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The administrative courts and the absence of comprehensive formation in Iraqi law: A comparative study

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Abstract

A legally exercising Council of State or State Consultative Council of courts underpins administrative justice. Both councils legitimately establish administrative courts and administer state administrative justice.

The State Consultative Council and its courts are vital to comparing legislation for administrative justice. Councils and courts administer justice. Similar law describes these councils' structure, functions, and jurisdictions within the court's organizational framework.

Iraq lacks an administrative justice system to resolve administrative disputes at all levels. Iraq's administrative judiciary confronts organizational and legislative issues after legislative reform. Unlike comparable legislation, administrative courts lack a comprehensive structure, generating gaps in their operation.

Keeping judges' promises, the Iraqi Council of State administers administrative justice within legal limits. State Consultative Council has judicial and consultative branches. Higher courts review administrative court decisions.

Plaintiffs can appeal Iraqi administrative judiciary verdicts as they are first instance. Higher courts can hear administrative judicial decisions. Similar to conventional appellate courts, the State Consultative Council General Board hears Administrative Court and GDC appeals.

Iraq's Fifth Amendment Law created the Supreme Administrative Court. To protect legal process and citizen rights, the Supreme Administrative Court hears Administrative Court and Employees Judiciary verdict appeals.

Thus, appellate courts with secondary jurisdiction and extensive dispute review are necessary to increase judicial efficiency and protect personal rights. Implement Article 7/First of the Fifth Amendment Law to Iraqi Council of State Law No. 17 of 2013 to streamline administrative and employee judicial tribunal matters in all provinces. State commissioners in the Iraqi Council of State can prepare and facilitate administrative actions under identical law.

Keywords: Administrative court, amendment law, state consultative council

Introduction

The organizational structure of the administrative judiciary is formed by a series of courts that exercise their jurisdiction within the limits set by the law, which falls under various names. Some refer to it as the Council of State, while others call it the State Consultative Council. Both councils exercise the jurisdiction of administrative justice in the state, which involves judicial duplication, meaning that the council is the vessel of administrative courts and regulates their work within the framework of the principles, determinants, and jurisdictions set by the law for each one of them.

The Council of State or the State Consultative Council and the courts falling under it receive significant attention in comparative legislations. This is due to the position occupied by the administrative judiciary in these legislations, as these councils and their courts have become representatives of administrative justice, exercising their powers and jurisdictions within this judiciary. Some comparative legislations have given greater importance to the formation of this council by specifying its formation, bodies, and jurisdictions within a comprehensive organizational structure parallel to that of the ordinary judiciary.

However, in Iraq, the deficiencies and shortcomings of the administrative judiciary in forming administrative courts are evident due to the absence of a comprehensive formation that addresses all the details and aspects of administrative disputes at their various stages. The Iraqi administrative judiciary still suffers from legislative deficiencies and organizational shortcomings, despite all the legislative reform efforts that have been made.

This deficiency contributes to filling the gaps in the operation of administrative courts, as discussed in the first section. This is in stark contrast to the approach followed in comparative laws, which emphasize the importance of forming these courts, making them equivalent to courts in the ordinary judiciary, as discussed in the second section.

Chapter One

Formation of Administrative Courts in Iraqi Law

In Iraqi law, the Iraqi Council of State exercises the jurisdiction of administrative justice within the limits set by the law and the guarantees granted to judges in these courts. The State Consultative Council is composed of two sections (Advisory and judicial), with the judicial section comprising a group of administrative courts. These courts handle cases at the initial stage (First instance), while there are higher-level courts above the initial courts.

The First Demand

Formation of Primary Administrative Courts

Until recently, Iraq was among the countries with a unified judicial system, prompting jurists and legal experts to make numerous attempts to establish a specialized administrative judiciary. The initial outcome was the issuance of Law No. (35) of 1977, which emphasized the necessity of establishing specialized courts to handle cases involving state employees and the public sector. These courts were to adjudicate disputes in which ministries and public institutions were involved.

This prompted the legislature to enact Law No. 140 of 1977 on Administrative Courts, considering the developments that occurred in public life following the issuance of several laws. This led the legislature to issue Law No. 65 of 1979 regarding the State Consultative Council. However, Iraq remained within the scope of a unified judiciary and did not implement the dual judicial system until the issuance of the Second Amendment Law No. 106 of 1989 to Law No. 65 of 1979 regarding the State Consultative Council.

Following the issuance of the Second Amendment Law, this judiciary began to perform its role through the General Discipline Council and the Administrative Judiciary Court, alongside the ordinary judiciary, which had general jurisdiction over disputes, whether administrative or ordinary. After the issuance of the Second Amendment Law, the State Consultative Council began to exercise judicial jurisdiction in the field of administrative justice through the General Discipline Council, the Administrative Judiciary Court, and the General Assembly of the State Consultative Council.

Thus, with the establishment of the Administrative Judiciary Court, Iraq joined the countries with a dual judiciary system, marking a turning point towards a specialized judiciary system. This occurred with the issuance of the second amendment to the law regarding the State Consultative Council, which stipulated the formation of the Administrative Judiciary Court. Additionally, the legislature authorized the formation of other courts as needed in the centers of appellate regions. Subsequently, the Iraqi legislature enacted the Fifth Amendment Law to the State Council Law, establishing Administrative Judiciary Courts. Article 7/First of the Fifth Amendment Law stipulated that these courts would be formed under the chairmanship of the Deputy President for Administrative Judiciary Affairs. The Iraqi administrative judiciary evolved in light of the

Fifth Amendment Law No. 17 of 2013 to Law No. 65 of 1979 regarding the State Consultative Council. This amendment considered the courts of employee judiciary as one of the formations of the State Council, as stated in Article 2/First/W and Article 7/First, Second, and Third.

The Second Demand

Formation of Higher Administrative Courts

The Higher Administrative Court was established by virtue of the Fifth Amendment Law No. 17 of 2013, with its headquarters in Baghdad. It convenes under the presidency of the President of the Council or those authorized by the counselors, with the membership of six counselors and four assistant counselors appointed by the President of the Council. This court exercises the same jurisdiction as the Federal Cassation Court pursuant to the provisions of Civil Procedure Law No. 83 of 1969 when considering appeals against decisions of the Administrative Judiciary Court and the Employee Judiciary Court.

The decisions issued by the Iraqi administrative judiciary are first-instance decisions, thus ensuring the right to litigation for the litigants. This necessitates that the decisions of the administrative judiciary be subject to appeal before higher judicial authorities. This is carried out by the General Assembly of the State Consultative Council regarding decisions issued by the Administrative Judiciary Court and the General Discipline Council. The General Assembly exercises the jurisdiction similar to that of the Court of Cassation in the ordinary judiciary, reviewing appeals against decisions issued by the Administrative Judiciary Court and the General Discipline Council.

The Fifth Amendment Law represented a qualitative leap for the Iraqi administrative judiciary, different from what it was before this amendment. It led to fundamental changes, the most important of which was the establishment of the Higher Administrative Court.

Therefore, the Higher Administrative Court is the supreme judicial authority that considers appeals against judgments issued by the Administrative Judiciary Court and the Employee Judiciary Court in terms of cassation. Thus, the establishment of administrative judiciary courts in Iraq has contributed to facilitating the litigation process and protecting the rights of citizens from administrative arbitrariness, as well as safeguarding the rights of the state and maintaining them from citizens' neglect of their duties.

Thus, it becomes apparent that the presidency of the State Consultative Council in Iraq resembles that of the Egyptian State Council, whereas the president of the French State Council is legally headed by the Prime Minister and the Minister of Justice, although the actual president of the council is the Vice President. Law No. 65 of 1979 regarding the State Consultative Council did not establish specific conditions for the president of the council but merely stipulated general requirements applicable to appointments in public office for the president, vice president, counselor, and assistant counselor. Special conditions were also set for the position of counselor, which are the same as those required for a counselor in the Higher Administrative Court. The Fifth Amendment Law to the council decided on specific formalities for the formation of the Higher Administrative Court.

Some jurisprudential perspectives view that the decisions of the current formation of the Higher Administrative Court are merely a form of the General Assembly in the State

Consultative Council in its cassation capacity. This is because they consist of the same members and president, with the difference being in the designation and nothing more.

The legislator has been keen on providing guarantees for members of the Iraqi State Consultative Council, including the presidents of the administrative courts, counselors, and assistant counselors in these courts. Among the most important guarantees are those related to the field of service, instilling a sense of reassurance and job stability? The legal system regulating the position provides protection for the member and grants immunity during the performance of duties. Additionally, one of the guarantees that enhances judicial independence is the issuance of a presidential decree for appointment, serving as an incentive for expressing opinions freely and impartially while preserving dignity and honor.

However, Iraqi laws, including Law No. 49 of 1933 on Legal Codification, categorize council members under the title of "legal codifier." The Civil Service Law No. 24 of 1960, as amended, in Article 2/8/z, specifies positions appointed by presidential decree, including legal codifiers. Furthermore, Law No. 65 of 1979 regarding the State Consultative Council, as amended, in the first paragraph of Article 22, states: "The president, vice president, and counselor shall be appointed by presidential decree upon the recommendation of the Minister of Justice." Subsequently, the Second Amendment Law No. 106 of 1989 to Law No. 65 of 1979 regarding the State Consultative Council stipulates that "the president, vice president, counselor, and assistant counselor shall be appointed directly by presidential decree."

Furthermore, the Revolutionary Command Council issued Resolution No. 1077 on 12/8/1982, which stated that the president of the council, his deputy, and the counselor are employees with a special rank.

As for the Constitution of the Republic of Iraq for the year 2005, it stipulated in Article 61/Fifth/b that "holders of special ranks shall be appointed upon the proposal of the Council of Ministers and the approval of the Council of Representatives." This means that the appointment to any of the positions related to the president, vice president, and counselor must go through these constitutional procedures before the issuance of the presidential decree for appointment.

The Federal Supreme Court, in its interpretation of Article 61/Fifth/b of the Constitution, indicated that "the request for appointment to special ranks by those covered by Article 61/Fifth/b of the Constitution for the first time requires the approval of the Council of Representatives for their appointment, in compliance with the constitutional article, including the request for the appointment of a counselor in the State Council for the first time. Also, in the case of the promotion of an assistant counselor in the State Consultative Council to a counselor in the council, this promotion does not constitute the appointment intended in Article 61/Fifth/b of the Constitution, but rather it is considered an academic promotion for those who meet the promotion criteria from assistant counselor to counselor. Therefore, this academic promotion does not require the approval of the Council of Representatives, but rather follows the mechanism stipulated in Article 22 of Law No. 65 of 1979 regarding the State Consultative Council, as amended.

From what has been mentioned, we find that the decision of

the Federal Supreme Court has established a mechanism for appointment and promotion that has been the subject of widespread controversy, due to the absence of a clear mechanism that aligns with legal logic and comparative law applications. This is also what the legislator encountered in the Fifth Amendment to Law No. 17 of 2013 of the Council of State Law. Another aspect of jurisprudence sees that practical application is carried out through the Ministry of Justice, and that nomination and approval are done by the ministry.

Additionally, there are guarantees granted to the members of the Iraqi Council of State, as stipulated in the Fifth Amendment to the Council of State Law. This text has sparked wide-ranging debate regarding how the president, vice president, counselor, and assistant counselor are counted as judges when performing their duties in administrative judiciary, despite the fact that the effective 2005 Constitution, in Article 88, stipulated the judicial authority and its organization. Similarly, Law No. 160 of 1979, as amended, in the third chapter of the first article, articles 36-45, stipulated the conditions for the appointment of judges, requiring the judge to be a graduate of the judicial institute.

This raises questions about how administrative judges are included in these privileges and rights, especially since the Law of the Council of State regulates the appointment of the council's president, vice presidents, counselor, and assistant counselor, all of whom are appointed by presidential decree. Particularly, the Iraqi Constitution of 2005, in Article 98, states: "Judges and public prosecutors are prohibited from the following: combining the judicial function with the legislative and executive functions or any other job." As it is known, the president, vice presidents, counselor, and assistant counselor exercise their duties as counselors and judges within the council. This prompted a challenge to the law's constitutionality due to Article 1/Third of the Second Amendment to Law No. 47 of 1979 of the Council of State before the Higher Administrative Court.

Legal scholars and jurists have responded to these questions, with some arguing that invoking Article 88 of the constitution does not align with the reality of the president, vice presidents, counselor, and assistant's roles within the council. They have non-judicial responsibilities in the regulatory field according to Article 5 of the amended Law No. 65 of 1979 of the Council of State, which involves drafting legislation projects. Additionally, they provide opinions and advice according to Article 1 of the same law. Alongside advisory roles, there are also judicial responsibilities exercised by the Employee Judiciary and Administrative Judiciary Courts, which are further enhanced by the establishment of the Administrative Supreme Court, completing the council's formation and its functions objectively.

It appears that granting the status of judge to members of the Council of State does not constitute a violation of the constitution or the Judicial Organization Law. This is because the description provided in the Fifth Amendment to the Law of the Council of State, which confers upon them the status of judges, does not prevent them from performing their advisory function and issuing legal opinions within the council. The legislator has granted them this status to prevent a dual role for members of the Council of State and to ensure their independence and neutrality. Furthermore, granting them the status of judges is an application of the

objective criterion adopted by the constitutional legislator when determining the judicial authority.

Section Two

Formation of Administrative Courts in Comparative Laws

The French experience in the field of administrative justice is a unique and successful one, making it a model for administrative judiciary in other legislations (First point). Following the French legislative model, both the Egyptian and Lebanese legislators have established their administrative judiciaries (Second point).

The First Demand

Establishment of Administrative Courts in France

The Council of State in France is one of the most significant institutions in administrative justice, where the judge of administrative disputes performs the functions of the Supreme Court for administrative courts in France.

The French Council of State is composed of two types of bodies

1. Administrative Courts, with the Council of State at the top.
2. Regional Administrative Courts.

The French Council of State constitutes a degree among the administrative courts. However, this degree varies depending on the nature of the case. Sometimes, the Council serves as a court of first instance, while at other times, it acts as an appellate court for certain administrative courts. In some instances, it functions as a court of final appeal, particularly concerning matters related to the Court of Auditors and audit chambers.

However, due to the accumulation of cases before the Council of State, acting as both a court of first instance and last resort, and the slow resolution of lawsuits, the French legislature has specified certain jurisdictions for the Council's work. This was done through Decree No. 30 of September 1953, based on legislative authorization granted to the government by Law No. 11 of July 1953. As a result of this decree, the Council of State became a court with specific jurisdiction, granting general jurisdiction to the administrative courts in handling administrative disputes.

Article 1 of Law No. 87/1127, issued on December 13, 1987, stipulated that the French Council of State considers judgments issued by administrative courts as an appellate court for appeals related to electoral disputes, annulment lawsuits against administrative decisions and regulations.

Additionally, the Council of State serves as a court of cassation for judgments issued by administrative courts that are not subject to appeal before it, as well as appellate administrative courts. In this capacity, the Council reviews decisions of the Court of Auditors, courts competent in assessing war damages, and the Supreme Council for Illicit Gains.

Administrative courts in France also share jurisdiction with the Council of State in administrative disputes as part of the judicial function of regional councils.

In France, there are 26 administrative courts, each composed of a president and several counselors. The selection of court staff is from graduates of the National School of Administration, following the appointment and promotion system in administrative court positions.

Each administrative court consists of one or more chambers, each comprising three counselors. The French legislature has left the organization of these chambers to the volume of disputes brought before the court, without specifying a set rule for the number of chambers. However, special provisions apply to the Paris court due to the high volume of cases it handles. It is divided into seven sections, each consisting of two chambers, with each chamber comprising three or five counselors.

The decree issued on July 31, 1945, and amended by the decree on September 30, 1953, specified the composition of the Council as follows:

First: Delegates

They hold the lowest ranks in the administrative hierarchy of the Council and are appointed from graduates of the National School. They serve a two-year probationary period, after which they may be transferred to another position if their competence in their current role is not demonstrated.

Second: Deputies

Seventy-five percent of them are selected from delegates of the first rank, while the remaining quarter consists of government officials and individuals from outside the Council.

Third: Government Advisors in Regular Service

Two-thirds of them are selected from among the deputies through promotion, while the remaining third are appointed by the government. They must be at least forty-five years old and are responsible for discussing cases presented to the Council and making final decisions. Their number is seventy-nine advisors.

Fourth: Heads of Departments

They oversee the work in the Council's departments, totaling five heads. The departments are divided into four administrative departments, with the fifth department being the judicial department, which handles administrative disputes.

Fifth: Vice President of the Council

The Vice President of the Council is the actual head of the Council, as the President of the Council is either the Prime Minister or the head of government. Their role is limited to chairing the Council's general assembly on official occasions in the absence of the Minister of Justice, ensuring the separation of the Council of State from the executive authority.

The Second Demand

Formation of Administrative Courts in Egypt

This section is the one that confers the judicial authority on the State Council, the decisive factor that makes the state have a dual judicial system. Since the State Council exercises its judicial jurisdiction through its various formations, each of which is characterized by specific competencies, we will review in this demand the formations of the State Council, which consist of two main courts: the Supreme Administrative Court and the Administrative Judiciary Court.

The judicial section of the Egyptian State Council consists of five levels. Article 4 of the Egyptian State Council Law No. 47 of 1972 stipulates that the presidency of the Supreme

Administrative Court is represented by the President of the State Council himself. Each chamber of the court consists of five counselors to issue judgments, and the jurisdiction of each is determined by the President of the State Council. The court includes one or more chambers to review appeals. Thus, it becomes clear that the Supreme Administrative Court is not competent to hear disputes initially but is an appellate court specialized in hearing appeals.

According to this law, the court convenes in a general assembly, which deals with matters related to its system, internal affairs, as well as the distribution of tasks among its members or chambers. The general assembly consists of all active counselors, and it is convened upon the request of its president, three of its members, or the president of the Commissioners Authority. Its sessions are valid only in the presence of an absolute majority of the attendees, and in case of a tie, the side favored by the president prevails.

The Supreme Administrative Court is the highest court in the Egyptian State Council hierarchy. Although its establishment came later, it preceded the Administrative Judiciary Court and the administrative courts in existence. Its creation was stipulated in Law No. 65 of 1955, known as the Third Law of the State Council.

Article 5 of the Egyptian State Council Law determines that administrative courts have headquarters in Cairo and Alexandria, supervised by one of the vice presidents of the State Council, who is assisted by the council's president in organizing these courts and ensuring their smooth operation. The courts issue judgments from chambers, each chaired by an assistant counselor and with at least two deputy members. In addition to the mentioned courts, the law also stipulates the formation of disciplinary courts in Article 7, which consist of two types of courts:

- Disciplinary courts for employees at the senior management level and equivalent positions.
- Disciplinary courts for employees at the first, second, and third levels, and their equivalents.

Article 8 of the mentioned law stipulates that the headquarters for disciplinary courts for employees at the senior management level are in Cairo and Alexandria. Each court consists of one or more chambers, comprised of three counselors. Additionally, the headquarters for disciplinary courts for employees at the first, second, and third levels are also in Cairo and Alexandria. Each court comprises chambers led by at least one assistant counselor and with membership of at least two deputies.

Furthermore, the Egyptian State Council Law specifies the formation of the State Commissioners Authority. Article 6 of the law states that the authority is composed of one of the vice presidents of the council serving as its president, along with a sufficient number of counselors, assistant counselors, deputies, and delegates. State commissioners must hold the rank of at least assistant counselor in the Supreme Administrative Court and the Administrative Judiciary Court.

A representative of the State Commissioners Authority must attend the sessions of the judicial section courts according to the council's law. If the authority is not represented in the sessions of the administrative courts, or if its representative holds a rank lower than assistant counselor or deputy, the court sessions are considered invalid. Consequently, any judgments issued by the court in that session are nullified. This is because the representative of the State

Commissioners Authority holds a judicial status in the proceedings of administrative lawsuits. This was affirmed by the Egyptian Supreme Administrative Court in one of its significant rulings, stating: "The State Commissioners Authority serves as a custodian of administrative disputes, and is a fundamental actor in preparing and presenting them for litigation, and in providing neutral legal opinions, whether in the memoranda submitted or in the clarifications requested during the public session. From this stems the conclusion that if a commissioner raises a cause of invalidity or a response provided for in Articles 313 and 315 of the Litigation Law, he is invalid in the first case and prohibited from performing his duty in the lawsuit, and his rejection is permissible if it does not result in a complete deviation from his function in the lawsuit, as previously explained. If the commissioner is invalid to perform his duty in the lawsuit and nevertheless continues to perform it, he must recuse himself and appoint another to perform his duty, as this constitutes a flaw in the procedures affecting the judgment, rendering it defective and null.

The legislator has established a set of guarantees for the members of the Egyptian State Council. The jurisdiction to hear appeals related to the functional rights of council members concerning salaries, pensions, and allowances is assigned to the Supreme Administrative Court. In addition to the guarantees provided by the Egyptian legislator for the members of the State Council, which include the non-removability of members, as stipulated in the referred Council Law.

Conclusion

Having completed the review of the structure of administrative courts and the absence of a comprehensive formation of administrative courts in Iraq, unlike some other countries such as France and Egypt, we have reached a set of conclusions and recommendations as follows.

Results

1. Regarding the organizational structure of administrative judiciary in Iraq, it is observed that the administrative judiciary has not adopted the integrated structure commonly recognized for administrative courts, such as administrative appellate courts and the Supreme Administrative Court. The administrative judicial system in Iraq suffers from deficiencies due to the absence of administrative appellate courts, creating inequality of opportunities among litigants before the administrative judiciary.
2. The absence of administrative appellate courts undermines the principle of equality before the judiciary. Litigants before administrative judicial bodies do not have the same opportunities available to litigants before regular judicial bodies, creating a disparity between the regular and administrative judicial systems. The former consists of first-instance courts, appellate courts, and a supreme court, such as the Court of Cassation, while the latter consists primarily of first-instance administrative courts and only an administrative court of appeal.
3. All the amendments made by the Iraqi legislator to Law No. (65) of 1999 concerning the State Consultative Council, including the fifth amendment in 2013, have not achieved the goal of creating comprehensive legislative regulation.

4. The second amendment to Law No. (109) of 1989 concerning the State Consultative Council led to the establishment of administrative judiciary alongside the regular judiciary. While this was a step in the right direction, the administrative judiciary remains underdeveloped due to legislative and organizational shortcomings. Thus, the task of this judiciary is challenging and requires improvement and expansion of its jurisdiction to align with the administrative judiciary in comparative countries.

Recommendation

1. It is essential to establish appellate courts and grant them the status of second-instance courts to ensure a thorough review of disputes, thereby guaranteeing the proper functioning of the judiciary. This would serve as a safeguard for freedoms and personal rights.
2. We recommend implementing Article (7/First) of the Fifth Amendment to Iraqi Law No. (17) of 2013 concerning the State Consultative Council, which pertains to the establishment of administrative courts and employee courts in all governorates. This would facilitate the process of filing lawsuits before these courts, as some employees endure arbitrary actions and administrative abuse, making it difficult for them to bear the hardship of travel.
3. We recommend establishing a body for state commissioners within the structure of the Iraqi State Consultative Council to prepare and facilitate administrative lawsuits in line with comparative legislation.

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