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Revista de Antropología, Ciencias de la Comunicación y de la Información, Filosofía,  
Linguística y Semiótica, Problemas del Desarrollo, la Ciencia y la Tecnología

Año 35, 2019, Especial N°

# 21

Revista de Ciencias Humanas y Sociales

ISSN 1012-1587/ ISSNe: 2477-9385

Depósito Legal pp 198402ZU45



Universidad del Zulia  
Facultad Experimental de Ciencias  
Departamento de Ciencias Humanas  
Maracaibo - Venezuela



# **The administrative decision against the protection of acquired rights under the provisions of the council of state (comparative study)**

**Assist prof. Dr.Maysoon Ali Abd Al-Hadi**  
**University of Baghdad – Women Studies Center**  
**Maysoon.law@yahoo.com**

## Abstract

Administrative decisions issued by the public administration may vary, either in the form of a legal status, amended or revoked, or the administrative decision may be revealing a legal situation, which may be either explicit or implicit, negative or positive, and as a result of these numerous decisions, or may be illegal, thus being subject to appeal and cancellation, provided that they have not established rights for individuals. The abolition should not prejudice the acquired rights to ensure the stability of the legal situation. Illegal administration at Either by itself or through the judiciary, and in front of that we find the emergence of an idea of the administrative decision appeared in Egypt, namely the idea of administrative decision counter (opposite) of the administrative decision of the draft issued by the Authority restricted to the administration, the administrative decision counter is a draft decision issued with the same elements and elements that characterize the administrative decision However, it differs from the idea of canceling the administrative decision in that it is legitimate, whereas the cancellation is for the administrative decision, which is legitimate and illegitimate, and differs on the other side from the idea of the administrative drawdown in that the effects of the counter-decision are transferred to the future in contrast to the draw that extends its effects to the past and the future.

**Keywords:** administrative decisions, canceling the administrative decision, administrative decision draw.

La decisión administrativa contra la protección de los derechos adquiridos bajo las disposiciones del consejo de estado (estudio comparativo)

Las decisiones administrativas emitidas por la administración pública pueden variar, ya sea en forma de un estado legal, enmendado o revocado, o la decisión administrativa puede revelar una situación legal, que puede ser explícita o implícita, negativa o positiva, y como resultado de estas numerosas decisiones, o pueden ser ilegales, por lo tanto están sujetas a apelación y cancelación, siempre que no hayan establecido derechos para las personas. La abolición no debe perjudicar los derechos adquiridos para garantizar la estabilidad de la situación jurídica. La administración ilegal ya sea por sí misma o por medio del poder judicial, y frente a eso, encontramos la aparición de una idea de la decisión administrativa en Egipto, a saber, la idea del contador de la decisión administrativa (opuesto) de la decisión administrativa del borrador emitido por la Autoridad se limita a la administración, el contador de decisiones administrativas es un proyecto de decisión emitido con los mismos elementos y elementos que caracterizan la decisión administrativa Sin embargo, difiere de la idea de cancelar la decisión administrativa en que es legítima, mientras que la cancelación es por la decisión administrativa, que es legítima e ilegítima, y difiere del otro lado de la idea de la reducción administrativa en que los efectos de la contradecisión se transfieren al futuro en contraste con el dibujo que extiende sus efectos al pasado y el futuro.

Palabras clave: decisiones administrativas, cancelación de la decisión administrativa, sorteo de decisiones administrativas.

Research importance:

The importance of the research in highlighting the idea of counter-decision that arose in Egypt, and whether it has something similar in Iraq?

Research problem:

The problem of research arises in the lack of uniformity of the label on the counter-decision between Iraq and Egypt, and therefore the lack of sources of jurisprudence that dealt with the subject.

Research Methodology:

The researcher relied on the methodology of legal analysis of legal texts and decisions issued by the Egyptian and Iraqi Council of State.

The first topic

What is the administrative decision counter

To discuss the nature of the administrative decision counter requires the search for the concept and basis of this decision with the statement of its conditions and pillars, so we divided this section into two requirements: We will address the first demand the concept and basis of administrative decision counter, either the second demand will address the terms and elements of the administrative decision counter.

The first requirement: the concept and basis of the administrative decision counter:

The opposite is the language: from the opposite, the opposite and the opposites and the opposites one, and the antibody may be a group, God Almighty said (and they will be against them), and has (counter-resistance) and they are opposite, and it is said no (against) him or (Zid) have any incomparable and competent for him. (1)

The antidote is a language from Z: Z is said to have violated the person. (2)

And the opposite language: the violator, it is said Zvlana violated, and against the people violated. (3)

The counter-decision is the opposite of a management decision issued by the administration. The counter-management decision is defined as the decision of the individual will of the administration under its restricted jurisdiction and aims to terminate or amend a single individual decision issued by the administration. (4) It is also defined as an administrative procedure whereby a proper administrative decision is canceled or modified for the future. (5)

The term "counter-resolution" is an expression in Egypt of one form of administrative decision. This term in Iraq is offset by the repeal or amendment of the individual administrative decision for the future. The legal basis of the counter-administrative decision is due to an important legal principle: non-retroactivity of administrative decisions. This principle was adopted by the Council of State in France, Egypt and also in Iraq. This principle requires that individual or organizational management decisions have a direct effect since their promulgation and have no retroactive effect the wisdom of this important

principle is embodied in the idea of protecting the acquired rights of individuals created under previous administrative decisions. Recognition otherwise constitutes a clear violation of and infringement of those acquired rights and, on the other hand, protects the stable legal status of the relationship for the emergence of management and individuals, and the retroactivity of administrative decisions leads to their collapse. (6)

This important principle has been settled by the French and Egyptian Council of State in many cases. The Egyptian Council of State has decided that “the laws in Article 27 of the Constitution (the 1923 Constitution) stipulate that the provisions of the higher laws shall not apply to the date of their entry into force (In other words, any laws passed by parliament, as well as administrative decisions containing general provisions having legislative power). The same court also ruled in another provision “(the law does not apply to the past so as not to prejudice acquired rights ...)(7) , and if the origin of the non-retroactivity of administrative decisions, but as is said to each rule except, as shown on the basis of the non-retroactivity of administrative decisions in respect of the first two exceptions if the explicit provision on the validity of the administrative decision on the last application of the law, the second case of the abolition of the administrative decision is not prescribed.(8) On the position of the Iraqi legislator and on the basis of this principle, the legislator of the Second Amendment Law of the State Shura Council Law No. 106 of 1989 stated that “The Administrative Court shall have jurisdiction over the validity of orders and administrative decisions issued by employees and bodies in the state and public sectors after the entry into force of this law).

The second requirement: the conditions and elements of the administrative decision counter.

The administrative decision must be met with the same conditions and elements that should be met in the proper or legitimate administrative decision. It requires that the counter-administrative decision be embodied in the disclosure of the individual will of the administration, thus distinguished from the administrative contract that arises from the union of will of management with another will on

certain conditions. (A) It shall be issued by a head of State or by a minister, a public body or any person of public law. Finally, the decision shall be issued by the competent authority by law, It has changed the legal status of a center the administrative decision must be final and enforceable without the need for any subsequent action (10). The final is required to meet the requirements of the counter-decision as required by the administrative decision.

As for the elements of the administrative decision counter are five agencies:

1. The issuance of the administrative decision against the competent administrative authority, which derives its power from the constitution (11), regulations and instructions, and there is no difference between whether the administrative decision issued by the same authority that issued the administrative decision, may be issued by another administrative body with the same jurisdiction. (12)

2 - The necessity of the form in the administrative decision counter, which is the form, required for the administrative decision of the project, since taking into account the form in the counter - resolution is an important element is the external appearance of the declaration of the will of the administration. (13)

3 - The administrative decision is counterproductive, because the reason in the administrative decision is a set of factual or legal elements that occur away from the man of the administration or person who issues the administrative decision to induce public interest, the administrative decision issued by the administration should be away from tendencies and whims and based on the reason for the decision of the counter-administration is the abstract motive for issuing it on tendencies and desires. It is issued for the purpose of achieving the public interest (14), and the reason is a factual or legal situation that precedes the issuance of the decision (15).

4 - The need to achieve a direct impact when the issuance of the administrative decision counter and this is known as the administrative decision, i.e. the impact resulting from it affects the legal centers of individuals, and this effect is what distinguishes the legal work from the physical work of management (16).

5. The administrative decision shall be issued to achieve an objective

embodied in the indirect or long-term objective of this decision or in other words the final result of the administrative decision which departs from the discretionary authority of the administration. The administrative counter-decision must be issued for the same purpose as the administrative decision. (17)

If the previous conditions and elements are met, we are faced with a counter-administrative decision aimed at modifying a legitimate administrative decision and the consequences of this change are in the future.

The second topic

Distinguish administrative decision against cancellation and administrative withdrawal

The administrative decision opposite is characterized by a number of advantages, which is different from the cancellation of the administrative decision as different from the withdrawal, so we will address in this section to distinguish between the decision of the administration cancellation or withdrawal and the administrative decision counter, in two cases will allocate the first requirement to distinguish the administrative decision against the abolition of administrative either the second requirement will deal with the distinction of the administrative decision against administrative withdrawal.

The first requirement: to distinguish the administrative decision against administrative cancellation.

The concept of canceling an administrative decision goes to the end of its effects for the future, with its implications for the past before the decision of cancellation, which is either explicit or implied, and may be wholly or partially. The administration may cancel its regulatory decisions, whether legitimate or illegal, provided that the cancellation of the decision was issued in accordance with the formalities determined by law according to the rule of parallel jurisdiction. The administration may also cancel its individual unlawful decisions within a specified period of time. The project which arranged for the



acquitted rights of others. (18)

As for the administrative decision counter, the effects of the decision to the future and includes legitimate decisions only, as it works to cancel or modify the impact in the future only without prejudice to the effects arranged in the past, there is no retroactive in the administrative decisions counter, and can be issued to individual decisions and organizational limit weather. (19) The administrative counter-award is also distinguished by the administration, while the cancellation may be issued by the administration and may be issued by the judiciary.

The counter-decision disqualifies the effects of the first administrative decision in accordance with the prescribed conditions and the legal rules issued accordingly. The administration can modify the legal status in accordance with the jurisdiction determined by law. Consequently, the issuance of the counter-decision is beyond the discretion of the administration. For example, For a staff member could not be affected if the conditions for appointment to the post subsequently changed, since the administrative decision issued by the administration in his timely appointment had been issued in accordance with the legal requirements and had established a legitimate legal status to prevent its subsequent infringement, You may issue an administrative decision against the termination of his appointment if any of the legal conditions are met, such as if he has committed an error that makes his presence in the job harmful to the public interest.

It also has the power to issue a counter-administrative decision concerning the referral of the employee to retirement when the legal conditions for his retirement are met. This is the administrative authority that is restricted according to the limits prescribed by law (20). The administration may also issue its counter-decision to cancel the decision to dismiss the employee after his appointment on the basis of the reason given in the law despite the management's decision to dismiss the employee means the cancellation of the correct individual decision issued by the appointment of the employee mentioned. (21)

The second requirement is to distinguish the administrative decision

against administrative withdrawal.

The intention of the administration to withdraw its administrative decisions is to remove its legal effects in the past and in the future, i.e., the administrative decision should not have been, and the withdrawal of the decision by the administration is both a matter of organizational decisions and whether it is legitimate or illegitimate. And the administration's obligation to withdraw its unlawful decisions is a duty, and the withdrawal is limited to illegal decisions in accordance with the principle of illegality rather than incompatibility. The administration also withdraws the administrative decision the defect shall be carried out with a serious defect at any time without limitation of duration. (22) The withdrawal of the administrative decision is required to be issued by the same authority that issued the defective decision. The administrative decision against it may be issued by the same authority that it issued, the legislator gave the decision-making authority. (23)

In addition, the counter-decision is characterized by the withdrawal of the administrative decision that its effects refer to the amendment of a previous administrative decision or cancellation of the future without prejudice to the previous effects, unlike the case with the withdrawal of the administrative decision, it has effects in the past and future. (24)

The withdrawal of the administrative decision is achieved when the administration issues an individual administrative decision establishing a right for others, and this decision has one or more defects. Thus, the administrative decision is withdrawn from the judiciary. The regulations issued by the administration are organizational decisions that do not create rights in the original but if the administrative decision has generated rights or advantages, the administration must make a counter-decision. If it resorted to withdrawal or cancellation, it would have exceeded the law. Her behavior is flawed by the impossibility of exceeding authority, so there is no way Before the administration in the event that a legitimate individual decision has created rights or benefits only by issuing a counter-administrative decision, whereas the withdrawal of the administrative decision is limited only when the administration has issued individual decisions that have

created rights or advantages and at the same time have been flawed by one or more of the wrongdoing that justify the request for its abolition through the judiciary.

The decision to withdraw the administrative decision also applies to a rule that corresponds to formalities or parallels of competence. In taking a decision, the administration must follow certain procedures and forms when taking a decision to withdraw, modify or cancel such a decision. Or a republican decision, it is necessary to withdraw or repeal this decision by the same instrument, which is a republican decision. Similarly, the decision issued by a minister cannot be affected by the deputy minister. Such a decision may be withdrawn only with the consent of the Court The party that ratified the withdrawal decision. (B) A counter-decision is a new decision subject to new rules and conditions that may be different from the rules and conditions to which the decision of the administration is subject (25). It may fall under the terms of reference of another new authority. For example, the decision to appoint an employee may be from a competent administrative authority that the administrative decision against dismissal is issued by a higher administrative authority, namely the Minister, and this is stipulated in the Law of Discipline of State Employees and Public Sector No. 14 of 1991 amended as it stipulates that: (1) The Minister may impose any of the penalties provided for in Article 8) Of this law to the employee who violates its provisions. Second: The head of department or employee authorized to impose any of the following penalties on the employee who violates the provisions of this law:

- A) Draw attention.
- B) Warning.
- C) Pay the salary for a period not exceeding five days.
- D) Rebuke.

If the Committee recommends imposing a heavier penalty than that stipulated in paragraph (ii) of this article, the head of the department or the official authorized to refer it to the Minister for decision (26). Here the administrative decision against (the imposition of punishment) may be issued by the same competent administrative authority that issued the decision of appointment of the employee starting or

may be issued by another competent administrative authority, such as the competent minister

The third topic

Applications of the State Council for the idea of counter-resolution

There are many applications of the counter-administrative decision in both the State Council of Egypt and the State Council of Iraq so we will address in this section the statement of applications of the Egyptian State Council in the first demand of this subject, either the second demand will be allocated to the statement of applications of the Iraqi State Council for the idea of counter-resolution.

The first requirement: Applications under the Egyptian State Council.

From the applications of the Egyptian State Council to the idea of the administrative decision against what the General Assembly of the sections of the Fatwa and Legislation, pursuant to the rule of direct impact of the provisions of the law has become permissible from 18/9/1981 ((appointment of non-PhD students as a teacher in the Academy in disciplines that have not been done) The organization of graduate studies provided that the candidate has the highest degree in the specialization, and has been engaged in technical work for six years and contributed to the production of technical or scientific research and therefore the decisions of the appointment of advanced to succeed the requirement of validity of obtaining a doctorate issued under Law No 768/1969 is not granted by the provision contained in article 36 of Act No. 158/1981, otherwise it would have been done in pursuance of the law to the preceding facts retroactively, without a text to be determined by ... “)(27).

As well as the Supreme Administrative Court, including the following decision:

(A) if it is a prescribed asset that if a general regulatory rule is issued, its repeal, amendment or addition thereto shall be only in the same administration as it has issued or under higher management than within the terms of the jurisdiction established by law ... “)(28).

I also went in another ruling for her ((The administrative decision,

whether it is necessary to make it a form of security was not necessary reason must be based on a reason justified by truth and truth, in fact and in law and corner of the meeting as a decision is a legal act and does not conduct any legal action Without causing it) (29).

In another ruling, the judge ruled that “the decision to assess the adequacy of the worker, like any administrative decision, must be based on the justification of the law. This can only be done by establishing fixed elements and extracting a summary from the service file and relating to the work of the worker during the year In order to evaluate its work during this period in respect of the principle of the annual report, so as not to take the worker unless he has a manual of papers (30).

The Supreme Administrative Court also ruled that “the issuance of a counter-award by the administrative body implies an implicit cancellation of its previous contested decision, which means that the rights in respect of the previous decision will become irrelevant.”(31).

The second requirement: Applications under the Iraqi State Council. The Iraqi Council of State was established by Law No. 17 of 2017, whereby the Council of State was entrusted with the functions of the Administrative Judiciary, Arbitration and Drafting. The law is an independent body with a moral personality represented by the President of the Council. It is chosen by the Presidency of the Council. (The Council of State) replaces (the State Consultative Council) wherever they appear in the legislation. (32)

The purpose of establishing this council is to implement the provisions of Article 101 of the Constitution and for the purpose of the independence of the administrative judiciary from the executive authority and to make the Council of State an independent body enjoying the moral personality which includes the administrative judiciary, the staff courts and the Supreme Administrative Court. In order to disengage the State Consultative Council from the Ministry of Justice and to change its name to the Council of State in accordance with the Constitution.

The Iraqi legislator did well by issuing this law. The first legislator’s step in setting up a high administrative court was a very important step, but the establishment of this court was not sufficient because

it did not enjoy administrative independence from the Ministry of Justice (33). Administrative and staff courts and the Supreme Administrative Court in a neutral and independent manner.

This amendment leads us to search for applications related to the administrative decision from the establishment of the administrative judiciary through the decisions of the Supreme Administrative Court and the decisions of the Iraqi State Council.

The General Disciplinary Board issued its decision: The Department shall dispense with the employee who is under probation if he acts irresponsibly and away from the values of public service as a result of blackmailing citizens For the achievement of illegal material gains, despite his warning because his stay in the job has become detrimental to the public interest and does not comply with its obligations. (34).

The General Disciplinary Board also stated in one of its decisions that “an employee who has been dismissed because of his sentence shall be subject to a request for reinstatement and the Department shall not refuse to return it, as long as the law does not prevent this and his salary is due from the date of his request for reinstatement because he was fit for the job.”(35)

In addition, the decision of the Administrative Court of Justice includes that “the use of buildings shall be with the consent of the municipality based on the provisions of Article (32) of the Roads and Buildings Regulations. Therefore, the director of the municipality shall not arbitrarily prevent the plaintiff from taking the shop to sell the pulses in bulk to prevent crowding. Especially for this business. (36).

As well as its decision (“the employee shall lose his job status during his term of imprisonment or imprisonment, and shall be dismissed from the position as of the date of the judgment and during his sentence, his case may not be heard before the General Disciplinary Board”).(37).

The Department shall, upon termination of the employee’s employment and exceeding its period of ten days’ interruption, issue an order as revoked and shall not be entitled to refrain from making the order. (38).

And the follower of the decisions of the State Consultative Council finds several decisions on the administrative decision counter, including its decision on the statement of opinion on the calculation of the highest certificate obtained by the employee during the job without contradicting the system of work with study, the Iraqi Public Authority for Broadcasting Services and the absence of a barrier The Ministry of Finance has recognized that the status of the employee is organizational in the sense that his functional affairs are governed by the text of the law and that the completion of the employee's higher education is governed by not counting High school certificate employee obtained during the service without study leave. (39)

As well as the decision to refer the employee to the courts of competence of the competent minister, and the imposition of disciplinary sanctions or withdraw his hand from the position of the competent minister. (40)

As well as the decision of the Supreme Administrative Court / Staff Court, which stated the legal principle that the appointment of an employee after his employment, or the violation of his legal status and termination of service may be canceled only in the manner prescribed by law. (41)

As well as its decision not to refer the employee to retirement except in cases specified by law. (42)

It also recognized another principle that the administrative decision to reappoint an employee should be a product of its legal effects from the date of its commencement after its reappointment.

The decisions issued by the State Council include the issuance of the first-time appointment of a staff member on the basis of a forged academic certificate, which is excluded and criminal proceedings against him for the crime of forgery (43), and the decision of the Council of State that the administrative decision is effective from the date of its issuance. (44)

As well as his decision not to terminate the employment relationship of the employee since it is not permissible to be exempt from the position of the employee a reason to terminate the relationship function because the legislator has identified cases of termination of employment and exemption is not one of them. (45).

### Conclusion:

At the conclusion of this research we reached a number of conclusions and recommendations agencies:

#### First: Results:

1. The administrative decision may be issued in accordance with the individual will of the administration (restricted) and therefore beyond the scope of the discretionary authority, for example an administrative decision to appoint the employee in accordance with the conditions specified by law. The legitimate appointment decision may be canceled only if the conditions necessary for his dismissal or dismissal, Here the administration issues a counter-administrative decision that requires him to be dismissed or dismissed in order to meet the specific conditions of separation or segregation according to the law, and not for other considerations. Otherwise, the decision of the administration is illegal.
2. The administrative decision may be issued by a competent administrative authority by law, and not by the fact that the counter-decision shall be issued by the same authority as it may be issued by a competent administrative authority.
3. The counter-decision in terms of the effects is similar to the administrative decision to cancel, since their effects are withdrawn for the future, not to the past, both of which are issued in opposition to the administrative decision.
4. The issuance of the counter-administrative decision is an expression of the will of the individual administration which is restricted by the legally established procedures and does not depend on the will of the person to whom it applies.
- 5 - The administrative decision counteracts the effects of the first administrative decision in accordance with the conditions set by law.

#### Second: Recommendations:

1. The counter-decision issued by the administration must be lawful. A counter-decision contrary to law or impossible in practice cannot be issued otherwise it is null and void.
- 2 - The necessity of restricting the administration when issuing its counter-administrative decisions within the limits prescribed by law.



3 - The effect of the administrative decision against the future should apply only if the law provides otherwise.

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Revista de Ciencias Humanas y Sociales

Año 35, Especial N° 21, (2019)

Esta revista fue editada en formato digital por el personal de la Oficina de Publicaciones Científicas de la Facultad Experimental de Ciencias, Universidad del Zulia.  
Maracaibo - Venezuela

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