

# The Public Employee's Right in Practicing Commercial Businesses in Jordanian Legislation "A Comparative Study"

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## ABSTRACT

The current study dealt with the issue of the public employee practicing the commercial businesses where it has always raised several problems among jurists. The study came to highlight the restrictions mentioned on the public employee freedom in practicing commercial businesses and the most prominent legislations adopted this direction and compared them with the ones that began to get rid of these restrictions and allowed the public employee to work in the private sector after the official working hours and allowed him to practice commercial businesses. Therefore, this study is dealt with three requirements; in the first requirement we dealt with the legal concept of the public employee where we showed the concept of the public employee in jurisprudence, law and judiciary. In the second requirement, we explained the nature of legal relationship that connects an employee with the employment administration whether it is contractual or regulatory list. Through the third requirement we dealt with the concept of a merchant and the entity of principle of preventing the public employee from practicing commercial businesses. Finally, we dealt with modern directions that adopted the principle of enabling the public employee of practicing commercial businesses and its justifications.

## Keywords:

The public employee, public employment, Civil Service System, merchant, commercial businesses.

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## General introduction

### First: Defining the study subject

The public administration supervises its public facilities in order to provide services and meet the required needs of citizens to satisfy their main and necessary desires that ensure a decent life for them where the administration does that through the public employees who have a continuous relationship based on a legal framework which defines their duties, rights, and actions that they are prohibited to perform, involve in or join like practicing commercial businesses; these prohibitions are based on the care of legislations to keep the ethics and principles of the public employment.

### Second: Importance of the study

The importance of the study lies in highlighting displaying the extent of the allowance of the public employee to practice commercial business, own a single institution, a partner in the

company and the extent of disagreement of that with the rules of public employment at the time that the world realizes the application of openness policy to reduce financial burdens on the public sector in the light of temporary economic crises and discuss ways of decreasing the salaries bill which has long overburdened the public treasury at the time when public administration is obliged to follow up the policy of employing to reduce unemployment rates which led to danger of paying attention to issue of ability to allow the public employee to practice commercial businesses where the latter suffer from employment cadres that exceed the need.

### Third: Study problem

The study problem lies in the restriction that most of legislations imposed which concern with public employment which prohibit the public employee from practicing commercial businesses, where most of legislations adopt keeping the public

employment isolated from any doubt or any condition that would undermine the citizens' trust in the public employee when he practices commercial businesses outside public employment. Under this problem falls the following questions:

1. What is the legal nature that connects the public employee and his administration, and what are the consideration and legal bases that legislations depend on in applying the principle of prohibited a the public employee from practicing commercial businesses?
2. What are rules and regulations that can be relied on in reducing intensity of the principle of prevention and the justifications of that?
3. What is probability of amending texts of employment legislations in general and the Jordanian civil service system particularly in accordance with the policy of economic openness that allows the public employee to practice trade business?

#### **Fourth: Difficulties of the study**

1. There were no specialized legal and juristic references or any previous studies related to the study subject, and the current study may be the first in its kind.
2. There were no scientific thesis or legal researches dealt with the study subject.
3. Lack of legal judgments issued by the administrative judiciary related to the study.

#### **Fifth: Study methodology**

We will use the descriptive analytical method in this study in addition to the comparative method to Jordanian legislations where the need arises such the position of French, Egyptian, Emirati and Saudi legislator based on the legal texts featured with modernity in the light of comparative legislations that rule the public employment, which is necessary for us to divide this study into three requirements as follows:

The first requirement: The legal concept of the public employee

The second requirement: The legal nature of the public employee's relationship. with the administration.

The third requirement: The entity of prohibition of the public employee practicing of commercial businesses.

### **The first requirement**

#### **The legal concept of the public employee**

##### **Preface and division**

The public employee is considered to be the major driver in functioning the public facility; no mind or logic can expect the existence of a public facility without the human element that is essential to run it, and this what we notice among all of administrations in different countries of the world. It is worth noting that the issue of defining one concept of the public employee isn't resolved yet where this is due to the difference of social, political and economic systems which differ from a country to another <sup>(1)</sup>, the employment legislations satisfied with mentioning the public employee within its range limits of application <sup>(2)</sup> as follows:

The first section: Jurisprudence position of the concept of the public employee

The second section: Judiciary position of the concept of the public employee

The third section: Legislations position of the concept of the public employee

#### **The first section**

##### **Jurisprudence position of the concept of the public employee**

The French jurisprudence didn't define a definite concept of the public employee, where the jurist "Maurice Horio" defined it as "All who are appointed by the public authority under the name of employees, workers or workers assistants occupying an employment in the permanent

<sup>(1)</sup> Prof. Mohammad Ali Al-Khalailah, **Mediator in law**, 2<sup>nd</sup> ed., Culture house for publishing and distributions, Amman, Jordan, 2018, p222.

<sup>(2)</sup> Dr. Abdel Hamid kamal Hashish, **Studies in public employment in the French system**, 1<sup>st</sup> ed., Cairo New Bookshop, Cairo, 1977, p 165.

cadres of a public facility managed by the country or other public departments” (1). The jurist “Marcel Wallen” defined it as “Everyone who works in serving national authority and contributes regularly in functioning a public facility managed by the direct administration and occupies a permanent employment within the administrative cadre” (2). As for the jurists “Doise” and “DePer”, they said that the public employee is “Everyone who contributes in managing a public facility managed by direct exploitation by the country and is put permanently within in an employment within an organized administrative cadre”(3). Arab judiciary didn’t approach further than what has included in the French judiciary, where some of the Egyptian judiciary came within the concept of the public employee as “Everyone who was entrusted permanently in serving a specific facility managed by the country or one of the public law people directly” (4). Another party defined it as “Everyone who was entrusted permanently in serving a public facility managed by the country or one of the public law people”(5). A party of Jordanian jurisprudence believes that the public employee is “The person who performs a permanent work in serving a facility managed by the country or one of the public law people, regardless the legal system which rules that person, his satisfaction or dissatisfaction with appointment, the way of getting the salary. The

(1) Prof. Mazin Lio Radhi, **Mediator in administrative law**, 3<sup>rd</sup> ed., Duhok University Press, 2010, p 68.

(2) Brigadier general Dr. Suleiman Al-Tamawi, **Mediator in administrative law, Arab House of Thought**, 1979, p 569, pointed to in Prof. Mohammad Ali Al-Khalailah, previous reference, p 224.

(3)-Duze (Paull) et Debeyre (Gug) *Traite de droit administratif* Paris 1952.  
-Chapuc.R. *Droit Administratif General*, T2, Delta, Paris, 1995.

(4) Mohammad Rida’t Abdel Wahhab, **Principles and rules of administrative law**, 1<sup>st</sup> ed., Al-Halabi Legal Publications, Beirut, 2003, p 356.

(5) Dr. Sharif Yusuf Khater, **Public employment**, a comparative study, 1<sup>st</sup> ed. House of Thought and Law for Publication and distribution, Mansoura, 2011, p9.

work he does or his employment level (6). Another party defined it as “The person who is appointed by the public authority to hold permanently the task of managing one of the public facilities managed by the country directly” (7).

**From our point of view we think that this definition isn’t suitable to adopt to define the public employee, where this concept was restricted to people who assume the tasks of administration without pointing to employments based on service, where the person who provides service and doesn’t assume tasks of administrations is an employee, and the opposite is true. Therefore, it was suitable to insert the word “And provide service” in the text of the definition to be comprehensive and complete.**

Some of Saudi judiciary defined it as “Everyone who occupies one of the employments belong to Civil Service System based on a royal imperative, a decision of ministers council or a ministry decision depending on circumstances” (8).

From the above we conclude the essential elements to define the concept of the public employee, which are:

1. The public employee works in a public facility under management and supervision of the country or one of the public law people.
2. The person should occupy a permanent employment.
3. Issuance of a decision by the authority or specialized reference itself.

**The question to be addressed here “Is it a condition for a person to acquire the feature of a public employee that his occupation of the public employment should be with factual**

(6) Prof. Nawaf Kana’n, **Mediator in administrative law**, “Second book”, (Public employment, administrative decisions, public money), 1<sup>st</sup> ed. , House of Culture for Publishing and Distributions, Amman, 2005, p 37.

(7) Dr. Haddaf Juma’ Abu Rashid, **Principle of equality in assumption of public employment between theory and application**, 1<sup>st</sup> ed. ,Bookshop of Law and Economy for Publishing and Distribution, Riyadh, 2014, p 74.

(8) Abdel Fattah Khedr, *Explanation of public system of employees in KSA*, 1<sup>st</sup> part , 1<sup>st</sup> ed., Aljazeera Institution for Publishing and Distributions, Riyadh, 1974, p 52.

**existence (time and place) in a facility or the public administration he was appointed in? Can a person perform distant work to be a public employee in conjunction with emergence of electronic public administration?**

**To answer this question, we would like to point to that the distant work system whether in the private or public sector which appeared in conjunction with emergence of Corona pandemic, which caused complete paralysis in functioning of public facilities in most countries of the world. Some countries tried to find a quick solution to overcome disruptions of public facilities running to keep their function systematically. From our point of view, we think that the change in the style of practicing the public employee of his job whether they are in the public facility arcana or afar doesn't affect the common concept of the public employee, where the appointed person based on a decision by the authority or the component body in practicing a specific work belongs to a public facility permanently that doesn't lose his employment feature by simply saying that he is not practicing his work inside the public facility place especially with the growth of the idea of electronic public facility. Therefore, we think that the criterion of that is the performance of this person of the employment or service he was appointed to.**

**In the light of this, we can put a definition to the public employee as "Everyone who is assigned a permanent work to serve a public facility managed by the country or one of the public law people whether this work is done afar using modern means of communication or inside the public facility itself when it is legally possible and permitted for the sake of public interest".** From our point of view, we think that the development of public employment concepts are only output of the administrative law characteristics in terms of its flexibility and portability for amendment and change to fit the essentials and novelties of life that arise continuously, where the judiciary must face them.

We think that the Jordanian legislator has alerted to this issue recently when decided the instructions of flexible work in civil service <sup>(1)</sup> ; for this goal, the Jordanian legislator defined distant work as "Working outside offices of the department whether from home or so, where the required employment tasks are delivered through modern technological applications or to the department personally". From our point of view, we think that Jordanian legislator succeeded in deciding these instructions where no employee based on the decision of civil service system council and the competent minister is permitted to perform his employment tasks afar provided that this work should fit the nature of the provided services.

## **The second section**

### **Position of judiciary from the concept of public employee**

The position of judicial systems doesn't differ from the position of jurisprudence in the issue of defining the concept of public employee, where the council of the French country defined in one of his rules the public employee as "The person who is assigned a permanent employment within the cadre of employments designated to a public facility"<sup>(2)</sup>. The Egyptian Supreme Administrative Court said in a rule: "The major pillars which the idea of the public employee is based on is that appointing an employee by a legal tool to perform a permanent work in serving a public facility managed by the country or one of the public law people "<sup>(3)</sup>. As for Jordanian

<sup>(1)</sup>Instructions of flexible work in civil service system of 2018, issued in the official newspaper No. 5530, on 16/9/2018, on page 5779.

<sup>(2)</sup> Andre de Laubadere , Traite elementaire de droit administratif 2eme ed 1957, p 640.  
-C.E. 9-4-1923 Hardonin 'R.D.P 1923 ' P 329 . C.E 20-12-1946 Colanie de Madagascar 'D 1947 ' P 404. Pointed to by Prof. Mazin Lilo Radhi, previous reference, p119 and beyond.

<sup>(3)</sup> Rule of The Egyptian Supreme Administrative Court No. 983 , on 19/5/1969, Group of legal principles decided by Supreme Administrative Court, The artistic Office Publications, year 14, p 713.

Administrative Court, it judged in one of its rules that the public employee is “The appointed person by a decision from the specialized reference in an listed employment in the table of job configurations in serving a public facility of the country whether he works for a monthly salary in an listed employment within the table of job configurations limit salary or a worker, and discrimination between an employee and a worker should be removed where they should be subjected to one system, so the significance of the public employee extended to all of employees except who works for daily payment. Accordingly, the civil service system mentioned above and diligence of the Supreme Court of Justice with the public committee decision stipulated that the employment intended to be appointed in table of job configurations in serving the public facility”<sup>(1)</sup>.

From the above, we can conclude the comparative position of judiciary concerning the public employee as:

1. Everyone who is assigned to provide a service or an administration task.
2. The service or administration tasks are connected to a public facility.
3. That person must provide that service or administration task continuously.
4. The public facility should be managed by the country or one of the public law people and should be managed by direct method.
5. Issuing the appointment decision by the specialized reference.
6. The employment he assigned in should be addressed on table of job configurations to serve a public facility but it should precede the appointment decision.

### The third section

<sup>(1)</sup>See Judgment of Jordanian Administrative Court No. 232 of 2014, session on 2/2/2015, Publications of Your Decision, Jordanian Lawyers Bar, 2020. See also judgment of Jordanian Administrative Court No. 17 of 2020, session on 22/6/2020, and Jordanian Administrative Court No. 81 of 1992, session on 29/11/1992, Publications of Your Decision, Jordanian Lawyers Bar, 2020.

### Position of legislation of the concept of the public employment

The issue of defining the concept of the public employee concerning the comparative legislations included some arguments, and this is from our point of view due to the nature of texts mentioned to define the public employee; some of them were legislated for regulatory purposes, some are for purposes of offering penal protection to some people or criminal goals or goals of defining legal centers. The French legislator position lies in that it is satisfied to define features of people who are featured of public employees<sup>(2)</sup>.

The Egyptian legislator in the new decision of civil service law defined the public employee as “Everyone who occupies one of the employment mentioned in the country budget”<sup>(3)</sup>.

The Egyptian New Civil Service Law is considered to be a radical turning point in the legislator position and a new approach which was for many years silent towards setting a definite concept of the concept of the public employee.

As for the Jordanian legislator, we mentioned a definition for the public employee in several legislations where each of them has its goals such as the constitution, penal code and civil service system as follows:

#### First: Jordanian Constitution

We find that the constitutional legislator has mentioned a definition to the public employee as “With considerations to the rules of Article 52 of this constitution, it is not allowed to combine between membership of the council of Parliament or Senate and public employments which mean every employment that its owner take his salary

<sup>(2)</sup> See the second article of French public employing law No. 16 of 1984, pointed to in Prof. Nofan Al-Aqeel Al-Ajarmeh, Authority of discipline employees, a comparative study, 1<sup>st</sup> ed., House of culture for Publishing and distribution, Amman, Jordan, 2007, p21. See also the first article of private law of employees of France on 19/10/1996, pointed to in Mohammad Al-Ahsan, the legal system for discipline in the area of public employment, a comparative study, PhD, faculty of law, Abu Bakr Belgide, Telmisan, 2015 – 2016, p 27.

<sup>(3)</sup> See article 76 of Jordanian constitution of 1952 published in the official newspaper No. 1093, on 8/1/1952.

from public money, and this includes departments of municipalities, and it is not also permitted to combine between membership of Parliament and the Senate <sup>(1)</sup>. **Here we think that this definition is a locating of features and conditions of the people who are allowed to run to the membership of parliament.**

### Second: Penal Code

The penal legislator mentioned a definition of the public employee in the articles of penal code as “An employee within this meaning in this chapter is every public employee in the administrative or judicial field, and every officer of civil or military authority or one of its individual, every worker in the country or a public administration” <sup>(2)</sup>. **As for this, we think that the goal of this definition is to apply texts of Penal Code, defining features of the people and penalties imposed on them or locating features of people who will be included in the penal protection umbrella<sup>(3)</sup>.**

### Third: Civil Service System

A definition of the public employee in the civil service was mentioned as “The person who is appointed by a decision of the competent authority in an listed employment in the table of job configurations based on the public budget or one of the departments and the employee appointed by a contract, and doesn't include the person who gets daily payment” <sup>(4)</sup>. **Here we think that the goal of this definition is to locate the features of people it applies to a description of the public employee and define the nature of the relation which connects him with the administration, and this what we mean in our study.**

<sup>(1)</sup> See Article 76 of the Jordanian Constitution of 1952, issued in the official newspaper No.1093, on page 3 on 8/1/1952.

<sup>(2)</sup> See the text of the Article 169 of Jordanian Penal Code No. 16 of 1960 and its amendments, issued in the official newspaper No. 1487 on page 374 on 1/5/1960.

<sup>(3)</sup> See the text of the Article 2 of Economic Crimes Act No. 11 of 1993 and its amendments issued in the official newspaper Is. No. 3891 on page 722 on 17/4/1993.

<sup>(4)</sup> See the text of Article 2 of the Civil Service Law No. 9 2020 issued in the official newspaper Is. No. 5619 on page 697 on 2/2/2020.

As for the Emirati legislator, the situation is not different from the Jordanian and Egyptian's one, where he defined it as “ Everyone who occupies one of the employments mentioned within the department budget and includes male and female” <sup>(5)</sup> . We think here that the Emirati legislator required the person to be described as public employee that he should be entrusted an employment where its financial allocation is included in the budget of the unit only. Concerning the Saudi legislator, he defined the public employee in the implementing regulations of the human resources of the civil service as “Everyone who occupies a public civil employment in the country or practice its tasks whatever the nature of his work or the name of his employment is whether by appointment or contract in permanent or temporary basis” <sup>(6)</sup>.

### The second requirement

#### The legal nature of the public employee's relationship with the administration

##### Preface and Division

The issue of defining the legal nature which connects the public employee with his administration raised irritation in comparative administrative jurisprudence <sup>(7)</sup>; the opinions and theories varied differed about that; some of them said that the nature of that relationship is contractual, and others said it is regulatory, and since this study deals with the problem of the public employee right in practicing commercial businesses, it is necessary to study the legal nature that rules the employee's nature with his administration to reach the legal basis which the administration sticks in order to confer legitimacy on the mentioned restriction on the public employee freedom and prevent him from practicing his trade business as follows:

<sup>(5)</sup> See Article 2 of Human Resources Law of Dubai Government No. 8 of 2018.

<sup>(6)</sup> See Article 1 of the implementing list of the human resources in Saudi Civil Service of 2019.

<sup>(7)</sup> Prof. Mohammad Al-Khalailah, previous reference, p 225.

The first section: The relationship between the public employee and administration is a contractual one

The second section: The relationship between the public employee and administration is a regulatory one

### The first section

#### The contractual relationship

The predominant view in the past historical stages thinks that adaptation of the relation between the public and his administration is a contractual one rules by the civil law<sup>(1)</sup>, which means that the contract isn't differ from any contract held by the people of private law among them<sup>(2)</sup>, so it is an employment contract if it is accompanied with a material action performed by the employee for the sake of administration, or a procuration contract if it is accompanied with a legal action<sup>(3)</sup>.

**From the above we think that the source of preventing the public employee to practice commercial businesses is the contract, i.e. that prohibition forms a source for commitment that the employee should achieve as a condition of administration imposed on the public employee at the time of the contraction and non-commitment to it resulted in terminating of the contract, but this theory was criticized and this led to be not validity in the area of administrative law that we will explain as follows:**

1. This theory contradicts with the principle of *pacta sunt servanda* which is the base of the common contraction process in the civil law, and by this the administration can't make any amendment on the legal status of the public employee without his agreement, where the administration decision which contains appointing the public employee is taken by the single will.

<sup>(1)</sup>Dr. Waleed Abdel Rahman Mizher, Dr. Sharif Ahmad Balousheh, The public employee in the light of rules of Palestinian Civil Service Law "Analytical study", 1<sup>st</sup> ed. , Nissan Bookshop for Press and Distribution, 2020, p 38.

<sup>(2)</sup> Dr. Muhanad Mukhtar Nouh, previous law, p 4.

<sup>(2)</sup> Dr. Muhanad Mukhtar Nouh, previous law, p 4.

2. This theory gives the public employee a legal status where he can demand to terminate the held contract between him and the administration if the latter aides by the terms of the contract.

3. The absence of public interest as a cause of the public employee existence in his employment status or the administration of the public facility.<sup>(4)</sup> Because of those criticisms, another party of jurisprudence said that the relationship between the public employee and administration is a contraction one organized by the principles and rules of the public law<sup>(5)</sup>. This party thinks that the administration way out in getting rid of private contracts restrictions is those tools that administration has in its powers to impose uncommon exceptional conditions on a concluded contract between it and the public employee. From our point of view, **we think who adopted this direction depended in their saying vision that it is the contractual relationship which gives the administration a sole power in imposing terms or requests in the contract, where the latter featured with a legal status enables it to run the public facility serving the public interest, but the direction owners didn't bring anything new where we still in the range of contracts, and the vision that the administration has the right to amend by single will doesn't serve those direction owners as the administration hasn't the ultimate freedom in amendment and it has no right to amend the contract in a way that affects the acquired rights of the public employment<sup>(6)</sup>.**

### The second section

Jean Rivero, Droit administrative Jurisprudenc general  
<sup>(4)</sup>Dalloz France 1971 p 105-p245.

pointed to in Mohammad Al-Ahsan, previous -  
reference, p 5.

<sup>(5)</sup> Dr. Waleed Abdel Rahman Mezhir, Dr, Sharif Ahmad Ba'lousha, previous reference, p 35 .

<sup>(6)</sup> See in the same vision in Dr. Farouq Khalaf, the legal nature of the public employee relationship with administration, a published study, Journal of Legal Sciences, College of Administrative Sciences, The University Center in the New Wadi, Is. 2, 2011, p 92.

## Relationship between the public employee and administration

After the debate that the jurisprudence made in adaptation the legal relationship between the public employee and administration and what has concluded of results which were not suitable for that goal in our point of view, the modern juristic systems came with a comparison that the nature of legal template of the relation between the public employee and administration is an organizational regularly template where it is subject to the texts of regulations and laws issued to organize the public employee with administration; which means that the source legal status which the public employee has isn't the contract but those legal and regular texts <sup>(1)</sup>. The laws, regulations and systems handle the issue of job creation and the methods of appointing employees and define their duties and rights <sup>(2)</sup>. The position of the French legislator was demonstrated in adopting the idea of the regularly or organizational status of the public employee through what he decided in the law of employing issued in 1946, and this is what its judiciary and jurisprudence have settled on <sup>(3)</sup>. The position of the Egyptian legislation, judiciary and jurisprudence didn't differ from the its French counterpart where they adopted the direction which said that the relation between the public employee and administration is ruled by laws, regulations and systems, which means that the public employee has an organizational legal status<sup>(4)</sup>, and this is the state in Jordan, where we

<sup>(1)</sup> Dr. Muhanad Mukhtar, previous reference, p 5.

<sup>(2)</sup> Dr. Waleed Abdel Rahman Mezhir, Dr. Sharif Ahmad Ba'lousha, previous reference, p 37.

<sup>(3)</sup> Laubadère.A – Delvolvé.P – Moderne.F, *Traité des contrats administratifs*, L.G.D.J, Paris1983, T1,p51.

- Moreau.J, *Les matières contractuelles*, A.J.D.A, 1998, p751. 65

C.E, 25-10- 1929, Portebois,D,1929,III,57,note.Bienv.

- Pointed to in Dr.Muhanad Mukhtar Nouh, *The effects of appointinf decision in the public employment*, published study, Damascus Journal for Legal and Economic Sciences, Vol. 30, Is.2, 2014, p 52.

<sup>(4)</sup>The Egyptian Supreme Administrative Court, in its judgment in Case No. 1749 of 7 BC, ruled that: "The judiciary of this court took place on the evidence that the

find that in the rules of administrative judiciary which settled a principle "The relation between the public employee and administration is a regulation one which derived its legality from laws and regulations that organizes the affairs of public employment <sup>(5)</sup>.

From our point of view, we think that this theory is the best one to depend on in evaluation the nature of legal relationship between the public employee and administration, where the administration has the final say in issuing its decisions according to its individual decisions without any comment from the public employee ,in addition to that she has the right to conduct any amendment or change to the legal situations for its employees when this achieves the public interest with the non-ability of the latter to handle and defense that he has acquired right or a legal status got in the light of a specific law in addition to that adopting this theory deprives the public employee

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relationship between the employee and the government is an organizational one ruled by laws and regulations, and the employee's status is a public legal one that may be amended according to the requirements of the public interest. ... etc. " State Council - Technical Office - Set of Legal Principles decided by the Supreme Administrative Court, Year 10 - Second Is. (from February 1, 1965 to the end of May 1965) - pg. 1174. See also the judgment of the Egyptian Supreme Administrative Court in Case No. 1205 of 7 BC, Which stated: "It is decided that the relationship between the employee and the government is an organizational one ruled by laws and regulations, and thus it is a general legal status subject to change ... etc." Publications of the Egyptian State Council - The Technical Office - The set of legal principles decided by the Supreme Administrative Court, Year 10 – Is.2 (from the first of February 1965 to the end of May 1965) - p. 884.

<sup>(5)</sup>The Jordanian Supreme Administrative Court judged in a ruling that: "Article 93 / b of the Civil Service Law No. 82 of 2013 can be understood as an organizational relationship ruled by laws and regulations ... etc." Supreme Administrative Court ruling No. 291 of 2018, hearing on 11-14-2018.

The Jordanian Administrative Court judged in a ruling saying: "Whereas, the relationship between the employee and the administration authority is an organizational one governed by laws and regulations ... etc." Judgment No. 374 of 2018, session date 25-3-2019, publications of Your Decision, Jordan Bar Association, 2020. See also the judgment of the Jordanian Administrative Court No. 395 of 2016, hearing on February 7, 2017.



from the issue of strike since it has a negative effect on running the public facility systemically and steadily <sup>(1)</sup>. It is worth noting that what we have reached before is only the results of the nature of this relationship, and we can also say that the organizational relationship between the public employee and the administration requires that he respects the laws, regulations or instructions that regulate the affairs of the public employment, and in light of them he avoids practicing any action that would put him in doubt, or the trust that the legislator and the public find in his person or hurting his neutrality and integrity <sup>(2)</sup>. **We conclude here that systems, regulations and instructions that rule the relation of administration with the public employment is the legal base of the principle of imposed prevention on the public employee and prohibited him from practicing his commercial businesses.**

### **The third requirement**

**Entity of the principle of banning the public employee practice commercial businesses.**

### **Preface and division**

It is recognized that everyone has complete freedom to practice commercial businesses whatever their types, take them as a craft to him, and it is enough to acquire the feature of merchant that he should have terms decided by law <sup>(3)</sup>. Whereas there are some legal controls that restrict the individual freedom when practicing trade for consideration related to the feature of the person if he was a public employee.

<sup>(1)</sup> See the text of Article 69/C of Civil Service System No. 9 of 2020, mentioned previously.

<sup>(2)</sup> Thus, the Jordanian Administrative Court ruled in one of its judgments by mentioning the following: "It is created in jurisprudence and judiciary that a man of administration must place himself in the best conditions and purify them ... etc." Jordanian Administrative Court ruling No. 79 of 2014, session dated 12/30/2014, publications of your decision, Jordan Bar Association, 2020.

<sup>(3)</sup> Rizkallah Antaki, Mediator in land commercial rights, 3<sup>rd</sup> ed., Syrian University Press, Damascus, 1956, p 61.

In this requirement, we will study the principle of banning the public employee practicing commercial businesses, then the modern directions led to retreat the principle of prohibition and allow the public employee in practicing commercial businesses as follows:

**The first section: The principle of prohibiting the public employee in practicing commercial businesses**

**The second section: The position of employment legislations from the principle of the public employee practicing trade**

### **The first section**

**The principle of prohibiting the public employee in practicing commercial businesses**

### **Entity of a merchant and his commitments**

#### **1. Definition of a merchant**

Many legislations mentioned the definition of a merchant, where the Article 9 of Jordanian Commercial Law stated the following: "1. Dalers are : A. People whose job is practicing commercial businesses"<sup>(4)</sup>.

Article 10 of the Egyptian Trade Law stated that a trader is "A person professionally involves in a business in his name and for his account."<sup>(5)</sup>, and in the Saudi Commercial Court system, in Article 1: "A trader is someone who practices commercial transactions and makes them his profession." The French Commercial Code defined it as: "Merchants are those who do business and make it their usual profession" <sup>(6)</sup>. We conclude from the definitions of the merchant that it is not related to his affiliation with a certain organization, craft or sect, but related to the work that he does, and the reliance in this is on the professionalization of the trade work in his name and for his own account, and this is the basis for acquiring the status of a trader, in addition to the

<sup>(4)</sup> Jordanian Commercial Law No. 12 of 1966, published in the official newspaper Is. No. 1910 on 30/3/1966.

<sup>(5)</sup> Egyptian Commercial Law No. 17 of 1999.

necessity of having commercial capacity for those who does it<sup>(1)</sup>.

## 2. Conditions of acquiring merchant character

What the legislations have settled on deciding the conditions of acquiring individual merchant character is to practice commercial activity or commercial businesses professionally, in his name, his private own and featured with commercial capacity, and this what was judiciary decided<sup>(2)</sup> a base which states “The condition of acquiring a merchant character is the person’s practicing trade in his name and own professionally”.

### A- Professionalism

All of legislations didn’t deal with a definition for professionalism, but it was left to legal jurisprudence which defined it as “The state of a person who took from practicing some commercial businesses a for making a living”<sup>(3)</sup>. Another party of jurisprudence defined it as “The activity should be directed continuously and usually to perform a specific work to achieve a specific goal, and professionalism includes two elements which are the craft and familiarity<sup>(4)</sup>. The craft is through devoting the person his activity continuously and systemically to perform a specific work with an intention to gain profit and seeking livelihood, or it is directly starting an activity that a person takes it a reason for livelihood<sup>(5)</sup>, and this is different from familiarity which means “The repetition of work by a person from time to time, but not occurring of work continuously and systemically. So, professionalism is a career that a person takes to gain livelihood, but as for familiarity it is enough

for work to occur by person from time to time”<sup>(6)</sup>.

### B- Doing commercial businesses

A person should do commercial businesses in his name and for his own independently because trade is based on personal credit, where the person who practices commercial businesses must bear all the effects and consequences that result from doing these acts from their benefits and bear the risks, and this condition is considered to be a compliment to the professionalism one<sup>(7)</sup>.

### C- Commercial eligibility

Commercial eligibility is an authority of a person to practice a commercial craft required him to be subject to the obligations imposed by law on merchants. Commercial businesses are kind of legal actions, so the essential legal eligibility in a merchant to conduct these procedures, which means that the person who does these procedures should reach a definite age defined by legislation of the country<sup>(8)</sup> which gets practicing trade on its region and should not be conducted by one where eligibility is lacked or absent. It is essential not to commix between absence of eligibility and prevention in professionalism of trade because the person may have eligibility but he is prevented from professionalism of trade like the public employee<sup>(9)</sup>.

### 3. The merchant’s commitments

The person who acquires the character of a merchant becomes in private legal status and based on that is subject to private rules that only applied to merchants<sup>(10)</sup>. Most of

<sup>(6)</sup> The same reference, p 119.

<sup>(7)</sup> Basim Mohammad Saleh, previous reference, p 97.

<sup>(8)</sup> The Jordanian Trade Law did not regulate commercial eligibility, but rather subjected it to the rules of the civil law in accordance with Article (15) which states: “Commercial eligibility is subject to the rules of the civil law.” See Eligibility rules, Article 43 of the Jordanian Civil Law, No. 43 of 1976, and its amendments, published in the Official newspaper Is. No. 2645, on 1-8-1976.

<sup>(9)</sup> Nadia Fadeel, Algerian Commercial Law, 6<sup>th</sup> ed., University Bureau of Publications, Algeria, 2004, p136.

<sup>(10)</sup> Mohammad AbdulGhaffar Al-Basyouni, Tamer Youuf Saa’fan, and Mohammad Abdul Rahman Al-Salhi, The commercial Law, Labor University, Specialized Studies Academy, Cairo, 2009, p 94.

<sup>(1)</sup> Esam Hanafi Mahmoud, The commercial law, without publisher, without date, p 217.

<sup>(2)</sup> Appeal No. 618/1974 Commercial Departments - Session 12/14/2010, Technical Office (Year 61 - Base 161 - Page 952).

<sup>(3)</sup> Rizkallah Antaki, previous reference, p.57.

<sup>(4)</sup> Basim Mohammad Saleh, The commercial law, first section, Publications of Dar Al-Hikma, Baghdad, 1987, p 78.

<sup>(5)</sup> Aziz Al-Okail, The mediator in explanation of commercial law, 1<sup>st</sup> part, 6<sup>th</sup> Ed. Culture House, Amman, 2020 p, 118.

legislations approved these rules where the merchant is restricted to in order to organize the commercial environment, support confidence among merchants such as register in commercial record and bookkeeping, take a commercial address and stop unfair competition :

**A- Register in the commercial:** There are several employments of the commercial record and through it is possible to inform others with legal and financial status of the merchant (Informing employment). It is considered to be a mean for collecting statistical data about trade status (statistical employment), and also economic represented in collecting essential data to plan economic policy of the country (economic employment). In addition, it is considered to be a tool for **legal declaration** about registered data where it ensures securing customer centers and creates a general atmosphere of mutual trust (legal employment) <sup>(1)</sup>. Most of legislations referred organization of commercial register rules to legislations and systems dedicated to it <sup>(2)</sup>.

### **B- Commercial Bookkeeping**

The merchant must continuously review his debts and know his commitments and rights in order to realize his financial status and his trade position whether, it is profit or loss <sup>(3)</sup>, and this is what is achieved from commercial bookkeeping. They also play a serious role in settlement of commercial transactions, and give the public authority an effective role to control trade and know validity of commercial operations <sup>(4)</sup>. Most of legislations approved this commitment on

the merchant to preserve his interest and others' at the same time <sup>(5)</sup>.

**D- Commercial Address:** it is the name that a merchant takes when practicing commercial businesses, and he signs all of the contracts and legal actions with others about his commercial action; it is the one that indicates the personality of the merchant in the commercial area, the related fame, confidence and honesty in dealing which has the effect of attracting customers <sup>(6)</sup>, and this is the position of Jordanian legislator.

### **D- Stop illegal competition**

Since competition is among rights approved by legislations, but this right should not be absolute, otherwise it should have limits that cannot be exceeded, shouldn't affect others' rights who practice the same activity, infringement the public interest, its practice should be based on controls and requirements of honesty and not to deviate from the principle of good will and not going beyond the limits drawn by customs, habits and integrity <sup>(7)</sup>. **We conclude from above that the merchant's non-restriction of commitments approved by legislations doesn't negate the character of a merchant in the provision of the law <sup>(8)</sup>, but he is considered violating the legal commitments and is subject to the penalties stipulated in the legal rules that imposed these commitments <sup>(9)</sup>.**

### **Second : The mentioned restriction on public employee practicing trade**

Some legislations approved the principle of free trade by the text of law to any person like the French legislator, while most of the legislations

<sup>(5)</sup>See Article 16 of Jordanian Trade Law, Article 21 of the Egyptian Trade Law, and Article 6 of the Commercial Court System KSA, previously referred to.

<sup>(6)</sup>Fawzi Mohammad Sami, Explanation of the commercial law, 1<sup>st</sup> part, House Culture for Publishing and Distribution, Amman, 2009, p 150.

<sup>(7)</sup> Aziz Al-Okaili, previous reference, p 180.

<sup>(8)</sup>Mohammad Mustafa Abdel Sadiq, The Legal system of a merchant in the light of Arab legislations, House of Thought and Law, Mansoura, 2015, p 18. Mustafa Kamal Taha, previous reference.

<sup>(9)</sup>See Article 33 of the Jordanian Trade Law No. 12 of 1966, the Jordanian Trade Registry System No. 130 and its amendments for the year 1966.

<sup>(1)</sup>Mohammad Samir Ashour, 1<sup>st</sup> part, Publications of Syrian Virtual University, Syria, 2018, pp. 25-53.

<sup>(2)</sup> For example: Article 23 of the Jordanian Trade Law, previously referred to, see Article 30 of the Commercial Law of the Commercial Registry, and the Law of the Egyptian Commercial Registry No. 34 of 1976.

<sup>(3)</sup> Hisham Pharaoh, Land Commercial Law, 1<sup>st</sup> part, Publications of Aleppo University, Directorate of university books and presses, Aleppo, 1984, p 114.

<sup>(4)</sup> Najeem Ahtut, The Mediator in the commercial law, Bookshop of Anwar Press, Morocco, 2020, p 69.

kept silent to approve such a principle considering that practicing of trade is a natural right to individuals, and the origin of individual freedom in practicing trade is permissibility the same as with the rest of public freedoms, but it may be prevented or restricted based on the character of some people or some businesses, and there several consideration that the legislator mentions since there is such a prevention or restriction <sup>(1)</sup>. The most important thing in this aspect is the directed restriction towards some people for characters inside them like the public employee.

### **1. Justifications of the restriction on practicing the public employee of trade:**

The issue of restricting the public employee freedom to practice trade is a fundamental one of deep legal roots, where the law has taken into account the public employment consideration as the intention of legislations which banned the public employee to practice commercial businesses for safeguarding the fame of the public employment and preserving the dignity of the person himself, in addition to his safeguarding of the private interest of individuals, where the employment powers don't affect the contraction process which should be completed with freedom and agreement without any pressures from any party <sup>(2)</sup>.

### **2. The position of commercial legislations from the public employee's practice of trade**

There are many countries that restricted clear restrictions to prevent the public employee from practicing commercial businesses. Although of that, the practical fact reflects many violations which indicate that the public employee practices trade, and this what most of legislations have alerted to like Jordanian Trade Law in the Article 14, but the public employment practicing trade although he is prevented to do that is subject him to the legal rules related to protective conciliation and bankruptcy. While the Jordanian legislator has not clearly legislated for the individual to acquire the status of merchant in this case, the violation of

the prevention imposed on him is subject to the rules of bankruptcy and the protective conciliation <sup>(3)</sup>.

As for the Egyptian legislator in the Article 17 of trade law, he clearly pointed that whoever practices trade and he was banned to do that based on the regulations, laws or systems is considered a merchant and based on that, the private rules mentioned in the commercial law are stipulated. **From our point of view, we think that the commercial legislations didn't prevent or restrict a group without others from practicing trade, but approved a public judgment to acquire the merchant status to the public employee and imposed on him what are imposed on merchants when practicing trade, and it isn't possible to be far from any commitments because there is a restriction on practicing trade in private legislations since he doesn't respect the restriction and practiced trade without caring for any penalties may imposed on him.**

### **3. The public employee practice trade in concealment or using another name**

We find in the practice some public employees practicing commercial businesses in hiding behind another person or using his name to circumvent the ban imposed on them, and to avoid disciplinary penalties against them; this was a juristic argument, where the first direction adopted that the merchant attribute is proved to the shown person, and this is a respect to the trust based on appearances of things since he deals with others in his name and show up as the business is for his own, while the hidden person's work is restricted to employ his money in one aspect of exploitation without any commercial activity <sup>(4)</sup>. A second direction said that the hidden person who is the owner of the origin business is considered a merchant only because business is

<sup>(3)</sup> See the details of that : Aziz Al-Okaili, previous reference, p 130. See also New Insolvency Law No. 21 of 2018, published in the Official newspaper Is. No. 5514 on Page 2640, on 5/16-2018.

<sup>(4)</sup> See in that Aziz Al-Okaili, previous reference, pp. 120-122.

<sup>(1)</sup> Rizkallah Antaki, previous reference, p 62.

<sup>(2)</sup> The same reference.

done for him <sup>(1)</sup>. The third direction which we tend to think that the merchant attribute referred to both shown and hidden person <sup>(2)</sup>. Whereas the position of commercial legislations, where the Jordanian Commercial Law and other comparative legislations didn't deal with this judgment which is opposite to the Egyptian legislator who approved in Article 18 of the Egyptian Commercial Law the stability of the merchant attribute for whoever professional commercial activity even with a hidden or nick name behind another, in addition to its approved to the shown person <sup>(3)</sup>.

### The second section

#### The position of employment legislations from the principle of the public employee prevention from practice trade

First: The traditional trend of the public employee prevention from practice trade

There was a legal approval concerning restriction of practice commercial activity by the by the public employee long ago for reasons the legislator mentioned and approved by judiciary, and the legal jurisprudence has emphasized. We will talk about legislations that approved and concentrated restriction frankly although of the repeated amendment on their legislations, and the justifications that are called by those who seek to keep and remain the restriction.

1. Position of the comparative legislations from the principle of prevention

A- Position of Jordanian legislator

Most of legislative systems in most of developing countries have approved to prevent the public employee from practice trade where Jordanian legislator adopted this trend, as mentioned in Jordanian Civil Service System No. 30 of 2007- cancelled- in the Article 68 to prevent any

<sup>(1)</sup> Muhsen Shafiq, The Egyptian Commercial Law, (without publisher), Cair, 1949, p 257. Pointed to it in : Elias Haddad, The Commercial Law, (without publisher), 1980, p66.

<sup>(2)</sup> In the same direction: Rizkallah Antaki, previous reference , p 56, Elias Haddad, previous reference, p 66.

<sup>(3)</sup> Egyptian Commercial Law No. 17 of 1999, previously pointed to.

employee outside of workday hours only by get prior permission from the prime minister or whom is delegated <sup>(4)</sup> .Jordanian Civil Service System of 2013 - canceled - was re-affirmed in Article 68 / g of it on the same mentioned text in the previous system without any amendments on it <sup>(5)</sup>. In the new Jordanian Civil Service System of 2020, it emphasized the same previous text, taking into account the re-numbering, and it came in Article 69 / H with the same content as the text of the Article in the two previous systems. However, the new civil service system has been included in Article 44 / g within the conditions of appointment that the employee shouldn't be a partner in a company which he manages or that he has a is feature of a merchant based on the rules of the Trade Law, and this is was not present in the previous two systems<sup>(6)</sup>.

**We conclude from the above that the trend of the Jordanian legislator 's intention in the light of the administrations' recommendations towards emphasizing prevention the public employee from trade, and cut the way for anyone who would like to be appointed in the public employment and defined within the primary terms to accept the appointment of any person that he must be outside trade practice, which means that when practicing it in later stage will lead to drop one of the approval terms beginning with appointment , which indicates violating previous terms of appointment which resulted in dropping the**

(4)The revoked Jordanian Civil Service Law No. 30 of 2007, published in the Official Gazette No. 4818 on Page No. 2985, dated 04/01/2007.

(5)The revoked Jordanian Civil Service Law No. 82 of 2013, published in the Official Gazette No. 5262 on Page No. 5630, dated 12/29/2013.

(6)Article 44 / g of the new Jordanian civil service system, previously referred to, stated on the following: "Whoever is appointed in any position must be: - g- He must not be a partner in a company that he manages or that he has a feature of a based on the rules of the Trade Law. ". For more details about the Jordanian legislator on this issue, see also: The interpretative decision No. 1 of 2011, issued in the session on 5/15/2011, published in the Official newspaper Is. No. 5089 on 06/16/2011.

**name employee from him. From our point of view, we think that Jordanian legislator wasn't succeed till this moment to conduct the essential amendment on the Civil Service System where the public employee is permitted to practice trade within specific controls take into consideration the public employment benefit.**

### **B- Saudi legislator**

In the same trend, the Article of Saudi Civil Service System stated on preventing the public employee to practice trade directly or indirectly. The regulation Executive Regulations for Human Resources in the Saudi Civil Service, in Article 209 assured on prevention the public employee from practice trade but approved in the same article the permission to the public employee to practice some activities not within practicing commercial trade<sup>(1)</sup>.

### **C- Bahraini legislator**

The executive regulations of the Bahraini Civil Service Law stated in Article 34/5 / B, 6, that a public employee is prevented from practicing trade only for his ownership of a portion in a commercial company or taken by inheritance or donation by one of his relatives till the fourth degree, and that he does not practice any activity or work in those companies, and the public employment is also prevented from being a member a company council of any joint stock company without the permission of the specialized authority<sup>(2)</sup>.

### **2. Justifications of preventing the public employee from practicing trade**

The prevention of the public employee from practicing commercial businesses was for restricting his freedom or limiting his activity, but the administration decided to impose that restriction according to considerations that administration thinks that the achievement of the public interest and its insurance to run the functioning of the public facility regularly and

steadily, it is also prevention the public employee to be a partner in the solidarity company or to be authorized, manage and sign, or to be a manager. Most of legislations and judiciary think that the goal of imposing such a restriction on the public employee freedom refer to considerations related to protect the sanctity of public employment on one hand and employee on the other hand.

We can summarize those considerations as follows:

1. The public employment is a responsibility and honesty to serve the citizen and society run by religious and patriotic values.
2. The public employment is ruled by ethical rules and standards derived from employment laws, regulations and instructions that the public employee should respect and abide by.
3. The public employment is subjected to considerations and morals that should be preserved and considered since they have an effect in creating trust and appreciation among citizens.
4. The public employee practice commercial trade will lead to his lack of sincerity and dedication to the requirements and duties of the public employment.

### **Modern legislations trends to enable the public employee of practice trade and their trends.**

After the problematic of the public employment if he can practice commercial business or not that raised argument among the jurisprudence and judiciary parties, legislative trends appeared adopt taking overcome this issue, and we believe that the appearance of the modern trend in order to solve that issue imposed on the public employee's practice of trade, came in line with what it happens to world economic transformations whose title is openness in markets and expansion of commercial activity in light of public sector of various countries of the world suffering from the liquidity crisis and the slowdown in the cash flow process because of inability of that sector to deal with the increasing numbers of employees, since this increase has become an economic burden that not only has exhausted burden the public treasury

<sup>(1)</sup>Saudi New Civil Service System of 1440 H.

<sup>(2)</sup>The executive regulations of the Bahraini Civil Service Law issued by Decree Law No. 48 of 2010.

when talking about the availability of money spent for account of the salaries of that group.

#### 1. Position of legislations

##### A- position of Emirati legislator

The Human Resources Law of the UAE Federal Government No. 11 of 2008 has approved in Articles 72/2 and 3 that it differentiated between the national employ who holds the Emirati nationality and foreigner, where it prevents

The non-Emirati employee to possess portions in any private institution or company except public joint stock companies but only with a prior written permission by the party he works to, while the national employee is permitted to possess any portion in any private institution or company, manage them, or work to others with pay within specific terms which are:

1. The work should be outside official work hours.
2. The work or possession shouldn't affect negatively his duties and tasks or the federal party.
3. This work mustn't related by any way to his official employment. Dubai Government's Human Resources Management Law No. 8 of 2018 has approved in Article 37 that the prohibition of the non-citizen employee's ownership of any sole proprietorship, shares or shares in any company except joint stock companies.

##### B- Position of Saudi legislator

The Shura Council in the Kingdom of Saudi Arabia has witnessed discussions about amendment the text of Article 13 of Civil Service System more than once where the last one was in 2019<sup>(1)</sup>, to permit the public employee to practice trade and work in the private sector outside official working hours within specific<sup>(2)</sup>.

<sup>(1)</sup> In 2017, a member of the Shura Council introduced a proposal to amend the text of Article 13 of the Saudi civil service system, where 51 members had objected allowance the public employee to work in trade outside the official working hours. On the other hand, 50 members supported the proposal that a public employee is permitted to practice trade, arguing that for the goal of improving living conditions.

<sup>(2)</sup> The executive regulations for human resources in the civil service for the year 2019 have not been amended - until now – since it is stated in Article 209 and assured preventing a

The committee was with the amendment which was in the formula of : “The employee must abstain from practicing trade directly and indirectly exception of this, it is permitted under a regulation issued by the Council of Ministers to permit specific groups to work in trade and accept membership in the boards of directors of companies or any work to them or in a commercial place except if he is appointed by the government in it, and according to a regulation issued by the Council of Ministers to work in the private sector outside the official working hours.

##### C- Position of Egyptian legislator

The position of Egyptian legislator concerning the right of the public employee to practice commercial businesses ranged between prevention and permission, and we can see this in the Civil Employees Law No. 47 of 1978 and New Civil Service Law No. 81 of 2016<sup>(3)</sup>.

##### Position before issuance Law No.81 of 2016

**All of legislations regulated civil employees affairs in the country prevented the public employee to combine between public employment and any other employment where Article 67 stated on that the employee mustn't combine between the public employment and any other job during his official work hours<sup>(4)</sup>, and law left the executive regulations to define controls and rules to work outside the official work hours where this shouldn't contradict with the public employment and its requirements.**

From our point of view, we think that the purpose for that is to look for methods to reduce government spending, through concentrating on reducing the salary and wages bill, which constitutes a heavy burden on the public treasury.

public employee from working in commerce, participating in companies, accepting membership in their boards of directors or working to only if he is appointed by the government.

<sup>(3)</sup> Egyptian Civil Service Law No. 81 of 2016, published in the Official published in Is, No. 43 repeated A, on 1-11-2016

<sup>(4)</sup> Law No. 47 of 1978 on the civil service system in the country cancelled based on the Egyptian Civil Service Law No. 81 of 2016.

This motivates the public employee to select between his work in the public sector and the private sector. It is worth noting that this has positive effects in terms of the efficiency and quality of production, and allow more job opportunities because working in more than one place at the same time deprives others of their right to the opportunity to work.

Position after issuance Law No. 81 of 2016.

Issuance of Civil Service System Law No. 81 of 2016 is considered a turning point in Egyptian functional systems, where the legislator didn't state in this law on any restriction on the public employee freedom when practicing trade except for businesses that affect fairness and impartiality of the public employee and his commitment during working hours which was emphasized by This is confirmed by the advisory opinion of the General Assembly in this matter.<sup>(1)</sup>

From our point view, we think that the Egyptian legislator went the right approach in lifting the restriction mentioned on freedoms of the public employment in practicing commercial businesses from the new law took effect based on the modern vision of the legislator in lifting restrictions set by the old law<sup>(2)</sup>.

### **Justifications of enabling the public employee practicing trade:**

The modern legislations have started their tries towards freedom from the restrictions imposed on the public employee and preventing him from practicing business, which we think from our point of view as a welcome trend, and it is possible to support enabling the public employee to practice trade, which expresses our viewpoint as follows:

1- Open the field for practicing commercial business for a public employee will result

(1) Fatwa of the General Assembly of the Fatwa and Legislation Sections, File No. 6/86/622, session dated 12-1-2-2018.

(2) Article 57 of the Egyptian Civil Service Law No. 81 of 2016, mentioned before, states on : "... a public employee in particular is prevented from practicing in work that is inconsistent with impartiality and job commitment during overtime hours ... etc".

inimproving in his standard of living and an increase for income and thus, will positively affect his performance and production.

2- Permit the public employee to practice commercial work will increase job opportunities and limit unemployment.

3- Enable the public employee to practice business trade will increase his annual income and be reflected on his purchasing power .

4- Limit the extend of crimes related to the public employment, such as bribery and pinching.

### **Conclusion**

The public employment which its base the public employee receives a great status among all of comparative judiciary and legal legislations, which require all of them to set judicial and legal rules that ensure its protection and function in a way that none can affect it or affect the impartiality or integrity of its employees. Since the public employment and employee are among subjects related to the administrative law featured with flexibility and ability to be amended and changed that fits the various requirements of life particularly the economic ones, an emergence need appeared to revise the functional legislations that meet those changes; where a need emerged to permit the public employee to practice commercial businesses because of the economic challenges facing the public sector and society all over the world which meets the openness policy that appeared to the sector of market economy to reduce financial burden that exhausted the public treasury particularly those classified under name salaries and benefits of public employees, thus we conclude this study in narrating the most important results as follows:

#### **First : The results**

1. The public employee is who assumed to manage a public facility or presenting a service to public based on a decision issued by a competence body of appointment.

2. The relationship between the public employee and administration is a systematic regulatory one



based on employment instructions, systems and laws.

3. The rule that the public employee commitment is based on related to non-work with commercial businesses is a systematic regulatory relationship that organizes his relation with administration.

4. Permission to the public employee to practice commercial businesses will lead to employment replacement policy in case the employee desired to transfer from the public employment to full-time commercial trade, where he allows space to graduates to take over the public employments.

### Second : Recommendations

In the light of the results of the study, the following recommendations are set:

1. We recommend the Jordanian legislator to amend the text of Article 2 of Civil Service System No. 9 of 2020 concerning the concept of the public employment and employee which fits the proper instructions and procedures to organist the flexible distance work No. 3 of 2020, which opens the door to permit the public employee to practice commercial businesses which doesn't contradict with the duties of the public employment by introducing the following statements:

A- "All of distance employments are within the concept of the public employment mentioned in the rules of this article".

B- "The employee who practices distance work is considered a public employee in the intended meaning wherever it is mentioned in this system".

2. We recommend the Jordanian legislator to amend item g of the text of Article 44 of Civil Service System No. 9 of 2020 where restriction mentioned in item g is lifted of the text of Article above including that who applies to a public employment mustn't be a partner in a company who manages the administration or have a feature of a merchant based on rules of trade law by deleting that item in the form it is mentioned in and replaced by " The public employee has the right to practice commercial businesses according to the rules of trade law".

3. We recommend the Jordanian legislator to create a text including controls and limits where the public employee should adopt by renumber the article 44 by adding item 2 to state as "The public employee is prevented to practice commercial businesses or a partner of a company where businesses or goals of the company contradict or look like the nature of his employment".

4. We recommend the Jordanian legislator to add two items including penalties on every employee violates what has been mentioned in the new item 2 of Article 44 and number them as 3,4 as follows: 3" The public employee who violates the rules of item 2 of Article 44 is subject to criminal and disciplinary accountability in accordance with the legislation in force.

4- "The Audit Bureau is responsible for retrieving any amounts of money, regardless how much they have obtained, or are credit aside for the employee's account, against the rules of Article 44 Paragraph 2 of the system, and their collection is achieved based on the rules of the Public Funds Collection Law in force".

5. We recommend the Jordanian legislator to amend the word bankruptcy mentioned in Trade Law in force wherever it is mentioned and replaced by insolvency in line with the new insolvency law No. 21 of 2018.

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