

# **The liability of the administration in Jordanian law from a comparative perspective<sup>(\*)</sup>**

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## **Abstract:**

This study examines the administrative liability in Jordanian law from a comparative perspective. The subject of this study is of great importance as that the liability of the administration represents today an important element of the "rule of law" principle. As far as the writer of this study knows, there is no relevant study in English examining this issue in Jordanian or other Arab legal systems, it is therefore an attempt to fill the gap in this area. The study considers at the first part the origin and the development of administrative liability in comparative legal systems and then moves, at the second part, to examine the administrative liability in Jordanian law.

## **Introduction**

This study is an attempt to examine the liability of the administration in Jordanian law from a comparative perspective. More than one study that have been conducted in this area by Jordanian researchers, but no one of them, as far as the writer of this study knows, has been written in English. It is therefore thought necessary to present this study in English to fill the gap and to provide those interested in this area with, as we hope, an appropriate work.

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(\*) Accepted 13/10/2010.

Subjects of this study are examined in two main chapters. The first chapter considers the origin and the developments of the theory of administrative liability in comparative legal systems (English and French legal systems). Three main issues are respectively discussed in this chapter: the stage in which the State was irresponsible for damage caused to others, the Stage of state's responsibility and the main types of administrative liability (the liability for fault and the liability without fault). Chapter two considers the administrative liability in Jordanian law. It starts with a general glance of the Jordanian administrative law, and then the following issues are respectively examined: the statutory basic and the jurisdiction to hear administrative liability cases, the liability of the administration for fault, and it's liability without fault.

The study shows that the theory of administrative liability is, in principle, adopted in Jordanian law, but a lesson should be learnt from the French law experience in this area. The Jordanian courts, unlike the case in France, do not yet accept the liability of the administration without fault except in cases where the legislation concerned provides for the remedy of compensation, which does not offer, we believe, a real protection for the rights and freedoms of people in their relation with the administration.

## Chapter One

### The origin and developments of administrative liability

This chapter, which includes three sections, examines the origin and the developments of the theory of administrative liability. The first section considers the stage in which the State was irresponsible for damage caused to others, whereas the second one is an attempt to follow the developments of the theory of administrative liability in the English and French legal systems, which are the subject of our comparison in this study. Section three of this chapter is a general examination of the types of administrative liability as they have been established in French law: the liability for fault and the liability without fault.

#### Section One

##### The stage of State's irresponsibility

The State was not subject to judicial proceeding for damage for many years. In the English common law public officers as individuals and not the state itself were subject to rules and sanctions of law applicable to the private indiThey were personally treated as ordinary citizens who for the time being are serving the govand who will fall back into the ranks of private citizens after their term of service has expired. Whereas the State enjoyed "soverimmunity" from suit, its officers did not share in its immunity. A public officer could be sued for the damage caused by his or her acts as a private individual, even if the acts were performed in the course of the official work.<sup>(1)</sup>

The immunity of the State was enjoyed only by the judges. The strict common-law rule of liability of public officer individually has never been applied to the judges of the law courts. A judicial officer in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal conseto himself. The otherwise would

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(1) See in English: J. Bell and A.W. Bradley, *Government Liability: A Comparative Study*, (London, 1991) ch. 2; Schwartz, B., *French Administrative Law and The Common -Law World*, New York University Press, 1954, p. 251. See in Arabic: Mohna. F., *Administrative Liability in Arab Legal Systems*, (Cairo 1972) p. 18. (Arabic text)

be inconsistent with the possession of this freedom, and it would probably destroy the independof judiciary.<sup>(2)</sup>

The image in the French law in this area was even more regrettable. The principle of complete immunity was adopted there. Both the State and those acting on its behalf where irresponsible for compensation. The administration in France, by compare with the case in England, has been stronger than the judiciary and therefore it has always claimed for its officers an immunity that it itself could de<sup>(3)</sup>

Immunity of public officers in France dates from pre-Revolutionary times. At this stage when officers were sued for damages in the law courts a practice developed whereby the king, as supervisor of the administration of justice, had the case transferred to his Council for decision, which made public officers immune from actions in the ordinary courts. The men of the Revolution maintained then this approach. The Constitution of the year VIII of the Revolutionary era (1800) provided that "Public officers... may not be sued for acts performed officially, except by virtue of a decision authorizing such suit by the Council of State, and, in such case, suit may be brought in the ordinary courts."<sup>(4)</sup> The Council of State at that time was an administrative agency rather than a court, therefore this provision meant in practice that a private citizen who wished to bring an action against a public officer had first to obtain the consent of the administration, which was very rarely given.

The immunity in this sense was subject to much criticism during the Second Empire by the republican opposition, and when it came into power Article 75, referred to above, was abrogated and all laws prevent actions against public officers were repealed by the 1870 decree, which

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(2) The courts have extended the immunity enjoyed by judges to administrative officers exercising judicial functions. Officers exercising such functions are vested with the authority to determine private rights and obligations by individual decisions, just as members of the judiciary are, and the considerations that have led to confer immunity on judges have been seen to apply with equal force to administrators entrusted with such a judicial authority.

(3) See Al-Nahri, M., *Liability of State for Non- contractual Actions*, (Cairo, 1997) p. 29. (Arabic Text).

(4) Article 75 of the Constitution of the year VIII of the Revolutionary era (1800).

created a broad principle of liability of public officers similar to that under the English common law.

The 1870 decree was critically examined by the Court of Conflicts in the celebrated *Pelletier* case (1873), where the Court was of the view, based on the separation of administrative and judicial powers, that the law courts were not competent to entertain all actions for damages against public officers based on faults committed by them while acting within the scope of their public functions.<sup>(5)</sup> That is, public officers could be sued in the law courts for the damages caused by their personal faults, which means that the principle of complete immunity that had governed the French law until 1870 gave way at least so far as the personal misfeasance of officials were concerned.

With this in mind, the *Pelletier* case has established the distinction between the "personal fault" on the part of the public officer and what has been termed "service-connected fault", (the fault committed in connection with the functioning of the particular public service that the officer is administering). Only if an officer has committed a personal fault is he personally liable. If the damage be caused by a service-connected fault, the fault is seen to be that of the public service itself, and therefore the administration rather than the officer is held liable.<sup>(6)</sup>

The personal liability in this sense is a relic from past when government was in the hands of a few prominent persons, who were in no way responsible. This situation became unsuited to the twentieth-century state, in which the Public Officer has been superseded by obscure civil servants, acting directly under the orders of their superiors, who are ultimately responsible to an elected body.

Treating the personal liability of public officers on exactly the same footing as that of private individuals appears became undesirable. An

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(5) For more details about this case see Schwartz, B., op. cit., no. 1, p 257.

(6) Brown, N and Bell, J, *French Administrative Law*, Clarendon Press, 5<sup>th</sup> ed., 1998, p 185, Christian, D and Susan, F, *the French Legal System*, Sweet and Maxwell, London, 1993, p. 211. See in French: Laferriere, *Traite de la juridiction administrative et des recours contentieux* 648 (Paris, 1896) referred to in Schwartz, B., *French Administrative Law and The Common -Law World* op. cit., no. 1, p 259.

ordinary citizen acts only in his own interest, and it is he who derives the benefits of his acts, whereas an official acts in the public interest, and it is the community as a whole that profits from his action. The considerations that have led to confer complete immunity on judges have been seen by many to apply with equal force to officers of the administration. If a rule of strict liability of judges would jeopardize the independence and effectiveness of the judicial system, a too heavy liability would paralyze the initiative of public officers.<sup>(7)</sup>

A strict rule of personal liability may greatly impede effective administration. If an officer knew that his exercise of judgment in doubtful cases might expose him to the payment of heavy damages, he might be disinclined to act at all in such cases. It is also unjust to impose on a minor public officer, who is generally poorly paid, the risks inherent in his functions and the duty of indemnifying from his meager personal resources those adversely affected by his faulty acts.<sup>(8)</sup>

The French administrative law has followed a proper approach in this regard. Instead of the wholesale rule of strict personal liability developed by the English common law, the French system has substituted a rule of personal liability for only so-called personal faults. But it is precisely these personal faults, as defined by the French courts, that from the constitutional point of view must be ensured against. The common-law rule of personal liability must not be replaced by a principle of broad immunity. There is still a constitutional need for personal liability for personal faults as the most effective means of eliminating them. Such a "balanced" approach may remove an important safeguard against the abuse of power by public officers, and for those adversely affected by administrative action the abandonment of the strict personal liability means elimination of the assets of the public officer as a possible source of reparation for any damages suffered. For those subject to administrative action the grant of immunity to the public officer is tolerable only if they are given some other source of reparation. This substitute source can be

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(7) Al-Nahri, M., op. cit., no. 3, p 244.

(8) Al-Hellow, M., *administrative Suit*, (Al eskandarei, 2004) p. 259. (Arabic Text)

only the State itself, in whose name the officer who caused the damage was acting.<sup>(9)</sup>

## Section Two

### The stage of State's responsibility

As it was stated above, the common law had started with the proposition that the public officer is personally liable for the damages caused by his wrongful acts, and that an action cannot be brought against the State on sovereignty considerations. This approach rests on the well-known historical maxim according to which the "King can do no wrong".<sup>(10)</sup> The case in French law before the Revolution was similar to that. The French public law was governed by the maxim that the "State is an Honest man", which reflected the theory of the absolute monarchy. The monarch was invested with a type of sovereignty which excluded reas to his acts or those acting on his behalf.<sup>(11)</sup>

The theory of administrative liability in the French law appeared at the stage followed the 1789 Revolution. Though the men of Revolution firmly believed in the principle of absolute national sovereignty, they believed even more firmly in the right of private property.<sup>(12)</sup> They were - for the most part - property owners, and they asserted the need to protect the right of property against all attack. Their doctrine of absolute sovereignty led them to concede that even private property could be taken by the State where the public necessity demanded it, but in that event the owner must be paid a just indemnity for his loss. This approach

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(9) Brown, N and Bell, J, op. cit., no. 3, p 186.

(10) Bradley, A. W., and K. D. Ewing, *Constitutional and Administrative Law*, (Longman, Twelfth edition, 1998), p254.

(11) Schwartz, B., op. cit., no. 1, p 255.

(12) Article 17 of the Declaration of the Rights of Man of 1789 reads that "Property being an invioand sacred right, none may be deprived of it except where the public necessity, established according to law, clearly demands it and on condition that just compensation be paid beforehand".

was the door through which the entire modern system of State liability was to work its way into French law.<sup>(13)</sup>

This approach was so clear in cases of private property injured by public works. No dispossessing of the owner happens in such cases, but if property is an absolute intangible right to which the sovereignty of the State itself must give way, it must be protected, not only when it is taken away from its owner, but also when a decrease in its value is caused. This approach was then extended to all cases in which private property was injured by administrative action, and even those cases where the private individual is injured in his person and in his rights other than the right of property.<sup>(14)</sup>

A reference has already been made to the 1870 decree, which created a broad principle of liability of public officers. The jurisprudence of the Council of State and the Court of Conflicts has also played a significant role in such fundamental change towards the State liability. It has indeed replaced - case by case - the original doctrine of irresponsibility by a broad rule of State liability.

In the English, on the other hand, the Crown Proceedings Act of 1947 represents a significant change in this area. The legislature here played a tremendous role in this regard by compare with the case in France. What changes there have been are the work of the legislature rather than of the courts.<sup>(15)</sup>

The liability of the Crown and other public authorities is generally accepted since the enactment of the Crown Proceedings Act of 1947, so that the citizen is able to sue them for damages in tort or contract. The 1947 Act places the Crown and other public authorities in almost the same position as any other individual as regard the liability in tort. It provides that "... the Crown shall be subject to all those liabilities in tort

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(13) Schwartz, B., op. cit., no. 1, p 269.

(14) Ibid., p. 270.

(15) For more details see in English: Wade, H. W. R., and Forsythe, C. F., *Administrative law*, (London, Clarendon Press, 8<sup>th</sup> ed., 2000) chapter. 20, and see in Arabic: Awabdi, A., *the theory of administrative liability*, (Algeria, 1994) pp: 38-52, (Arabic Text).



to which, if it were a private person of full age and capacity, it would be subject".<sup>(16)</sup>

In English law, which is the other point of divergence between English law and French law in this regard, it is the same law of tort or contract which is applied to public authorities as to private individuals. In French law, on the other hand, the rules governing the administrative liability differ in important respects from those found in the civil law (*droit civil*) and applied by the civil courts in suits against private individuals. That is, there are two law of liability in French law, the one private and the other public or administrative. This approach was clearly expressed in the judgment of the Tribunal des Conflits in blanco (TC 8 February 1873) as follows:<sup>(17)</sup>

"... Considering that the liability which may fall upon the state for damage caused to individuals by the act of persons which it employs in the public service cannot be governed by the principles which are laid down in the Civil Code for relations between one individual and another that this liability is neither general nor absolute: that it has its own special rules which vary according to the needs of the service and the necessity to reconcile the rights of the state with private rights."

### **Section Three**

#### **Types of State Liability**

Having stated that the stage of administrative irresponsibility was over and a general tendency towards a responsible state was replaced, the question then is whether the liability of the administration is subject to the same rules and procedures applied in the liability of individuals in private law? Although most of the rules of private liability has been adopted in the liability of the administration, the French administrative courts established a group of rules and 'principles of administrative

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(16) s2(1)(a) of the Crown Proceedings Act 1947.

(17) Referred to in Brown, N and Bell, J, op. cit., no. 3, p 183. See in Arabic: Khalil, M., *the Lebanese administrative jurisdiction - a comparative study*, (Biro 1982) p. 35. (Arabic Text). See in French: M. Waline, *Traite ele mentaire de droit administratif*, 7 th edn. (Paris, 1957) para. 114 - referred to in Brown, N and Bell, J, op. cit., no. 3, p 185.

liability which are of a particular nature by comparison with those applied in private law cases. Unlike the case in private law disputes, the administrative liability is not always based on a wrong being done, but the administration may also be liable in some situations without such a wrong, which has been called in French administrative law the liability without fault, or the theory of risk.

### Liability for fault

The liability of the administration for fault is the older and the famous type of administrative liability. A distinction must be made here between the fault committed by the public officer personally and the fault connected to the administrative body in which he is serving. As it was established in French law, the public officer himself is personally liable if he acted willfully, maliciously, with gross negligence, or outside the scope of his official functions. If he or she has acted within the scope of his employment, then he has normally committed a "service-connected fault" for which the State itself would be liable for damage caused by such a fault.<sup>(18)</sup>

The service-connected fault may appear in three forms: the particular administrative service has functioned improperly (*misfeasance*); the service has failed to function (*nonfeasance*); and the service has functioned too late (*Late -feasance*). These three forms of fault are briefly examined.<sup>(19)</sup>

#### *misfeasance*

In the first category, the administration would be guilty of *misfeasance*, where a damage has been caused by the "positive" fault of the administration. If the term fault means acting or the failure to act that would not have been committed by a diligent man, a prudent man, a careful man, an

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(18) A reference to the distinction between the "personal fault" and the a "service-connected fault" is considered below in the course of examining the position in Jordanian law.

(19) For more details about these forms of administrative faults see in English: Schwartz, B., op. cit., no. 1, pp: 276-282, and see in Arabic: Shafeeq, J., *Liability of the State concerning the acts of its authorities*, Cairo, 2002) pp: 198-204. (Arabic text).

administrative officer who deviates from the standard of a careful and a prudent man while acting in the scope of his official functions, would then be committing a service-connected fault for which the State is liable. Cases in which there is misfeasance on the part of a public officer acting within the scope of his employment are numerous. They occur whenever injury is caused by the failure of a public officer to conform to the standard of conduct imposed on a reasonably prudent man by the circumstances of the case, unless he has so deviated from his employment that only he, and not the State, is liable.

### *nonfeasance*

In the second category, the adminwould be guilty of *nonfeasance*, where a damage has been caused by the "negative" fault of the administration. By not acting, the administration can commit a fault when it is under a duty to act and that it must repair the pecuniary consequences resulting from its inaction. This is a substantial step forward in the law of State liability, and it is due to the fact nowadays that the exercise of authority is not a privilege, but a duty imposed upon the administration. Such liability may arise when a private citizen has been injured by the administrative refusal to enforce a statute or regulation. The following case heard by the Council of State in 1948 is an illustrative example. A regulation had forbidden doctors employed by the State to engage in private practice, but this regulation was not enforced. The plaintiff was a private practitioner who alleged that he had suffered damage because of the competition of doctors employed by the State. It was judged that in failing to enforce the regulation the administration had committed a fault and was obliged to repair whatdamage the plaintiff had suffered from the improper competition of the public doctors.<sup>(20)</sup>

### *Late -feasance*

Public services must be operated on time. Closely related to the above cases of administrative nonfeasance are those in which the

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(20) See Schwartz, B., op. cit., no. 1, p. 280, and Shafeeq, J., op. cit., no. 19, p. 204.

administration acted too late. The matter here depends on whether the administration has acted with "reasonable" diligence in the circumstances. The application of the standard of reasonableness will vary in accord with variations in the fact pattern of the cases at issue.

The following is an illustrative example in French case law. A minor was enlisted in the Foreign Legion without parental consent, which was prohibited under French law, and the minor should have been discharged as soon as the military authorities were made aware of the facts. Several months elapsed after the minor's father asked for his son's release; and during this administrative lag the son was killed in combat. The Council of State held that the administration's delay in acting constituted a fault for which the State was liable.<sup>(21)</sup>

### A "combination" of faults

It was stated above that French law has made a distinction between the personal fault and service-connected fault in the course of administrative liability, under which the State was absolved of liability in every case in which a personal fault had been committed. It was recognized later on that a given damage can be caused both by a personal fault of the officer and by a fault of the administrative service, if the officer is acting within the scope of his official functions.

This trend was established in the *Lemonnier* case, decided by the Council of State in 1918.<sup>(22)</sup> A local carnival held each year by a small southern commune. Its principal attraction was an afternoon-long shooting contest aimed at a target fixed on a small plank floating in the local river. The plaintiffs, husband and wife, when walking toward the river about 6 p.m. to see the carnival, were struck by bullets fired in the contest. It was found that some hours earlier several persons walking in that area had almost been hit, and they had hastened to inform the local authorities. But the mayor did not order the shooting stopped until after the plaintiffs had been injured.

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(21) See Schwartz, B., op. cit., no. 1, p. 282, and Shafeeq, J., op. cit., no. 19, p. 202.

(22) Brown, N and Bell, J, op. cit., no. 3, p 186.

The mayor had acted with gross negligence in not ordering a halt to the shooting, which was a personal fault for which he was personally liable. This fault did not mean, however, that the State was absolved. If the officer's fault "has been committed in the adservice or because of the service, if the means and the instruments have been put at the officer's disposition by the service, if the victim has been put into a position to be injured by the effect of the working of the service, if the service has provided the conditions for the commission of the fault or its injurious consequences to a given individual, the administrative-court judge will then have to say: The fault may be separable from the service; that is for the law courts to decide; but the administrative service is not separable from the fault. The State is only relieved of its responsibility if the administrative service can be held to be a complete stranger to the fault.

The idea of a "combination" of faults led to an important approach in French administrative law that in most cases the existence of a right of personal action against the public officer for damages for his personal fault no longer removes from the individual concerned the right to bring an action against the State. That is, the State is now liable in most cases in which damage has been caused by the fault of an adofficer. It is only where an officer has so devifrom his official functions that his act is in effect that of a private individual unconnected with the administration that the State is abof responsibility.<sup>(23)</sup>

The citizen injured by the personal fault of an administrative officer may, thus, either to sue the officer or - which is preferable- to bring an action against the State. This led to the virtual elimination of suing public officers personally, and this in turn led to the afraid that officers would accordingly not be care enough in exercising their public work. It is therefore suggested that the needed check on the public official that was formerly supplied by his personal responsibility can be obtained by making the officer personally liable to the State under a theory of subrogation, where the State has been compelled to pay damages caused by the officer's personal fault.

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(23) Shafeeq, J., op. cit., no. 19, p. 226.

The personal liability of officers to State in this sense was so clear in 1951 judgment.<sup>(24)</sup> A private individual injured by a government vehicle driven by a drunken officer had brought an action against the State and recovered a judgment on the theory that there had been a fault connected with the administrative service involved. The State then sought indemnity from the officer, maintaining that his personal fault in drivwhile drunk had really caused the injury, and the Council of State was of the view that it could recover from the concerned officer the damages it had paid.

With this jurisprudence the State is now liable in every case in which damage is caused by the faulty functioning of its services, unless the official concerned has so deviated from the scope of his employment that he has acted as a private citizen rather than as a man vested with official authority. If the damage were caused by the personal fault of the officer, he is personally liable, not only to the citizen injured, but also to the State, which has to make the citizen whole for his damages.

### **Liability without fault**

One main part of the administrative liability theory established by the French administrative courts is the liability of the administration without fault. In French administrative law the administration might find itself in certain circumliable even where guilty of no fault.

The liability without fault notion was early established on the will of Parliament. Thus, a Law of 1799 imposed on the administration a duty to compensate anyone injured as a consequence of the carryout of public works. Bering in mind the fact that rules of administrative liability in French law are separate from those enshrined in the Civil Code in which only fault was the keynote, the liability without fault was then based on the theory of risk: activities of the state, even when conducted without fault, may in certain circumstances constitute the creation of a risk; if the risk materializes and an individual is occasioned injury or loss it is only

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(24) Referred to in Schwartz, B., op. cit., no. 1, p. 285.

just that the state should indemnify him.<sup>(25)</sup> This type of liability is also based on the fundamental principle of the equality of all citizens in bearing public burdens: what is done in the general interest, even if done lawfully, may still give rise to a right to compensation when the burden falls on one particular person.<sup>(26)</sup>

Categories of cases in which the Council of State has imposed liability without fault upon the administration, even without statute, include those concerning the risk in assisting in the Public Service. Thus, in commune de saint-priest-la-plaine the victim, in a voluntary capacity, was helping to set off fireworks at a village carnival when he was injured by the premature explosion of a firework; the Council allowed him to recover damages without proving fault on the part of the<sup>(27)</sup>

They include also cases where risks arising from dangerous operations. This can be illustrated by the twin cases of *lecomte* and *daramy*, both concerned the same kind of incident and in both of them the administration was held liable: the accidental injuring of a bystander through the use of firearms by the police. In *daramy* the complainant's wife was shot dead when a policeman was pursuing the assailant of a taxi-driver; in *lecomte* the proprietor of a bar, whilst sitting at the street door, was killed by shots fired by the police at a motorist apparently evading a road block.<sup>(28)</sup>

Cases where abnormal burdens suffered in the public interest is another category in which the administration would be held liable without fault and without need to a statutory reference. This was the case

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(25) See in English: Walter, C and Robart, M, *Introduction to French Law*, Cavendish Publishing Limited, London, 1998, p. 139, and see in Arabic: Tamawi, S., *Administrative Jurisdiction - compensation Jurisdiction* - (Cairo: 1996) p. 211 (Arabic text), Rosslan. A., *Liability of State for Non- contractual Actions*, (Cairo, 1982) p. 258. (Arabic Text)

(26) See Labib, H., the theory of "service-connected fault", (Cairo, 1968) p. 397. (Arabic Text), Rosslan. A., *ibid.*, p 267.

(27) CE 22 November 1946) see for more details in French law: C. Guettier, *La responsabilite administrative* (Paris, 1996) 108-113; G. Braibant and B. Strin, *Le Droit administratif francais*, (Paris, 1997) 282-4. referred to them in Brown, N and Bell, J, *op. cit.*, no. 3, p 191.

(28) (CE 24 June 1949).

in couiteas.<sup>(29)</sup> Couiteas was the owner of extensive tracts of land in Southern Tunisia which were occupied by nomadic tribesmen. His own efforts to evict the natives having failed,, he sought the help of the local police who said it was a matter for the military authorities. The military commandant feared that action by him would provoke a rebellion in the region and referred the matter to the Resident-general who in turn referred the matter to the government in Paris. The government decided no military assistance could be given because of the risk of serious disorder. He then sought damages against the administration, and the Council of State was of the view that since the plaintiff had obtained a declaration of his rights as owner from the Tunisian civil courts, he was entitled to expect the assistance of the public authorities in executing his judgment; if then, perhaps for good reason, this assistance is refused, the citizen is called upon to bear an abnormal burden in the public interest; and to protect the principle of equality he must be compensated in damages for his special sacrifice.

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(29) CE 30 November 1923).



## **Chapter Two**

### **Administrative liability in Jordanian law**

This chapter examines the administrative liability in Jordanian law through four main sections. The first section is a general glance of the Jordanian administrative law. The statutory reference and the jurisdiction concerning administrative liability cases is the subject of the second section. Sections three and four are respectively examining the liability of the administration for fault and administrative liability without fault in Jordanian law from a comparative perspective.

#### **Section One**

##### **A general glance of the Jordanian administrative law**

##### **A constitutional background**

Jordan is a constitutional hereditary monarchy with a parliamentary system.<sup>(30)</sup> There are three organs of government in Jordan: the Legislative, the Executive and Judiciary. The legislative power is vested in the National Assembly and the King. The National Assembly consists of a Senate and Chamber of Deputies.<sup>(31)</sup> The Executive Power is vested in the King who exercises his powers through His Ministers in accordance with the provisions of the Constitution.<sup>(32)</sup> The Judicial Power is exercised by the courts of law in their varying types and degrees.

According to the provisions of the 1952 Constitution and Acts enacted in conformity with them, the courts in Jordan are the Regular courts, the Religious courts and the Special courts. The Regular Courts have the jurisdiction over all persons in the Kingdom in all matters civil

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(30) See Al- Kaswani, S., *Principles of Constitutional Law with A particular Analysis of Jordanian Constitutional System*, (Amman, Al-Kaswani Press, 1983) Chapter 4; (Arabic Text) Al - Gazwi, M., *The Political and Constitutional System in the Hashmiate Kingdom of Jordan*, (Amman, Dar Al-Thaqafah, 1996) pp. 65-69(Arabic Text).

(31) Section 25 of the Constitution.

(32) Section 26 of the Constitution.

and criminal *except* in such matters as the provisions of the Constitution or any other law shall be assigned to the jurisdiction of other courts.<sup>(33)</sup>

The Regular Courts include *Magistrates Courts*, having the jurisdiction to determine certain civil and criminal matters within certain limits specified by the law.<sup>(34)</sup> Courts of First Instance, having original jurisdiction (over matters civil or criminal except those excluded by the law) and appellate jurisdiction (to examine appeals against rulings of Magistrates Courts), *Courts of Appeal*, having the jurisdiction to determine appeals against civil and criminal judgements except those lying within the jurisdiction of the Courts of First Instance in their appellate capacity, *The Supreme Court*, which has the jurisdiction to determine objections by way of cassation against civil and criminal decisions made by the Courts of Appeal or, in certain cases, made by the lower courts, *The High Court of Justice*: this Court was established as a response to Section 100 of the 1952 Constitution. It has the jurisdiction to determine administrative law disputes, including challenges made against illegal administrative decisions. This jurisdiction is not to be exercised by any other court, Judgements of the High Court of Justice are, therefore, of a final and a non-appealable kind.

The Religious courts are divided, according to Section 104 of the Constitution, into two types: the Shari'ah Courts and the Tribunals of other Religious Communities. The Shari'ah Courts have jurisdiction in matters of personal status of Muslims,<sup>(35)</sup> and their decisions are appealed before the Shari'ah Court of Appeal in Amman. The Tribunals of other Religious Communities have jurisdiction in matters of personal status of non-Muslims. Their decisions are also subject to an appeal before a Court of Appeal formed according to the principles relating to the community concerned.<sup>(36)</sup>

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(33) Section 102 of the Constitution.

(34) The Magistrate Courts Act 1988.

(35) Section 105 of the Constitution.

(36) See Sections 108 and 109 of the Constitution.

The "Special" courts are formed, according to Section 110 of the Constitution, to deal with certain cases which are excluded from the jurisdiction of the Regular Courts. Among these courts are the Martial Court, the Police Court, the Military Councils, the Costume Courts, Tax Tribunal and Land Tribunal.<sup>(37)</sup>

### **Model of judicial review**

As stated above, the administrative jurisprudence is performed by the High Court of Justice, which has the power to examine the legality of administrative decisions. When the 'modern' Jordanian State was established at the beginning of the second half of the Twentieth Century, Parliament considered whether to follow the French model in the field of judicial review, where special administrative courts are established side by side with ordinary courts, or to follow the English law style, where the same courts hear all types of disputes including those concerning administrative authorities. The arrangements of the 1952 Constitution show that Parliament decided to follow, in principle, the French model. Section 100 of the Constitution provides for the establishment of a 'High Court of Justice' with the exclusive jurisdiction to hear administrative law disputes.

Bearing in mind the circumstances of a newly established country including the lack of staff and judges, the Regular Courts Act 1952 provided that while administrative law disputes are heard by the High Court of Justice, this Court should be formed of judges who are members of the Supreme Court.<sup>(38)</sup> In 1989 the High Court of Justice Act 1989 was enacted. According to section 3 of the 1989 Act, the High Court of Justice must be formed of a President, who is of a similar rank as the President of the Supreme Court, and at least four other members<sup>(39)</sup>, who are of a similar rank to judge members of the Supreme Court.

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(37) See for more details Hiyria, A., *Constitutional Law and the Constitutional System in Jordan: Comparative Study*, (University of Jordan, 1972) p 815-825. (Arabic Text)

(38) Section 10/3 of the Regular Courts Act 1952.

(39) Section 8 of the 1989 Act.

In 1992 the High Court of Justice Act 1992, the one now in force, was promulgated. The main changes and developments provided in the 1992 Act are briefly the following:<sup>(40)</sup>

Firstly, the High Court of Justice has now the jurisdiction to compensate a person affected and not only to quash a decision complained of. After enumerating matters which are within the jurisdiction of the Court in section 9(a) of the 1992, it is provided, in section 9(b) that “The High Court of Justice has the jurisdiction to compensate applicants who suffered damage as result of any illegal administrative decision...Applications for damages may be sought separately or together with the application to quash a decision complained of.”

Secondly, for the first time the non- exclusion of judicial review by statutes is provided for. Section 9(a) (10) reads: “The High Court of Justice has the jurisdiction to examine the validity of all administrative decisions no matter whether a decision subject to challenge has been given an immunity from being challenged according to a statute concerned”.

Thirdly, the High Court of Justice may now examine the legality of different types of delegated legislation. Section 9(a) (7) reads: “The High Court of Justice has the jurisdiction to hear applications which are submitted by an injured person to nullify a regulation which violates the provisions of the Constitution or an Act of Parliament”. Traditionally, the Court could only examine the legality of administrative decisions which are made *in pursuance of* illegal delegated legislation and not the delegated legislation itself.<sup>(41)</sup>

It is worth noticing here that having a separate ‘administrative’ court does not mean that Jordanian law is a copy of the French law model. Unlike the case in Jordanian law where judges members of the High Court of Justice are professional lawyers and follow the Ministry of Justice, most members of the Conseil d’Etat are ‘special administrative judges’ trained and educated in what is called the State College of Public

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(40) See Al-Tahrawi, H., *Administrative Law*, (Amman, Dar Al-Thaqafah, 1998) pp. 62-65. (Arabic Text)

(41) Section 10 (3) of the 1952 Act and section 9 (7) of the 1989 Act.

Administration (SCPA). Secondly, while the French administrative courts have a general jurisdiction to hear all kinds of administrative law disputes, the High Court of Justice's jurisdiction is exclusively enumerated. Thirdly, unlike the case in Jordan, the Conseil d'Etat plays a central role in the process of legislation and in advising the Government. Fourthly, while in France there are several administrative courts culminating in the Conseil d'Etat, the High Court of Justice is the only 'administrative' court in Jordan.<sup>(42)</sup>

### **Preconditions for proceedings**

Judicial review proceedings in Jordanian law start by presenting a 'petition' to the High Court of Justice in Amman. The applicant's 'petition' - which must be presented by a senior lawyer<sup>(43)</sup> - includes a summary of the facts, legal submissions being relied upon, the grounds of challenge, remedies sought and any supporting evidence.<sup>(44)</sup> A copy of the applicant's 'petition' must be sent, through the court, to the defendant who should reply on the applicant's claim within 15 days.<sup>(45)</sup> If no reply is made, a decision under attack may be considered as being illegally taken.<sup>(46)</sup> If the defendant replies within the time limit, a copy of the reply will be sent to the applicant who has to decide within 7 days whether to go ahead with the proceedings or not, and if the decision is to continue, parties will be called to the first sitting in which the court would start examining the requirements for access to judicial review.<sup>(47)</sup>

It is required for access to judicial review in Jordanian law that a decision subject to challenge being emanated from a body subject to judicial

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(42) For a full account of the French law model see; Brown, N and Bell, J, op. cit., no. 1, chapters 2 and 3.

(43) Section 13 (a) of the 1992 Act.

(44) Section 13 (b) of the 1992 Act.

(45) According to section 17 of the 1992 Act, this period can be extended, on the discretion of the Court, for another ten days upon the respondent's request.

(46) See for example case 52/55, L.A.J., 4, 593.

(47) Section 17 of the High Court of Justice Act 1992. For more details of these procedures, see Al-Zoubi, K., "Procedures before the High Court of Justice in Jordan" [1996] *Mutah for Researches and Studies Journal*, 73; (Arabic Text) Al- Gwairey, A., "The Administrative Litigation Procedures before the High Court of Justice: A Comparative Study" [1991] *Mutah for Researches and Studies Journal*, 201. (Arabic Text)

review and it is, *per se*, amenable to challenge. An applicant must also have a standing to seek proceeding. In addition, proceedings have to be instituted within a short time limit, and other convenient and equally effective remedies have to be exhausted before judicial review becomes an option.<sup>(48)</sup>

### Grounds for judicial review

Once the hurdle of 'accessibility' has been cleared, that is access to the substance of the case is allowed, the claim will then be substantively examined and the main question will be: upon what grounds are judicial review proceedings sought. Grounds of judicial review are generally classified under three main categories: substantive *ultra vires*, procedural *ultra vires*, and abuse of power.

Section 10 of the High Court of Justice Act 1992 reads that "Objections against administrative decisions shall be related to matters of: (a) jurisdiction [lack of competence or incompetence to act]<sup>(49)</sup> (b) violating the Constitution, statutes or statutory instruments or applying or interpreting them incorrectly [statutory infringement]<sup>(50)</sup> (c) failing to observe the formal procedural requirements.<sup>(51)</sup>

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(48) For more details see See Al- Gwairey, A., *Administrative Jurisdiction in Jordan*, (Amman: Dar Al-thaqafah, 1989) (Arabic Text), Kan'an, N., *Administrative Jurisdiction in Jordan*, (Amman: the University of Jordan 1999). (Arabic Text)

(49) Incompetence denotes a lack of authority of the administrative organ to take the decision which it has in fact taken. Lack of competence in this context covers the situation in which the administrative authority in question has no power or where the power has been exercised by the wrong body. Incompetence may arise because of the territorial area of jurisdiction of the administrative authority concerned. The exercise of jurisdiction may also be limited by law to a certain period of time, so an administrative body may only exercise its power within the limit of such a period, otherwise its decisions would be declared as to invalid.

(50) In this context the word "law" is understood not simply in its usual meaning of written law, but may be a rule of the constitution (which is the supreme law), a statute passed by the legislature or ministerial regulation. Non-compliance with a judicial decision is also to be considered as a violation of law. The Court may also examine the 'reasoning' process followed by a deciding authority in reaching the final conclusion. It may examine here (i) whether the conclusion has been based on 'existing' and 'sound' factual basis and (ii) whether a '*manifest error*' has been committed in appreciating the relevant facts'

(51) This ground of review concerns a breach of procedural or formal requirement. A failure to observe a substantial procedural formality will be enough to lead to avoidance of subsequent proceedings. Irregularities which are of a substantial nature can affect the validity of an

(d) abuse of power.<sup>(52)</sup>

## Section Two

### Statutory reference and jurisdiction to hear administrative liability cases

#### Statutory reference

The statutory basic to compensate injured people in Jordanian law where a damage is caused either by individuals or by an administrative body is provided in Article 256 of the Jordanian Civil Code 1976. The said Article reads that "damage caused to another must be compensated even in cases where it is caused by a non- discriminating person".

It seems for the first reading that the 256 Article, on which most of the private law of tort is based, does not make fault a prerequisite of liability. If this were applicable in the field of administrative law, it would seem that the administration would be responsible for compensation as long as it's action caused damage to others, even if it is not a faulty action. Some Jordanian commentators argue for this understanding.<sup>(53)</sup>

The prevailing argument among the Jordanian commentators in this regard is that although it seems for the first impression that the 256

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= administrative process but less serious, immaterial irregularities do not affect such validity. In reaching an administrative decision the administration, though not obliged by law, may prefer to follow a certain procedure. In such a case, it is not necessary that the administration should follow the same procedure in the revocation of the decision in question. One of the procedural requirements in reaching an administrative decision may be that the administration has to carry out certain consultations and seek the opinion of certain bodies. The law may further lay down that the opinion received shall be binding on the administration. In such a case an administrative decision that is incompatible with the issues put forward in the process of consultation will be annulled.

(52) This ground of judicial review denotes the use of power or discretion for a purpose other than that for which the power was given. When there is an allegation of a misuse of power the court would examine the motives of the administration to find out whether it has acted for motives other than in the public interest. A deciding authority may act for a personal or private purpose for example.

(53) See Alhiari, A., *the Nonfeasance Liability for the act of others*, (Amman: Dar Al-thaqafah, 2003), p. 40., (Arabic Text) Swar, W., *the Public Direction in the Civil Law*, (Amman: Dar Wail, 2001), p. 137.

Article adopts the "damage" theory in the field of liability, a comprehensive review of all provisions concerned would lead to a different conclusion. Section 61 of the Civil Code provides that who legitimately exercises his rights and powers would not guarantee a resulting damage. This, it is convincingly argued, means that only when there is a faulty, or at least illegal, action one would be held liable to compensate an injured person.<sup>(54)</sup>

The case law shows, however, that the Jordanian courts have adopted this argument in many occasions, requiring that there must be a list of three elements to decide the liability for indemnity: a faulty action committed by the defendant, a tort resulting from such an action and a causal relationship between the two elements; the faulty action and the tortuous result.<sup>(55)</sup> That is, the liability without fault is only accepted in Jordanian law, unlike the case in French law, where a statute concerned imposes on the administration a duty to compensate injured. This issue is further examined below.

### **Jurisdiction to hear administrative liability disputes**

As for the jurisdiction to hear administrative liability disputes a distinction must be noted here between two stages. Before the enactment of the High Court of justice Act 1992, the one in force today, all administrative liability disputes were subject to the jurisdiction of the "regular" or "ordinary" courts and not the High Court of Justice. Matters within the jurisdiction of the High Court were, as stated above, exclusively enumerated and no reference has been made to administrative liability disputes. That is, all disputes of liability, including those in which the administration is a part, were within the jurisdiction of the regular courts which constitutionally have the jurisdiction over all persons in the Kingdom in all matters civil and criminal *except* in such matters as the

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(54) See Alzoubi, M., "the liability of the immediate and causative in the Jordan Civil Law", Mutah for Researches and Studies Journal, Mutah University: (1987) p. 871., (Arabic Text) Shatnawi, A., *the Liability of the Public Administration*, ((Amman: Dar Wail, 2008), p. 154. (Arabic Text)

(55) Shatnawi, A., *Ibid.*, p. 155.



provisions of the Constitution or any other law shall be assigned to the jurisdiction of other courts.<sup>(56)</sup>

When the High Court of Justice was enacted in 1992 it is provide for the first time that the High Court has the jurisdiction to compensate applicants who suffered damage as result of an illegal administrative decision.<sup>(57)</sup> Since that time the administrative court has the jurisdiction to examine part of administrative liability disputes in which the damage is connected to an illegal administrative decision. Not all administrative liability disputes, to put it another way, are now within the jurisdiction of the High Court of Justice. Only where damage is resulting from an illegal administrative decision proceedings can sought before the High Court. Other administrative liability disputes, including for example those in which damage is a result of a material faulty action committed by an administrative body, are still within the jurisdiction of the "regular" or "ordinary" courts.<sup>(58)</sup>

### **Section Three**

#### **Administrative Liability for Fault**

Quashing an illegal administrative action is not always an adequate remedy for a plaintiff where such an action caused damage for him. When the administration for improper purpose decides, for example, to destroy an old house, the judgment declaring the decision in question being illegal would have no value and only compensation may relief the plaintiff.

In such cases judicial review alone, though it result in the setting aside of an administrative act found to be illegal, is useless from a practical point of view to the injured person. If individuals are to be protected adequately, an action for damages is the necessary compleof the action for review, which results only in the setting aside of improper administrative action.

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(56) Section 102 of the Constitution.

(57) Section 9 of the High Court of Justice Act 1992.

(58) For a full account in this regard see Shatnawi, A., op. cit. no 54, pp: 39-55.

Having stated that most types of administrative liability disputes in Jordanian law are still examined by the ordinary courts and not by the High Court of Justice, the rules and principles governing administrative liability are not yet separate from those applied in civil law cases. As mentioned above, only where damage is resulting from an illegal administrative decision proceedings can sought before the High Court. Other types of administrative liability disputes are still within the jurisdiction of the ordinary courts.

With this in mind, disputes concerning the liability of administration for fault in Jordanian law can be classified under to main categories: disputes concerning the liability for "material" faults, which still lay under the jurisdiction of the ordinary courts, and disputes concerning the liability of the administration for "legal" faults (more precisely liability for illegal administrative decision), which became since the enactment of the 1992 Act within the jurisdiction of the High Court of Justice.

### **Administrative liability for a "material" fault**

The liability here is for fault of a material nature. The statutory basic for this type of liability is Section 256 of the Jordanian Civil Law 1976. This type of administrative liability, which is still within the jurisdiction of the ordinary courts, represents the majority of cases in which compensation is claimed against the administration.

Although cases of administrative liability under this category are, as just stated, still examined by the ordinary courts and not by the High Court of Justice, the French law of administrative liability has an influence on the Jordanian law where proceedings of liability are sought against the administration. This influence is so obvious in adopting a distinction between "personal" and "service-connected" fault by the Jordanian courts. The Supreme Court was of the view in many occasions that public officer himself is personally liable if he has committed a "personal fault" (if he has acted willfully, maliciously, with gross negligence, or outside the scope of his official functions). If he has acted

within the scope of his employment, then he has normally committed only a "service-connected fault" for which he is not personally liable.<sup>(59)</sup>

The criteria to draw the distinction between personal faults and service-connected faults is still a debatable issue both in comparative legal systems and in Jordanian law.<sup>(60)</sup> One famous attempt in this regard was that of Laferriere who stated that if an act reveals an administrator more or less subject to error rather than a man with his weaknesses, his passions, his imprudence, the act remains administrative and cannot entail the personal liability of the officer.

Seeking to lay down a more precise criteria, Jeze argued that the fault would be a personal one when there was willfulness or malice or gross negligence on the officer's part. In his view, unless there were willful or malicious intent or unless the officer's negligence exceeded the normal, the fault remained connected with the service. This view does not wholly resolve the problem, for it does not deal adequately with the public officer who has no malicious intent and commits no gross negligence, but who is not acting within the scope of his official functions. This omission has led Hauriou to assert the test of separability from official function. He argued that the act becomes personal to the officer when there is a circumstance manifestly separable from the exercise of the function which places it outside the ordinary practices of the agency and makes one feel that the officer has been motivated by a desire not to act as an administrator.

The Jordanian courts as well as the courts in France do not adopt one exclusive test in this regard. The Council of State and the Court of Conflicts in France have appeared that they adopted the test of

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(59) See, for example, the following illustrative cases that have been decided by the Jordanian Supreme Court: case 343\68 (LAJ, 1969, p. 648), case 359\85 (LAJ, 1986, p. 1015), case 304\73 (LAJ, 1973, p. 1614).

(60) For more details in this regard see in English: Brown, N and Bell, J, op. cit., no. 3, pp: 186-188, Schwartz, B., op. cit., no. 1, pp: 259-261, and see in Arabic: Shafeeq, J., op. cit., no. 19, pp: 165-170, Shatnawi, A., op. cit. no 54, pp: 166-175. See in French: D. Rasy, les frontieres dela faute personnelle et dela faute de service en droit administartif francaais, Paris, L.G.D.J., 1963, refereed to in Shatnawi, A., op. cit. no 54, p. 169.

separability from official functions urged by Hauriou. Thus, it was held that an official was acting outside the scope of his employment and had consequently committed a personal fault for which he alone was liable in using a government vehicle for purely personal business; Burning -down of plaintiff's house by soldiers in revenge for the murder of one of their comrades by plaintiff; Using of the facilities of a municipal laboratory by its director to make analyses for a private individual.<sup>(61)</sup>

In other cases they appear to construe the concept of scope of employment more strictly. For example, they tend to hold that the public officer has acted outside the scope of his employment and committed a personal fault if he has acted in a manner manifestly improper, even though still acting on behalf of the administration. It has been held that a personal fault was committed when a policeman sought to frighten a child by shooting a pistol that he thought was not loaded; when a public doctor vaccinated without taking the elementary precaution of cleansing himself.<sup>(62)</sup>

As it is the case in French law, no single criteria to draw the distinction between personal faults and service-connected faults has been adopted by the Jordanian courts. The Supreme Court has adopted in some cases the test of separability from official functions. This was the case, for example, when the Director of the State Broadcasting Station was held to be liable for allowing illegally the plaintiff to establish a café in the building of the Station, which was then closed. The Court was of the view that it is not within the power of the Director to give such a permission and therefore he and not the institution responsible to compensate the injured person.<sup>(63)</sup>

The test that the fault would be a personal one when there was willfulness or malice or gross negligence on the officer's part, was adopted in some other cases. The Court was of the view that unless there were willful or malicious intent or unless the officer's negligence exceeded

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(61) Schwartz, B., op. cit., no. 1, pp: 261- 263.

(62) Ibid., p. 262.

(63) Case 343\68 (LAJ, 1969, p. 648).

the normal, the fault remained connected with the service. Thus, the administration was held liable and not the Police Commander for destroying some buildings and vacating inhabitants for the public good, as that there was no negligence on his part was proved.<sup>(64)</sup>

The case law shows, however, that the Jordanian courts has adopted the liability of the administration in most cases in which damage has been caused by the fault of an adofficer. It is only where the officer concerned has so devifrom his official functions that his act is in effect that of a private individual unconnected with the administration that the State is abof responsibility.<sup>(65)</sup>

The case law shows also that a personal fault would be considered as to be a "service-connected" one whenever the officer concerned was, in causing harm to others, implementing a presidential order. This approach is based on Section 263 of the Civil Law which provides for the conditions and limits to be adopted in this regards. An officer would not be personally liable, according to the said section, if he was implementing an order imposed upon him from his president; if he believed that the order was legitimate; and if he was cautious and accurate during the implementation of that order.

### **Administrative liability for a "legal" fault**

Before the enactment of the High Court of Justice Act 1992 all disputes concerning the liability of administration were within the jurisdiction of the ordinary courts. One of the main developments adopted in the 1992 Act, to which a reference has already been made, is that the High Court becomes having the jurisdiction to compensate applicants who suffered damage as result of an illegal administrative decision (administrative liability for legal fault).

Although commentators in Jordan consider this development as to be a step forward,<sup>(66)</sup> we do believe that a comprehensive jurisdiction to

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(64) See Case 304\73 (LAJ, 1973, p. 6114).

(65) Shatnawi, A., op. cit. no 54, p. 179.

(66) Al-Tahravi, H., op. cit., no. 40, p. 62.

examine all types of administrative liability disputes must be conferred upon the High Court of Justice. The suggested jurisdiction side by side with the establishment of several administrative courts culminating in the High court of Justice as a court of cassation would improve the administrative law in Jordan and it would provide more protection for rights and freedoms of people.

The case law shoes that the High Court of Justice - in exercising this jurisdiction - has mostly adopted the same rules and requirements of administrative liability applied by the ordinary courts when examining the liability of administration for "material" faults. To decide the liability of the administration for indemnity there must be a faulty action committed by the defendant administrative body (which is here an illegal administrative decision), a tort resulting from such an illegal administrative decision and a causal relationship between the decision under attack and the tortuous result.<sup>(67)</sup>

The liability without fault has never been accepted in this area. The High Court of Justice adopts the view - in many cases - that it is not enough to decide the liability of the administration to compensate an injured person merely on the ground that the decision in question has caused a harm to him. Such a decision must be a defective one; if it is legitimate no fault has then been committed and the administration would not be held liable. The High Court used to make a reference in this regard to Section 61 of the Jordanian Civil Law 1976 which, as it was stated before, provides that who legitimately exercise his rights and powers does not guarantee a resulting harmful damage.<sup>(68)</sup>

Thus, the administration was not held liable although the plaintiffs suffered damage when it decided, for the public good, to locate an area to get rid of rubbish near the applicant's land;<sup>(69)</sup> to hole a tunnel which reversely affected the markets around;<sup>(70)</sup> to build suspension bridge

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(67) See for example, case 289\2002 (LAJ, 2002, p. 648), case 182\94 (LAJ, 1994, p. 3230), case 176\97 (LAJ, 1997, p. 1614).

(68) Shatnawi, A., op. cit. no 54, p. 280.

(69) Case 2570\2001 (LAJ, 2001).

(70) Case 3496\2004 (LAJ, 2004).

between two areas in Amman which similarly affected the commercial business of the markets already established there.<sup>(71)</sup> In all these cases the court was convinced that the decisions under attack have caused damage to applicants, but there was no fault committed by the administration as that the decisions were taken for the interest of the whole society and no ground for review was proved.

In cases where a decision under attack is an illegal one and it causes a damage to the applicant proceedings for compensation would be then accepted and the administration can be held liable. Examples of cases in which the administration was held liable to compensate damage caused by its illegal decisions are many.<sup>(72)</sup>

It is worth noticing, however, that not all grounds for quashing illegal administrative decisions are accepted to be grounds for compensation. The case law shows that the High Court of Justice may accept proceedings for compensation only when a decision in question is "substantially" illegal (cases where a quashed decision is violating the law, based on illegal reasons, or taken for improper purposes). When a decision is "formally" illegal (cases where a quashed decision is taken by an incompetent person, or without observing formal procedural requirements) the Court would not rule to compensate a victim person unless a gross defect being proved.<sup>(73)</sup>

#### **Section Four**

##### **Administrative Liability Without Fault**

As it was stated above, the Jordanian courts do not accept yet the liability of the administration without fault except in cases where the legislation concerned provides for the remedy of compensation. Unlike the case in French law, the Jordanian courts require fault as a prerequisite of administrative liability, on the ground, referred to above,

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(71) Case 477\2003 (LAJ, 2003).

(72) See Shatnawi, A., op. cit. no 54, p. 155.

(73) For more details and examples in this regard see Al- Gwairey, A., "The General Rules of the Comprehensive Administrative Litigation in the light of the High Court of Justice Act 1992- A Comparative Study" [1993] Mutah for Researches and Studies Journal. (Arabic Text)

that who legitimately exercising his power shall not be asked to compensate a resulting damage.

The liability of the administration without fault is still a debatable issue in developing countries, including Jordan. Some Egyptian and Jordanian commentators, who are influenced by the French law approach in this regard, argue for the liability of the administration without fault.<sup>(74)</sup> Their argument can be summarized as follows: in cases arising only between two private individuals it can rightly be asserted that there should be liability only if there is fault. Both parties are in equal positions, and as long as neither of them violates the standard of care imposed by the law, no obligation to make reparation should be imposed on either. It is only where there is fault on the part of one that he may be ordered to pay damages. In public law cases, on the other hand, parties are unequal by their nature: on the one side, the public power whose action is dictated by the necessities of the general interest, and which engages in operwholly beyond the scope of those that private persons can carry out; on the other side, the ordinary individuals whose private interests must yield before the public necessity. In such cases the French administrative law has had to redress the inbetween the parties by applying the rule of absolute liability.

They also argue that when a particular citizen is damaged by the operation of an administrative service, even if there is no fault, the principle of equality before law, particularly in sharing the expense of government, is violated. The victim is beard here a burden not imposed on other citizens through the operation of a public service that functions for the benefit of the whole community. In such cases the administration, though it has not committed a fault, is under an obligation to vindicate the principle of equality before the costs of government by removing the

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(74) See Lelah, M., *judicial control over the administrative actions*, (Cairo 1970) p. 504, (Arabic Text)  
Al Jurf, T., *judicial control over the administrative actions*, (Cairo 1967) p. 186, (Arabic Text)  
Abu Zeed, F., *Administrative Jurisdiction and the Council of State*, (Cairo 1989) p. 188. (Arabic Text)



additional burden that has fallen upon the one injured and, by assuming it itself, distributing it among the entire body of the citizenry.

Other commentators still reject the liability of the administration without fault at least in developing countries.<sup>(75)</sup> The main arguments beyond this view are the following. First, asking the state to compensate injured people although no fault was committed on its part is against the sovereignty of the state. Second, liability without fault is a kind of insurance which always requires a statutory reference. Third, in cases where the Council of State in France has applied the theory of risk there was a faulty action committed by the administration, but it was so difficult to prove it. Fourth, the adoption of the liability without mistake as a general theory would cost the budgets of the developing countries, which are mostly not enough to cover such an additional burden.

The case law in Jordan shows, as it was stated before, that the courts in Jordan do not accept yet the absolute liability of the administration, and that fault remains the fundamental element that proState liability. Cases in which the courts have accepted the liability of the administration without mistake are only where a statutory reference to this affect is provided. Unlike the case in French law, a general theory in this regard is not yet accepted and, as stated above, the administration was not held liable although the plaintiffs suffered damage in many cases as that the deciding body was acting lawfully and there was no statutory reference for the remedy of compensation was found.

The Jordanian law approach in requiring a legislation reference for the liability of the administration without fault does not offer a real protection for the rights and freedoms of people in their relation with administrative bodies. This study, in an agreement with the first group of commentators, would argue for the adoption of a general theory in the field of administrative liability without fault as it is the case in French law. This would arguably a step forward in protecting the rights and freedoms of people in their relation with the administration.

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(75) For a full account see Shafeeq, J., op. cit., no. 19, pp: 301-306.

There are several examples of Jordanian legislation in which the liability of the administration is provided even without fault. The Compulsory Purchase Law 1987 is one obvious example. Article 10 of the 1987 Act provides that damage caused to the owners of neighboring area as a result of the compulsory purchase process must be compensated by the Council of Ministers.<sup>(76)</sup>

The Civil Service System 2007 is another example. Article 174 provides that the Council of Ministers, which has the power to cancel or incorporate public departments for the public good, must find an appropriate office to an officer who may miss office because of exercising this discretionary power, and if that would not be possible the officer concerned would be discharged and subsequently compensated for the damage caused to him by such a lawful decision. Article 176 of this System provides similarly that compensation must be paid to an officer who may suffer a serious occupational accident while performing his public job, or to his inheritors in the case of death.<sup>(77)</sup>

The "Conciliation for Damage Caused by the Armed Forces" Law 1953 is another example of legislation which adopts the liability of the administration without fault. It provides that "... a person who suffers a bodily damage as a result of the activities of the army may apply for compensation... the Defense Minister has the power to examine the application and, if the application is accepted, a compensation up to 500 JD can be paid to the injured person."<sup>(78)</sup>

## **Conclusion**

This study, which contains two main chapters, has examined the liability of the administration in Jordanian law from a comparative perspective. While the first chapter considers the origin and the

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(76) See case 3336\2004 (LAJ, 2005), and case 3152\2000 (LAJ, 2001).

(77) A similar approach is also adopted in the Military Retirement Law 1959 (Articles 11, 16, 22).

(78) Section 2 of the "Conciliation for Damage Caused by the Armed Forces" Law 1953

developments of the theory of administrative liability in comparative legal systems (English and French legal systems), the second one examines the administrative liability in Jordanian law.

The study showed that although the theory of administrative liability is initially adopted in Jordanian law, more than one lesson can be learnt from the French law experience in this regard to offer a real protection for the rights and freedoms of people in their relation with the administration. Matters within the jurisdiction of the High Court of Justice are still exclusively enumerated, including its jurisdiction to compensate those suffered damage as result of an illegal administrative decision. Other cases of administrative liability, including those in which damage is a result of a material faulty action, are still within the jurisdiction of the "regular" or "ordinary" courts. A "general" jurisdiction of the High Court of Justice to hear all kinds of administrative disputes, as it is the case in French law, is therefore suggested to develop the Jordanian administrative law in general and to improve the theory of administrative liability in particular.

It is also suggested to establish several administrative courts in different provinces culminating in the High court of Justice as a court of cassation. This would give people more than one chance to challenge the illegality of administrative decisions, and it would accordingly develop the rules and principles of administrative law, including those concerning the theory of administrative liability.

The study suggests, more specifically, to adopt the theory of administrative liability without fault as it is the case in French law. It appears from the foregoing discussion that the Jordanian courts do not accept yet the liability of the administration without fault except in cases where the legislation concerned provides for the remedy of compensation. Such a "restricted" approach, the study argues, weakens the position of people in their relation of the administration.

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