

Judicial Control over Administrative Discretion in Iraq

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Abstract: Discretionary powers allow administrative authorities to fulfil public interest through their flexibility to act in circumstances not anticipated by law. Yet, in Iraq discretionary power remains contentious as it may undermine individual rights. This article examines the concept of discretionary powers, particularly how Iraq's administrative authorities exercise such powers and the role of Iraq's administrative judiciary in reviewing any administrative decisions. Analysis of material from primary and secondary sources reveals that Iraq's legal system permits administrative authorities to exercise broad discretionary decision-making powers. This precipitate abuses. Further, the restriction of Iraq's administrative judiciary and the absence of suitable legislation prevent administrative court judges from effectively curbing administrative arbitrariness. Legal transformations are necessary to streamline the scope for discretion by requiring Iraq's administrative authorities to provide reasoned decisions and better empower the administrative judiciary to check the administration's arbitrariness. As well, judges need more training on the operations of administrative courts.

Keywords: Administrative Authorities; Administrative Judiciary; Discretionary Powers; Judicial Review

1. Introduction

The discretionary power is one of the administrative law's most contentious issues. It involves striking a balance between two competing objectives. On the one hand, the administration must have a certain level of autonomy to perform its duties. On the other side, excessive administrative discretion can abuse an individual's fundamental rights.¹ The important aspect of guaranteeing individual liberty is judicial oversight of the administrative authority. A court of law can declare the relevant decision invalid if the administrative authority abuses discretionary power.²

Discretionary power is one of the broadest and most important powers that administrative authorities exercise when making decisions in the absence of explicit law addressing relevant administrative issues, whether in normal or exceptional circumstances.³ In such situations, question arises as to who determines whether the

¹ Jerzy Parchomiuk, "Abuse of Discretionary Powers in Administrative Law. Evolution Of the Judicial Review Models: From "Administrative Morality" to the Principle of Proportionality", *Časopis pro právní vědu a praxis* 3 (2018): 453. <https://doi.org/10.5817/CPVP2018-3-4>

² Rakesh Chandra, "Administrative discretion," *International Journal of Academic Research and Development* 2, no. 4 (2017): 138.

³ Victor Imanuel W. Nalle, "The Scope of Discretion in Government Administration Law: Constitutional or Unconstitutional?", *Hasanuddin Law Review*, 4 no. 1 (April 2018): 3-5, DOI: <http://dx.doi.org/10.20956/halrev.v4i1.1316>

actions of administrative authorities are in the public interest or not. In this regard, the principle of separation of powers and recognition of the judiciary as an independent oversight body provide critical safeguards for the principle of legality in the exercise of discretionary powers. Thus, decisions made in the exercise of discretionary powers remain subject to judicial control. This is a fundamental approach for the protection of individual liberty against the arbitrary actions of administrative authorities.

This article examines the concept of discretionary powers and how administrative authorities in Iraq exercise such powers. It assesses the role of Iraq's administrative judiciary in this regard and the grounds on which it may review administrative decisions. In doing so, relevant administrative laws and cases are analyzed, in addition to data obtained from interviews data are used to substantiate its arguments. Among the key findings is that discretionary authority is one of the most important and expansive administrative powers exercisable under the Iraqi legal system. It is used by administrative authorities when taking decisions on matters not expressly addressed by law. One consequence of the broad discretionary powers enjoyed by administrative authorities in Iraq is the prospect for abuse. This can be seen, for example, in the imposition of disciplinary sanctions for alleged violations of public service rules. An inescapable conclusion is that the rules granting discretionary powers are unjust as they afford administrative authorities over-reaching powers in the decision-making process.

In response to the above findings, this article argues for the imposition of a legal obligation on Iraq's administrative authorities to provide reasons to justify their decisions. Presently, they are under no such obligation, which encourages arbitrariness. In the midst of the various studies pertaining to judicial oversight of discretionary power in Iraq, there is no specific study that has addressed the problem of abuse in the use of discretion from a practical standpoint, whereas the previous studies were limited to a theoretical perspective. By analyzing cases presented to the administrative judiciary in Iraq, this article seeks to shed light on the arbitrariness of administrative decisions and clarify the administrative judiciary's stance on them. Through its recommendations and proposals, the article also seeks to develop appropriate solutions to the problem of the administration's abuse of discretion.

2. Method

This article employs a qualitative research method, which is deemed appropriate for validity and reliability.⁴ It draws on primary sources, such as legislation, regulations and constitutions, as well as cases, especially those of Iraq's administrative judiciary. For the purposes of completeness, the primary sources are supplemented by interviews, which are verbal means of data assembly and constitute a primary part of the qualitative research method.⁵ In addition, the article relies on secondary sources that include journal articles, newspaper articles commenting on research issues, as well as textbooks and academic theses.

⁴ Salim Ibrahim Ali, "Legal Research of doctrinal and non-doctrinal", *International Journal of Trend in Research and Development* 4, no. 1 (2017): 494.

⁵ Khadijah Mohamed, "Combining legal research methods", *The Social Sciences* 11, no.21 (2016): 5194, DOI: 10.36478/sscience.2016.5191.5198.

With regard to the interviews, a semi-structured method was applied. Semi-structured, in-depth interviews are the most commonly used in qualitative research. Three interviews were conducted face-to-face, while four were by phone. Each interview, whether in-person or by phone, lasted 45 minutes. Every effort was made to comply with research ethics. Three of the seven interviews were held with decision-makers in administrative authorities in Iraq. The remaining interviews were held with two judges and two advisors.

3. Powers of the Administrative Judiciary

Administrative law governs the activities of administrative authorities and imposes effective control over their decisions and actions. Administrative law also establishes a framework for external authorities to exercise sufficient control over administrative processes to prevent injustice to individuals while simultaneously allowing administrative authorities sufficient latitude for effective management. If external authorities have an oversight function upon administrative authorities, they must be independent and free from interference by other arms of government. The existence of a just and independent judiciary acting as a check against the exercise of absolute and arbitrary powers is germane to the entrenchment of the principles of democracy.⁶ Therefore, there must be an active, independent and bold judiciary with effective powers to discharge its functions. Without a judicial power capable of controlling administrative authorities, individual rights would be threatened, as authorities would become arbitrary and prone to abuses. Such development would undermine the principles of natural justice and the rule of law.⁷

The most important aspect of administrative law is the judicial review of administrative actions. Therefore, Judicial review is a 'court's power to review the actions of the other branches of government, especially to invalidate any legislative and executive actions as being unconstitutional.⁸ It is a potent weapon in the judiciary's arsenal, which enables critical scrutiny of the legality of administrative actions, ensures the rule of law and safeguards individual rights.⁹ The primary purpose of judicial review is to promote justice by preventing administrative authorities from misusing their power, ensuring that they make lawful decisions, and assuring that individuals are treated fairly.¹⁰

In Iraq, the administrative judiciary has the power to review decisions made by administrative authorities in two circumstances: first, Article 7(4) of the State Council Law No. 71 of 2017 gives the administrative and staff courts the power to review decisions made by administrative authorities when challenged by affected parties. Second, Article

⁶ Jai Ram Upadhyaya, *Administrative Law* (Uttar Pradesh: Central Law Agency, 2012), 212-213.

⁷ Khalat Yahyah. "General Education Supervisor, Supervisor, Ministry of Education" interview by the researcher, 5 November, 2020. Audio.

⁸ Black's Law Dictionary (Eagan, Minnesota: West Thomson Reuters, 1999), 864.

⁹ E. Wheat, *Judicial Review: Corruption, Accountability and Discretion (Public Policy and Governance)* (Bingley: Emerald Publishing Limited, 2017), 222.

¹⁰ Wheeler, Chris, "Judicial review of administrative action: An administrative decision-makers perspective" (2017) *Australian Institute of Administrative Law*, 87, (2017): 80.

2(4) passes the Supreme Administrative Court the jurisdiction to review decisions made by administrative and staff courts when people appeal against them.¹¹

Understandably, in Iraq, the judiciary has established the broad principle that allowing administrative authorities unfettered discretion would infringe fundamental rights. This creates the necessity for the legislature to establish uniform legal standards governing the exercise of administrative discretion.¹² The court endeavors to ensure that administrative authorities exercise their discretion inline with the demands of the law.¹³ In other words, the primary objective of judicial review is to ensure that administrative authorities do not abuse their discretion, that individuals receive fair and equitable treatment, and that authorities reach conclusions that are correct in the eye of the law.¹⁴ Accordingly, Article 7(8) (a) of the State Council Law, No. 71 of 2017, empowers the administrative judiciary to take one of the following steps:

- a. Dismiss the case: the administrative court may dismiss the case if the petitioner has not met the conditions of the appeal. This can arise in two ways. The first is the expiry of the time limit for filing the appeal, and the second is the lack of interest on the part of the petitioner in diligently prosecuting his appeal.
- b. Quash the administrative decision: the court may annul the decision if it is found to be flawed in its main elements, such as lack of jurisdiction, reason, form and procedure, object or purpose. The decision may also be quashed if it was issued in a manner that contravenes the law.
- c. Amendment of the decision: the court may amend the contested decision by setting aside a part of it. This would particularly be the case where the administrative authority has exercised its discretion in issuing a decision, and there is an apparent disproportion between its reason and object.

4. Abuse of Discretion: Meaning and Forms

Administrative authorities are public service bodies that interact directly with society.¹⁵ When an administrative authority is granted discretionary authority, it must exercise that authority under the law.¹⁶ An administrative authority is considered to have abused its discretion when it exercises its powers for an improper purpose or in bad faith, when the decision is made without reasons, or when it exceeds its discretionary power.¹⁷ For example, consider the black government employee terminated by the authority due to her skin colour. The administrative officer exceeded his discretionary authority, resulting

¹¹ Mohammed. N. A & Nurhafilah Musa, "The Role of Administrative Actions in Fighting the Coronavirus Pandemic in Iraq" *Current Legal Issues (CLI)*, 4, (2022): 9.

¹² C.K. Thakkar Takwani, *Lectures on Administrative Law* (Lucknow: Eastern Book Company, 2010), 277.

¹³ Chandra, "Administrative discretion", 135.

¹⁴ Chris, "Judicial review of administrative action: An administrative decision-makers perspective": 79.

¹⁵ Hardiyanti, Tuti, Ahsan Yunus, and Irwansyah, "Abuse of Authorities in the Publishing of Environmental Permits: Analysis of Local Government Authority", *UNES Journal of Law* 2 no. 1 (2017): 50-55.

¹⁶ Chandra, "Administrative discretion", 136.

¹⁷ Nandita Krishnan, "Discretionary powers & fundamental rights: A critical study", *the World Journal on Juristic Polity* 4 (2017): 5.

in a decision that was unreasonable and susceptible to being characterised as made in bad faith.¹⁸

The term 'abuse of discretionary power,' as used in Iraqi law, is derived from the French term, *abus des droit*. The Iraqi Law of the State Council¹⁹ contains provisions relating to abuse and exceeding the limits of discretion. This law also refers to an error in administrative authorities' application of the law.²⁰ Generally, 'abuse of discretionary powers' means an infringement of the principles of law. It also refers to decisions based on non-legal grounds, such as personal or political motives that do not conform to the criteria and objectives of the discretionary powers conferred on an administrative authority. All administrative authorities are expected to act reasonably and in good faith. They must not misuse their powers or exercise them arbitrarily or misleadingly.²¹ In this sense, the failure to provide reasons for an administrative decision may also fall under the Iraqi model of abuse of discretion, where the law requires administrative authorities to support their decisions with reasons.²² Generally, the administrative judiciary in Iraq adjudicates administrative disputes and interferes with the following circumstances that indicate an abuse of discretion:²³

- a. exceeding jurisdictions (*ultra vires*);
- b. unreasonable exercise of discretionary powers;
- c. *mala fide* (deviation of discretion);
- d. transfer as an implicit penalty; and
- e. Unreasoned decisions.

4.1. Exceeding Jurisdiction

An administrative authority must exercise its powers within the bounds of the law. If it goes beyond those limits, its action would be deemed *ultra vires*.²⁴ The notion of *ultra vires* arises when the legislature grants discretionary powers to an administrative

¹⁸ Srishti Vaishnav & Karn Marwaha, "Judiciary: A Ladder between Inevitable Administrative Discretion and Good Governance", *International Journal of Multidisciplinary Approach and Studies*, 2, no. 2 (2015): 65.

¹⁹ The State Council is an independent institution with dual jurisdiction, both judicial and advisory. Established on the basis of an idea borrowed from France, its roots go back to the beginning of the creation of the Iraqi state. Its formative years were bedeviled by teething challenges that hindered its development. The State Council exercises its jurisdiction through the administrative judiciary, which is one of its most important divisions. Its role is to consider disputes with individuals arising from the exercise of administrative powers. The administrative judiciary exercises its powers under the Iraqi Law of the State Council. See Law of the State Council No. 71 of 2017, Articles 1 and 7. See also, M. Ali, "The impact of successive legal systems and its role in the emergence and development of the administrative judiciary in Iraq", *Cihan University-Erbil Journal of Humanities and Social Sciences* 5, no.2 (2021): 6.

²⁰ Article 7 of State Council Law No. 71 of 2017.

²¹ Parchomiuk, "Abuse of Discretionary Powers in Administrative Law. Evolution Of the Judicial Review Models: From "Administrative Morality" to the Principle of Proportionality", 459.

²² Areej Taleb and Aseel Omar, "Forms of Abuse of Discretion: An Empirical Comparative Study between Legislation and the Judiciary in Iraq" *Al-Mustansiriya University Journal* 5, no.2, (2013): 12.

²³ Iraq operates a dual judicial system comprising an ordinary judiciary and an administrative judiciary. The ordinary judiciary hears disputes between individuals, while the administrative judiciary adjudicates disputes in which the state or one of its administrative authorities is a party

²⁴ Chandra, "Administrative discretion", 36.

authority to pursue a specific objective. Using such powers to go beyond the legislature's intention is considered an unlawful act.²⁵ The courts decide whether an administrative authority has acted within or beyond the limits of its jurisdiction. As an illustration, an administrative authority may be empowered to undertake a transaction of a particular value, using its discretion. If it engages in any undertaking that exceeds that value, it would be deemed to have exceeded its powers, and a competent court would be justified to intervene in the matter. For example, in the case of *JML v. Dean of the Imam Al-Kadhimi College of Islamic Science*,¹⁴ ESD 421(SC 2013), the Imam Al-Kadhimi College in Baghdad issued an administrative order to transfer a public servant to Maysan Governorate. The petitioner challenged the transfer decision, arguing that it had caused him significant financial and moral (psychological) damage. The staff court held that:

[...] the transfer process falls within the discretionary powers of the administration, but this authority is not an absolute one. It is subject to the control of the administrative judiciary. In this case, the administration exceeded the limits of its discretionary authority. The transfer process must occur within the governorate's borders and must be reasoned. The transfer process may not occur beyond the governorate unless the reasons for the transfer are in the best interests of the job, which is a matter to be determined by the judiciary.

It is worth noting that, in some instances, the transfer of a public servant may be deemed discretionary. However, whether at the public servant's request or at the administration's direction, the transfer process involves a very delicate exercise of authority. This is because the workflow is typically dependent on the presence of the affected public servant.²⁶ Also, the transfer process is likely to impact upon his job performance. Simultaneously, the transfer process may be based on the public interest. This is, however, a very fluid concept, especially where the nature and scope of such interest are unclear. Invariably, the administrative authority determines that the transfer in question is in the public interest, which may stand for just anything. This renders it vital to establish criteria that clearly define the 'public interest' so that administrative authorities do not use it to overreach and abuse their discretionary powers.

4.2. Unreasonable Exercise of Discretionary Powers

The discretionary powers conferred on administrative authorities ought to be exercised reasonably—unreasonable exercise of discretion results in the nullification of an administrative decision.²⁷ Noteworthy is that 'unreasonableness' is a vague term and may include many things. For example, a decision may be taken by an administrative authority based on irrelevant or extraneous considerations. Also, such a decision may be based on an improper or collateral purpose or bad faith. In such cases, the courts may set aside the decision.²⁸

²⁵ Craig Paul, *Administrative Law* (London: Thomson, Sweet & Maxwell, 2012), 568.

²⁶ Kareem Ahmed, "Director-General of Examinations and Evaluation, Ministry of Education," interview by the researcher 9 November 2020. Audio.

²⁷ Chandra, "Administrative discretion", 136.

²⁸ Takwani, *Lectures on Administrative Law*, 319.

Notions of reasonableness and non-arbitrariness are enshrined in Part II of the Iraqi constitution of 2005, entitled 'Rights and Freedoms.'²⁹ Also, judicial review of administrative processes is a prominent feature of this constitution.³⁰ The onus of proving that the administrative authority's decision is unreasonable, however, rests on the petitioner. As always, it is open to the court to enquire and verify whether the decision falls outside the administrative authority's discretion by being unreasonable.³¹

In the Iraqi case of *Taha.H.T v. Ministry of Education*, 409, SACD, 278 (SAC 2016). The Supreme Administrative Court stated that, 'any absolute authority vested in any judicial or quasi-judicial authority will ultimately lead to unreasonableness.' In the case at hand, the Court observed that, 'there is no violation of educational controls and instructions, and therefore, the reasons on which the administration relied in imposing the punishment are untenable.' On the above issue, Ismat Abd Al-Majeed Bakir expresses the view that, 'discretionary power exercised in bad faith is an armed enemy. It is inconsistent with the constitutional guarantees of rights and freedoms, and conflicts with the ethics of the job that the administrative authorities are expected to perform.'³² He concludes that, 'accordingly, the administrative judiciary has the power to quash unreasonable and improper decisions, especially in matters of transfer and disciplinary penalties.'³³

Substantiating his views, he draws attention to a real time case brought before the administrative judiciary by a public servant who worked in Iraq's Ministry of Higher Education. She was transferred to the General Retirement Authority because of an article she published, which was very critical of the performance of the administrative authority. She lodged an appeal against the administrative decision. After investigation and review of her file, the court found that she was a competent employee with extensive experience. She had an impressive research record, as well as certificates of commendation from several authorities. Further, the Iraqi constitution guarantees the freedom of speech and expression, albeit within limits.

Administrative authorities must take proper cognisance of these constitutional guarantees while making their decisions. Admittedly, the State and Public Sector Employees Discipline Act, as well as other administrative laws grant administrative authorities wide discretionary powers to impose appropriate punishments on employees for misconduct.³⁴ Yet, such powers must be exercised reasonably and in accordance with the law. Altogether, in the present case, the transfer decision was quashed by the court because it was based on unreasonable grounds.

²⁹ Dr Hadi Muslim Younis, "Senior Advisor and Head of the General Assembly, Shura Council of the Kurdistan Region-Iraq" interview by the researcher 20 November 2020, Face-to-face.

³⁰ Constitution of Iraq 2005, Article 93.

³¹ Sardar Aziz Khoshnaw, "Administrative Judge and Judicial Supervisor, Erbil and Dohuk Court of Appeal' Shura Council of the Kurdistan Region-Iraq, interview by the researcher 27 November 2020. Audio.

³² Dr Ismat abd Al-Majeed Bakir, "former President of the State Council in Iraq," interview by the researcher 22 November 2020. Face-to-face.

³³ Dr Ismat abd Al-Majeed Bakir, interview.

³⁴ Dr Hawkar A. Ahmed, "Director-General and Chairman of the Finance Committee," interview by the researcher 10 November 2020. face to face.

4.3. *Mala Fide*

Bad faith or *mala fide* is described in Arabic literature as deviation of discretion (*al-khūbth al-īdary*). It is a term that expresses dishonest intent or corrupt motive, which prompts administrative authorities to take decisions affecting individuals.³⁵ It is difficult to ascertain the intent of an administrative authority where the decision is improper. This is due to a variety of reasons. First, an administrative authority may assert that its decision or action is in the public interest. Second, while the term, *mala fide*, refers to the intent of an administrative authority, such intent is usually an internal matter for the administrative decision-maker. Third, is the question as to how the judiciary can precisely ascertain the bad faith of an administrative authority.³⁶ There are two kinds of *mala fides*, which are malice in fact and malice in law. Where an administrative authority takes a decision out of personal animosity, vengeance, ill-will or dishonest intention, there is malice in fact. That decision necessarily needs to be struck down. Unlike malice in fact, malice in law may be assumed from the intentional commission of an illegal act, without cause, reason or excuse.³⁷ In other words, a plea of *mala fide* raises two questions. First, whether there is a personal bias or oblique motive. Second, whether the administrative decision is contrary to the objects, conditions and requirements of a valid exercise of power.

This article observes that Arabic jurists use both the terms, 'deviation of power' and *mala fide*. Deviation of power is one of the most severe flaws in administrative decisions because it relates to the essential elements of administrative decisions.³⁸ Moreover, this defect relates to the intentions or motives of the administrative decision-maker. It may be difficult to determine whether the decision maker has abused his discretion in bad faith or not in a particular case due to the broad powers that the law may grant to the decision maker. In many cases, it is also difficult for the individual to gather evidence to prove the administration's bad faith.³⁹

According to Ismat Abd al-Majeed Bakir,⁴⁰ former President of the State Council in Iraq, the administrative judiciary can decipher such motives by reviewing and scrutinising the case presented before it. Considering that, in many cases, administrative authorities take decisions that harm individuals, the motivation for a particular administrative decision is essential, and the administrative judge will usually consider such issues. Access to a public servant's records kept at his place of employment would be necessary to determine his performance during his period of employment. He adds that, often, a decision-maker uses his discretionary powers in an abusive manner. This can be called malice in administrative decision-making. For example, in one case brought before Iraq's administrative judiciary, the petitioner, a public servant, was transferred to southern Iraq

³⁵ Krishnan, "Discretionary powers & fundamental rights" 5.

³⁶ Srishti Vaishnav & Karn Marwaha, "Judiciary: A ladder between inevitable administrative discretion and good governance", *International Journal of Multidisciplinary Approach and Studies* 2, no.2 (2015): 65.

³⁷ Takwani, *Lectures on Administrative Law*, 321.

³⁸ Taleb and Omar, "Forms of Abuse of Discretion", 9.

³⁹ Munir, Bakht, Ali Nawaz Khan, and Naveed Ahmad, "Controls over Administrative Discretion: A case Law Study in the context of Pakistan", *ISSRA Papers (The Journal of Governance and Public Policy)* (XIII), (2021): 6. <https://issrapapers.ndu.edu.pk/site/article/view/100>.

⁴⁰ Dr Ismat abd Al-Majeed Bakir, interview.

based on vengeance. He was promoted to the post of director and immediately transferred thereafter. He objected to the administrative authority's decision, arguing that the transfer affected his interest. The court, after examining the case documents, including the petitioner's employment file, held that the promotion decision was meant to conceal hidden malice (*al-khūbth al-khafi*) on the part of the administrative authority. Through promotion, the administrative authority intended to move the public servant to a remote location as punishment for resisting the implementation of unlawful decisions. Accordingly, the court overturned the transfer decision.

In Iraq, the administrative judiciary, also known as the State Council, similarly makes a distinction between 'good faith' and 'bad faith' on the part of administrative authorities in the exercise of discretion. It has stressed that discretionary powers should be exercised in the public interest and not to the detriment of individuals.⁴¹ In the well-known case of *ABB v. Ministry of Education*,⁴² 22 DFSC 333 (GDC 2018), the erstwhile General Disciplinary Council,⁴² which acted as a judicial body for personnel disputes, held that the decision to transfer a public servant from Baghdad to Salah al-Din Governorate was arbitrary and based on bad faith for several reasons. First, the decision put the applicant's life at risk because of the lack of security and safety in that governorate. Second, the decision was based on bad, rather than good faith, because the administrative authority was aware of the seriousness of the security situation in that location. Third, the administrative authority was supposed to maintain a balance between public and private interests, but this humanitarian criterion was absent in its decision. Accordingly, the transfer decision was null and void. It is important to note from this case that, even if an administrative authority has the power to take disciplinary actions against a public servant, its decision must be in accordance with the principle of legality.

4.4. Transfer as an Implicit Penalty

Administrative authorities have broad authority to regulate the functioning of public utilities and advance the public interest. Personnel transfers constitute one of the discretionary tools by which they do so.⁴³ An administrative authority may resort to this means where the transfer of a public servant is in the interest of the relevant ministry or its functions. The transfer may be necessitated by the needs of another institution, poor relationship of the public servant with his colleagues or even by his own will. Whatever

⁴¹ Salam Tahah Mardan, "Judge and Chairman of the Staff Disciplinary Court", interview by the researcher 26 November 2020. Audio.

⁴² The General Disciplinary Council (GDC) was one of the most prominent formations of the State Shura Council in Iraq. It exercised judicial powers under the State and Public Sector Employees Discipline Act No. 14 of 1991. The Council was competent to hear cases related to state employees and retained this jurisdiction until 2013. It was abolished under Law No. 17 of 2013 and replaced with what is now called the staff court. With this transformation, Iraq became one of the countries that adopt a dual judicial system. Under this system, there are two types of judiciaries, the conventional judiciary with its ordinary courts and the administrative judiciary with an administrative court. Appeals lie from the administrative court to the Supreme Administrative Court, which sits at the apex of the administrative judiciary. They exercise their powers under the Law of the State Council 2017, which replaced the Law of the State Consultative Council.

⁴³ Vincent Joy, "The Use and Abuse of Discretionary Powers of Governor in Formation of Ministry in a State in India", *Indian Journal of Public Administration*, 64, (2) (2018): 235.

the case, the reasons for transfer decisions should be valid and not detrimental to the public interest. In the same vein, the transfer process should not affect the public servant's legal status and, therefore, his right to promotion and career advancement.⁴⁴

The transfer process must be based on reasonable and lawful grounds. The goal must be to serve the public interest and improve the quality of services provided by the institution where the public servant works. If the transfer is prompted by ulterior motives, the administrative judiciary must overturn it. An administrative authority may also be guilty of misusing its discretionary powers by attempting to affect a transfer based on unlawful goals, such as the victimisation of an incompetent employee who, strictly speaking, has not violated the law, or the suspension of an employee's promotion under the pretext of public interest, when in reality, it is an implicitly punitive measure.⁴⁵

The transfer process may be arbitrary and in bad faith, if it involves fundamental changes in an employee's legal status, such as the transfer of a public servant from the Ministry of Education to the Ministry of Environment. In this case, the transfer process becomes passive in a more disruptive way than an inconvenience or change in job responsibilities. Further, an administrative authority may be perceived to have used the transfer process to impose an implied penalty, if the intention is *animus nocendi* to cause damage to the affected employee. Such a transfer does not constitute a disciplinary sanction because, as the court stressed in *SKHG*, it is not listed among the sanctions permitted by the State and Public Sector Employees Discipline Act.⁴⁶ In Iraq, the administrative judiciary has pointed out, in many of its decisions, that most administrative decisions have included implicit penalties. As Sardar Aziz Khoshnaw observes, when an administrative authority cites public interest as the basis for transferring a public servant, its intentions are often bad.⁴⁷

In *RAD. AD v. Ministry of Higher Education and Scientific Research*,³³ SCKR, 44(GB 2015), which arose in the autonomous Kurdistan Region of Iraq, the administrative authority decided to transfer the petitioner from the College of Agricultural and Technical Engineering in Erbil, the capital city, to the Agricultural Technology Institute in Khabat. The petitioner requested the staff court to annul the transfer order after filing a grievance⁴⁸ with the issuing authority, as required by law, but to no avail. The court held

⁴⁴ Hung Chang and HaoLi, "Public Servants Transfer Factor Analysis and Discussion - A Case Study of a City Hall in Miaoli County" *International Journal of Managerial Studies and Research (IJMSR)* 7 (7) (2019): 1-3. <http://dx.doi.org/10.20431/2349-0349.0707001>

⁴⁵ Saddiqay Nabila, "Transferring the Employee between Disciplinary Punishment and Internal Regulatory Procedure," *Journal of Law and Society*, 3 No. 1, (2015): 57

⁴⁶ State and Public Sector Employees Discipline Act, No. 14 (1991). Under Article 8, the permissible sanctions are drawing attention, warning, pay-cut and reprimand. Others are salary reduction, demotion, suspension and dismissal.

⁴⁷ Sardar Aziz Khoshnaw, Interview.

⁴⁸ A grievance is a request made by a person affected by an administrative decision to the administrative authority that made that decision, demanding that the decision be reviewed, either by withdrawal or amendment, prior to resorting to the judiciary. Where a fair and acceptable result cannot be reached, the affected public servant may institute a legal action before a court for the quashing of the decision. For individuals who are not public servants, the filing of grievance is optional. The grievance procedure provides administrative authorities an opportunity to demonstrate goodwill and minimize

that the transfer decision was legal since it was made in the exercise of a discretionary power. Therefore, it did not affect the employee's financial rights. As a result, the case was dismissed. The petitioner, who found the court's decision unacceptable, brought an appeal before the General Body of the region's Shura Council sitting as an appellate body.⁴⁹ Following a review of the case, the General Body held that the transfer decision was made without valid reasons. This ran afoul of Article 36 of the Civil Service Law, which requires all transfers of public servants to be supported by reasons and based on the public interest. According to the General Body, a transfer decision may include an implied penalty, but the transfer should be justified by the 'public interest requirement, not by the fact that the transfer is intended to punish.' The General Body emphasised that the administration's discretion is not unlimited and must be employed in the public interest.

Similarly, in *MAKH v. Minister of Education*, 236, DFSC 443(2007 GDC), the administrative authority issued a decision to exempt the petitioner from the administration of Al-Falah High School, transferring him instead to Ammar bin Yasser School. The petitioner challenged the transfer decision, arguing that it was arbitrary and tainted by bad faith. The General Disciplinary Council, held, however, that appointing the petitioner as a school principal and then transferring him to another school is the discretion of the administration. Thus, the petitioner's transfer was for the public interest and in the interest of the educational process as well.

It is important to note that the administrative judiciary took different approaches in the above two cases. In the first case, it relied on the application of the law in reaching its decision. The transfer decision of the administrative authority was deemed illegal because it was made without due regard to administrative law. In the second case, the court rendered its decision after conducting an analysis of the case by reviewing court papers, as well as records, in addition to listening to the disputing parties.

This article argues that Iraq's administrative judiciary must be truly active, rather than merely enforcing the law. Considering the fact that, in Iraq, administrative laws are not codified in the same way that other laws are. While administrative judges are tasked with the responsibility of resolving conflicts in accordance with applicable legislation, they must conduct an analysis and investigation of the matters presented before them, using administrative laws as guidance. In this connection, this article expresses the view that

confrontations with individuals, thereby boosting attainment of the public interest. It also helps in reducing the burden on the administrative judiciary.

⁴⁹ In the Kurdistan Region, there is also an administrative judiciary that plays a critical role, similar to that of the administrative judiciary for the rest of Iraq. Under the Kurdistan Region Shura Council Law No. 14 of 2008, the judicial function is performed by the State Shura Council, which discharges this role through the region's Disciplinary Body and the administrative court. The Disciplinary Body handles personnel-related disputes, particularly challenges brought by public servants in the region against disciplinary sanctions imposed on them under the State and Public Sector Employees Discipline Act. The administrative court adjudicates the validity of decisions issued by administrative authorities in the region. Parties who are not satisfied with the decisions have the right to bring an appeal before the General Body of the regional Shura Council. This body is competent to hear appeals against the decisions of the administrative court, when challenged by affected parties. Such appeals must be filed within thirty days after the notification of the decisions sought to be challenged. The decision of the General Body shall be final. See Article 19 of the Shura Council Law.

Iraq's administrative judges require additional experience and more in-depth understanding of the country's administrative laws.

4.5. Discretionary Powers: Unreasoned Decisions

The reasoned decision is the third principle of natural justice. It is viewed as a new dimension to modern addition to the principles of natural justice. The reasoned decision principle gives a person the right to know why a decision has been issued against him.⁵⁰ It requires administrative authorities to act according to the principle of legality. The reasoned decision is vastly regarded as one of the essential principles of good and successful administration, as well as a tool to control the misuse of discretionary powers.⁵¹ A clear and sound decision is always supported by reasons that explain the purpose of its issuance.⁵² In addition, the reasoned judgement should not be merely a rubber stamp, but rather a concise explanation of the material considerations for a decision.⁵³ Such a decision would violate Article 14 of the Iraqi constitution of 2005, which guarantees the right to equality, as well as Article 15, which enshrines the right to life and personal liberty. Therefore, the established parameter for natural justice is that every judicial, quasi-judicial or administrative authority must support its decision with valid reasons.⁵⁴

Where discretionary powers are vested in an administrative authority, they must be exercised in compliance with the principles of natural justice. The reasoned decision principle has steadily developed due to its importance and interface with the principles of transparency and human rights.⁵⁵ The failure of administrative authorities to record the reasons for their decisions would, as evident from many of the cases brought before the courts, render such decisions null and void. In this sense, the reasoned decision principle serves as a check on the arbitrary use of discretionary powers.⁵⁶

In the Iraqi case of *GMA v. Minister of Education*, 275 DFSC, 479 (GDC), the administrative authority imposed a salary reduction of ten per cent on the petitioner for a period of six months due to the collapse of sections of the wall of Martyr Jabbar Alik Primary School, causing damage to property. The petitioner argued that the administrative authority's decision was arbitrary and harmful to his pecuniary rights. Thus, he requested the

⁵⁰ Ambika R. Nair, "Principles of Natural Justice: An Effective Mechanism to Control Administrative Discretion", PhD thesis, Pondicherry University, Chinna Kalapet, 2013), 122.

⁵¹ Makoto Hong Cheng, "Shaping a Common Law Duty to Give Reasons in Singapore: of Fairness", *Singapore Academy of Law Journal* 28, no. 1, (2016): 27.

⁵² Matthew Groves, "Before the High Court Reviewing Reasons for Administrative Decisions: Wingfoot Australia Partners Pty Ltd v Kocak", *Sydney Law Review*, 35(3) (2013): 628.

⁵³ Ingrid Op & Stephanie De, "The Duty to Give Reasons in the European Legal Area a Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law" *Public Administration Yearbook*, 2, (2016): 120. DOI 10.4467/24497800RAP.16.001.5094

⁵⁴ Dr Ismat abd Al-Majeed Bakir, interview.

⁵⁵ Ambika, "Principles of Natural Justice" 63.

⁵⁶ Anju P. Singh, "Reasoned Decision: The Necessity and Importance to Achieving Transparent and Accountable Society" *Journal of National Law University*, 3, (2016): 181. <https://doi.org/10.1177/22774017201501>.

General Disciplinary Council to vacate the order. After conducting an investigation and hearing witnesses, the court concluded that the administrative authority, and not the school's management, was responsible for the accident. It held that the administrative authority's decision to impose a financial sanction was illegal. This is because the authority made a decision based on its discretionary authority without relying on specific reasons.

This article contends that, in the aforementioned case, the court's ruling did not correctly capture the reasoned decision principle, which was at issue. It tended to confuse reasoned decision with reason. Properly construed, the case arose due to the absence of a reasoned decision, rather than the absence of reasons. The administrative authority gave reasons, but failed to provide a reasoned decision. Although somewhat tenuous, there is a distinction between 'reason' (*al-sabab*) and 'reasoned decision' (*al-tasbeeb*). Iraqi jurists and judiciary have always insisted that, traditionally, both terms differ in concept and functionality. Reason defines the legal or factual situation that motivated an administrative authority to intervene by taking an administrative decision. Put differently, it is the material circumstances that led to the decision being taken. By contrast, a reasoned decision is a decision that discloses the reasons upon which it is based. It contains an explanation of the reasons justifying it. The Iraqi administrative judiciary similarly differentiates between 'reason' and 'reasoned decision.' Generally, Iraq's administrative authorities are under no obligation to issue reasoned decisions, unless legislation expressly provides otherwise.

5. Conclusion

The administrative authorities exercise broad discretionary powers for two reasons: First is the absence of a statute defining the administration's discretionary powers. The second issue is the ineffectiveness of the administrative judiciary in Iraq, which is founded on the State Council Law. This law restricts the court's work by endowing it with limited powers. In terms of experience, the findings show that administrative court judges in Iraq lack the requisite experience to deal effectively with administrative cases. This is problematic. First, many of them are inexperienced in the fundamentals of administrative law. Second, numerous errors arise when cases are decided. A typical example is in correctly identifying the subject matter of cases being litigated.

In light of the foregoing, this article makes a number of recommendations. The structure and bylaws of administrative authorities should be revised and made more methodical, taking into account the following considerations. Limits should be set on the powers of administrative authorities and the scope of discretion exercisable by them. This will necessitate amendment to the State and Public Sector Employees Discipline Act to impose an obligation on administrative authorities to provide reasoned decisions.

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