

Jurisdiction of the Courts in Iraqi Legislation

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Abstract

It is well known that legislation, whether it is ordinary or subsidiary, should not be issued except by the competent authority to issue it in accordance with the rules and provisions stipulated in the Constitution. Violation of the rules of jurisdiction is the first aspect of the formality of monitoring the constitutionality of legislation, as jurisdiction is one of the most important elements on which the general law is based, which means the rules that determine the persons or bodies that have the authority to conclude public actions, and accordingly, lack of jurisdiction means the inability to Undertaking a certain legal act because the legislator made it the authority of another body or individual.

Introduction

First: The importance and purpose of the research:

The issue of the judiciary in general, and the jurisdiction of the courts in particular, is of great importance, because just societies do not exist without the presence of competent courts. A court may not refuse to consider a case that the law has assigned to it, and a court may not consider a case submitted to it if this case is not within its jurisdiction .

Also, this research aims to study these courts and identify them in the Iraqi legislation, while identifying the

defects in the latter, as well as identifying the shortcomings in the legislation and determining the need to add texts in it or cancel a text that affects it negatively.

Second: The research problem:

If these courts are unfair or non-competent, their existence will be like their absence, because they will place the right in the hands of someone other than its owner, and this is one of the most dangerous things that human societies can witness. Positive law and we also highlight the impact of this progress on the fairness of these courts and the conditions for fair jurisdiction.

Third: Research Methodology:

Since this research studies the subject of the jurisdiction of the courts in Iraqi legislation, we have adopted the method of rooting for these courts in positive law, and the research has adopted the scientific method based on induction and analysis in addition to rooting.

Forth: Research Plan:

This research has been divided into two sections. In the first topic, we deal with the concept of the courts' jurisdiction with two demands. In the first requirement, we deal with the definition of the courts' jurisdiction and the second requirement, the conditions for the justice of jurisdiction. As for the second topic, we dealt with the types of courts and the forms of their jurisdiction. The second requirement to clarify the images of the jurisdiction of the courts and a conclusion that includes the results and proposals that have been reached.

The first topic

The concept of court jurisdiction

The trial is a set of procedures aimed at examining the evidence of the criminal case, whether it is in the interest of the accused or against him,

in search of the legal and factual truth related to the case, and therefore this trial must be before a competent court. Defining the jurisdiction of the court. In the second requirement, we address the conditions for the justice of jurisdiction.

The first requirement

Defining the jurisdiction of the courts

In the application, we will define the jurisdiction of the courts in language and terminology to determine its meaning, as follows:

First branch

Definition of the jurisdiction of the courts language

The term "jurisdiction of the courts" did not appear in the language as a verbal compound, but rather it is understood from two separate words, so it is necessary to know their linguistic meaning separately.

Specialized linguistically means "singularity" (Muhammad ibnAbiBakribnAbd al-Qadir al-Razi, Mukhtar al-Sahah, Dar al-Kutub al-Ilmiyya, Beirut, 1990, p. 69).

As for judgment in the language, it means to judge. It is said that so-and-so is the most wise of a thing, i.e. perfected it, and the thing has been governed, i.e., it has become perfect.

And controlling it became tyrannical. And wisdom may mean knowledge, jurisprudence, and judgment (Surat Al-Ma'idah, from verse 43), and wisdom means: knowing the best of things with the best of sciences. The word judgment has been mentioned in many verses of the Noble Qur'an, including the Almighty's saying (IbnManzur, Lisan al-Arab, vol. 7, p. 24. Published on the School of Electronic Jurisprudence Library website at the link: <http://ar.lib.eshia.ir> Date of visit 21/4/2020):

second branch

Defining the jurisdiction of the courts idiomatically

As for the definition of jurisdiction in the terminology, it was defined as "the authority granted by the legislator to a judicial body to settle disputes"(Abdul Rahman Al-Alam, Theory of Jurisdiction, Journal of the Judiciary, Al-Ani Press, first issue, twelfth year, Baghdad, 1960, p. 5), and jurisdiction is also defined as the extent of the authority granted by law to an authority or court (Dr. Salim Ibrahim Harba and Professor Abdul-Amir Al-Akaili, Explanation of the Principles of Criminal Trials, Volume

1, Al-Atek Company for the Book Industry, Cairo, 2008, pg. 51).

Jurisdiction means the authority to rule in accordance with the law in a particular case, and the jurisdiction of the court is its share of the cases that it may decide on (Dr. Adam Wahib Al-Nadawy, Civil Procedures, 3rd Edition, Al-Atak Book Industry, Egypt, Cairo, 2011, p. 76).

While the judgment is defined as a result of arbitration, which represents a special type of dispute to give everyone his right (Dr. Abdul Hamid Al-Ahdab, Arbitration, its rulings and sources, part 1, Nofal Foundation, Beirut, Blasna reprint, p. 19).

Hence, we see that the definition of the competent court is the one that has the power to decide the criminal case that arises from a crime.

The second requirement

Conditions for the fairness of the jurisdiction of the courts

In order to start implementing the judgment that is the fruit of all the above procedures, some conditions must be met, as the judgment is not enforceable once it is issued by the court (Abbas HikmatFarmal Al-Darkazli, The Executive Force of Criminal Judgments, Master's Thesis, submitted to the Council of the

College of Law / University of Baghdad, 2003, p. 18), and we will address the most important of these conditions through the following:

First branch

Judgment issued by a competent court

It means the court that has the authority to decide the criminal case that arises from a crime, and that this condition is necessary in the implementation of penal judgments, so if the judgment is issued by a court that is not competent to hear the case, it is subject to appeal and is not invoked. The Iraqi legislator made the criminal courts the original jurisdiction in all cases, except for those exempted from them by a special provision in accordance with Article (137/a) of the Code of Criminal Procedure, which stipulates that “the criminal courts are the misdemeanors court, the criminal court and the court of cassation, and these courts are competent to consider all Criminal cases, except for those exempted by a special provision.

Second branch

Public trial

The Iraqi legislator has stipulated the rules followed for the

conduct of trial procedures in Articles (152-166) of the Code of Criminal Procedure, and the most important of these rules is the publicity of the trial stipulated in Article (152) that “the trial sessions must be public unless the court decides that they are all or Some of them are secret and are not attended by anyone other than those involved in the case, out of consideration for security or preservation of morals, and they may prevent certain groups of people from attending

Third branch

Appeal to the accused

The stage of the trial procedures begins with the summons of the accused, which is stipulated in Article (167) of the above law that “the trial begins with the summons of the accused and the rest of the litigants, then the identity of the accused is recorded and the decision of referral is read. And other documents, then hear the testimony of the accused and the statements and requests of the complainant, the civil plaintiff, the civil official, and the public prosecution.” Also, Article (179) of the same law stipulates that “the court may direct the accused what it deems

to be questions to reveal the truth before or after accusing him, and his refusal to answer is not considered evidence against him

The second topic **Types of courts and their jurisdiction**

In this topic, we will talk about the types of courts and whether there is a diversity in the courts. We will also talk about the forms of the jurisdiction of these courts, according to the following two demands:

The first requirement **Types of courts**

Based on the opinion that allocating judges to consider specific crimes is not a departure from the general rule governing jurisdiction, but rather a distinction for these crimes with some special provisions in procedures required by the public interest (Mulder (A) - Le Droit penal SociaEconomique, R.I.D.P, N. 3, P. 411 - 419), and in accordance with Article (137/a) of the Law The principles of criminal trials, which stipulate that "the criminal courts are the misdemeanors court, the criminal court, and the court of cassation, and these courts are competent to consider all criminal cases, except for those exempted by a special provision."

Ordinary judiciary during the following two branches.

First branch **Special Court**

The application of the general rule in jurisdiction that stipulates "the jurisdiction of ordinary courts of law to hear criminal cases in relation to various crimes" is under normal circumstances that do not require exceptional procedures, and this was supported in the light of the recommendations of the Sixth International Conference on the Law Sanctions (It is stipulated in Clause Five (A) of these recommendations that: "Ordinary criminal courts are competent to look into economic crimes and impose the prescribed penalties, provided that it is taken into account in each court allocating a number of its judges for this." seen d. FakhriAbd al-Razzaq al-Hadithi, The Penal Code, Economic Crimes, 2nd Edition, Higher Education Press, Baghdad, 1987, p. 78), held in Rome in 1953.

At that time, the legislator set up a special court in the Ministry of Interior, pursuant to the (dissolved) Revolutionary Command Council Resolution No. (209) of 1991, with its headquarters in Baghdad, and

consisting of a president and two members, one from the Internal Security Forces and the other a public prosecutor appointed by order of the Minister of Interior.

As it is within the jurisdiction of this court to consider some of the felonies mentioned under the aforementioned decision of the dissolved Revolutionary Command Council No. 39 of 1994 (Article (5) of the decision above, which states that: "The accused in the crimes stipulated in the first paragraph of this decision shall be referred to the Special Court at the Ministry of Interior by a decision of the competent investigative judge."), as this court follows the procedures stipulated in the Code of Criminal Procedure and was considered one of the exceptional courts that were entrusted with the task of Settling criminal cases arising from crimes referred to it by the Security Investigation Court; This was due to the exceptional circumstance that the country was going through, represented by the economic blockade that was imposed on it due to the previous ruling policies.

But after the change in the political and constitutional conditions in Iraq after 2003 and the issuance of

its current constitution for the year 2005 mentioned previously, and the resulting change in various state bodies and agencies, including the judiciary; Where this type of court (special and exceptional courts) has been abolished due to its conflict with the provisions and principles of this Constitution (Article (95) of the Iraqi constitution for the year 2005, which states that "it is prohibited to establish special or exceptional courts.").

In addition to the above, the legislator may establish specialized courts to consider crimes committed by individuals belonging to a certain category, such as juveniles who are tried before juvenile courts and military personnel before military courts, or to consider cases arising from a certain type of crime. In the cases arising from the crimes stipulated in the Law on Regulating Trade (Article (19) of the Trade Organization Law No. 20 of 1970), and the Customs Court, which has jurisdiction to consider cases

Arising from offenses defined by the Customs Law (Article (240) of Customs Law No. 23 of 1984), as well as the Labor Court, which has jurisdiction to consider

In lawsuits arising from the applications of Labor Law No. 71 of 1987 (Article (8/First) of Labor Law No. 71 of 1987), and other special courts (Among these courts is the (Administrative Judicial Court), which was formed and defined its jurisdiction under Article (7) of the amended State Consultative Council Law No. 65 of 1979. The (State Security) Court is now abolished).

Second branch

Ordinary criminal courts

1. Misdemeanors Court:

The Misdemeanors Court is one of the criminal courts established by the Iraqi Code of Criminal Procedure, which is competent to adjudicate criminal cases arising from misdemeanors and infractions, and it does not have the right to consider felony cases. It is convened by one judge and in the presence of the Deputy Public Prosecutor, as there is a misdemeanor court in each court of first instance, and the judge of the court of first instance assumes the jurisdiction of the judge of the misdemeanor court unless the latter has appointed its own penal judge. The area of the Court of First Instance (Abdul-Amir Al-Akaili, The Principles of Criminal Procedures in

the Code of Criminal Procedure, Volume 2, Baghdad University Press, 1977, pp. 21-23), in accordance with the provisions of the aforementioned Iraqi Judicial Organization Law (Article 31 of the Judicial Organization Law, which stipulates that “First – One or more misdemeanors court shall be formed in every place where there is a court of first instance and is competent to consider the cases assigned to it in accordance with the provisions of the law. Second – the misdemeanour court is convened by one judge. The judge of the court of first instance shall be considered a judge of the misdemeanour court if it does not have a special judge)

2. Criminal Court:

The Criminal Court is originally competent to consider criminal cases arising from felony crimes, and it may consider those arising from misdemeanors and infractions referred to it by the investigative judge by mistake or omission (Article 138/b and Article 139/b) of the Iraqi Code of Criminal Procedure), based on the principle that says “whoever owns The whole belongs to the part.” Since it is competent to look into the most serious types of crimes, which are

felonies, it is more appropriate for it to look into other crimes, namely misdemeanors and infractions (Abdul Amir Al-Aqili and Dr. Salim Ibrahim Harba, Explanation of the Code of Criminal Procedure, Volume 2, previous source, pp. 32-35). It is permitted by law.

Based on the provisions of the Iraqi Judicial Organization Law, one or more criminal court shall be formed in the center of each governorate (Article (29) of the Judicial Organization Law). It shall be held at the center of the Court of Appeal from a panel of judges headed by the President of the Court of Appeal or one of his deputies, and the membership of two deputies (Article (30) of the Judicial Organization Law), where this court is competent to hear criminal cases arising from the assault on the interest subject of criminal protection, and in its work, the procedural provisions contained in the provisions of the Code of Criminal Procedure (Criminal Procedures) shall be followed.

The second requirement

Courts jurisdiction pictures

Jurisdiction is the criterion that determines the scope of the application of jurisdiction to be

limited to a specific type of powers conferred by this jurisdiction (Dr. Saeed Abdel Latif Hassan, Explanation of the Criminal Procedure Law, 1st Edition, Dar Al-Nahda Al-Arabiya, Cairo, 1993, p. 7), and there are several forms of jurisdiction, including:

First branch

Spatial competence

Article (141) of the Iraqi Code of Criminal Procedure No. (23) of 1971 indicated that the provisions of Articles (53, 54, 55) of the law clarify the spatial jurisdiction of the criminal courts and settle jurisdictional disputes, and this means that the courts have spatial jurisdiction and they Adherence to it, as stated in Article (1/Second) of the Iraqi Supreme Criminal Court Law No. (10) of 2005, that the court's territorial jurisdiction is the Republic of Iraq or any other place, and this indicates that the jurisdiction of the court is comprehensive for all countries of the world.

With regard to the spatial jurisdiction of the ordinary courts (the place where the crime was committed), it means the place where the whole or part of the crime occurred, or any act complementing it or any result

resulting from it (With the exception of the Juvenile Welfare Law, which was adopted by this criterion in accordance with Article (65) of the Juvenile Welfare Law No. 76 of 1983), except that what is taken on the Iraqi legislator in Article (53/a) is that it stipulated The knowledge of the person who moved the crime scene to another place to determine the spatial jurisdiction, and he was not accurate in that because the text of the previous article is a regulatory text aimed at regulating the issue of jurisdiction as indicated by the explanatory memorandum of the law itself, and therefore the person's knowledge or lack thereof has no effect In regulating this issue, then what if the person who moved the place of the crime was not aware of this, is the court not competent? Which is required by the logic of the text, so I suggest that the legislator remove the last phrase from the text (or a person who knows it) and put the following phrase in its place (or any other person). Finally, the spatial jurisdiction may be determined (by the place of residence of the accused or his arrest), which is a criterion that the Iraqi legislator did not take (Article (6) of the Iraqi Penal Code),

unlike some other penal legislations (Article (217) of the Egyptian Code of Criminal Procedure, and Article (5/1) of the Jordanian Code of Criminal Procedure).

In fact, this criterion achieves the importance of complementing the previous criteria represented by helping to know the defendant's past and precedents and finding some evidence that he may have hidden in his home, especially if he does not have a known place of residence (Dr. Kamel Al-Saeed, Explanation of the Criminal Procedure Code, the Theories of Judgments and Methods of Appeal, Dar Al-Thaqafa for Publishing and Distribution, Jordan, 2001, p.683), and given the importance of this criterion, we suggest that the Iraqi legislator add a new paragraph to Text Article (53) reads as follows (Spatial jurisdiction is also determined by the place in which the accused resides or the place in which he is arrested).

With regard to the jurisdiction of the military court in terms of location (according to the place where the crime was committed), the jurisdiction of the military courts includes all Iraqi lands occupied by the Iraqi army, and with reference to

the provisions of Article (53/e) of the amended Iraqi Code of Criminal Procedure, which stipulates that “there shall not be The investigative judge’s actions and decisions are invalid because they were issued in violation of the provisions of Paragraph (A).

It is clear to us from this text that the rules of spatial jurisdiction are not related to public order, because the text indicated that the procedures taken by the investigative judge or the court were not invalid, even if they were issued contrary to the criteria for determining the spatial jurisdiction to consider the case contained in paragraph (a) of the same article and the reason for that It is that the rules of spatial jurisdiction are organizational rules and are not inevitable, and their violation does not entail the nullity of the investigation procedures and decisions, and that they were not set for objective considerations, but rather related to the interests of the litigants more than it is related to the public interest and must be adhered to before the trial court first, and the plea for lack of spatial jurisdiction before any payment subject matter of the case. In all cases, the crime exists, but its

circumstance, factors and means of implementation change with the change of time and place, that is, to keep pace with the social and civilized development of the society.

Second branch

Temporal jurisdiction

The court may be competent in crimes that occur in a certain period of time, and this is what some national criminal courts have said. It is the time period between 17/7/1968 and 1/5/2003.

Third branch

Qualitative competence

It means defining the jurisdiction of the court in a specific type of crime(Dr. Adam Wahib Al-Nadawi, previous source, p. 88), and thus the court must be competent to consider the case in which it issued the ruling. The Code of Criminal Procedure was based on this triple division (Articles (23-27) of the Iraqi Penal Code), in determining the courts competent to consider cases arising from these crimes, making the Misdemeanors Court the competent court to consider crimes of misdemeanors and violations, and it may be allocated to decide on misdemeanors cases alone or in offenses alone. As for the criminal court, It is competent to

decide on felony cases (Article (138/a-b) of the Iraqi Code of Criminal Procedure), and it may also consider cases of misdemeanours (Article (139/b) of the Iraqi Code of Criminal Procedure), while the Court of Cassation is competent to consider judgments and decisions issued in felonies, misdemeanors and other cases stipulated by law to ensure the validity and integrity of the procedures taken in the case (Article (138/c) of the Iraqi Code of Criminal Procedure).

The Iraqi legislator did not refer in the Code of Criminal Procedure to the nature of the rules of specific jurisdiction, and the prevailing opinion in jurisprudence with which he agreed is that it is one of the rules related to public order, the violation of which entails absolute nullity (Dr. Ibrahim Hamid Tantawi, *The Defense of the Invalidity of the Public Prosecution's Permission to Search*, Dar Al-Nahda Al-Arabiya, Cairo, 1997, p. 22), and as for the misdemeanour court, it is not permissible for it to violate it, otherwise its decisions are in violation of the system. As for the criminal court, it is not bound by this jurisdiction if a case was wrongly

referred to it as being within its jurisdiction, as it has general jurisdiction over the criminal case, whatever the crimes it includes. . This can be inferred from the text of Article (53/e) of the Code of Criminal Procedure, as well as the text of M (77) of the Civil Procedure Code, which states: "A plea that the court has no jurisdiction because of its lack of jurisdiction or because of the type or value of the case, the court shall rule on its own." It may be presented in any case in which the case is."

As for the specific jurisdiction of the military courts, it is also considered a public order that cannot be violated. The military courts have jurisdiction only with regard to the terrorist crime and the military crimes specified in the Military Penal Code No. 19 of 2007. The law of the Iraqi High Criminal Court has defined the court's specific jurisdiction in Article 1/Second with the crime of genocide, crimes against humanity, war crimes and violations of Iraqi laws stipulated in Article (14) of the Court's Law.

Fourth branch

Personal specialty

The principle in criminal matters is that the person of the accused or his capacity is not considered in

determining the court competent to hear the case, but there are considerations related to the public interest that called the legislator to take into account the special situation of some accused persons and to exclude them from being subject to the jurisdiction of the ordinary courts due to the existence of a special capacity in these persons and therefore measures must be taken that suit their personal circumstances (Dr. Nanplal, The Good of Criminal procedure (Law publishers) 1973, P 267).

Including what was stipulated in Article (11) of the Iraqi Penal Code, "This law does not apply to crimes that occur in Iraq from persons who enjoy immunity established under international conventions, international law or internal law." Also, the constitution may exclude some people from being tried before ordinary courts. A member of the House of Representatives enjoys immunity for the opinions and suggestions he expresses during the session, and he may not be arrested during or outside the legislative term except in specific cases exclusively with the approval of the majority of members. The exception may be due

to the rules of international law and international conventions (Article 63/Second of the Iraqi Constitution of 2005), where the international custom is to grant immunity to heads of foreign countries as well as members of diplomatic missions and their families and entourage during their passage or presence in the territory of another country by preventing them from being subject to the judiciary of that country for political considerations related to the mutual relations between States and out of respect for the sovereignty of the State they represent.

As for the legal nature of the rules of personal jurisdiction, they are part of the public order, and therefore individuals are forbidden to agree to violate them. At the level of national courts, we find that the Iraqi High Criminal Court has limited its personal jurisdiction to natural Iraqi or non-Iraqi persons residing in Iraq, and this is what Article 1/ Second) of the Iraqi Criminal Court Law.

Conclusion

After completing our humble research, praise be to God, Lord of the Worlds, we reached a set of results and recommendations, as follows:

First: Results :

1. We found that the expanded body of the Court of Cassation is the one that is competent to decide on conflict of positive and negative jurisdiction between courts in accordance with Article (11/2) of the Iraqi Judicial Organization Law.
2. Jurisdiction means the authority to rule in accordance with the law in a particular case, and the jurisdiction of the court is its share of the cases that it may decide on.
3. There are several conditions for the fairness of the court's jurisdiction, the most important of which is the issuance of the judgment by a competent court, the publicity of the trial and the summons to the accused.
4. We have also found that the legislator may establish specialized courts to look into crimes committed by individuals belonging to a certain category, such as juveniles who are tried before juvenile courts and military personnel before military courts, or to consider cases arising from a certain type of crime.
5. We found that the constitution and law stipulate the independence of

the judiciary and that the executive and legislative authorities should not interfere in this stability.

6. We also found that there are four forms of court jurisdiction, namely, spatial jurisdiction, temporal jurisdiction, qualitative jurisdiction, and personal jurisdiction.

Second: Suggestions:

1. With regard to judicial institutes and studying in them, we believe that the relevant Iraqi laws should be amended so that the study in judicial institutes is for a period of no less than five years, during which the student has an intensive study that includes high curricula and professors with high scientific sufficiency based on the provision of it in the law of the institute.
2. Making amendments to the texts of laws on everything that affects the independence of the judiciary. We believe that the matter of the judiciary should be entrusted to a judicial authority because of the need to protect the independence of the judiciary, which requires that it not interfere in the work of the judiciary and supervise and

control it, even on the administrative aspects.

3. The appointment of judges should be through a higher judicial body that interviews them and checks who meet the conditions, and that an order for their appointment is issued at the request of the commission by the President of the Republic and is obligatory.
4. A provision for limiting the order of transfer, dismissal, secondment and promotion of judges to the Supreme Judicial Council by amending the text of Article (49) of the Judicial Organization Law.
5. Providing for the formation of a constitutional court that monitors the constitutionality of laws and giving the judge the right not to apply the law if he finds it in violation of the constitution to fill the legislative deficiency in this area that has led to the doctrinal dispute and the transgression of constitutional principles by issuing laws that violate the constitution and stripping judges of the right not to apply them.
6. Amending the text of Article (58) of the Judicial Organization Law by specifying that the order to impose a disciplinary punishment

be entrusted to the Judicial Council exclusively through the Judicial Affairs Committee or the Disciplinary Council.

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