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Research Article

The Curvatures of the Legitimacy Principle in Light of the Discretionary Authority of Administration, the Exceptional Conditions and Works of Sovereignty: An Analytical Study

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Abstract

This study aimed at shedding light on the curvatures of the legitimacy principle under which the state is subdued to the law, and that is only achieved by subduing rulers and subjects alike to verdicts of the law. This is also done by bounding the public authorities in the state— including the legislative, executive and judicial— and all their actions by law and its provisions, where the legitimacy principle guarantees the real protection of individuals in confronting administration in case their rights and freedoms have been infringed This is due to the administrative obligation to abide by the provisions of the law in order to ensure adequate protection of the rights and freedoms of individuals.

Methodology of the study

The researchers, in this study, adopted the descriptive analytical method to describe and analyze the curvatures of legitimacy principle.

Results of the study

1. The discretionary authority of the administration does not represent a constraint; it does not even lighten the legitimacy principle, because the administration is obliged to properly assess the conduct, or else it commits a mistake in the law cautioning for the illegitimacy of its decision.
2. Some of the illegal administrative decisions in normal circumstances are considered legitimate by the judiciary if they are proved necessary to protect public order or to ensure the functioning of the public facility because of exceptional circumstances that the administration cannot cope with under normal circumstances.
3. If the exercise of sovereignty is not subject to judicial control, it is subject to political control, and it is acts, although sovereign, for the sake of the common good, the preservation of the State entity, and subject to any change according to circumstances. There are acts that are no longer sovereign in certain circumstances, including those which are otherwise tantamount to.

Recommendations

1. Administration is obliged to choose the adequate type of conduct for each circumstance separately so that it achieves objectives and suitable goals for the need calling for its discretionary authority.
2. The necessity procedures must remain restricted by the constitutional restrictions and the guarantees established in the constitution so that the authority based on the state of necessity does not derogate from such restrictions on the grounds of necessity or exceptional circumstances.
3. The study recommends that the scope of the exercise of sovereignty be narrowed by leaving it to the jurisdiction at which this theory arose to examine its legitimacy and, if possible, to compensate for its mitigation in the event of any infringement of the principle of legitimacy.

Conclusion

Administration needs some elasticity and appropriateness to meet its executive responsibility in a way that is in the public interest. It is, therefore, common for the administration to have some discretion under the general framework of legality. On the other hand, the administrative authority needs more freedom of action and movement if the country has severe and exceptional circumstances, as it does not find the traditional means and the rules that have been developed to cope with the normal circumstances, and this justifies the emergence of the theory of exceptional circumstances that would give the administration the freedom necessary to maintain the public interest in facing the dangers of exceptional situations.

Concerning the acts of sovereignty, they are characterized with a type of specialty. This particular nature came from the correlation of these actions and forms of conduct with higher political interests, or for the considerations of the national security of the country. Therefore, the majority of jurisprudents consider them a clear violation of legitimacy principle. This is only because it is not subject to any judicial control.

Keywords: Discretionary Authority of Administration, Exceptional Circumstances, Sovereignty Acts.

Introduction

The legal state must have constituents and elements in order to call it as a state of law, such as the existence of constitution, the principle of separation of authorities, the hierarchy of legal rules, judicial control, and the principle of sovereignty of law, or the principle of legitimacy.

This last principle is considered one of the most important features that distinguish the legal state from states with different systems, where the principle of legitimacy means in its narrowest meanings, subduing of the administrative institution in the state to the law. Some consider it the legitimacy of administration, the thing that makes each legal or materialistic behavior issued by the administration leaning in its existence on a beforehand existing legal rule, and be in agreement with this rule. So, the principle of legitimacy and sovereignty of the legal rule are the practical legal appearance of the true democracy existence, performed on ruling the people all by itself for the interest of its group. The rules we mean here are that well-known legal hierarchy; so as to pass

from the constitution to the law to the arranging systems to the individual decisions, that is the lowest rule should lean on the highest one or else will contradict with it, or considered illegal and exposed to uselessness.

The sources of legitimacy principle are not restricted to the legal rules issued by the legislative authority but have a broad meaning that encompasses all the norms of the positive law and the rules of the legal order of the State, whatever its sources, whether written or not.

What we are trying to focus on in this study is the curves of the principle of legitimacy. The researchers have tried to avoid the terms that have expressed in this part, including: the limits of the principle of legitimacy, the scope of the principle of legitimacy, the exceptions to the principle of legitimacy, and the balancing of the principle of legitimacy.

Since the principle of legitimacy is based on strict rules that the administration is obliged to respect and consider in its actions, it imposes restrictions on the administration for the benefit of individuals, but the protection of individual freedom obscures the need for the administration to ensure good performance, since if it is necessary to avoid mismanagement, we must not lead us to make them automatic and therefore have certain privileges.

As to the curvatures of legitimacy principle that we confine to the discretionary authority, the exceptional circumstances and the acts of sovereignty, some jurisprudents consider that each of the discretionary authority and the exceptional circumstances are factors of balance or exceptions provided on legitimacy principle that lighten the strictness of its application at certain circumstances. They also consider that the theory of sovereignty acts, or what are called the acts of the government are the exception or the clear violation of this principle.

If we are unanimous that these three theories are exceptions to the legitimacy principle, this means that the principle of administrative legitimacy is not an absolute principle, the administration is bound by its provisions at all times and in all circumstances, that is, they can be applied at times and at other times.

Therefore, both researchers attempt to make the term “curvatures of legitimacy principle” the closest term, in order to make the legitimacy principle curves without any cessation to be concordant with every act and every circumstance alone.

Study problem and questions:

The problem of the study is concerned with giving the term "curvatures of legitimacy principle" deeper and more pliable to minds. Therefore, the problem of the study centers in an answering the following questions:

1. Is the rule of administrative legitimacy always applicable, regardless of the jurisdiction granted to the administration, or the nature of circumstances to which it is subjected? Or might they have some restrictions and exceptions?
2. Is each of the three theories (the discretionary authority, exceptional circumstances and acts of sovereignty) actually considered violation of the legitimacy principle, or there is what distinguishes each theory from the other?

Study objectives:

The objectives of this study are that we do not mean that there should be a smooth passage of illegal acts, but the meanings and sources of legitimacy are altered so that these sources are rearranged, and that those which are more appropriate to the nature of the competence conferred on the administration or to the circumstances under which it is subjected. Legitimacy remains in place and priorities are given to sources other than ordinary law or the constitutional provision; that is, the matter is the rearrangement and harmonization of the legal norms that make up the national legal system. The latter, on the whole, do not disappear until we speak of limitations or exceptions to administrative legality.

Study significance:

The significance of this study stems from the prominent role played by the principle of legitimacy and the situation that administration requires to apply and to determine the control of the judiciary or other authorities and bodies that will reduce the size of the description given to it as a violation or exception to the principle of legitimacy, and make these theories merely curves.

First topic

1. The discretionary authority theory of administration in light of legitimacy principle

The discretionary authority has always been linked to the principle of legitimacy as an exception to it, since under this principle the administration is bound to operate in accordance with the law. However, discretionary authority is the degree of freedom that the legislator leaves to the administration to carry out its administrative function fully.

The two researchers should therefore examine in the first requirement the concept of the administrative discretionary authority and its justifications, and then, in the second requirement, the areas of discretionary authority and its distinction from the restricted jurisdiction. And in the third requirement, the researchers discuss the administrative judiciary's control over the discretionary authority.

First Section

1.1 The concept of the discretionary authority of administration and its justifications

The legislator granted this authority to the administration recognizing that it is more proficient to choose the suitable means for intervention and take the appropriate decision at certain circumstances, no matter what he tried, he could not restrict all those situations that might arise in the administrative work and draw the appropriate solutions for them (Qubailat, 2018).

Probably, the importance of the principle of discretionary authority is that in some cases the public interest requires recognition of discretionary authority by the administration, since the role of the administration cannot be limited to being subordinate to the law. The administration is not a deaf machine that must be made when the legislator presses the key to operate, but is a governing and a management body, based on the interests and affairs of individuals, in order to achieve their requirements fully.

Thereupon, this topic will be divided into two subsections; **the first subsection**: in which both researchers will tackle the definition of the discretionary authority of administration, and in **the second subsection, they** will discuss the justifications of the discretionary authority.

First subsection

2. Definition of the discretionary authority

The administration authority shall be discretionary when the legislator grants it an amount of freedom of choice whether to take the action or behavior or not, or else granting it the freedom of choosing the suitable time or reason to issue it, or to locate it and choose its form. But if the legislator does not grant it any of the previous choices to the extent that they are required to follow up when making the decision, the discretionary authority of the administration in the extent to which it is entitled to make the appropriate decision in cases other than where it is subject to the obligation of the legislature (Khalifa, 2001).

Therefore, the discretionary authority of administration is granting administration more freedom of choice in doing its tasks and practicing its functions, this means greater flexibility in movement and a way to assess requirements of the circumstances to which it is subjected, thus choosing the appropriate type of action for each circumstance, so that this action comes in fulfilment of the goals and objectives appropriate to the needs of the parties. The law cannot, however, try to be aware of all the circumstances of the post, place the rules of each state, provide a solution to each problem, determine the requirements of certain positions, and thus include the issues of trust and special powers that help them understand their functions on the one hand, and to make them more accountable in a way that achieves their goals on the other (Kanaan, 2010).

In the context of defining the French Jurisprudence of the discretionary authority, the jurisprudent “Falin” defined it that it is the method by which the administrative authority exercises its powers (Khalifah, 2001), so that the competent authority is entrusted with freedom of estimating the exercise of its powers.

Therefore, the discretionary authority of administration is merely the discretion of the public, and it is free to take the position and decision it deems appropriate if the necessary legal conditions are met for its issuance (Shatnawi, 2011).

Thus, the discretion of the administration is when it has the right to act which it deems appropriate and to determine the appropriate time if it decides to intervene in order to meet those

circumstances when the legislator is free to determine the circumstances under which it is justified.

Second subsection

2.2 Justifications of the discretionary authority

Imposing restrictions on the exercise of the administration of its authority, and commencing its functions represent a significant guarantee for the individuals' rights and freedoms against the misusing of the authority granted to the administration or any deviation.

But the legislator is obliged not to restrict administration rather grants it the freedom of assessing the appropriate circumstances, and the suitable time to issue its decisions so as to achieve the public interest. Since the administration is the most capable of meeting the daily toil, solving the administration problems that hinder the way of the administration work, or representing a danger on public system (Basyouni, 1995).

Nevertheless, the idea of the discretionary authority has justifications represented in the inability of the legislator to organize the minute details of administrative works. When laying the general rules of the administration, the legislator cannot predict and be aware of all obscurities and circumstances of the administrative occupation. Therefore, the legislator is obliged to grant the administration the power of the appropriateness in performing its various administrative tasks and activities (Laylah, 1968). It is inconceivable that the legislator will impose upon the administration some accurate criteria and adjusted standards and solutions for each case expected to happen and oblige it to implement in such cases. Therefore, this obliges the administration with numerous restrictions and conditions, and prevents it from achieving its activities. Thus, the administration becomes like the executive machine with no agreement with the public interest. But the public interest and the proper functioning of the public facilities systematically and automatically require granting administration enough amount of freedom in taking action or appropriate decision and work, or defining the appropriate time for taking action considering that the discretionary authority is necessary for the proper function of the administration and the protection of the individuals and their freedoms. This is a practical and legal necessity for the administration.

Second Section

3. Domains of the discretionary authority of the administration and the standards that distinguish it from the restricted authority

The domains of the discretionary authority are a group of cases in which the administration can have a discretionary authority, on the contrary of that, there is the restricted function. This is what the researchers will attempt to tackle in two branches. In the **first branch,** the researchers will pin-point the domains of the discretionary authority, and whether it is absolute or not? Whereas in t**he second branch**, they will tackle with the standards that distinguish it from the restricted authority.

3.1 First branch

Domains of the discretionary authority of administration

If the administrative decision is characterized by being "a final legal work issued by the individual will and is obliging to the public administration with what it has of authority in accordance with the regulations and bylaws and in the form that the law requires to issue, amend, or cancel a certain legal center" (Supreme court of Justice 75/2008 issued on 31/3/2008, publications, Justice).

Thus, there are specific elements that are necessary for the decision to be made to be valid and legitimate, and these elements are in terms of jurisdiction, form, procedure, situation, reason and purpose.

Thereupon, the discretionary authority of administration varies from element to another element of the administrative decision, and no discretionary authority of the administration in the area of jurisdiction, form, procedure and purpose. Rather, the elements of the administrative decision in which the administration freely appreciates its suitability are limited to two elements (cause and situation) (Kanaan, 2010).

In terms of the form and jurisdiction there is no domain here for the existence of the discretionary authority, because there is no freedom of administration for both of them, but the administrative has continuously to act according to law, and has to respect the rules of specialization (Al-Tamawi, 2006). Because the party that issues the decision either will be specialized or not. If the decision issued by a non-specialized authority in accordance with the

determined legal specification, it will be deemed non-specialized (Abdel Baset, 2012), and will be exposed to cancellation.

The administration, when issuing its decisions, has to observe these conditions and respect them; or else its decisions become defective and illegitimate. And when the administration exercises its authority in this field, it is found that there are certain limits that limit this authority in the range of every condition of the administrative decision appropriateness' conditions.

Second branch

Standards of distinguishing the discretionary authority of administration from the restricted authority

The importance of determining cases of discretionary and restricted authority is due to the fact that the determination of the authority of the administration provides greater protection of the principle of legitimacy and is more secure for the rights of individuals than the arbitrariness and abuse of the administration, on the one hand. On the other hand, the requirements of sound administrative management and public interest require that they not be constrained by restrictions that paralyze and lose their flexibility in a manner that affects the appropriateness of addressing the changing circumstances of life and ultimately damages the public interest, provided that the administration's discretionary authority does not include absolute freedom from submission to the principle of legitimacy (Abdel Basset, 2012).

In view of the lack of an inventory of discretionary authority cases and the fact that the judiciary has not conclusively identified such cases, the jurists have made numerous attempts to establish a criterion by which to determine when the competence of the administration is discretionary and when it is limited, as follows:

First standard:

Distinguishing through personal rights, it is said here that the administration has discretionary jurisdiction in cases where it does not face a personal right, since the logic of personal rights requires that the exercise of personal rights is not allowed to be held accountable to the strictest limits, requiring its powers to be necessarily restricted (Hassan, 1974). This view is taken as a link

between personal rights and discretionary administration authority, although it does not define the concept of personal rights through which we reach the type of administration. In addition to the assumption that when the administration exercises its discretionary power, it does not, therefore, deprive it of personal rights, because it directly affects persons, and this is not the case.

Second standard:

Distinguishing through means of issued decisions and sweeping decisions, considering that sweeping decisions are those issued on the basis of a restricted authority, and issued decisions are those issued based on discretionary authority (Qubailat, 2018).

Third standard:

The basis of this standard is the absolute absence of a discretionary decision, since the limitation and assessment vary according to the administrative decision. The authority of the administration is restricted in terms of form, jurisdiction and purpose. It is an estimate for both the cause and the situation, in which the features of discretion are clearly shown. However, it is clear that there is no discretionary work, or that there is absolutely no restriction on the combination of discretion and restriction in each administrative work.

In general, restricted authority is not free of the element of discretion, and discretion is not absolute but is restricted to the public interest. The same administrative procedure can also be estimated at some stages and at other stages, a joint process that is due to the legislator's will and the practical exercise of the powers of the administration (Alshubaki, 2011).

Third Section

Judicature control of cancellation on the discretionary authority of the administration

In its exercise of its discretion, the administration must respect all aspects of legitimacy. Its decision must be in accordance with the law in its broad sense. The administrative judiciary therefore monitors the legality of the administrative decision in its five corners, but this control differs between control over internal elements that are reflected in both the reasons and the situation, where it serves as a suitable ground for the exercise of judicial control over discretionary

power. And the control over external elements, which focuses on both the element of jurisdiction and the element of form and element of purpose if it includes a defect.

So, the judicial control on the discretionary authority of administration concentrates on the internal elements and the extent of its appropriateness with the principle of legitimacy. The administrative judicature, and when the appeal relates to the cause of the administrative decision, first makes sure that occurrences upon which the decision is built exist and are active till the decision is issued. It also makes sure of the extent of legal description accuracy given to these occurrences by administration in order that its decision be safe, together with controlling the proportion between the decision and occurrences, upon which the decision is built, provided that the decision is canceled due to a defect in the cause whenever there is inappropriateness between the decision and occurrences upon which the decision maker relies (Al-Khalaylah, 2015)

However, the judicial control over the exercise of the discretionary authority from part of administration is a legal and obligatory means for the sake of protecting public rights and freedoms in meeting the privileges of the public authority, because the administration practice of its discretionary authority demands assertion by the jurist, especially the extent of correctness of the objective elements of the administrative decision, that is by referring to the correctness of its adaption and its appropriateness with the effect resulting from the legal part and the goal it seeks to achieve (Khleifi, 2016).

Second Section

The concept of exceptional circumstances theory in light of the administrative legitimacy principle

The theory of exceptional circumstances or necessity as a constitutional organization did not appear until after the establishment of the state with its modern concept, and this theory with its conditions and new adjustments are the creation of the council of the French state formed in specified legal frame. Where the judicature considers some administrative decisions that are illegitimate at normal circumstances as legitimate if proved they are necessary to protect the public system or to ensure the performance of the public utility due to the occurrence of exceptional

circumstances (Al-Tamawi, 2006). So, the illegitimate in normal circumstances is considered legitimate in exceptional ones.

In this section, we will highlight the extent of the obligations of the administration, which is to respect the requirements of administrative legitimacy during the exercise of its exceptional powers and thus the relationship between the impact of exceptional circumstances on the requirements of the principle of legitimacy, through a presentation of the exceptional circumstances and scope and administration authorities in the first subsection, as well as control of the administrative judiciary in the second subsection.

The first Subsection

The exceptional circumstances theory and its basis

The idea of exceptional circumstances represents the second exception provided on the principle of legitimacy after the first exception represented in the discretionary authority, where this theory is considered a legal one of a judicial origin, as it refers to in its origin to its origination by the French state council.

According to this theory, if dangerous incident such as war state, or severe riots that threaten the internal security, or a spread of a somewhat dangerous pestilence, or associated with the emergence of emergency conditions affecting even the prevailing economic, political and social concepts (Al-Sanari, n.d.).

The council of the French state had applied this theory afterwards at periods called them “postwar periods,” then later took aid of it even at peace time and applied it at critical times in case of public strike.

As a result of the spread of the powers and competencies of the administration under exceptional circumstances, some administrative decisions and procedures that are illegal under normal rules of legitimacy become legitimate as a result of exceptional circumstances and dangers. Noting that necessity is appreciated in the sense that the legitimacy of such decisions and procedures is conditioned by an important limitation is that the decision or action taken is necessary to face exceptional circumstances (Abdel Wahab, 2003).

The basis of this theory is represented in two things: first, change of conditions, where the legislative authority lays laws to be applied at normal circumstances, if these circumstances are replaced by emergency ones, it forms a necessity case obliges seeking other means more appropriate, from here the idea of exceptional circumstances emerged.

The second thing is the public interest, where the administration works to stabilize security and public system, conserve the entity of the state, and protect it from the internal or external threats. By no means, if circumstances changed, the administration has to consider the public interest, sacrifice with the rules of the normal legitimacy and change them with the rules of the exceptional legitimacy dictated by these circumstances.

The purpose of the principle of legitimacy requires, first and foremost, to ensure the survival of the state, "which entails the activation of the government for exceptional circumstances, and this situation authorizes the authorities to take the actions required by the situation, even if they violate the law in its verbal meaning so long as it is in the public interest" (Fudah, 2003).

First branch

The scope of the exceptional circumstances' theory

Some have linked the theory of exceptional circumstances to the idea of necessity, so that the application of this theory is confined to the scope of administrative police. This extends the power of the latter under these circumstances. But the scope of this theory is in fact much broader, as exceptional circumstances are linked to a more general idea of the idea of necessity and administrative police, which is the idea of legitimacy, which makes its natural position the field of legitimacy only. However, exceptional circumstances do not exclude the principle of legitimacy. The rules of normal legitimacy are broad enough to enable the administration to face such exceptional circumstances, all under the supervision and control of the judiciary.

It is evident that the scope of exceptional circumstances theory is not confined to the domain of the administrative police, where it works to expand its authorities. However, this goes beyond a much broader field of working to achieve public utilities and maintain order (Khalil, 1978).

Second branch

Authorities of administration under the exceptional circumstances

It is not possible to confine all abnormal authorities which the administration can enjoy in light of exceptional circumstances, since stating those authorities and their scope finally depends on the nature of exceptional circumstance, its scope and extent of its danger on the security of the country or the functioning of its public utilities.

However, it is important to define the outlines that can be included under administration authorities, and the other ones that the administration cannot violate, which is to override the defects of the jurisdiction, form and situation; and not to override the defects of reason and purpose.

Due to the of the seriousness of these powers enjoyed by the administration under exceptional circumstances, special conditions and restrictions on the application of this theory must be observed (Niqash, 2010-2011):

1. The state of necessity or exceptional circumstances that threaten public order and the proper functioning of public utilities, such as severe internal disturbances of security, flooding, spread of pestilences, external invasion and so on, should be present.

   The dangerous incidents that permit the application of the theory of exceptional circumstances may be expected or non-expected, the theory of exceptional circumstances apply whether or not events are expected, and whether the issue of relates to the legislator or the administration. However, processed normal rules set by the legislator may be insufficient, which justifies the application of the theory of exceptional circumstances.
2. It is conditional that the legal means held by the administration under the laws prepared for normal times shall be insufficient to meet exceptional circumstances. This does not mean to be absolutely impossible for the administration to confront circumstances correspondent to the normal legal rules, untill it is allowed to take the exceptional procedures. Rather, it means that it is impossible for the administration to follow the rules laid for normal circumstances (Qubailat, 2018).
3. It is conditioned to be the pioneer of administration of its actions in order to benefit the public interest which must be considered in order to justify the exceptional procedures

taken by the administration. It is not enough to allow the administration to violate the rules established for ordinary legitimacy that there are serious events that make it difficult or impossible to respect the norms of ordinary legitimacy, but also the two preconditions must endanger the public interest.

4. Exercising exceptional authority shall be limited to the extent necessary and shall assess the extent of such necessity.

Therefore, the theory of exceptional circumstances does not form disagreement of legitimacy principle, but it leads to enlarge the scope so that it moves from ordinary legality to exceptional legality to suit the exceptional circumstance while ensuring that it is subject to judicial control to ensure its legitimacy (Qubailat, 2018).

Second Section

Control of administrative judicature on the theory of exceptional circumstances

The exceptional circumstance does not mean to release the hand of the administration to harm the rights of individuals, but it is subject to the control of the administrative judiciary, first, to ensure of all the justification for the violation of legitimacy, and can the administration perform its duty under normal legislation or not? This is what we will try to show in the following two sections:

First subsection

Control in case of legislator's organization of the exceptional circumstance

The procedures of necessity may still be constrained by constitutional constraints and guarantees established in the rules of the constitution. The necessity-based authority does not have the right to violate these restrictions on grounds of necessity or exceptional circumstances. The theory of exceptional circumstances creates exceptional provisions that have priority in application besides the norms of regular legitimacy, which means that the effect of this theory is not limited to the interpretation of legal texts in a broad interpretation of the provisions of necessity even if it is an exception to the rules of ordinary legitimacy, it is not an exception to the constitution, but an exception to the legislative texts. Moreover, the theory of necessity is not a violation of the

principle of legitimacy because its legal source is the codified constitution, and adherence to other constitutional rules (Ghirbal, 1988).

In this case, it is impossible to talk about mitigating the principle of legitimacy, so we can say that the principle of legitimacy exists with the same power, where administration here is in case of subduing to the law; as it cannot be overlooking the scope allowed by the law to address the cases and crises that the country undergoes. Consequently, flexibility and mitigation of legitimacy in this imposition cannot be made by the original regulator, the legislator.

The judge here has to carry out the legislator's will, so as long as the legislator expected abnormal circumstance, and laid the appropriate rules, so the judge cannot tolerate the administration in carrying out this law (Foudeh, 2003).

Second subsection

Control in case of absence of the legislative organization

In this case, we refer to the general rules and the distinguishing characteristics of the administrative law being judicial law. Being a judicial law, the administrative judge has to interfere and fill this legislative vacuum with rules he innovates, and imposes its verdict on administration at such circumstances. And here the judicial legitimacy replaces the legislative legitimacy.

Since the administration often seeks to break away of every restriction during the exceptional circumstance, the judicature interferes (particularly the French judicature) and imposes conditions to perform the responsibility of administration about the harms that it causes during the exceptional circumstance. The French judicature says "error, in the abnormal circumstance, is estimated with a different standard, and the responsibility is similarly estimated; what is considered wrong at normal circumstance may be a legal behavior at utmost necessity cases and exceptional circumstances.

Therefore, we say that the legitimacy of the acts of necessity, despite of its violation of the of law if organized by the legislator, the basis of administrative responsibility should change. But whenever the decision is legitimate, it could not be cancelled, and the responsibility shall not be held on the basis of error. However, this does not prevent responsibility from being placed on another basis, such as risk and responsibility (Sami, 2003).

Therefore, it is evident that the legislative texts are designed to govern the ordinary circumstances, and if exceptional circumstances emerged, the administration is forced to apply the ordinary texts, which inevitably leads to unpalatable results that contradict with intention of designers of those ordinary texts. Laws provide for procedures to be taken in normal circumstances. As long as there is no provision for what should be done in case of urgent danger, then the administrative authority should be able to take decisive measures that have served only for the public interest.

Third Section

Theory of sovereignty acts in light of the legitimacy principle

Acts of sovereignty or actions of the government are those of executive authority acts that enjoy immunity against judicial oversight in all its forms and are protected from any control, either control of cancellation or compensation (Asfour, 1980). Neither the administrative judge nor the normal one considers himself competent to look into it, so it gets out of judicial control. This includes a clear violation of the principle of legitimacy and a total disregard for its provisions, and therefore a serious assault on the rights and freedoms of individuals. Through such actions, the administration is able to take some actions that are outside the scope of legitimacy, and individuals cannot face such a dangerous means as long as the judiciary is not competent in view of such acts (Niqash, 2010-2011).

In this section, we will show the emergence and nature of sovereignty acts in the **first subsection**, and the position of jurisprudence and judicature from the theory of sovereignty acts in the **second subsection**, and control of judicature on sovereignty works in the **third subsection**.

First subsection

The emergence and nature of sovereignty acts and standards of their distinction

A review of the acts of sovereignty and its attachment to the principle of legitimacy requires us to stand at its inception and this establishment is the source of its origin, since the act of sovereignty is the most serious exception to the principle of legitimacy.

Perhaps the researcher in the French law does not find a trace of this kind of work in the shadows of the French Revolution and the first empire, and the reference is that the idea of the realization of sovereignty in its present status did not benefit any. The rule at that time was that the administration is not responsible for its work. The rule of separation of powers, according to the French interpretation of it, prevented the ordinary judge from considering everything related to the administration, and left the matter to the administration to act. After Napoleon established the French Council of State, the Council did not have the final authority to decide on matters submitted to it, but merely offered suggestions to the Prime Minister who had the full confidence given by the Council (Al-Tamawi, 2006).

The theory of acts of sovereignty stabilized and its applications were numerous after the fall of Napoleon and the return of monarchy again. The State Council feared that the monarchy would dissolve it. It worked to fortify a part of the executive branch from the judiciary's control over its legitimacy in order to preserve its existence and survival (Qubailat, 2018).

As of 1872, under the Third Republic, the legal situation had stabilized, and the principle of the legitimacy of the administration's act had established its foundations in the jurisprudence of public law, and the legislator had intervened to legislate all the progress achieved by the Council, and concluded all that made the Council the final judiciary authority or the commissioner (Al-Tamawi, 2006). Under which the judiciary became the final decision authority, and its decisions enjoy the power of the self-executive.

The theory of acts of sovereignty, like most theories of French administrative law, is the work of the French Council of State, came from the need and the requirements of work (Alshobaki, 2011). These acts of government consist of a range of actions issued by the executive authority, and not only from the jurisdiction of the administrative judiciary, but also from the jurisdiction of the ordinary judiciary. The adaptation of the work issued by the executive authority as a government action has a very serious consequence, which is to fortify this work against administrative control of the judiciary, whether administrative or ordinary (Othman, 2003).

This risk requires the development of criteria that show how to distinguish it from other actions and behaviors, as follows:

1. **Political motivation criterion**: during the Nineteen Century, it was believed that the administrative act becomes a governmental one and goes too far from the judicial control at being inspirited from the political incentive (Muheu, 1992).

The first judgments that created the theory of the exercise of sovereignty in the jurisdiction of the Council of State were based on this criterion of motivation or political purpose of action. The interpretation of the French State Council's selection of this criterion is, as Professor Horio said, that the Council has chosen not to involve itself in administrative disputes that have political repercussions, so that it is excluded from its competence of its own volition, in return for retaining its right to control other administrative acts in complete freedom.

But criticism of this criterion is characterized by flexibility and lack of discipline. In order to escape the principle of legitimacy and judicial control, the government can argue that its work was politically motivated for the benefit of the state. In fact, all the actions of the executive power are in the interest of the state, whether economic, political, social or cultural.

On the basis of this criterion, it is not possible to determine conclusively what acts of sovereignty are, and what are those that are inherently related to sovereignty (Fodeh, 2003). This led the French State Council to renounce this criterion to a criterion based on the nature of the work itself.

2. **The work nature criterion**: after it became clear that criterion of political motivation was useless, French jurisprudence and judicature moved towards a new criterion characterized by being objective and not being personal, unlike the previous one.

   In this context, it can be said that the procedure can be described as an act of sovereignty if it is an implementation of a constitutional text, and is an administrative act if it is issued in implementation of laws and regulations. In other words, the work of sovereignty is that of the executive authority as an act of administration (the work of the government), while the work is administrative if it is issued by the executive athority as an administrative act of administration.

   Despite the validity of the basic idea of this criterion, its criticism opens up a new problem that is defining the content of the government and administrative function, which makes it ambiguous and vague. Judicial rules had to be used to determine the scope of

sovereignty acts because of the inability of the previous two criteria to establish a clearer and more specific criterion to distinguish sovereignty acts. Therefore, the French State Council decided to extract a judicial list of acts of sovereignty.

3. **Judicial list criterion**: it is intended to be left to the discretion of the trial court in accordance with the circumstances of the executive work. If the court considers that the work is related to the matters of the Supreme State and the most sensitive, so it is impossible to be the subject of a lawsuit for contact with the critical issues that are indisputable and it is advisable not to discuss them. The French Council of State and the Court of Conflict contributed to the establishment of a list of acts of sovereignty, including a set of actions, the most important of which are:

First: works related to the relationship of the executive authority with the legislative authority:

This is considered among the decisions issued by the executive authority related to the legislative process: proposition of projects of laws and referring them to the executive authority, pulling them, or objecting them, also the decisions concerning invitation of the parliament for meeting, or for its dissolution, opening its sessions, adjourning them, or proposing them. Or the decisions of the head of state regarding the relationship between constitutional powers such as forming a government or accepting its resignation.

Second: works related to the international and diplomatic relations:

The Council of the State had prepared the decisions related to procedures of preparing or rejecting the international treaties, decisions of the representatives of the state while practicing their diplomatic tasks, and also the decisions related to the law cases prosecuted in front of the international judiciary (Qubailat, 2018). Besides the decisions of founding the diplomatic relations or severing them, in addition to the works performed by the state representatives abroad concerning their diplomatic occupations (Kanaan, 2010).

Third: some war-like works:

These works include the right of the state to announce war and war operations taken by the state when the state announces war and the procedures related to it, provided that the decision of announcing war will be necessary and indispensable to pay damage away from the state.

Fourth: works related to the internal security:

The other aspect, which is predominantly political, is related to the protection of the State's internal and external security. It is not an administrative activity in the strict sense of the word and therefore the judge is not competent to hear appeals directed to the work related to it (al-Jubouri, n.d.).

Second subsection

Jurisprudence and Judicature's attitude to sovereignty works

Since it is the administrative judiciary that has established the foundations of the theory of acts of sovereignty, which determines the actions that can be considered as acts of sovereignty, we do not deny the role of jurisprudence, which tries to find the justification and motivation behind the determination of this theory on the one hand, and on the other is considered a critic of it with introducing other legal alternatives and this is what we will discover in the following two subsections.

First subsection

Attitude of jurisprudence

According to jurisprudential studies, it is found that French jurisprudence rejects the idea of acts of sovereignty as a description and justification for the immunity of some government actions against the control of the Council of State or the judiciary in general, with the recognition of the consequences, and the following is a statement of the attitude of the rejectionists and supporters of this idea.

First: Supporters' attitude:

Supporters of the sovereignty acts idea adopted numerous reasons that justify their support. Some of them adopted the legal reasons justifying the non-subduing of these acts to the control of the State Council, that is based on the article No.26 of May 24th , 1872, which transforms the French Council of State into a judicial body.

While some others turned to political justification, which is that these actions are not inherently incompatible with the control of the State Council, but the reason for the imposition of immunity is due to sensitive political matters. The results of sovereign acts are justified by the idea of mixed acts (Fodeh, 1992).

The mixed actions are summarized, according to the French State Commissioner, "Cele," the thing that distinguishes the actions of the government is that it is issued by the executive authority in relation to another authority and is not subject to the control of the judiciary.

Hence, these actions are mixed, that is, shared between two authorities or at least directed by one authority to another. Consequently, actions by the executive authority regarding its relationship with parliament, such as the call for elections, are mixed (Sami, 2004).

Some of them supported it on the grounds that the theory of sovereignty acts in principle is justified and is one of the means that must be provided to the executive authority to carry out its tasks, considering the necessity of strengthening the centre of the executive authority and providing it with all necessary means and mechanisms of action to ensure the effectiveness and speed of intervention and determination to suit the requirements of the moment (AbdulBasit, 2012).

Second: The attitude of the rejectionists:

If we notice the rejectionists at this point, we find them already deny the idea of acts of sovereignty within the limits of its legal description, as the word sovereignty reminds them of the earliest times when the king was not wrong because he was sovereign under an authoritarian totalitarian state.

This theory involves a clear and explicit infringement of the principle of legitimacy by rejecting and not invoking it through setting free the sovereignty of the executive authority in some fields. Thus, this theory leaves individuals without judicial protection to protect them against any act of dominance by the executive authority on their public rights and freedoms. They are therefore deprived of any means judicial to defend their sacred rights and freedoms (Shatnawi, 1998). However, with the return of the theory of acts of sovereignty, the under the rule of law, they tried to justify its results, despite their denials of its description.

Second subsection

Judicature's attitude

We previously tackled criteria of distinguishing acts of sovereignty, and have concluded that the judicial criterion is the most important. Therefore, we say that "it is the administrative judiciary that established the theory of the acts of sovereignty" (Foudeh, 1992).

The judiciary of the French State Council was often an experimental judiciary that does not restrict itself to the principles and rules in advance, but is responsible for finding individual solutions, and for each individual dispute in a manner commensurate with the circumstances of each case, and with the development that inflicts the idea of administrative legitimacy itself, wherever the interest of individuals and administration its verdict will be.

The theory of acts of sovereignty is one of the most important cases that highlights the experimental role of the French State Council. Following the provisions of the French Council of State, we find that many of the actions of the government have been removed from the scope of these acts described as acts of sovereignty either because they are by nature non-sovereign, and therefore administrative subject to the control of the administrative judiciary, or because they are not acts of sovereignty, but they do not fall within the jurisdiction of the State Council for one reason or another. But this scope is narrowing and expanding from one country to another.

Third subsection

Control on acts of sovereignty

Acts of sovereignty or acts of the government no longer include, according to the most likely, jurisprudence and the judiciary, except those that arise from the relationship of the executive authority with other authorities within the same state, especially the parliament, or through its relationship with foreign authorities and international bodies or other countries. These acts are outside the jurisdiction of the judiciary in view of the disputes brought before it, in accordance with the normal rules of jurisdiction, and then the use of these rules of jurisdiction in addition to the theories of exceptional circumstances and the theory of discretion, completely eliminates the establishment of the theory of sovereign acts to explain and justify the lack of jurisdiction disputes

related to them on the basis of their distinct nature, leading to their independence and immunity based on vague justifications (Sami, 2003).

Accordingly, the constitutional legislator is keen to address the organization of these acts and identify the competent authorities to carry them out as a function of governance as one of the functions and actions of the State. And then determine the competence to carry out the work of the government, and oversight jurisdiction.

It is noteworthy that the constitutional legislator, in adherence to the principle of separation of powers, and the requirement of this principle to ensure the balance and cooperation between these authorities, makes sure that the task is not to regulate relations in the hands of any of these authorities in particular, or otherwise becomes a governing authority.

Hence, the constitutional legislator had to organize these relations, and therefore the exercise of public authorities of these relations negates the work resulting from it as a legislative or administrative work. Consequently, they are not subject to the control of legislative or administrative actions, but are governed by the procedures established by the constitution itself as governmental acts.

Viewing the predominant political nature of these acts, it is noticeable that the constitutional legislator favors the method of political oversight surrounding it under the eyes of the body which the constitutional legislator has the responsibility to monitor (Sami, 2003).

Moreover, noticing that the actions of the government or sovereignty are, as we have explained, controlled by the parliament, it is not desirable for the administrative authority to claim that one of its actions or decisions is an act of sovereignty, with the aim of fortifying it. As long as the constitutional legislator does not deal with this work in the organization, especially with regard to determining the competent authority to exercise control over it. Nor does the ordinary legislator call such an act of sovereignty. To reach the same result is immunized from the control of the judiciary.

Undoubtedly, the theory of acts of sovereignty includes and relies on the principle of legitimacy and the demolition of the concept of the state of law, by releasing the hands of the executive authority and leaving it unconditionally, and thus this theory leads to the lack of

commitment of the executive authority to the principle of legitimacy and encourages them to tamper and violate the rights of individuals and their freedoms without being able to defend their rights and sacred freedoms (Shatnawi, 2009).

Of course, the judiciary may not follow the administration or the legislator, unless the act is inherently an act of sovereignty. In addition, there are some French and foreign jurisprudences which limit the effect of the theory of sovereignty to the exclusion of the challenge of abolition only, i.e. the need to allow individuals affected by the acts of sovereignty to claim compensation, either on the basis of risk theory, or on the basis of the principle of equality in terms of general costs which are the two foundations of the theory of responsibility without error (Abdel Wahab, 2003).

Accordingly, there is another tendency towards administrative jurisdiction to narrow the scope of sovereignty and limit the effects of some of them on disputes of abolition without compensation, and the introduction of the idea of separable actions from sovereignty. In addition, there is a jurisprudential trend calling for the abolition of the theory of acts of sovereignty and replacing it with existing and established theories and principles of public law such as: the discretionary authority of the administration, which guarantees the administration some discretion under the principle of legitimacy and the rule of law (Qubailat, 2011). We, in turn, tend to narrow the scope of sovereignty by leaving it to the judiciary on which this theory arose to examine its legitimacy and, if possible, compensate for it as a mitigating effect and depart from the principle of legitimacy.

References

1. Abdel Basset, M. F. (2012). *Legal administrative works*. First Book, *Administrative decision*. Dar Al Nahdah Arab: Cairo. pp. 402, 398,196, 529.

2. Abdel Wahab, M. R. (2003). *Administrative judgment*. First Book, Halabi Rights Publications: Beirut. pp. 250,212.

3. Al-Khalayleh, M. (2015). *Administrative law*. Book II. House of Culture for Publishing and Distribution: Amman. p. 221.

4. Al-Sinari, M. A. (n.d). *Principles and provisions of administrative contracts in the field of theory and practice.* Arab Renaissance House: Cairo. p. 292.

5. Al-Shobaki, O. M. (2011). *Administrative judiciary: Comparative study*. Dar Al-Thaqafa for Publishing and Distribution: Amman. pp. 69,88.

6. Al-Tamawi, S. M. (2006). *The general theory of administrative decisions*. Dar Al-Fiker Al-Arabi: Egypt. pp. 52,122,132,133.

7. Asfour, S. (1980). *Political principles in constitutional law and political systems.* Knowledge Establishment: Alexandria. p.22.

8. Bassiouni, A. A. (1995). *Administrative judiciary*. Manshiyet Al Ma'aref: Alexandria. p. 554.

9. Fouda, A. H. (2003). *Administrative dispute*. Knowledge Establishment. Alexandria. pp. 57-56, 277,32,215-216.

10. Ghorbal, W. (1988). *The extraordinary powers of the president of the republic.* Al-Ma'aref Establishment: Alexandria. pp. 82, 83.

11. Hassan, M. M. (1974). *The discretionary power in administrative decisions.* Atef Press: Cairo. p. 123.

12. Jabouri, M. S. (n.d.). *Administrative decision.* Saddam College of Law: Baghdad. p.175.

13. Khalifa, A. A. (2001). *Deviation of power as a reason to cancel the administrative decision*. University Thought House: Alexandria. pp. 13,15.

14. Khalifi, M. (2016). *Judicial controls of the discretion of the administration: comparative study.* doctoral thesis, University of Belqayd: Algeria. p.11.

15. Khalil, M. (1978). *Lebanese administrative judiciary and its control of the work of the administration: comparative study.* Dar Al-Nahda Al-Arabiya for Printing and Publishing: Beirut. pp. 139-138.

16. Kanaan, N. (2010.) *Administrative judiciary*, Dar Al-Thaqafa for Publishing and Distribution: Amman. pp. 37,40, 67.

17. Laylah, M. K. (1968). *Control of the work of the department, comparative study, second book*. Dar al-Nahda al-Arabiya for Printing and Publishing: Beirut. p. 76.

18. Mahio, A. (1992). *Administrative disputes*. Trans. Fayez Anjek and Bawad Khalid. University Publications. Algeria. p. 167.

19. Niqash, H. (2011). *Exceptional conditions and judicial supervision*. Master Thesis. Montessori University: Constantine, Algeria. pp. 22, 29.

20. Osman, H. O. M. (2003). *administrative justice law "the principle of legality, administrative justice, jurisdiction of the administrative judiciary, conflict of jurisdiction."* New University Publishing House: Alexandria. p. 203.

21. Qubailat, H. S. (2018). *Al-wajiz in administrative judiciary*. Dar Wael Publishing and Distribution: Amman. p. 57, 61,76,79,85-86.

22. Qubailat, H. S (2011). *Al-wajiz in administrative judgment*. Dar Wael Publishing and Distribution: Amman. p. 82.

23. Sami, J. (2004). *The mediator in the case of canceling administrative decisions*. Al Maaref Establishment: Alexandria. p. 189.

24. Sami, J. (2003). *administrative claims "the proceedings of the cancellation of administrative decisions, settlement claims."* Al Ma'aref Establishment: Alexandria. pp. 61, 63.

25. Sami, J. (2003). *Regulations of necessity and judicial supervision*. Al Ma'arif Establishment: Alexandria. p. 34.

26. Shatnawi, A. K. (2011). *Encyclopedia of administrative justice*. Dar Al-Thaqafa for Publishing and Distribution: Amman. p.62.

27. Shatnawi, A. K. (2009). *The Jordanian administrative law*. Dar Wael Publishing. pp. 220,62.

28. Shatnawi, A. K. (1998). *Studies in administrative decisions*. University of Jordan Press: Amman. p.60.