



THE ROLE OF ADMINISTRATIVE LICENSE IN REGULATING THE PRACTICE OF PUBLIC FREEDOMS: A COMPARATIVE STUDY

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Abstract:

An administration exercises its authority by making a variety of administrative decisions, such as administrative licensing decisions, which are considered a legal action, whereby public order is maintained and laws are enforced. These proceedings and decisions affect individuals' public freedoms by restricting and regulating them according to certain legal controls and conditions. The expansion of the principles of democracy and the rivalry among nations forced their political regimes to take these principles into consideration when drafting and enacting laws. One of the means of regulating these rights is the administrative licenses represented by administrative decisions issued by ad hoc administrative bodies of a special nature and of multiple qualities. The non-binding executive capacity and the temporary capacity that give the administration the authority to monitor it even after issuing the administrative license decision are among the most important of these qualities. Despite affecting the public freedoms and the principles of democracy by the administrative licensing decisions, these decisions have positive effects on freedoms as well as elements of public order through its role in achieving a balance between them. Individuals are considered free with regard to exercising their freedoms and activities according to the provisions of the constitutions and laws, provided that individuals commit themselves when exercising these freedoms not to harm public order in society. The legislator always acknowledges the administration to play the mediating role among the law and individuals when exercising their rights, freedoms and activities, whether profitable or not. He also grants them the practice of administrative control in order to maintain public order in its various elements and to protect society from harm in all aspects of life. Individuals are unable to engage in some activities without a license, and they are only permitted to do so after receiving a license or prior approval from the appropriate authorities. Therefore, licensing can be considered the most effective means of administration in controlling the activity of individuals and their freedoms.

INTRODUCTION

Public freedoms play a crucial role in society, particularly since the ideas of democracy have been adopted by the majority of political systems worldwide. The extent to which democracy is achieved in the political system is commensurate with the extent of its commitment to protecting these freedoms. Although the extent of these freedoms is broad, they must be subject to constraints and regulations in order to avoid becoming anarchic and undermining the freedoms of others. Therefore, it is regulated by administrative bodies in accordance with legal proceedings according to which the administration aims to maintain public order and regulate the role of the authority in order to prevent it from becoming a tyrannical tool that affects rights and freedoms. Administrative licensing decisions are only one of the methods that may be used to accomplish this regulation. The administrative license is an administrative proceedings practiced by the competent administrative authority in order to maintain public order and the public interest in society. Through this action, the authority seeks to achieve a balance between public freedoms and public order. The license has a certain effect on individual public freedoms in society, whether in the case of approval or rejection of the license application.

First: The research importance:



The importance of the research stems from the importance of the subject of administrative licensing, its role in monitoring public freedoms, and achieving a balance between them and the elements of public order.

Second: The research problem:

The research problem lies in the licensing decisions. Are they administrative decisions having their own characteristics? Do they violate public freedoms or abuse of these authorities?

Third: The research methodology:

The analytical and comparative approaches will be adopted in analyzing the various legal texts in addition to identifying the jurists' opinions related to the subject in France, Egypt and Iraq.

Fourth: The research structure:

The topic will be divided into two sections: The first section deals with the definition of administrative licensing and its characteristics, whereas the second section deals with the control of administrative licensing on public freedoms. The research is concluded with a number of conclusions and recommendations.

First: The definition of administrative license and its characteristics

The administrative license is a legal means employed in regulating the individuals' various activities, which is used in controlling their freedoms and rights. It takes many forms and appellations, such as accreditation, license, visa, entry visa... and so on. It is an individual administrative decision that is characterized by some legal characteristics differing from other administrative decisions, which ultimately make it an administrative decision of a special nature, due to its connection to proceedings that may extend for a certain period of time. Thus, it has characteristics that differ slightly from the characteristics of the ordinary administrative decision in terms of the possibility of revocation it and how it is terminated and modified. Therefore, the jurists' opinions have varied in defining administrative license linguistically and idiomatically. In order to take note of the subject from these aspects, the topic will be divided into two requirements: the first requirement deals with the definition of the administrative license, and the second requirement deals with the characteristics of the administrative license.

The first requirement: The definition of administrative license

The various naming given to the administrative license had an effect on defining the linguistic and idiomatic meaning. Moreover, due to the various opinions of the jurists in finding a definition, it obliges us to research more on the subject. Accordingly, we will deal with the research in its linguistic and idiomatic meaning in two branches: the first section deals with the linguistic meaning of the administrative license, and the second section deals with the idiomatic definition of the license.

First branch: The linguistic meaning of the administrative license

The linguistic meaning of the term "license" in Latin is derived from the term (Licentia) which means license or freedom (Jehl, 1985). In the English, it may denote the sense of granting a license or "to license, grant license to". (Elias, 1972). In France, the term "licensing" can correspond to several terms, including three words: (autorisation), (permis) and (permission). (Law Dictionary, 1999)

In Arabic, the word "tarkhis' licensing, permission, authorization' is derived from the verb "urkhis' to license or permit, or authorize", in the sense of facilitating the matter. (Al-Wajiz, 1995). It is said "rukhes lahu fi almer' means "he was permitted to do something after it was forbidden. "tarkhas fi almer' permitted to do something" in the sense of taking a license in it. The word "license" in Arabic denotes 'mitigation and facilitation'(It indicates permission or granting and giving of freedom. (Musa, 1981). It may indicate the meaning of enforcement and making the behavior correct and enforceable, as we say "اجاز زيد رأي عمر وجوزه" *ajaz Zayd ray eumar wajawzih'* 'Zayd accepted Omar's opinion and authorized it) in the sense of acceptance (Ibn Manzur, 737). The word "Ijazah' license" was not mentioned in the Holy Qur'an.

In Egypt, the legislator often uses the term (altarkhis' or 'alrukhsa 'license'). It is generally a linguistic habit that the legislator employed and is followed by jurisprudence (Jibril, N.D). In Iraq, the term (Ijazah' 'license') is used in the legal rules to express the same meaning. Despite the



difference in the term used, it includes the same meaning of the license in comparative law, such as the permit to carry a gun and the permit to build. The origin of the term 'Ijazah' 'license, permit' mentioned in Iraqi law came from the act of permitting something, indicating 'to make it permissible by permitting disposal of it. Linguistically, it means giving permission to individuals to do a certain thing (Musa, 1999).

Section two: The idiomatic definition of administrative license

In France, jurisprudence defines administrative licensing broadly as "it is a right granted by a competent authority to carry out a work that is not considered legal without this right" (Jehl, 1985). Others have defined it as "the permission or approval issued by the owner of the license, which may be verbal or written, whether it is given for free or in exchange for anything else, explicitly or implicitly" (Bessis, 1990). Egyptian jurisprudence has also adopted several trends in defining the administrative licensing, including (AbuAinin, 2006). "It is a preventive police action. Accordingly, licenses must be issued by an explicit or implicit decision." We point out that this definition necessitated the existence of the legislative text approving it and that the administrative license is a right and not a gift of the license applicant. A similar second opinion defined it as "it is the permission required by the regulations to practice a specific activity by the necessity of obtaining a licensing permit from the competent authority. It is one of the preventive methods. This opinion was considered one of the preventive methods that the administration resorts to in order to exercise activity or freedom. (Ashi, 1996). As for Iraqi jurisprudence, it had several definitions. Dr. Maher Salih Allawi defined license as (an announcement by the administration with the intent of creating a legal effect on individuals issued by the direct administrative authority). (Allawi, 1991). Although this definition considers decisions as legal means with a legal effect, it deals with administrative decisions issued by the administration that address individuals only, without decisions that address the administration. The administrative license was also defined as "an individual administrative proceeding that has some different legal characteristics, which ultimately make it an administrative decision of a special nature. (Hasan, 2020)


Thus, it has characteristics that differ slightly from those of the ordinary administrative decision in terms of the possibility of revoking it and how it is enforced and modified. Under this definition, the license is considered a temporary administrative decision of a special nature that distinguishes it from the nature of the ordinary decision, especially with regard to the possibility of revoking and amendment. Based on the above and after reviewing the most important positions of jurisprudence, we can define the administrative license as (a preventive administrative decision of a special and temporary nature issued by a competent administrative authority in order to preserve public order and public interest. It is a restriction on the exercise of individuals' freedoms based on a legal text that allows them to do so. The freedom of individuals original is an exception to a general rule.

The second requirement: Administrative licensing properties

The administrative license is an administrative legal action practiced by the competent authority which whereby seeks to restrict the activities and freedoms of individuals in order to protect public order and the public interest. It is similar to other administrative decisions and at the same time differs from them because of the characteristics it has.

First branch: The administrative license is an administrative decision and a legal document

Granting an administrative license to practice a specific individual activity is one of the individual administrative decisions of the administration when the conditions set by the legislator are met. Licensing is considered a legal act in public law and in the field of administrative law, as it is considered an administrative legal act practiced by the administrative or semi-administrative authority according to certain legal texts. It is not considered a material business because it produces a legal effect, so it can be challenged before the courts. Likewise, licensing is an act of administration that differs from the work of other authorities, such as the legislative and judicial authorities. In addition, it is considered a previous decision that must be issued before carrying out the activity if it is in the form of granting or refusal. As for the fact that the administrative license is a legal document, the administrative license is considered a legal administrative decision issued



by a competent authority that creates a certain legal effect. These effects have repercussions towards the administration, the licensee, and towards third parties as well. Thus, in the event of any dispute between the aforementioned parties, it can be invoked in the event of violation of the legal conditions of the license, as well as in the case of cancellation or illegal revocation of the license or preventing the licensee from practicing this activity (Abdulrhman, 2007).

Section two: The executive and temporary status of the administrative license

The administrative decisions, especially the administrative control ones, have the executive power that is binding for individuals, which entails obligations towards the administration or prohibits them from certain behaviors. This is the characteristic of most administrative decisions in this field, but this matter differs with regard to the licensing decision, as there are decisions. Even if the decision has an executive capacity, it is not binding on individuals. If an administrative decision is issued granting a license to a building permit applicant, or a decision granting him a certain privilege or right, or the exercise of a certain freedom, for example, then he is not obligated to implement it and does not entail any legal responsibility on him. This feature distinguishes licensing decisions from other obligatory decisions. This is with regard to the decision to grant a license, but if the administration issued its decision to reject the application for a license, such as the administration rejecting the application for a license to carry weapons, or refusing to show a specific movie, then its decision shall have the binding executive power towards individuals in order to protect the public interest. As for the temporary nature of licenses, the administrative jurisprudence is unanimous in considering the administrative license as one of the temporary decisions in nature, which gives the administration the right to revoke or repeal it in consideration of the public interest, such as the building permit or the organization of demonstrations or groupings... and others (Ali, 2014).

Furthermore, the basic principle in administrative licenses is that they are personal, in the sense that they are linked to the personality of the applicant. For example, a license to hold or possess weapons, a license to drive vehicles, a license to practice the profession of pharmacy or medicine, and so on. For example, the law related to Egyptian import stipulates that licenses are personal and may not be waived. The same applies to the Iraqi Weapons Law, which stipulates that licenses cannot be used for anyone other than those issued to. (Article (First) of Egyptian Law No. 9 of 1959 regarding imports from abroad, and Article (8/First) of the Iraqi Weapons Law in force No. 51 of 2017).

Second: The control of administrative licensing over public freedoms

Rights and freedoms are descendent from constitutions and laws, then comes the role of the administrative authority in organizing them and following up on their details because they are closest to individuals in general. The administration practices this procedure by various means, including administrative licenses. The origin of the licenses is that they are an exception to freedom because of the consequent restriction of the freedoms of individuals in carrying out their activities under certain conditions and procedures that they must fulfill. Licenses may be an exception to a prohibition in the event that the activity required to be practiced is prohibited by nature, for example, excavation for antiquities or carrying and possessing weapons...etc. In order to find out the possibility of licensing in regulating freedoms, the topic will be divided into two requirements: The first requirement discusses the role of the administration in regulating freedoms and activities, and in the second requirement deals with the authority of the administration in restricting freedoms through administrative licensing.

The first requirement: The role of administration in regulating freedoms and activities

The administration is responsible for regulating freedoms and activities, and the authority to regulate is not limited to the law in the general sense, but rather extends it to regulatory regulations. The constitutions and laws in France and Egypt may be deliberately or inadvertently silent about regulating individual freedoms or activities, or the constitutions expressly stipulate granting the ordinary legislator the role in that regulation, which may be delayed for a period of time, which gives the administrative authority the right to organize. It is based on the constitution



in the event that it does not stipulate a ban or does not reserve the procedure for the law (Sorour, 2000).

On the other hand, the administrative authority may find that the law regulating freedom or activity does not cover the issue in all its aspects or did not fulfill the purpose. Therefore, this authority completes the deficiency without authorization, based on certain circumstances, provided that they do not conflict with the original texts, and it is called subsidiary or supplementary regulations (Ali, 2019). However, if the work of the administration is not complementary to the law or based on it, then it should be called the independent or police regulation, the “administrative control regulation”, which is considered legitimate due to its reliance on constitutional principles (Kesari, 2010).

In Iraq, there are examples of the legislator regulating some freedoms and activities, achieving a balance between them, and giving the administration the possibility to regulate them. Some of them, despite the existence of texts regulating its practice and the necessity of obtaining a license to do so, it may negatively affect the environment, such as establishing a factory or factory. (Article (11) of the Iraqi Environment Protection and Improvement Law No. 27 of 2009 stipulates: (Entities with activities affecting the environment are prohibited from practicing their work without obtaining the approval of the Ministry). In addition to being disturbing to comfort, it has a degree of danger affecting public health as an element of public order. (Article (4) of the Noise Control Law No. (41) for the year 2015 prohibited carrying out craft work and activities that result in noise in other than industrial places after nine o’clock in the evening until seven o’clock in the morning, and establishing crafts and workshops such as blacksmithing and carpentry in places other than those designated for them. (Article (33) of the amended Public Health Law No. 89 of 1981 included the impermissibility of establishing any public place, whether affiliated to the public, mixed or private sectors, except after obtaining a health permit from the competent authority). Here, the duty of the administration appears in the necessity of preserving these elements in the public order, and the administration that grants the license must monitor and follow up even after issuing the license. In the example of (mobile phone towers), which are widespread in Iraq at the present time. In spite of obtaining the administrative licenses that include the establishment of these towers, this does not negate the responsibility for the damage that occurs to individuals as a result of their use and the failure to take into account the dangers that result from them, whether the responsibility is on the authority granting the license or the grantee (Al-Musawi, 2017).

The question that arises in this regard is who are these administrative authorities concerned with granting the administrative license? Here we say that the competent authority to grant these licenses may be (competent administrative bodies as well as quasi-administrative bodies). The members of these administrative authorities are competent to issue decisions within the limits of their competence (Al-Hillo, 2012), and they are represented in the administrative authorities and authorities affiliated to one of the persons of internal public law (the state and local and utility public persons).

As for legal persons or non-administrative or quasi-administrative entities, the legislator has also recognized them with the authority to issue some administrative decisions, such as syndicates such as the Bar, Medical Association, and Pharmacists Syndicate, etc., which have the right to issue a license to practice the profession. Although the general principle is the absence of an administrative character in its work, the judiciary counted it among the persons of public law within the limits of what it enjoys of the privileges of the public authority (Arafa, 2018). These works have the freedom to act regarding the practice of these professions with the obligation to observe public order in the state and they have some privileges of the public authority because of the public interest they achieve (Al-Qabani, 1985).

It has been settled in both Egypt and France that the decisions issued by professional associations are administrative decisions and their actions fall within the actions of the public authority (Abdulrhman, 2007). In Iraq, even though unions such as the Pharmacists Syndicate, the Medical Association, or the Bar Association have been granted the power to grant a license to practice the profession in accordance with the laws, the legislator did not explicitly stipulate that the decision



to grant or reject the license be considered an administrative decision. It also did not provide for granting the license holder the right to appeal before the administrative court. Therefore, we call on the Iraqi legislator to amend the relevant laws in line with the fact that these decisions are administrative. (Article (44) of the Pharmacists' Syndicate Law No. 112 of 1966, Article (6,110) of the Law on Advocacy No. 173 of 1965 as amended, Article (5) of the Medical Association Law No. 81 of 1984.).

The second requirement: The authority of the administration to restrict freedoms through administrative licensing

The authority of the administration regarding granting the administrative license appears after the person concerned submits the license application and its attachments with its discretionary or restricted authority, as the case may be, as follows:

First: The authority restricting the administration to grant the license:

The law predetermines the behavior that the administration is obligated to perform when the required conditions are met without having the possibility of choosing, as its role is limited to ensuring that the license applicant adheres to its conditions and legal procedures. It is what is known as the restricted authority of management (Abdulrhman, 2007). The authority is committed to issuing a specific decision without having the privilege to search for the appropriateness of granting it or not, and it cannot add new conditions or resort to measurement such as a building permit or a driving license. (Al-Khawja, 2011). If the necessary conditions are met, it is illegal to refuse the license or take a negative stance (Abdulwahab, 1984).

The obligation of the administration to consider the application submitted is one of the manifestations of restricted authority, regardless of the final result, whether approved or rejected. The restriction mentioned here is the acceptance of receiving the application, studying and deciding it, with the possibility of not rejecting it in advance (Abdulrhman, 2007). Moreover, one of the manifestations of restricted authority is the case where the granting or refusal of a license is linked to the availability of certain technical conditions in the license applicant, such as the driving license, in which certain health and technical conditions are required for the granting a license, with the need for the opinion of specialists in this field. If these conditions are met, the administration has no right to refuse to grant the license.

Second: The discretionary authority in granting the license:

The discretionary power is indispensable for management at the present time (Hamad, 2003) in order to enable it to perform its duties in achieving the public interest. On the other hand, not negatively affecting public freedoms in light of the role of the legislator and the judiciary in determining this authority to the extent necessary to achieve its various goals. The discretionary power is represented in granting the administration some freedom in carrying out its activities and not obliging it to take a certain action, as well as granting it the freedom to choose the appropriate time and granting it the freedom to make a decision or refrain, provided that it is committed to taking into account the public interest, such as the authority of the administration in granting residence permits to foreigners. Some go to achieve the discretion of the administration towards granting licenses in freedoms or activities that are not restricted by legal texts (Farhat, 2009). In other words, the discretionary power, the obligation of the competent department includes granting licenses within the general legal framework of the legislation, while giving it the freedom to assess the circumstances or conditions. The legislator granted the administration this authority because it does not take note of possible cases, and also so that the administration does not turn into a tool that works on the literal implementation of the texts of legislation. This is done on the condition that its aim is to achieve the public interest and make the administrative work flexible and effective and to ensure the smooth functioning of the administration and avoid the shortcomings of the restricted authority (Hamad, 2011).

Furthermore, the administration is determined in its discretion by the competence that the legislator specified for it, and it is not free to deviate from it. The issuance of a decision by a non-competent authority makes its work null and falls within the acts of overstepping the authority and is determined by the reason that is represented in the licenses in the application submitted by the

concerned parties. (Farhat, 2009). The authority is also determined by the purpose of issuing the decision to be the achievement of the public interest so that the decision is not tainted by abuse of power (Abdul-Latif, 1957).

From previously mentioned, it becomes clear to the researcher that licensing is a great and important role, and it is a necessary system that contributes greatly to achieving a balance between freedoms on the one hand and the elements of public order on the other hand. The researcher also believes that it is possible to benefit from technological and technical progress in practicing these proceedings. Accordingly, time can be properly utilized, licensing proceedings will be facilitated, and government spending will be rationalized. It also contributes to combating administrative and financial corruption and at the same time provides for granting wide discretionary powers to the administration in granting, preventing or revoking licenses in proportion to the nature of its duties. For example, granting the administration the right to refuse a license for a particular demonstration or to cancel it if these meetings or demonstrations include speeches that include sympathy for certain actions such as sympathy with terrorist acts, homosexual acts, or sympathy with other actions affecting elements of public order.

It may not constitute in its general form a specific crime, although it is close to dangerous crimes, but the legislator does not criminalize sympathy with the criminal who committed a specific crime or imposed a certain penalty on him (Behnam, 1977) , (Mehdi, 2009). The spread of these modern phenomena, which are contrary to public order and its elements in all their details, with the absence of a legal text, requires the legislator to deal with them in legal texts. To give the administration a major role in preventing and combating these ideas and actions and combating similar phenomena in order to preserve public order. Stipulating the details of granting licenses as well as the existence of judicial control (administrative judiciary) are the most important guarantees for maintaining public freedoms and preventing abuse of power.

Conclusion

After researching the role of administrative licensing in regulating the exercise of public freedoms, we arrived at a number of conclusions and recommendations as follows:

First: Conclusions:

1. It became clear that the administrative licensing decision is an administrative decision, but it has a special nature and is characterized by certain characteristics, including: It is a legal document that can be invoked, which does not enjoy binding force unless it is in the form of rejection or revocation, or it is temporary in nature.
2. It was shown that the Egyptian and French legislators considered the decisions issued by professional associations to be administrative decisions and their actions fall within the actions of the public authority. The same is true in Iraq, where trade unions were granted the power to grant licenses to practice the profession in accordance with the laws. However, the legislator did not consider the decision to grant or deny the license an administrative decision and did not grant the license holder the right to appeal before the administrative court.
3. It was obvious that the authority to grant the license is a regulatory authority, not an authority to prevent or cancel, and is either restricted or discretionary in granting or rejecting the license. There is no absolute or only restricted authority, because freedoms are variables, so management cannot be restricted or granted absolute discretionary power.

Second: Recommendations:

1. We urge the legislator to explicitly stipulate and amend the texts in the laws regulating the work of unions, such as the Pharmacists' Syndicate, the Dentists' and Bar Association, to consider the decision to grant or deny the license an administrative decision, and to grant the holder of the license the right to appeal before the administrative judiciary instead of other parties.
2. We call on the administration to take advantage of the technological and technical progress in practicing these licensing proceedings, and to use the time correctly and facilitate licensing these proceedings to rationalize government spending and combat administrative and financial corruption.

3. We urge the legislator to stipulate explicitly in the laws related to licensing to grant the administration a wide discretionary power to grant, prevent or cancel licenses that include a clear violation of the elements of public order, especially public security.

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