

THE CONSTITUTIONAL RULE IS THE MOST IMPORTANT GUARANTEE OF HUMAN RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA (MENA) (THE JORDANIAN CASE)

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Abstract

This study came to investigate the constitutional guarantees for preserving human rights by focusing on the Jordanian case, and for the purposes of achieving the objective of the study, the descriptive analytical approach was followed, by examining the role of each of the principle of separation of powers and control over the constitutionality of laws and control over the work of the administration in guaranteeing human rights And their freedoms recognized by the Jordanian constitution. The study reached a number of results, the most prominent of which is: the principle of separation of powers and oversight of the constitutionality of laws and oversight over the actions of the administration are among the most important guarantees that work to establish these rights and ensure work on their proper implementation and enjoyment by individuals, until they became constitutional principles and titles for the contemporary legal state. The study recommended Activating oversight of the constitutionality of laws by establishing judicial bodies that handle them, such as the constitutional courts, and facilitating access to them by individuals and institutions without obstacles, in addition to establishing a strong and independent administrative judiciary to ensure the principle of legality and prevent the administration from violating the law or deviating from the use of power, and narrowing the sphere of sovereignty.

Keywords: human rights, principle of separation of powers, control over the constitutionality of laws, control over management.

INTRODUCTION:

Since the beginning of life on this earth, man has been searching for security. His security in life, his security in his home, his security in his movement, and the basic requirements that derive from that for himself and his family, and which were later called human rights, public rights and freedoms, or basic rights. These designations have become headlines in constitutions and basic laws.



Human rights and public freedoms did not stop at the titles of the chapters in the constitutions of modern countries, but rather became the titles of international declarations, and the contents of international covenants and treaties. They are decided and protected by national means, and their implementation is supported and followed up by international mechanisms.

The duality of the legal system that ensures the protection of human rights between nationality and internationality, certainly leads to a praiseworthy integration in the determination of human rights, but at the same time it may lead to an overlap that searches for a solution at a time in which the power of the state increases its strictness and rigidity in extending national sovereignty over its region and people on the one hand, and international efforts to globalize these rights are spreading and growing on the other hand, with the consequent problems in the conflicting components of this duality.

This duality in the determination of human rights and the endeavor to provide guarantees for their protection prompted legal jurisprudence to try to solve the problems arising from them in a way that the judiciary sometimes agrees with, and at other times disagrees with. This has created before us what is called the constitutionalization of international law and the internationalization of constitutional law. With the continuation of research related to the content of these rights and guarantying their implementation at the national and international levels they became the interest of constitutional jurisprudence at the national level and international jurisprudence at the global level. Each of them tries to support its orientations and opinions in this field, which does not stop at an individual, a state, an alliance, a treaty or a declaration, but rather includes them all because its content and main title is human being.¹


The human being in the whole world is the human being; there is no change in his creation, his life, his death and his resurrection. The constitutions and laws of states do not add to his spirit, and organs, nor does international declarations, treaties, and international covenants. What are changing and increasing or decreasing are his rights and freedoms according to the national constitutions and legislations of each country. As for international declarations, treaties and covenants, they are an attempt to unify these rights, establish them and ensure their implementation as much as possible.²

Despite countries' respect for these declarations and treaties, the tendency of national sovereignty remains dominant with the consequent repercussions on the national legislative, executive & judicial authorities, especially in the developing countries and the countries of the Middle East and North Africa (MENA), including Jordan, our homeland in which we were born, raised and educated. And in which we held several positions that gave us extensive knowledge and experience in theory and practice in what we write about here.

The scientific and theoretical life that we spent enabled us to study the legal comparative of multiple constitutional and legal systems regionally and globally. It also enabled us to contact with national and international constitutional issues through conferences, seminars and working papers that

¹ For more see: Shaw, Malcon: International law. Cambridge University press. 2014, P.100. Conseil Constitutionnel, 1997-2005. Documents. Hadat-liban 2015, P. 147.

² Giussan, E: Constitutional and Administrative Law. Sweet and Maxwell. 2008, P. 375.



we contributed to presenting with the participation of our colleagues in the Supreme Constitutional Court in Egypt, Kuwait and Bahrain as well as the Federal Constitutional Court in Germany and multiple contributions from constitutional jurisprudence in France, Italy and the United States of America. All of this, along with what we found in terms of congruence, similarity, or difference in constitutions, legislation, judicial rulings, or jurisprudence, prompted us to discuss this topic, "The constitutional rule is the most important guarantee of human rights" in what it is and what should be, taking Jordan as case study for the components of this research.

And if the international experience in the field of "human rights" did not achieve what the individual aspires and wishes to enjoy in light of the correction of the various international efforts, then we see that the individual's hopes and aspirations to live freedom and enjoy the right and ensure that it is not violated by the authority before the individual is mainly due to the basic law of every country, or what is called in most countries of the contemporary world, the constitution, complementing it and interpreting its directions in this regard by the provisions of the ordinary laws and the various regulations and systems. The constitutional rule is the most important guarantee of human rights.³

The international effort and its results which were evident in international declarations, covenants and treaties had a great impact on human rights in the countries of the Middle East and North Africa, with variations in implementation. However, constitutions, with the national mechanisms they contain, are the most effective in guaranteeing these rights. These mechanisms and guarantees appeared to us through the principle of separation of powers first, oversight of the constitutionality of laws second and judicial oversight of administration third.

Accordingly, our study will be divided into three main parts:

First: In it, we explain the principle of separation of powers.

Second: In it, we explain the principle of supremacy of the constitution and control over the constitutionality of laws.

Three: In it, we show control over management.

First: The Principle of Separation of Powers and Human Rights

³ Dr. Othman Khalil clarifies this trend and supports it by pointing out that there is a clear trend in modern constitutions towards expanding this method of guarantees of rights and freedoms in order to provide them with the stability and constancy characteristic of constitutional texts, especially rigid constitutions that require more complex procedures than those required to amend the rule regular. And that there is an expansion in the constitutions to include most of the natural public rights and freedoms, including social, economic and political ones, especially after the dominant human shift in contemporary constitutions. * Dr. Othman Khalil: The evolution of the concept of human rights. Alam Al-Fikr Magazine, No. 7, 1971, p. 16. For more, see

Goldrick, M: The Human rights committee. Its role in the development of the international covenant on civil and Political rights. Oxford University press. 1994, P. 125.



The principle of separation of powers derives its content from the political philosophy that emerged in the seventeenth and eighteenth centuries, especially from what was written by the English philosopher John Locke in his research "Civil Government", and what was defended and explained by the French philosopher Montesquieu in his book "The Spirit of Laws" issued in 1748 in order to define the meaning of freedom and its determination and how to guarantee it to the citizen.

Montesquieu believes that the three basic functions of the state, legislative, executive and judicial, should be assigned to three distinct bodies so that each of the political bodies (parliament and government) can stop the other if it exceeds the framework or goals set for it or tries to abuse its powers within this framework.

The principle of separation of powers means that the three functions of the state should not be concentrated in the hands of one body, and that these functions should be distributed among several different bodies. Each body is specialized in one of the three functions. Or executive or judicial, so as to prevent misuse of it and also helps to monitor the exercise of powers by any of them⁴.

Thus, the researcher believes that the principle of separation of powers is the basic means to grant each authority the necessary power that authorizes it to carry out its work and tasks to the fullest extent without interference from another authority, in order to achieve justice among members of society and thus preserve the rights and freedoms of all, and for this reason most modern constitutions sought to achieve the principle of separation. between the authorities to achieve the principle of legitimacy in a state of law and democracy, taking into account not prejudice the required complementarity between these authorities in order to ensure the proper functioning of public facilities and maintain public order in the state.

Cooperation between the authorities is essential to the good work of these authorities and their progress in a harmonious manner. Separation of powers creates pluralism, and pluralism requires limited intervention that maintains the principle of separation of powers and is based on cooperation and balance. Those who dealt with Montesquieu's research called this rule "checks and balances." Les freins et le contre boards" and which the Americans adopted and implemented in the name of "checks and balances."⁵

Political regimes have differed in their adoption of the principle of separation of powers and defining the relationship between them. Some of them adopted the separation of powers in its flexible sense, which achieves cooperation between legislative & executive powers, so they were called parliamentary regimes, such as Jordan and Egypt. These systems give the legislative authority the right to question, interrogate, and ask for trust in the government after determining its political responsibility. In return, it allows the executive authority the right to monitor the formation of the

⁴ Al-Lemon, Awad Rajab, Al-Wajeez in Political Systems and Principles of Basic Law, 2nd Edition, Amman: Dar Wael for Publishing and Distribution, 2016, p. 219.

⁵ Review Jennings, Sir Ivor: The law and the constitution E.L.B.S. 1970 P. 18.

Barthelemylet, Joseph Paul Duez: Traite de droit constitutionnel. Economica. 1985. P. 140.

legislative authority and its exercise of its legislative work. It may even give it the right to dissolve this authority if the executive authority deems a justification for that.

Some others adopted strict separation, such as France after the French Revolution, as it appeared in its constitution of 1791, and the United States of America in its permanent constitution of 1787, which is still in effect until now. These are the so-called presidential systems.

Even those constitutions that are described as having taken strict separation, they did not take full separation, because the head of state still enjoys the right to object to laws and address Parliament with his oral messages, in addition to his mutual influence through his party, especially if he is from the majority party in Parliament.⁶ As for the legislative authority, its approval is necessary for the execution of many of the actions of the executive authority, such as appointing senior officials, concluding some treaties, approving the budget, and even more than that, charging and prosecuting the head of state. The Impeachment⁷

even who adopted the strict separation of powers, could not ignore the importance of building a bridge of cooperation between the legislative & executive branches, because this is not only a bridge for the interference of each authority with the other, but rather it is the imposition of a kind of mutual control between these authorities, and determining the relationship between them, which reflects first and foremost on the inability of one of them to be tyrannical or deviant, and thus provide the greatest guarantee for the individual and ensure that he enjoys his rights and freedoms.⁸

The majority of the political systems of the Arab and Middle East countries are a parliamentary system, as the executive authority in each of them is entrusted with the President of the State, and the Council of Ministers. The executive and legislative powers exchange multiple specializations, each overlapping with the other in several regulatory means, as we have previously shown in theory. However, the practical reality shows the control of the executive authority on the management of

⁶ See Prewitt K. and Vesba S.: An Introduction to American government. Second ed. Harper and Row N.Y 1977. P 332.

⁷ This procedure is adapted from the British regime, but it is not used for ministers but rather for the President of the Republic, as the American constitution stipulates in the fourth paragraph of Article Two that, "the president, the vice president, and all civilian employees of the United States of America are isolated from their positions when accused or convicted of lack of loyalty, betrayal, or other felonies or dangerous misdemeanors. (high crimes) For more detail, see Carr R. and Brenstein M. .. American Democracy 1977. 1977. P.333.

⁸ 3. Constitutional jurisprudence usually refers to this cooperation when they talk about the relationship between the authorities in the United States of America. Cooperation stipulated in the constitution, such as the participation of the head of state in proposing laws, participation a limitative des lois, his right to veto suspensif, preparation of the budget, criminal accusation Empeachment, employment, participation in some competencies shared between him and the Senate, and the presidency of the Vice-President of the Senate by virtue of the second paragraph of Article 1 of the Constitution. A cooperation created by practical application in general and the party system in particular in the United States of America. This constitutional and practical cooperation prompted some American jurists to say that the constitutional system in the United States is now based on intervention and cooperation between the authorities more than separating them.

The present system in the U.S.A has been described as a system of aseparate institutions sharing powers, rather than a system of separation of powers.

Prewitt K. and Vesba S.: An Introduction to Am. Government. M. (op. Cit), P. 369.

state affairs, including the formation of Parliament and the influence of it on its work, including control, so that it becomes a machine that is driven by the executive authority, and finally loses its proper legislative role in determining the rights and freedoms of individuals, as well as its supervisory role in protecting these rights.

What weakens the role of the principle of separation of powers and reduces its effectiveness in protecting human rights and public freedoms in these systems is that modern constitutions in some countries increase the competencies of the President's executive and legislative power and his interference in the formation of the judiciary, leading some to say that these systems are on their way to shift from parliamentary systems to presidential systems as it appeared in the Egyptian constitution and its amendments and the Tunisian constitution and its amendments. And in all of this (as described by the White House) undermining and weakening public rights and freedoms.

From above, the researcher believes that the principle of separation of powers is considered one of the most important guarantees of human rights because it entails the establishment of the legal state, which is characterized by allocating an independent authority for each of the law enforcement authority or the legislator of the law or the judiciary, which guarantees the proper functioning of the state's interests and prevents abuse or abuse of power. This would guarantee human rights and freedoms.

Second: The Principle of Supremacy of the Constitution and Oversight of the Constitutionality of Laws and Their Impact on Human Rights

The constitution in general means a set of basic legal rules that show the system of government in the state and how to exercise sovereignty in it and its relationship to individuals. The constitution defines the nature of the system of government in the state and the authorities in it (legislative, executive and judicial), and how they are formed, the scope of work of each of them and the relationship between them. Also constitution determines the relationship of power to the individual and the meaning, content and scope of rights and freedoms, and gives these rights and freedoms special importance, leaving the matter of regulating them to ordinary laws, without violating it or prejudice to the essence of these rights and freedoms.

The principle of supremacy or supremacy of the constitution is a recognized principle in democratic countries, whether they are monarchical or republican. In order for it to be said that there is a democratic constitutional system, there must be supreme rules that the ruling political system must respect in all its actions, in appreciation of the principle of legitimacy and the inclusion of legal rules, otherwise the state will become a police state.

The constitutional rule may be written or customary. There is no doubt that written constitutions are clearer than others and gives more guarantee to the freedom of the individual and his right to confront authority.⁹

⁹ Barthelemy, Joseph. *Traite de droit Constitutionnel*. Economica. Paris 1985. P. 186.



The constitutional rule is higher in rank than the ordinary rule, and therefore it is not permissible - in most cases for the ordinary rule - to cancel or amend the constitutional rule, which gives the second continuous stability, respect and clarity that facilitate the exercise of its competencies within the framework of legitimacy. Note that stability does not mean absolute stagnation, but rather relative stagnation that requires more complex procedures than modifying the normal rule.

In light of the convergence of the principle of legitimacy and the principle of supremacy of the constitution, the ordinary rule is not allowed to contradict or conflict with the text or spirit of the constitutional rule. Otherwise it would be illegal and invalid.¹⁰ But who can decide this invalidity?

Countries' attitudes differed in determining the control over the constitutionality of laws, ensuring respect for the provisions of the constitution, and determining the sanction for violating the principle of legitimacy and the supremacy of the constitution. However, this discrepancy does not deviate from two important methods: preventive political control (Control Preventif) and judicial control (Control Judicial).¹¹

A: preventive political control:

Political oversight is a preventive oversight that takes place before the law is issued and becomes enforceable, by assigning the constitution to a special political body prepared for this purpose. If this commission finds that a law is unconstitutional, it decides so and therefore refuses to complete the rest of the procedures for issuing it. It is an oversight prior to the birth of the law and not subsequent. Therefore, it is called preventive oversight. Most of the countries of the Eastern bloc, Morocco and Tunisia earlier¹², and France, which established a specialized council of a political nature called Le conseil Constitutionnel, adopted such oversight. ¹³Algeria and Mauritania adopt it at present.

As the American constitutional jurisprudence says - that some rights are considered superior to the legislative executive powers, even if it came later to issue it in the form of amendments, which have so far amounted to 27 amendments. Baradat, Leon: Political Edeologies. Prentice - Hall, Inc., Engwood cliffs. N.J 1979 p, 78.

¹⁰ This issue is only raised in countries with rigid constitutions. Because in countries with flexible constitutions, the legislative authority can set the rule that it wants, even if it is contrary to the constitution, because it can cancel it. For more details, see The supremacy of parliament in Sir Jennings

¹¹ The constitution may prohibit oversight of the constitutionality of laws in certain matters, such as those submitted to a referendum. Here, its blatant prohibition must be obeyed, regardless of the objective violation. But if the constitution does not stipulate the prohibition of censorship, then our opinion is that political censorship is not permissible because it needs special regulation. As for judicial oversight, we must differentiate between the two types of this oversight. Censorship through the original case and that is not permissible, but by means of defence it is permissible. This is what most countries follow.

¹²Among the Middle Eastern countries that adopted this type of censorship were Morocco, Tunisia, Algeria and Mauritania, but Morocco abandoned it in its 2011 constitution and Tunisia abandoned it in its 2014 constitution . They established a constitutional courts.

¹³ The Constitutional Council, Le conseil Constitutionnel in France, is constituted in accordance with what is indicated in Articles 56-63 of nine members appointed for a period of nine years, three of whom are appointed by the President of the Republic, three others are appointed by the President of the Senate, and the other three are appointed by the President of the National Assembly.



There is no doubt that preventive control prior to the promulgation of the law seems logically better than subsequent control, in accordance with the well-known principle “prevention is better than cure.”

However, the most important drawback of this type of oversight is that it is not possible to provoke unconstitutionality except from certain persons such as the head of state, the president of the Senate, the National Assembly, and a certain number of deputies, as is the case with the French Constitutional Council on the one hand, and the lack of impartiality of this oversight and its influence on political whims on the other hand. Thus, we are working, as Professor Burdeau says, to put an end to the tyrannical whims or the political lusts of one of the political bodies (Parliament), and that is when another body is not immune from those whims or lusts, as long as it is also a political body, as expressed by the jurist Duguit, “no more than” an aristocratic body that does not consistent with the principles of modern democracy.¹⁴

However, the most important drawback of this type of oversight is that unconstitutionality can only be provoked by certain persons such as the head of state, the president of the Senate, the National Assembly, and a certain number of deputies, as is the case with the French Constitutional Council on the one hand, and for being affected by political whims on the other hand. Thus, Political censorship, as Professor Burdeau says, put an end to the tyrannical whims or the political lusts of one of the political bodies such as Parliament.

B: Judicial control:

Judicial control is the oversight that is practiced through a judicial body, and therefore it is called judicial in relation to the body that exercises it, and it is a body with a judicial character, as it appeared as an alternative method for political oversight, which was the subject of criticism¹⁵. Also Judicial control is subsequent control over the issuance of the law and its implementation, practiced by the competent judicial authorities in one of two ways. The first is the original case, and the second is the defense of the unconstitutionality of the law.

1- Central Control through the original appeal

This method can be summed up in asking a competent court to cancel the law, or at least to rule it invalid because it is contrary to the constitution. If this court finds that it is unconstitutional, it shall rule to annul it (judging its invalidity), provided that this decision applies to everyone and considers the law as if it did not exist. Among the countries that adopted this type of censorship are Germany, Italy, Spain, Egypt, Kuwait, Bahrain, Morocco, Tunisia and Jordan recently since 2012.

Debbasch, Ch, Pontier J. et Bourdon J. et Ricci J.: *droit Constitutionnel et institutions Politiques*. 2ed. Economica. Paris P. 504

¹⁴ Barthelemy, J. et Duez, P: *Traite de droit constitutionnel*. Economica. 1985 p. 203.

Hauriou, A et Giquel, J: *Droit Constitutionnel et Institutions. Politiques*. Montchrestion. Paris 1985. P. 927.

Conseil Constitutionnel liban 1997-2005. Documents. 2016.

¹⁵ Al-Abdullah, Omar, *Monitoring the Constitutionality of Laws: A Comparative Study*, Damascus University Journal, 17 (2), 2001, p.9.



Article (58) of the Jordanian constitution, since its amendment in 2011, stipulates that “a constitutional court shall be established by law its headquarters shall be in the capital it shall be considered an independent self-contained judicial body it shall consist of at least nine members including the president who shall be appointed by the king”. The same Article (59) also states that “the Constitutional Court is concerned with monitoring the constitutionality of laws and regulations in force also it has the right to interpret the provisions of the Constitution”.

The Jordanian legislator responded to this constitutional text and issued the Constitutional Court Law No. (15) of 2012 establishing the Constitutional Court and it began its work on October 6, 2012. Since then, the Constitutional Court issued (37) rulings, including (11) unconstitutional rulings, most of which are related to human rights, Such as the right to equality, the right to property, and the right to litigation.¹⁶

We hope that the Constitutional Court will have a more effective role in protecting these rights and defending freedoms in light of the constitutional amendments that were made and published in the Official Gazette on January 31, 2022, which included more than twenty articles in the Jordanian constitution, including the amendment to Article (60) of The Constitution, which abolished the double referral and turned it into a direct (single) referral, initiated by the judge of the court before whom unconstitutionality is pleaded without obligating him to refer the plea of unconstitutionality to the Court of Cassation, as was obligatory under the provision of Article (60) before the amendment, and Article (11) of the Constitutional Court Law No. (15) of 2012 before the amendment, thus the referral system in the constitutional judiciary became a (single) system after it was a (Double Referral) (double system).¹⁷

2- Control by arguing that the law is unconstitutional.

In this case, the individual who challenges the unconstitutionality of the law does not take the path of attacking the law, but rather takes the path of defense. And since an unconstitutional law is intended to be applied to a case pending before the court, the individual concerned may argue that this law is unconstitutional, so that the court will therefore refrain from applying it if it deems that request valid and serious.

¹⁶ For more, see Counselor Jihad Al-Otaibi: A set of interpretive rulings and decisions issued by the Constitutional Court for the years 2013-2018, Amman 2018. The researcher had a dissenting opinion on some rulings of the Constitutional Court when he was a member of it, including what he says in it, “Since the constitution guarantees the right to litigation is vacant Among the restrictions that affect his nature by waste or detraction, the threat of someone who disagrees with the estimates of the tax administration and wishes to challenge its decisions before the judges ... does not represent a derogation only of the right to litigation, but rather a gross assault of the legislative authority on a right stipulated in the constitution for all, and guaranteed by the declarations of universal human rights and international conventions, same reference, p. 248

¹⁷ The text of the amendment deletes the phrase (which is determined by the law for the purposes of deciding on the matter of referring it to the Constitutional Court) contained in Paragraph (2) thereof and replaces it with the phrase (constitutional in accordance with the provisions of the law). The Official Gazette, Issue (5770) issued on January 31, 2022. For more information, see: Nasrawin, Lith: The Constitutional Amendments of 2011 in Jordan. Their impacts on The Public Authorities. Dirasat. Sharia’a and Law. (40) Volume (1) 2013.



This type of censorship was adopted by legal systems (I do not say constitutions because constitutions are not subject to this type of censorship) in several countries before moving to central censorship, with only judicial jurisprudence, such as Jordan until 2012.

The content of this oversight is the court's refrain or its neglecting of the unconstitutional rule of law in the case subjected before it, without the right to order its repeal. This means the relativity of this ruling, which does not preclude the continuation of the law and its application in other cases. Perhaps the United States of America was the first country to know this kind of censorship, as it granted all courts at all levels the right to refrain from applying unconstitutional law that had important precedents in the field of protecting the rights and freedoms of individuals.¹⁸

From all of the foregoing, it becomes clear to us that determining the principle of constitutionalism is not theoretically sufficient to guarantee the rights and freedoms of individuals. Rather, a penalty must be decided for violating that principle if every country sincerely seeks to protect the rights and freedoms of its citizens after its constitutions include these rights and freedoms, thus ensuring that they are respected and not to attack it not only by the executive authority and the administration, as we will explain later, but also by the legislative authority, so that it is not - as it is said - the injustice is legalized. In all cases, the legislative authority must base its legislation on the provisions and spirit of the constitution and the principle of moderation and reasonableness (Rule of reasonableness) that enhance the protection of basic rights and oblige the authorities to provide all means to ensure their implementation. In this regard, the German Federal Constitutional Court says: "We aim to strengthen the protection of the fundamental right stipulated in the Basic Law, and all state agencies must provide the means that guarantee the reserved space for the judiciary in order to effectively protect the fundamental right."¹⁹

In this regard, the Jordanian Constitutional Court also says, "The legislator, while addressing the implementation of laws and regulations, must fulfill the provisions of the constitution... This requires that legislations are to be in harmony with each other and with the goals and objectives of the constitution on the other hand."²⁰

From above, the researcher believes that the supremacy of the constitution and its recognition of basic rights and freedoms within its provisions is insufficient to protect these basic rights and freedoms, and therefore the control over the constitutionality of laws is considered the real constitutional guarantee for the preservation of human rights and freedoms.

¹⁸ Jordan is one of the countries that have adopted control over the constitutionality of laws, as it granted the various judicial authorities the right to refrain from applying unconstitutional law without abolishing it. The authority (duthority) of the judiciary in controlling the constitutionality of laws here is an authority of abstention that has only a relative effect. See the Supreme Court of Justice 27/68 year 16, issue 3, p. 317.

¹⁹ Judgments of the German Federal Constitutional Court. The structure of the state and the rule of law. part One. Translated by Ahmed Al-Sudani. Koral Adenauer Stittung. 2017, p. 162.

²⁰ Jordanian Constitutional Court. Judgment No. (2) issued on December 25, 2018. Official Gazette No. (5549) of December 16, 2018



Third: Monitoring the work of the administration and its impact on human rights

Peoples have actively contributed over the times and in various places in the transformation of tyrannical rule into legal rule. A state can be described a legal state as long as it is subject to the law regardless of its political or constitutional form. It remains so until the principle of legality "Principe de la legalite" is wasted and thus turns into a police state "Etat de police" whose survival is guaranteed only by force and the submissiveness of the governed people.

Rights and freedoms expanded and became stronger and guaranteed by the spread of democratic thought and its impact on the exercise of power and its relationship to the individual. They were defined by the constitution, which stipulates the principle of separation of powers explicitly at one time or adopts and applies it implicitly at other times, in addition to other constitutional controls.

Parliamentary and popular, However, one of the most important tangible developments we have seen in the matter of public freedoms and human rights is also related to the oversight of the judiciary over the administration. The importance of oversight over management is due to many reasons. Whereas, if the nature of the work of the legislative authority brings it closer to impartiality and distances it from favoritism or personal whims due to the multiplicity of its members and its objectives, the nature of the work of the executive authority raises the suspicion of its deviation and violation of the law, especially since the work of the executive authority is more connected and in contact with the public than the rest of the other authorities.

The characteristic of abstraction and impartiality is confirmed and evident whenever the legislation rises to the ranks of the all, and decreases and falters whenever it descends to the part. Therefore, individual decisions remain, even the general regulatory decisions that are called regulations (Reglment, Regulations), and although they come with general rules through legislation, they remain less impartial and abstract from the law established by the legislative authority. In addition, the executive authority that sets the regulations or the system is the same that implements it, and thus combines the function of legislation and implementation, which threatens the rights and freedoms of individuals and confuses various aspects of the principle of legality.²¹

The principle of legitimacy, as we have presented, requires that the ruler and the ruled are subject to the law in order to return any of them to the path of righteousness whenever they deviate from the limits of the law, intentionally or by negligence, through monitoring their actions - especially the administration - and the consequent invalidity that is decided by the competent authority.²²

Oversight over the administration is exercised in various ways, the most important of which are political, popular, administrative and judicial. As for political oversight, it is assumed by the

²¹ Chapus, Rene: droit du contentieux administrative 8ed. Montchrestien. Paris 1999 PP. 341.

²² Rivero, Jean: Driot Administratif Dalloz. Paris. 1983. 14. Dr. Suleiman Al-Tamawy: Administrative Judiciary. First book. cancellation. Dar Al-Fikr Al-Arabi 1976, p. (23).

Dr. Muhammad Al-Khalayleh: Administrative Judiciary. A comparative analytical study. Dar Al Thaqafa for Publishing and Distribution, Amman, 2022, p. 19.

parliament, as we mentioned, by directing questions and interpellations and asking trust in the ministry or ministers. It can be assumed also by investigation conducted by appointed committees.²³

As for popular oversight, it is assumed by public opinion and other official and unofficial popular bodies, such as parties, trade unions, and associations. In general, it is convenient control. As for administrative oversight, it is practiced by the administration itself, either automatically by reviewing the source of the decision to himself and canceling, amending or replacing his work, or by reviewing the administrative head of the work of his subordinates by canceling or amending it, or based on the grievance of the concerned parties to the source of the decision or his boss, or a special committee. Despite the effectiveness and speed of this control, it remains criticized in all cases because it makes the authority an adversary and an arbiter at the same time.

As for judicial oversight, it is the most sole and independent guarantee, especially in the field of protecting the rights and freedoms of individuals and preventing the administration from abuse of its power or violation of the law. And since the judicial systems does not follow a single path in exercising judicial control over the administration, but rather took several different paths. However, the dual judiciary (an independent administrative judiciary and an ordinary judiciary) that was adopted by some countries such as France, Belgium, Egypt, Syria, Lebanon, Morocco and Jordan later, remains the most successful and effective guarantee, and balance between the public interest and the private interest at the same time on the one hand, and between the requirements of modern administration and the rights and freedoms of individuals in the legal state on the other hand.

The French Council of State (le Conseil d'Etat) has led the phenomenon of independent administrative judiciary in many countries since its establishment and the completion of its competences in 1872 and its reorganization in 1945. Perhaps the Egyptian judicial system was one of the first judicial systems in the Middle East and North Africa to adopt this system by establishing the State Council in Egypt, pursuant to Law No. (112) of 1946, then other laws followed in 1949, 1955, 1959, and the latest of which is the most advanced and important, Law of the State Council No. (47) of 1972, which expanded its advisory and judicial powers in oversight of public administration and granted it general jurisdiction to consider all administrative disputes in response to Article (172) of the 1971 Constitution, which stipulates that “the State Council is an independent judicial body that is competent to adjudicate administrative disputes and disciplinary cases, and the law defines its other competences.” This situation has continued to the present time under the 2014 constitution.²⁴

In Jordan, the administrative judiciary has begun to take its first steps since the issuance of Law No. 26 of 1952 on the formation of regular courts, which granted the Court of Cassation the status

²³ For example, Article (96) of the Jordanian Constitution of 1952 stipulates that “every member of the Senate and House of Representatives may direct questions and interpellations to ministers about any of the public matters.” Article (53) states that “a vote of confidence in the ministry or one of the ministers shall be put before the House of Representatives. If the Council decides a vote of no confidence in a minister, he must retire from his position.

²⁴ Chapus, Rene: *droit du contentieux administratif*. 8ed 190 Montchrestien. Paris 1999 P. 31, 61. Dr. Sulaiman Al -Tamawi: *Administrative Judiciary. Eliminate cancellation*. Dar Al -Fikr Al -Arabi, Cairo 1976, p. 23.

of a High Court of Justice to consider some administrative cases, especially appeals and lawsuits related to administrative decisions in response to the text of Article (100) of the Constitution, which stipulated that “the types, degrees, divisions, jurisdictions, and manner of administration of courts shall be determined by a special law, provided that this law asks for the establishment of a Supreme Court of Justice.”²⁵

The Supreme Court of Justice continued to exercise its specific jurisdiction exclusively as an administrative judiciary, under the jurisdiction of the Court of Cassation until it became independent from it in 1989, pursuant to temporary Law No. (11) of 1989 and then Law No. (12) of 1992, which expanded its jurisdiction and increased its effectiveness. It dealt with hundreds of issues related to human rights and public freedoms, triumphed in some of them and regressed in others.²⁶

However, the fact that its competencies remain strictly defined on the one hand, and its work coincided with the declaration of martial law and the enforcement of the defense law on the other hand, and its consideration of the first and last degree on the third side (one degree) has reduced its effectiveness in standing firmly on the side of the individual and defending his freedoms and triumphing over the principle of legality. (Principle of legality), until extensive amendments were made to the Jordanian constitution on October 1, 2011, including what was stated in Article (100), which stipulates that “the types of all courts, their degrees, divisions, specializations, and how they are administered shall be specified by a special law, provided that this law stipulates to establish an administrative judiciary of two levels. As a result of which the Administrative Judiciary Law No. (27) of 2014 was issued, which states in Article (3) of it, “a judiciary called “administrative judiciary” will be established in the Kingdom, and it will consist of the Administrative Court and the Supreme Administrative Court.”

In spite of the formal developments that took place in the administrative judiciary in Jordan and its process to eliminate two degrees instead of one degree - as it was in light of the legislation that ruled the Supreme Court of Justice from (1952-2014) - and the limited expansion in the competencies of the administrative judiciary, the challenges that faced administrative judiciary for the six decades, are still standing and are represented in the following:

1-Lack of adequate qualification of the members of both the Administrative Court and the Supreme Administrative Court, and the weakness of their familiarity with the nature of the constitutional and administrative public law and the relationship of the authority to the individual.

²⁵ Dr. Muhammad Al -Khalayleh: Administrative Judiciary. A comparative study in Jordan, France and Britain. House of Culture for Publishing and Distribution. Oman 2020, p. 102.

²⁶ From the judgments of the Supreme Court of Justice against a basic right in the constitution stated that “If it is proven that the summons is Arab and holds Palestinian citizenship before 15/5/1948, and he is not Jewish and usually resides in the Hashemite Kingdom of Jordan at the issuance of the Nationality Law No. 16 of 1954, then he has obtained Jordanian citizenship” based on the aforementioned nationality law, and therefore it is not permissible to remove it from the Kingdom, pursuant to Article (9) of the Constitution. The Supreme Court of Justice 58/78. A set of legal principles decided by the Supreme Court of Justice in twenty-five years (1972-1996). Collection and preparation of Dr. Noman Al -Khatib, House of Culture for Publishing and Distribution. Oman 2000 p. 345



2- The competencies of the Administrative Court are still exclusively mentioned and most of them are in consideration of appeals related to administrative decisions related to the public employee.

3- It is true that the year 1992 was an important point in the history of the principle of legitimacy in Jordan due to the issuance of the Supreme Court of Justice Law No. (12) of 1992 and the end of work in the defense law and the martial law that were applied five decades ago and more, but the re-declaration of work in defense law No. (13) of 1992 dated March 17, 2020 due to the spread of Corona (Covid 19) epidemic and continuing to take the concept of sovereignty work, still represents harsh restrictions on the administrative judiciary right to protect the principle of legitimacy with the consequent restrictions on the protection of human rights and the freedoms of the individual.²⁷

4- This calls us to continue to say that the achievements we have achieved in the administrative judiciary in Jordan may partially proportional to the visions and calls of the jurisprudence of administrative law, but it is not totally commensurate with the aspirations of human rights defenders and freedoms. Hope is still signed by the administrative judge as a major pillar of comprehensive legal security, adopted, sponsored and watched over by the contemporary legal state.

The French State Council was and still is a strong judicial fortress of human rights protection and public freedoms, even with the presence of legislation that detracts them at one time and restricted them at another time.²⁸

Although France was the first European country to prohibit the niqab in 2010 and punish its wearing, as the veil was banned in schools and universities before that in 2004, the State Council and in a hadith judgment decided "... and that if the mayor is in duty, under the municipal law to organize the beaches and activities that are practiced on them, he, while doing so should respect the rights and freedoms that the law also guaranteed, and then he must put the public order in consideration in time and place, and the mayor must not establish his behavior on other considerations, and that restrictions on freedoms are justified only in the event of facing an apparent danger

which threatens the public order, and that the feelings of fear and anxiety are not suitable for assaulting public rights and freedoms ".²⁹ In any case, we return to say that because of the formation of the judicial authorities, the nature of their work and its independence, it truly occupies the most complete, most impartial, and guarantee of human rights and the freedoms of individuals.

²⁷ This is what the Administrative Court approved in its ruling No. 164 of 2021, in which it was found, "The administrative judiciary has settled in dozens of rulings on the absence of a permanent, fortified administrative decision ... No fortified administrative decision of the appeal is left except for sovereignty referred to in Article (5/) From the Administrative Judges Law No. (27) of 2014. Among the definitions of the Administrative Court of Sovereignty Acts, "These are the actions and procedures that are considered by the government as a authority of ruling, not an administrative authority, and it is the one that comes out of the administrative judiciary control and the administrative court 79 of 2020.

²⁸ For more, see Dr. Noman Ahmed Al -Khatib: "The most prominent features of the administrative judiciary in the Hashemite Kingdom of Jordan, a research published in the Lawyers Syndicate Journal. Volume (4, 5, 6) 2016, p. 40.

²⁹ Conseil d'Etat, ordonnance du 26 out 2016. Ligue des droits de l'homme et autree-association de defense des droits de l'homme. L'actuallte jurispradenticelle du consil J'Etat Francais.



From above, the researcher believes that the constitution's approval of basic rights and freedoms within its provisions must be reinforced by a constitutional guarantee, which is the oversight of the administration's work. The rights and freedoms of all persons stipulated in the Constitution.

CONCLUSION

Every beginning has an end in a person's life, except for the end of his rights, which remain valid for his survival and existence, and it does not end except with the end of man and his annihilation. This prompted the human being, with all the forms of his gatherings and societies, to search for the determinants and guarantees of his right to life first, and the ways to provide an appropriate life that begins with his right to security, and ends with a decent life with all its requirements and components.

The efforts that have been made to establish human rights and ensure their enjoyment at the international and national levels have expanded the legal framework that protects them. However, this expansion did not seem equal to all peoples, which prompted us to question how to provide the minimum level of human rights for some peoples who live in Multiple and different political systems, and providing appropriate mechanisms to claim their rights.

National efforts appear to be more effective than international efforts, especially when they appear to us in the constitutions of countries, so human rights are decided in multiple and different headings such as basic rights, basic ingredients, public rights and freedoms, or public freedoms, the purpose of which is to enumerate these rights and freedoms and crown them with constitutions to take the rank of supremacy enjoyed by the constitutional rules, which the three authorities must take into account in their formation, competencies, and work, and the consequent invalidity if any of these authorities violate what the constitution states and defines.

Accordingly, the study showed a number of results, the most important of which are:

1. The principle of separation of powers is considered one of the most important guarantees of human rights because it entails the establishment of a legal state that is characterized by allocating an independent body for each of the law enforcement authorities, the legislators of the law, or the judiciary, which guarantees the proper functioning of the state's interests and prevents abuse or abuse of authority. would guarantee human rights and freedoms.
2. The supremacy of the constitution and its recognition of basic rights and freedoms within its provisions is insufficient to protect these basic rights and freedoms. Therefore, monitoring the constitutionality of laws is considered the real constitutional guarantee for preserving human rights and freedoms.
3. Oversight over the work of the administration is one of the guarantees that work on establishing rights and ensuring that they are properly implemented and enjoyed by individuals. This oversight also works to ensure that the administration does not exceed the limits and powers established for it, and thus guarantees the achievement of justice for all, and guarantees the rights and freedoms of all persons as stipulated. in the constitution.



Recommendations:

The discrepancy in what the international community decides, and the multiple applications of human rights and their guarantees in these countries, which we have presented previously, invites us, in conclusion, to try to narrow this discrepancy and difference in favor of expanding human rights and guarantees for their implementation, and working to adopt the most effective national and international means and coordinate between them in order to reach a real development and sustainability for human rights and freedoms, and protect them in particular.

1. Work to respect the principle of separation of powers and maintain cooperation and balance between them to allow each of them to exercise effective oversight, especially with the tendency of the constitutions of some countries to strengthen and give priority to the executive authority over the rest of other authorities, and to shift from the parliamentary system based on “Check and Balance” to the system Almost absolute presidency.
2. Activating oversight of the constitutionality of laws by establishing judicial bodies that handle them, such as the constitutional courts, and facilitating access to them by individuals and institutions without obstacles.
3. Establishing a strong and independent administrative judiciary to ensure the principle of legality and prevent the administration from violating the law or deviating from the use of power, and narrowing the sphere of sovereignty.
4. Respecting the rules and provisions of public international law in what is decided by international declarations, treaties and covenants regarding human rights, and giving it a higher status than the law to ensure that the legislative authority does not deviate with its discretion from the provisions and spirit of the Constitution and the international obligations and principles established and decided by the international community, and which are supported by constitutional texts, national legislation and judicial rulings .This gives Treaties the status of supremacy over the local national legislation.

Thus, the issue of human rights should not be left to perfect slogans hung on the international bulletin board and the entrances to political and parliamentary conferences. Because this issue is a citizen's right, just as it is a human's freedom. Domestic and international legislation must pay attention to it and ensure that it is implemented and implemented by local national procedures, supported by the jurisprudence of public law with their writings and explanations. It is a message more than a duty, and a global humanitarian constitutional issue.

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