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To politicize or depoliticize, is that really the question of administrative adjudication?: A study of the state council judicial interpretation in Egypt

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TO POLITICIZE OR DEPOLITICIZE, IS THAT REALLY THE QUESTION OF ADMINISTRATIVE ADJUDICATION? : A Study of the State Council Judicial Interpretation in Egypt

A Thesis Submitted to the

Department of Law

In partial fulfillment of the requirements for the

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By

Abouelfetouh Hussein ElSammak

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DEDICATION

I dedicate my thesis work to the souls of my parents whose love and dedication were endless – may you rest in peace – I am where I am today because of you and I hope I have made you proud.

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Supervised by Professor Hani Sayed

ABSTRACT

When a court is called upon to adjudicate, it is crucial to establish the meaning of the norm, allegedly governing the litigants in order to apply it. Legal interpretation is, hence, the beating heart of judicial activism. It is an intellectual process that shows the judge's appreciation and their personal understanding of the facts and the ability to localize the court's boundaries within the public system of the State. Legal interpretation is often used strategically to advance a certain judicial policy, which is always at the background of the judge reasoning. The court deviates from the obvious rule interpretation and adopts a certain interpretation that can only be justified by policy or practical considerations. This thesis tends to demonstrate the judicial activism in Egypt regarding the legal interpretation of the State Council judges, through the examination of different court reasoning that shows a pattern of subconscious activity related to the political analysis of the case facts. I intend to demonstrate that when the relation between the Government and the Parliament is facing turmoil or one authority is consumed by the other, the State Council is obliged to raise its jurisdiction in order to maintain the balance between public authorities and preserve the public interest by protecting individual rights and enforcing high standards of public governance. The conclusion is far from being conclusive. If legal interpretation is means to an end, with the end supposedly the public interest, then legal interpretation is no longer a reflection of the court's understanding of law but rather how it perceives the separation of powers principle and its duty to protect the public interest, which is highly related to political and practical considerations of each case.

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“Those who surrender freedom for security will not have, nor do they deserve, either one.”

— *Benjamin Franklin*

Introduction

Administrative law has various definitions, it is considered to be a sophisticated academic area.[1] From one point of view it is an eminent legal tool in defining and regulating the state and its agencies and their inter-relations with private law persons. Secondly, it holds a leading role in shaping the society because of its heavy impact on supporting or obstructing public policies. Thirdly because administrative law – unlike the civil law - is not a codified set of rules, it is a legal doctrine created within the administrative courts and formed by case law. This is the reason that administrative judiciary is often called a law-making judiciary, rather than being primarily of a legal application character like the ordinary judiciary.

Professor Osman Khalil, stated that the State Council as an independent administrative judiciary is at its core different that it could look like from the outer crust, it is a system that the legal provisions could not adequately describe. That's because it is grounded not on the evident meaning of the provision but rather on the spirit of the law even if it was not articulated in the obvious reading of the provision.[2] Professor Khalil thinks that it would be a great mistake to consider the State Council as a lifeless statue, actually,

[1] Scholars of common law systems would have a general consensus about defining administrative law as the branch of law governing the creation and operation of administrative agencies, especially the powers granted to them and the substantive rules that such agencies make, and the legal relationships between such agencies and governmental bodies, and the public at large. While in France, *André De Laubadère* regards administrative law as the group of rules defining the rights and obligations of the public administration.

[2] Professor Osman Khalil Osman, is public law professor and dean of law school in Ibrahim Pacha the Great University (which is Ain-Shams nowadays), he is considered to be one of the pioneers in constitutional law, he contributed greatly in the foundation of the Kuwaiti constitution in the sixties, and he was among the first scholars in Egypt in administrative law. His illustrations about the State Council and the administrative adjudication were the beacon of light to any legal research in the twentieth century.

to grasp an adequate meaning of what the State Council is all about one should consider it as a living creature, [3] which affects and gets effected by the changes in the society.

Maurice Hauriou, mirroring Khalil's statement, believes that along the history, the *Conseil d'Etat* presented a single character, and it was always the same, one that is greatly plastic.[4]

The great *Marcel Waline*,[5] proposed that if it was not for the *Conseil d'Etat,* administrative law would not had any existence in France or at least would have been limited to the regulation of the State agencies and its jurisdictions. Waline considers the decisions of the *Conseil d'Etat* to be the main initiator in establishing and framing the major doctrines in public law. The judge does not simply have the function of settling disputes, but has historically played a part, often decisive, in the creation of administrative law.[6]

This makes the administrative law particularly susceptible to modification and always in need of progressive scholarly input to support the variable legal interpretation. In fact, judges do often use the academic writings and especially when confronted with

[3] Osman Khalil, Administrative Law – the State Council, 2nd edition, Dar Al-Fikr Al-Araby, 1950. At page 4.
[4] Maurice Hauriou, *Précis de droit administratif et de droit public*, reedited by Paris: Dalloz, [1933] 2002, 162.
[5] Marcel Waline (1900-1982) is a grand French doctrinal author from the interwar period and the father of the theory of civil liberties. He is a true Gaullist and one of the few authors that opposed clearly the Vichy regime. He is the inspirer of the August 9th 1944 law related to the reestablishment of the republican legality on the territory, and also the main inspirer of article 66 of the 1958 Constitution that institutes the judicial authority as the main guarantor to the individual liberties. He was assigned by General de Gaulle to the Supreme Council of Magistrate in 1958, then the Constitutional Council 1962-1971.
[6] *See* Laubadere, Venezia & Gaudemet, *Traité de droit administrative*, tome 1, 14e édition, p. 28 (1999) in french.

hard cases. For instance, it is claimed that the solution put forward by the *Conseil d'Etat* decision in *Laruelle et Delville*,[7] was first presented in an article by *Marcel Waline*.[8]

Generally, the idea of political activity within the State Council is normally unfavorable, because it goes against the very mission of a judicial body. Yet an informed observer of the administrative jurisprudence could eventually trace a linear trend of court rulings empowering a particular judicial policy, within the judicial interpretation of legal materials.

The general idea of an explicit politicized court ruling is difficult to grasp on many levels. Primarily it refers to the content of the political debate around the issue presented by the case on bar and whether a judge is fit to decide on such matter or not. And another restriction is the quality of the political debates produced by judges and its direct conflict to their sublime duty to legal fidelity. Nevertheless, judges tend to manipulate the legal interpretation strategically to reach a desired outcome enforcing a certain jurisprudential policy, which mostly regarded by legal scholars as political or ideological interpretation of law. [9]

Politicized court reasoning is the process of a judge with a desired outcome that goes beyond the explicit legal interpretation that everybody understands to be absolutely not

[7] In the *Laruelle et Delville* case the judge has recognized the possibility for the administration to take recourse action against its agent when it has been ordered to pay damages on the basis of an error committed by the agent and, on the other hand, the possibility for the agent to payed back by the administration for a part of the convicted payment, in the event of division of responsibility.

[8] See JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW, p. 34 (2008). Also see CE, 28 July 1951, RDP 1951, note Waline p. 1087.

[9] Many scholars have long argued that law and politics are deeply intertwined, some of which goes back to Montesquieu's chef-d'oeuvre The Spirit of Laws (1748), *also* Lon L. Fuller (1958) "Positivism and Fidelity to Law: A Reply to Professor Hart." *Harvard Law Review*, vol. 71, 4, pp. 630–672. Criticizing professor Hart for ignoring the internal morality of order necessary to the creation of all law. *Also* Coase, R. (1960). The Problem of Social Cost. *The Journal of Law & Economics, 3*, 1-44. Describing how the application of tort liability could deeply reshape the political economy of the society.

modifiable. The judge pushes forward certain political arguments exceeding the court competence in trenching what essentially should be a legal conflict.

This political activity could be a result of a particular ideological belief of the judge, or their personal desire in adjusting public policy, but nevertheless, it reflects the court's understanding of its role/duty as a judicial authority in a system based on the separation of powers principle.

So, when the court deviates from the obvious rule interpretation and adopts a certain interpretation that can only be justified by policy or practical considerations. The court is not, essentially, motivated by its personal desire to impose a certain policy but on the contrary it is the imposed duty to rebalance the public system of separation of powers.

Consequently, it is of paramount importance that the court should express a clear perception of its position within the State authorities, and that any jurisprudential shift is a direct execution of the proper understanding of this position. So when the court deviates from the obvious rule interpretation and establishes a new jurisprudential policy, its motivation is not law but mainly the fidelity to public interest.

The constitutional duty of the State Council is not only limited to the day-to-day management of administrative conflicts and trenching cases, but also defending the high interest of the people (public interest), and protecting fundamental rights and public freedoms, and also promoting high standards of public governance. These last responsibilities are of inevitable political character, and its regulation falls primarily within the jurisdiction of the Parliament and the discretionary power of the government in shaping the way the society behaves. Hence, it seems inevitable that the court ruling should convey a clear understanding of the State Council jurisdictional position within the political system and the extent of its effect on the other authorities.

I intend to demonstrate that when the relation between the Government and the Parliament is facing turmoil or one authority is consumed by the other, the State Council is obliged to raise its jurisdiction in order to maintain the preservation of public interest by protecting the public freedoms and enforcing high standard of public governance.

In times of political instability, when the governing authority shows dictatorial and suppressing practices the State Council reduces its jurisdiction for a greater latitude to the governmental discretion, mainly to prevent a devastating confrontation with the governing authority that could have led to the total abolishment of the State Council as an independent judicial authority. But eventually after the change of regimes, the State Council regains back its rightful position as the defendant of the legitimacy principle, which could not happen but by admitting more space to freedoms and liberties.

Chapter I - The Politicization of administrative adjudication

The State Council jurisprudence, as a matter of fact, sometimes favors politicized decisions, [10] only when the socio-political situation requires such outcome. But mostly, it repels the interference in the debate of public policy at times of political stability within the executive-legislative relation. In both events, the court explains its standing in the judgment reasoning.

In this chapter, I present several decisions of the administrative judiciary from France and Egypt, observing the evolvement of the jurisprudence to trace a strategic activity in the jurisprudential policy. The observation of the judicial interpretation development reflects, ultimately, a certain understanding of the separation of powers principle with an emphasis on the judge's perception of their role in the community and the court's duty as an independent public authority.

This chapter introduces the history of the theory of *acte de gouvernement*, which is known in the Egyptian doctrine by the acts of sovereignty. It starts from its creation in France to its Egyptian adaptation and application. The purpose is mainly to use it as a medium in tracking a pattern of jurisprudential policy by observing the evolvement of the doctrine's interpretation and application by the judge and its impact on public policy, to show that legal interpretation is often used strategically to advance a certain judicial policy, which is always at the background of the judge reasoning.

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10 Professor Duncan Kennedy thinks that politicizing is *disloyal* by definition, first it endangers the court's ability to perform its mission, and secondly it risks everyone's investment in the credibility of court decisions. *The ideological politicizer demonizes enemies, treating his own side as all good and the other as all bad, guided not just by the spirit of faction, but also by a deluded sense that his own side has a correct theory that shows that the other side is evil.* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE], Cambridge, Massachusetts; Harvard University Press, 370 (1997)

The interest in choosing the acts of sovereignty doctrine as the medium of this analytical work, emerges from the unique characteristic of that doctrine. First it was created, by the French judiciary in the nineteenth century, essentially, as we will see, to establish a policy that tends to diminish the judicial intervention in public policy by immunizing certain governmental acts. Secondly, the acts of sovereignty, although enacted in legal provisions, it is objectively subordinate to the judicial discretion which makes it, as a theory, highly pliable. The judge has a quasi-entire discretion in pronouncing the quality of sovereignty on the reviewed governmental act. More importantly, the acts of sovereignty doctrine is inversely proportionate to democratic and liberal principles, so it would have an excessive field of application in dictatorial regimes and gets relatively narrower scope in the progress toward enforcing democracy,[11] and in that characteristic the acts of sovereignty stands alone in the administrative law.

The observation of the acts of sovereignty theory and its jurisprudential development shows that the theory has passed through three stages in France; creation, maturation and saturation. Whereas in Egypt, the theory is still in the middle stage, aspiring to achieve the complete saturation. This hesitation of the jurisprudential development in Egypt concerning the acts of sovereignty theory is a direct reflection of the instability in the political scene. Where the relation between the State authorities is experiencing major turmoil deeming its chronic turbulence, and pushing the legal interpretation toward instability.

[11] 13846/59, Supreme Administrative Court, 21/4/2013, *available at* http:/www.eastlaws.com (Eg) This is a free translation by the author and the original text could be found at the end of the thesis

1) The French doctrine of the acts of government theory and its development in the *Conseil d'Etat* decisions

The doctrine of the acts of government distinguishes in the governance practice two functions; the first is acting as the public administration in controlling all state agencies and their functions regarding the public services. The second is acting as a political authority in crafting the public policy. Whereas, the acts taken by the state in its administrative capacity (*actes d'administration*) are susceptible to judicial control reviewing its legality, while the actions of the State as a political authority (*actes de gouvernement*) escape the court's jurisdiction and benefit from an absolute immunity against claims of annulation as well as tort liability.

The theory of acts of government is as old as the administrative judiciary itself. It is regarded, widely, as one of the most complex constructions of administrative law.[12] It was created by the French *Conseil d'Etat*, essentially, to abstain from reviewing certain matters affiliated to the governing authority, to avoid the brutal confrontation that could have possibly jeopardized the judicial independence of the newly established *Conseil d'Etat*.

The *Conseil d'Etat* was established in 1799 by Napoleon Bonaparte, as a successor to the King's Council (*Conseil du Roi*).[13] The mission of the *Conseil d'Etat* have been primarily to advise the government, even in functioning as an appeal to the governmental decrees the decision rendered was not of obligatory nature, it is only a

[12] P. Gonod, F. Melleray et P. Yolka, *Traité de droit administratif*, Dalloz, tome 2, p 136 (2011). Original text could be found at the end of the thesis.

[13] Also known as the Royal Council, it is a general term for the administrative and governmental apparatus around the king of France during the Ancien Régime designed to prepare his decisions and give him advice.

suggestion of the adequate decision concluding the alleged dispute. [14] As the time passed and the position of the *Conseil d'Etat* as an independent judiciary became tighter, the administrative jurisprudence has already well established the principle of legitimacy (*Principe de légitimité*). Consequently, it was widely recognized that the *Conseil d'Etat* is an independent judicial authority, and expressly given the capacity to review the entire governmental activity.

a) The theory of the acts of government at the early age of the *Conseil d'Etat*

The theory of acts of government was first introduced in the famous case *Laffitte* in 1822,[15] where the acts of government were initially defined by their political motive (*mobile politique*) a notion that was extensively used back then. The court would declare its incompetence to review any claim against an act taken by the executive authority for political ends.

Jacques Laffitte was a banker who claimed the payment of the arrears of an annuity he had acquired from the *Princess Borghese*, sister of Napoleon I. The *Conseil d'Etat* rejected his claim on the reason that it held a question of political nature which is exclusively left to the government discretion to decide upon.[16] The *Conseil d'Etat* announced its incompetence to review any act taken essentially for political purposes.

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[14] One of the established principles of the French monarchy was that the king could not act without the advice of his council. Under Charles V, it was put forward that the king made decisions only after "good and careful deliberation" (French: *bonne et mûre délibération*), and this principle was maintained by his successors; the closing formula of royal acts "*le roi en son conseil*" expressed this deliberative aspect. Even during the period of French absolutism, the expression "*car tel est notre bon plaisir*" ("because such is our pleasure") applied to royal decisions made with consultation. See the *Conseil d'Etat* official website available at http://www.conseil-etat.fr/Conseil-d-Etat/Histoire-Patrimoine/Histoire-d-une-institution/Ses-fonctions/Naissance-et-evolution

[15] CE, 1 May 1822, *Laffitte*, n°5363. Also *see* same theory of political mobility introduced in another decision CE, 9 May 1867, *Duc d'Aumale* n°39621, where the judge refused to review any decision of political nature. It considered « *des actes politiques qui ne sont pas de nature à nous être déférés pour excès de pouvoir en notre Conseil d'Etat par la voie contentieuse* », *available* at http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions

[16] *La réclamation du sieur Laffitte tient à une question politique dont la décision appartient exclusivement au Gouvernement.*

The *Laffitte* decision was produced in an era known in the French history as the Second Restauration period (1815-1830), where the political regime in France was exceptionally experiencing strong incidents leading to instability and frequent change in power and authorities.[17] After the assassination of the *Duc de Berry* in 1820, *Joseph de Villèle* was assigned president of the council of ministers, where he adopted an extremist policy that produced the most anchored measures in an absolutist ideology.[18] The creation of the theory of acts of government was motivated by the intention to avoid a fatal confrontation that might lead to the abortion of the newly established *Conseil d'Etat*.

Historically, the governing ministers were competent to adjudicate all administrative claims opposed to their decisions, and the recurrence to the *Conseil d'Etat* was only an appeal to the judgment dictated by the relative minister. After the law promulgated on May 24th 1872, the *Conseil d'Etat* has seen a jurisdictional expansion and became, by enforcement of positive law, exclusively delegated as the administrative judge (*justice déléguée*) competent to adjudicate all administrative claims independently from any interference of the executive power.

Consequently, the politically motivated act that was regarded previously as an argument of exclusion from the judicial review, after the *justice déléguée* law, it has become

[17] The Second Restoration period is a political regime in France from 1815 to 1830. It succeeded the Hundred Days, which had seen Napoleon Bonaparte briefly return to power (20 March to 22 June 1815). After a period of confusion, Louis XVIII returns to the throne, and begins the experience of a constitutional monarchy that tends to unify the country under the rule of inherited authority inspired by both the Revolution of 1789 and the ancient monarchy. This period is regarded by historians as a return to the past monarch. *See* Francis Démier, *La France sous la Restauration (1814 - 1830)*, Gallimard, 2012, p. 1095, and *also* Bertrand Goujon, *Monarchies postrévolutionnaires 1814 - 1848*, Seuil, coll. « L'univers historique, Histoire de la France contemporaine », 2012, p. 443

[18] *Villèle* introduced the law known by "*du milliard aux émigrés*" that offers compensations, with an estimated total of 630 million Francs, to those whom have lost their properties and got sold for the national benefit of the State during the Revolution. Also he promulgated a law named "*loi sur le sacrilège*" that incriminated and punished any person who shows any disrespect to what others hold as sacred and holy, which marked a restoration of the notion of sacral religion to the political discourse, but it only raised an anticlericalism responses within the population.

subject to judicial claims of annulation for the abuse of power (*détournement de pouvoir*) or the error in interpreting the law (*erreur de droit*).

The *mobile politique* was entirely abandoned by the jurisprudence in the *arrêt Prince Napoléon* in 1875. This decision abolished the *mobile politique* as a ground for the acts of government and asserted that the administrative judge is competent to review all acts even those taken after being deliberated by the council of ministers or those essentially taken for political reasons.

The court said that, as a principle the governmental acts, likewise the legislative activity, escape the judicial revision and cannot be the subject of any legal claim, even if it regulated an individual right. But if these acts represent a discriminatory nature that exceeds the sphere dedicated to the discretionary power of the government, it should be naturally limited to the respect of the objectives set by law. In that case, the court will declare its annulation in case of violating the legitimate objectives of the governmental discretion. [19]

This shift in the jurisprudential policy is historically explainable by the strengthening in the position of the *Conseil d'Etat* in relation to the governing authorities after the enactment of the *justice déléguée* law. The jurisprudence evolved from creating to abandoning the theory of political motive aiming to expand, rather than to reduce, the threshold of the judicial control. This jurisprudential policy has an essential motive to render most governmental activities susceptible to judicial control to avoid arbitrary policies, and to concretize the impact of the *Conseil d'Etat* in the political debate through the adjustment of public policy. We can consider, then, that almost every

[19] CE, 19 February 1875, *Prince Napoléon*, n° 46707. Rec. Lebon p. 155. *Also* available at http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Les-decisions-les-plus-importantes-du-Conseil-d-Etat/19-fevrier-1875-Prince-Napoleon (Fr). Original text could be found at the end of the thesis.

governmental decision became susceptible to judicial revision on grounds of excessive authority granting its annulation.[20]

Henceforward, the decision in the *Prince Napoléon* case did not abolish entirely the theory of acts of government, but rather diminished its scope of application. Nevertheless, the criterion of the quality of acts encompassed by the theory of acts of government is decided particularly by the *Conseil d'Etat*.

Moreover, the principle of *Compétence de la Compétence* implies that the *Conseil d'Etat* is the only jurisdiction with the competence to consider whether an act constitute the criteria of an act of government, and thus exceeds the administrative control, or not.

b) Maturation of the *acte de gouvernement* theory in the French jurisprudence.

Part of the French scholarship supported the theory of *acte détachable*, as a development of the *actes de gouvernement* doctrine and an attempt to reduce the administrative acts that were historically granted immunity against judicial prosecution. This theory of *acte détachable* simply distinguishes the administrative aspect that could be tied to acts taken in the political capacity of the government, either in the international relations or in the constitutional relationship between the executive and legislative authority.

The idea of the detachability of administrative acts in the governmental conduct in international relations was theorized by *Paul Duez* (1935) who was inspired by the *arrêt*

[20] P. Gonod, F. Melleray et P. Yolka, *Traité de droit administratif*, Dalloz, tome 2, p 533 (2011). Original text could be found at the end of the thesis.

Goldschmidt.[21] In the *Goldschmidt* decision the *Conseil d'Etat* held that the measures to be taken by the French Government to determine those having rights to the advantages stipulated in the treaty are absolutely independent from the treaty itself and could thus be the subject of administrative litigation. The court stated that even though the attacked decree was a direct application of an international treaty between France and Germany, but the limitation of the benefits under the treaty to only certain exporters was a matter of domestic policy.[22]

Duez distinguished between the governmental measures oriented to the international order from those directed to the internal order; only the later raises the intervention of the national jurisdiction. He explains that, the judicial immunity of the act of government is explained by the unconditioned will of the judge to avoid a complicated conflict of jurisdiction and to avoid causing international difficulties to the government. The judge's will to self-reservation is at the heart of this jurisprudential policy. [23]

Michel Virally strongly opposed the theory of *acte détachable* and criticized the idea of the judge's will in the determination of the theory, asserting that the criteria to the acts of governments find its limitations in the positive law. He claims that the rules governing the jurisdiction of the administrative judge are more than sufficient to give an account to the jurisprudence.

With regard to the diplomatic acts, it is observed that they are subject to international law and that such submission is sufficient to explain the incompetence of the *Conseil*

[21] CE, 27 June 1924, Goldschmidt.

[22] ERIC E. BERGSTEN, COMMUNITY LAW IN THE FRENCH COURTS: THE LAW OF TREATIES IN MODERN ATTIRE, p. 33-34 (1973).

[23] DUEZ Paul, *Les actes de gouvernement*, Paris, 1935, réédité en novembre 2006, Paris, Dalloz, p 63-64. Original text could be found at the end of the thesis.

d'Etat. As for the activity concerning the government's relations with Parliament, these acts fall within the competence of either the Constitutional Council or refer to the political responsibility of the government which is primarily a competence of the legislative authority.[24]

René Chapus contested *Virally*'s arguments, claiming that the acts of government are an autonomous category that depends entirely on the acting government itself for being forthwith an administrative authority and a political power. One can never separate the administrative aspect of the acts immerging from the relationship of the executive to the legislative, or the international relations, or even a military operation.

An Italian ship was stopped in the high seas on May 3rd 1959, by a French war-ship during the Algerian rebellion. The *Conseil d'Etat* ruled that the situation was equivalent to a state of war and therefor prevented compensation to the Italian party, but the court refused clearly to consider this action as an *acte de gouvernement* involving international relations between France and a foreign authority. It added if the same incident had occurred without the excuse of the Algerian situation, the French administration would not have escaped liability.[25]

Chapus indicates that the absolute embrace of the *acte de gouvernement* theory will eventually create a fortified sphere of governmental functions –that can never be precisely defined-[26] untouchable by the judicial control.[27]

[24] *See* VIRALLY Michel, *L'introuvable acte de gouvernement*, in Revue du droit public, Librairie générale de droit et de jurisprudence, p. 317-358 (1952)
[25] *See* CE, March 30, 1966, *Société Ignazio Messina*, Lebon p.258.
[26] Beside the scholars cited here the following contributions represent different tentative to frame the theory of acts of government. *See* P. Serrand, *L'acte de Gouvernement – Contribution à la théorie des fonctions juridiques de l'État*, thèse Paris II, 1996 ; F. Melleray, « L'immunité juridictionnelle des actes de Gouvernement en question – le droit français confronté aux développements récents du droit espagnol », *RFDA* 2001 p. 1086.
[27] CHAPUS René, L'acte de gouvernement, monstre ou victime ? Recueil Dalloz, p. 5-10 (1958)

Ultimately in 1995, *Josiane Auvret-Finck* indicates that the acts of government theory, in fact, reflects the court's perception to the concept of separation of powers and its legal interpretation *in concreto*.[28] *Auvert-Finck* perceived the application of acts of government theory as a message of political nature sent from the judge to extend or delimit their jurisdiction over the executive through the creation of an immune sphere, a vision similar to the "*part de feu*" formulated by *Hauriou* in 1893 suggesting that when the judge extends the judicial control they have to place it within the administrative behaviour. *Hauriou* finds that the legal explanation cannot give a concrete reasoning to the theory of acts of government, since the judge have extended the court's jurisdiction to encompass a matter primarily of political nature, then the decision rendered has to be justified by practical and political considerations. [29]

The participation of the judge in crafting the political debate is a very slippery slope. It should be used for the sake of preserving the separation of power principle and rule of law, and also should be based on concrete legal arguments, otherwise it will produce irreversible outcome. The biggest fear is the risk of losing credibility and that court decisions became useless and incapable of bending the executive authority against the respect of certain sensible subjects.[30]

c) Saturation of the *acte de gouvernement* theory

[28] AUVRET-FINCK Josiane, *Les actes de gouvernement, irréductible peau de chagrin*, in Revue du Droit Public, p 131-174 (1995)

[29] M. HAURIOU, Note on CE 30 juin 1893 *Gugel*, in Recueil général des lois et arrêts, Ch. « Jurisprudence administrative », p. 41-43. *Lorsque le juge administratif avait étendu son contrôle sur les actes de l'administration, il avait dû composer avec le pouvoir administratif. Il avait dû nécessairement faire du feu en abandonnant à l'administration certains domaines de droit*.

[30] *See* Maxime REYNAUD, *Les actes de gouvernement relatifs à la défense nationale: Un périmètre renouvelé qui les situe entre atteinte et soutien à l'Etat de droit*, thesis presented to Université Lyon 2, p. 11 (2008) *available at* http://doc.sciencespo-lyon.fr/Ressources/Documents/Etudiants/Memoires/Cyberdocs/MFE2008/reynaud_m/pdf/reynaud_m.pdf *Le juge craint, en effet, que ses arrêts ne restent lettres mortes ; incapables de faire plier l'exécutif sur des sujets sensibles, avec un risque pour la crédibilité de la juridiction.*

Eventually, the application of the *acte de gouvernement* theory became limited to particularly two types of acts. Those related to the constitutional relation between the public authorities, and those concerning the state conduct in international relations.[31] Nevertheless, the administrative judge reserve the absolute power to decide on what qualifies to the judicial immunity and what deviates from the sovereign quality and thus should be considered as an act of administrative character.

1- State Acts concerning the relationship of the executive and the parliament

In the internal order, the decisions made by the executive power in the constitutional context regarding the participation in the legislative functions are not susceptible to judicial revision. The *Conseil d'Etat* considered that the act of refusal to present a project of law to the Parliament constitute an act of government and evidently non reviewable by the administrative judge. Even if the European Council stipulated in a decree that such amendments should be induced in the national legislation.[32]

The court decided that the abstention of the French government from presenting the project of the alleged law regarding the French citizens returning back from Algeria, which constitute the very foundation of the petition, is a matter that derives from the relation of the executive authority to the Parliament, which is by nature unreviewable by the administrative judge.[33]

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[31] See the speech of *Jean-Marc Sauvé*, vice-president of the *Conseil d'État*, speaking of the great challenges of the administrative jurisdiction, at the Hungarian Supreme Court on February 13, 2015, *available at* http://www.conseil-etat.fr/Actualites/Discours-Interventions/Les-grands-defis-de-la-juridiction-administrative#_ftn1. Original text could be found at the end of the thesis.

[32] *See* CE, 26 novembre 2015, *Krikorian et autres*, n° 350.492

[33] *See* CE, 29 November 1968, *Tallagrand*, n° 68938**,** Rec. p.607. The plaintiff asked to be compensated for the damages he suffered from the appropriation of his properties by the Algerian state. The law of 26 December 1961 has anticipated the promulgation of another distinctive law that will regulate the amount and the modalities of the compensation related to these circumstances. So the plaintiff criticized the abstention of the French government for not deposing the project of such law. Original text could be found at the end of the thesis.

The court cleared that in order to admit the sovereign quality, the act should be directly attached to the governmental behavior in the inter-relation with the parliament. But if it was addressed to regulate an administrative affair, like assigning a certain parliamentarian to perform a certain task, then it must be regarded as an administrative act and thus susceptible to annulation claims.

The decree by which the Prime Minister assigns a Member of Parliament to a mission that he must perform with or within an administration, constitutes the first act of the execution of an administrative mission, of which that parliamentarian is temporarily invested. Such an act, which is detachable from the relationship between the executive and the legislature as organized by the Constitution, is an administrative decision that may be the subject of an action for abuse of power.[34]

2- State Acts related to the international public affairs

In the international order, the acts taken in respond to the diplomatic conduct and the decisions related to the relation with an international actor are regarded as acts of government and escape the judicial control. In diplomatic practice the Conseil d'Etat refused to review the decision taken by the minister of foreign affairs declaring a *persona non grata* quality to a member of a foreign diplomatic mission.[35]

The *Conseil d'Etat* considers the nomination of a candidate to the election of the International Criminal Court qualifies as an act of government uncontrollable by the administrative jurisdiction, because it is a direct application of an international treaty by the member States.[36]

[34] CE, sect., 25 September 1998, arrêt Mégret, n°195499, Lebon.
[35] CE, 16 November 1998, *Lombo***,** N° 161188 & 161189.
[36] CE, Sect., 28 march 2014, *Groupe français de la Cour permanente d'arbitrage*, N° 373064. Original text could be found at the end of the thesis.

The indeterminacy about the frame encompassing the acts of government has become less redundant in the jurisprudence. In the national context of France, the space of judicial appreciation has been extensively reduced and replaced by rules of positive law defining clearly the threshold of judicial control in certain areas of governmental activity. This has delimited, consequently, the space of judicial interpretation regarding the application of the *acte de gouvernement* theory.

On the other hand, the huge developments of the International and European law, especially the creation of European courts, have restrained the legal interpretation activity in national courts.[37] According to article 55 of the October 4th 1958 Constitution the international treaties and conventions have a superior authority over the national laws. Consequently, the courts are obliged to determine if the applicable national rule is in conformity with the European legislations regulating the same subject. Which puts more restrains on the government, by striking any decree that its application shows unconformity with the European Convention on Human Rights.[38]

Obviously, the *acte de gouvernement* theory has attained a state of saturation in practice and in the jurisprudence that it has become to a great extent determinant, in its application, to both the government and the *Conseil d'Etat*. This state of saturation in legal interpretation is a direct result of the concrete relation between the State authorities. The legislative independence assure the proper function of the Parliament in controlling the governmental policies and thus courts would abstain from interfering in the political debate. Also, the respect of judicial autonomy and non-violability has a

[37] The conventionality test (*Contrôle de Conventionalité*) is an obligation the court to determine if the applicable national rule is in conformity with the European legislations. For a deeper perspective about the conventionality test and the administrative jurisprudence in France *see* L. Dutheillet de Lamotte and G. Odinet, *Chronique de jurisprudence du Conseil d'Etat – Contrôle de conventionalité; in concreto veritas?*, in Actualité Juridique de Droit Administratif, 25/2016, 11July 2016, p.1398. (Fr)

[38] *See* CE, 20 Octobre 1989, Arrêt Nicolo, Rec. Lebon p. 190. This judgement is considered to be the first pillar in recognizing the superiority of international legislation over the national laws.

direct effect on the stability of legal interpretation that courts will not tend to use it strategically to secure its independence and preserve the rule of law.

2) The State Council and the jurisprudential policy in Egypt

a) The history of the Egyptian State Council and the post 1952 Revolution effects

The Egyptian State Council was created on August 17, 1946. King Farouk signed the promulgation of the law 112/1946 that stated in its first article that the State Council is an independent institution and affiliated to the Ministry of Justice. The first official working day of the State Council was on February 10th 1947 taking residency in Princess Fawkeya's palace in Guiza.[39]

Abdel Razak El-Sanhoury Pacha,[40] was the second president of the State Council from 1949 to 1954. Under his presidency the Administrative Judicial Court stated in a ruling,[41] that there's nothing in the Egyptian law that prevent the Egyptian courts from exercising a constitutional control on the applicable laws. In this function, the court determines either the law has respected the procedural conditions stated in the constitution or not. The Court reviews the legality of the laws (*Contrôle de légalité*) that examines the determinate authority granted to the legislator (*Pouvoir lié*); either

[39] *See* http://www.ecs.eg/. The official web site of the Egyptian State Council.
[40] After studying law in Egypt, Sanhoury Pacha spent 5 years in France where he held two theses at the faculty of law in Lyon. In 1926 he returned to Egypt to be a law professor at the university, and throughout his career he held different eminent position in the Egyptian government from 1939 to 1949, among them the vice secretary of state for justice and the minister of education. Sanhoury Pacha contributed greatly to the legal history of Egypt and the Middle East. He is at the origin of the creation of the Civil Code in Egypt (1949) and many countries of the Arab world. His twelve-volume *Al-Wasīṭ fī sharḥ al-qānūn al-madanī al-jadīd* [Medium commentary on the new Civil Code] (Cairo: 1952–1970) adorns the bookshelves of any legal library in the Arab world. *See* Nabil Saleh, *Civil Codes of Arab Countries: The Sanhuri Codes*, Arab Law Quarterly, vol. 8, no. 2, 161–167 (1993), *also* Amr Shalakany, *Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamise*, in Islamic Law and Society, Vol. 8(2), (2001).
[41] 1090/6, Administrative Judicial Court, 21/7/1952, *available at* http:/www.eastlaws.com (Eg). Free unofficial translation by the author.

this legislation is a law promulgated by the Parliament or a decree produced by the executive authority. Unlike the control exercised by the Parliament that reviews the opportunity (*Contrôle d'opportunité*) of the promulgated law through the evaluation of the discretionary power granted to the competent authority.[42]

The State Council was born strong and healthy, an independent judicial authority exercising complete control on almost the entire administrative activity. Courts were granted a vast competence that entitled them to strike any governmental decree based on its unconstitutional regularity, even if it was issued in the legislative capacity of the government. Courts, also, could abstain from applying a law that shows a constitutional violation.

The Administrative Judicial Court considered that despite the legislative character of the issued decree-law (*المرسوم بقانون*), the court would define the jurisdiction of its control only in regard to the authority that produced such decree. Giving that the decree was issued by the executive authority then it is considered as an administrative act submitted to the judicial control of the State Council that could lead to its abolishment in case of its irregularity.

The State Council affirmed, on its constant jurisprudence, that all Egyptian courts have the authority to review the constitutionality of the applicable rules either objectively or subjectively. Therefore, the State Council in applying a rule – whether it is legislation or an administrative decree – has to respect the constitutional hierarchy of the rules, and thus abstaining from applying a lower rule that contradicts a higher norm.[43]

[42] *Id*, the original text could be found at the end of the thesis.
[43] *Id*, the original text could be found at the end of the thesis.

This judgment was issued on July 21st 1952, just about a day before the 1952 military uprising leading to the adoption of the 1952 Revolution. After the July 23rd 1952 incidents, the military took over the executive and the legislative authorities in Egypt and exercised *de facto* government control through the Revolutionary Command Council (*مجلس قيادة الثورة*).

During that period, the Revolutionary Command Council (RCC) issued different laws that caused many controversies.[44] First of these laws is the agrarian land reform law,[45] and the non-disciplinary dismissal of public employees law that practically allowed formal dismissal without due motivation, and offered absolute immunity to the related decrees.[46] Additionally, the RCC issued a law confiscating the properties of the Mohamed Aly family members (the royal family), and this law expressed the absolute immunity of the RCC related acts against any judicial control.[47] More laws, afterwards, were promulgated to immune different administrative decisions from judicial prosecution.

On the same day that the Agrarian Reform Law was promulgated, the RCC approved the Party Reorganization Law that gave the government complete authority in

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[44] In July 23rd 1952, a group of disaffected army officers (the "Free Officers") led by General Muhammad Naguib and Colonel Gamal Abdel Nasser overthrew King Farouk, whom the military blamed for Egypt's poor performance in the 1948 war with Israel. The revolutionary officers then formed the Egyptian Revolutionary Command Council (RCC), which constituted the real power in Egypt, with Naguib as chairman and Nasser as vice-chairman. After assuming power it selected Ali Maher Pacha as Prime Minister, but forced him to resign in 1952 after refusing to support the agricultural land reform law. At that time, the Council took full control of Egypt. The RCC controlled the state until 1954, when it dissolved itself. For further readings *see* KHĀLID MUḤYĪ AL-DĪN, MEMORIES OF A REVOLUTION: EGYPT 1952, AMERICAN UNIVERSITY IN CAIRO PRESS (1995), the original copy was written in Arabic. *And* STEVEN A. COOK, THE STRUGGLE FOR EGYPT: FROM NASSER TO TAHRIR SQUARE, OXFORD UNIVERSITY PRESS (2013).

[45] Agrarian Land Reform Law 178/1952 issued on 9/9/1952, *available at* http:/www.eastlaws.com (Eg).
[46] Non-disciplinary dismissal of the public employees law 181/1952 issued on 14/9/1952, *available at* http:/www.eastlaws.com (Eg).
[47] The law of the confiscation of the Mohamed Aly family members properties 598/1953 issued on 5/12/1953.

controlling the establishment, leadership and acceptable ideologies of political parties. This law was essential to the RCC efforts to establish complete power over the parliament which had been in a state of suspension since the coup.[48]

By January 1953, the RCC dissolved and banned all political parties, declaring a three-year transitional period during which the RCC would rule. A provisional Constitutional Charter granting legitimacy to the RCC was proclaimed on 10 February 1953,[49] in an indication that the RCC officers had begun to think more ambitiously, and started referring to the July coup as a revolution.[50] Nasser declared that reforming the parliamentary system had become a minor objective compared to the wider aims of the revolution.[51]

The State Council was reformed by the promulgation of the law 165/1955 reorganizing its structure.[52] Among the reforms was the creation of the Supreme Administrative Court to serve as a second degree jurisdiction in the administrative litigation, functioning as a higher court with the essential ability to review the judgments rendered by Administrative Judicial Court.

The Supreme Administrative Court has clearly abandoned the previous jurisprudence, which enforced the judicial independence of the State Council which used to assert its constitutional control. The Supreme Administrative Court considered that the recently issued law declaring the non-reviewability of certain administrative decrees, is

[48] STEVEN A. COOK, THE STRUGGLE FOR EGYPT: FROM NASSER TO TAHRIR SQUARE, OXFORD UNIVERSITY PRESS, 49 (2013)
[49] 1953 Constitution issued and published on 10/2/1953 by a constitutional declaration of the general commander of the armed forces and leader of the army revolution. This declaration functioned as the only constitution of Egypt till the promulgation of the 1956 Constitution.
[50] *Id* at 50.
[51] Gamal Abdel Nasser quoted in Gehad Audah, *The State of Political Control: The Case of Nasser 1960-1967*, The Arab Journal of the Social Sciences, 2 no.1 (April 1987).
[52] The organization of the State Council law 165/1955, issued on 29/3/1955, *available at* http:/www.eastlaws.com (Eg).

consisted with the constitution. It clearly stated that the absolute immunity of certain administrative acts does not constitute a constitutional violation to the fundamental right of adjudication and access to justice. The court reasoning was that this jurisdictional adjustment is merely a reorganization to the judicial functions which is a prerogative of the law and the legislative authority. Hence, this amendment is constitutional as long as it is regulated by a legislative norm.[53]

The Supreme Administrative Court presented an alternative interpretation to the notion of equality before the law, allowing the exception of excluding the acts related to the non-disciplinary dismissal of public employees from being judicially reviewed. The court declared, in the judgment reasoning, that equality before law means the non-discrimination between individuals of the same group at the same legal position, and since the stated law (The non-disciplinary dismissal of public employees) does not manifest a discriminatory practice therefor it exhibits an equal and just application to all the public employees of the different institutions and thus deemed consistent with constitutional principles.[54]

This Jurisprudential shift in the legal interpretation is much explained by the governmental pressure caused after the 1952 military uprising. [55] The judges of the State Council have adopted a "loose" legal interpretation for the ultimate aim of avoiding the

[53]131/3, Supreme Administrative Court, 29/6/1957, *available at* http:/www.eastlaws.com (Eg) Free unofficial translation by the author. Original text could be found at the end of the thesis.
[54] *Id*, free unofficial translation by the author, the original text could be found at the end of the thesis.

[55] Sanhoury Pacha, the State Council president, was forced into retirement by President Nasser and was physically attacked by a mob for attempting to restore the constitutional government in 1954. Sanhoury left Egypt and went to different Arab countries where he worked as a constitutional advisor and contributed greatly in drafting their civil codes. *See* NATHALIE BERNARD-MAUGIRON, JUDGES AND POLITICAL REFORM IN EGYPT, AMERICAN UNIVERSITY IN CAIRO PRESS, CH.9 (2008).

devastating confrontation with the governing regime that could have led, most probably, to the total abolishment of the State Council as an independent administrative judiciary. Same jurisprudential policy was adopted by the French *Conseil d'Etat* in its early age by creating theories that served primarily as a preventive measure to any brutal confrontation with the governing regime.

During the Nasser era, some scholars considered the recent jurisprudential policy of the State Council in supporting the RCC laws, is nothing less than an act of patriotism and reflects great wisdom in balancing the contradicting interests of the government and individual rights. Professor Tharwat Badawy is among those who believed in the idea that true development requires revolutionary measures, and these measures should not be left strangled by formality. Badawy admires the jurisprudential policy that liberated the governmental discretion.[56] In his opinion it is a moderate price for preserving the State Council as an independent administrative judiciary, forasmuch the people of Egypt have been longing for too many years to get rid of the mixed courts system.[57] Badawy, hopes that the RCC laws will eventually be replaced by more liberal legislation when the society reach certain level of development that no longer require such governmental control.[58]

b) The doctrinal development of the acts of sovereignty theory in Egypt.

1. Pre-Nasser era

[56] Tharwat Badawy, Mabadia' al-qanoun al-edary (Principles of administrative law), Dar Al-Nahda Al-Arabeya, page 86, 1966.
[57] Mixed Courts were competed to adjudicate legal issues between foreign nationals, and between foreigners and Egyptians. Three courts were established in Cairo, Mansoura and in Alexandria, the proceedings were held in French. Judges were appointed by the Khedive from leading Egyptian and foreign candidates, but the majority were non-Egyptians. "The judiciary was at all times under the authority of the rulers of Egypt." *See* Mark S. W. Hoyle, *Mixed Courts of Egypt*, Arab & Islamic Laws Series, xxvii, 206, 1991. *Also* Brinton, Jasper Y, *The Mixed Courts of Egypt*, The American Journal of International Law, vol. 20, no. 4, 670–688, 1926 .
[58] Badawy at 87.

In 1950, at the early age of the Egyptian State Council, Professor Osman Khalil believed that the acts of sovereignty theory is an actual result of the reconciliation of the judicial and the executive authorities, whereas the government agreed to submit its entire activity to the judicial discretion with a unique exception of the acts of sovereignty. He explains that the administrative law accepts such outcome, giving that the acts of sovereign quality are very much intertwined with rather political than legal responsibility, which implies that the supervising authority should be of political character which evidently exceeds the court's competencies.[59]

Professor Khalil's concern is that the immunity granted to the acts of sovereignty could be used to legalize an act of misuse of public authority. For that particular reason he strongly favors that the interpretation of the sovereign quality should be released from any concrete definition and to be left entirely to the court's consideration, to be decided on case to case bases.

Khalil takes the expulsion of individual foreigners as an example, it is very well grounded in the jurisprudence that the expulsion is a matter of sovereignty. Deporting a foreigner or denying their access to the country is a matter of sovereignty and thus falls short to the judicial jurisdiction.[60]

On a different occasion, the Administrative Judicial Court ruled on 27/1/1948 in favor of the plaintiff who has been the subject of a decree of expulsion. The court did not accept, at first instance, the sovereign defense put forward by the government attorney. On the contrary, the court waited first to discuss the fact whether the plaintiff has legitimately acquired the Egyptian nationality or not before announcing the sovereign

[59] Osman Khalil, Administrative Law – the State Council, 2nd edition, Dar Al-Fikr Al-Araby, 1950. At page 89.
[60] Egyptian mixed tribunal ruling on 14/4/1931 and 22/5/1939 cited in Osman Khalil at 96.

quality of the act. This finding if proven right, will put the attacked decree in violation of article 7 of the constitution, which prohibits the expulsion of Egyptian nationals, and therefore the sovereign plea cannot be used in a matter particularly prohibited by law.[61] Although the government disputed that the plaintiff has acquired legally the Egyptian nationality, it was proven wrong and the court ruled in favor of the plaintiff and annulled the decree of his expulsion.[62]

Khalil criticize the theory for not allowing compensation for damages caused by an act of sovereignty, mainly because the announced decision of the court's incompetence restrain it from discussing the compensation demand. Khalil suggested that the state responsibility -regarding the acts of sovereignty- should be based on risk, unlike the civil code that rests the responsibility on error which requires discussing the case merits.

Eventually, there should be a middle solution regarding this theory, whereas the acts of sovereignty escape the judicial revision in abstract but only raises the court's competence to announce the State liability to compensate the damages suffered, without discussing the merits of the acts.[63]

Part of the scholarship, before the inauguration of the State Council, opposed to this idea and criticized the earlier judgement in 1901 of the mixed courts,[64] for holding the state liable for tort regarding acts of sovereignty. Professor Mohamed Zoheir Garana supports that the State should never be held liable for compensating damages caused by an act of sovereignty. He believes that these acts are deeply affiliated with political

[61] This finding was asserted by a court judgement rendered by the French Tribunal of Conflicts on 15/2/1895, see Osman Khalil at 96 footnote 2.
[62] Osman Khalil at 96.
[63] Khalil cited the decision of the mixed appeal court on 31/1/1901 that ruled in favor compensating a foreigner (Guido Levi) who suffered damages from an act of sovereignty, and the compensation was grounded on the idea of justice as if the act of sovereignty that caused damages to a "privileged" foreigner should be treated like expropriation and thus liable to compensation. *Id* at 103.
[64] *Ibid*

considerations that amounts any individual right, and raising the State responsibility in that matter will limit the discretion required by these considerations.[65]

It seems that Khalil is not really settled on the position of the theory and its efficiency within the administrative doctrine. Theoretically, the administrative doctrine is sufficiently rich to provide theories that support the governmental discretion without the need of the sovereign label. Such as the theory of necessity and the discretionary power of the administration, which will enable the court to discuss the case merits and decide if it is in the best interest regarding that particular matter to be decided solely by the executive authority or it shows irregularity deeming its annulation.

Practically, Khalil admits that the acts of sovereign theory is only a result of the reconciliation between the State Council as a judicial body and the Government as the executive authority that allowed the establishment of an independent administrative judiciary. Although, he asserts that it is unlikely to witness the total abolishment of the theory in practice but he strongly supports narrowing its scope to minimum application.

2. Post-Nasser era

After the Nasser era, the State Council jurisprudence that applied the RCC laws and adopted a loose interpretation of the acts of sovereignty theory, was faced with quasi-entire objection from the Egyptian legal scholars. Professor Suleiman El-Tammawy,[66] criticized the Supreme Administrative Court decision that asserted the legality of the laws that denied the right to recurrence to justice, by immunizing certain administrative

[65] Mohamed Zoheir Garana, Mabadia' al-qanoun al-edary al-masry (Principles of the Egyptian Administrative Law), 1944

[66] Suleiman Mohamed El-Tammawy is an imminent law professor and jurist, he was dean of law school in Ein Shams University from 1973 to 1981. Participated in drafting many legislations among them was the 1971 constitution.

decrees from any judicial revision.[67] El-Tammawy said that the essence of this problem is limited to three clear principles; the principle of legitimacy, the independence of the judicial power and the legislative freedom in organizing the judicial authorities. Moreover, it is well established that the principle of legitimacy enforces the rule of law, which is only realizable by giving to courts the power to review the constitutionality of laws and the legality of the administrative activity.

El-Tammawy explains that the legitimacy principle was established progressively, and it is still developing. Historically in France, as in Egypt, the government was not subject to judicial revision, but with time and political development all governmental activity became susceptible to judicial control. Although this control is not complete, but each time the judge expands the court's control it takes over a part from the sphere given to governmental discretion, which eventually gives more rights to the citizen and marks a milestone in the court's jurisdiction.

From another point, the judicial power is an independent authority, which means that it is on equal level with the other state authorities. Thus, it find its legitimacy independently from the legislative authority.

El-Tammawy criticized The Supreme Administrative Court judgement for not distinguishing between the regulative powers of the Parliament; in organizing the access to justice as a matter of public service, and between the absolute deny to the right to access to justice. Every law regulating the judicial procedures and recurrence to justice have at heart a certain mission which is enabling the exercise of public freedoms and fundamental rights in an undisrupted manner. Consequently, the legislative

[67] *See* Suleiman Mohamed El-Tammawy, Al-wajeez fil qadaa' al-eidarri (the brief of administrative adjudication), Dar al-fikr al-araby, 1974. At page 260 and follow.

authority have the power to regulate the judicial authority only if the aim is to organize the access to justice, but not to exclude certain claims.

From the point of view of propriety, denying access to justice in certain cases does not empower the principle of good functioning of public services (*le bon déroulement des services publics*). It is actually nothing but a severe strike to the rule of law and principles of equality and eventually it goes against the public interest.

The Public Interest as a legal principle finds its source in the application of the necessity principle. Where it is allowed, exceptionally, the breach of the legitimacy principle to confront unusual circumstances jeopardizing the general interest of the community as a whole. The preservation of the State is sublime to law *Salus patriae suprema lex*, which is the primary motive to immune the acts of sovereignty. El-Tammawy notes that preserving the State also includes the proper application of the rule of law and protecting the public interest.

Eventually, the laws denying access to justice were squashed after the promulgation of the 1971 constitution on the 11th of September 1971,[68] which asserted explicitly on the liberty of the State Council courts to extend its control on the entire governmental activity, with the only exception of the acts of sovereignty.

The Supreme Court (Supreme Constitutional Court nowadays) in the decision of 6/11/1971 have announced the unconstitutionality of the decree law 31/1963 that considered the non-disciplinary dismissal of public employees as an act of sovereignty and thus immune from any judicial prosecution.[69]

[68] Article 68.
[69] 6/1, Supreme Court, 6/11/1971. *See* note 51 *Al-Tammawy* at 291.

Al-Tammawy considers this judgement as a milestone in the battle of the judicial authority in preserving its independence against the unprovoked intervention of the governing authority. This decision has recovered the violated importance of two legal principles. First the absolute control of the judicial authority over the entire governmental activity for the exception of the acts of sovereignty as a caprice to the public interest principle. Second, the distinction of the sovereign quality depends on the nature of the act itself, which is only decided by the competent judges and certainly not the will of the executive authority.

A rising opinion among Egyptian scholars called for the redrafting of the acts of sovereignty provisions.[70] The new draft should only allow the admissibility of tort claims regarding the acts of sovereignty, since article 68 of the 1971 Constitution prohibits explicitly the immunization of the administrative activity. On the other hand, a precise definition should be clearly set to the required capacity and interest to raise claims of damage compensation caused by an act of sovereignty.[71]

[70] Article 11 of the State Council law 47 of 1972 states that the courts of the State Council are not competed to review any claims related to the acts of sovereignty.
[71] See Councilor Mohamed Maher Abul-Enin, PhD, *Da'awa al-elgha' amam al-qada' al-eidari* (Claims of Annulation in the Administrative Adjudication), 1996 at page 175.

Chapter II - The theory of acts of sovereignty in the modern jurisprudence of the Egyptian State Council

The successive laws regulating the State Council have expressly stated the non-reviewability of the acts of sovereignty.[72] The recent jurisprudence is entirely asserted that the definition of what constitutes an act of sovereignty is left to judicial determination. Thus, the development of the acts of sovereignty doctrine is still ongoing as long as the State is still facing political instabilities.

In this section I will present different decisions that cited the Acts of Sovereignty theory, while analyzing the legal interpretation course that each decision developed. Unlike the French jurisprudence, the State Council courts did not achieve the complete saturation of the doctrine which makes it less resistant to frequent adjustment.

The French certitude is a direct consequence of the strong stability in the inter-relation of the public authorities. While in Egypt, the absence of the defined lines between the government and the parliament puts the State Council in restless struggle to protect the legitimacy principles and the public interest. Moreover, the State Council judges find themselves forced into a battle that is not fit for courts, but for the ultimate goal to defend the public interest, and to protect the fundamental rights and public freedoms, the court uses strategically legal interpretation to achieve a certain political end.

This struggle will never end unless the legislative-executive relationship reaches a state of reciprocity ensuring the independence of each authority. In the following section I will

[72] *See* Article 11 of the State Council Law 55/1959, and the State Council Law 47/1972

present three State Council judgments that engaged the acts of sovereignty theory in the judicial reasoning.

1) The expulsion of the Israeli consul from Alexandria (2002)

The theory known in the French doctrine as the *acte de gouvernement* is introduced in the Egyptian context as the acts of sovereignty. Article 11 of the current State Council law 47/1972 explicitly states that the courts are not competent to litigate the claims concerning the acts of sovereignty.

In the Egyptian doctrine as in France, the criterion of what is qualified as an act of sovereignty is left to judicial determination. The administrative jurisprudence has defined the acts of sovereignty as being limited to the acts related to the relationship of the state authorities and those acts related to the international relations, but the jurisprudence has produced different interpretations of the theory depending on the particularity of each case.

In 2002 the Administrative Judicial Court in Alexandria ruled in favor of its incompetency to oblige the president to expel the Israeli consul in response to the military attacks operated by the Israeli army against Palestinian civilians.[73]

The plaintiff side in this case was represented by many political and public figures such as famous attorneys and representatives from different syndicates and political parties, and people from different sectors of the society. Their primary demand – as indicated in their petitions – was to rule in favor of the suspension and annulation of the negative decision

[73] 6399/56, Administrative Judicial Court in Alexandria, 23/5/2002, unpublished.

(omission) of the president of the Republic to expel the consul of Israel from the city of Alexandria.

The court found that the legal question raised here is mainly a question of its jurisdiction in controlling such act. The main argument presented in the petition, regarding the court jurisdiction, is mainly arguing that the consul is not a member of the diplomatic mission because of his detachability from any diplomatic purposes and essentially restricted to the commercial and administrative representation. Consequently the act enforcing the consul expulsion is not related to the diplomatic conduct of Egypt with a foreign State, and therefore cannot be regarded as an act of sovereignty that escapes the judicial jurisdiction.

The court in its reasoning has showed great sympathy to the violent situation in Palestine, and raised different legal provisions enforcing the Arabic unity and the freedom to all Arabic population. And then, the court asserted that only the legislator has granted the judiciary the discretion to decide upon whether a State act constitutes an act of sovereignty or falls within the administrative functions of the State, adding that what might look usually like an administrative act might be regarded in exceptional circumstances as a sovereign act because of its close relation to the diplomatic policy of the State. Essentially, the theory of acts of sovereignty is deeply grounded in the international relation field because of its strong relation to the political considerations that justifies an expand latitude of a discretionary power without the interference of any judicial appreciation because such discretion is built on acquiring certain information and specialized criterion of evaluation that exceed the ability of any court.[74]

[74] *Id*, this is a free unofficial translation by the author, the original text could be found at the end of the text.

The court also enumerated the different positive actions that the Egyptian government adopted as an objection to the Israeli policy toward the Palestinian conflict. The court highlighted that the President redrew the Egyptian ambassador from Israel and decided to suspend all diplomatic communications unrelated to the Palestinian conflict, such policy allowed the Egyptian minister of the foreign affairs to meet with Yasser Arafat (the Palestinian leader) despite his detention by the Israeli forces which was of a great assistance to the progress of the peace negotiations.

Finally the court founded its legal reasoning essentially on the revision of the legal argument raised by the group of plaintiffs claiming that the consular affairs differ from the diplomatic relations. The court started by citing different decisions from the French and the American jurisprudence and mentioned that there is a quasi-unanimous confirmation in the international doctrine and jurisprudence that consider the consul activity and related decrees are independent from the diplomatic relations. Nonetheless, the special relation between Egypt and Israel implies a different interpretation of this finding. In fact, both countries have signed and ratified a peace treaty that imposes reciprocal obligations, it stipulates particularly on establishing diplomatic and consulate relations and the immediate termination of the economic boycott. That puts the consular affairs as an integral part of the diplomatic relations particularly between Egypt and Israel.

In this regard, the court declared the inseparability of the consular relations with Israel from the diplomatic conduct of Egypt. Therefore, the "political act" to expel the Israeli consul from the city of Alexandria is an exclusive competence of the president of the Republic to which the jurisdiction of the State Council courts fall short.

Since the question raised by the case is of primarily a legal nature, as much as the court reasoning partially is, but the clever observer might find dubious the utility of mentioning the positive actions that the Egyptian government concerning the Palestinian conflict. More importantly, it is highly doubted that the court's opinion on the Palestinian matter could be credible for the case, because of its deviation from the court's mission in trenching essentially a question of legality.

Obviously, the court's legal reasoning stated that despite the unanimous affirmation in the comparative doctrine and jurisprudence the consular affair in the Egyptian/Israeli context is considered to be a part of the diplomatic relation between the two states, and a direct execution of the peace treaty. That was more than sufficient to produce coherently the final decision. What end could the political argument possibly serve? Why did the court –even not asked to- present its opinion on the Palestinian conflict which is a matter of policy by nature?

One can only assume that the court felt an "urge" to convey to the public that it believes in the moral duty of supporting the Palestinian conflict, but it surely do as well trust the political conduct of the Egyptian government and asks the population to do the same as well. This urge has two purposes, first to justify the deviation from the prevailing legal opinion in the comparative scholarship and jurisprudence. Second to support its final decision declaring the attacked decree an act of sovereignty, and keeping or expelling the Israeli consul is an exclusive discretion granted to the president of the Republic.

The second case involves the diplomatic relations with Israel as well, but the time has changed so as the socio-political scene in the Egyptian society.

2) The suspension of exporting natural gas to Israel (2008)

Since the first presidential elections in 2005 the confrontation between the executive authority and the judges of Egypt has seen an aggravation. Judges have been struggling for years to enhance their independence from the executive power and exercise full supervision of the electoral process to achieve transparent elections. In order to gain concessions, judges went as far as to threaten to boycott the supervision of the presidential and legislative elections in the fall of 2005 and they have organized sit-ins in the streets, marking the first protest in the entire judicial history of Egypt. Since that time the political scene in Egypt has seen growing tensions between the judiciary and the executive authority.[75]

In 2008, the Administrative Judicial Court in Cairo have decided to suspend the exportation of the Egyptian natural gas to Israel.[76] The plaintiff part consisted of a list of different political actors, and they all argued that the Egyptian government has signed an agreement, since 2000, with the Israeli government to export considerable volumes of natural gas at a price dramatically lower than its value in the international market today, while the internal economic situation in Egypt cannot tolerate such generosity. The State attorney claimed

[75] *See* NATHALIE BERNARD-MAUGIRON, JUDGES AND POLITICAL REFORM IN EGYPT, AMERICAN UNIVERSITY IN CAIRO PRESS (2008). The struggle between the two powers was in full swing in the spring of 2006, when a conference convened in Cairo in early April on the theme of the role of judges in the process of political reform in Egypt and the Arab world. The conference was organized by the Cairo Institute for Human Rights Studies (CIHRS) in cooperation with the Institut de Recherche pour le Développement (IRD). This book is a collection of papers from the conference dealing with Egypt. They allow a better understanding of the role judges are playing in the process of democratic reform in Egypt as well as the limits of their struggle.

[76] 33418/62, Administrative Judicial Court in Cairo, 18/11/2008. *See* Mohamed Ahmed Atteya, لمحات من ذاكرة العمل, Dar El-Fateh, p. 83-91 (2014). The author is the former prime vice-president of the Egyptian State Council and magistrate president of the judicial administrative courts and the former minister of the municipal governance during the SCAF regime in 2012-2013. The author exposes his landmark decisions throughout his entire judicial career.

that this act constitutes an act of sovereignty regarding the international relations of Egypt with a foreign State, and thus the State Council has no jurisdiction to review such act.

The court rejected the act of sovereignty defense and asserted its absolute power on the matter. It considered that the disposition and the exploitation of the country's natural resources is an administrative activity submitted to the judicial revision. Therefore, the government is bound to respect the constitutional and legislative limits for the purpose of achieving the maximum public utility of these natural resources.

The court's main legal argument is about article 123 of the 1971 Constitution, and since it stipulates that the law regulates the rules and procedures regarding the exploitation of natural resources and the public services,[77] then the government was under the obligation to present the attacked contract to the Parliament to attain the proper approval on the obligations and the procedures concerning exporting the natural gas to a foreign State.

The court concluded that any governmental decree concerning the disposition of the natural gas without seeking the proper approval of the legislative authority is deemed null and has no legal effect what so ever, and ended by ruling in favor of suspending the exportation of natural gas to Israel.

The court reasoning was not limited to the legal argument based on the constitutional breach and the public utility considerations. The court stated also that many high profile employees in the Egyptian government and delegates of the Parliament and experts have

[77] This is a free unofficial translation by the author. The original text of article 123 of the 1971 Constitution reads as follow
يحدد القانون القواعد والإجراءات الخاصة بمنح الالتزامات المتعلقة باستغلال موارد الثروة الطبيعية والمرافق العامة، كما يبين أحوال التصرف بالمجان في العقارات المملوكة للدولة والنزول عن أموالها المنقولة والقواعد والإجراءات المنظمة لذلك.

asked relentlessly to revise the pricing concerning the exportation of the natural gas, and neither the government nor the Parliament was in measure to respond to their enquiries. This makes the matter – as the court indicated – highly dubious, asking why the government shadowed such important economic trade.

The court also expressed its concern toward the conduct of the government, and not defending its position in the court of law, regarding the reason to export natural gas for such a fracture price of its market value, and the unorthodox procedures that the government adopted to conclude the contract. The court doubted the ambiguity of the attacked decision, giving that it was neither published as a normal procedure of all administrative acts nor the details of the agreement were clearly announced, despite the numerous demands of inquiry presented by parliament members and political figures. [78]

This political argument was logically unnecessary to reach the final legal conclusion, which is already proven by showing the constitutional irregularity. It seems that the court felt another "urge" to express its unconsent toward the government behavior and the poor functioning of the Parliament that only puts the responsibility to protect the national interest and the due diligence of public utility but in the jurisdiction of the State Council courts. Hence, the court panel acted on behalf of the parliament members.

It seems that whenever the State raises the acts of sovereignty defense, the court tends to ask itself whether it trusts the government in carrying on such activity or not? The court asks, itself, should the government be granted the exclusive discretion to decide on that

[78] This is a free unofficial translation by the author, the original text could be found at the end of the thesis.

matter despite any legal formality? What benefit could that matter contribute to the public interest? Would the Parliament be able to efficiently discuss that matter in public sessions?

Obviously, that is not the question that the court was requested to answer. When originally the question was about legality and the court did answer deductively, but the real court rational is primarily of policy character. In fact, all these political arguments cited in the court reasoning -the incapability of discussing the matter at the Parliament and the ambiguous procedures of the government- could be regarded as the real motivation behind raising the jurisdictional limit of the court.

The court became a political calculus trying to insert certain policies in the governmental activity. Nevertheless, the court would express these policies as a direct requirement of the public interest which is a legal term. Obviously the court is not fit for policy talks, because simply the court is neither meant to function that way nor it represent a majoritarian ideology justifying its conduct.

The court is not deliberately covering up the political truth about the alleged dispute, but because the legality control can no longer be sufficiently fit to ensure the proper functioning of the separation of powers principle, as set by the constitution and public practice. Giving the lack of trust in the current governmental policy the court is bound to act as a policy maker, but unfortunately it does not possess what it takes.

Nevertheless, these political arguments –by itself- cannot establish grounds for appeal because it is not essentially based on factual or legal grounds, unless the government started tackling these arguments of policy to eliminate any unconscious doubt regarding its policies.

So eventually this judgment was appealed by the Supreme Administrative Court, it asserted on the sovereign quality of the attacked decree, and that the governmental activity regarding the exportation of natural resources is immune against any judicial control.

Legal scholars have seen this judgment as a scare of weakness in the administrative jurisprudence. Magued Ragheb Al-Helw, thinks that the court should have been more prudent and wise to the damage affecting the national interest by exporting the natural gas at such low price. Evidently, the court is explicitly called upon to act on behalf of the Parliament.

Al-Helw blames the Supreme Court for not using its discretion and specifically legal interpretation to announce the non-sovereign quality of the attacked decree, for the sake of stopping the exportation of natural gas to Israel. The court should have abandoned its traditional interpretation of the acts of sovereignty theory or even have bended it to oblige the government to respect the public interest, which is, according to them, not selling the natural resources at low prices and specifically not to Israel.[79]

Al-Helw seems firm on the fact that courts are obliged to use legal interpretation strategically, and moreover, it should overstep the weak parliamentary jurisdiction in order to protect the public interest. His critique gives the impression that he believes that the focal point of the judicial activity is not settling disputes of legal nature but rather it functions as a political tool to bend the governmental policy when the legislative authority seems to be incapable. Which means that it is the court's duty to act as a political

[79] Magued Ragheb Al-Helw, The Administrative Judiciary, Alexandria University Press, 2016. At 45. This is a free unofficial translation by the author, and the original text could be found at the end of the thesis.

calculation to the governmental activity to maintain the functionality of the separation of powers principle.

Therefore the court reasoning has to be mainly justified by arguments of policies and practicality, as if the panel are Members of Parliament and not members of the judicial authority. But this practice did not prove its efficiency, yet, as we will see later. Mainly because the judge does not possess any competencies of a politician.

The next case to come up is a judgement of the Supreme Administrative Court. It shows that the court clearly admits to be a political authority if the government defense kept abstaining from hammering the main legal issue and ignored the court's demand to present objective defense justifying the real motivation behind the current policy.

3) The final ruling concerning the reallocation of the maritime boarders with the Kingdom of Saudi Arabia (2017)

In January 2017, the Supreme Administrative Court refused the appeal of the Egyptian government concerning the annulation of the signed agreement of the reallocation of maritime boarders with KSA, which basically reallocate the position of two islands namely Tiran & Sanafir to the territorial sovereignty of KSA.[80]

The court produced the final decision in 59 pages. It went generously explaining the theory of acts of sovereignty, highlighting that the submission to the judicial authority and enforcing principles of justice and protecting the national interests and individual liberties are all also manifestations of sovereignty. The court asserted that the rule of law and the

[80] 74236/62, Supreme Administrative Court, 16/1/2017. This case is publicly known by "Tiran and Sanafeer".

acts of sovereignty are not – and should not be – contradictive. Moreover, the traditional interpretation of the acts of sovereignty as a theory should be replaced by a new one, one that reflects a consistent understanding of the recent constitutional amendments and its effect on the legal system as a whole.[81]

The judgment reasoning asserted on the transcendental value of the people's revolutions of January 25th and June 30th, that implied new constitutional reforms leading to a new legal system that changed the preconception of the Separation of Powers concept, manifested in the great value restored to the people in exercising their right to participate in the political, social and economic life in Egypt. Henceforward, the legal interpretation has to respond to this understanding, which is introduced by the recent constitutional amendment affecting the foundations of the Egyptian legal system.

The court have distinguished between the control of the constitutionality which is an exclusive competence of the Supreme Constitutional Court, and the interpretation of the constitutional provision which the State Council courts exercise to the extent to determine its constitutional jurisdiction. Therefore, the new constitutional amendments imply an original and adequate "interpretation".

Historically, the power to conclude an international agreement was a prerogative of the executive and the legislative authorities. After the 2014 Constitution, article 151 has imposed two renovated obligations. The first requires the approval of the population in a general referendum before the ratification of any international treaty concerning the State

[81] *Id*, unofficial translation by the author, and the original text could be found at the end of the thesis.

sovereignty. Secondly, it is generally prohibited to conclude a treaty that violates the constitution or wavers part of the territorial integrity of Egypt.[82]

The court concluded by asserting the illegality of any governmental act – either it is of sovereign quality or not – if it consisted on a violation to the constitutional provisions, and any person with the proper capacity to act has an interest to claim this illegality in a legal suit reviewable by the State Council.

This decision revives the old jurisprudence of the State Council of post-1952 Revolution, which grants the administrative judiciary the power to examine the constitutionality of the acts provoked in an annulation claim, where the court is obliged to abstain from applying any act that constitutes a breach to the constitution. The court firmly declared that the use of the sovereignty defense cannot be a cover-up justifying a constitutional breach.[83]

This recent ruling of the Supreme Court has adopted the same methodology of the French *Conseil d'Etat* that created the theory of *acte détachable* in *arrêt Goldschmidt* (1924).[84] The actual aim is to submit the entire governmental activity – despite its formal appearance- to the judicial control, and only the court has the competence to decide on its reviewability. Which is clearly a matter of respect to the legitimacy principle and enforcing the rule of law. But the two judgments diverge in application, where Goldschmidt only adjusted the application of the international treaty, the Tiran&Sanafeer ruled in favor of the annulation of the treaty itself.

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[82] Article 151 reads as follow يمثل رئيس الجمهورية الدولة في علاقاتها الخارجية، ويبرم المعاهدات، ويصدق عليها بعد موافقة مجلس النواب، وتكون لها قوة القانون بعد نشرها وفقًا لأحكام الدستور. ويجب دعوة الناخبين للاستفتاء على معاهدات الصلح والتحالف وما يتعلق بحقوق السيادة، ولا يتم التصديق عليها إلا بعد إعلان نتيجة الاستفتاء بالموافقة. وفى جميع الأحوال لا يجوز إبرام أية معاهدة تخالف أحكام الدستور، أو يترتب عليها التنازل عن أى جزء من إقليم الدولة.

[83] *Supra* note 80 at 15. Original text could be found at the end of the thesis.

[84] *Supra* note 20-21.

We can extrapolate that the administrative judiciary tends to extend its jurisdiction when the executive-legislative relationship is marginalized and it shows a significant disability to maintain its proper constitutional functions as mandated by the separation of powers principle.

The recurrence of a lawsuit like Tiran & Sanafeer before the French judiciary is most likely to be a dubious statement. Because the type of these hidden arguments of trust are likely to be settled *a priori* by parliamentary debates because of its inherent political/ideological character. The French political pluralism is strongly functioning that no court would feel the 'urge' to carry on any democratic duty that normally falls within the jurisdiction of the other authorities.

The Supreme Court would not have deliberately chosen this path if only the government have cleared the truth behind the utility of such treaty, and disclosed the real nationality of the two islands, instead it did not provide any factual evidence in defense of her standing.

Chapter III – The Tiran and Sanafeer dilemma

This case illustrates the jurisprudential shift in the acts of sovereignty theory, and shows how the court justified its interference in debates of policy disregarding the legal formality. Apparently the court did not perceive this case as a legal dispute adjudicating whether such act is legitimate or not, rather the court regarded it as a dispute over the principle of transparency and the court was asked to enforce the government into respecting it.

1) When the Parliament lacks public trust, people turn to courts.

On April 10th 2016, more than 180 plaintiffs, mostly social activists from different sectors, submitted a petition to the Administrative Judicial Court of Cairo. Claiming the suspension and the annulation of signing and concluding the maritime demarcation treaty with the Kingdom of Saudi Arabia, and the sedation of the two islands Tiran and Sanafeer and, consequent to its annulation, depriving the Parliament from the right to discuss such treaty.

On June 21st 2016, the court ruled against the State.[85] It refused the defense of non-admissibility, and announced the invalidity of the State representative's signature on the maritime demarcation treaty with the Kingdom of Saudi Arabia signed in April 2016. Essentially, because it included the sedation of the two islands Tiran and Sanafeer to the Saudi sovereignty.

[85] 43709/70 , 43866/70, Administrative Judicial Court, 21/6/2016, *available at* http://www.achariricenter.org/wp-content/uploads/2016/06

This case as a legal claim, presented many complications. The first set of obstacles concern the case admissibility. Second is the merit of the case which is, basically, addressing objectively the legal problem in question.

a) Admissibility

Primarily, the treaty is an act of sovereignty where the judicial jurisdiction falls short to its revision. Secondly, according to article 151 of the constitution the competence of reviewing international agreements is a prerogative of the legislative authority, and thus the court should announce its incompetence to review the case on bar. Lastly, this case is inadmissible to judicial revision for the lack of objective, which is a final administrative decision susceptible to a claim of annulation.

1. Acts of sovereignty defense

The court faced a big challenge in responding to the sovereignty defense. First, how the treaty in question is not applicable to the acts of sovereignty defense. Second, it had to prove why this case is different from other judgments where this very same court ruled for the non-reviewability of international agreements including a maritime demarcation treaty signed with Cyprus.

The court said that according to the supreme administrative court the acts of sovereignty as a theory is very malleable and it is inversely proportionate to democratic and liberal principles, so it would have an excessive field of application in dictatorial regimes and gets relatively narrower scope in the progress toward enforcing democracy.[86] While all

[86] 13846/59, Supreme Administrative Court, 21/4/2013, previously cited.

legislative norms regulating the acts of sovereignty stood silent for putting an exact definition, therefore, it is a matter of judicial discretion to decide, on each particular case, whether an act qualifies for such quality or not.

The court also assured that the non-reviewability of the acts of sovereignty is not because it stands in a higher level than any legality revision, but precisely because the court does not acquire the technicality of evaluating such acts, because of its inherent political character. Which implies the availability of certain information that exceed the resources of any court. However, where this claim falls short, the court should deem this defense inapplicable.

It is obvious that the case at hand raises a legal dispute that revolves around the application of article 151 of the constitution, and its effect on the legitimacy of signing such a treaty. The court elaborated, that there's no doubt that what concerns the territorial integrity of Egypt is a matter concerning every citizen of Egypt, and the source of any sovereignty derives essentially from the people and to serve the people. Thus, the sedation of any territorial part of the State is a serious manifestation of degrading the national sovereignty, which differs entirely from the intended meaning of immunizing such act.

In response to the second part of the acts of sovereignty defense, the court asserted that judicial decisions are sufficiently flexible, and thus experience a jurisprudential shift that revolves around the unique circumstances of each case. Nevertheless, this case is dramatically different from the mentioned treaty signed with the state of Cyprus. Because it did not involve any territorial transfer to a foreign state. Nevertheless, the acts of sovereignty defense can only produce effect on legitimate acts. Whereas, the claimed treaty

constitutes a major breach to article 151 of the constitution that prohibits the conclusion of any a treaty that violates the constitution or wavers any part of the territorial integrity of Egypt.

2. Article 151 and the Parliament jurisdiction

According to the 2014 constitution, article 151 stated that the President of the Republic represents the State in all its foreign relations, signs treaties, and ratifies it after the approval of the House of Representatives. It also imposed two renovated obligations. The first requires the approval of the population in a referendum before the ratification of any international treaty concerning the State sovereignty. Secondly, it prohibits the conclusion of any treaty that violates the constitution or wavers part of the territorial integrity of Egypt.[87]

The court deducted that according to article 151 the House of Representatives' jurisdiction functions only consequently to the signing of an international treaty. Thus, each authority has a precise functional jurisdiction. As matter of fact, presenting the treaty to the parliamentary approval does not obstruct the administrative courts from reviewing the legitimacy of the governmental activity in signing a treaty involving constitutional breach.

3. The lack of a reviewable administrative decision

The state defense claimed that the signing of an international agreement does not constitute, by itself, a final administrative decision that submits to judicial revision. Signing a treaty is a preparatory step to establish the binding acceptance of the alleged convention.

[87] *Supra* note 100.

However, it is a mean of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The decision to be considered binding is only effective by the ratification of the President after the proper approval conditions stated by the constitution. According the State Council Law, only final administrative decisions are susceptible to claims of annulation.[88]

The court responded to this defense, that the definition of an administrative act is the disclosure of the intentions of the public administration in realizing a certain legal effect using its binding will and its legitimate authorities according to the law. Whereas, the international convention is a multilateral agreement that produces legal effect within the contractual parties. Thus, an administrative decision differs from an international treaty in the fact that it is unilateral, whereas the latter is a multilateral activity.

Therefore, the will to sign an agreement that involves a serious and explicit constitutional breach consists, by this court, an administrative decision susceptible to annulation claims. The court concluded to the regularity of the case admissibility that leads to its objective revision.

b) What is the particular legal problem of this case

The court based the illegality of the treaty, essentially, on the act to transfer the ownership of the two islands Tiran & Sanafeer to the Kingdom of Saudi Arabia, which in itself establishes a constitutional breach to the territorial integrity of Egypt deeming but the invalidity of such treaty. In order to reach such conclusion, the court must be certainly positive on the nationality of the islands, otherwise this act will not represent any violation

[88] Article 10 of the 47/1972 law.

to the Egyptian territorial integrity. Hence, the essential question should have been, are these islands Egyptian or Saudi. In fact, it is a matter of technicality rather than a legal conflict. Answering that question involves, inevitably, examining historical and geo-political facts to prove the covered truth regarding the islands nationality.

The court managed that question in a slightly different way, it asked the state attorney, several times, to present the proper documents, reports and proper evidence revealing the truth behind the islands nationality. Threatening the state, if it continued to abstain from presenting the efficient documents, the court will consider this omission as an evidence of bad faith and will be obliged but to consider the claim presented by the plaintiffs as an undisputed truth.[89] But, the government never complied and even refused to present the actual text of the treaty.

Apparently, the court saw the question from an entirely different angle than it real is. The court considered the question about the islands nationality as a matter of political transparency, where the government has breached the minimum requirements of transparency in any democratic system and refused to be cooperative. Thus, the court focused on coercing the government to respect the principles of transparency rather than exerting its effort to find the adequate answer, in a decisive manner, to the true nationality of the islands.

The court took charge of examining the documents, maps, reports and history books presented by the plaintiffs. Undoubtedly, reading a document of history and extracting the information laying within is a task that any average person could do. Nevertheless,

[89] Free unofficial translation by the author. The original text could be found at the end of the thesis.

determining a historical fact as complex as the nationality of a territory is not an average task. Turning an assumption about the islands nationality into a fact is a fundamental job that requires a quasi-unanimous decision within the academic field of history and geo-politics. As a fact, answering that question depends also on the field expert opinion such as naval officers and national security agents. The history of international adjudication is overwhelming with territorial disputes,[90] it is difficult to imagine that any of them were entirely decided based on one party's point of view.

This case is similar to the same situation in the 1949 judgment, where the court was asked to adjudicate an expulsion decree, which is by nature falls within the sphere of sovereign acts. The court concluded that the sovereign plea cannot be used in a matter particularly prohibited by law.[91]

But the court did not announce the sovereign quality of such act before assuring that it is not in breach of the constitutional provision that prohibits the expulsion of Egyptian nationals. Therefore, the court found itself in the obligation of examining the fact of whether the plaintiff has legally acquired the Egyptian nationality or not. Giving that the government at that time was more than cooperative, the State defense argued that the plaintiff did not legitimately possess the Egyptian nationality. Eventually, the plaintiff did

[90] According to many analysts, territorial conflict and expansion are of secondary importance as causes of competition and rivalry between states. *See* PAUL K. HUTH, STANDING YOUR GROUND: TERRITORIAL DISPUTES AND INTERNATIONAL CONFLICT (2009).

[91] *Supra* note 60-61

succeed to prove the legitimate possession of the Egyptian nationality and thus the court ruled in favor of the annulation of the expulsion decree.

I is a fact that the quality of the acts of sovereignty depend greatly on the nature of the legal act itself and its great attachment to political considerations. Whereas, the determination of the sovereign act quality is based on the nature of the legal act regardless to the constitutive procedures or the legal formality in which the government presented it.

Therefore, the governmental discretion does not entirely void judicial revision, rather it is only immune against reviewing its merits. So the judicial competence is not entirely paralyzed regarding international treaties, rather than limited to ensure the sovereign quality of the act, leaving its propriety to the legislative scrutiny.

Obviously, the issue of maritime demarcation between Egypt and KSA was governed by customary rules since the dawn of modern history up to our date, and practice never showed any discontent regarding this issue. Therefore, one can imagine that the court had the same idea in mind which made the panel think that the treaty is not essentially about maritime borders.

Giving the abstention of the government in presenting objective defense, the court found itself with nothing but to believe that the true intention of this agreement is to transfer the territorial authority over the two islands to the Saudi sovereignty. And the formality of an international treaty grants this transfer a delusive immunity against judicial prosecution, which does not deceive the court's acumen.

This understanding is not unorthodox to the Egyptian jurisprudence. The Supreme Constitutional Court reached the same conclusion in its ruling regarding the international

convention founding the Arab International Bank. The court said that it is not true that every international treaty is automatically considered as an act of sovereignty precluding judicial revision, even if it was conducted formally in accordance with the constitution. The base of such immunity depends entirely on the nature of the legal act itself and not the form covering its true definition. The judgment mentioned that other than being founded by a multilateral treaty, the purpose of this act is to establish a bank no different than any other commercial bank. Therefore, it is inaccurate to consider such action as an act of sovereignty escaping the judicial revision.[92]

Eventually, The State Council judgments regarding Tiran&Sanafeer were deprived from any executive force. Mainly because the two judgments were based on the assumption that the islands are a territorial possession of Egypt, which turned out to be a false fact.

The government submitted to the Parliament an official letter dated on May 2nd 1990 sent from the Egyptian President to the United Nation committee declaring the maritime boarders of Egypt as a direct result of the ratification of the United Nations Convention on the Law of the Sea on 26 August 1983. Hence, the Tiran&Sanafeer treaty is simply a codification of the customary agreement between Egypt and Kingdom of Saudi Arabia concerning the maritime boarders of the Red Sea, and that the islands were never Egyptians.

[92] Supreme Constitutional Court, 10/14, 19/6/1993. *Available at* The Collection of Principles Decided by the Supreme Court and the Supreme Constitutional Court in Forty Years 1969-2009, page 213-214.

2) The impact of the Tiran & Sanafeer on the political scene

The absolute truth that this case is not about the legality of the act but rather about the struggle to maintain the proper functioning of the separation of powers. The government wants to prove its uncontested authority and the State Council is struggling to coerce the government into respecting the principles of democracy. This conclusion is drawn from the unusual sequence of events that followed.

It shows that, unlike the French doctrine, [93] the judge's will to self-reservation was not at the heart of this jurisprudential policy. Apparently the court panel was more sentimental than objective. Perhaps the pressure of the mass media coverage and their sense of nationalism have put the panel in the position to carry on a task that out-weights the court ability, but would be the right thing to do.

On April 28th 2017, the Parliament have approved the Presidential decree concerning changing the Judicial Authority Law. The new amendments, law number 13 of 2017,[94] have essentially changed the procedures of nominating and designating the chief justice of

[93] DUEZ Paul, *Les actes de gouvernement*, Paris, 1935, réédité en novembre 2006, Paris, Dalloz, p 63-64. Original text could be found at the end of the thesis. *Supra* note 12.

[94] Published in the official gazette on Friday 28/4/2017. Article 4 states that the text of the first paragraph of Article 83 of the State Council law No. 47 of 1972 shall be replace by the following text.

The Chief Justice of the State Council shall be appointed by a decision of the President of the Republic out of three of the deputies nominated by the General Assembly of the State Council, among the seven oldest Vice-Presidents of the Council, for a period of four years or the remaining period until he reaches the retirement age whichever is earlier and for one term in his career.

The President of the Republic shall be informed of the candidate names at least 60 days before the end of the term of the President of the Council.

In the event that the candidates are not nominated before the end of the period mentioned in the preceding paragraph, or the nomination of a number less than three or the candidacy of those who do not comply with the conditions mentioned in the first paragraph, the President of the Republic shall name the Chief Justice among the seven oldest Vice-Presidents of the Council. (Free unofficial translation by the author)

each judicial authority. Historically, each authority nominated one person to the Presidential institution to be the next chief justice, and the presidential signature was a matter of formality. Under the new law all judicial authority have to nominate three candidates – among the oldest seven, and the President has the exclusive discretion to designate one of them as the head of the respective authority.

On May 13th 2017, the general assembly of the State Council has decided in its annual assembly, and in compliance to the 13/2017 law, to nominate but one name to the position of State Council president. The nominated name is, as it was the tradition, the oldest judge among the body of the State Council, and it is also the very same judge (Councilor Yahiya Al-Dakroury) that presided the court's bench of the first judgment declaring the illegality of the Tiran & Sanafir treaty. As a sign of protest against the arbitrary interference of the President in the judicial independence.[95]

Moreover, on June 14th 2017, the Parliament has ratified the treaty of the reallocation of the maritime boarders with KSA, including the transfer of the two islands to Saudi sovereignty. Smashing any consideration to the State Council ruling. The vote came very swiftly as reported. The House Committee on Defence and National Security unanimously backed the plan earlier and referred it to the House for a final vote. A majority approved it less than four hours later.[96]

[95] *Available at* http://www.ecs.eg/archives/1580 (The official site of the Egyptian State Council)

[96] Egypt's parliament approves Red Sea islands transfer to Saudi Arabia, REUTERS, June 14, 2017, https://www.reuters.com/article/us-egypt-saudi-islands/egypts-parliament-to-vote-on-red-sea-islands-transfer-idUSKBN1951G4 (last visited Nov 12, 2017).

House of Representatives Speaker Ali Abdelaal said the required majority of lawmakers had voted for the agreement despite a court striking it down last march. Abdelaal said before adjourning the session "*I announce the House's final approval of the maritime demarcation agreement with the Kingdom of Saudi Arabia signed on April 8, 2016*," Those opposed to the measure stood up in protest and chanted "Egyptian, Egyptian" in reference to the islands.[97]

Few days after the parliament approval, the president of the Supreme Constitutional Court has issued an order to suspend the execution of all State Council judgments concerning the legality of Tiran & Sanafeer treaty, as a consequent measure to raising the court's jurisdiction, until it trenches on the constitutionality of these judgments.[98]

On July 2017, marking the beginning of a new judicial year, the State Council sent to the President the letter of nomination for the position of the new Chief Justice, and it stated after following the proper procedures that the general assembly of the State Council have decided to nominate one person for that position, and hereby it nominates councilor Yahiya Al-Dakroury.

On July 19th 2017, the President of the Republic issued the presidential decree 347/2017,[99] designating the councilor Ahmed Abul-Azm as the chief justice of the State Council. Asserting the presidential dominance over the entire judicial authority.

[97] *Id.*
[98] The state attorney filed a claim of constitutionality against the judgments concerning the legality of the Tiran & Sanafeer treaty. The case is still in court under the registration number 12 of the 39th constitutional year.
[99] Published in the official gazette number 28(z) of 19/7/2017.

In the French context the judicial immunity of the acts of sovereignty is explained by the unconditioned will of the judge to avoid a complicated conflict of jurisdiction and to avoid causing international difficulties to the government. In the Egyptian practice, the judge's will to announce, or not, the sovereign quality of the attacked act is sometimes imposed by the people's will to obstruct of refrain the governmental behavior regarding diplomatic relations. The assessment of international relations is primarily a competence of the Parliament, but when it is in a state of malfunctioning, people turn to the judicial authority as their last resort against governmental oppression.

The legal interpretation in Egypt will always be far from reaching the saturation stage, which makes it almost entirely unsettled on the perimeters of the governmental discretion. I believe that the blurriness in defining the threshold of each power's jurisdiction is a reflection of a weak and troubled relation between the state authorities. When the separation of powers principle is in a genuine functional state, the threshold delimiting each authority will definitely be clearer and it will eliminate any attempts to over-step the other's jurisdiction. The court will stop extending its jurisdiction, when it believes in the efficiency of the Parliament in controlling the governmental activity and that the government applies high governance standards.

Conclusion

What happens when the political life breaks down, when the public authorities are no longer separated, when the power is no longer to the people, when the political debate rather than enriching the general interest of the whole society, becomes a confrontation between all that was rightfully owed to the society against all that is regarded essential to the governing regime?

When it breaks down it creates a system of contradictions, where the functionality of the public system is unlimited to the constitutional design. When law and public policy becomes univocal, and people find no place to be heard. That's when the opposition is voiced out through all that was considered pure to the society, whether it is in a form of art, literature publications or social activities.

The philosophy of administrative adjudication is to protect the public interest, by reviewing the administrative activity to ensure the non-abuse of public authority. Hence, the governmental accountability is not essentially for protecting private rights against arbitrary practices, but mainly to ensure that the government in its exercise of authority is only aiming for public interest. Which, sometimes, allows the violation of individual rights for the preservation of public interest.

Nevertheless, this delicate balance is subject to the judicial revision. The administrative jurisprudence has developed many theories precluding the wrongfulness of administrative activity for the sake of public interest. In the field of tort liability, the court distinguishes

between institutional and personal error. Where the administration cannot be held liable for tortious actions caused by an official agent, even during office.[100]

On the other hand, courts have created theories of accountability despite the legality of the attacked act. Theories like the abuse of authority,[101] and the proportionality test,[102] were set to delimit the discretion of the executive authority despite its legitimacy, aiming to limit its excessive weight on public interest.

As a result, in administrative doctrine the promotion of public interest stands on the tip top of legal principles. It is the aim of any executive authority and the focal point of administrative adjudication.

It is a fact, and one of the great qualities, that the State Council has a highly pliable character to confront the swift changes in the society that shapes the public governance.[103] But the question is how far the court would go to keep preserving the public interest? When the Parliament is ineffective and the court become the last resort to discuss a matter of

[100] The Judicial Administrative Court of Alexandria on 27/6/2002 has found the President of the University of Alexandria personally accountable for insisting on not applying 14 judicial court ruling that entitles some students to be on the student association, and the standard of personalizing this misconduct was based on the obvious personal intention to prejudice these students by not executing the court orders. The court ruled that the University pays the compensation money and return against its tortious president to personally redeem the amount paid to these students

[101] This principle is known in the French jurisprudence as *L'Excès du Pouvoir*. When the administrative action is initiated by personal motivation and do not essentially aim to serve the public interest.

[102] *Le Contrôle de Proportionnalité* was first introduced in the French State Council in the well-known case *Arrêt Benjamin*. It created a base of review to verify whether the police measures taken are not only legitimate and justified within the given circumstances but equally adapted proportionally to the actual threat weighing on public order. Thus, the court squashed the governmental action because its lack of proportionality despite its legitimacy and legality.

[103]The great Maurice Hauriou stated that the *Conseil d'Etat* presents a single character which is greatly plastic, and Professor Osman Khalil Osman considers the State Council as a living creature highly sensible to the constant changes of the society. *Supra* page 2-3.

national interest. Would it stay put, or raise the threshold of law to contain this new position mandated by the actual situation?

The acts of sovereignty doctrine, despite its legal character, in practice it is inversely proportionate to democratic and liberal principles, so it would have an excessive field of application in dictatorial regimes and gets relatively narrower scope in the progress toward enforcing democratic policies.[104]

In the French context the judicial immunity of the acts of sovereignty is explained by the unrestrained will of the judge to avoid a complicated conflict of jurisdictions and to avoid causing international difficulties to the government. So, because of the political stability of the French system, the theory is controlled by the principle of good functioning of public services (*le bon déroulement des services publics*).

In the Egyptian practice, the theory is manipulated to function as a political calculus, as a counter weight to the governmental authority. The judge's will to announce, or deny, the sovereign quality of the attacked act is mostly inspired by the people's demand to obstruct or refrain the governmental behavior in the field of diplomatic relations. The assessment of international relations is primarily a competence of the Parliament, but when it is in a state of malfunctioning, people turn to the judicial authority as their last resort against governmental oppression.

[104] 13846/59, Supreme Administrative Court, 21/4/2013, *available at* http:/www.eastlaws.com (Eg)
نظرية أعمال السيادة وإن نشأت قضائية في فرنسا وقننها المشرع المصري في قانوني السلطة القضائية ومجلس الدولة إلا أن مضمونها يظل دائما بيد القضاء يحدده في ضوء البنية الدستورية التي تنظم سلطات الحكم في الدولة، ومن ثم فهي ليست نظرية جامدة المضامين وإنما تتسم بالمرونة بحسبان أن مساحة أعمال السيادة تتناسب عكسيا مع مساحة الحرية والديمقراطية فيتسع نطاقها في النظم الديكتاتورية ويضيق كلما ارتقت الدولة مدارج الديمقراطية.

In that case, the court find itself compelled but to embrace the capacity of a legislative authority and over step the parliamentary jurisdiction. This patriotic charge would enable the judge to raise the bar of governmental scrutiny, from the legality control to discussing the merits of the attacked governmental activity raising the political responsibility of the government.

Eventually the execution of the court's decision, whatever it may be, is entirely a prerogative of the executive authority. The biggest fear is the risk of losing the court's credibility and that judicial decisions became useless and incapable of compelling the executive authority into the respect of sensible subjects.

Original Text Index

Footnote	Original Text
11	نظرية أعمال السيادة وإن نشأت قضائية في فرنسا وقننها المشرع المصري في قانوني السلطة القضائية ومجلس الدولة إلا أن مضمونها يظل دائما بيد القضاء يحدده في ضوء البنية الدستورية التي تنظم سلطات الحكم في الدولة، ومن ثم فهي ليست نظرية جامدة المضامين وإنما تتسم بالمرونة بحسبان أن مساحة أعمال السيادة تتناسب عكسيا مع مساحة الحرية والديمقراطية فيتسع نطاقها في النظم الديكتاتورية ويضيق كلما ارتقت الدولة مدارج الديمقراطية.
12	L'acte de gouvernement […] compte […] parmi les constructions prétoriennes les plus complexes du droit administratif.
19	Il suit de là que, pour présenter le caractère exceptionnel qui le mette en dehors et au-dessus de tout contrôle juridictionnel, il ne suffit pas qu'un acte, émané du gouvernement ou de l'un de ses représentants, ait été délibéré en Conseil des ministres ou qu'il ait été dicté par un intérêt politique. Mais si les actes qualifiés, dans la langue du droit, actes de gouvernement, sont discrétionnaires de leur nature, la sphère à laquelle appartient cette qualification ne saurait s'étendre arbitrairement au gré des gouvernants ; elle est naturellement limitée aux objets pour lesquels la loi a jugé nécessaire de confier au gouvernement les pouvoirs généraux auxquels elle a virtuellement subordonné le droit particulier des citoyens dans l'intérêt supérieur de l'Etat. Tels sont les pouvoirs discrétionnaires que le gouvernement tient en France, soit des lois constitutionnelles, quand elles existent, pour le règlement et l'exécution des conventions diplomatiques, soit des lois de police.

20	[O]n peut estimer que le recours pour excès de pouvoir est devenu un recours ouvert à peu près n'importe qui (…), pour attaquer à peu près n'importe quel acte administratif unilatéral et en obtenir l'annulation.
23	[L]'immunité juridictionnelle de l'acte de gouvernement s'expliquerait par la volonté du juge d'éviter de rentrer en conflit avec les chambres et d'éviter de provoquer des difficultés internationales au gouvernement. La réserve du juge serait à l'origine de cette politique jurisprudentielle.
31	La liste des actes échappant à la compétence juridique du Conseil d'Etat a été considérablement réduite, qu'il s'agisse d' « actes de gouvernement » portant sur les rapports entre les pouvoirs publics constitutionnels, et sur la conduite des relations internationales.
33	Si le requérant soutient que sa demande en réparation trouve son fondement dans l'abstention du Gouvernement qui n'a pas déposé le projet de loi annoncé en ce qui concerne les Français rapatriés d'Algérie, la question ainsi soulevée qui se rattache aux rapports du pouvoir exécutif avec le Parlement n'est pas susceptible par sa nature d'être portée devant le juge administratif.
36	Considérant que les actes contestés ne sont pas détachables de la procédure d'élection des juges à la Cour pénale internationale par l'Assemblée des Etats parties à la convention portant statut de cette juridiction internationale et échappent, dès lors, à la compétence de la juridiction administrative française.
41	ليس صحيحاً القول بأن الرقابة على المرسوم بقانون إنما هي رقابة سياسية أو برلمانية **فلا محل لرقابة القضاء ما دام المرسوم بقانون واجب العرض على البرلمان** ذلك أن الرقابة البرلمانية لا تمنع من الرقابة القضائية ولكل رقابة من

هاتين الرقابتين طبيعتها ومجالها وجزاؤها فالرقابة البرلمانية رقابة تنبسط على ملاءمة التشريع من حيث موضوعه فينظر كل من مجلسي البرلمان هل هذا التشريع صالح فيبقى أو غير صالح فيسقط من الوقت الذي لا يقره فيه. أما الرقابة القضائية فتنبسط على مشروعية التشريع واستيفائه لشروطه الدستورية. فينظر القضاء هل استوفى هذا التشريع الشروط التي تتطلبها المادة 41 من الدستور في المراسيم التي تكون لها قوة القانون فيحكم بصحته، أو لم يستوفها فيقضى بإلغائه ويعتبر التشريع باطلاً منذ صدوره. فالرقابة البرلمانية رقابة ملاءمة contrôle d"opportunité وترد على السلطة التقديرية للمشرع pouvoir discrétionnaire وجزاؤها سقوط التشريع من وقت عدم إقراره. أما الرقابة القضائية فرقابة مشروعية contrôle de légalité وترد على السلطة المحددة للمشرع pouvoir lié وجزاؤها زوال التشريع بأثر رجعي. إن المرسوم بقانون رقم 64 لسنة 1952 هو مرسوم له قوة القانون صدر من السلطة التنفيذية بمقتضى المادة 41 من الدستور ولا شك في أن هذا المرسوم يعتبر من ناحية مصدره – وهي الناحية التي يعتد بها وحدها في تحديد مدى رقابة القضاء – قراراً إدارياً يخضع لرقابة هذه المحكمة خضوع سائر القرارات الإدارية التنظيمية منها والفردية. فإذا ما كان باطلاً كان على المحكمة أن تقضي بإلغائه عند رفع الدعوى الأصلية وأن تمتنع عن تطبيقه عند الدفع بالبطلان.	
من الأصول الدستورية أن يطبق القضاء القانون فيما يعرض له من الأقضية، والقانون هنا هو كل قاعدة عامة مجردة أياً كان مصدرها سواء كان هذا المصدر نصاً دستورياً أو تشريعياً يقرره البرلمان أو قراراً إدارياً تنظيمياً وسواء كان القرار الإداري التنظيمي مرسوماً أو قراراً من مجلس الوزراء أو قراراً وزارياً أو أي قرار إداري آخر، يطبق القضاء كل هذه التشريعات على اختلاف ما بينها في المصدر وعلى تفاوت ما بينها في المرتبة، فإذا تعذر على القضاء تطبيق هذه التشريعات جميعاً لما قد يوجد بينها من تعارض وجب عليه أن يطبق القانون الأعلى مرتبة وأن يستبعد من دائرة التطبيق القانون الأدنى إذا تعارض مع القانون الأعلى.	42
إن نص المادة الثانية من القانون رقم 600 سنة 1953، وإن جاء مضيفاً لإختصاص القضاء مانعاً إياه من نظر المنازعات المشار إليها بذلك النص إلغاء أو تعويضاً، إلا أنه لا وجه للنعى عليه بعدم الدستورية بدعوى مصادرته لحق التقاضى، ذلك أنه تجب التفرقة بين المصادرة المطلقة لحق التقاضى عموماً وبين تحديد دائرة إختصاص القضاء. و إذا كان لا يجوز من الناحية الدستورية حرمان الناس كافة من الالتجاء إلى القضاء للانتصاف ، لأن فى ذلك مصادرة لحق التقاضى ، و هو حق كفل الدستور أصله ، إذ تكون مثل هذه المصادرة المطلقة بمثابة تعطيل وظيفة السلطة القضائية ، و هى سلطة أنشأها الدستور لتمارس وظيفتها فى أداء العدالة مستقلة عن السلطات الأخرى - لئن كان ذلك كذلك ، إلا أنه لا يجوز الخلط بين هذا الأمر و بين تحديد دائرة إختصاص القضاء بالتوسيع أو التضييق ؛ لأن النصوص الدستورية تقضى بأن القانون هو الذى يرتب جهات القضاء و يعين اختصاصاتها ، و على هذا نصت المادة 125 من دستور سنة 1923 و المادة 176 من دستور جمهورية مصر ، و ينبنى على ذلك أن كل ما يخرجه القانون من ولاية	43

القضاء يصبح معزولاً عن نظره ، و هذا أصل من الأصول المسلمة . و قديماً قالوا إن القضاء يتخصص بالزمان و المكان و الخصومة ، و على هذا الأصل الدستورى صدرت التشريعات الموسعة أو المضيفة لولاية القضاء فى جميع العهود و فى شتى المناسبات ، كالنصوص التشريعية المانعة من النظر فى اعمال السيادة سواء بالإلغاء أو بالتعويض ، و كالنصوص التى كانت تمنع القضاء من النظر فى طلبات إلغاء القرارات الإدارية أو وقف تنفيذها ، إلى أن أنشئ مجلس الدولة ، فجعل ذلك من اختصاصه على الوجه المحدد بقانونه ، كتلك النصوص التى تمنع سماع الدعاوى فى شأن تصرفات السلطة القائمة على إجراء الأحكام العرفية بعد إنتهائها إلغاء أو تعويضا ، و كالمادة 13 من المرسوم بقانون رقم 178 لسنة 1952 الخاص بالإصلاح الزراعى التى تمنع جميع جهات القضاء من النظر فى طلبات إلغاء أو وقف تنفيذ قرارات الاستيلاء أو فى المنازعات المتعلقة بملكية الأطيان المستولى عليها ، و كالمادة السابعة من المرسوم بقانون رقم 181 لسنة 1952 الخاص بفصل الموظفين بغير الطريق التأديبى التى تمنع القضاء الإدارى من نظر طلبات إلغاء قرارات الفصل أو وقف تنفيذها ، و كالمادة 14 من القانون رقم 598 لسنة 1953 بشأن أموال أسرة محمد على المصادرة التى تمنع المحاكم على اختلاف أنواعها و درجاتها من سماع الدعاوى المتعلقة بتلك الأموال ، و كالمادة 291 من القانون رقم 345 لسنة 1956 فى شأن تنظيم الجامعات المصرية التى تمنع القضاء الإدارى من النظر فى طللبات إلغاء أو وقف تنفيذ القرارات الصادرة من الهيئات الجامعية فى شئون طلابها - و لا شبهة فى دستورية هذه التشريعات جميعاً ، ما دام القانون هو الأداة التى تملك بحكم الدستور ترتيب جهات القضاء و تعين إختصاصاتها ، و من ثم فله أن يضيفها أو أن يوسعها بالشروط و الأوضاع التى يقررها.	
لا وجه للنعى على المادة الثانية من القانون رقم 600 لسنة 1953 بأنها تنطوى على إخلال بمبدأ المساواة أمام القانون و القضاء ، لأن المقصود بالمساواة فى هذا الشأن هو عدم التمييز بين أفراد الطائفة الواحدة إذا تماثلت مراكزهم القانونية ، و لم يتضمن القانون المشار إليه أى تمييز من هذا القبيل بين الموظفين الذين تنطبق عليهم أحكامه.	53
من حيث إن نظرية الأعمال السياسية – كقيد على ولاية القضاء الإداري في رقابة المشروعية – تجد في ميدان العلاقات والاتفاقات الدولية معظم تطبيقاتها بأكثر مما يقع في المجال الداخلي ، وهو ما يقضي منح الجهة القائمة بهذه الأعمال في المجال الدولي سلطة تقديرية أوسع مدى وأبعد نطاقاً لصالح الوطن وسلامته دون تخويل القضاء سلطة التعقيب على ما تتخذه في هذا الصدد ، ولأن النظر فيها والتعقيب عليها يستلزم توافر معلومات وضوابط وموازين تقدير لا تتاح للقضاء ، فضلاً عن عدم ملاءمة طرح هذه المسائل علناً في ساحاته ، لما تثيره من مواقف سياسية دقيقة بين الدول ، ومن ثم وجب إخضاعها لسلطات الإدارة بحسبانها سلطة سياسية تستهدف تحقيق المصالح العليا للدولة.	54
ومن حيث إنه من ناحية أخرى ولما كان البادي من ظاهر الأوراق أن القرار المطعون فيه لم ينشر – رغم كونه قراراً وزارياً – كما لم تنشر تناصيل وشروط تصرف الهيئة المصرية العامة للبترول والشركة المصرية القابضة للغازات الطبيعية المتعلقة ببيع هذه الكميات الكبيرة من الغاز الطبيعي المصري إلى شركة شرق البحر الأبيض المتوسط ومنها	78

– إلى إسرائيل رغم مطالبة العديد من نواب الشعب والخبراء المتخصصين في مصر للإطلاع على تفاصيل هذه الصفقة ورغم الجدل الكبير الذي يدور في الأوساط العلمية حول حجم الاحتياطي المصري من هذه الثروة الناضبة على نحو ما ورد بالمستندات المقدمة من المدعي.	
كان أجدر بالمحكمة الإدارية العليا في تقديرها لأعمال السيادة أن تتجاوز فكرتها التقليدية أو تطوعها بمقتضى سلطتها التقديرية بما يمكنها من إعلاء مصلحة الدولة في مواجهة حكومة متغطرسة تعيث في الأرض المقدسة فساداً وتهدد بضرب السد العالي لإغراق أرض الكنانة، رغم معاهدة السلام المبرمة معها.	79
للسيادة معنى سلبي وآخر ايجابي ، والمعنى السلبي يقطع الاستقراء التاريخي له بأنها قد بدأت كفكرة سياسية ثم تحولت إلى فكرة قانونية، وتنصرف إلى عدم خضوع الدولة لسلطة دولة أخرى ، وعدم وجود سلطة أخرى مساوية لسلطة الدولة في داخل حدود البلاد ، أما المعنى الإيجابي فإنه ينصرف إلى سلطة الأمر والزجر في داخل البلاد وتمثيل الدولة وترتيب حقوق لها والتزامات عليها ، والمعنى المنضبط إنها تمثل وظيفة الحكم التي تظهر في الوظيفة التشريعية والتنفيذية والقضائية ومجرد الاستناد إلى هذا المعنى الإيجابي للسيادة لا يكفي وحده تبريراً لعدم الخضوع للرقابة القضائية – بحسبان الخضوع لرقابة القضاء لا يتنافى في ذاته مع فكرة سيادة الدولة بالمعنى الإيجابي والفصل في المنازعات وإرساء قواعد العدالة والمحافظة على حقوق الدولة وحريات الأفراد – أحد مظاهر السيادة العامة. من أجل ذلك – وهو بعض من كل – وجب على الفكر القانوني أن يتماشى مع التعديلات التي استحدثها الدستور على النظام القانوني المصري.	81
ولا يسوغ – والحال كذلك – للسلطة التنفيذية اجراء عمل أو تصرف محظور دستورياً ويكون لكل ذي صفة أو مصلحة اللوذ إلى القضاء لإبطال هذا العمل ، ولا يكون لها التذرع بأن عملها مندرج ضمن أعمال السيادة ، إذ لا يسوغ لها أن تتدثر بهذا الدفع لتخفي اعتداء واقع منها على أحكام الدستور وعلى وجه يمثل إهداراً لإرادة الشعب مصدر السلطات ، وإلا غدت أعمال السيادة باباً واسعاً للنيل من فكرة سيادة الشعب وثوابته الدستورية وسبيلاً منحرفاً للخروج عليها وهو أمر غير سائغ البته.	83
ومن حيث إن المدعيين قدما إلى المحكمة الوثائق والمستندات المشار إليها فى وقائع الدعويين والتى استدلا بها على أن جزيرتى تيران وصنافير من الجزر المصرية ، وجزء من إقليم الدولة المصرية والتمسا الحكم لهما بطلباتهما استناداً إلى ذلك ، بينما غيبت جهة الإدارة المدعى عليها نفسها عن الدفاع الموضوعى عن الاتفاق الذى وقعت عليه واعتصمت بالصمت فى هذا المجال وتمرست خلف الدفع الذى ابدته لمنع المحكمة من سماع الدعوى , وإذا كان من الجائز للأفراد فيما بينهم أن يلجأوا إلى حيل الدفاع يلتمسون من ورائها مصلحتهم الشخصية فان ما يجوز للأفراد فى هذا الشأن لا يليق بجهة الإدارة لأنها لا تقوم على شان شخصي ويتعين أن يكون رائدها الصالح العام في كل عمل تأتيه حين تختصم أو تختصم أمام القضاء ، لا سيما حين يتعلق النزاع بشان وطنى يمس كل مصرى ويتصل بتراب الوطن وهو ما كان	89

يستوجب الهمة فى الدفاع لإظهار الحقيقة أمام محكمة مصرية هى جزء من السلطة الوطنية وأمام شعب مصر صاحب السيادة والذى تعمل باسمه كل سلطات الدولة.	