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The influence of the jurisprudence administrative on the Cancellation Case; "Analytical study"

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ABSTRACT

The present study tackles the influence of jurisprudence of the administrative judiciary on the cancellation lawsuit in order to highlight the great burden on the administrative judiciary in comparison with the criminal and civil courts. The topic is discussed by examining the effect of judicial jurisprudence on the external legitimacy of the administrative decision. Lack of jurisdiction, form, and procedures in the administrative decision show the effect of jurisprudence on the internal legitimacy of the decision. The prominent results of the present study are that the comparative administrative judiciary requires commensurate legislation with the administrative judge's tasks and judicial staffs whose qualifications, competence, and capabilities of those in charge of the administrative judiciary.

1. Introduction

Administrative judiciary plays a creative role in creating legal rules. Its task is not limited to applying the law. It is not only concerned with interpreting legal texts. But, the judiciary invented most of the rules and theories of administrative law as there is no written codification collecting its rules in a similar way to the civil and penal laws. The judiciary is described as creative not applier; the judge plays a positive role in creating and applying the rule.

1.1. The significance of study

The value of the present study is the attempt to highlight the creative role of the administrative judiciary, especially in the case of the legislative vacuum. It extracts the necessary rules for resolving administrative disputes from the established values in society, which ensures fulfilling its enormous task in preserving rights and freedom of individuals and respect for the principle of legality. There is no doubt that it is a daunting task that requires those practicing it to possess special qualities; a deep legal culture and distinct mental skills.

Therefore, the French State Council highlighted the great role that the administrative judiciary plays in defending the principle of legality, especially the abolition judiciary, as it is concerned with the issue of qualification and preparation of members of the State Council (Al-tamawi, 1966, p. 66).

1.2. Problem study

The texts related to the conditions for appointing judges for the administrative judiciary in Jordan indicate that the judge's degree for the administrative court shall not be less than the second degree on the basis that this condition is sufficient for the task of the judiciary with the administrative court. Special conditions and provisions for the appointment of a judge of the Supreme Administrative Court are not mentioned. The conditions stipulated in the Judicial Independence Law apply to whoever is appointed in the regular judiciary. The preparation of the administrative judges in a special way is not taken into account to comprehensively train them. Judges from the regular judiciary, who are mostly not specialized in the consideration of administrative disputes and are imbued with the spirit of the private law are appointed as administrative judges, which raises many questions:

1. Does the method of appointing administrative judges in Jordan contribute to establishing the experience of dual judiciary?
2. Has the holistic composition of the administrative judge been reflected in its jurisprudence?

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3. Does the Jordanian jurisprudence achieve the desired goal of the cancellation lawsuit?

1.3. The study aim

The present study aims to shed light on some of the jurisprudence of the Jordanian administrative judiciary in a critical evaluation view to discuss the adequacy and relevance of these precepts in particular and their impact on the desired development of the administrative judiciary, especially the elimination judiciary that suffers from multiple obstacles (Abdullah, 2018: 605) to provide a set of suggestions which contribute to moving forward in the march of the dual judiciary in Jordan.

1.4. The methodology

The comparative analytical method is followed by analyzing legal texts and jurisprudence opinions related to the subject of research and the various comparative jurisprudence in the countries under study.

1.5. Literature review

Judicial jurisprudence means in the concept of the hadith a set of substantive rules that are deduced from the stability of court rulings on its followers in all cases that it deals with, so that the courts settle down and expel their opinion on respecting a specific rule, therefore it follows the same solution whenever the conditions for applying this rule are met, thus, the rule whose respect has been eliminated has the general and abstract characteristic of the legal rule (Ziyan, 2017: p. 223).

However, a number of jurists criticized the idea of the judge's diligence and his establishment of general principles, on the pretext that the judges 'mission is confined to their original job, which is to resolve disputes before them, it cannot be establish general principles, as the French thinker (Montesquieu) said: "The justices of the nation are only the mouth who utters the words of the legislation, they are against this legislation, beings who have no life and no power to reduce its strength or intensity. " Robespierre says: "The word jurisprudence must be removed from our language, in a country that has a constitution and legislation, jurisprudence is nothing but the legislation itself. " In other words, the administrative judge's role is limited to applying the law, not creating it. However, the situation in France was changing, as was the case in Rome, where the judiciary was an important role as a source of law no less important than legislation and custom, the Council of State was not limited to applying the law, but rather made it well through judicial publications (Ahmad, 2016: p. 224).

From the above it is clear that the administrative jurisprudence is the contribution of the judiciary, or, in other words, the latest additions of the judges, the results of their efforts to interpret the law, to fill or supplement the deficiency in it, and raise the contradictions between the two rules, or determine the meanings of the rules if they are ambiguous. As for the characteristics of the jurisprudence of the administrative judge, they are represented in the following:

First: *The administrative judge overtook his role as a judge in the dispute*

The original principle is that the administrative judge in the Latin Church has only jurisdiction in applying the law, but the application of the law may go beyond searching for a balance between the public interest and the individual interest, his ruling exceeds the ordinary task as a separator in a specific litigation, and the administrative judge is transformed through his ruling, a structural source for the general principle that it sets and for the legal rule contained in this principle, and this is confirmed by some studies (Saber, 2018: p. 159).

The authority of the administrative judge derives from the creation of solutions from the legal ties that arise and derive from the general principles of law, the administrative judge, as he decides on the dispute presented to him, is obligatory in the absence of a text in the legislation and the absence of a custom in which the work is going, by adhering to what has been termed as general principles of law (Ziyan, 2017: p. 224).

Also, it is not possible to deny the role that the judge plays in relation to administrative law, the administrative judge, in contrast to the ordinary judge, besides applying the rules of administrative law and interpreting them in a way that suits the dispute presented to him, it plays a more serious and bold positive role in the field of making the legal rule itself in the absence of the legislative text.

Therefore, the administrative judge is still creating the legal rule in the field of administrative law so that in the administrative article there are many solutions provided by the administrative judiciary in the absence of any text and it is more and more than just an interpretation of the text.

Second: *The link between the administrative law, the administrative judiciary, and the inability to separate them*

It is not possible to talk about the existence of an administrative law unless there is an administrative jurisdiction, it had impacted of the previous appearance of the French administrative judiciary on the existence of an administrative law, and he was credited with making it an independent and special law, this is another specificity added to the administrative jurisprudence, because administrative law differs from civil law in its principles and theories, which requires different jurisprudence.

What follows from this is that administrative jurisprudence has advantages over other, for diligence, as these advantages are due to the following reasons:

Lack of codification of the administrative law - the speed of the development of the administrative law - the prevalence of the administrative spirit over the jurisprudence of the administrative judge, because the administrative judge's perimeter forces him to be not only a judge specialized in the administrative matter, but the judge has the spirit of a man of administration, a judge is fully aware that his decisions are complementary to administrative activity (Abdullah, 2018: p. 606).

The above is clear to us. Administrative jurisprudence has secured an important and influential position in the process of establishing the state of law. It deserved it through his creative and founding role in modern administrative law, this is allowed the transformation of the state administration into a modern, governed administration that is subject to its broad and branched public activity to the provisions of the law, as this constitutes a fundamental guarantee for the freedoms and rights of individuals, the process of establishing a state of law: results from the state being governed by a legal system, that is, its various bodies can act only with the qualification of the law. The idea assumes that state administration will be subject to law. The administration must respect the set of controls and provisions that constitute at the same time the basis of the framework and limits of its work under penalty of applying the penalty. But before declaring, the ordinary judiciary and the special law were not valid for applying to the work of the administration, the law applicable to the administration was mainly the share of the administrative judiciary, and the French State Council in particular was not only a guardian of the law but a source of it. Those controls that the judiciary was able to impose on the administration can be grouped in the principles of legality and responsibility, the two main pillars of the rule of law, they formed the subject of administrative jurisprudence for consecutive years that spanned more than a century (Saber, 2018: p. 63).

As for the interpretation of jurisprudence: the judge's role does not exceed the level of adjudication in disputes that follow his jurisdiction, it has no authority to set or dictate general rules, it his decision necessarily requires a previous rule because the judicial work is by matching the requests of the parties with the provisions of those legal rules. In order to understand and explain the function that the administrative jurisprudence carried out for establishing the state of law - at time when the legislation was either absent, insufficient or vague, rather, it was unable to keep pace with the movement of the development and expansion of public activity - the circumstances surrounding the judicial function must be examined. Since the administrative jurisprudence was historically linked to the emergence of the French State Council as the Plenipotentiary and the Dispute Court in 1872, the search for the historical origins

of the discretionary function is due to the jurisprudence of the judicial bodies that applied the private law included in the codification of Napoleon in 1804 (Affendi, 2015: p. 143).

The Functions of Judicial Diligence: The authors of the Napoleonic Regulation wanted to adopt ideas that exceeded those that prevailed during the era of the revolution by giving jobs to the court diligence within the framework of the codified law. We find, in particular, the jurist(M.PORTALIS) he says that (we can never reach jurisprudence only by passing legislation. The task and function of the legislation is to define and control the largest amount of generalities of the law through treatment of a general nature. Any setting principles and foundations rich in results and not going down to the details of the issues that can be generated by the word special status. It is for judges to be inspired by the spirit of general legislation and directing its applications, there is science for the legislator as it is for judges and one is unlike the other. The science of the legislator aims to find for each article the most appropriate and appropriate principles. As for the judge's knowledge, it aims to set those principles for application and their ramifications and expand their scope with insightful applications that are inspired by known hypotheses) (Affendi, 2015: p. 143).

This remarkable presentation gives due diligence several functions, this brief presentation begins not only with the application of legislative rules, but also with scrutiny of their scope in the various circumstances that appear in practice. Due diligence gives several functions, the legislator has to remain in a degree of generality so that a heavy workload does not occur and may not reach to cover the diversity and diversity of cases, therefore, the judge is the legislator of special cases. Second, treating the problem of the legislative vacuum, shortage and ambiguity in the legislative texts. Then the law adapted to development in society and filled the void that appears on occasions of new cases (Saber, 2018: p. 61).

2. The effect of judicial jurisprudence on the external legitimacy of the administrative decision

The external legitimacy of the administrative decision is achieved, when jurisdiction, form, and procedures are available. The decisions of the administration must be issued in accordance with a legal qualification that authorizes individuals or administrative bodies to conduct legal actions. On the other hand, these decisions must be issued by following specific procedures in the form that is legally prescribed for issuing them.

2.1. The impact of lack of jurisdiction

Bonar defines the lack of jurisdiction as the inability to practice legal work because it is the prerogative of another member, (Bonnard, 2006: p.167).·Lack of jurisdiction is one of the most serious defect of the administrative decision, (Basyouni, 1997: p184). The rules of jurisdiction cannot be amended by agreement (Le Pillouer, 2008: p. 9**)**. It is the first reason relied on by the French State Council to cancel the administrative decisions. The rules of jurisdiction regulate the acts of Public authorities in the State as each jurisdiction is checked by constitutional rules, laws, regulations, legal general principles devised to eliminate, resolutions, or customs. The competence rules represent an urgent need for regularity and promotion of universal management activity, (Abdullah, 2018: p.608).

Concerning the Jordanian legislators, the defect of lack of jurisdiction is the first of the reasons mentioned in the request for cancellation, (Jordanian Administrative Judiciary Law No. 27, 2014). Linking the rules of jurisdiction with the public system, the issuance of the administrative decision marred by the defect of lack of jurisdiction requires that it should not be corrected by a later procedure from the competent authority because this means that the decision issued The competent authority has a retroactive effect. The question arising in this regard is "does the administrative judiciary have licenses to correct administrative decisions tainted by the defect of lack of jurisdiction?". In fact, the Jordanian administrative judiciary, despite the lack of its provisions in this regard, authorized the subsequent correction by the competent authority to issue the decision to remove the defect of lack of jurisdiction. Accordingly, the Supreme Court of Justice indicates that the principles established in administrative jurisprudence allow the rectification of the invalid decision by a subsequent procedure that removes the defect in the decision. At that time, a request to cancel becomes irrelevant, (Higher Justice No. 63/63, 1963: p. 275). The court also indicates that there is no time limit for rejecting the decision. So, correcting it by the authority that issued it or canceling it by the court is permissible at any time. Thus, the claim that the lawsuit is filed after the deadline is rejected, (Justice High No.: 39/68: 1968: p. 683).

Yet, the realization of the principle of legality requires that administrative decisions be issued according to what is legally prescribed when they are issued. Hence, the legitimacy of any decision is decided in accordance with the relevant legal texts under which the decision is issued. Justification that the competent authority corrected the defective decision by authorizing or approving it makes the judgment away from fact as the competent authority issues it with the same content. This assumption does not deny that the decision is illegitimate.

The administrative authority may change issuing it or it may issue it with a Different content if the court decides to cancel the decision, (Bassiouni, 1997: p.184). Correcting the defect of lack of jurisdiction must not prevent the judiciary from nullifying the decision. The decision is considered non-existent if it is tainted with a serious defect; if the decision is issued by an ordinary individual, a body that is not originally specialized in practicing this jurisdiction, the decision is issued by an authority in regard to the competence of another authority, as if the administrative authority undertakes a responsibility of the judicial or legislative authorities, if an employee issues a task that is not of his specialization, it is a decision that lacks its characteristics as an administrative decision that is legally ineffective, (Higher Justice No. 11/75, 1975). The court mixes between cancelling and correcting the decision. Instances of that mixture is the court's decision that what is wrongly paid for an employee is returned through the court. Whereas, what happens is that it is discounted from the salary of the retiring employee, (Higher Justice No.: 282/97, 1998: p. 848). In another instance, the court indicates that resolving rental contractual rights is within the scope of courts' tasks. Whereas, governors do that instead. Thus, such decisions should be cancelled, **(**High Justice No.: 128/82, 1983: p. 167**)**.

The court indicates that preventing travelling is an aggression, (Higher Justice No.: 257/98, 1999: p. 157). Similarly, the Director General of Passports deviates the jurisdiction of the Court of First Instance by correcting the name mentioned in the passport, (High Justice No.: 98/71, 1971: p. 1199). It is clear from the previous decisions that the administration has come out with a blatant departure from the rules of jurisdiction, accustomed to the validity of the courts. Thus, its decisions are tainted by the defect of lack of jurisdiction. The assault of the administrative authority on the jurisdiction of the judiciary is one of the basic cases leading to the result that an administrative decision requires that the administrative judiciary does not only decide the absence of these decisions, but also cancels them as they are not legally present and do not fix any basis for any right (Helmy, 1984: p.277). In other cases, the Supreme Court of Justice considered some of the administration's decisions tainted by the defect of lack of jurisdiction as non-decisions. It states that if a decision is issued to grant permits to facilitate tourist buses on the Amman-Aqaba line by the undersecretary of the Ministry of Interior, that decision is considered non-existent, **(**Higher Justice No. 68/91, 1969: p .329**)**. The same issue is when the minister of agriculture decides away from the cabinet of ministers, (High Justice No. 80/75, 1981: p. 1667). The court must control the terms it uses in its decisions.

2.2. Defects off forms and procedures

De lobadier defines the defect of form and procedures as the negligence or incorrectness of the formalities followed in administrative work

(Al-Ghwairi, 1997: p.343). The formalities are a restrictions on the absolute authority of the administration as it obliges them to deliberately issue their decisions in accordance with public interests, which avoids issuing decisions affecting the individuals' rights. Adherence to formalities fulfills the interest of both the administration and individuals (Gamal El-Din, 2004: p. 437). They are guarantees that achieve a dual interest targeted by legislators. It results in their negligence to act void even if no provision is made for that (Peiser, 1976: p.25). The Supreme Court of Justice indicates that the decision must be issued.

According to the procedures specified by legislators in the form envisaged for it. The rules for form and procedures are established to protect public interests. Failure to observe violation ruins the guarantees established for individuals' rights, (High justice No. 21/86, 1987: p. 40). The rules of form and procedures are considered guarantees in favor of individuals' rights. The Jordanian administrative judiciary authorized the correction of the formal defect that marred the administrative decision, through the subsequent fulfillment of formalism. The supreme Court of Justice indicates that the principles established in administrative jurisprudence allow the correction of the null decision; A subsequent procedure removes the defect in the decision. At that time, the lawsuit seeking to cancel it becomes irrelevant, (High Justice No. 63/63, 1963: p. 275).

As for the impact of the stakeholder's acceptance of the decision tainted by a defect in the form, it is noticed that the court authorized the coverage of this defect if the official authority decides to refrain from adhering to the invalidity of the defective decision. In this regard, the supreme court of justice indicates that having the summoned attending before the governor, who issues a decision against her, guarantees her sponsorship to provide a bond, Ensuring her good behavior without issuing a warrant summoning her and replying to the charge against her, is a waiver of her from adhering to the invalidity of the governor's decision, (Justice High No. 56/26, 1956: p. 338).

The court should abandon its previous jurisprudence whether with regard to its permission to correct the defect of the form by a subsequent procedure, or what relates to its approval of a decision with a defect in its form. The administration will not hesitate to issue its decisions without caring about guarantees that protect the rights of individuals. Its decisions are not canceled. The Jordanian administrative judiciary reinforces safeguards that protect individuals 'rights and freedom from arbitrariness and unfairness of the administration, in line with the French State Council's judiciary, which does not permit the subsequent correction of the defect that marred the administrative decision except with regard to material errors that do not affect the content of the decision, (Al-Tamawi, 1996: p. 687). This defect cannot be corrected as long as the formalities, especially the essential ones, achieve the public interest, even if the French State Council's judiciary is vacillating in this regard (Fahmy, 1977: p.288). In the context of the jurisprudence of the Jordanian administrative justice concerning the defect of form and procedures, particularly in the field of convening administrative councils and committees, it is evident that when the legislator is granted the authority to issue some administrative decisions to these councils and bodies, it must take its decisions in the manner stipulated by the law and that all the members who make up the council be involved in the decision. The court states that all members of the Council need to attend if the text does not specify the quorum for attendance,(Higher Justice No. 6/75, 1975: p. 896). On the other hand, some laws of the supreme court of justice indicate that the attendance of the majority of the members of the council is enough to make the decision correct as long as it is not stipulated otherwise, (High Justice No.: 198/97, 1998: p. 881). It is significant to state that the court should always require the attendance of all the members of councils and committees as this insures the rights of individuals.

3. The effect of judicial jurisprudence on the internal legitimacy of the administrative decision

The supervision of the administrative judiciary examines the legitimacy of the administration's decision to consider the conditions of the internal legitimacy of this decision. Those conditions are related to the internal content of the administrative decision; location, reason, and purpose. These conditions must be met collectively. Otherwise, the decision is stigmatized as illegal.

3.1. The defect of reason

Reason is the legal or realistic situation that takes place away from the administrator, (Al-Tamawi, 1970: p. 539.). Then, reason is the real or legal case that happens before the issuance of the decision. It gives the administrator the ability to legally issue a specific decision. This means that reason relates to motivation that urges the administrator to take a certain decision. The motives for the administrative decision are distinguished as being external, objective and independent of the source of the decision (Abdel-All, 1971: p. 36). The Supreme Court of Justice states that every administrative decision must be based on a reason calling for issuing it. This reason is a cornerstone of the administrative decision and a condition for its validity, (Higher Justice No. 25/84, 1985: p. 1080). The court also states that the decision subject to appeal is not based on realistic reasons that require issuing it and is contrary to law and order. Reasons for appeal become sufficient that the decision must be canceled, (Higher Justice No.: 373, 2011). Therefore, it is clear that all administrative decisions must be based on a reason justifying issuing them, which must be correct.

The French State Council has taken into consideration the rule of "substituting reason", (Roslan, 2013: p.234)for practical considerations.

It is clear that the court does not cancel the administer operative decision, despite the incorrectness of the reason on which it is based, as long as there is a valid reason that can replace the incorrect one. It is noticed that this constitutes a prejudice to the principle of separation of powers. The judge practices the role of the administrative chief, which affects the independence and impartiality of the judiciary. This jurisprudence is not consistent with the nature of the task of the administrative judiciary as a legitimate judiciary that addresses the administration's injustice by canceling its decisions that violate the law.

3.2. Deviation of power

The defect of deviating the authority means the use of the discretionary authority by the administration to achieve an unrecognized purpose, (Al-Tamawi, 1966: p. 81). The content of the previous decision is based on incorrect reasons, but it will base it on valid reasons, and accordingly there is no point in canceling it in this case.

What distinguishes this defect is that it is related to the purpose of the decision that requires conscious will on the part of the decision-maker. When the administrative authority is restricted, it acts according to the law imposed by the legislative authority. Thus, the Supreme Court of Justice states that the decision is valid when it is available and is not sound when it is not available, (Ruslan, 2013: p. 233). The decision with the defect of deviation is sound in terms of form, procedures, jurisdiction, location, and reason, which makes the issue of proving it extremely difficult (Shatnawi, 2004: p. 825).

There is no doubt that the personal nature of the defect of deviation in the authority constitutes an obstacle preventing it from being proven. The research and investigation undertaken by the judge to identify the real motives for the source of the decision. It is not easy to determine the deviation in power, especially in light of the presumption of legitimacy of

all Administrative decisions. Hence, the decision is considered in principle to be correct until the plaintiff proves the opposite. This constitutes a heavy burden on the plaintiff, (Bassiouni, 1997: p.300).

In fact, the jurisprudence of the Jordanian administrative judiciary is contradictory because, in some decisions, it is sufficient for the plaintiff to present what destabilizes the presumption of legitimacy, (High Justice No. 175/94, 1995: p. 51). It is clear that the court is tightening its requirements to provide conclusive evidence to prove the deviation of authority, which is considered incapable of the appellant with weak and unequal status with the administration in substantiating the case, especially since the court does not oblige the administration to cause its decisions unless the legislator obliges it to do so, (Higher Justice No. 55/86, 1987: p. 887).The court states that all decisions are correct unless proved otherwise, (Higher justice No.: 214/94, 1995: p. 44). The appellant should then present whatever proves that the decision is arbitrary, (High Justice No. 198/93, 1994: p. 101). These reasons make it hard for those appealing to correct some decisions. Thus, the court should review the procedures of correcting decisions which violate the public interest.

4. Conclusions

This study examined the jurisprudence of the Jordanian administrative judiciary and its impact on the cancellation lawsuit, we have clarified the position of the Jordanian administrative judiciary regarding issues related to the claim of annulment, by studying his various jurisprudence on many detailed matters related to the admissibility of the case as a matter, the study showed fluctuation and sometimes contradictions in the jurisprudence of the Jordanian administrative judiciary regarding the fundamental issues of the lawsuit that are the subject of the comparative administrative judiciary consensus, the administrative case, like all other cases, is based on two parties to the dispute, however, what distinguishes the administrative case is that the administration is a party to it with the powers and privileges it possesses, as it is responsible for achieving the public interest inside the state and ensuring the regular functioning of public facilities, we turn to show the most important results and recommendations reached by researchers in this study:

4.1. The results

1. Creating a higher administrative court, as a second instance court, is an important step in the development of the Jordanian administrative judiciary, which gives the litigants the advantages of multiple levels of litigation.
2. The fluctuation of the jurisprudence of the Jordanian administrative judiciary confuses the cases of lack of jurisdiction.
3. The Jordanian administrative judiciary permits, in some of its provisions, to correct administrative decisions tainted by the defect of lack of jurisdiction in subsequent procedures, which contradicts with what is agreed upon in the jurisprudence and administrative judiciary.
4. The Jordanian administrative judiciary has recognized its right to substitute the correct cause for the defective reason on which the administration relied in its decision.
5. The Jordanian administrative judiciary, in many of its applications, is strict as it necessitates providing conclusive evidence to prove the deviation of power.

4.2. The recommendations

1. Setting special conditions for whoever is appointed as an administrative judge, to suit the task assumed by the administrative judiciary.
2. Establishing a judicial institute for the preparation and formation of administrative judges. The training period for this institute should be at least two years during which the competence and capabilities of those in charge of the administrative judiciary are qualified and refined.
3. It is necessary for the Jordanian administrative judiciary to control its jurisprudence related to cases of lack of administrative decision.
4. It is necessary for the Jordanian administrative judiciary to desist from its jurisprudence which recognizes the right to substitute the correct reason instead of the unlawful reason.
5. Reducing the complexities of proving deviation in authority that destabilizes the presumption of correctness presumed in the administrative decision.

Declarations

Author contribution statement

Faisal Alshawabkeh: Conceived and designed the experiments; Performed the experiments; Analyzed and interpreted the data; Wrote the paper.

Mohmmad Husien Almajali: Contributed reagents, materials, analysis tools or data; Wrote the paper.

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The authors declare no conflict of interest.

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