

Critical Analysis of Judicial Review of Administrative Actions in Iran

(Analisis Kritis Semakan Kehakiman terhadap Tindakan Pentadbiran di Iran)

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ABSTRACT

To have a thorough insight of judicial review of administrative action in Iran it seems necessary to have a brief look at judicial review over past decades, to be more specific Shah's regime. The system of government in Shah's regime similar to many countries in 19th century was monarchy, but there were formal limitations on Shah's discretion and the kingdom office was passed to him through inheritance. At that time judicial review of administrative action was left to the ordinary courts. This means that there was no special administrative court to deal with disputes between individuals and public bodies; and the system was inspired by the Anglo-Saxon system of judicial review. The inadequacy and inefficiency of the judicial review system gave rise to an increasing discontent on part of individuals at the end of Shah's regime and eventually the Council of State Act was passed to improve judicial review and eliminate defects but this never came into practice. The Islamic Revolution in Iran heralds a dawn in the field of citizens' rights because the governmental system is based on Islam and Democracy. Accordingly, the Administrative Justice Tribunal was established as a special administrative court for reviewing administrative actions but there are still defects in the current system which this article seeks to highlight and propose solutions. The main objective of this article is to assess how far the present system of judicial review is efficient in protecting citizens' rights. This is a pure legal research in terms of methodology and is a qualitative one.

Keywords: Judicial review; administrative actions; administrative justice tribunal; citizen right; Shah and Islamic regimes

ABSTRAK

Dalam memahami secara mendalam mengenai semakan kehakiman terhadap tindakan pentadbiran di Iran, tinjauan kepada semakan kehakiman yang terdahulu, secara khususnya ketika pemerintahan Shah Iran, adalah perlu. Pentadbiran kerajaan yang diamalkan semasa regim Shah adalah mirip kepada pemerintahan monarki di kebanyakan negara di abad ke-19. Namun, terdapat kekangan formal terhadap kuasa budi bicara Shah dan pentadbiran tersebut telah diserahkan kepada beliau menerusi pewarisan. Pada ketika itu, kuasa semakan kehakiman adalah terletak kepada mahkamah biasa, di mana tidak wujud mahkamah pentadbiran khusus dalam menangani pertikaian yang timbul antara individu dan pihak berkuasa awam. Sistem semakan kehakiman ini merupakan aspirasi dari sistem yang diamalkan oleh Anglo-Saxon. Kekurangan dan ketidakcekapan sistem ini telah mewujudkan keadaan tidak memuaskan yang telah membawa kepada keruntuhan regim Shah dan penggubalan Council State Act bagi menambah baik dan mengurangkan kelemahan semakan kehakiman. Malangnya, akta ini tidak dikuatkuasakan. Revolusi Islam di Iran telah membawa perubahan kepada hak warganegara kerana sistem pemerintah telah beralih kepada asas Islam dan demokrasi. Ini telah membawa kepada penubuhan Tribunal Semakan Kehakiman yang diwujudkan sebagai mahkamah khas pentadbiran bagi menyemak tindakan pentadbiran. Artikel ini akan mengetengahkan kekurangan yang terdapat dalam sistem ini, di samping mengutarakan pandangan bagi mengatasi kekurangan tersebut. Objektif khusus artikel ini ialah untuk menilai sejauhmanakah sistem semakan kehakiman yang kini wujud di Iran berupaya untuk melindungi hak warganegara. Kajian yang dilakukan adalah kajian legalistik tulen dan bersifat kualitatif.

Kata kunci: Semakan kehakiman; tindakan pentadbiran; tribunal pentadbiran kehakiman; hak warganegara; regim Shah dan Islam

INTRODUCTION

The role played by courts in reviewing the decisions and acts of public bodies, is found in all legal systems such as common law. The fact that courts possess authority to declare a public body action unconstitutional or ultra

vires, hence transforming that action unlawful, is a live argument particularly in the political and legal field.

Because of increasing involvement of governments in individuals' everyday life, there have been more contact between individuals' right and governmental activities, eventually there has been an exponentially increase in

judicial review cases. ‘The modern states are involved in regulating trade and commerce, transport and means of communication, education, health, environment, natural resource, economic development and a host of other matters.’¹ Therefore, in recent decades judicial review role has steadily increased. As a comparative lawyer Mauro Cappelletti observes, the rise of administrative state has led to the courts in many jurisdictions becoming themselves the third giant to control the mastodon legislator and the leviathan administrator.²

This article is purely doctrinal. Doctrinal researches referred to as theoretical, pure legal, academic, traditional, conventional armchair research is essentially a library based study, which means that the material needed by a researcher is available in libraries, archives and other databases.³ The research would be qualitative study. Qualitative research methods are a complex, changing and contested field a set of multiple methodologies and research practices. Qualitative research therefore is not a single entity, but an umbrella term which encompasses an enormous variety.⁴ Also it is a pure legal study because this paper will focus on Iran statutes related to judicial review of administrative actions.

CONCEPT OF JUDICIAL REVIEW

There are variety of explanations and classification regarding the extent to which the concept of judicial review involves that some of them collected as follows. Burris stated that the whole conceptual framework of judicial review is premised upon the assumption that there is a distinction between the power of the court to review laws to determine if they are consistent with the constitution, and reviewing laws to determine if they are good policy decisions.⁵ Then he continues that the former is related to judiciary to determine what is law and the latter is concerning with political decision process.

Bradley⁶ stated that judicial review denotes power of the courts to review acts of the executive and legislature on constitutional grounds, tracing this foundation from the landmark case of *Marbury v Madison*, where the United States Supreme Court declared the constitution to be the fundamental law. Furthermore, to make a comprehensive and coherent definition of judicial review of administrative action can be effective in providing a better overview of concept of judicial review. In terms of definition, there are varieties of definitions for judicial review of administrative action. For example as Richard Gordon says, ‘Judicial review is a specialized remedy in public law by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies.’⁷

One may justly say that the rule of law stands one step behind judicial review of administrative actions and lack of rule of law and decision making in accordance with law may result in a judicial review if administrative action

and also may cause discontent of people as happened in the late of Shah’s regime and also other countries such as Indonesia. As Rifai says: ‘It appears that a lack of the rule of law and the lack of protection toward human rights have led Indonesia into a situation of political uncertainty and into episodes of sporadic violence.’⁸

As Barnett⁹ says judicial review lies at the heart of administrative law. It is a procedure that is designed to test and ensure the legality of acts of those public bodies on which parliament has conferred powers. The requirement that public bodies act according to law involves a number of issues, such as: Whether the public body has correctly interpreted its power granted by statute or common law; Whether any decision conferred by statute has been lawfully exercised; Whether the decision maker has complied with the requirements of natural justice or fairness; Whether the decision maker has violated a person’s human rights and finally: Whether the decision maker has acted in a manner proportionate to the objective.

Nevertheless, it seems obvious from above mentioned perspectives that the word judicial review is generally used pertaining both constitutional and administrative review. Judicial review is viewed as the courts’ authority to examine primary and secondary legislations or any other government department actions against the constitution. Undoubtedly, constitution in different legal systems is the fundamental law that delegates separated powers to three arms of government namely legislature, executive and judiciary. Meanwhile some mechanisms have been predicted in the constitution to limit authorities conferred to legislature and executive through giving right to courts to test and determine issues related to constitutional law.

Taking judicial review of administrative actions into account in different legal systems, it seems to mean checking and testing the conformity of administrative actions of executive, legislative and judiciary with law or a supreme authority (like constitution) by judiciary (sometimes through a specific court). However, judicial review is a long rooted practice but still there are many discussions among scholars on this field.

WHAT LED TO BIRTH OF JUDICIAL REVIEW

The United States Supreme Court in fact formed the basis of judicial review in landmark case of *Marbury v Madison* in 1803. As the case is a famous one, there is no need to go through it in detail but a little bit about fact and circumstances, ruling the case will be helpful in providing a better perspective of the origin of judicial review.

Thomas Jefferson overcame John Adams in the presidential election of 1800 and became the third president of the United States. During the lame-duck session from February 17, 1801 to March 4, 1801, the Judiciary Act of 1801 was passed by Congress, which

intended to amend the Judiciary Act of 1789 and proposed some changes in number of judges and forming new district courts. According to new Act, the president had authority to appoint new judges. Before Adam's term comes to an end, he appointed numbers of judges that later on became famous as Midnight Judges. William Marbury was one of them that has been appointed as Justice of the peace in the District of Columbia for a five years term. After confirming of appointments by Senate, in order to put them in practice, appointed judges should have delivered a commission. Before Adam's term finishes, it was not possible to deliver all commissions to appointed judges and after expiration of Adam's term as the president, the new Secretary of State (Madison) were in charge to deliver the rest of commissions but he refused to do that and the appointments were not complete without commissions. To force Madison to deliver commissions, Marbury petitioned directly to the Supreme Court for a Mandamus. The Supreme Court denied the petition and hold that the Article of Judiciary Act as the basis of Marbury's petition is unconstitutional because it is about to expand the Supreme Court's jurisdiction beyond the extend that has been provided by Article three of Constitution. The courts' jurisdiction and duty explicitly stated in memorable expressions of Chief Justice Marshall in *Marbury v Madison* (1803); "It is, emphatically, the province and duty of judicial department to say what the law is."

This case not only regarded as the basis of judicial authority to render statutes unconstitutional but also considered as the roots of judicial power to strike down the administrative and executive actions. When the decision was handed down, and for many decades afterwards, *Marbury* was primarily regarded as being about judicial review of executive action, not legislative action.¹⁰ Three essential angles of administrative action seem to be and executive actor, an individual and a court to deal with disputes. Apparently, *Marbury v Madison* includes all these paradigms. Marbury as an individual, Madison as executive actor and the Supreme Court. Eventually it can be said that *Marbury v Madison* established the fundamental principle that it is for the courts to determine whether legislative or executive action falls within the limits set by the Constitution.¹¹

Some are of the view that *Marbury v Madison* is not generally the origin of judicial review of administrative action. Interestingly, *Marbury v Madison* appears not generally to have been identified in the United States as the origin of the judicial review of administrative action.¹² The case in fact resulted in rendering a law, unconstitutional, a law that made the Supreme Court able to issue Mandamus against an administrative authority. Given that the principles governing the judicial review of administrative action have developed in the United States only after the legal realist revolution and largely as a result of the enactment in 1946 of the Administrative Procedure Act.¹³ This Act put in practice all the crucial elements

of judicial review, including an explicit authorization to declare federal and state laws constitutional.¹⁴

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN SHAH'S REGIME

To have a thorough insight of judicial review of administrative action in Iran it seems necessary to have a brief look at judicial review over past decades, to be more specific Shah's regime. The system of government in Shah's regime similar to many countries in 19th century was monarchy but there were formal limitations on Shah's discretion and the kingdom office was passed to him through inheritance but there were formal limitations on Shah's discretion and the kingdom office was passed to him through inheritance. As a result it was a constitutional and also hereditary monarchy at the moment. After that, constitutional monarchy happened in Iran in Shah's regime as a result of continuous efforts of freedom seekers and returning scholars from western who had been knowledgeable of political changes and progresses in western countries. In Shah's regime a constitution was established in which few limitations provided for king but before that there was no limitation for the ruler and even the ruler was called Shadow of God and enjoyed the maxim of the king can do no wrong.

In 30th December 1906 the first constitution of Iran was born in a post haste way but the king was not eager as the constitution was about to confine his powers. So they made it just in 51 Articles which one of them was about king's power and not limiting but somehow gave Shah another competence to suspend or remove House of Representatives. This fifty one-Article-constitution changed the type of government from an absolute monarchy to a constitutional monarchy but as mentioned above, it was done in a haste and very quick way and in fact could not serve as a direct measure to confine King's unlimited authority. Those 51 Articles contained a brief introduction to establishment and jurisdiction of House of Representatives and hinted citizen's rights. Subsequently the appendix of constitution attached to it and constituted in 107 Articles. The appendix was better organized and those 107 Articles not only contained citizen's rights and jurisdiction of the House of Representatives but directly focused on king's powers and also established three branches of government and judicial review of administrative actions was passed to ordinary courts of law but none of them served as a measure of democracy in practice.

Indeed there was no judicial review of administrative action because according to Article 88 of appendix of constitution, ordinary courts and in the highest place, Supreme Court were granted jurisdiction in just two issues. First jurisdiction was to solve the conflict between executive organizations in terms of dispute in competence. On the other hand if a dispute rises between

two executive bodies, ordinary courts were in charge to deal with it. The second jurisdiction was to deal with employees' complaint. On the other hand if there is a dispute between an employee and employer organization in part of government, ordinary courts would be in charge to deal with this kind of dispute. As it is apparent it was not mere reviewing of administrative actions and just can be looked as a start to prepare the ground for judicial review in coming decades.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN IRAN AFTER ISLAMIC REVOLUTION

After revolution, judicial review of administrative actions was constitutionalized through Articles 170 and 173 of Iran constitution 1989 and subsequently a specific body named Administrative Justice Tribunal established to take hearing citizens action from administrative bodies and authorities. Within Iran domestic law, there are considerable problems regarding judicial review of administrative actions. The first criticism to Iran judicial review of administrative actions is that the body in charge of hearing complaints against public authorities is located just in Tehran, the capital of Iran and there is no other branch in cities. Obviously for a wide country like Iran (with approximately 80 million population and more than 1.5 million square kilo meter as total area as the 18th country in list of countries by area) it cannot be convenient. Also one of the fundamental citizen rights is easy and quick access to competent court which has been expressed in Article 34 of Iran constitution (1989) but in terms of Administrative Justice Tribunal (body in charge to hear actions against administrative bodies) this Article and this fundamental right has been breached. Considering Iran as a large country and its executive as an extensive one, locating the foresaid in charge body just in Tehran limits people access, also enormous number of cases are brought to this body that takes a long time to be dealt with. For example a people in my hometown that is approximately in centre of Iran (Shiraz) is imposed to take a 1000 kilo meter distance to get to Tehran to catch up with his or her action.

The other important problem with Iran judicial review of administrative actions is the jurisdiction of Administrative Justice Tribunal. According to Article 173 of Iran constitution (1989) to deal with peoples actions against officials, bodies and regulations of government, Administrative Justice Tribunal is established. For years the interpretation of government phrase in the foresaid Article was the gap. At the end Guardian Council (which is in charge of constitution interpretation in Iran) made a narrow interpretation and limited the scope of government phrase to executive branch. This interpretation was followed by the new Act of Administrative Justice Tribunal. According to Article 13(1) (a) Act of Administrative Justice Tribunal

(2006), jurisdiction of Administrative Justice Tribunal is categorized as below:

1. Decisions and acts of ministries, organs and public companies, municipalities.
2. Decisions and acts of officials of those bodies mentioned above.

According to Iran administrative and constitutional law, all foresaid bodies come under executive branch, therefore jurisdiction of Administrative Justice Tribunal is limited to executive bodies and their officials; it means that an action between an individual and a judicial official cannot be brought before this body or a judiciary employee cannot bring an action for his or her employment rights before Administrative Justice Tribunal.

Exhaustion principle is an accepted one in all progressive administrative justice systems with the meaning that no administrative hearing should be done unless it has been already brought before administrative body. This principle considerably contributes in decreasing the number of cases brought to administrative judicial tribunals because the organization in question may deal with the individual complaint satisfactory in first step, but unfortunately there is no place for this principle in Iran and every individual can initially bring the action before Administrative Justice Tribunal needless to arise it in relevant administrative organization first.

CONCLUSION

As the emphasis of this paper is on judicial review of administrative actions in Iran, so as mentioned above the emphasis would be on Iran legal system, so different related articles of Iran Constitution to judicial review have been discussed. For instance according to Article 173 of Iran constitution, Administrative Justice Tribunal is responsible to deal with citizens' action against government. The interpretation of phrase government in this Article has been discussed as a touchstone that shows the scope of judicial review in Iran legal system. In terms of scope, it should be mentioned that judicial review in Iran has just been limited to executive and exemption of administrative actions in judiciary and legislative from judicial review is a serious threat for citizens' right.

It is apparent that some basic well-known principles should be taken into account while making law or legal decisions. There are some principles which underlie decision making such as proportionality, legitimate expectation, natural justice, giving reason and public hearing. Lack of obedience to (fail to observe) these principles in making decisions will most likely put the decisions at risk of judicial review because all these principles are toward citizen rights protection. So it would be better firstly to take into account these principles in making administrative decisions in order to prevent them violate citizens' rights and finally less need to

judicial review. In Iran legal system these principles are not obeyed and most of the decisions are made by an authority in interest, or proportionality between means and consequences can hardly be found or the authorities fail to give reason and there is no public hearing.

Consequently, there are lots of requirements and principles which should be taken into account for judicial review of administrative actions to be exercised properly and those requirements ought to be met by body in charge of judicial review, if citizens' rights are to be protected by judicial review. Taking into account abovementioned problems in judicial review in Iran legal system, makes it appear that so far as those problems exist, that would be hard to review administrative actions properly and protect citizens' rights.

NOTES

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- ³ Anwarul Yaqin, *Legal Research and Writing*, Lexis Nexis, Kuala Lumpur, 2007, p. 16.
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- ⁵ J.C. Burris, 'Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review,' (1987) *Oklahoma City University Law Review*, 12, p. 585-655, at p. 586.
- ⁶ A. Bradley, 'Judicial Review,' Lecture Notes on Themes in Legislative Studies 2010, p. 1. Available at <<http://studyonline.sas.ac.uk/course/view.php?id=18>>, accessed 2 October 2017.
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- ⁸ Amzulian Rifai, 'The Rule of Law and Land Dispute in Indonesia' (2004) 8 *JUUM* 105-123.
- ⁹ B. Hilaire, *Understanding Public Law*, 1st edition, Routledge-Cavendish, London, 2010, p. 187, 188.
- ¹⁰ T.W. Merril, 'Marbury v Madison as the first great administrative law decision,' (2004) 37 *J. Marshall L. Rev.* 48, p. 481.
- ¹¹ S. Gageler, 'The underpinnings of judicial review of administrative action: common law or constitution?' (2000) 28 *Fed. L. Rev.* 303-313, p. 308.
- ¹² H. P. Monaghan, 'Marbury and the Administrative State' (1983) 83 *Columbia L R* 1-36, at p. 1.
- ¹³ S. Gageler, 'Underpinnings of judicial review of administrative action: common law or constitution?.'

- ¹⁴ M.A. Graber, 'Establishing Judicial Review: Marbury and the Judicial Act of 1789,' (2003) *Tulsa Law Review* 38, p. 609-650, p. 612-613; Bradley, 2010, p. 1.

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