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LEGISLATIVE DEFICIENCY IN ORGANIZING JUDICIAL OVERSIGHT OF ADMINISTRATIVE PENALTIES FOR VIOLATING HEALTH ADMINISTRATIVE CONTROL RULES

(A STUDY ON THE AMENDED IRAQI PUBLIC HEALTH LAW NO. 89 OF 1981)

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Abstract

Until 1989, the judicial system in Iraq was considered one of the unified judicial systems. In this year, the Administrative Judicial Court was established in accordance with Law No. 106 of 1989, the Second Amendment Law to the State Shure Council Law No. 65 of 1979, as amended. Under this amendment, this court had jurisdiction to consider... The legitimacy of administrative decisions, regardless of who issued them. Hence, it was assumed that the matter would apply to administrative penalties imposed for violating the rules of health administrative control, followed by purely administrative decisions issued by an administrative body, namely the various health departments. From here, we must ask whether this assumption is valid. Is it achieved, or has the Iraqi legislator regulated the means of control been deficient? Especially since the legislator has designated certain bodies to consider the validity of decisions to impose administrative health penalties.

Keywords :Monitoring, administrative penalty, public health, administrative control, appeal.

Introduction

First: Subject Of The Study

The decisions issued to impose administrative penalties for violating the rules of administrative health control are purely administrative decisions issued by the health administration. If it is the competent authority to impose these penalties, its exercise of this jurisdiction must be within the framework of legitimacy by being subject to the supervision of the Administrative Judiciary Court, as the latter is the authority with general jurisdiction to consider all administrative

disputes, including disputes related to imposing administrative penalties for violating the rules of administrative health control, after which they are purely administrative disputes. By reviewing the General Health Law No. 89 of 1981, as amended, we find that the Iraqi legislator has stipulated a specific method for objecting to decisions issued to impose administrative health penalties. If the position of the Iraqi legislator in reporting this method of objection is commendable, its position regarding this organization has been deficient.

The health administration enjoys broad discretionary authority that enables it to carry out its various activities and face various health challenges under normal and exceptional circumstances, which may make it more vulnerable to clashing with the rights and freedoms of individuals , or that it is abusing its powers in confronting them, hence it was necessary to enable individuals to challenge the illegal actions of the health administration by guaranteeing the right to litigate for individuals before the administrative judiciary regarding the administrative penalties that the administration has the authority to impose against individuals, which prompted us to devote this research to addressing the features of this deficiency by organizing the jurisdiction of the administrative judiciary in monitoring administrative penalties for violating the rules of administrative health control, in a way that would achieve a balance between the rights and freedoms of individuals on the one hand and the broad and increasing authority of the administration on the other hand..

Second: The Importance Of The Study

Achieving an optimal legal organization for the subject of monitoring general administrative penalties, especially the penalties imposed by health administration agencies in order to maintain the public health system, would enhance the effectiveness of these penalties, especially since they affect all individuals and their imposition does not require a direct legal relationship between the administration and individuals, which distinguishes the latter from other penalties that, despite being issued by the administration, do not fall within the scope of our research because they take the relationship between individuals and the administration as a justification for imposing them, such as the contractual penalty And disciplinary penalty.

Third: The Study Problem

The fundamental problem that we are trying to shed light on through this study is the legislative deficiency represented by restricting the jurisdiction of the administrative judiciary to consider administrative health penalties through the texts of the Public Health Law No. 89 of 1981 as amended and the texts of the Iraqi Council of State Law No. 65 of 1979 as amended, which raises the question about the way to challenge these penalties? On the one hand, and to what extent can the administrative judiciary extend its jurisdiction to disputes related to these penalties on the other hand?

Fourth: Study Methodology

To reach the study objectives by answering the aforementioned questions, the research will rely on following the analytical approach based on analysing the legal texts of the Iraqi Public Health Law No. 89 of 1981 as amended, as well as the judicial rulings related to the subject of the study. Fifth: Study plan In order to clarify the requirements of the study and its importance, we will divide the study into two sections. The first section is devoted to examining the conceptual framework of the administrative penalty for violating health control rules; while the second section is devoted to studying the problem of judicial oversight of the administrative penalty for violating health control rules. We will follow it with a conclusion that includes the most important results and recommendations we have reached.

The First Section

The conceptual framework of administrative penalties for violating health control rules.

The idea of administrative penalties in general and among them administrative penalties in the field of public health emerged as a result of the developments that affected the work of the administration and the expansion of the activities it practices, which led to a change in principles that were fixed and stable for a long period of time, so it became a familiar way to implement the law by granting the administration judicial jurisdiction to impose administrative penalties, not only to maintain public order with its known elements - public security, public health, public tranquility, and public morals and ethics but also to use it to achieve public interests as well, as it is a phenomenon imposed by the necessities of balance in daily life between the duty of the administration to implement the law and the right of individuals to enjoy the rights guaranteed to

them by law. Hence, the administrative penalty in the field of health control has become one of the mechanisms that the administration resorts to in order to achieve its goals in the field of administrative control, including the protection of public health. It is worth noting that these penalties are individual administrative decisions taken by the administrative body responsible for protecting public health with the aim of implementing the legal texts related to health. However, what distinguishes them from other decisions is their deterrent and punitive nature against individuals, which made the issue of accepting them a matter of dispute among public law jurists. Hence, to shed more light on the concept of administrative penalties for violating health control rules, I will clarify two requirements in this section; the first requirement is to study the concept of administrative health penalties, while the second requirement is to study the forms of these penalties, as follows:

The First Requirement

The Concept Of Health Administrative Penalty

To fully understand the concept of health administrative penalty, this requirement has two branches: the first is defining health administrative penalties, and the second is explaining the characteristics of these penalties, as follows:

The First Branch

Definition Of Health Administrative Penalty

In the absence of a legislative text that classifies, defines and defines administrative penalty in general, public law jurists have made a great effort in trying to develop a comprehensive and exhaustive definition of these penalties. The definitions have multiplied and varied according to the viewpoints of their authors. Some have defined them as “those penalties of a punitive nature imposed by ordinary or independent administrative authorities such as bodies, councils or committees through specific procedures - administrative decisions - and they are in the process of exercising their general authority towards individuals regardless of their functional identity or their relationship with the administration in order to deter some acts that violate laws, regulations and bylaws” (1), while another side has defined them as “a penalty that the legislator entrusts the authority to impose on an administrative body on anyone who violates a legal obligation or does

not comply with one of Administrative decisions (2), and another opinion defined them as “those penalties with a punitive nature imposed by the administrative body through specific administrative procedures while exercising its public authority, with the aim of limiting acts that violate laws, regulations and instructions and deterring their perpetrators regardless of their legal positions to achieve the public interest” (3), and others believe that administrative penalties are “individual administrative decisions of a punitive nature as a result of violating legal and regulatory obligations, or they are administrative decisions imposed by the administration as a public authority on the occasion of carrying out its activity in the manner and procedures prescribed by law and its aim is to control individual activities in a way that achieves the public interest (4). Others defined it as "the measure or procedure taken by administrative authority bodies against those who violate a legal or regulatory text with the aim of protecting public order and achieving the public interest (5).

From the above, we can say that the administrative health penalty is "individual administrative decisions that have the character of deterrence and punishment issued by administrative control bodies in the field of public health against anyone who violates a text of the laws or regulations with the aim of protecting the public health system".

It is worth noting here that the penalties referred to above do not include the commonly accepted meaning of punishment in criminal laws, but rather they are nothing more than preventive measures aimed at preventing disruption of public order whose effects have become apparent and whose consequences have been feared, and they are called administrative penalties only because they affect the freedoms of individuals (6).

The Second Section

Characteristics Of The Administrative Health Penalty

The administrative penalty imposed for violating the rules of administrative health control did not arise in vain and without a goal or features. Its existence, as we have previously presented, is an important means to ensure the daily implementation of legal health rules, which would achieve a balance between the duty of the health administration to carry out its role in implementing the laws and the right of individuals to enjoy their rights guaranteed by law. From

here, it can be said that this penalty has features that define it and goals that necessitated its existence. These features and goals are what represent its personality and determine its characteristics. These characteristics are represented by the following:

First: It is an individual administrative decision issued by an administrative authority: The administrative health penalty is an administrative decision issued by the competent administration by its sole will and without resorting to the judiciary, like other administrative decisions, except that what distinguishes it from other administrative decisions is according to what has been established by jurisprudence (7). The deterrent and punitive nature of it (8), from the above it becomes clear to us that the health administrative penalty requires for its validity what is required for the validity of other administrative decisions, so it must have the known elements of the administrative decision, which are jurisdiction, location, form, and the elements of reason and purpose, so if one of these elements is missing, the decision is illegitimate and it is permissible to appeal it by cancellation before the administrative judiciary (9), and perhaps one of the most important results resulting from considering the health administrative penalty an administrative decision is the independence of the health administration with the authority to impose it by its sole will without the intervention of the judiciary, and this is what distinguishes the health administrative penalty from the criminal penalty according to the opinion of jurisprudence (10). We conclude from the above that the issuance of the health administrative penalty by a non-administrative body results in the penalty losing its administrative nature, so the issuance of the health administrative penalty by the administration is considered one of the privileges granted to it according to the law. Second: The administrative health penalty is characterized by generality of application: Generality in this context means that the application of the administrative health penalty is not limited to a specific category of individuals, as the authority of the administration is broad in its application such that it includes all individuals who violate the legal texts related to the protection of public health, and its imposition does not depend on the existence of a specific link or special relationship between the health administration and the individuals subject to it(11).

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Third: The Deterrent Nature Of The Administrative Health Penalty:

Since the purpose of the administrative penalty is to maintain the elements of public order, which includes public health, this procedure or measure does not imply the meaning of punishment, but rather deterring the person whose sinful act led to a disruption of the public health order, and forcing him to respect the law (12). In this capacity, the administrative health penalty is close to the criminal penalty, as both imply the meaning of deterrence and punishment that is imposed as a result of a criminal or sinful act that is harmful to public health, whether this sinful act is an act or an omission, the administration's goal in imposing the penalty is to deter and address the health problems that occur as a result of individuals practicing activities that violate the rules of administrative health control (13).

The purpose of the administrative health penalty being characterized by a deterrent tendency is to ensure that individuals adhere to its provisions, otherwise the wisdom or lesson of imposing the penalty is negated if this characteristic is absent(14).

The fact that administrative health penalties have the property of deterrence and punishment necessarily requires them to be subject to the same principles to which criminal penalties are subject, whether they relate to their objective legitimacy (15), or were intended to guarantee their procedural legitimacy, such as the principle of legitimacy, which requires the administration not to impose any penalty unless stipulated by law, in addition to the principle of the personality of the administrative health penalty, the principle of proportionality between the sinful act and the penalty, the principle of non-retroactivity of the penalty, and other principles to which criminal penalties are subject (16), which in fact represent a type of guarantee that would prevent the administration from abusing its authority in imposing these penalties. From the above, it becomes clear to us that the administrative health penalty is determined by three characteristics according to the angle from which it is viewed. From the organic perspective, it is an administrative act for which the jurisdiction is vested in the administration. From the final perspective, it is close to the criminal penalty, as its goal is to deter behaviour that violates public health. From the perspective of the possibility of its application, it is characterized by generality,

as its adoption does not depend on the existence of a relationship between the administration and those subject to its rule.

The Second Requirement

Types Of Administrative Penalties For Violating The Rules Of Administrative Health Control

To confront the case of failure to comply with the legal procedures necessary to ensure the protection of the public health system, the Iraqi Public Health Law No. 89 of 1981, as amended, obliges the administration to impose the appropriate administrative penalty on anyone who engages in an activity that harms or is harmful to public health. It can be said that these penalties that the administration has the power to impose to protect the public health system fall into two forms; They are financial penalties and preventive penalties, from the above and to better understand the types of these penalties, this requirement is divided into the following two sections:

The First Section

Financial Penalties

The administrative health penalties of a financial nature, and from the appearance of their name, penalties related to the financial liability of the perpetrator of the violation, are imposed by the health administration agencies on anyone who violates health laws and regulations with the aim of achieving general and specific deterrence. Their purpose is not generally to compensate or repair damages and restore the situation to what it was before the violation occurred (17). These penalties are among the most important administrative health penalties, and even the most common. The administration resorts to them to confront violations or breaches of public health laws and regulations (18). They are many and varied. Since we are concerned in this context with explaining their types within the framework of protecting public health, we can point to the two most important types referred to by the Iraqi Public Health Law, which are the administrative financial fine and administrative confiscation, and this is what we will try to explain in the following items:

First: The Administrative Financial Fine

The administrative financial fine means In general, "an amount of money imposed by the competent administration, as stipulated by law, on the violator as an alternative to criminal prosecution. The text usually stipulates that the amount of the fine should be between two limits, a minimum and a maximum, leaving the discretionary power to the competent administration to impose the appropriate penalty" (19).

From the above definition, it becomes clear to us that the administrative fine for violating the rules of administrative health control often takes the form of sums of money imposed by the administration, by its sole will, on those who violate the legal texts related to the protection of public health.

It is worth noting that the administrative fine takes many forms; it may be imposed by the administration in the form of a fixed amount according to what the law specifies as a specific tariff for every behavior harmful to public health, or the matter of estimating the amount of the fine may be left to the administration to decide in light of the upper and lower limits specified by the legislator in the law according to its discretionary power. The legislator may be satisfied with specifying a minimum or upper limit that the administration must not exceed when determining the amount of the fine in light of the seriousness of the act harmful to public health and the extent of the measures taken by the violator to avoid or prevent it from occurring.

By examining the texts of the Iraqi Public Health Law, we find that the Iraqi legislator has stipulated the administrative fine as one of the administrative penalties that the administration has the right to impose on those who violate the provisions of the Public Health Law, as it stipulated that “the owner of the establishment subject to a license or health supervision shall be punished, upon violating the provisions of this law or the regulations, instructions or statements issued pursuant thereto, with an immediate fine not exceeding 250,000 two hundred and fifty thousand dinars or the closure of the establishment for a period not exceeding 90 ninety days or both, by a decision of the Minister or his authorized representative” (20). From the above text, we conclude that the Iraqi legislator has stipulated the administrative fine as an original way to confront some acts that violate the rules of the Public Health Law, and has authorized the competent health administration to impose a financial fine as an administrative penalty imposed

on those who commit acts that constitute harm to public health, and has also granted the administration discretionary authority to state the amount of the financial fine in light of the maximum limit it has set. The Iraqi legislator was not successful in determining the amount of the fine, as it was small and perhaps disproportionate to the seriousness of the health damages that may arise from violating the provisions of the Public Health Law. Perhaps the reason for this position of the Iraqi legislator is that he allowed the competent authority, in the event that the violation is serious, to impose another penalty in addition to the fine, which is closing the store. It may impose the fine or close the store, and it may rule on both according to its assessment and in light of the seriousness of the violation and its danger to public health. In addition, the law requires preventing the violator from practicing his profession until the reasons that led to his closure are eliminated.

Second: Administrative Confiscation

It can be said that administrative confiscation in the field of protecting public health is an administrative penalty imposed by the competent administrative authority for violating the rules of administrative health control, represented by forcibly seizing money from its owner without compensation, and it is a material penalty even if it is directed at a specific amount of money (21). Administrative confiscation as a penalty can be imposed by the administration with the aim of protecting public health, and it often applies to things or means that people are prohibited from using or

Confiscation occurs in two forms: general, which includes all the money of the convicted person, and this type of confiscation has been prohibited in most constitutions of the world. The second form of confiscation is special confiscation, which applies to a specific thing that may be the subject of the violation or crime, or may have been used in the crime or obtained from it. Confiscation may be a mandatory penalty when the legislator imposes on the administration the necessity of its application by the administration, and it may be optional when the legislator leaves the administration with discretionary authority to impose it or leave it (22).

By examining the texts of the Public Health Law No. 89 of 1981, as amended, we find that the Iraqi legislator has explicitly stipulated the authorization of the competent administrative

authority to impose such a penalty, granting health control agencies the authority to confiscate food and cosmetics that enter Iraq through unofficial means, as well as materials, machines and equipment used in their manufacture in violation of the law and in violation of the requirements of the health license (23).

It is understood from the above that the Iraqi legislator has adopted administrative confiscation in its discretionary form, leaving it to the administration, according to its discretionary authority, to impose it or not. We believe that this penalty should be reconsidered and surrounded by real guarantees, such as subjecting the decision issued to confiscation to judicial approval, since it is unacceptable to infringe on the right to private property except with judicial permission.

Section Two

Preventive Sanctions

They are also called prohibitive or freedom-restricting or rights-restricting sanctions. They are more deterrent to the person who causes harm to public health than financial sanctions. They affect the violator personally more than they affect his financial status. Hence, the authority of the administration to impose them is restricted out of respect for the rights and freedoms of individuals. It is worth noting here that calling these sanctions non-financial does not mean that they do not affect the financial status of the violator, but their effect is not direct (24). In this regard, three forms of non-financial sanctions can be referred to, which are stipulated in the Iraqi Public Health Law No. 89 of 1981, as amended, as follows:

First: Closing The Facility And Preventing Activity

Administrative closure is defined as "an administrative penalty issued by the competent administrative authorities that includes closing the facility for violating and breaching laws and regulations" (25).

In the context of protecting public health, it is intended to prevent the continued activity of the facility concerned from carrying out its activities that constitute harm to the public health system. This penalty is considered one of the most severe administrative penalties, as it causes the activity to be suspended for the entire period specified for the closure, which leads to incurring significant material losses for the facility subject to closure (26).

On the other hand, administrative closure is considered one of the most common administrative penalties in the field of protecting public health, as it greatly reduces practices that are dangerous to public health in a rapid manner that ensures that the health violation is not repeated in the future (27).

As for preventing activity, it means preventing the continued exploitation of the facility at certain times when it is a place or tool for actions that pose a danger to the public health system, as the legislator gives the administration, based on an administrative decision when closing the facility, the temporary or permanent prevention of some activities (28), provided that the prevention is not comprehensive or absolute for all persons and in all circumstances, then it is unlawful (29). Hence, I find that the Iraqi legislator has stipulated this penalty in the Public Health Law No. 89 of 1981, as amended, granting the administration, represented by the Minister of Health or his representative, the authority to temporarily close for a period not exceeding 90 days, extendable by a unilateral decision aimed at deterring acts harmful to public health (30). It also prevented the violator from practicing his profession in his place until the reasons for the closure were removed (31). There is no doubt that the Iraqi legislator was successful in stipulating this administrative penalty for what it achieves in deterrence for the violator and pushing him to avoid acts harmful to public health in the future. However, the most important thing to note about the position of the Iraqi legislator is that he made the imposition of this penalty optional and for a specific period in a manner that may not be commensurate with the danger that may result from the activities practiced by the health facility subject to closure. However, he addressed the matter in Clause Two of Article 96 of the law, obligating the administration to prevent the violator from practicing the profession in the place until he removes the reasons that led to Closing it..

Second: Withdrawing Or Cancelling The License

Withdrawing or cancelling the license is a penalty imposed on anyone who exercises the right granted to him by the license in a manner that violates the laws, regulations and health instructions. It is worth noting that withdrawing or canceling the license may be final or temporary (32). The administration may withdraw or cancel the license without the meaning of

the penalty being available in that, so the penalty is according to the requirements of protecting the public health system in addition to keeping pace with emerging circumstances without any error attributed to the licensed person (33).

The Iraqi legislator stipulated in the Public Health Law No. 89 of 1981, as amended, in addition to closing the health facility that is harmful to public health in Article 100 thereof, that the Minister of Health has the right to cancel the health license immediately upon proof of environmental pollution that threatens the safety and health of citizens in that place without being bound by the provisions of the Labor Law or any other law.

Section Two

Disadvantages of Judicial Oversight of Administrative Penalties for Violating Health Control Rules

It is known that one of the most important requirements for achieving the principle of legitimacy is that the actions of the administration in the state are subject to the rule of law and the provision of legal means that would ensure that it does not deviate from its provisions. At the forefront of these means is the organization of judicial oversight of the actions of the administration, so that the judiciary can cancel the actions of the administration that violate the law and are flawed by one of the flaws of legitimacy, and rule on compensation for the damages caused by the illegal administrative decision. The administrative judiciary has general jurisdiction to consider all disputes arising from these decisions. Since administrative penalties for violating health control rules in all their previous forms, according to what we presented in the first section, are individual administrative decisions issued by administrative control bodies against anyone who violates a text of the health laws or regulations, they are basically subject to the general jurisdiction of the administrative judiciary, like other administrative decisions. Individuals may appeal them if they are illegal, without the administration having the right to deprive them of the possibility of litigation. Here we have to ask whether these penalties are subject to this principle in terms of appealing them before the administrative judiciary in accordance with the provisions of the Iraqi Public Health Law No. 89 of 1981, as amended, or whether they are an exception to the jurisdiction of this judiciary, especially since the Iraqi legislator has designated special bodies

to consider the validity of decisions issued by the inspection agencies competent to impose administrative penalties. This is what is explained by dedicating this section to studying the mechanism for appealing health administrative penalties, and then the extent of the jurisdiction of the administrative judiciary to consider the appeals submitted against them, in two requirements. As follows:

The First Requirement

Mechanism for appealing administrative penalties for violating the rules of administrative health control

The subject of objecting to decisions and orders issued by health committees regarding the imposition of administrative penalties is one of the most important subjects. By referring to the Public Health Law No. 89 of 1981, as amended, we find that the legislator has determined a specific mechanism for appealing administrative penalties for violating the rules of administrative health control. This mechanism will be explained in detail in the following two sections:

The First Section

Submitting An Objection

The Iraqi legislator has confirmed the right of the owner of the establishment subject to a license or health control and who violates the provisions of the Public Health Law or the regulations and instructions issued pursuant to it and who disputes the validity of the administrative penalty imposed on him to initially object to that penalty before the administrative body that issued it, which is represented by the agencies affiliated with the Inspection Department established pursuant to Resolution No. 615 of the dissolved Revolutionary Command Council in force. This department is directly linked to the Minister of Health and is headquartered in Baghdad, with the presence of inspection departments in the governorates that have an organizational structure similar to the organizational structure of the Inspection Department in Baghdad (34).

The Inspection Department has the authority to monitor and inspect all health professionals' shops, including general practitioners, dentists, pharmacists, and veterinarians, in addition to its authority to inspect laboratories in cooperation with the representative of the relevant union (35).

As for food control, the health control divisions in the Baghdad and governorate health departments are responsible for investigating and confiscating these materials if they violate health conditions. This is confirmed by Article 96/Third of the Public Health Law No. 89 of 1981, as amended, which states that "the owner of the shop has the right to object to the closure decision before the Appeals Committee formed by the Minister of Health for this purpose. The objection is submitted through the health authority that issued the closure decision, and the latter must send the objection accompanied by the case priorities within five days from the date of registering the objection with it, and the committee's decision is final."

The report submitted by the health team that conducted the on-site health examination is considered sufficient evidence for conviction unless other evidence is provided to the contrary.

We conclude from the above that the objection has several conditions, which are:

1- The objection must be in writing, and this can be understood implicitly from the text of the previous article, as it stipulated that the objection be submitted to the Appeal Committee through the health authority that issued the decision to impose the administrative penalty, and this inevitably requires that the objection be written.

2- The objection must be submitted through the health authority that issued the decision to impose the administrative penalty on the violator, and therefore the violator does not have the right to submit this objection himself.

3- The Iraqi legislator did not specify in the Public Health Law the period within which the objector must submit his objection to the health administration authority.

4- The health authority that issued the order to impose the administrative penalty must send the objection submitted by the violator, accompanied by the priorities, within five days from the date of registering the objection with it, and the law does not allow the Appeal Committee to accept its submission outside this period.

5- The law considered the report submitted by the health team that conducted the on-site health examination as evidence Sufficient for conviction unless other evidence is provided to the contrary. We have many observations about the previous text. On the one hand, the Iraqi legislator did not grant the aggrieved party the right to appeal the decision to the competent

health control authority and thus the authority to reconsider its decision issued to impose the administrative penalty on the violator, and to cancel or amend it. Rather, it obliged it to refer the objection accompanied by its priorities to the Appeals Committee only, without it having the right to review its decision that it issued, amending or canceling it. We see in this a legislative deficiency, as one of the most important mechanisms of administrative control and guarantees of legitimacy is control based on a grievance, due to its many benefits; The acceptance of this objection by the health control authorities will result in correcting the legal situations arising from the administration's issuance of its decision in a faster and easier manner. If the objection is accepted, the right to appeal is lost. However, if the administration rejects the grievance, this rejection is not considered decisive for the dispute, and the objector can resort to appealing the decision before the appeal committees, which will increase the guarantees granted to individuals in the face of the administration's broad powers to prevent its arbitrariness, especially since the decision of the appeal committee, as we will see in the second section, is a final decision to reject or approve the decision of the health authorities that issued the penalty without having the right to amend this decision.

Section Two

Appeal before the Appeal Committee

The Iraqi legislator has given the jurisdiction to consider appeals submitted against decisions and orders issued to close, prevent, fine, or confiscate issued by health control agencies to health appeal committees formed by the Minister of Health, headed by the Assistant Director of General Technical Health Prevention in Baghdad, and the membership of two employees in preventive and environmental institutions chosen by the Minister of Health, while an appeal committee is formed in the center of each governorate, headed by the Assistant Director of Health for the Governorate, and the membership of two employees in preventive and environmental institutions, also chosen by the Minister of Health (36).

After the Appeal Committee verifies that the conditions required for the objection have been met, namely that it has been submitted by the party that imposed it, accompanied by its priorities, and within the legally specified period of five days from the date of registering the objection with

the health committees competent to impose it, the Appeal Committee considers the appeal, and has the right to accept or reject it. The rejection decision is considered a decisive administrative decision for the dispute, so it cannot be appealed before any other party (37).

From the above, it becomes clear to us that the legislator did not stipulate that the appeal committee must file a grievance against it before the health authority that issued it, as we mentioned previously. The Iraqi legislator also did not grant the appeal committee the power to amend the decision of the health control committees or inspection committees, but rather limited the powers of these committees to rejection or acceptance only. It also becomes clear to us that the decisions of these committees are final, and this is clear from the legislator's position and his prevention of the courts from hearing lawsuits arising from orders issued under the provisions of this law to close stores subject to licensing or health control or to destroy food items for reasons related to public health. We see that the Iraqi legislator has deviated from the right path in what was mentioned above, as it reduced the guarantees granted to the administration and individuals alike, especially since it considered the decisions of the appeal committees as final decisions - as it seems - so on the one hand, the administration that issued the penalty may deviate from the right path and impose an administrative penalty that is less severe than it should have imposed, in favor of the violator, which exposes the public health system and the lives of individuals to danger, and on the part of the objector, the administration may be arbitrary and impose a penalty that is not commensurate in terms of its severity with the act committed by the violator, which would make the latter's rights vulnerable to violation in the face of the health administration's agencies and their broad privileges, especially since the Iraqi legislator has prevented the courts from hearing lawsuits arising from orders issued under the provisions of this law to close shops subject to license or health supervision or to destroy food items for reasons related to public health. Hence, the Iraqi legislator had to grant the appeal committees the power to reconsider and amend the decisions taken by the health administration that imposed the penalty, in a way that would preserve the public health system and the rights of individuals at the same time.

The Second Requirement

The jurisdiction of the administrative judiciary to monitor administrative health penalties

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To determine the extent of the jurisdiction of the administrative judiciary to monitor administrative penalties for violating health control rules, it is necessary first to determine the legal classification of the appeals committee competent to consider appeals and the nature of the decisions issued by it, and then the limits of the administrative judiciary to monitor administrative health penalties, as follows:

The First Section

The legal classification of the appeals committee and the decisions issued by it

The dispute has arisen in the arenas of jurisprudence regarding the legal classification of the administrative bodies competent to adjudicate appeals submitted against administrative decisions issued by the administration in many laws, including the appeals committee formed pursuant to Article 97 of the Public Health Law No. 89 of 1981 as amended. Some (38) believe that they are judicial committees, as they are authorized, and no one else, to adjudicate the dispute over the legality of administrative penalties resulting from violating the rules of administrative health control, while another opinion (39) goes to say that these committees are administrative committees with judicial jurisdiction,

When they consider the objections submitted before them, they are It is necessary to follow the same method followed by the courts, while the third and final opinion went to the fact that such committees are purely administrative committees, considering that all of their members are administrative employees (40). On our part, we see that by referring to the text of Article 97 of the Public Health Law No. 89 of 1981, as amended, which is related to the formation of appeal committees, we find that these committees are formed by a decision of the Minister of Public Health, headed by the Assistant Director of General Technical Health Prevention in Baghdad, and the membership of two employees in the preventive and environmental institutions who are also chosen by the Minister of Health, while an appeal committee is formed in the center of each governorate, headed by the Assistant Director of Health of the governorate, and the membership of two employees in the preventive and environmental institutions who are also chosen by the Minister of Health. We conclude from the previous formation of these committees that it is not possible to say that they are judicial or even quasi-judicial committees, since no judicial element

enters into their formation, on the one hand, and on the other hand, these committees cannot rise to the level of judicial bodies, due to their lack of the most important foundations on which the structure of the judiciary is based, which are the elements of independence, neutrality, and specialization (41). Hence, these committees are purely administrative committees, considering that all their members are administrative employees, and their formation is through an administrative decision by an administrative employee (the Minister of Health) who has a major role in forming them in accordance with the powers granted to him by law. Their mission is to examine and review the objections submitted by individuals against the administrative decisions issued to impose administrative penalties, to then decide on these objections, accepting or rejecting them. Perhaps what supports the previous statement that they are purely administrative committees specialized in examining and reviewing objections is that the legislator did not stipulate - as previously mentioned - that there is a specific form for the objection, nor did he set specific restrictions and procedures for submitting this objection and its acceptance or rejection by the administration. This means that they are merely administrative bodies specialized in considering grievances only, accepting or rejecting them. As for the legal classification of the decisions issued by these committees, they are purely administrative decisions issued by an administrative authority. The decisions issued by them do not resemble the rulings issued by the courts, but rather are merely decisions that decide on the validity of the objections or grievances submitted by the person against whom the penalty was issued.

The Second Section

The limits of the administrative judiciary in supervising administrative health penalties

There is no doubt that the judicial system in Iraq is described as a dual judiciary, especially after the establishment of the Administrative Judiciary Court under the Second Amendment Law of the State Council Law No. 65 of 1979, and the legislator has defined the jurisdiction of the court in two issues, the first of which is cancellation, by saying: “The Administrative Judiciary Court has jurisdiction to adjudicate the validity of individual and organizational administrative orders and decisions issued by employees and bodies in ministries and entities not affiliated with a ministry and the public sector for which no reference has been appointed to appeal them...” (42).

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As for the second issue, it is represented by compensation, as he explained that "The Administrative Judiciary Court shall decide on the appeal submitted to it, and it may decide to reject the appeal or cancel or amend the contested order or decision with a ruling on compensation if there is a reason for it based on the plaintiff's request" (43). The reasons for filing a cancellation lawsuit before the Administrative Judiciary Court are represented by five defects specified by the State Council Law No. 65 of 1979, as amended, which stipulates that "the following are among the reasons for challenging orders and decisions in particular:

1- That the order or decision includes a breach or violation of the law, regulations, instructions or internal regulations.

2- That the order or decision was issued in violation of the rules of jurisdiction or is defective in its form, procedures, place or reason.

3- That the order or decision includes an error in the application of laws, regulations, instructions or internal regulations or in their interpretation or includes abuse or arbitrariness in the use of authority and deviation from it" (44).

Here is the question: Does the Administrative Judiciary Court have jurisdiction to adjudicate appeals filed against administrative penalties issued for violating the rules of administrative health control after they are administrative disputes, especially since these penalties are administrative decisions, and what is issued by the appeal committees are administrative decisions, as we explained previously?

The answer to the above question is determined by stating the restrictions imposed by the State Council Law on the jurisdiction of the Administrative Judiciary Court, and the effect that these restrictions have on the jurisdiction of the court, in addition to the restrictions imposed by the Iraqi Public Health Law No. 89 of 1981, as amended. To clarify this, the following is provided:

First: The Restriction Contained In The State Council Law:

The Iraqi legislator included in the State Council Law No. 65 of 1979, as amended, a restriction on the jurisdiction of the Administrative Judiciary Court; By stipulating that the court shall have jurisdiction to consider the validity of all individual and organizational administrative orders and decisions for which no reference has been designated for appeal (45), which raises the question

of whether the legislator intended by the phrase "reference for appeal" to adopt the theory of parallel appeal adopted by the French State Council, which stipulated that in order to accept the annulment suit, the legislator must not have organized for the interested party another judicial path for appeal through which the interested party could reach the annulment of the administrative decision issued to close, prohibit or withdraw the license without having to take the path of the annulment suit (46). Here, we must point out that when the French State Council adopted the theory of parallel appeal as a condition for accepting the annulment suit, it stipulated several conditions, including that the matter relates to a lawsuit, and that this suit would achieve the same results as the annulment suit in erasing the effects of the defective decision for the plaintiff or the appealer, in other words, that the results resulting from it would be the same results as those resulting from the annulment suit (47). In the context of knowing the extent of the jurisdiction of the Administrative Court to consider appeals filed against administrative penalties for violating the rules of administrative health control, in light of what the State Council Law included in terms of a restriction, the opinions of researchers differed regarding the existence of the parallel lawsuit condition or not as a condition for accepting the cancellation suit. Some of them supported its existence and some of them objected to it, as some of them criticized the existence of this condition for several reasons, including that the existence of the phrase "reference for appeal" mentioned in Clause Four of Article 7 of the State Council Law No. 65 of 1979, as amended, does not apply to the lawsuit. It is possible to reject the acceptance of the cancellation suit simply because there is an administrative body or committee that can consider these appeals, regardless of whether this reference is a judicial reference or not related to the judiciary (48), which means that the main condition of the parallel lawsuit theory is missing, which is that it is a lawsuit and not just an appeal filed before the administrative authorities. In other words, the phrase "which no reference has been designated for appeal…" is related to the jurisdiction of the administrative judiciary, not to the theory of parallel appeal. The legislator restricted the jurisdiction of the administrative judiciary to the references for appeal, thus excluding disputes that have a reference for appeal from the jurisdiction of the court. The proponents of this trend believe that the modern trend in French jurisprudence and administrative

judiciary aims to get rid of the theory of parallel appeal as a defense to the inadmissibility of the annulment suit, because the laws that established the annulment suit have given the general character to the annulment suit, and there is no other judicial suit that can achieve what the annulment suit achieves from the legal point of view, since its rulings have absolute authority towards everyone. Moreover, this defense "the defense of inadmissibility of the annulment suit" is likely to reduce the legitimate guarantees achieved by the annulment suit and cannot be imagined to be achieved in another suit (49). Thus, the existence of this phrase is a restriction on the general jurisdiction of the administrative judiciary competent in all administrative disputes.

While the second opinion (50) goes to say that the legislator in the State Council Law in force intended to adopt the theory of parallel appeal, and the idea of parallel appeal adopted by the latter does not differ from that in France, so it is sufficient for the acceptance of the annulment suit before the administrative judiciary that there is no other way organized by the law to appeal these decisions other than the annulment suit, and the Supreme Administrative Court in Iraq explained the concept of parallel appeal by saying "...that there is no other reference for appealing the decision, which is known as the parallel appeal method, and the meaning of this principle is that the annulment suit may not be accepted before the Administrative Judiciary Court if there is another reference for appealing it, whether this reference is a court or a body, as evidenced by the legislator's use of the phrase "reference for appeal" in an absolute word, and it did not stipulate that it be a court or a judicial body, and it is also not required that there be a suit before that reference, but it is sufficient for the law to stipulate the jurisdiction of that reference in the appeal, whether it was filed before a lawsuit or an appeal or not, and it is also required that the parallel appeal method be such that it is possible to reach the same result, which is the annulment of the administrative decision or the prevention of its implementation..." (51). The above summarizes that the Iraqi legislator's organization of the issue of challenging a defective administrative decision through a parallel appeal, in which the interested party takes a judicial path to challenge the defective decision, results in the person affected by this decision refraining from resorting to challenging it by a lawsuit for cancellation before the administrative judiciary, and he must follow the other path represented by the parallel or counter appeal. Accordingly, the

Iraqi legislator adopted the theory of parallel appeal when it prevented the jurisdiction of administrative courts from considering some lawsuits filed against administrative decisions for which the law has organized a path to challenge them. This was confirmed by the State Council Law in Article 7/Fourth/ thereof, which states that "the Administrative Judiciary Court shall have jurisdiction to adjudicate the validity of individual and organizational administrative orders and decisions issued by employees and bodies in ministries and entities not affiliated with a ministry and the public sector for which no reference has been appointed to challenge them based on a request from a known interested party and a possible case..." The Supreme Administrative Court also confirmed this by saying, "Which means that the legislator did not make the Administrative Judiciary Court the one with general jurisdiction to consider the validity of administrative decisions, when it removed some decisions from its jurisdiction." Administrative, as this jurisdiction was restricted so that there would be no other reference for appealing the decision, which is known as the parallel appeal method (52).

The correct opinion is that the position of the Iraqi legislator in the State Council Law, although it suggests the adoption of the theory of parallel appeal in accordance with the above, we should not miss the fact that one of the conditions for implementing this theory, which was adopted by the French State Council, is that the matter is related to a lawsuit and that this lawsuit works to erase the effects of the defective decision for the plaintiff, i.e. its practical results are equal to the results of the annulment lawsuit, so that the plaintiff can resort to this lawsuit to obtain the same results that he obtains from the annulment lawsuit (53). If we compare this condition with what the Iraqi legislator went to in the State Council Law, we find that the latter ignored the most important condition of its conditions, which is that the lawsuit be judicial, so he prevented the Administrative Judiciary Court from considering the lawsuit merely because there is another reference for the appeal, even if it is an administrative body, and this is something that contradicts the purpose for which the legislator established the Administrative Judiciary Court, since the law designates a reference for appealing most administrative decisions. Hence, implementing this condition means preventing the Administrative Judiciary Court from considering appeals merely because there is a body to which the objection is made, even if it is

administrative, which would remove most decisions from the supervision of this court. From the above, we see that the Administrative Judiciary Court should not stand before this restriction so as not to exclude many decisions from the supervision of the administrative judiciary, and that the matter should be limited to administrative bodies with judicial jurisdiction that the law authorizes to adjudicate disputes through decisions of a judicial nature and within the limits specified by the law regulating these bodies.

Second: The Restriction Contained In The Iraqi Public Health Law No. 89 Of 1981, As Amended

The Iraqi legislator ruled in the Public Health Law No. 89 of 1981, as amended, to prevent the courts from considering appeals related to the application of its provisions, as Article 96/Fifth of this law stipulated that "the courts shall refrain from hearing lawsuits arising from orders issued pursuant to the provisions of this law to close establishments subject to license or health supervision or to destroy food items for reasons related to public health", while Article 96/Third granted the owner of the establishment the right to object only before the appeal committees through the health authority that issued the administrative penalty. As a result of this and as a result of the literal interpretation of the aforementioned text, most of the administrative judiciary's approach was to not accept any lawsuit related, near or far, to the orders issued pursuant to the provisions of this law, including the decision issued by the Administrative Judiciary Court on 5/3/1992, in which the plaintiff filed the lawsuit claiming that the Karkh Health Directorate closed his restaurant under the pretext of violating health conditions and his lack of conviction in the aforementioned decision The defendant was requested to be summoned in addition to his job to plead and oblige him to lift the seizure. As a result of the pleadings, the Administrative Court decided to dismiss the case due to the existence of special appeal methods referred to in Article 96/First of Health Law No. 89 of 1981, as amended (54).

From what was presented, it was clear that the Administrative Court considered itself incompetent to consider appeals submitted against administrative penalties in the field of public health based on the prohibition stipulated in the Public Health Law in Article 96/First thereof.

The correct opinion is that the text contained in the Public Health Law, which is represented by preventing the courts from hearing lawsuits arising from orders issued pursuant to its provisions, has undergone two important developments, which are:

First: The text of Article 100 of the Iraqi Constitution of 2005, which stipulates that "the text in the laws shall not protect any administrative action or decision from appeal", which means that the text of Article 97 of the Public Health Law has ceased to be effective.

The second development: is represented by the Iraqi legislator issuing Law No. 17 of 2005, as amended, regarding the cancellation of legal texts that prevent courts from hearing lawsuits arising from the application of laws and issued decisions.

It is clear to us from the above that the aforementioned legislative development has opened the door for litigants to resort to the Administrative Judiciary Court to appeal the decisions issued to impose administrative health penalties, as there is no legal impediment that would prevent this. However, the restriction included in the aforementioned State Council Law in Article 7/First thereof may be an obstacle to appealing administrative health penalties before this court, because the Public Health Law has specified a reference for appealing these penalties, although we believe that what is meant by the appeal included in the Council Law is the judicial appeal, while the objection included in the Public Health Law No. 89 of 1981, as amended, is not likely to prevent the Administrative Judiciary Court from considering such lawsuits. Therefore, we call on the Iraqi legislator to lift this restriction in a way that would open the way for the Administrative Judiciary Court to play its role in monitoring all administrative decisions, including administrative health penalties.

Conclusion

The study reached a set of results and recommendations summarized as follows:

First: Results

1- The administrative health penalty is "individual administrative decisions that have the character of deterrence and punishment issued by administrative control bodies against anyone who violates a text of the laws or regulations in order to protect the public health system."

2- The health control penalty is determined by three characteristics according to the angle from which it is viewed. From an organic perspective, it is an administrative act that is subject to the jurisdiction of the administration. From a final perspective, it is close to the criminal penalty, as its goal is to deter behavior that violates public health. From the perspective of the possibility of its application, it is characterized by generality, as its adoption does not depend on the existence of a relationship between the administration and those subject to its rule.

3- The administrative health penalty, according to the provisions of the Iraqi Public Health Law, takes multiple forms and images, represented by financial penalties affecting the financial status of the violator, in addition to non-financial administrative health penalties affecting the person of the violator, not his financial status.

4- The legislator has determined a specific mechanism for appealing administrative health penalties, which is to submit an objection to the decision to the Appeal Committee formed by the Minister of Health for this purpose, through the health authority that issued the decision. The latter must send the objection to the Appeal Committee, accompanied by the case priorities, within five days from the date of registering the objection with it, and the committee's decision shall be final.

5- The violator was not granted the right to appeal the administrative penalty imposed on him before the competent health control authority, and thus the authority to reconsider the decision issued to impose the penalty and cancel or amend it, but rather obliged it to refer the objection accompanied by its priorities to the Appeal Committee only.

6- The Iraqi legislator did not grant the Appeal Committee the authority to amend the decision of the health control committees or inspection committees, but rather limited the powers of these committees to rejection or approval only, as it is clear to us that the decisions of these committees are final, and this is clear from the position of the legislator and his prevention of the courts from hearing lawsuits arising from orders issued under the provisions of this law to close shops subject to license or health control or to destroy food items for reasons related to public health. 6- The research showed that the appeal committees are purely administrative committees, considering that all of their members are administrative employees, and that they are formed by

an administrative decision by an administrative employee (Minister of Health) in accordance with the powers granted to him by law, and their mission is to examine and review the objections submitted by individuals against the administrative decisions issued to impose administrative penalties, to then decide on these objections, whether to accept or reject them.

7- The research concluded that the decisions issued by the appeal committees are purely administrative decisions issued by an administrative authority, and the decisions issued by them do not resemble the rulings issued by the courts, but rather are merely decisions that decide on the validity of the objections or grievances submitted by the person against whom the penalty was issued.

8- The scope of application of the parallel lawsuit theory in the Iraqi judiciary is expanding, as the mere fact that the law specifies a way to consider the objections submitted by the interested party is considered a parallel lawsuit that prevents the administrative judiciary from hearing the cancellation lawsuit. 9- The existence of a phrase that does not specify a reference for appeal has become an obstacle to the jurisdiction of the Administrative Judiciary Court in considering appeals submitted against administrative health penalties.

10- The research showed that the administrative judiciary in Iraq is not integrated despite the long period that has passed since adopting the dual judiciary system, as this judiciary has not been able to consider many administrative disputes that fall within its original jurisdiction, as many administrative decisions are still subject to appeal outside the jurisdiction of the administrative judiciary, as is the case with administrative penalties in the field of public health.

Second: Recommendations

1. I recommend that the Iraqi legislator amend the third clause of Article 96 of the Public Health Law No. 89 of 1981, as amended, by entrusting the administrative judiciary with examining disputes arising from the imposition of administrative health penalties, after which matters fall within the core jurisdiction of this judiciary, and making the appeal before the appeal committees an administrative grievance against the decision, which enables these committees to reconsider these penalties, rejecting or accepting them, in addition to the possibility of amending them, provided that the decisions of these committees are subject to appeal before the competent

administrative judiciary courts, so that the objection before these committees is an administrative grievance before resorting to a judicial appeal and is not an obstacle to resorting to this judiciary.

2. We suggest to the Iraqi legislator in the Public Health Law No. 89 of 1981, as amended, to cancel the text of Clause Five of Article 96, which prevented the courts from hearing lawsuits arising from the application of the provisions of this law, in line with the provisions of Article 100 of the Iraqi Constitution of 2005, which prevented the immunity of any administrative action or decision from appeal. Accordingly, the immunity of lawsuits related to the Public Health Law must be canceled, as the decisions issued under this law are administrative decisions that must be subject to appeal before the administrative judiciary. 3. I recommend that the Iraqi legislator amend Article 7/Fourth of the Iraqi Council of State Law No. 65 of 1979, as amended, by deleting the phrase "which no authority has been appointed to appeal" in a way that would extend the jurisdiction of the administrative judiciary to include the consideration of all administrative decisions that are still outside its jurisdiction, without exception.

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