

THE ROLE OF JUDICIAL REVIEW IN THE SETTLEMENT OF STATE CONTRACT DISPUTES

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Abstract

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This paper aims to study the recent developments in appealing public procurement contracts (Alhamidah, 2007) by examining the expansion of the administrative judiciary in Egypt in accepting appeals filed against contracts concluded by the state to invalidate contracts tainted by the waste of public money. This paper relied on the analytical approach to analyze several details of the subject under study based on the legal and constitutional frameworks regulating state contracts. In addition, it will examine the judicial rulings issued by the Egyptian State Council. The study reached the significant expansion adopted by the Egyptian State Council in monitoring state contracts, which resulted in the issuance of Law No. 32 of 2014, limiting the right to appeal state contracts to the benefit of the two parties to the contract only.

Keywords: Public Procurement, Administrative Contracts, Administrative Decisions, Administrative Disputes, Egypt

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1. INTRODUCTION

Administrative authorities resort to contracting with each other or persons of private law to manage public facilities to satisfy public needs ("Arbitration and Government Contracts", 1941; Duguit, 1914; Garner, 1924). They conclude the necessary contracts to achieve those purposes (Trotabas, 1930; Langrod, 1955; Minattur, 1974; Friedmann, 1955). The legislator determines for the administration authority the contracting methods and the rules that must be adhered to in a way that ensures the preservation and maintenance of public funds while not neglecting to consider the importance of practical reality, which requires that there be the flexibility that allows the administration to confront developments and overcome crises, provided that this is not used as a means to evade the provisions of the law (Farnsworth, 1967; Nash, 1964; Braucher, 1952; Trowbridge vom Baur, 1967, 1968).

Public procurement contracts constitute a large proportion of the state's general budget (Aboelazm & Afandy, 2019; Aboelazm, 2022) and are

considered one of the government's most essential tools for its constitutional functions (Aboelazm, 2023a). Given that they are one of the areas where the private sector deals most with the government sector, public procurement contracts are also considered one of the areas where corruption most occurs (Aboelazm, 2023b). The most common areas where corruption occurs are when the government and private sectors come together directly (Aboelazm & Ramadan, 2023).

Management contracts are characterized by the fact that they are not single. There are contracts concluded by the administration that do not differ from those concluded by individuals, and those contracts have a civil character and are contracts of private law (Bergstrom, 1967; Gavin, 1972; Annoussamy, 1984; El-Hassan, 1985; "Executors and Administrators: Duty of an Administrator to Complete a Building Contract Entered into by the Decedent", 1926; Munnely, 1982). However, the administration may act as a public authority and conclude contracts that differ from previous contracts, and these contracts are described as administrative "public procurement contracts"

(Leventhal, 1966; Langrod, 1955; Aboelazm, 2021). The distinction between the two administration contracts is equally crucial in determining the applicable law and the judicial authority competent to hear the disputes regarding those contracts.

The administrative judiciary exercises its role in monitoring the work of the contractual administration body by establishing solid legal principles that formulate and develop the characteristics of the administrative contract (public procurement contracts) (Langrod, 1955) and address its various disputes while developing the rules and principles that govern those disputes. Hence, the theory of public procurement contracts is characterized by its judicial nature (Leventhal, 1966).

The judicial principles governing contract disputes concluded by the state have undergone many developments, which tend toward expanding the scope of judicial oversight over contractual administration (Al-Jarbou, 2011). The French Council of State moves from one theory to another to pursue that goal. This ensures the preservation and maintenance of public funds and opens the door for all interested parties to challenge these contracts (Munnely, 1982). Whether by cancellation of administrative decisions separable from the contract or in the contract itself (Alhamidah, 2007). The legislator may support him in preserving public funds, as the French legislator did in the Law on the Rights and Freedoms of Local Units issued in March 1982 (Shalev, 1988).

The Egyptian Council of State is following in the footsteps of its French counterpart in adopting the principles it established to monitor the work of contractual administration ("Arbitration and Government Contracts", 1941). The matter has reached an exaggeration in implementing this oversight by adopting the *Hisbah* "action populism" lawsuit, the famous lawsuit to protect public funds (Robalino-Orellana, 2007). This prompted the legislator to limit this role to both the constitutional and legislative levels, possibly bringing the constitutional judiciary to the front line. That is when this legislation was challenged as unconstitutional (Trotabas, 1930).

The problems raised by the subject of this paper are the extent to which the ordinary judiciary can apply the principles that govern public procurement contracts to private law contracts that fall within its jurisdiction, the extent to which the principle of proportionality of the effect of the contract keeps up with modern developments in the field of administrative contracts and the extent to which the Egyptian legislator can adopt it. For the ideas approved by the French legislator to challenge contracts concluded by local administration units, the extent to which the Egyptian Council of State can apply the modern principles approved by the French Council of State in this field, and the extent to which the Egyptian Council of State can apply the *Hisbah* "action populism" lawsuit after its authority to monitor state contracts has been restricted by both the constitutional legislator and the ordinary legislator.

The rest of the paper is structured as follows. Section 2 reviews the literature. Section 3 provides the research methodology. Section 4 presents the research results. Section 5 discusses the results. Section 6 concludes the paper.

2. LITERATURE REVIEW

The Egyptian legislature regulated the conditions for accepting state contract lawsuits (Štemberger & Millard, 2021). The state concludes two types of contracts: administrative (public procurement contracts) and civil contracts ("Executors and Administrators: Duty of an Administrator to Complete a Building Contract Entered into by the Decedent", 1926). By tracking the direction of the judiciary, it becomes clear that the ordinary judiciary does not expand in accepting appeals against civil state contracts, which is the same trend that the Egyptian Council of State adopted concerning appeals against public procurement contracts (Minattur, 1974).

2.1. Legislative regulation of the right to file a lawsuit

The Egyptian legislator stipulated the conditions for accepting claims in the Civil and Commercial Procedures Code (Burgi, 2020). The legislator emphasizes the necessity of having the interest of the person filing the lawsuit for his claim to be accepted. This is the same matter that the Egyptian Council of State confirmed (Freeman, 2000).

Article 3 of the Civil and Commercial Procedure Law No. 13 of 1968 stipulates that no request or payment shall be accepted in which the party does not have an existing interest recognized by the law (El-Hassan, 1985). However, the potential interest is sufficient if the purpose of the request is to take precautions to prevent imminent harm or to anticipate a right. He fears his evidence will disappear when there is a dispute over it. Then, the legislator amended that article with Law No. 81 of 1996. Its text after the amendment read: No claim shall be accepted, nor shall any request or payment be accepted based on the provisions of this law or any other law, in which the party does not have a personal, direct, and existing interest recognized by the law. However, it is sufficient. Possible interest if the purpose of the request is to prevent imminent harm or to anticipate a right whose evidence is feared to disappear when disputed (Comba, 2013). The court shall rule on its initiative, in whatever state the case is, not to accept it if the conditions stipulated in the previous two paragraphs are unmet (Pardy, 2014). The court may rule not to take the case due to the absence of the interest condition, which requires a procedural fine not exceeding five hundred pounds if it becomes clear that the plaintiff has abused his right to prosecute (Al-Hejailan, 1986).

This is confirmed by the current Egyptian State Council Law No. 47 of 1972 in the last paragraph of Article 12, which stipulates that "the following applications shall not be accepted: (a) Applications submitted by persons who have no personal interest in them". However, the concept of interest in administrative lawsuits completely differs from civil lawsuits (Joaquin & Greitens, 2012). Therefore, the person filing the lawsuit regarding public procurement contracts concluded by the state must be interested in his lawsuit to be accepted (Sabbath, 1964).

The administration concludes two types of contracts: civil contracts subject to the rules of private law and administrative contracts, and public

procurement contracts subject to the principles and provisions of administrative law (Van Harten, 2007). Initially, Egypt adopted a unified judicial system, but it did not know the dual judicial system until after establishing the State Council with Law No. 112 of 1946. Under the unified judicial system, the ordinary judiciary could hear disputes over all contracts concluded by the state, whether civil or public procurement contracts (Singer, 2016). However, after the establishment of the State Council, the legislature did not initially stipulate that the State Council had jurisdiction over disputes related to public procurement contracts (Olivera, 2015). However, subsequent legislative amendments stipulated the jurisdiction of the State Council over immunity in these contracts, but gradually (Bogdanowicz, 2016).

2.2. The failure of the ordinary judiciary to accept challenges to civil state contracts

The jurisdiction of the ordinary judiciary to consider public procurement contract disputes in Egypt at the stage of the unified judiciary did not exist, as it refused to apply the provisions of the administrative law to public procurement contracts, as follows.

2.2.1. The stage of the unified judiciary and the jurisdiction of the ordinary judiciary to consider disputes of all state contracts

Egypt adopted a unified judiciary system before establishing the State Council in 1946. Therefore, all contracts of administrative authorities were subject to the regular judiciary, and the rules of civil law were applied unless special regulations were applied to those contracts (Schooner, 1986). The Court of Cassation ruled in November 1944 that the administrative authority's disposal of public property for the benefit of individuals can only be by way of a license, and the administration has the right to cancel and revoke it before its due date ("Committee on Public Contracts", 1955).

2.2.2. Unified judiciary and lack of expansion in accepting lawsuits related to state contract disputes

In its ruling issued in January 1933, the Court of Cassation affirmed the requirement that there be an interest for the appellant in the verdict and that the person who was removed from the case by the court, who was not among those who appealed its verdict, and who was not bound by the appellate ruling to do anything, cannot be appealed against this ruling. The court ruled, "It is not permissible to appeal without an interest. The person who was removed from the case by the court of first instance and was not among those who appealed its ruling but rather disputed the appeal filed by someone else, and the appeal ruling did not oblige him to do anything; this person is not allowed to appeal this ruling, because he has no interest" (Simovart, 2016, p. 299). He has the right to appeal, and similarly, anyone who did not file a request before the trial court against some of the opponents who were removed from the case based on their appeal is not permitted to appeal the ruling" (Al-Jarbou, 2011).

2.2.3. The unified judiciary and refusal to apply the provisions of the administrative law to public procurement contracts

Before the establishment of the State Council, the ordinary judiciary in Egypt refused to apply the provisions of the administrative law, which differ from the rules of ordinary law to disputes related to public procurement contracts (Osei, 2011). The civil judiciary and the mixed judiciary refused to adopt the theory of emergency circumstances approved by the French Council of State, as the mixed court of appeal issued a ruling in March 1924 according to which it denied the Alexandria Water Company the right to request an increase in the fees it receives from subscribers due to the high costs and decided that the only way for the company was an amicable agreement with the administration (Sen, 1973). The judiciary must not infringe on the administration's right because its jurisdiction is limited to interpreting concluded agreements and not amending them. This is what the Alexandria Mixed Court confirmed in May 1926, declaring that Egyptian law is ignorant of the theory of emergency circumstances and that the court's task is limited to interpreting them (McAleese, 1997). Contracts and work to respect agreements concluded freely, and these principles apply to concession contracts concluded by the administration without a doubt (Maggi, 1998). The civil courts confirmed this, and when the Court of Appeal wanted to apply the theory of emergency circumstances by adopting that theory from the French judiciary, the Court of Cassation overturned that ruling and affirmed the refusal to apply the rules of administrative law to contracts concluded by the public procurement contracts (Levey, 1993).

3. RESEARCH METHODOLOGY

This paper relied on the analytical approach to analyze several details of the subject under study, based on the legal and constitutional frameworks regulating state contracts, whether civil or public procurement contracts. In addition, it will analyze the judicial rulings issued by the Egyptian State Council, whether those issued by the Supreme Administrative Court or those issued by the Administrative Judicial Court. The descriptive approach was also relied upon to describe the phenomenon of appeals against state contracts and to identify the idea of the public interest in the judiciary of the Egyptian State Council.

4. RESULTS

4.1. The administrative judiciary, the "Council of State" does not expand its acceptance of appeals against public procurement contracts

The idea that the Egyptian administrative judiciary should not expand in accepting appeals against public procurement contracts has gone through different stages (Bloomfield, 2019), and this will be presented through the various stages that the State Council has gone through concerning its jurisdiction over state contract disputes (Brainard & Martimort, 1998), through the stage of establishing the State Council and the exit disputes of public procurement

contracts fall under its authority (Cozzio & Tozzo, 2020). The stage of limited and shared jurisdiction of the State Council looks into state contract disputes, such as public procurement contracts (Prager, 1994). Then, the State Council became the holder of general jurisdiction in looking into public procurement contracts, but it did not expand its acceptance (Racca & Perin, 2013).

4.1.1. The stage of establishing the State Council and removing state contract disputes from its jurisdiction

Egypt became a dual judiciary after establishing the State Council in 1946 with Law No. 112 of 1946. Several laws were issued to organize the State Council, the most recent of which was Law No. 47 of 1972, the current law of the State Council, and other legislative amendments introduced to it (Roberts, 2008).

Law No. 112 of 1946 limited the jurisdiction of the State Council exclusively, and among those jurisdictions, the consideration of disputes related to public procurement contracts was not included. Thus, the ordinary judiciary retained its complete jurisdiction in state contracts, whether civil or public procurement contracts (Brainard & Martimort, 1996).

4.1.2. The limited and shared jurisdiction of the State Council to consider state contract disputes

The issuance of Law No. 9 of 1949 regarding the State Council stipulated that it has jurisdiction to consider some public procurement contract disputes (James, 1990) exclusively, which are concession, public works, and supply contracts that arise between the administrative body and its contractor (Bergstrom, 1967). Jurisdiction was shared between the State Council and the ordinary judiciary, and filing a lawsuit before one of the two parties meant it was not permissible to file it before the other party. Some saw this matter as an anomaly in the legal organization and contradicted the idea of an independent administrative judiciary (Berrios, 2006). The jurisdiction of the State Council to consider disputes over these contracts was limited to disputes that arose between administrative bodies and their contracting parties. In contrast, other disputes remained within the jurisdiction of the ordinary judiciary (Prager, 1994).

4.1.3. The State Council has general jurisdiction over state contract disputes

Law No. 165 of 1955 was issued regarding the organization of the State Council, and Article 10 stipulated that “the State Council shall adjudicate exclusively as an administrative judiciary in disputes related to concession, public works, and supply contracts or any other administrative contract” (Singh, 2017). Hence, the State Council became the one with general jurisdiction over all public procurement contracts, and it may apply the rules of administrative law to disputes that differ from civil law rules (Perloff & Perloff, 1997).

With the issuance of the 1971 Constitution, Article 172 stipulated that “The State Council is an independent judicial body and is competent to decide administrative disputes and disciplinary cases, and the law determines its other powers”

(Trowbridge vom Baur, 1967, p. 249). Thus, the State Council became the holder of general jurisdiction in all administrative disputes for the first time since its establishment (Trowbridge vom Baur, 1968). It required the issue of a new law regulating the powers of the State Council, which is the current State Council Law No. 47 of 1972. Article 10 in paragraph (11) stipulates the jurisdiction of the State Council. The council state has jurisdiction over disputes related to concession contracts, public works, supply contracts, and any other administrative contract (Braucher, 1952). This confirms what was stipulated in the 1971 Constitution (Nash, 1964). The State Council confirmed it had become the holder of general jurisdiction concerning administrative contract disputes (public procurement contracts) (Brown, 2008). The Administrative Court ruled that “the Egyptian State Council’s jurisdiction in administrative contracts is no longer limited to a specific number of management contracts, but includes all administrative contracts, and extends to various disputes related to those contracts” (Gavin, 1972, p. 245).

The Egyptian Constitution of 2012 affirmed the general jurisdiction of the State Council in administrative disputes. Article 173 stipulates, “The State Council is an independent judicial body; it has exclusive jurisdiction over all other judicial bodies to decide all administrative and implementation disputes related to its rulings. It handles disciplinary lawsuits and appeals”. This is what was confirmed by the Egyptian Constitution of 2014 in Article 190, which stipulates that “The State Council is an independent judicial body, exclusively competent to decide administrative disputes and implementation disputes related to all its provisions, and it is also competent to decide disciplinary lawsuits and appeals”.

4.1.4. The administrative judiciary does not expand in accepting appeals against public procurement contracts

The administrative judiciary in Egypt did not expand on accepting appeals against public procurement contracts. It emphasized the necessity of the interest condition being met to receive the lawsuit without expanding its concept (Lu, 2013), and the Supreme Administrative Court confirmed that the interest condition is a fundamental condition that must be met. Beginning at the time of filing the lawsuit and continuing until it is finally decided (Dekel, 2008), the defense of not accepting the lawsuit is one of the defenses that is not waived, but it may be made in any case the lawsuit is in, which was confirmed by the first rulings of the Administrative Court, where it ruled that “the interest of the condition for initiating the lawsuit and the basis for accepting it” (Duguit, 1914, p. 390). If the interest was absent from the beginning or disappeared after it was established during the lawsuit, then the lawsuit becomes inadmissible (Garner, 1924).

The administrative judiciary confirmed that the claim to invalidate the contract can only be submitted by the contracting parties and is before the contract judge himself with complete jurisdiction (Trotabas, 1930). The Supreme Administrative Court confirmed this in its ruling

issued in June 1973 (Annoussamy, 1984). It ruled that “the mistake made by the plaintiff is considered, for the reasons mentioned above, to be a fundamental mistake if it would undoubtedly have resulted in him refraining from contracting to supply the required barley at the price and on the terms on which the contract was made” (Langrod, 1955, p.330). Since this was the case, this mistake had contacted the contracting administration to consider it was participating in the preparation of the budget. She knew, or at least it was easy for her to know, that the budget approval would be delayed by several months (Minattur, 1974). As such, for considerations of integrity in dealing, she should inform the bidders of this fact so that they would be aware of their situation when submitting. With their bids, but they did not do so (Friedmann, 1955). Since this was the case, the plaintiff would be entitled to demand the invalidation of the contract due to the fundamental error that occurred in it about the part that was not implemented regarding the supply of the rest of the contracted quantity of barley, which is 300000 kg (Plantey, 1992). It must then be decided to invalidate the contract in this regard. This part of it and the consequent entitlement of the plaintiff to recover the insurance amount he provided as part of the contract (Farnsworth, 1967).

The Supreme Administrative Court also confirmed in its ruling issued in January 1976 that the claim to invalidate the contract does not belong to the person outside the contract (Brown, 2008). Still, it is for the person for whose benefit the condition preventing the act was decided and not the last two, who alone have the right to insist on the contract’s invalidity (Berrios, 2006). It ruled that invalidation is not determined for every interested party, as is the case with the normal effects of invalidation in civil law, but it is determined only for the person whose interest the prohibiting condition is determined to exclude others (“Executors and Administrators: Duty of an Administrator to Complete a Building Contract Entered into by the Decedent”, 1926). If the condition is determined for the benefit of the stipulator or disposer, he alone has the right to adhere to the invalidity, and others are in the condition (Robalino-Orellana, 2007). What prevents action is subject to permission if issued by the person for whose benefit the condition was imposed (Munnely, 1982).

4.2. Applying the theory of administrative decisions separate from public procurement contracts

Since its inception, the Egyptian Council of State has adopted the theory of administrative decisions separate from public procurement contracts (Roberts, 2008). It also emphasized its adoption of the theory of decisions separate from acts of sovereignty. This will be presented, and then some judicial applications of that theory will be presented concerning the Egyptian State Council’s confirmation of its adoption of the theory of decisions and actions separate from acts of sovereignty (Racca & Perin, 2013), as follows.

4.2.1. The adoption of the theory of separate decisions by the Egyptian State Council

The Egyptian State Council adopted the theory of separable decisions since its establishment and before it was given jurisdiction to hear disputes related to public procurement contracts (Levey, 1993), and did not adopt the theory of merger (Osei, 2011), which was confirmed by both the Administrative Judicial Court and the Supreme Administrative Court in their rulings (Al-Jarbou, 2011).

4.2.2. Judicial applications of discrete decision theory

The Administrative Judicial Court ruled that it has jurisdiction to hear a lawsuit to cancel administrative decisions related to a contract concluded by the state, which can be separated from that contract (Gellhorn, 1935). Its ruling issued in November 1947 ruled that “the operations undertaken by administrative bodies, including those that may be complex, have two aspects: one of them is purely contractual” (Al-Jarbou, 2011, p. 80). “The civil court has jurisdiction, while the other is administrative, in which administrative bodies must proceed by the administrative system established for that. In this regard, they issue unilateral decisions, which have all the characteristics of administrative decisions and are related to the contract in terms of authorizing it, concluding it, or approving it, so the judicial court has jurisdiction. The administrative court has decided to cancel these decisions” (Schooner, 1986, p.237), which was confirmed by the Supreme Administrative Court, saying, in the legal context, a distinction must be made between the contract concluded by the administration and the procedures it uses to prepare for the implementation of this contract or prepare for its birth (Freeman, 2000). This is the case regardless of whether this contract is civil or administrative; the competent authority’s decision carries out these procedures and has the characteristics and components of an administrative decision. Such decisions, even if they contribute to the formation of the contract and aim to complete it, are separate from the contract, whether civil or administrative, and are separate from it (El-Hassan, 1985). Therefore, the concerned parties may appeal to them. By abolition independently (Brainard & Martimort, 1996).

4.2.3. The State Council's affirmation of adopting the theory of decisions separate from acts of sovereignty

The State Council affirmed its adoption of the theory of decisions separate from acts of sovereignty (Robalino-Orellana, 2007). This was regarding the government’s appeal before the Supreme Administrative Court of the two Administrative Judiciary Court rulings regarding stopping the gas export to Israel (Van Harten, 2007). The Supreme Administrative Court confirmed the acceptance of the appeal against decisions separate from acts of sovereignty as its verdict was issued (Pardy, 2014). In February 2010, it ruled that “approval to export gas to Israel is considered issued by the executive authority in its capacity as a governing authority to

regulate its international relations, and that the description of “act of sovereignty” is only attached to this approval in terms of the principle of export” (Stemberger & Millard, 2021, p. 262). As for what the Council of Ministers issued in September 2000, then Minister of Petroleum Resolution No. 100 of 2004 authorized contracting procedures with the Eastern Mediterranean Company to export natural gas with companies located in the Mediterranean region and Europe, including the Israel Electric Company. They were issued by a national authority and by Egyptian legislation (Burgi, 2020). Therefore, they constitute two administrative decisions that are separable from the sovereignty act mentioned above, and each is subject to the oversight of the administrative judiciary (Joaquin & Greitens, 2012). Based on the above, the court ruled to cancel the ruling issued by the Administrative Judicial Court because it was issued in a matter related to an act of sovereignty (Simovart, 2016). Therefore, the export of Egyptian natural gas must continue (Al-Jarbou, 2011). For Israel, but with a periodic review of quantities and prices during the contract period to achieve the Egyptian interest and ensure the provision of local needs, the minimum and maximum prices must be reviewed periodically by developments in global market prices (Bloomfield, 2019).

5. DISCUSSION

5.1. Accepting the appeal for cancellation of public procurement contracts

At this point, the Egyptian State Council’s acceptance of the appeal for cancellation in the public procurement contracts (Pardy, 2014) will be clarified. We will show that it has adopted that trend in many of its rulings, transforming the lawsuit to challenge state contracts into a lawsuit to protect public money in many cases. Its rulings, including its ruling on the contract to sell the land of Madinaty, its ruling to invalidate the contract of the Misr Shebin Al-Kom Spinning and Weaving Company, and its ruling to invalidate the contract to sell the Omar Effendi Company (Comba, 2013).

The administrative judiciary in Egypt has expanded its acceptance of challenges to state contracts. This is done by adopting the Hisbah “action populism” lawsuit to protect public money and accepting the appeals filed by others to cancel the administrative agreement (Joaquin & Greitens, 2012). The Administrative Court ruled that the plaintiff met the two conditions of capacity and interest because he is a citizen of the Arab Republic of Egypt and that every citizen has a capacity and a definite interest in resorting to the judiciary demanding the protection of public property (Singer, 2016). In doing so, it relied on the text of Article 33 of the Egyptian Constitution of 1971, which stipulates that “public property is inviolable, and its protection and support is the duty of every citizen by the law” (Olivera, 2015, p. 40). The court believes that, by that article, the constitutional legislator has placed on every citizen the obligation to protect public property from any assault and to defend it against anyone who attempts to tamper with it or violate its sanctity, which would give every citizen

a standing and a definite interest in resorting to the judiciary (Bogdanowicz, 2016), demanding the protection of public property. Whether by filing a lawsuit initially or intervening in a lawsuit already filed, the administrative judiciary allows others to challenge the administrative contract by invalidating it (Simovart, 2016).

One of the most important of these rulings is the Administrative Court’s ruling invalidating the Madinaty contract, in which the court allowed others in the administrative contract to challenge the contract itself by invalidating it and ruled that the plaintiff’s interest condition is met simply because he is a citizen of the Arab Republic of Egypt (Bloomfield, 2019). His goal is to protect public funds, as well as the ruling of the Administrative Court. The administration decided to invalidate the contract for the sale of the Misr Shebin El-Kom Spinning and Weaving Company (Simovart, 2016), the contract for the sale of the Omar Effendi Company, the contract for the exploitation of the gold mine in Jabal al-Sukari, the contract for the sale of the Al-Nasr Company for steam boilers, the contract for the sale of the Nile Cotton Ginning Company (Cozzio & Tozzo, 2020), cancel the decision issued to export gas to Israel, and accept a lawsuit to cancel the government’s decision (Racca & Perin, 2013). By presenting the Egyptian antiquities in Japan, invalidating the contract for the sale of the Tanta Flax and Olive Company, and invalidating the contract for the sale of the Palm Hills land, it will be sufficient to present only three cases from the above (Burgi, 2020), as follows:

5.1.1. Administrative Court ruling in the Madinaty land sale contract in 2010

The facts of the case are summarized in the fact that a lawsuit was filed by the plaintiffs before the Administrative Court demanding the invalidation of the preliminary sale contract dated August 1, 2005, and its annex, concluded between the New Urban Communities Authority, and the Arab Company for Projects and Urban Development regarding the Authority’s sale to the company of an area of eight thousand acres, in the city of New Cairo to establish a project. For free housing under the name “Madinaty”, for luxury housing, the unit’s value reaches several million pounds, and as a precaution, the contract must be canceled (Simovart, 2016). The plaintiff explained that he was surprised by the publication of the contract on the website of a newspaper without announcing a bid or taking legal measures in violation of the Tenders and Auctions Law No. 89 of 1998, which applies to all state bodies, including the New Urban Communities Authority, noting that the value of this land amounts to one hundred and sixty-five billion Egyptian pounds (Bloomfield, 2019). It was allocated free of charge to those mentioned above in his capacity as Chairman of the Board of Directors of the Arab Company for Projects and Urban Development by the contract as discussed above (Van Harten, 2007). The Administrative Authority argued that the lawsuit should not be accepted due to the absence of a condition (Burgi, 2020). The interest and capacity of the plaintiffs were that they did not submit any requests to the New Urban

Communities Authority regarding allocating a plot of land to them in New Cairo (Cozzio & Tozzo, 2020).

The Administrative Court ruled that the plaintiffs met the conditions of capacity and interest. It is based on their status as citizens and their right to protect public property (Burgi, 2020). Its ruling stated that “given the above, the plaintiffs were citizens of the Arab Republic of Egypt, and they are among those addressed by the provisions of the Constitution and are entitled to defend what it seems to them that it is one of their rights related to selling part of the state’s lands” (Racca & Perin, 2013, p. 288).

5.1.2. Administrative Court ruling to invalidate the sale contract of the Misr Shebin El-Kom Spinning and Weaving Company in 2011

The facts of the case are summarized in that the plaintiff filed his lawsuit demanding the invalidation of the contract for the sale of all the material and moral assets of the company mentioned above (Aboelazm, 2023a). The right to lease the land for 25 years, explaining that the company mentioned above was one of the castles of the textile industry, its area was 157 acres, and it had many production stores, equipment, and raw materials. The plaintiff added that the sale decision violated the Tenders and Auctions Law No. 89 of 1998 and wasted the rights of the workers displaced and replaced by others on temporary contracts (Burgi, 2020). Hence, the court ruled to accept the case and based its ruling on fulfilling the conditions of capacity and interest on the basis that public property is inviolable and protecting it is the duty of every citizen (Aboelazm & Ramadan, 2023). According to what the Constitution stipulates, the court ruled that “Article 6 of the Constitutional Declaration currently in effect, corresponding to Article 33 of the fallen 1971 Egyptian Constitution, stipulated that public property is inviolable, and its protection and support is a duty for every citizen by the law. Thus, the constitutional legislator placed on every citizen the obligation to protect public property from any attack and to defend it against anyone who tries to tamper with it or violate its sanctity, which would give every citizen a standing and a definite interest in resorting to the judiciary demanding the protection of public property”.

5.1.3. Administrative Court ruling to invalidate the sale contract of Omar Effendi Company in 2011

In that case, the Administrative Court ruled that the conditions of capacity and interest were met for the one filing the annulment case based on the fact that the constitutional legislator has placed on every citizen the obligation to protect public funds from any assault and to defend them against anyone who tries to violate their sanctity (Al-Jarbou, 2011), which would give every citizen the right to There is a definite interest in resorting to the judiciary demanding the protection of public property (Štemberger & Millard, 2021).

We want to emphasize the availability of the conditions of capacity and interest for the employees of Omar Effendi Company if they appeal the administrative decision resulting in the sale

of the company (Štemberger & Millard, 2021). Still, the Administrative Court did not limit filing the cancellation lawsuit to them but expanded on that, ruling that every citizen has a status and a definite interest in asylum (Al-Jarbou, 2011). The judiciary must demand the protection of public property, whether by filing a lawsuit initially or intervening in a lawsuit already filed (Joaquin & Greitens, 2012).

The facts of the case are that the plaintiff filed a lawsuit with the court to annul the decision of the Ministerial Group for Economic Policies (Singer, 2016), approved by both the Ministerial Committee for Privatization and the Council of Ministers (Simovart, 2016), to sell the Omar Effendi Company and the effects (Olivera, 2015), the most important of which is the invalidation of the contract for the sale of the Omar Effendi Company (Joaquin & Greitens, 2012). The court ruled that the contested decision was invalid (Bogdanowicz, 2016). It is based on the fact that that decision violated the provisions of the law and the decisions regulating the sale of public money contributions owned by the state, banks, public business sector companies, and public legal persons (Simovart, 2016). These violations reached a level of gravity that led to the waste of public money and neglect (Singer, 2016). In which the shares of Omar Effendi Company are sold at a price that is disproportionate to the rights and privileges acquired by the buyer, in addition to handing over to the buyer real estate owned by the company for free and without any return, as stated above, and allowing him to sell assets of an archaeological, historical and cultural nature that cannot be disposed of, and enabling the investor to Sell the company’s assets at market value despite their evaluation based on discounted cash flows, enabling him to evade taxes and charging the company with the value of the taxes due from him, and other violations mentioned above, which are violations that would reduce the contested decision to the point of nonexistence, so that it and the physical work become equal (Bogdanowicz, 2016). He is not entitled to immunity and is not bound by the deadlines for withdrawing and canceling administrative decisions. The court ruled that the absence of the contested decision invalidated the contract by necessity and applied to all the obligations resulting from this contract (Olivera, 2015).

The Administrative Court followed the same approach by limiting the citizen’s capacity to accept the lawsuit (Bogdanowicz, 2016), stating that the condition of interest and capacity is met, and receiving the appeal submitted by third parties to cancel the administrative contract in its ruling to invalidate the agreement for the exploitation of the Jabal al-Sukari mine dated October 30, 2012, and its ruling to invalidate the contract for the sale of Al-Nasr Company for steam boilers dated September 21, 2011, and its ruling invalidating the Nile Cotton Ginning Company’s sale contract dated December 17, 2012 (Simovart, 2016).

It is clear from these provisions the extent of the expansion adopted by the Egyptian State Council in accepting challenges to contracts concluded by the state, limiting the status of a citizen to take the lawsuit and saying that the conditions of capacity and interest are met simply because

the plaintiff is a citizen of Egypt (Bloomfield, 2019), and this is considered a departure from the usual concept of the interest condition in the cancellation lawsuit (Cozzio & Tozzo, 2020). These were submitted to the administrative decisions issued by the contracting administrative authority, resulting in the administrative contract's conclusion (Simovart, 2016). This behavior will result in a reaction from the executive and legislative authorities, which will limit the role of the Council of State in carrying out this oversight, which will be explained in the next point (Racca & Perin, 2013).

5.2. The role of the constituent and legislative authorities in reducing the powers of the administrative judiciary in judging public procurement contract disputes

The role of the State Council in accepting challenges to public procurement contracts has been restricted (Singh, 2017), whether by directly challenging the contract concluded by the administration or by challenging administrative decisions that are separable from that contract and whose ruling to cancel them would result in the contracts that were part of it being invalid. The restriction came from the constituent authority when writing the constitution and the legislative authority. This restriction extends to all state contracts, whether civil agreements within the jurisdiction of the ordinary judiciary or those public procurement contracts (Joaquin & Greitens, 2012), whose disputes are within the jurisdiction of the administrative judiciary of the State Council. Accordingly, the role of both the constituent power and the legislative power will be addressed as follows.

5.2.1. The role of the constituent authority in reducing the powers of the administrative judiciary in examining public procurement contract disputes

The constituent authority (the constitutional legislator) reacted strongly to the expansion of the Egyptian State Council in accepting challenges to public procurement contracts. The Constitution of 2012 was amended, and the Constitution of 2014 was issued Article 34, which stipulates that protecting public property is a duty by the law (Pardy, 2014).

Article 33 of the Egyptian Constitution issued in 1971 stipulated that public property is inviolable, and its protection and support is the duty of every citizen by the law, as it is a support for the nation's strength (Comba, 2013) and a foundation for the socialist system and a source of the people's well-being. This article was amended in 2007 and stipulates that "public property is inviolable, and protecting and supporting it is the duty of every citizen by the law" (Burgi, 2020). When the 1971 Constitution came into effect, Article 6 of the Constitutional Declaration issued by the President of the Supreme Council of the Armed Forces on March 30, 2011, stipulated that "public property is inviolable, and its protection is the duty of every citizen by the law". Hence, the 1971 Constitution, whether before its amendment in 2007 or after that date, made the protection of public funds a duty for every citizen, which is confirmed by Article 6 of

the Constitution mentioned above Declaration. In the Egyptian Constitution issued in 2012, the protection of public funds was also emphasized (Štemberger & Millard, 2021). Article 22 of the Constitution stipulated that "public funds are inviolable, and protecting them is a national duty for the state and society". Hence, protecting public funds became a duty for the state and society. After temporarily suspending the 2012 Constitution, the interim president issued a Constitutional Declaration in 2013, Article 11, stipulating that "property is inviolable, and protecting it is the duty of every citizen by the law". The Constitution of 2012 was amended, and the Constitution of 2014 was issued. Article 34 stipulates that "public property is inviolable and may not be infringed, and its protection is a duty by the law".

The current Egyptian Constitution of 2014 clearly states that protecting public funds is no longer a duty for citizens, as was the case in the 1971 Constitution, or for society, as was the case in the 2012 Constitution. Instead, protecting public funds has become a duty according to the law (Burgi, 2020). This protection is regulated by a law that sets the rules for safeguarding public funds, the conditions for accepting a lawsuit, and the procedures that must be followed to protect those funds (Štemberger & Millard, 2021).

5.2.2. The role of the legislative authority in reducing the powers of the administrative judiciary in examining public procurement contract disputes

The legislative authority's response was as strong as the constituent authority's. In light of the 2014 Constitution, the interim president represents the legislative authority, as he has the authority to legislate due to the absence of the House of Representatives. He issued Decree-Law No. 32 of 2014, regulating some procedures for appealing state contracts.

The law came in three articles, and the first article stipulated that: "Without prejudice to the right to litigation of the owners of personal or real rights over the funds subject to the contract, the appeal shall be against the invalidity of contracts in which one of the parties is the state or one of its agencies, including ministries, agencies, and agencies that have special budgets. Local administration units, public bodies and institutions, and companies that the state owns or contributes to, or to appeal the cancellation of the decisions or procedures based on which these contracts were concluded, as well as the decisions to allocate real estate from the parties to the contract and not others unless a final judgment has been issued convicting the two parties to the contract. Alternatively, one is a crime of public funds stipulated in Chapters Three and Four of Book Two of the Penal Code, and the contract was concluded based on that crime".

Article 2 of Decree-Law No. 32 of 2014 states that without prejudice to final judicial rulings, the court shall rule on its initiative not to accept the lawsuit or appeals related to the disputes stipulated in Article 1 of this law that are brought before it in a manner other than that specified by this article, including Lawsuits and appeals filed before the effective date of this law.

5.2.3. Evaluating the role of the legislative authority by restricting the role of the State Council in examining disputes in public procurement contracts

Reasons for issuing Decree-Law No. 32 of 2014

The issuance of Decree-Law No. 32 of 2014 regulating the procedures for appealing state contracts came as a reaction to the expansion of the administrative judiciary in accepting appeals in contracts concluded by the state, in which the status of a citizen was sufficient to accept those appeals, and as stated in the report issued by the Legislation Department of the State Council when presenting the draft The law is based on it (Hrin, 2023; Štemberger & Millard, 2021). Issuing it aims to restore confidence in the contracts concluded by ministries, public bodies and institutions, local administration units, and companies to which the state contributes with their contractors.

The time frame of Decree-Law No. 32 of 2014

The law stipulates in its second article that, without prejudice to final judicial rulings, the court shall rule on its initiative not to accept lawsuits or appeals related to challenging the invalidity of contracts concluded by the state or one of its agencies or challenging the decisions or procedures based on which these contracts were concluded, and which are brought before it. In a manner other than that specified by the law, including lawsuits and appeals filed before the implementation of this law (Imami & Batalli, 2024; Štemberger & Millard, 2021). Therefore, the law will be applied retroactively to all courts and used even if a ruling is issued in the case as long as the path to appeal the verdict is still open and even if the ruling was appealed before the issuance of this law. As long as the right to pleading has not yet closed before the Court of Appeal, the general rule is the immediate application of the law and not applying it retroactively, one of the general principles confirmed by the Supreme Administrative Court and stipulated in the Constitution.

The extent to which the decree-law protects administrative activities from being subject to judicial oversight

Decree-Law No. 32 of 2014 regulating the procedures for appealing state contracts does not protect the work of administrative bodies from being subject to judicial oversight so that the following provisions may appeal those contracts:

1) Resolution Law No. 32 of 2014 limited contracting parties to the exclusive right to appeal the invalidity of contracts in which one of the parties is the state or one of its agencies or to appeal the cancellation of the decisions or procedures based on which these contracts were concluded, as well as real estate allocation decisions.

2) Owners of personal rights, such as workers, labor federations, and labor unions, may file lawsuits to claim workers' rights if the conclusion of that contract violates those rights.

3) Those with absolute rights over the funds subject to the contract, such as shareholders, mortgage creditors, and banks with absolute rights related to those funds, can claim their rights before

the courts if the conclusion of that contract results in prejudice against them.

4) Besides the above, a third party in an administrative contract may appeal administrative decisions separate from the contract, provided that he has a personal and direct interest in filing the lawsuit.

Limits of the right to litigation for holders of personal or fundamental rights in public procurement contracts

According to the text of Article 1 of Decree-Law No. 32 of 2014 regulating the procedures for appealing state contracts, those with personal or fundamental rights to the funds subject to the contract may not demand the invalidation of the state contracts contained on those funds (Shhadah Alhussein et al., 2023; Aboelazm, 2021). Instead, they only have the right to claim their rights related to the funds subject to the contract, whether by continuing to work under the same conditions with the person to whom the funds of the company under sale were transferred or to claim all of their financial rights resulting from the termination of the employment relationship (Štemberger & Millard, 2021). Owners of fundamental rights, such as partners and mortgage creditors, do not have the right to demand invalidation of the contract but rather the recovery of all their rights related to the property being sold (Pysarenko et al., 2023; Burgi, 2020).

Decree-Law No. 32 of 2014 does not prohibit Hisbah "action populism" lawsuits to protect public money

Despite Decree-Law No. 32 of 2014 issuance, filing a lawsuit before the State Council to safeguard public funds is still permissible. Non-party parties to the contract, non-holders of personal rights, and owners of fundamental rights to the funds subject to the contract are urged to appeal the contract's invalidity concluded between the contracting administration. They also have the right to appeal the decisions and procedures based on which the contract was concluded if a final ruling is issued convicting one of the contracting parties (Bogdanowicz, 2016). One is a crime of public funds in the Penal Code stipulated in Chapters Three and Four of Book Two, and the contract was concluded based on that crime (Burgi, 2020). Book Two of the Penal Code relates to felonies and misdemeanors harmful to the public interest, and Chapter Three relates to a crime. Bribery and its fourth chapter deal with crimes of embezzlement of public funds, aggression against them, and betrayal. Anyone other than those specified by the law has the right to challenge the contract concluded between the state and its contracting party and challenge the decisions and procedures according to which the contract was concluded if it was based on those crimes (Karanikić Mirić & Petrović, 2020; Olivera, 2015).

Decree-Law No. 32 of 2014 and the role of the citizen in protecting public money

The question arises regarding the extent of the impact of the issuance of Decree-Law No. 32 of 2014 on the positive role of the citizens in

safeguarding public funds. Contrary to what some people see, that the citizen has been wholly prevented from playing any positive role in protecting and preserving public funds, we believe that the citizen can play a role (Bogdanowicz, 2016). It is essential to protect public money, even if it is not among the parties stipulated by the legislator in Decree-Law No. 32 of 2014. This is done by submitting a report to the Public Prosecutor to initiate a criminal case if there are suspicions of a crime of assault on public money committed by the contracting administrative body or its contractor. The contract was made based on these crimes. In this case, the Public Prosecution ensures that this crime occurred and files a criminal case (Olivera, 2015).

This decree-law sparked widespread controversy between supporters and opponents, and the dispute raged between its supporters and opponents. It is sufficient to clarify that one of the opponents of Decree-Law No. 32 of 2014 submitted a report to the Alexandria Appeals Prosecution Office accusing the interim President of the Republic of participating in harming public funds by issuing it (Olivera, 2015). Decision by law. Another citizen also filed an urgent lawsuit to cancel it. On May 4, 2014, the Seventh Circuit of the Administrative Court authorized the plaintiffs' lawyers to appeal before the Supreme Constitutional Court the constitutionality of Decree-Law No. 32 of 2014, less than ten days after its issuance, in the first hearings. Claims to invalidate decisions to privatize public sector companies after the issuance of the decree law to complete the examination of the Nobasid and Cairo Oils and Soap Company cases (Bogdanowicz, 2016).

6. CONCLUSION

This paper examines the stages of development of the Egyptian State Council in monitoring public procurement contracts, where the legislator organized lawsuits and required that the filer of the lawsuit have a personal and direct interest approved by the law for his lawsuit to be accepted. Before adopting the dual system, the ordinary judiciary had jurisdiction to hear all disputes. As a result of state contracts, he did not expand on accepting these claims and refused to apply the provisions of the administrative judiciary to administrative agreements. After establishing the State Council by Law No. 112 of 1946, the State Council by Law No. 165 of 1955 was authorized to consider all disputes of state administrative contracts, "public procurement contracts" which was confirmed by the Egyptian Constitution of 1971 and 2012, as well as the Constitution of 2014. The Egyptian Council of State adopted the theory of separable administrative decisions since its inception. Then, he expanded the acceptance of lawsuits filed against contracts concluded by the state by making it a legal suit, which is sufficient for it to be accepted if the plaintiff has the status of a citizen. He emphasized his adoption of the theory of decisions separate from acts of sovereignty, which had the effect of restricting the role of the Council in monitoring these disputes through each of the following: Constituent power and legislative power.

For our part, we tend to support Decree-Law No. 32 of 2014. Our argument for that is not to violate the provisions of the Constitution issued in

2014, including Article 34, which did not make protecting public money a duty on the citizen, and Article 97, which stipulated guaranteeing the right to litigation. As well as its agreement with the text of Article 3 of the amended Civil and Commercial Procedure Law No. 13 of 1968, which stipulates that no suit, request, or payment shall be accepted in which the owner does not have a personal, direct and existing interest recognized by the law, and its agreement with Article 12 of the Council of Ministers Law. The state has stipulated that it does not accept requests submitted by persons with no interest in it. It agrees with the principles approved by the Supreme Constitutional Court regarding the legislator's authority to regulate rights. It agrees with the principle that it is not permissible for the public authority to use the excuse of not fulfilling the procedures when concluding a contract or violating it. The law has the right to cancel a contract after concluding it to the detriment of the contracting party. The House of Representatives approved Decision Law No. 32 of 2014 after rejecting it in a previous session.

State contracts represent the research limits, the concept of the interest condition in state contract disputes, and the development of the idea of interest in the Egyptian administrative judiciary. This idea was linked to the concept of public money, ownership of public money, and protection of public money as a right for every citizen until the idea of interest became narrowly defined and was only the interest of the parties to the contract.

This study reached several recommendations, such as applying the theory of severable decisions to private law contracts and administrative contracts concluded by the state so that both parties to the contract and third parties benefit from it. In addition, the ordinary judiciary expanded the interest requirement to accept appeals against private law contracts concluded by the state to preserve public funds.

On the other hand, acceptance of appeals for cancellation by others against contracts concluded by the state provided that the person filing the lawsuit has a personal and direct interest recognized by law. Also, the judiciary requires that the public authority commit severe violations in concluding contracts to accept an appeal from others to cancel those contracts.

Moreover, issuing a law adopting a system of judicial oversight instead of administrative guardianship in the central authority's oversight of contracts concluded by local units. Furthermore, a law stipulates that the central authority's representative has the right to appeal the cancellation of contracts concluded by local administration units.

Nevertheless, the legislative authority activates the citizen's role in protecting public funds by allowing the citizen to request the representative of the central authority in the local unit to which he belongs to appeal the cancellation of local unit contracts based on a citizen's request to monitor the cancellation.

Additionally, giving citizens the right, if they have an interest, to directly challenge contracts concluded by the central authority in case of evidence of wasting public money. Also, the judiciary must balance its role in monitoring

the work of contractual administration with the principle of the relative effect of the contract without prejudice to this principle. Finally, do not turn judicial oversight of state contracts into a lawsuit; this may raise the sensitivity of the legislative and executive authorities, threatening the existence and survival of the administrative judiciary or limiting its oversight.

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