

THE LEGALITY OF ARTICLE (11) OF BRAND NAMES LAW NO (9) BASED ON INSTRUCTIONS OF THE JORDANIAN CONSTITUTIONAL COURT

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Abstract

The study is concerned with the interpretation of Article (11) of brand names law no. (9) for the year 2000, which states that the decision of the Registrar of brand names to remove a brand name is subject to appeal to the Supreme Court of Justice. The article allows the appeal of the Registrar's decision in case of cancellation of a brand name. The appeal is rejected if the request for the cancellation of a brand name is denied, especially that the request for the cancellation of a brand name requires the presence of two parties; the first is the one demanding the cancellation and the second is the one who registered the brand name in his name. Article (11), clause (C), of the law distinguishes between the two parties, as only one of them is granted the right to appeal before the administrative courts while the second party is denied this right.

1. Introduction

A brand name means "The name chosen by a person to distinguish his commercial store from other stores, a brand name consists of a creative label or of the person's name or title or all of them together as well as any addition relating to the type of trade or service practiced at that shop" (Sami, 2006).

Truthfully, a brand name is only a label chosen by a merchant to distinguish his store from other stores. Here, the merchant has absolute freedom to choose any label which may come in the form of real or fictional or created name. A brand name must be new and should never be registered in the name of a second person nor be against public disciplinary manners and

moralties (Al-Qaliobi, 1971). A merchant often chooses a brand name for the role it plays in attracting customers and creating fame and good reputation for his store.

Once a brand name is registered, it becomes the right of the owner who registered it and is covered by legal protection. The trade name may not be used illegally by another person as it will be considered illegal and an act of unfair competition (Zein Aldein, 2005). The Brand Names Law defined the method and procedures for registering a brand name in the private registrar of the Ministry of Industry and Commerce in order to become a private property of those who have registered and to have the right to dispose of it and protect it against the violation of others. The legal protection of a brand name shall be criminal and civil as stated in the brand Names Law. The Brand Names Law also stated and determined the cases of cancellation of a brand name. Clause (C) of Article (11) of

the Law states that the Registrar's decision to remove a brand name from the Law states that the Registrar's decision to remove a brand name from the register is subject to appeal to the Supreme Court of Justice.

In the concept of violation of this article, the decision to reject the cancellation of a brand name is not subject to appeal before the Administrative Court. So, does this article grant equality to the adversaries before the judiciary? And is there any constitutional violation of the law that does not grant the opponent the right to resort to justice in the case of refusal to cancel a brand name? This is what we will study in this research in two sections: the first is in light of the decision of the Jordanian Constitutional Court No. (7) for the year 2013, and the second is in light of the Band (commercial) Names Law with some general rules and the legal opinion of the decision of the Constitutional Court (Administrative Judiciary Law No. (27) For the year (2014).

2. The first section: Decision of the Constitutional Court No. (7) For the year (2013)

In the appeal filed against the unconstitutionality of clause (C) of Article (11) (1) of the Brand Names Law No. 9 of the year 2006, and based on the provisions of Article (11) of the Constitutional Court Law No. (15) For the year 2012, the plaintiff's agent submitted a memorandum that raises an argument against the unconstitutionality of clause (C) of Article (11) as it expressly states that the decision of the registrar to remove a brand name from the registrar of brand names is subject to appeal to the Supreme Court of Justice. What the Supreme

Court of Justice concluded from the contravention of this is that it is not competent to hear the appeal against the decision of the Registrar of Brand Names in the case of the rejection of the request for cancellation. On the basis of that the paragraph, in its text and concept, is contrary to the provisions of Articles (6/1), (99), (100) (101/1) of the Constitution and is also contrary to the principle of constitutional equality (Brand Names Law No. (9) For the year (2006). After scrutiny was completed, the Constitutional Court found that Article (11) of the Law of Trade Names No. (9) For the year 2006 states as follows:

A) The Registrar, on his own or based on an application submitted by a person of interest, may decide to remove a brand name from the Register in any of the following cases:

- 1- If the registration was made against to the provisions of this law and the regulations issued pursuant thereto.
- 2- Based on a decision of the competent court.
- 3- If it is proven that the owner has not been engaged in trade for five consecutive years (The decision of the Constitutional Court, official website of the Court).

B) Notwithstanding the provisions of paragraphs (1) and (3) of clause (A) of this Article, a brand name registered for any person shall not be removed if the following conditions are met:

- 1- If the brand name has been registered for more than five years.
- 2- The person who registered the brand name under his name is of good well and does not preclude the right of the original owner of the brand name to register it, provided that the registrar distinguishes each of them so as not to confuse the public.

C) The Registrar's refusal to remove the brand name from the register shall be subject to appeal to the Supreme Court of Justice.

The Constitutional Court concluded that the Supreme Court of Justice in cases similar to this case had been addressed to distinguish this last clause of the appeal where it settled its jurisprudence and frequent rulings without any dispute or hesitation on what it deduced from the concept of the violation of the law contained in this paragraph under appeal that the Supreme Court of Justice is not competent to hear the appeal in the case of rejecting the request for cancellation of the brand name and that the Supreme Court of Justice is competent to hear the appeal in case of cancellation of the trade.

The court also stated that article 6/1 of the Constitution provides that "All Jordanians are equal before the law, they are not discriminated in rights and duties based on differences in race, language or religion". This means that equality and equal opportunities are constitutional principles whose content must be respected in cases where legal centers are in conformity. The request for cancellation of a brand name assumes the presence of two parties; the one demanding the cancellation and the one who registered the brand name in his name. It also assumes that an administrative decision is issued in this regard. Each of the parties confronts the other with request of a brand name to be cancelled and therefore each of them shall have the same legal means (lawsuits) and the same judicial body. Since the paragraph contested in the meaning and concept referred to have distinguished between the two parties and have not equaled between them in the right to resort to administrative courts in particular, where one of them (the one who registered the brand name in his name) has the right to appeal in the case of cancellation and deprived the other (the one demanding the cancellation) In the case of rejection of the request for cancellation. Subsequently, the text violates the principles of equality provided for in Article (6/1) of the Constitution and leads to the denial of the right of one of the parties to resort to Administrative judiciary (Shatnawi and Hatamleh, 2013).

According to the preceding, Article (11) of the Brand Names Law No. (9) of the year 2006 shall be unconstitutional and declared null and void from the date of issuance of the decision.

3. The second section: Legal comment on the decision of the Constitutional Court

Article (4) of the Brand Names Law stipulates that "Anyone who wishes to use a brand name shall register it in the register in accordance with the provisions of the law".

For the registration of a brand name, the law requires that the brand name be new and not registered in any person's name for the same type of trade or for a similar type that may confuse the public. A brand name should also be an uncommon innovation in the type of trade to which it refers unless the brand name consists of the person's name, title, proportion or denomination and not be contrary to the doctrine of the nation and its values (El Helou, 1994).

Article (5) of the law stipulates that a brand name shall not be registered in any of the following cases:

- A) If it is identical to a brand name or a trade address and any of which is owned by another person for the same type of trade or a similar type that may confuse the public.
- B) If it is similar to a brand name or a trade address, and either of which is owned by another person who practices the same type of trade or a similar type and to a degree that may cause confusion to the public.
- C) If it is identical or similar to a trademark and to a degree that may cause confusion to the public.
- D) If it is identical or similar to a famous brand name or trademark, whether for the same type of trade or for any other kind of trade.
- E) If it leads to the belief that the owner is of official status or has special patronage.
- F) If it includes a civilian name for another person without his consent or the consent of his/her heirs.
- G) If it may mislead the consumer with respect to the type, importance or size of the trade or may mislead him in any way.
- H) If the names of recognized bodies or organizations are included without their consent.

4. Article (4/b) of the Brand Names Law

It is clarified that the law specifies the conditions for the registration of a brand name and that if a trader has registered a brand name according to the previous conditions and to the specified rules, he has a legal presumption on the ownership of the brand name as long as the conditions apply and he pays the fees stipulated in the law and continues to practice trade.

The registration gives the owner of a brand name the right to dispose, exploit and use it. He may also take all the legal procedures. For example, the name should be duly recorded. The owner of a brand name shall have the right to protect his brand name from any offense or infringement and he has full criminal and civil protection to grant this right.

In reference to the decision of the Constitutional Court and the application of the provisions of the previous law, we find that the law provides protection in the case of proper registration of a brand name and specifies the cases in which a brand name may be written off and cases in

which a brand name cannot be registered. Article (11), Clause (C), stipulates that the Registrar's decision to remove a brand name from the register shall be subject to appeal before the administrative judiciary (Badawi, 2006).

The present researcher supports the view of the Constitutional Court, considering Article (11)/Clause (C) unconstitutional because this it deprives one of the parties of a constitutional right and a fixed principle which is the principle of just equality between the litigants before the judiciary as clause (C) distinguishes between the parties of the case in the right of recourse to administrative judiciary in particular, because the text of the article means that the applicant who has registered a brand name in his name shall be deprived of the appeal before the administrative courts in case of rejection of the request for cancellation of the brand name.

The request for the cancellation of a brand name requires the presence of two parties; the first is the one demanding the cancellation and the second is the one who registered the brand name in his name. The Brand Names Law also assumes the issuance of an administrative decision on this subject that is likely to two things only, either accepting the request resulting a loss for the one who registered the brand name, or rejecting the request resulting a loss for the one who demanded the cancellation. Both parties must have the same legal means (law suits) and at the same Judicial authority (Al Quliebi, 1971).

The decision of the Constitutional Court is relevant and proper considering Clause (C) of Article (11) of the Brand Names Law as unconstitutional and invalid.

5. Conclusions and Recommendations

The establishment of the Constitutional Court according to Law No. (15) For the year 2012 is considered a tremendous development in Jordan as it resembles a step to respect democracy, to apply the law and to respect the basic principles of human rights in accordance with the advanced democracies in which constitutional judiciary is one of the most important features most and to address any violation in the legal texts. The provisions of the Constitutional Court are final and cannot be appealed by any means of appeal, and the provision of unconstitutionality of any legal Article leads to refraining from the application of the Article for unconstitutionality. This applies to clause (C) of Article (11) of the Brand Names Law, where the clause as mentioned above leads to a breach of the constitutional principle of equality between opponents in the right to recourse to the judiciary. Based on the decision of the

Constitutional Court, we hope that the legislator will amend the Brand Names Law where Article (11), Clause (c) becomes (The registrar's decision is subject to appeal before the administrative court).

We also believe that the legislator had to amend the Commercial Names Law to abolish the term of the Supreme Court of Justice to become the Administrative Court as stated in the new administrative law currently in force. Whereas the Jordanian legislator has delegated his authority to challenge the Commercial Names Registrar's decision to delete the trade name before the High Court of Justice. The Ordinary Judiciary (the Court of First Instance shall be competent to hear any disputes arising in respect of infringement of the trade name) (Article 13 of the Commercial Names Act). This inconsistency needs to unify the legal texts to be challenged in the trade names by deletion or rejection. The Constitutional Court is not an object of appeal to the Court of the subject, but it is a body with the inherent competence defined by the Constitution and the Constitutional Court Act, I see that the legislator is responsible amend the texts and unite the appeal so that he doesn't the direct recourse to the Constitutional Court.

Eventually, the trademark owner has the right to protect his trade name from any infringement issued by third parties and the Commercial Names Act that provided such protection in its current texts. The dispute over the right to dispose of the trade name or its ownership and protection falls within the jurisdiction of the primitive courts. Here, the commercial brand name may take pictures of civil protection, especially in case of illegal competition as it may take pictures of criminal protection in cases of fraud and imitation and/or fabrication of the trade name. Once again, here the court of first instance is more capable of conducting this practice, so we wish to give all competence in regard to the registration of names.