

Theoretical relation between misuse of power in the administrative law and the theory of abuse in the use of the right in private law

Comparative study

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Abstract:

The study concluded to reveal the place of this theory from similar theories and the extent of its independence from it. Among these similar theories, my attention was drawn to the theory of abuse in the use of the right in private law, so it was necessary to encounter the strong similarity between the theory of deviation in public law and the theory of abuse in the use of the right in private law.

The researcher's interest in talking about this strong bond between the two theories was not inspired by his thought, but rather that this strong link between those two theories drew the attention of public law scholars and private law scholars.

As both jurisprudence attached special importance to the strong link between those two theories, which was the main motive for shedding light on them, even briefly, so that the noble reader could stand on the standard and field of differentiation between these two theories.

Keywords: *abuse of power, abuse of right, public law, private law.*

I. Introduction

The theory of abuse of power was and remains one of the most accurate public law theories despite their plurality, if not the most accurate of them all. Its study is related to most of the modern administrative law theories, which refer to the originality of this law.

This theory enjoys an excellent position among the modern theories of administrative law.

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In the guise of legitimacy, the administration commits whatever legal violations it likes. If injustice is a general loathing, then the most hated is what is dressed in the dress of justice². Therefore, we divided this research into two topics, in the first we talk about the concept of both theories and in the second we talk about the convergences and differences between them in terms of standard, field and reward.

The first topic: What is abuse of power and the theory of abuse of using rights

We will talk about the concept of the theory of abuse of power and abuse of right in this section briefly, with the aim of clarifying the concept of both theories, by dividing this topic into two requirements.

The first requirement: the concept of the theory of abuse of power

The abuse of power is defined as "The use of the discretionary power of the administration man to achieve unrecognized purposes." From this definition it becomes clear to us that the abuse of power occurs when the manager uses his powers and capacity to achieve goals that are not recognized for him

This defect is also defined as: "the administration's use of its powers other than the purpose set by the legislator for them"³.

The second requirement: the concept of abuse in using the right in civil law

Before defining the abuse in using the right, it is necessary to define the right, where the right is defined as "A specific legal machine that realizes direct self-interest, The purpose of the right and the position it implies is to achieve a direct self-interest that has a social value. The right is not to be decided, and it is not permissible to be used except to achieve this purpose. Therefore, the use of a right is not absolute and is left to the sole discretion of its owner, rather, the use of the right within the scope specified for it is restricted not to be deviated from the purpose for which it was created"⁴.

As for the theory of the right abuse , where it was defined by the Egyptian legislator in the text of Article (5) of the Egyptian Civil Law No. 131 of 1948, where the article stated: "The use of the right is illegal in the following cases:

1- If only intended to harm others.

2- If the interests that aim to be achieved are of little importance so that they are not at all commensurate with the harm that inflict others because of it.

3- If the interests aim to be achieved are unlawful. It was also defined by the Jordanian legislator, where Article (66) of the Jordanian Civil Law No. (43) of 1976 stipulated that:

1- To guarantee the person who used his right unlawfully.

² Dr. Sulaiman Al-Tamawi: An article entitled "The Theory of Abuse in the Use of Power", published in the Journal of Administrative Sciences, No. 2, 1967, p. 263.

³ Dr. Mahmoud Helmy: An article entitled "Defects of the Administrative Decision," published in the Journal of Administrative Sciences, Issue Two, 1970, p 134.

⁴ Dr. Ramadan Abu Al-Saud: Mediator in Explanation of Introduction of Civil Law, The General Theory of Right, University House for Printing and Publishing, no date, p. 635.

2- The use of the right is illegal:

A- If there is intent to infringe.

B- If the interest sought from the act is unlawful.

C- If the benefit from it is not proportional to the harm that inflict others.

D- If it exceeds what is customary⁵ .

The second topic: Aspects of convergence and difference between the two theories

In this study, we will talk about the strong bond that unites these two theories in a first demand, and then we will compare them in terms of scope, criterion and penalty in a second demand.

The first requirement: The similarity between the two theories

The great similarity and strong interrelation between these two theories and their role in legal systems had a prominent role that drew the attention of both public and private law scholars.

Dr. Suleiman Al-Tamawi⁶ talks about the most important scientist who spoke about this link, the scholar "Jusran", the first to write about the theory of abuse in the use of the right, and its most enthusiastic supporter, portraying for us the link that combines the two theories in an attractive way, where he says, "The link between the theory of abuse in private law and deviation in public law imposes itself, they were only two branches of a common origin. An echo of one idea that our privileges, whether due to private or public law, and whether they relate to our people or our jobs, have a social value, which inevitably differs according to different countries and legal ties.

Although there are those who violated this world in jurisprudence, this difference in jurisprudence does not exist in Jordan. As I did not find any of the jurisprudence that spoke about this difference - despite the few who spoke - and therefore the Jordanian administrative judiciary followed the same approach that the Egyptian judiciary had set.

The second requirement: A comparison between the two theories

Comparing the two theories requires clarifying the characteristics of the theory of arbitrariness in order for this work to be fruitful in order to prevent raising doubts about the validity of the idea of arbitrariness in itself.

Where this theory, the theory of abuse of the right to had settled in jurisprudence and the judiciary in France, Egypt and Jordan. It also won the support of the legislator in the Egyptian Civil Law⁷ and the Jordanian one⁸.

Therefore, a comparison will be made between these two theories in their field, criteria for distinguishing them, and their penalties.

⁵ Corresponds to Article 5 of the Egyptian Civil Code.

⁶ Dr. Sulaiman Al-Tamawi: The Theory of Abuse in the Use of Power "Deviation by Power", a Comparative Study, Ain Shams University Press, Edition 3.11978, pp. 157-158.

⁷ See Article (5) of the Egyptian Civil Law No. 131 of 1948.

⁸ See Article (66) of the Jordanian Civil Law No. 43 of 1976.

The field of the two theories

The field of the theory of abuse of power is the discretionary power of the administration. When the law granted the man of administration the freedom to act in a matter, the administration could take in this regard whatever decisions he pleases without being supervised by the administrative judiciary unless it is proven that he has deviated from the use of those powers from its true path and its goals.

As for the field of the theory of arbitrariness in the use of the right, we cannot define the field of abuse in civil law in the same way as the previous method, because the abuse of power is based on the division of powers into a specific authority and discretionary power as this division does not exist in the civil law. This is because the individuals' use of their rights has not yet been subjected and cannot be subjected to the same restrictions that the public administration man is subject to while he uses his powers and capacity. Therefore, the field of the theory of arbitrariness in the use of the right is much wider than the theory of abuse of public law, because it can only be raised with respect to the discretionary authorities, and its field has become narrow.

2- Standard of the two theories

The definition of the use of power reveals its criterion. The criterion here is of an objective character, as every time the administration misrepresents the legitimate goal, even if it is out of good faith and for a noble purpose in itself, its decision is considered flawed, and in fact the judge does not neglect the personal motives that tempt the administration to make its decision, but that, as we have presented, is in the area of finding evidence of abuse of power that is characterized in the end in an objective manner⁹.

As for the criterion of abuse of the right, a dispute has arisen among the jurists, one group calling for a personal criterion and others influencing it as an objective criterion.

Without going into the broad details of this topic, we can summarize the criteria as follows:

A- Personal Criterion

This criterion is primarily based on the intent to harm, which is the primary motive of the right holder to use his right, where the fraud and deception committed by the right holder is considered complementary to that advanced principle, we can note that this criterion is based on motives and intentions.

This standard is considered one of the oldest standards presented by legal scholars, it is closely related to the origin of the theory, and to it the courts refer frequently in France, Egypt and Jordan.

However, one aspect of jurisprudence believes that this standard falls short of dealing with all cases of abuse of right that occur at work, especially in the case in which the jurisprudence and judiciary have determined the characteristic of abuse¹⁰.

⁹ Dr. Suleiman Al-Tamawi: The Theory of Abuse of Power, Previous Reference, pp. 163-164

¹⁰ Dr. Suleiman Al-Tamawi: The Theory of Abuse of Power, Previous Reference, pp. 165-166.

Another trend adds that in addition to the difficulty of proving a personal criterion; Because of its ambiguity, it also carries a great danger, so jurisprudence and the judiciary tended to exclude the psychological elements in the tort, and even outside the scope of tort liability.¹¹

Objective criterion:

For the sake of the aforementioned, jurisprudence, in pursuit of the search for objective elements, has tried to set an objective standard that does not stop at the end of the search for the will of the right holder, but rather goes beyond that by searching for the results of the work and the fruit of this use. The reason for this is that rights are not an end in themselves, but are means to achieve interests, and these rights may be specific to the right holder or to others, but that must be within the limits of the general purpose, which is the interest of the whole community.

Advocates of this criterion when determining what it is, were divided between two different criteria:

1-Economic criterion or lack of legitimate interest

By this criterion, what is meant is the illegality of the desired interest from the act, that is, the interest that the right holder aims to achieve, and it is an objective criterion because it is not a commonplace behavior for a normal person to target from using his right an unlawful interest, and the interest is not unlawful if its realization violates a provision of the law. Not only the law, but this description is related to it as well if its realization is contrary to public order or morals.¹²

The criterion of the right's social purpose

This criterion was created by "Jusran". it is a wider standard than the previous standard. According to this standard, private rights become social functions that have goals set in the same way as the prerogatives of the public law. Anyone who uses his right or the licenses placed at his disposal with the aim of achieving anti-social or illegal ends, whatever the personal interest he aims at by using his right, is considered abusive.

The researcher believes that Paragraph (c) of Article 5 of the Egyptian Law refers to this standard, as it makes the use of the right illegal "if the interests that it aims to achieve are unlawful.

The researcher believes that the Jordanian Civil Law No. (43) of 1976 refers to the "Jusran" criterion, where Paragraph (b) of Article (66) indicates that the use of the right is unlawful if the interests it aims to achieve are unlawful.

The penalties of the two theories

The defect of abuse of power is one of the aspects of cancellation, i.e. a defect in the administrative decision that makes it an unlawful decision. once this defect has been fulfilled makes the administrative work subject to

¹¹ Dr. Mohamed Shawky Al-Sayed: The Theory of Abuse in the Use of Right, The Egyptian General Book Authority, 1979, p. 133.

¹² Dr. Anwar Ahmad Sultan: Sources of Compliance in Jordanian Civil Law - A Comparative Study in Islamic Jurisprudence, The Legal Office, 2nd Edition, 1998, pp. 368-389.

revocation, thus enabling everyone who has an interest to request this from the administrative judiciary without the need to start implementing the decision, or affects the acquired right of an individual.

Hence, the defect of abuse of power focuses primarily on the administrative decision itself, and the cancellation lawsuit was originally directed at it, either eliminating it for everyone, or keeping it intact.

However, it sometimes happens that the decision is implemented before its cancellation, and this implementation results in harm to some individuals. In this case - and on condition of proving the harm and a causal relationship - the injured may claim compensation for that damage.¹³.

As for the penalty for abuse of the right, it consists in compensation for the damages resulting from it, and the lawsuit for abuse of the right is directed to an act of execution issued by a right holder while using his right or causing harm to others, where he has to compensate for that.

And if the basic principle in the penalty is to judge the abuser with an amount of money that he pays to the injured person for the damage he has suffered, is it permissible to judge the abuser as well for compensation in kind, instead of compensation for a consideration, i.e. the ruling to remove the harmful work?

A group of jurisprudence went on to say that the penalty for abuse of the right is limited only to ruling on the abuser to pay monetary compensation, in contrast to exceeding the limits of the right in which the ruling for compensation in kind is valid, however, the prevailing opinion in jurisprudence and the judiciary believes that it is fair that treatment of harm is to be compensated for.

It is imperative to avoid its repetition by eradicating its cause, and that can only be done with compensation in kind. This opinion is consistent with Article 62 of the Jordanian Civil Law which states that: "do no harm" and the harm shall be removed."¹⁴.

It is stipulated in this compensation in kind that it be possible and not to be paid unless compensation in kind is not possible. The compensation in kind may be adjudicated with compensation for a consideration, and the purpose of that is to compensate for the previous damage and to avoid the subsequent damage..

II. Conclusion

This lightning comparison between the theory of abuse in private law and deviation in public law, clearly reveals to us the common nature of them and the similar role of the two theories in the general legal system.

¹³ Dr. Suleiman Al-Tamawi: The Theory of Abuse of Power, Previous Reference, pg. 170 ff.

¹⁴ Dr. Anwar Ahmed Sultan: Sources of Compliance in the Jordanian Civil Law, previous reference, pg. 370 ff

III. Results:

1- Both theories do not have an accurate standard to differentiate between them despite all the criteria presented.

2- Both theories preserve their own characteristics. The theory of abuse of the right remains personal and the deviation of authority has an objective character.

IV. Recommendations:

1- The researcher recommends that the criterion of the social purpose of the right is not valid as a basis for distinguishing between the two theories due to the different nature of the powers granted in the field of public law than in the field of private law.

2- The researcher recommends that the criterion of the social purpose of the right is not valid, because the role and authority of an administrative judge differs from the nature of the role and powers of a civil judge.

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