Powers of Governorates under the Law of Governorates that are not organized in a Region No. 21 of 2008

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Abstract:
The purpose of this paper focuses on the powers enjoyed by the governorates under the Law of the Governorates No. 21 of 2008. This paper will explore whether the powers of the Governorates commensurate with the concept and elements of the administrative decentralization? It will be conducted through doctrinal approach; data will be collected through secondary source by examining the contribution scholars in this field. This paper concludes that the powers exercised by the governorates exceed what is recognized by the administrative decentralization of its elements. Also, the governorates are almost up to the level of the regions adopting the federal system leading to the occurrence of many of the problems in the application of the legal provisions. Hence, the Iraqi legislator should amend the constitutional provisions and the legal provisions which equate the regions with the governorates in the exercise of the powers and reduce the powers enjoyed by the governorates that are compatible with being an administrative unit.

Keywords: Law of the Governorates, Governorates, Powers, Administrative Decentralization.

0.1 Introduction

Since its inception until the fall of the political regime in 2003, Iraq adopted the administrative centralization in which it was focused on all authorities in hand of central government in the Capital. The local councils are not able to discharge its duties involving public interest. After the year 2003, Iraq witnessed a movement from a unitary state into a federal one under the State Transitional Administrative Law of 2004. This was confirmed by the Constitution of 2005.

The collection of the Constitution of 2005 between the Federalism and Administrative decentralization equalized the governorates adopting administrative decentralization and the regions. Those regions adopted federalism despite the different legal status for each region. Also, the governorates have enjoyed broad powers under the law of the Governorates not organized in a Region No. 21 of 2008.

This study concentrates on the administrative decentralization applying in the light of the powers enjoyed by the governorates under the law of the Governorates No. 21 of 2008. Hence, this study will shed the light on the proportionality of the powers exercised by the governorates in accordance with the concept of the administrative decentralization of the basic elements of its presence.

0.2 The Definition of Administrative Decentralization

If one can state that the administrative centralization means gathering different aspects of administrative function in the state in the hand of one body often located in the Capital in a way that causes the unification of administrative style and its homogeneity all over the state, the administrative decentralization then means the distribution of the administrative function in the state between the centralized government in the Capital and the regional or attached bodies enjoying juristic personality (Hutchcroft, 2010).

Some scholars defined the administrative decentralization as the division of administrative function between the centralized authority in the Capital and the independent administrative bodies beginning

working under the supervision and control of the centralized authority (Bilouseac& Zaharia, 2009; Treisman, 2002).

On the other side, other scholars explained that administrative decentralization depends on the distribution of powers between the centralized government and administrative units. This takes three forms. First, it involves the lack of centralization of authorities while retaining the administrative units into a wider autonomy. Second, this form involves the devolution of powers represented by the administrative units that practices its functions. Such administrative units are liable for their actions before the government. The third form includes the transfer of powers under which the administrative units practice their powers with their enjoyment of a degree of autonomy as well as their submission to the supervision of the centralized government (Schneider, 2003; Neven, 2015).

0.3 The Elements of Administrative Decentralization

The administrative decentralization depends on three elements. These elements include the following:

1.The Presence of Local Interests that are Distinguished from the National Interests.

This element means the presence of local interests. These local interests are different from the national interests, meaning that the local interests provide the local needs although the centralized authority adopts the administration of national interests and facilities under which they give the services to satisfy the needs of all citizens of the state (Nicolescu, 2014). Nevertheless, the difficulty lies in adopting a standard to distinguish among the local tasks in which the local bodies adopt these tasks and the national tasks. The centralized bodies adopt these tasks as well. The tasks are considered to be national by its nature; they cannot be local like the relationship of a state with other states, home defense affairs, planning the educational and economic policies, etc. The local tasks are considered to be so by nature as they are limited to a particular local geographical range such as the water and electricity services, health maintenance, transportation, housing, schools, public parks and other local affairs (Canaan, 2010).

However, there are tasks that are difficult to differentiate its nature whether they are national or local. This is due to the comprehensive nature of these tasks because they are connected to a particular region and they relate to the state as a whole as well. The matter of the distinction between local and national interests is a relative one; it differs from a state to another one. It is important to note that it may be regarded as a national facility in a state, whereas it may not be regarded as such in another state. An example of this is the security facility serving the community. The state is then regarded as a general national facility run by using the method of centralization. However, the same facility in the United Kingdom is regarded as local facility that belongs to the local administrative bodies (Osman, 2010). There is actually a difficulty in creating a common standard to distinguish these interests. The reason behind this goes back to the flexibility of local and national interests. Therefore, one can determine the choice of any party to perform this interest on the basis of the political and economic conditions of that state.

1.The Presence of Local Bodies Sponsoring those Interests

As a matter of fact, it is inadequate for the legislator to recognize the local interests which are distinguished from national ones. Therefore, there should be the presence of local bodies. The authority should be granted to give a decision in some issues and an administration of some interests. Also, it should have financial and administrative independence. Nevertheless, the implementation and the administration of these interests are based on the recognition of the regional units of the juristic personality so as to gain the required capacity to attain these interests through legal conducts and acts. To achieve this aim, the legislator has to adopt the theory of juristic personality by which regional units are given this personality to attain their autonomy through the increase of the local participation. Thus,

this personality is described by the establishment of a new legal person rather than the state even if this act occurred inside its borders (Brinkerhoff& Johnson, 2009).

To achieve this concept, in Article 22 concerning the amended law of governorates not organized in a region No. 21 of 2008, the Iraqi legislator provided that "each administrative unit has juristic personality and financial and administrative independence. It has the following actions in order to practice its acts. First, the taxes, fees and wages are fulfilled based on the valid provisions of federal laws. Second, the powers given under the Constitution shall be exercised. Finally, the tasks and the duties entrusted under the law shall be performed in a way that does not go in line with the Constitution".

The recognition of the juristic personality of a part or more in the state as well as its enjoyment with a degree of autonomy compared to the centralized authority means the inception of a new general legal personality within the state itself. It is however essential to attain this independence practically. A council or a local body representing the residents of the regional units should be established so as to adopt the administration and the supervision of local affairs in the unit. In this way, the administrative decentralization cannot be attained through the recognition of the existence of noticeable interests. The administration and achieving these interests must be administered to the people of the local unit. Hence, independent local authority shall be gained by each unit with jurisdiction in the administrative function adopted by this independent local authority itself (Alhmaondi, 1990).

With respect to the structure of these local bodies and the way how to select its members, scholars differ in the way how to be conducted whether it is conducted by election or appointment. They differ in the way how it is combined as well.

A number of legal scholars think that the independence of the regional units cannot be attained unless the choice of its members of bodies has been conducted by the election achieved by the people of regional unit. This action is regarded as an essential requirement for the structure of these bodies. Moreover, no administrative decentralization is without following the election method (Antwi-Boasiako, 2010; Grindle, 2007).

Another perspective believes that supporting the method of appointing members of local bodies by the centralized authority does not prevent administrative decentralization from appointing these members by the executive authority among the population of the region. This action is to confirm the administrative efficiency and to raise the services level given to the population on the basis that some communities do not get to the level that qualifies them to properly elect their representatives in local councils resulting from the lack of the political and cultural awareness among these communities (Alaqbilat, 2008).

Other legal scholars are likely to select the method of combining the election and appointment in structuring the local bodies. This indicates the sense that there should be members selected by the centralized authority among the members of the local bodies. The combination of appointment and election of the local bodies' members causes the provision of the element of the administrative efficiency as well as the provision of the independence of the council at the same time (Hussein, 2007).

1.The Control of the Centralized Authority over Decentralized Bodies

The independence that has the enjoyment of the local units is not an absolute one. Nevertheless, the centralized authority still obtains the right of supervision and control of these units so as to confirm the unity of the public policy of the state. This act is to make sure that the services are equally and efficiently performed (Alhelo, 1987). Under the administrative decentralization described as a general rule, the state shall enjoy its political and legal unity. When the units enjoy the administrative and financial independence whatever its degree has, its enjoyment is not absolute. Rather, these units are subject to a particular amount of administrative control through the centralized bodies in the state (Ahmed& Mbwambo, 2004) to confirm the survival of its local policy in the range of the general policy of the state. They are also to confirm that it will not cause the independence or secession. Additionally, the

legitimacy of actions and decisions of decentralized bodies should be entrusted and should achieve the coordination among its different actions (Alaqbilat, 2008).

If the existence of elected local councils is a necessity required to meet the local needs in the governorate, it is essential that these councils shall act away from the centralized administrative bodies' intervention. This independence is regarded as one of the elements needed by the administrative decentralization and its constants in addition to the recognition of its juristic personality. This is because its local affairs and interests should be conducted. However, these councils are still part of the state as well as its public authority. Hence, they should be under the control of the centralized government with particular limits. There is no need to get the control on this justification, whereas the jurisprudence provides a set of justifications. These justifications include the following (Al-Zahir, 1998; Osman, 1939):

1. The existence of administrative control confirms the commitment of elected local councils to the policy of the state. It also confirms its legal, political, and administrative unity.
2. The existence of administrative control protects individuals from the possible actions of negligence, abuse, and deceleration of the local councils so as to address the public needs that could influence the services' level given to the local population.

If the administrative control practiced by the administration of the center of the local councils depends on several bases and justifications, these controls' forms differ according to the states' legal systems (Abdullah, 2007; Al Qubaisi, 2007).

To sum up, the practice of the centralized government of the administrative control over local bodies should be constrained. Otherwise, this causes the influence of the powers given to the decentralized local bodies. Furthermore, the bodies of the local units enjoy the powers and authorities based on the autonomy in which the administrative decentralized system is based on the remaining part of the state. They are also linked in some way or another with the centralized authorities. Thus, the determination of administrative control differs from one state to another with respect to mitigating or stressing the administrative control over the local units in accordance with the conditions of the state. Therefore, there should be some kind of that control. Actually, this issue will be discussed later to identify the extent of the commitment of the Iraqi legislator to this control when he approves the principle of administrative decentralization.

0.4 Administrative Decentralization under the Governorates that are not organized in a Region Law No. 21 of 2008

This section addresses the powers granted by the Constitution of the Iraqi governorates. The constitutional legislator stated that each provision that does not provide exclusive powers of the federal authorities will be in the limits of the powers of the regions and governorates not organized in a region. Additionally, the priority of the other shared powers should be provided to the law of the regions and governorates not organized in a region. The Constitution is not only adequate with this extended trend of the powers of the governorates, but it also attempts to ensure this trend in sporadic provisions, emphasizing that governorates shall give the financial and administrative broad powers by enabling them to run their affairs in accordance with the principal of administrative decentralization. The question one can pose is that what these financial and administrative broad powers are and what its scope is.

Moreover, the constitution did not give examples of the administrative and financial broad powers. Instead, the regulation of these powers is left to a law enacted by the authority of the federal legislature. Thus, on March 19th, 2008, the Law of Governorates No. 21 of 2008 was issued and this law was called the law of the governorates not organized in a region (Mingus, 2012). This law emerged to replace the Coalition Provisional Authority Order (CPA) No. 71 of 2004. The reasons behind the enactment of this law include the capacity of the powers given by the Constitution to the governorates and its management. The purpose of regulating these powers goes in line with the new form of the state

on the basis of federalism and administrative decentralization, and finally it goes with the lack of the current legislations in such a circumstance.

When the administrative decentralization has been addressed in the beginning of this chapter, it has been found that the administrative decentralization depends on the elements that should be available so as to be succeeded as an administrative system. Those elements should be also interrelated and complement each other. One can pose the following questions! Can the law of governorates of administrative decentralization and its ruling systems deal with checking its crucial elements or the section of the distribution of the administrative function between the federal government and the governorates not organized in a region? Can it develop a system which varies from the administrative decentralization? Thus, to answer the above questions, the issues below should be discussed.

1.The Powers of the Governorates

The Law of Governorates No. 21 of 2008 stated that the governorate involves two authorities. First, it is known as the governorate's council. It is the highest legislative controlling authority within the governorate (Law of Governorates not organized into a Region No. 21 of 2008). The other is the highest executive head authority in the governorate. It is known as the (Law of Governorates not organized into a Region No. 21 of 2008) as well. The Law of Governorate gives both of them the powers according to the administrative decentralization principle. In this way, Article 7 of the law of the governorates involves the powers of the council of the governorate. These powers are very broad and they are about 17 paragraphs. The Article 31 of the law provided that the powers of the governor is wide and are about 11 paragraphs.

A.Legislation of Laws

Based on the law of governorates, the governorate's council is regarded as the highest legislative authority at the governorate's level. This law gives the council the power to create local legislations inside the governorate. The issuance of the legislation is regarded as the final stage in creating the legislation process. The law does not indicate the role of the governorate's council in the previous phases of the issuance stage described by stages of proposing, discussing and voting the legislation. This implies that the law does not involve the organizing legislative stages that precede the issuance stage as well as determining the role of both the governor and the governorate's council. This will create difficulty when the legal provisions are applied to put them into practice. Hence, enacting the local legislation and the extent of the contribution of the governor as a representative for the local executive authority in the legislation process has not been displayed to the law.

Furthermore, this issue is away from the provisions of Article 122 of the Constitution; this only gives the governorates the exercise of administrative and financial powers by enabling them to run their matters in accordance with the administrative decentralization principle. It is important to note that the above Article does not contain the authorization of legislative authority of the local bodies. Consequently, this issue is only mentioned in the systems that address the federalism. Also, at the local level of the regions in the federal state, the legislation of laws is regarded as one of the fixed rights; the parliament of the region addresses this task on the basis that it does not go with the provisions of these laws with the federal constitution and the constitution of the region (Abdullah, 2007). Thus, it is impermissible to give the governorates' councils the authority to issue laws since this Act belongs to the authority of the federal legislature as well as legislative councils in the regions.

Moreover, the Article 28 of the constitution stated that it is impermissible to impose fees and taxes except by law. Hence, the law of the governorates in Article 22/I provided that "Collect taxes, fees and wages pursuant to the federal laws in force" which is considered as a whole matter. The governorates' councils however headed questions to the Federal Supreme Court, requesting a statement of view of the court about the possibility of enacting laws pertaining to collecting and imposing local taxes.

The Federal Supreme Court has indicated its view on the subject by pointing out that "the councils of the governorates not organized in a region have right to enact the laws pertaining to imposing, collecting and spending local taxes and to enact the laws pertaining to imposing, collecting, and spending the fines and fees by enabling them to run their affairs in accordance with the administrative decentralization principle given by Article 115 of the Constitution" (The Federal Supreme Court decision No. 16 of 2008).

Furthermore, a resolution was issued by the Federal Supreme Court at the request of the Legal Department of the House of Representatives concerning the power of councils of governorates not organized in a region. It pointed out that the governorate's council does not possess the legislative characteristic to enact local laws, whereas it practices its administrative and financial broad powers on the basis of the Article 122/III of the Constitution(The Federal Supreme Court decision No. 9 of 2007).

Accordingly, it has been noted that there is a contradiction noted in the Federal Supreme Court; the Constitution obliges that the governorates not organized in a region shall be given administrative and financial broad powers. It does not provide giving these governorates legislative powers due to a simple reason; they behave according to the administrative decentralization principle. It is only relating to the administrative function. The practice of the legislative powers shall be under the Constitution as well.

Hence, what is pointed out in Article 2/I of the law of the governorates concerning giving the governorates the issuance of local legislation that is regarded as unconstitutional and contrary to the provisions of Article 122 of the Constitution. The opinion of the Federal Court No. 16 of 2008 does not go with its resolution No. 9 of 2007. Besides, it does not have any basis from a constitutional standpoint (Al-Hassani, 2012).

A. Other Powers

The Constitution gave the governorates not organized in a region the participation in the field of the administration of different institutions of the federal state provided in missions, in regional and international conferences, and in studies fellowships. It has been due to the establishment of a public body to confirm these rights. Thus, it permitted the representatives of the governorates to join the public body membership (Iraqi Constitution 2005).

Also, the Constitution gave the representatives of the governorates not organized in a region the right to the public bodies membership to control the allocation of federal revenues to check the fairness of the grants' distribution, aids, and international loans granted to the regions and governorates not organized in a region with giving them the power to verify the optimal use of federal resources and their joint to confirm the transparency and equity when allocating these funds (Iraqi Constitution 2005). This is in regard to the representation of the governorate at embassies and diplomatic missions and opening any offices for diplomatic missions supposed to be confined to the Union. Accordingly, it should not fall within the powers of the regions and governorates at all. The federal government alone has the right to regulate and exercise foreign trade outside the region's borders. In addition, it has the right to conclude treaties with organizations and other countries; whether they include cultural, economic or social level. This means an excess concerning the federal government's exclusive powers. The application of this provision causes the presence of offices that have the equal numbers of regions and governorates that are not organized in a region. Thus, this action confuses the embassies' work and costs the state exorbitant expenses.

To sum up the aforementioned, the Constitution adopted the governorates not organized in a region with federal powers like regions. The constitutions of the federal states are not familiar since the stage of writing the Iraqi constitution has been difficult under the conditions which were contemporary with its writing process. That process failed to reach a political consensus concerning a number of issues, including the regions that formulated the federal state except Kurdistan region. Therefore, the Iraqi

constitution adopted a system containing administrative decentralization and federalism (Iraqi Constitution 2005).

Regarding the amended law of the governorates not organized in a region No. 21 of 2008, it has been found that the lack of comprehensive and clear vision of the role of administrative decentralization should be done by the local authorities. This is evident that the legislator mixes between the administrative decentralization and federalism with respect to identifying the powers in spite of the explicit differences between them.

2.The Control over the Governorates

The independence of the governorates' councils is considered as relative, limiting by the control granted by the legislator to the federal authorities and its acts. The legislator granting such control to the centralized government aims to emphasize the unity of the political and administrative state and to ensure the legality of the acts of those councils. In addition, it has the purpose of confirming that these councils act on a particular degree of efficiency and at the different administrative units' levels in the scope of the state. The control causes the confirmation of the achievement of the public policy objectives of the state to check the commitment of these bodies so as to respect this policy by doing what has been vested regarding the powers that have to be implemented (Al-Zoubi, 1984).

After 2003, the constitutional and legislative changes witnessed by Iraq caused deny to each control from the centralization to the governorates' councils. In this way, the State Administration Law for the transitional period 2004 has been established due to the principle of weakening the centralized administration's control. This law is due to the enjoyment of the governorates' councils with extreme independence from the federal government (Law of Administration for the State of Iraq for the Transitional Period 2004).

It gave the strength to the issuance of Coalition Provisional Authority Order (CPA) No. 71 of 2004. This trend assured the idea of independence of the governorates' councils in a way that canceled each control or supervision from any ministry or institution that has not been connected to the ministry.

The constitutional legislator went in the same direction in the constitution of 2005 since he affirmed that the governorate's council shall not be under the control or supervision of any ministry or any institution not connected to the Ministry despite of the independent funds of the council (Iraqi Constitution 2005).

However, the intention of the constitutional legislator is obvious in creating the governorate's council a substitute for the centralized administration within the governorate. Also, It is obvious in building the series of its independence by using phrases "control and supervision" to show the prohibition of the control to all its forms. Hence, the Iraqi constitution ignored an important element of administrative decentralization.

0.5 Conclusion

The administrative decentralization depends on the distribution of powers between the local bodies and the federal government. The success of the administrative decentralization and its continuation relies on a scope of elements involving the existence of local interests that are different from the national interests. The existence of local bodies sponsors those interests as well as the control of the centralized authority over decentralized bodies. The governorates have legislative, executive powers and financial spacious exceeded and recognized by the administrative decentralization. They are almost up to the level of the regions that adopt federalism. Therefore, the interference in the practice of the powers among the regions, the governorates and the Federal Government lead to many problems when conducting the application. The constitutional legislator must then amend the legal texts to mitigate the governorates' powers that are commensurate with being an administrative unit instead of being a political unit.

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