



وزارة التعليم العالي والبحث العلمي
جامعة الموصل / كلية الحقوق

التعسف في استعمال الحق الإداري

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في القانون العام / القانون الإداري

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المستخلص

التعسف في استعمال الحق الإداري من المفاهيم الحديثة ابتدعها القضاء الإداري من خلال خلق قواعد ومبادئ عامة ملزمة للإدارة في سبيل رسم الحدود لسلطتها التقديرية وخاصة في نطاق القرارات الإدارية وحسب ما محدد في نطاق البحث ، لكون تلك السلطات تشكل حقوق وامتيازات للسلطة الإدارية تقوم على عدة ملاءمات منحت المرونة للإدارة في تعاملها لتحقيق أهداف رسمها المشرع ، فلقد ظهرت ملامح حديثة للرقابة القضائية تجسدت في التوسع في بسط رقابة الملائمة بالاستناد على معايير موضوعية تقوم على مدى التناسب في قرارات الإدارة وفي أركانها التي تكمن في السبب والمحل والغاية في سبيل تحقيق الأهداف الأساسية التي منحت من أجلها تلك السلطات ولضمان عدم خروجها عن مبدأ المشروعية بمعناها الواسع باعتبار أن الملائمة والتناسب هي من العناصر الأساسية للمشروعية ولا تشكل خرقا لها .

ظهرت ملامح حديثة للرقابة ومنها رقابة التناسب ورقابة الخطأ الظاهر ورقابة الغلو ورقابة الموازنة بين المنافع والأضرار وشملت مجالات عديدة وطبقت في البلدان محل المقارنة مع وجود اختلافات في التطبيق ، استند استنباط هذه الرقابة إلى القواعد العامة للقانون الخاص ونخص بذلك القانون المدني ومنها في العراق وحسب نص المادة ٦٧ من القانون المدني رقم (٤٠) لسنة ١٩٥١ المعدل وكذلك المادة (٥) من القانون المدني المصري رقم (١٣١) لسنة ١٩٤٨ المعدل .

وقد حققت تلك الأنواع من الرقابة أهدافها في رسم الحدود لسلطة الإدارة التقديرية وضمان عدم تعسفها في استخدام حقوقها شاملة لكافة الحقوق والحريات والرخص الممنوحة للمواطن ، ومن خلال المقارنات بين المتناقضات تم إزالة الغموض الذي يعتري التعسف فضلاً على إيجاد مواطن الضعف والقوة لرصد واقع القضاء الإداري العراقي وإبداء المقترحات ومنها وجوب اثبات وقيام التعسف ان يستند الى ضوابط موضوعية بعيدا عن التقديرات وفق القناعات الشخصية وبحسب وقائع كل دعوى ، كما نوصي باضفاء الفاعلية على ما يتوصل اليه الباحثون من خلال التنسيق بين الأكاديميين وصناع القرار في سبيل اتباع النهج المتطور والفعال للحد من السلطة التقديرية للإدارة وضمان عدم تعسفها حفاظا على حقوق وحريات المواطن من خلال تعزيز الثقة بالإدارة وتقييم وتقويم تصرفاتها بما يحقق المشروعية بمعناه الواسع .

Abstract

Abuse of the administrative right of modern concepts invented by the administrative judiciary through the creation of judicial rules to be added to the legal rules written in administrative law based on the structural role of the administrative judiciary where these rules have become general principles binding on the administration in order to draw the limits of its discretion, especially in the scope of administrative decisions and as specified in the scope of research, because those discretionary powers constitute rights and privileges of the administrative authority based on several conveniences granted flexibility to the administration in its dealings To achieve the objectives set by the legislator, which favored the balance of its legal centers over the legal centers of the client, and for the purpose of rebalancing those centers and work to ensure the effectiveness of the administration and protect the rights and freedoms of the client away from control and arbitrariness, modern features of judicial oversight have emerged, embodied in the expansion of the extension of appropriate control based on objective criteria based on the extent of proportionality and appropriateness in the decisions of the administration and in its elements, which lie in the cause, place and purpose in order to achieve the purpose for which those powers were granted and to ensure that they do not deviate from the principle of legality in its broad sense, considering that appropriateness and proportionality are among the basic elements of legality and do not constitute a violation of them.

Modern features of the control appeared, including the control of proportionality and the control of the apparent error and the French judiciary was the pioneer in which it is based on the proportionality between the cause of the administrative decision and its place by examining the appropriateness of the seriousness and proportionality of the facts with the direct impact of the place of the administrative decision and applied in many areas, as appeared

control of exaggeration in disciplinary penalties and was the leadership in it for the Egyptian administrative judiciary to reduce the exaggeration in achieving the public interest in cases of excess or negligence and applied by the Iraqi judiciary under the name of Another is proportionality, but one of the other modern features of control is the control of the balance between benefits and harms, which is also invented by the French judiciary and included many areas and applied in the countries under comparison with differences in application.

These forms of censorship were based on general rules of abuse of the civil right and that there are no legal texts in the administrative law address the issue of arbitrariness and with reference to the provisions of private law, including in Iraq and according to the text of Article 6 and 7 as well as Article 5 of the Egyptian Civil Code, we find them developed treatments for cases, images and standards of arbitrariness and clearly by relying on personal or objective criteria, as for the issue of proving arbitrariness, although the administrative judiciary has been based on General rules as well, but it included the plaintiff by facilitating by transferring the burden of proof to the administration because of its authority to keep the documents that prove the claim and oblige it in most cases to submit it to the judiciary or to deduce the intention of damages based on objective criteria based on non-balance or proportionality in order to arrange responsibility based on the realization of its pillars represented by error based on deviation in the use of the right or in achieving the result represented by the preponderance of damages over the total benefits, considering that the interest The desired is of a dual nature that affects public and private interests at the same time, and therefore this responsibility entails the penalty of both kinds, whether preventive to avoid arbitrariness or therapeutic to redress the unusual damage, and the criterion in the recognition of responsibility here is the standard of the common man and the usual disposition in the use of the right or in achieving the usual result

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and Scientific Research
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Abuse of the administrative right

Master's thesis submitted by master's student

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to the Council of the Faculty of Law, University of Mosul,

which is part of the requirements for obtaining a master's
degree in public law

supervision of

Prof. Dr. Naktal Ibraheem Abd AL Rahman

2024 A.D ----- 1445 A.H