the public interest or the public utility's interest.

According to the administrative jurisprudence, the uncommon condition is "a condition that is not usually found in the private law contracts and under which rights and obligations of contracting parties are different from the rights and obligations that may be accepted by a contracting party under the civil or commercial law….". [2]

An example of the exceptional and uncommon conditions is the management's rights to unilaterally amend some conditions of the

[1] Decision of the Egyptian Supreme Administrative Court in case No. (1963/1059) dated 25.5.1963.

[2] Khalaileh, Mohammad. (2017), The Administrative law, 2nd book, ibid taken by Jabouri, Mahmoud (1998), Administrative Contracts, p.42, Dar Thaqafa for Publication and Distribution, Amman, p.269.

contract, give orders and instructions to the other party during execution of the contract, and impose penalties on the other contracting party for breaching the contract or delay in execution of the same.

It should be noted that no certain number of uncommon conditions is required in order for the contract to be administrative; rather one condition is enough to show the management's intent to adopt the public law method and provisions in concluding or executing the contract.[1]

Importance of distinction between the administrative and private contracts lies in determination of the jurisdiction that looks into disputes of the administrative contracts, which will be discussed in the next topic.

SECOND PART

THE COMPETENT COURT IN ADMINISTRATIVE COURT

The competent authority to look into disputes of administrative contracts in Topic I, the standards that distinguish the

[1] Kanan, Nawwaf. (2010), the Administrative law, 2nd book, edition 1, Dar Thaqafa for Publication and Distribution, Amman, p.321.

administrative contracts from the private contracts are discussed, where a contract is not considered administrative if any of such standards is absent. Importance of distinction between the administrative and private contracts lies in determination of the competent court that looks into disputes of the administrative contracts. The competent court is determined based on nature of the contract. If the contract is administrative, the disputes arising out of such contract shall be tried by the administrative court, while if it is a private law contract, then the disputes related to such contract will be looked into by the ordinary courts. This is only applied in the countries that adopt the dual jurisdiction system, which have ordinary courts to look into the disputes related to the private law contracts, and administrative courts to look into all administrative disputes, including disputes of administrative contracts as in France and Egypt.

The question that arises here is: do the Jordanian administrative courts look into disputes of administrative contracts, as in the above countries, or not?

First: Disputes of administrative contracts in France

The theory of administrative contracts in France is relatively new where it was developed early the twentieth century, though the French Council of State had been established many years before.

The standard of public authority was the standard used for the distribution of jurisdiction between the ordinary and administrative courts, while other ordinary dispositions performed by the State, including disputes of administrative contracts, are governed by the ordinary courts.

However, the French administrative judiciary retracted this approach and began to expand its jurisdiction to include contracts concluded by the State or one of its organs which were considered as a normal disposition of management. This happened in 1903, specifically in its judgment in the Terry's case where it stated "jurisdiction of administrative court covers all matters in connection with regulating and running the public utilities, whether regional or local… the contracts concluded by the administration in this regard are of administrative nature, and the administrative court shall have jurisdiction to settle all disputes arising out of such contracts". [1]

The Council of the State continued to use theory of administrative contracts in its decisions, like the decision issued in the Granite

[1] Referred to in Ubada, Ahmad Uthman (1973), Manifestations of Public Authority in Administrative Contracts, edition n1, DarNahda Arabia for Publication and Distribution, Egypt, p.14.

Company's case in 1912, where it confirmed that a contract is deemed to be administrative only if it contains uncommon conditions.

Second: Disputes of administrative contracts in Egypt

Before establishment of the Egyptian Council of State in 1946, the Egyptian administrative judiciary did not have jurisdiction over disputes of administrative contracts, rather the ordinary courts had jurisdiction over the disputes arising out of the contracts concluded by the State.

Despite the establishment of the Egyptian Council of State in accordance with Law No. 112 of 1946, the ordinary judiciary continued to have jurisdiction over these disputes. The said Law specified powers of the Council of State, where it did not grant such Council the jurisdiction to look into various types of disputes of administrative contracts.

The situation continued to exist where the Law No. 9 of 1949 was issued, where it provides in Article 5 that "the administrative court shall look into the disputes arising out of the contracts of obligation and public works as well as administrative procurement contracts between the government and the other party, and if such

disputes are instituted before the ordinary courts, they may not be instituted before the administrative courts".[1]

Having verified the said Article, it is found that the Egyptian legislator confines jurisdiction of the administrative judiciary to three types of administrative contracts namely, obligation contracts, public works contracts, and administrative procurement contract. Though jurisdiction of the Council of State was limited to these three types of contracts, the Egyptian administrative judiciary has expanded its jurisdiction over the administrative contracts to include other contracts based on their association with any of these three contracts.[2]

The drawback of this text is that it stipulates that jurisdiction over these administrative contracts will be shared by the ordinary courts and the administrative courts, where it indicates that institution of a case before either court will prevent institution of the same case before the other court.

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[1] Helmi, Mahmoud. (1977), Administrative Judiciary, edition 2, Dar Fekr Arabi, Egypt, p.299.

[2] Khalaileh, Mohammad. (2017), the Administrative Law, 2nd book, ibid, p.261 referred in Jabouri, Mahmoud (1998) Administrative Contracts, Dar Thaqafa for Publication and Distribution, Amman, Jordan, p.16.

This situation continued to exist until the issuance of the Law No. 165 of 1955 which superseded the former law, where Article 10 thereof provides that "the Council of State shall solely look into the disputes arising out of contracts of obligation, public works and procurement or any other administrative contracts".

The same provision was included in the Egyptian Council of State Law No. 47 of 1972. Under these provisions, the Egyptian administrative judiciary has had an absolute and exclusive jurisdiction over all disputes arising out of all administrative contracts in all phases of contracting from formation of a contract until its expiration, and the Egyptian Council of State has become the only competent body to look into the disputes arising out of the administrative contract.

Third: Disputes of administrative contracts in Jordan

Before its amendment, Article 100 of the Jordanian Constitution of 1952 provides for establishment of a higher court of justice. In accordance with this constitutional provision, the Law on Formation of Civil Courts No. 26 of 1952 was issued, which superseded the Law on Formation of Civil Courts No. 71 of 1951. The Law defines the civil courts as follows: magistrate courts, courts of first instance, courts of appeal and court of cassation,

provided that the court of cassation enjoys three capacities: criminal, civil and administrative capacities.

The imperative constitutional provision in Article 100 was not established, where "establishment" means to establish an independent high court of justice with specialized judges who are independent of the civil courts to look into the administrative disputes. This did not happen, where the court of cassation was granted an exclusive jurisdiction over some administrative appeals, provided that such jurisdiction is confined to only overruling the decision without delivering a judgment for compensation. These appeals include: appeals against election of municipal and local councils, appeals and disputes against the public officials, and appeals against individuals and administrative entities. This situation has led to the intensification of debate and disagreement between Jordanian jurists over the nature of the judiciary in Jordan, whether it is uniform or dual. Some jurists argue that the Jordanian judiciary was still uniform in this phase,[1]

1 Before its amendment, Article 100 of the Jordanian Constitution of 1952 provides that "The establishment of the various courts, their categories, their divisions, their jurisdiction and their administration shall be by virtue of a special law, provided that such law provides for the establishment of a High Court of Justice".

while other jurists, whom we support, argue that the judiciary was dual in this phase,[1] However, part of jurists argue that the Jordanian judiciary was mixed in this phase.[2]

The situation continued until issuance of the Interim Law of High Court of Justice No. 11 of 1989, where the previous dispute and debate were resolved, and Jordan became has become one of the dual judiciary States. Article (9/a) exclusively defines jurisdictions of the court, where disputes of administrative contracts do not exist. After that, this Law was repealed and superseded by the Law of High Court of Justice No. 12 of 1992. The new Law adopted approach of the previous law where powers of the court are defined in Article 9 thereof without mentioning disputes of the administrative contracts. Therefore, the High Court of Justice was not competent to look into administrative contracts related disputes. This has been confirmed in many decisions issued by the said Court.

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[1] Hafez, Mahmoud. (1987), Administrative Judiciary in Jordan, Publications of the University of Jordan, p.37.

[2] Shatnawi, Ali. (1993), Principles of Administrative Law, Arab Center for Student Services, Amman, pp.68-73. referred to in Qbeilat, Hamdi (2018) A Brief in the Administrative Judiciary, Dar Wael for Publishing and Distribution, Amman. P 113.

In one of its decisions, the High Court of Justice decided that "the decision issued by the administration according to its powers under the contract is beyond jurisdiction of the High Court of Justice. Further, the case for appealing against the contract in terms of its contractual scope but not of its administrative one is beyond jurisdiction of the High Court of Justice, rather it should be heard by the ordinary civil courts".[1]

The High Court of Justice has confirmed this in another decision where it decides that "dispute on rights is heard by the ordinary courts even if it relates to administrative contracts, since competences of the High Court of Justice were exclusively defined and they do not include disputes of contracts, regardless of their types…"[2]

It also decided that "where it is established in the administrative jurisprudence and judiciary that in the scope of the abolition judiciary it is impermissible to rely on breach by the administration of its contractual obligations as a ground that permits a request for

[1] High Court of Justice, decision No. (1954/26) dated 1.1.1954, administrative body, Journal of Jordan Bar Association, issue 1, p.684.

[2] High Court of Justice, decision NO. (77/106), Journal of Jordan Bar Association of 1978, p.956.

abolition of the administrative decision, where abolition action is a result of the principle of legality, while the obligations of the administrative contracts are personal on the one hand, and the abolition action is not directed to contracts since it is a condition that it is directed to an administrative decision issued unilaterally by the administration depending on its authority under the laws and regulations, while a contract is coupling of two wills….".[1]

Further, the High Court of Justice decided that "any dispute between parties to an administrative contract in the execution phase is indeed a dispute over rights, and where there is no doubt that such disputes are right-based disputes and not over legality of an administrative decision, and whereas the Higher Court of Justice has jurisdiction over the matters set out in Article 9 of its Law No. 12 of 1992 and looking into disputes of administrative rights is not contained therein…. Hence, looking into the case falls in jurisdiction of the civil courts and beyond jurisdiction of the High Court of Justice…".[2]

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[1] High Court of Justice, decision No. (1999/352) dated 19.1.200, published on Bar Association website, system.jba.org.jo.

[2] High Court of Justice, decision No. (2009/159) dated 23.6.2009, Adalah Center Publications,

It also decided that "examination of conditions of the contract and application of its provisions and any consequent dispute are beyond jurisdiction of the High Court of Justice, rather looking into such dispute is within jurisdiction of the civil courts".[1]

Having reviewed all decisions above, it is found that the High Court of Justice has always asserted that the administrative contracts are like the private contracts, where looking into disputes arising out of such contracts is beyond its jurisdiction and falls within jurisdiction of the ordinary judiciary.

Afterwards, the Jordanian Administrative Judiciary No. 27 of 2014 was issued. We hoped that it would provide for jurisdiction of the administrative court over the administrative contracts like the case of the French and Egyptian legislation and judiciary that have jurisdiction over disputes of the administrative contracts, as explained above. Yet, nothing of this happened, where the Jordanian Administrative Judiciary Law has not indicated to jurisdiction of the administrative courts over the disputes arising out of the administrative contracts, and it has confined such jurisdiction to the ordinary judiciary neglecting the privacy that

[1] High Court of Justice, decision No. (2010/55), five-judge board, dated 13.10.2010, Qistas.

distinguishes the administrative contracts from the private ones. It can be said here that the said Law has adopted the approach adopted by the repealed Court of High Justice Law.

In this context, Article 5/a of the Administrative Judiciary, law provides that "the administrative court shall solely have jurisdiction over all appeals filed against the final administrative decisions…"The said Law, therefore, did not provide for jurisdiction of the administrative courts over the disputes arising out of the administrative contracts. Accordingly, the administrative court has issued several decisions asserting its lack of jurisdiction over the administrative contracts , where it ruled that "since subject of the case relates to the contact between the plaintiff and the Jordan Valley Authority and application of its provisions and any consequent disputes, and since the issued and appealed decisions are associated with the contract and its execution as well as its legal consequent effects pursuant to the conditions of the contract, especially that the plaintiff acknowledged, as explained earlier, that the relationship between the plaintiff and the Authority is a contractual relationship but not a legal relationship.

In other words, subject of dispute arises from the contract and its amendment and its consequent effects and executive procedures.

Hence, In this case not appeal may be filed against cancellation or termination of the contact before the administrative court, since the appeal in this case is based on the personal rights created by the contact itself that are subject to the provisions of the law in connection thereof… and since disputes of administrative contracts are beyond jurisdiction of our court pursuant to the provisions of Article 5/a of the Administrative Judiciary Law, then the defense is permissible and the case shall be dismissed in form for lack of jurisdiction".[1]

Upon the foregoing, it is found that the Jordanian administrative legislator did not include disputes of administrative contracts within jurisdiction of the administrative courts, which means jurisdiction over such disputes is given to the ordinary courts which have the general mandate on looking into the judicial disputes.

We believe that non-inclusion of administrative contracts related disputes within jurisdiction of the administrative judiciary is a criticized and reprehensible matter and prevents development of rules and provisions of the administrative contracts. The

[1] The Administrative Court, decision No. 267 of 2015, dated 28.10.2015, Qistas.

administrative judges have the expertise and knowledge that make them better able to look into administrative contracts related disputes where such contracts have a distinct quality that distinguishes them from the private contracts, since they are associated with the public utilities and public interest. The contacts concluded by the administration are sort of administrative works in nature, under which the administration has an authority and privileges that are not available to the other contracting party. Thus, the administrative judiciary is required to look into the disputes arising out of such kind of contracts.

It is, therefore, hoped that the Jordanian legislator will reconsider competences of the administrative court by amending the Jordanian Administrative Judiciary Law No. 27 of 2014 and include hearing of disputes of administrative courts within its jurisdiction, following the example of the comparative countries that successfully re-included disputes of administrative contracts within jurisdiction of the administrative judiciary, as explained above, after it has been asserted that it is the most familiar body with such disputes due to their administrative nature that distinguishes them from the private contracts, and to which the State is a party as a pubic authority that have the rights and

privileges not available for the other contracting party with a view to realization of the public benefit and public interest.

It should be noted, however, that the administrative jurisprudence and judiciary have always analyzed contractual process of the administrative contracts and differentiated between the decisions issued by the management, which can be separate from the administrative contract in order to prepare for conclusion of the contract, on the one hand and the process of contracting itself on the other hand. Such decisions are apart from the administrative contracts, which make it permissible to appeal them for abolition before the administrative court since they are administrative decisions over which the administrative judiciary have jurisdiction as set out in Article 5/a of the Jordanian Administrative Judiciary Law, which provides that "the administrative court shall solely have jurisdiction over all appeals filed against the final administrative decisions…".

These decisions include, a decision issued for placing the work in a tender, a decision issued for removal of a certain bidder, and a decision issued for cancellation of the tender or awarding it to a certain person. These are final administrative decisions like any other final administrative decision, where they are subject to all provisions applicable to the final administrative decisions.

It is established in the Jordanian judiciary that such administrative decisions may be independently appealable before the administrative judiciary if they can be separated from the contractual process upon availability of elements of the administrative decision.

In this regard, the High Court of Justice decided" It is agreed that if the administrative decision is integrated into a complex process, the rules of ordinary jurisdiction will allow the High Court of Justice to separate the administrative decision from this complex process and an make it subject to the abolition judiciary, provided the rest of the process in connection with the civil right is governed by the competent court".[1]

It also decided that "The administrative contract passes through a complex process required by its preliminary nature, where the administration, in its capacity as a public authority, unilaterally issues administrative decisions under which it determines the legal positions before awarding the tender. In this phase, these decisions take the form of administrative decisions in the meaning placed for this. In the second phase, the procedures become independent and

[1] High Court of Justice, 81/53, Journal of Bar Association, 1982, 2nd issue, p.178.

any dispute is governed by an amnesty and the subsequent legal rules. The administration becomes a party to the contract and the dispute over the right and the interpretation of the contract and the rights of its parties becomes a dispute governed by the contract and right-based dispute that is heard by the ordinary courts".[1]

Conclusion

Subject of administrative contracts is very important due to distinction between the administrative and private contracts. The administration is a party to the administrative contract and association of the contract with the public utilities, where such contract is aimed at managing the public utility regularly and steadily. Further, the administration uses the public law methods in the contract, where the State in the contract has a public authority that imposes conditions on the other contracting party that are unusual in the private law, in order to achieve the public interest. Due to the distinction between the administrative and private contracts, some dual judiciary States, like France and Egypt, grant the administrative judiciary the jurisdiction over

[1] High Court of Justice, 97/270, dated 18.11.1997, Journal of Bar Association, 1988, p.412. See also, decision of High Court of Justice, No. 2009/159, dated 23.6.2009, publications of Adalah Center.

disputes arising out of the administrative contracts since it is the best body to look into these disputes.

However, the Jordanian legislator unfortunately did not grant the administrative judiciary the jurisdiction over these disputes, rather he granted it to the ordinary judiciary, the repealed Law of High Court of Justice No. 12 of 1992 did not provide for jurisdiction of the court, that has specific competence, over the disputes arising out of the administrative contracts.

The Jordanian Administrative Judiciary Law No. 27 of 2014 has adopted the same approach where it does not provide for jurisdiction of the administrative courts over these disputes.

When he enacted this relatively new law, we hoped that he had adopted the approach adopted by the dual judiciary comparative countries where they grant the administrative judiciary the jurisdiction over the disputes arising out of the administrative contracts due to their privacy that distinguishes them from the private contracts; a party to such contracts is a subject of the public law, they are associated with activity of the public utility, and the administration uses the public law methods in such contracts.

Upon above, the study concludes a set of findings as follows:

1. Not all contracts made by the administration are administrative. The administration may make contracts as the individuals do where they are equal in this case and such contracts considered private and governed by the ordinary judiciary.
2. A contract is not administrative unless it has standards that distinguish it from the private contract.
3. In principle, the administrative judiciary looks into the disputes arising out of the administrative contracts. This is adopted by the comparative judiciary, France and Egypt. However, the Jordanian legislator did not require jurisdiction of the administrative courts over such disputes rather he granted such jurisdiction to the ordinary judiciary.
4. Non-inclusion of administrative contracts related disputes within jurisdiction of the administrative judiciary is a criticized matter and prevents development of provisions of the administrative contracts.
5. Due their experience and knowledge, the administrative judges are the best ones to look into the disputes to which the administration is a party as it has a public authority.
6. It is established in the administrative jurisprudence and judiciary that the process of making the administrative contracts is to be analyzed, where the appeal against the

decisions that can be separated from the administrative contract must be lodged with the administrative judiciary since they are administrative decisions that are issued unilaterally by the administration.

To conclude, the researchers put in forward the legislator a set of recommendations as follows

1. The administrative legislator is kindly requested to expand jurisdiction of the administrative courts to include all administrative disputes not only the administrative decisions by amending Article 5/a of the Administrative Judiciary Law No. 27 of 2014 to become "the administrative court shall solely have jurisdiction over all appeals against administrative disputes".. instead of the existing Article which provides that "the administrative court shall solely have jurisdiction over all appeals against the final administrative decisions, including…". This amendment is very important since it gives the administrative judiciary the jurisdiction over all appeals in connection with the administrative contracts.
2. We hope that the administrative legislator will benefit from the experience of comparative countries that adopt

dual judiciary in the area of administrative contracts like Egypt and France, which preceded us very much in this field.

3. We hope that the Jordanian legislator will pay a great attention to the administrative judge by expanding his competence since he could better understand nature of administrative disputes faced by the administration, which in turn ensures running of the public utility regularly and steadily.

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