

The Administrative Judge's Role in Filling the Legislative Gaps

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This study addresses the administrative judge's role in filling the legislative gaps. It discusses the judicial system of the administrative judge authority in establishing a new legal principle, as the real role of the administrative judge is the structural role, that invents and creates theories and legal solutions to administrative disputes and not the practical role of law provisions. The administrative judge is bound to adjudicate upon the dispute and pass a fair ruling, and the absence of legal provisions cannot be invoked in the application of justice; otherwise it will be considered a denial for justice. On the other hand, this has been linked to the effect of advantages taken from judicial rulings in the Latin system, including the Iraqi system, of which it is a part, but it ultimately remains non-binding to the Supreme Administrative Court itself and the lower courts.

Key words: *Administrative jurisdiction, administrative disputes, Iraqi legislations.*

Introduction

The task of the administrative judge lies in deriving legal rules, in case provisions are kept silent about setting any rule that resolves the dispute in question, and the judge cannot dismiss the ruling in the dispute otherwise it will be considered a denial for justice, as is the case of Iraq, which is one of the Latin system states, whose legal system does not determine the principle of precedents authoritative power, known in the Anglo-Saxon system.

Significance of the Study

From the theoretical aspect, studying this topic is important in knowing the role of the administrative judge, in adapting the legislation to be tailored to the dispute before him, without violating the sanctity of legal provisions, opening the door for the development of the law and filling the gaps in its texts. From the practical aspect, it is a discretionary authority that belongs to the judiciary to say its opinion in accordance with the requirements of the relationship between reality and law, so that the justice is applied.

Statement of the Problem

The study addresses the problem of filling the legislative gap in case of the silence of legal provisions, and shows how the Supreme Administrative Court settles on a particular legal principle to be applied to other similar facts before the Court and its future impact on the unification of legal principles, to achieve justice and equality between litigants. In addition, this topic has not been analysed and studied by the jurisprudence, for the fact that the administrative jurisdiction in Iraq is newly established from the practical aspect, and it is in dire need of such studies.

Methodology

This study adopted the analytical method through analysing the legal texts, jurisprudence provisions, and the opinions of administrative law jurists. This research will be divided into two subjects as follows:

Subject one: will be devoted to the study “the administrative judge authority to establish a new legal principle”. This subject is divided into two themes, the first of which deals with the legal basis of the administrative judge authority in the establishment of a new legal principle. The second theme will deal with the impacts of the judge's authority scope in establishing a new legal principle.

Subject two: will study “the impacts of the Judge's authority to establish a new legal principle”. This subject is divided into two themes: the first will discuss the extent of the Supreme Administrative Court's commitment to the new legal principle, while the second theme will deal with the extent of the other administrative court's commitments to the new legal law. The study ends with a conclusion regulating the findings and recommendations of the study.

The Administrative Judge Authority in Establishing a New Legal Principle

One of the administrative law characteristics is that it is uncodified. The judge finds himself committed to rule in the disputes before him. The administrative judge seeks to find and devise solutions to the disputes before him, in the absence of the legislation provisions to fill this gap (Othman, 2008). Thus, we will address this topic in two themes: the first is devoted to explain the legal basis of the administrative judge authority to establish a new legal principle and the second theme deals with the reasons for which the administrative judge establishes a new legal principle.

The Legal Basis of the Administrative Judge

When the administrative judge applies the law, he sometimes creates and innovates the legal base of his own, which is a scientific and practical necessity required by the nature of the legislative texts and judicial process. Here, the establishment in the field of administrative law

has a very important role, no less important than the legislation itself, (Daqouqi, 2015) because law is a spirit and sense, not letters and words, thus it is the responsibility of the judge to turn the rigid texts into vibrant facts (Obaidi, 2011).

In Iraq, Article 1 of the Iraqi Civil Law of 1951 stipulates the steps to fill the lack of legislation, in the case of ambiguity or loss of the provision: “1. The legislative provisions shall apply to all matters addressed in these provisions in their word or content, 2. If there was no legislative provision that can be applied, the court shall rule in accordance with the custom, if this does not exist then it shall be ruled in accordance with the principles of the Islamic law (Sharia) that is most convenient to the provisions of this law without restriction to a particular doctrine, and if this does not exist then in accordance with the rules of justice, 3 ... and then in other countries whose laws converge with the Iraqi laws”. It seems that the Iraqi legislator has allowed the judge to study and establish the law base, and this is consistent with the school of free scientific research, which allows the judge to return to the essence of the law if there is no rule in its official sources, and then to laws in other countries that emulate the Iraqi laws.¹ In addition, it can be concluded, in contrast, that the Iraqi legislator has authorised the judge the diligence, provided that it not be in the provision's resource. Article 2 of the Civil Law in force stipulates that “there is no justification for diligence in the text's resource”.² In administrative matters, there may be no written rule dealing with the case considered by the administrative judge and he cannot abstain from giving the ruling. In this regard, he does not have the choice, but is forced by virtue of the law to create that rule and apply it to the dispute presented before him, or else it will be considered a denial “for justice”. The Iraqi lawmaker has prevented the judge from invoking the ambiguity, loss or lack of law texts, as stipulated in Article 30 of the Procedural Law No. 83 of 1969, which was amended: No court may refrain from ruling on the pretext of ambiguity, loss or lack of law text, otherwise the rule shall be deemed a denial of justice. Unlawful delay in passing the judgment shall also be considered as a denial of justice. Failure to enforce the law is also deemed as an abolition, which is outside the jurisdiction of the court. If the administrative judge refrains from adjudicating the case, Article 286 of the Iraqi Procedural Law in force allows the complaint against him through the competent authorities: “Each of the parties to the litigants may complain to the judge, the court of justice, or one of its judges in the following cases: **1.** If the defendant committed cheating, fraud, or serious professional error when performing his job, in violation of the provisions of the law, out of prejudice or with the intent to harm one of the litigants. **2.** If the defendant accepts a material benefit to favour one of the litigants. **3.** If the judge refrained from redressing justice”. The court also obligates the defendant to compensate for the damage caused to the complainant, this is stipulated in Paragraph 3 of Article 291 of the Iraqi Procedural Law in force: “If the

¹ Most of the Arab civil laws derived from the Journal of Judicial Provisions provided for similar texts to Article 1 of the Iraqi Civil Law No. 40 of 1951, where they are matched with Article 1 of the Egyptian Civil Code No. 141 of 1948, Article 1 of the Jordanian Law No. 43 of 1976 and Article 1 of the Syrian Law No. 48 of 1949.

² Article 2 of the Iraqi Civil Law in force is an Islamic jurisprudence rule first codified in the Journal of Judicial Provisions with Article 14 of which was issued in 1876 and applied in the courts of the Ottoman Empire and in the countries under its rule, including Iraq.

complainant proved the authenticity of his complaint, the court shall obligate the defendant to compensate for the damage cause to the complainant, and he/she reported the matter to the Supreme Judicial Council to take the necessary legal action”. The Iraqi Penal Code No. 111 of 1969, amended, under Article 330, states that “any official or public servant who has unlawfully refrained from performing his job, or deliberately violated its duties for a request, recommendation, and mediation or for any other illegal reason, shall be liable to a penalty of imprisonment”. The judge acts as an employee,³ he has a general duty, namely the judiciary, and any violation from him to the law shall consider him a perpetrator of this crime. If he refuses to adjudicate the lawsuit presented before him, under the pretext of a missing or ambiguous law rule, his act shall be considered a deliberate violation of one of the job duties identified by the legislations. Article 341 of the Iraqi Penal Code adds to this act: the grave attached mistake that cause harm to others, whether the State or persons resulting from a violation to functional duties⁴. The Iraqi legislator also obliged the judge to follow the evolutive interpretation of the law in Article 3 of the Iraqi Evidence Law No. 107 of 1979, as amended, which stipulated that: “the judge is bound to adhere to the evolutive interpretation of the law and to observe the wisdom of the legislation when applying it”. (Bakr, 2007)⁵ The evolutive interpretation principle is the latest principle in contemporary legal interpretation, which gives the administrative judge a positive role when interpreting the texts, and classifying them in accordance with the objective or purpose of the text, also finding solutions to cases not provided for by the legislator, as confirmed by Article 104 of the Iraqi Law of Evidence, which stipulates that “the judge may take advantage of the scientific progress methods in the elicitation of the judicial presumptions” (Obeidi, 2016). At the end of this thematic discussion, we find that the Iraqi legislator in some subjects of the law recognised the existence of the gap in legislation and required the judge to assert rights, by adjudicating the lawsuit before him and prevented him from invoking the lack of or ambiguity in the legal rule, and delay or refrain from judgment and establish penal sanctions.

The Reasons for Which the Administrative Judge Establishes a New Legal Principle.

The reasons for the administrative judge's authority to create legal principles can be traced to the following:

A. The Authority of the Judge in the Case of Legal Provision Existence

³ Article 19/ Paragraph 2 of the Iraqi Penal Code No. 111 of 1969 defined the public servant as: “every official, employee or worker entrusted with a public task in the service of the government, its official and semi-official departments and the affiliated departments ...”.

⁴ Article 341 of the Iraqi Penal Code in force: “any official or public servant who has, due to his gross mistake, caused grievous damage to the assets of entity interests with which he works or connects as ex-officio or the assets or persons interests he is entrusted to, in case that was resulted by a gross negligence in the performance of his or her functions, the abuse of power or a serious violation of his or her duties, shall be liable to a penalty of imprisonment”.

⁵ The Iraqi legislator did not clarify the meaning of the evolutive interpretation and did not set its standards. One of the scholars defined it as “giving a positive role to the judge when interpreting and applying in accordance with the objective or purpose of the text”.

Legal rule is characterised by generality and abstraction, and law proceeds to address a certain subject or topics in the field of jurisdiction. The provision is drafted in general terms and conditions without mentioning the precise details of the subject, and this requires the administrative judge to inject life into abstract texts (Shukri, 2015).

The Administrative Law and the Civil Law are closely related, as the most active part of the administration is subject to the rules of the civil law. We note that many of the administrative authority regulations do not conflict with the special rules of the Civil Law, and they have their own coordination and development in accordance with the needs of the facilities and their compatibility with the rights of individuals (Hassan, 2015).

The administrative judge can narrow the interpretation of the legal rule, to make it compatible with the general principles of law. When faced with an unidentified or general law rule, the administrative judge defines content, to make it consistent with the general principles of the law and to make sure that the meaning does not explicitly divert from or contradict the text. This creates a new law that differs from the original rule, (Hassan, 2015) which is often from the Civil Law, for many reasons : it contains a set of integrated legal rules issued by the legislator, such as the Civil Procedures Law and Criminal Procedure Code, and most of its provisions are in line with the administrative jurisdiction and are consistent with the requirements of the public interest. Moreover, the Civil Procedures Law is a precedent in private law. This requires a great effort from the administrative judge to interpret the text or educe the general principle of the spirit and essence of the law (Abdulwahhab, 1992).

B. The Administrative Judge Authority in Case of Ambiguity of the Legal Text.

The ambiguity of the text means that it does not have a clear indication; it does not indicate what is meant by it in its form per se, and understanding what it means depends on something outside of its words, i.e., it may have more than one meaning due to the words and phrases of the text in its entirety (Sheikhli, n.d), which requires an effort from the judge to identify the intended meaning.

Interpretation is one of the most important functions of the judge when he finds himself compelled to find a solution to the dispute before him, therefore, he resorts to giving the legal rule the meaning that he wants with a free will and choice, thus creating a new rule different from the legal rule from which it was taken. This leads to more than the field of interpretation and application up to the point legal rules of creation. The judges are very much affected by the factual circumstances of disputes before them, which are reflected by the interpretation they give to the positive laws; this concept is called “the structural interpretation of the legislation” (Othman, 2008). This seems clear in some provisions of the administrative jurisdiction in Iraq,

for instance, the Decision dated 03 July 2014: “The administrative decision is subject to the rule of non-retroactivity”.⁶

C. The Authority of the Administrative Judge in Case of Legal Provisions’ Lack

The issue of lack (Abdulhadi, 2009)⁷ of legal provisions has been very controversial among positive lawmakers, (Al-Mamouri, 2010)⁸, so that the scope of the administrative judge is broader than the civil judiciary, due to its relative modernity, flexibility and lack of codification. (Shaqqaf, 2016) Thus, the administrative judge has to face a huge legislative vacuum which he must fill, and hence his role becomes to create a law in order to face situations not addressed by the legislator. (Obeidi, 2016) The administrative judge, while considering administrative disputes and after completing the rules of legal adaptation, has before him the legislative provision, because the law did not address them in abstracto. Hence creation and innovation are inevitable, and a legal principle will be established on the occasion of the ruling in the dispute presented before the judge, as if it was directed only to the parties to the dispute. However, a specialist researcher can recognise the ruling issued for the dispute, from the provisions of legal principles that established a new legal principle or confirmed a previous legal principle (Othman, 2008). This is the case of the Supreme Administrative Court of Iraq,⁹ as it considered disputes with interest to reach a fair and just adjudication.

The Impact of the New Legal Principle Establishment

Our study of the impact of establishing a new legal principle in this section will be addressed in two demands as follows:

A. The Supreme Administrative Court Commitment to the New Legal Principle.

Jurisprudence defined the precedents of the Anglo-Saxon system as a previous legal case that has established a principle or rule for which the court, or any other judicial organ, is entitled to follow in subsequent similar cases, (Abu Al-Majd, 1963) or it is a legal rule first established by the court for a case of a particular issue and applied to similar cases (Nassar, 2003).

The legal principles devised by the administrative judge in Iraq, however stable they are, are not binding on the judge himself or other judges, who may dissuade from them, as they are

⁶ Supreme Administrative Court Decision No. 446/Officials Justice, Cassation / 2013, on 03 July 2014.

⁷ Lack in legislation: means the vacuum that is achieved when there is nothing that requires the reality of its existence and the idea of vacuum in the advanced sense expresses a state of imperfection.

⁸ Disagreements between the judges over the lack of legislation emerged supporters of “the perfection of legislation” theory and the other trend known as the lack of legislation which is the supporter of “the denial of legislation perfection”.

⁹ The Supreme Administrative Court Decision No. 106/ Staff Justice – Cassation/ 2017 on 15 November 2018.

subject to the circumstances which called for them to be adopted. The legal precedents in the Latin system are considered as an interpretative source of the rules of law to guide judges (Hadi, 2010).

Here, we wonder when the legal principles are due process and when they are not, if the countries of the Latin system do not take the principle of the binding force of the precedents. And will the new legal principle actually become binding on the court that rendered it?

Jurisprudence has differed in determining the legal principles to due process; some jurisprudence view (Bakri, 1984) states that there is no criterion to distinguish between legal principles that are due process and legal principles that are not, because the countries of the Latin system do not follow the principle of legal precedents. Another view of jurisprudence (Khateeb, 1963), distinguishes between the legal principles that are due process and the legal principles that are not. If the Supreme Administrative Court establishes a new legal principle in the absence of legal provisions it will be applicable and adhered to, and the new legal principle becomes a binding force in the judiciary and once upheld in a series of judicial decisions, it will be a stable judiciary. On this basis, some jurisprudence views (Alawi, 2009; Hamid, 2018) assume that the criterion of distinguishing of the legal principles considered as a precedent, is to be issued by the Court of Cassation or the Supreme Administrative Court because the Supreme Administrative Court rarely amends a legal principle it decided in prior rulings. This leads to the instability of legal centres, and the new legal principle will be transformed from an individual judgment issued by the judiciary to due process precedents, due to the subjective value of the judges decisions, inclined to be in favour of what has already been ruled, and the unity of solutions and coherence in similar cases, which leads to the unity of the principles guaranteed by the judiciary (Yassoub, 1999).

The Iraqi legislator did not provide for the commitment of the administrative jurisdiction courts to the earlier issued judgments. Despite the foregoing, we find that the practical reality of the Supreme Administrative Court, although not bound by the precedents, it has fully authorised itself in the unification of administrative decisions, especially as the decisions of the court are issued with consent. And this is what we observe by mentioning a phrase indicating the stability of the principle when causing the verdicts in many decisions by mentioning the phrases: “the jurisdiction of this court has proceeded”, “the jurisdiction of this court has settled” and “this is what the court ruled in many of its adjudications”.¹⁰

B. The Other Administrative Courts Commitment to the New Legal Principle

In the Iraqi Council of State Law No. 65 of 1979, as amended, or in any other legal text, the Iraqi legislator made no reference to the commitment of the lower administrative courts or

¹⁰ Supreme Administrative Court Decision No. 966/Officials Justice, Cassation / 2016, on 25 May 2015.

other administrative courts to the rulings issued by the Supreme Administrative Court,¹¹ while respecting the authenticity of judicial rulings.¹² One of the jurisprudence states that the commitment of the first and second instance courts, to the adjudications of the Court of Cassation in similar cases, is due to the fact that the jurisdiction of this court is of an ethical binding force rather than a legal binding force (Bakri, 1984).

The decisions of the Supreme Administrative Court are binding and uncorrectable¹³. On this basis, if the ruling is overturned and the Supreme Administrative Court disposed it's subject, then its decision is final and binding based on Article 7 (8) (C) of the Council of State Law. If we assume to present the same dispute before the judiciary in the future with the unity of opponents, place and reason, the rulings and principles would have been contradicted, which violates the dignity of the judiciary and undermines people's confidence in its provisions (Sab'awi and Ajyad, 2006).

In extrapolating the reality of the judicial work and the decisions issued by the administrative jurisdiction in Iraq (which confirms this),¹⁴ it seems that the impact on the Supreme Administrative Court authority as a result of adjudicating the merits of the case, leads to the consolidation of all rulings and decisions, regardless of the entity that issued them, and its decision is due process. Although it is a Latin state that does not recognise the principle of the binding force of precedents, the administrative jurisdiction in practice has a moral commitment to follow these principles in future cases.

Conclusion

We summarise our proposals and recommendations, as follows:

Conclusions:

1. The role of the administrative jurisdiction is characterised by the constructive role to fill the lack of legal texts, to reach a solution to the conflict presented before it. It establishes legal principles determined by the provisions of the administrative jurisdiction, which the

¹¹ See: Article 215 (2) of the Iraqi Civil Procedures Law, in force, which states that "if the separate decision is issued by the Court of Appeal or the Court of First Instance, the decision of cassation shall be restricted to the fundamental procedures contained therein, unless the cassation decision is issued by the Plenary, it shall be due process in any case".

¹² This is confirmed by Article 105 of the Iraqi Evidence Law No. 107 of 1979, as amended, which stipulates that: "the judgments issued by the Iraqi courts that have obtained the adjudication degree are authoritative in their decisions upon the rights if the parties to the case are united, their qualities did not change and the dispute is related to the dispute per se in terms of place and reason". And Article 106 that stipulates: "it is impermissible to accept evidence that contradicts the authenticity of the final judgments".

¹³ See: Article 220 (1) of Civil Procedures Law in force, that stipulates: "the request of decision correction from one of the two parties is permitted only once".

¹⁴ The Resolution of the Employee Justice Court in the Iraqi Council of State No. 524/2019 dated 27 February 2019, unpublished.

judiciary derives from the rules of legal regulations in the State, from the basic elements in society.

2. The lack in legislation in jurisprudence and the jurisdiction has been acknowledged. It arises for several reasons including the absence or ambiguity of a legal provision governing the dispute, and some are related to the development of life means and their impact on finding new facts that have their own characteristics.
3. Although there are no legal provisions in the Law of the Iraqi Council of State and its amendments or in the Civil Procedures Law in force, the Supreme Administrative Court has committed itself to the legal principles it had previously approved.
4. The administrative judge of the Supreme Administrative Court practically consolidated the legal principles and it is relied on his will and discretion.
5. The rulings of the Supreme Administrative Court are not binding on the Administrative Court itself or the lower administrative courts, but it has ethical and moral binding forces. They provide ready-made solutions for the similar cases presented before the jurisdiction in the future. They are also consistent with the principle of time and economy in the administrative jurisdiction.

Recommendations

The recommendations are reviewed as follows:

1. We suggest to the distinguished Council of State to strengthen the role of the administrative judge in the development of the general principles of law, so that they are more flexible than the legal texts derived from them, through the interpretation of legal provisions, in accordance with a developed concept, taking into consideration the legislative wisdom of the text, especially that the Supreme Administrative Court is newly established.
2. We call on the Iraqi legislator to form a special body to unify legal principles within the Supreme Administrative Court itself, selected on the basis of expertise and competence to decide on cases of unification of legal principles, in order to work on the proper functioning of justice, application and interpretation of law and contribute to the stability and consistency of the transactions and legal centres.
3. We call on the Supreme Administrative Court to stay away from the excessive interpretation of legal texts more than once, or the establishment of legal principles in the same cases before the jurisdiction with different formulations, because it gives the impression of changing the trends of the judiciary, the difficulty of access to them and leads to a difference in the interpretation of those legal principles.
4. We suggest to the Iraqi Council of State to work on the dissemination of all legal principles and decisions of the Supreme Administrative Court and circulate them without limiting only to some of them, as is the case today, for the precious legal and judicial stockpile it constitutes, that makes the judges and state departments informed about all the previous legal principles.

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