The effectiveness of judicial duplication in Algerian legislation

L'efficacité de la duplication judiciaire dans la législation algérienne

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Abstract

Developments and changes in the Algerian judicial system have strongly affected the authorities and the judicial bodies in terms of organization, functioning and competence. Thus, any development of the judicial system is systematically reflected through the rules of jurisdiction and each judicial reform brings new objective rules and new procedures relating to the judicial policy to be achieved to protect the acquired rights of individuals. The administrative courts are considered the cornerstone of the process of creating and concretizing duality in order to guarantee the litigant's right to resort to administrative justice. It is also considered to be the most important step in operating the duality system and thus adopts the principle of judicial specialization, which is one of the positive effects of legal duality.

Keywords: Judicial duplication ; the principle of specialization of judges ; administrative courts ; conflict of jurisdiction.

Résumé :

Les développements et les mutations du système judiciaire algérien ont fortement affecté les autorités et les organes judiciaires en termes d'organisation, de fonctionnement et de compétence. Ainsi, tout développement du système judiciaire est systématiquement reflété à travers les règles de juridiction et chaque réforme judiciaire apporte de nouvelles règles objectives et de nouvelles procédures relatives à la politique judiciaire à réaliser pour protéger les droits acquis des individus. Les courts administratifs sont considérés comme la pierre angulaire du processus visant à créer et concrétiser la dualité en vue de garantir le droit du litigant de

recourir à la justice administrative. Il est en outre considéré comme l'étape la plus importante pour actionner le système de dualité et adopter ainsi le principe de la spécialisation judiciaire, qui est l'un des effets positifs de la dualité juridique.

Mots clés : Duplication judiciaire ; principe de spécialisation des juges ; tribunaux administratifs ; conflit de compétence.

INTRODUCTION

The Algerian judicial system has known many developments until it reached its current status. After the independence of the Algeria in July 1962, Law No. 62-157 of 16 December 1962 was promulgated, which allowed to continue to apply French law, except what is in contradiction with the national sovereignty. Thereby, Algeria has kept the French judicial system and these laws remained in force until 1965, where Order No. 65-278 of 16 November 1965 was adopted, which included the judicial organization which adopted the principle of the unity of the Algeria's judicial system. As a result, the administrative courts inherited from colonialism were abolished for several reasons, as in particular the lack of specialized structures and skills. This order also provided for the transfer of the powers and competences of the administrative courts that existed previously to the administrative chambers established on the judicial councils.

The judicial organization is made up of the courts, judicial councils and a Supreme Council, which was known as the Supreme Court in 1989, where all disputes and regardless whatever its nature or the nature of their parties, are subject to a single judicial body. So it is natural and logical that in the existence of a single judicial pyramid, there will be no problem of litigation of judicial specialization, a problem that had been dealt with within the same judicial hierarchy without the need to resort to another judicial body specialized in the settlement of judicial specialty's litigations.

Thus and after its independence, Algeria adopted a different approach and its own system, in which it attempted to introduce two judicial systems : the unified Anglo-Saxon system and the dual French judicial system, and therefore the Algerian judicial system was united in structures with a duality in litigation. This situation continued until 1996, the year in which Algeria's judicial system witnessed a kind of internal revolution that led to the division into two parts: Ordinary Judiciary and the Administrative Judiciary, and that, after the period of independence (from 1965 to 1996) which has been

characterized by the unified judiciary because the ordinary judiciary contained the administrative chambers.

We have tried in this research to highlight its importance by asking the following question:

How much is the dual judicial system applied in Algeria?

The answer to this problem requires us to find an answer to these following secondary questions:

- What are the most important steps of the judicial organization in Algeria after its independence?

- What are the most important shortcomings in the organization of administrative justice after the Constitution of 1996?

In our research, we adopted the following approaches or methods:

- Historical approach in the follow-up periods passed by the administrative judiciary in Algeria.

- Analytical and descriptive approach in reviewing the research elements through a collection of references.

- Legal approach in the analysis of legal texts.

In order to answer this main question, we will discuss the study of the positive effects of judicial duality in Algeria (the first Subject), and then overlook the shortcomings of the organization of administrative justice after the Constitution of 1996 (the second Subject) as follows:

The first subject

The positive effects of judicial duality in Algeria

The dual judiciary is based on a number of advantages and that their application can lead easily to applied to the principle of specialization and independence (autonomy). The existence of an independent administrative judiciary specialized in enriching the theory of administrative law and interpreting and applying the provisions and rules of this theory to administrative disputes makes the process of application of judicial control over public or state affairs more concrete, which helps to guarantee the preservation of the idea about the rule of law [1] (State of law).

This is what we will try to address in this subject, which includes three topics (the first topic), in which we talk about the most important amendments introduced by the legislator through the introduction of the civil and administrative procedures, and then will discuss the principle of specialization of judges (the second topic), and finally we will talk about methods applied in the designation of the administrative courts as a general jurisdiction body within the administrative judiciary (the third topic).

First topic

Developing civil and administrative procedures law

The procedural rules are the legal way to regulating the process of litigation which leads to the knowledge of the validity or lack of legal status claimed after the consideration of a competent authority. Given the importance of this subject, the preparation of the new law or code 08/09 included the Code of Civil Procedure many years of preparation and enrichment presented to the Council of Ministers After it was discussed before the Council of Government during 06 meetings between 20 October 2004 and March 16, 2005 before being referred to Parliament in its two chambers for final approval.

This is what we will address in this topic by addressing the Code of Civil and Administrative Procedure in terms of form and content (section I) and then the reasons for the introduction of the Code of Civil and Administrative Procedure (section II).

Section I

Civil and administrative Procedure Code in terms of form and content

Several definitions have been mentioned, we can mention for example that administrative judicial procedures are all the regulations, procedures and legal formalities that must be observed when exercising the right of administrative judicial action before the specialized judicial authority in regards to the designation of the competent judicial party and also the conditions and formalities of administrative litigation and the organization and provisions of the functions and powers of judicial authorities about the application specially in investigation, expertise, file preparation, trial and the appeal judgment and methods of appeal against the judgments in judicial and administrative proceedings, as well as ways of implementing these provisions[2].

In terms of form, the new Code of Civil and Administrative Procedure contains 1065 articles divided into introductory chapter and 50 books hormonally disaggregated in order to facilitate the reading of the text for the reader.

In terms of content, the legislator adopted a scientific methodology through this law in order to trace the process of civil action from registration, process and its practice before the judicial authorities until the issuance of the judgment. It also includes the principles procedural. In addition to that, the legislator adopted a direct method in the drafting of the texts with short sentences and simple terms enshrined in the jurisprudence to make text simple and accessible to all normal and specialized readers.

Section II

Reasons for the introduction of the Code of Civil and Administrative Procedures

As a result of the pressure of reality dictated by the type of human composition of the judges because of ideological considerations, the legislator has searched for simple rules during the formulation of the law of procedures. He was therefore concerned with three preoccupations: bringing justice closer to the litigant through the distribution of jurisdiction and the abolition of major courts and establish courts in areas where they are lacking. As well as ensuring the unity and rationalization of the judicial system through the unification of procedural rules".

Moreover, and with the development of the society politically, economically and socially, the old laws have become useless, that means that Algeria today is no longer the Algeria of yesterday. In addition, Algeria is not isolated from the rest of the world, and can affect and be affected by an international community, so it must have relations with other countries under international treaties and conventions[3].

The draft of this law is an imperative necessity for the embodiment of real justice. These are the main reasons that led to the need to review whether this review is radical or complete.

The second topic

The principle of specialization of the judges

The idea of embodying the specialization of judges is one of the most prominent new directions in the organization of the Algerian judiciary and an important objective for activating dual judiciary in a better way. Specialization in the field of justice is of great importance and an effective role in raising the level of judicial action, that's exactly what was developed by the Algerian legislator by creating specialized poles to reach an strong and independent justice both at the level of the judicial system, ordinary or administrative, which requires the search for the best ways to establish clear standards and the adoption of the so-called principle of specialization of the judges [4].

From this we shall address the concept of the specialization of judges and its importance (section I), and then the advantages of the specialization of judges (section II).

Section I

The concept of specialization of judges

The specialization of the judge means that he should be limited to a specific branch of the judiciary based on special legislation during the consideration of disputes, so that he can easily and deeply understand all the problems that arise within a particular branch with accuracy, which may gives him great qualification by virtue of his repeated consideration of a particular type of texts and jurisprudence in the field of justice related to the subject of his specialty.

In this regard, the Algerian legislator spoke of specialized jurisdiction in accordance with organic Law 11/04, which contains the basic law on the Judiciary and Organic Law 04/12 on the Supreme Council of the Judiciary.

In the light of this definition, the idea of the specialization of judges seems very important in particular:

We do not live today in the time of accuracy and specialization, and who cared about one branch of science and knowledge, he will be able to increase his ability which lead him to success, and this can be dropped on the idea of specialization of judges. Accordingly, we are sure that the judge's knowledge of all the texts and their control in the branches of the law and their differences. It must be remembered that the judge is a human first of all

with a limited capacity like other people and can not be a circle of landmarks known every small and large thing in the law in both type general or complex and we can burdened him with what human will can not bear.

Therefore, as we have already pointed out, the specialization of the judge in a particular section of the judiciary is a matter that helps the judge himself to deepen further, especially when we know that the role of the judge and this specialization may help him to invent and devise judgments surrounding the subject of his specialization[5].

Section II

Advantages of judges' specialization

From the above, we conclude that the judges' specialization has some advantages such:

- The judge can be familiar with the legislative texts of interest to the branch in which he specializes.

- The accuracy of the application of the law and the proper functioning of justice.

- The judge's specialization leads to simplification of litigation procedures, because it enables him to complete his work in a faster and more efficient time.

- The judge was able to formulate the reasons for his rulings easily and easily.

- Enable the judge to follow a specific type of dispute or litigation, that means that when the judge is assigned to follow up a specific type of litigation and is accustomed to applying the legislative texts and following the jurisprudential studies in his field of specialization, he must follow the jurisprudence of the judge in a specific area of disputes that he used to treat in order to reveal the position of the judicial authority on the interpretation of a particular text.

- Enable the judge to provide better efficiency in view of the increasing number of disputes before the judiciary, so that it would be illogical to present to the judge in one session a set of cases with different legal texts. Even if we recognize the existence of this type of judge, they will not find the time or effort to prosecute the number of laws and this will harm the litigants themselves. Therefore, the judge must either accelerate or delay the sentencing.

In this regard, the Superior school of the judiciary, the National School of court registrars, and the School of Training Officers and Education Agents has been rehabilitated through better methods of organizing and appropriate means to upgrade the level of training in addition to modern teaching methods.

All these schools have become visible marks in raising the qualifications of judges and other professionals working in the sector to a high degree of professionalism and specialization through basic training. The administrative judge must have special qualities and a considerable experience in the field of administration and related activities and the resulting disputes, which means the need for a specialized administrative judge[6].

We have already pointed out that the administrative courts are the basic structures of the administrative justice system, which is the first instance in litigation in administrative disputes. From here, we will refer to the administrative courts as having a general jurisdiction in the administrative judiciary in the third topic.

Third topic

The creation of administrative courts as general jurisdiction body in the administrative judiciary

The establishment of administrative courts is part of a comprehensive reform policy in various sectors of the country, including the justice sector, which seeks to achieve modernization.

On November 14, under Executive Decree No. 98-356, which includes the modalities of the implementation of Decree 98-02, the creation of 31 administrative courts was formally announced by virtue of some substantive and necessary conditions for its application.

With the promulgation of the Code of Civil and Administrative Procedure 08-09, the jurisdiction of the administrative courts has changed substantially from what it was in the past, both in the qualitative and regional jurisdiction of the public order[7].

Therefore, we will address the specific jurisdiction (ration Materia) (in section I), and domestic jurisdiction (ration loci) of the administrative courts (in section II).

Section I

Specific jurisdiction of Administrative Courts

The specific jurisdiction of the courts means the power to adjudicate disputes according to their type or nature, so the assigning jurisdiction to a particular court is the qualitative criterion based on the type of dispute[8].

The Administrative Courts Act 98/02 has remained dead letter and has never materialized on reality. This has made the pioneers of the juridical arena very anxious for the promulgation of the Code of Civil and Administrative Procedure and what it may hold again, especially in administrative disputes and litigations. On February 25, 2008 - 10 years after the promulgation of the Administrative Courts Law – the code No. 08/09, which contains the Civil and Administrative Procedures Act, was amended.

The Article 800 of this law provides that "administrative courts shall be the body of general jurisdiction in administrative disputes and shall be competent to adjudicate in the first instance an appealable judgment in all cases in which the State, the Wilaya, the municipality or a public institution of an administrative nature is a party[9].

Therefore, the legislator wanted through the text of Article 1 that the administrative courts enjoy the general competence and the general jurisdiction of the administrative dispute except as expressly assigned by the law to another party, as is the case with organic law 98/01 in Article 9, we note that the legislator used terms that do not make sense of general jurisdiction. Then, If we refer to article 800/1 of Law 09/08, which includes the Code of Civil and Administrative Procedures, which stipulates that administrative courts are bodies of general jurisdiction in the case of administrative disputes.

We note that the legislator has rectified the wrong choice of terms, as explained above, and he used instead of the phrase "judicial authorities" in public law in the administrative article the term of "general jurisdiction" in the administrative dispute. However, the question is: the administrative courts are they really the owners of the general jurisdiction?

When we say that this latter is the owner of the general jurisdiction in administrative disputes, it means that the administrative disputes are presented to it first and the courts are separated by a trial judgment that can be appealed to the Council of State, and that guarantees the principle of litigation on two levels and the principle of bringing justice closer to the citizen.

But when we refer to article 07 of the Civil Procedures Law, we can notice that the jurisdiction of the administrative chambers is limited to the annulment proceedings, interpretation and examination of the legality of which the Wilaya municipality or public institution of an administrative nature is a party. Further, this type of proceeding shall also be filed by the central administrative authority and public bodies to the Council of state (Article 90 of Organic Law 98-01), which can initially or definitively adjudicate this proceeding which is not within the jurisdiction of the administrative chambers at the level of the Judicial Councils and thus the legislator has reduced the general mandate or jurisdiction of the administrative chambers[10].

It is further noted that the legislator has removed the proceedings of annulment, or interpretation and examination of the legality filed against the decisions issued by the jurisdiction outside the realm of the jurisdiction of the local administrative chambers and make them exclusive to the regional administrative chambers.

Therefore, the issue of the extent to which administrative courts have general jurisdiction under the Code of Civil and Administrative Procedure 08/09 is raised.

By reference to the text of Article 801 of the Code of Civil and Administrative Procedures 08/09, that provides for the jurisdiction of the administrative courts by adjudicating in:

- Proceedings for annulment of administrative decisions and interpretative appeals and proceedings of the examination of the legitimacy of decisions issued by the jurisdiction (Wilaya) and the decentralized services of the state at the level of Wilaya, municipality and its other administrative services and also within local public institutions of administrative nature.

- Cases of full jurisdiction, the cases conferred upon them under special provisions.

We note through reading Article 801 that the legislator has combined jurisdictions of both local and regional administrative chambers and referred them to the administrative courts without classifying the latter to regional or local and thus have the same quality jurisdiction at the level of the whole country.

In this regard, the legislator did well not to differentiate between decisions issued by the jurisdiction (Wilaya) from its own judicial body as before, and this to achieve the important principle of bringing justice closer to the

citizen. However, the legislator violated again this principle, so that the same article stipulates that the administrative courts consider the case against decisions issued by the local public institution of an administrative nature only, without the national public institutions, so what is the judicial body competent to consider the proceedings against the decisions issued by the latter?

These cases are subject to the jurisdiction of the Council of State which is able to consider them initially and definitively because the administrative judiciary is composed of administrative courts and the Council of State, but this new situation added by the legislator to the powers of the Council of State has reduced the general jurisdiction of administrative courts, especially as the legislator continues to monopolize the proceedings for annulment and the examination of legitimacy against decisions issued by the central administrative authorities in accordance with article 901 of the Code of Civil and Administrative Procedures 08/09 [11], but this can violates the principle of bringing justice closer to the citizen and the principle of litigation on two levels.

We also note that the legislator has added to the jurisdiction of the administrative courts all cases and proceeding relating to the decisions of the State's decentralized services at the level of Wilaya, represented by the directorates of the Ministry.

The legislature, for its part, has adopted the organic standard to determine the jurisdictional competence of the administrative courts as referred in article 800 paragraph 02 of Law 08/09, which states: "It shall be competent to adjudicate in the first instance an appealable judgment in all cases involving the State, Wilaya or Municipality Or a public institution is a party to it", which is the same standard mentioned by the legislator in the Algerian Code of Civil Procedure[12].

This criterion has practical significance in its ease so that the ordinary litigant can determine the jurisdiction of the administrative judge in advance if it is sufficient for him to be a public person mentioned in article 800 of Law 08/09 to guide his proceeding before the administrative courts.

The legislator has also extended the jurisdiction of the administrative judiciary to the public institutions of commercial and industrial nature in accordance with the provisions of Article 56 of Law No. 88-01, which includes the orientation Act concerning Public Economic Institutions.

Exceptions about Organic Standard:

If we follow the evolution of Article 70 of the Code of Civil Procedure, we find that the exceptions stipulated in the law were included in this article until 1990, and in 1966 these exceptions were limited to two cases:

- Violation of all the regulatory way subject to the general or common law before the court and the annulment requests are filed directly before the Supreme Council. In 1990, they were extended to other subjects stipulated in Article 70 bis of the Civil Procedure Code. But, if we refer to the Civil and Administrative Procedures Law 09/08, we will find that was reduced to only two cases in violation of article 70 of the Code of Civil Procedure.

- Breaching party and disputes relating to each claim in particular: Liability and compensation for damage to a vehicle belonging to the state, municipality or public institution of an administrative nature, and what is noted in this article is that the legislator has removed the exception concerning lease disputes, whether civil or commercial.

According to Professor Chihoub, the reasons and justifications for referring these disputes to the courts rather than the administrative chambers may lie in the fact that these disputes are governed by private civil and commercial law.

Section II

Regional jurisdiction of administrative courts

The Article 803 of the Code of Civil and Administrative Procedure stipulates that "the territorial jurisdiction of the administrative courts shall be determined in accordance with articles 37 and 38 of this law".

The Article 37 stipulates that territorial jurisdiction of the judicial authorities shall be vested in the jurisdiction bodies in which the last place of residence is situated in the case of the election a place where territorial jurisdiction belongs to judicial authorities of the selected place if it was not contrary to law. Regarding to Article 38 of the same law stipulates that in the case of multiple claimants, the territorial jurisdiction shall be vested in the judicial authority within the jurisdiction of which one of them is located.

In addition, article 804 provides that cases shall be brought before the administrative courts in the following articles:

1 - All about taxes or fees before the court which falling within its competence the place of taxation and fee.

2. In the public works and before the court which falling within its competence the place of execution of works.

3 - In the field of administrative contracts and whatever their nature before the court, which falls within its jurisdiction the place of conclusion or execution of the contract.

4. In disputes concerning employees, State agents or other persons employed in public administrative institutions before the court within whose jurisdiction the place of recruitment[13].

5- In the supply or works or in the rental of technical or industrial services before the court in whose jurisdiction the place of execution of the agreement or the place of its execution if one of the parties is domiciled there.

6- In the case of compensation for damage resulting from a felony, delict or omission before the court for which the judgment was issued.

About conflict of jurisdiction and its connection:

The Law on Civil and Administrative Procedure 08-09 adjudicated in the conflict of jurisdiction with regard to association and the settlement of questions of jurisdiction.

1 - Adjudication in the conflict of jurisdiction:

The article 808 of code 08-09 stipulates that the adjudication in the jurisdiction between two administrative courts shall be decided by the Council of State. Meanwhile, the adjudication of jurisdiction between an administrative court and the Council of State shall be subject to the competence of the latter in each competent chamber.

2 – In the connection:

The article 809 provides that "when the Administrative tribunal is notified of requests in the same claim but related to each other, some of which belong to one jurisdiction and others to the jurisdiction of the Council of state, the President of the Court refers all such requests to the Council of State".

For its part, the Article 804 states: "The Administrative court shall have jurisdiction in the region to adjudicate requests in respect of which the territorial jurisdiction shall revert to another administrative court".

The Article 118 also provides that: "When two administrative courts are notified simultaneously of separate requests but interlinked in terms of their respective territorial jurisdiction, the President of the two courts shall submit

such requests to the President of the Council of State, informing each President of Administrative Courts about the referral order. The President of the Council of State must rules on the inter-connection by his order if that exist, and he determines the court or competent courts to adjudicate the requests.

Article 812: "The referral orders provided for in articles 809 and 811 above may involve deferment of the adjudication of the dispute and it is not subject to any appeal".

3. About resolving jurisdiction issues:

The article 813 provides that when an Administrative Court shall be notified of requests which it deems to be within the competence of the Council of State, the President of the Court shall, as soon as possible, transfer the file to the Council of State which shall adjudicates in the jurisdiction and, where appropriate, determine the competent administrative court to adjudicate all or part of the requests.

The article 814 states: When the Council of State adjudicates on jurisdiction, the case shall be referred to the competent administrative court and the latter may not declare its lack of jurisdiction.

We conclude from all the above that despite the establishment of the administrative courts and the fact that it is a public authority in the administrative judiciary, there were not many of them. Although the creation of the administrative is translated into practice, it is supposed to create an administrative court in each Wilaya (state).

The second subject

Deficiencies of the Administrative Court organization after the 1996 constitution

It is clear to us that the different efforts made by the legislator in his attempt to build a judicial pyramid have failed because the characteristics of the system of judicial duality have not yet been fully explained in the judicial organization[14], given that of the various shortcomings in the texts regulating judicial duality.

There are deficiencies in the structural framework (the first topic) because of the incomplete transformation of the administrative judicial bodies and the maintenance of an important part of administrative disputes within the jurisdiction of the ordinary judiciary. There is also a lack of procedural

framework (the second topic) and dual judiciary incompleteness in Algeria by losing the important party in the equation of judicial duality which consist of the judge practicing in the administrative courts of important characteristics in his career, as long as his career path is controlled by the guardianship authority, we refer here to the Executive power (third topic).

First Topic

Deficiencies of the structural framework of the administrative judiciary in the light of duality

We are clearly aware of the establishment of the system of judicial duality under article 152 of the 1996 Constitution, which provides for the establishment of two separate judicial and organic judicial institutions and another judicial institution that considers the conflict of jurisdiction between administrative and civil courts.

Also, the ordinary judicial system depends on the existence of the first instance (courts), and then the second instance appellate (judicial councils), and the cassation degree represented by the Supreme Court. In this way, the levels of litigation in the ordinary system are full and are more capable of unifying the jurisprudence.

This is reflected in practical realities, as there are many shortcomings in the structural transformation of the administrative justice bodies through the incomplete structural transformation of the judicial bodies (section I) and the administrative courts lacking powers because a significant portion of the administrative disputes remain within the jurisdiction of the ordinary judiciary).

Section I

Inadequate structural transformation of administrative courts bodies

The Article 4 of the Administrative Courts Law stipulates that the organization of the court takes the form of chambers that can be divided into sections. For its part, the Article 14 of Council State Law stipulates that the Council of State shall be organized in the form of chambers to exercise its jurisdiction, and we can divide chambers to sections. For information, the texts do not indicate at all that this room should be allocated, that means that all rooms are of the same type and the same composition, and it would have been preferable in our opinion if the Law provided designation of the chambers and assign each one to a specific type of administrative dispute.

It is necessary to devote the idea of specialization even within the administrative judiciary itself, and not only to the general specialization between the ordinary judiciary and the administrative judiciary.

The Algerian legislator could have reserved chambers for tax disputes, and others for people disputes, etc. Thus, the neglect of the idea of specialization continues at the level of the Basic Law of the Judiciary, he uses uniform and homogeneous criteria for the designation of judges, regardless of the judicial field in which they are employed, and therefore he does not require any specialization or formation for judges of the administrative judiciary. That what the article 39 of basic low of judges states: "Trainee judges receiving a certificate from the Higher School of the Judiciary are appointed as judges in accordance with the provisions of Article 3 of this organic law[15].

Moreover, the basic Law of the Judiciary did not mention the possibility of appointing new graduates in the specialization of administrative justice, due to the absence of a private school providing training for judges in administrative disputes, and that even within the school that currently exists that does not contain training programs in the specialty of administrative justice[16].

Section II

Administrative judicial bodies with incomplete prerogatives

The list of exceptions in article 7 bis of the Code of Civil Procedure and a series of separate texts here and there, we do not deny the wisdom of retaining the jurisdiction of the ordinary court in some cases, especially when the law applicable to the dispute is the private law including the private law judge because it is a judge of the rent cases. But in other cases, the legislator assigned complex administrative disputes affecting the depth of the administrative and political law of the civil court or the electoral commissions which belongs to Wilayas (states), meanwhile, they were supposed to be attributed to the administrative courts, and we can here just give an example of local electoral disputes and the disputes of standing for legislative elections. The electoral law gives the jurisdiction of consideration of disputes of candidacy for elections and referendums to civil courts in general[17].

The attribution of dispute to non-judges of administrative law undermines the principle of specialization and is inevitably reflected negatively on the level of performance of the Justice and Judicial Service.

The second Topic

Deficiencies of the procedural framework of the Algerian administrative judiciary in light of the duality

The doctrine differed on the definition of judicial administrative procedures between what is limited and what is expanded. In fact, all definitions mentioned in the legal doctrine do not deviate from the consideration of judicial administrative procedures as rules of procedure relating to the initiation of disputes and the investigation and judgment of disputes within the jurisdiction of administrative courts[18].

The administrative judicial procedures include both the rules governing the judicial body, which is competent to adjudicate administrative disputes, whether it enjoys formal or organic autonomy from the ordinary judiciary, or it enters into a one structure with the ordinary judiciary such as the system of administrative chambers within the jurisprudence of these chambers and how they operate, appointment of judges (their transfer, promotion and dismissal) and also the guarantees provided to them.

It also includes the set of rules governing the work of judicial agents (assistant judges), as well as the legal rules relating to the specific or local jurisdiction.

What is noteworthy is the lack and incompleteness of procedural construction. In order to view that in detail, it is necessary to address the ordinary rules of procedure applied by the administrative judge **(Section I)**, as well as the obstruction of the judicial system because of incomplete litigation levels **(Section II)**.

Section I

Civil proceedings for administrative disputes

The organic law concerning the competence, organization and work of the State Council before the Council refers to the Code of Civil Procedure, as well as administrative courts, before the issuance of the Civil and Administrative Procedures low and its entry into force. Thus, the application of administrative judicial procedures to the administrative dispute before administrative judicial bodies will facilitate the work of judge who adjudicates administrative cases.

This is reflected in the text of the Law of the Council of State in article 40 that states "proceedings of a judicial nature shall be subject to the provisions

of the Code of Civil Procedure before the Council of State". The administrative Tribunals Code states in its paragraph of article 2 that "The procedures before the administrative courts shall be subject to the provisions of the Code of Civil Procedure".

The administrative proceedings in the dual justice system are part of the examining procedures for objective reasons relating to the fact that the public administration is a party to the dispute, while the civil proceedings are the type of accusatorial process[19]. If the judge does not enjoy the same powers to be able to redirect the suit which is special case between two equal parties, the judge in the case has a positive and intrusive role. Also, the proceedings are conducted under the guidance of the judge and when the parties are unable to interfere in the preparation of the proof, such as when the administration refrains from submitting documents.

The introduction of these procedural provisions into a common system of procedures represented by the Code of Civil Procedure was justified immediately after independence, where the legislature under certain influences adopted a more uniform judicial system. Today and since 1996, it is drastically transformed into dual judiciary and the logical result is the independence of the administrative procedures from civil proceedings, and therefore, this must be taken into account in the amendment of the Code of Civil Procedure by withdrawing the special provisions and enriching them so that they are valid to cover all aspects of administrative litigation.

Section II

Blockage of the judicial system due to incomplete levels of litigation

In the ordinary judicial system, the levels of litigation are complete. There are the first instance (courts), the second instance (the judicial councils) and finally the degree of cassation carried out by the Supreme Court, which its task of monitoring legality and consolidating case law in the ordinary matters and compensate councils and courts work. The Constitution explicitly states this role in Article 152, which is the same function as the State Council in administrative matters[20].

However, the provisions of ordinary legislation do not reflect this role of the Council of State when both the Administrative Courts and the Council of State low states that the latter's provisions are subject to appeal before the Council of State (art. 2 / Administrative and civil procedures law, art.10 of Council of state low).

Thus, the main function of the State Council appears in its judicial form as an appellate judge, and his function as a judge of cassation is only shown symbolically when article 11 of its law indicates that the decisions of the final judicial authorities and the decisions of the Accounting Council can be challenged by cassation.

He had a possibility to make the State Council essentially as a court of cassation to reflect the provisions of article 152 of the Constitution by establishing administrative appeals courts whose verdicts are irrevocable before the Council of State. And here only become all decisions of the administrative judicial bodies are subject to revocation and scope of the provisions of the legal control and thus the unification of jurisprudence[21].

The appellate jurisdiction could be granted to the current five regional administrative chambers by turning them into appeal courts for all Wilayas (as in the regular system).

This solution embodies, on the one hand, the function of the control of the law (cassation), which must be carried out by the Council of State because the function of appeal does not guarantee judicial control as required, on the other hand achieve the degrees of litigation that become complete as in the ordinary system, and thirdly, it does not cost much for the public budget because the administrative appeals courts are regional and not state-owned (Wilaya) .

We also favor the fact that the administrative courts themselves are regional and not state-owned for economic reasons, especially when the article 1 of their law leaves the determination of their number to the decree.

Third topic

The dependence of the administrative judge to the executive power

The primary role of the judiciary lies in the application of the law to the disputes before it, and this can only be achieved if the judge performs his duties without any pressure and away from all restrictions, whether direct or indirect, and therefore the judicial function must be exercised independently through the establishment of guarantees and procedures do not allow for both the executive and legislative powers shall affect the performance of the judge for his duties in settling disputes or even resolving the place of the judge in adjudicating disputes or annulling judgments and decisions issued by the judge[22].

This indicates the desire of the executive power to maintain its control, and it indicates also the absence of an organic autonomy of the adjudicator in administrative articles (section I). It also shows how vulnerable is the adjudicator in administrative articles (administrative judge) by the existing political system as a functionary of the executive power (section II), because the judge, first of all, is a citizen like the rest of the citizens so that he is influenced by his surroundings and here is the role played by the executive authority in influencing the judge in administrative matters.

Section I

Absence of organic autonomy of the adjudicator in administrative articles

In order for the judge to enjoy full independence, he must be immune from any pressure and all bargaining, and it is not enough to not give him instructions, because the judge is naturally afraid of his office, and that makes him perform his job to the fullest[23]. Here, the functional independence of judges is insufficient, and an organic autonomy must also exist, which means that no other authority interferes with the organization and management of the professional career of judges. This requires, of course, the creation of procedures and rules regarding the professional career of judges, including: appointment, transfer, retirement, isolation ...) in order to keep him away from the interference of any authority that may control the judge[24].

Therefore, this independence is not an end on in itself because of the advantages resulting from the independence of the judges. Rather, independence is a means of ensuring the impartiality of the judge and the establishment of the rule of law in order to protect the rights and freedoms of litigants. In order to avoid this imbalance, the Supreme Council of Magistracy must be established so that it will be entrusted with the task of managing the professional career of judges away from the influence of the executive power, namely the Minister of Justice and the President of the Republic, who preside over the Council on many occasions. Therefore, both the Constitution and the legislation must ensure the independence of the judiciary. But what we observe is the opposite, so that the law gave the ruling power in favor of the executive authority in the management of the judge professional career and all the guarantees that provide independence of the judiciary are just a formal guarantees which does not exist in practice.

The text of article 155 of the Constitution of November 28, 1996 states that "the Supreme Council of the Judiciary shall determine, in accordance with

the conditions prescribed by law, the appointment and transfer of judges and the functioning of their career ladder". As provided in articles 07.08 and 09 of Organic Law No. 98/03 dated 03 June 1998 concerning court dispute jurisdictions and organization and functions[25], the President of the Court of Dispute and its judges, the Governor of the State and the Assistant Governor of the State, shall be appointed by the President of the Republic on the proposal of the Minister of Justice and after the adoption of the corresponding opinion of the Supreme Council of the Judiciary", and this is contrary to the provisions of Article 155 above mentioned in the Constitution.

This confirms the hegemony of the executive authority over the process of appointing judges and the conduct of their career through tis prerogatives in appointing judges, and in contrast, their consideration of the Supreme Council of the Judiciary as an instrument under its control and it directs it as it wishes.

The Supreme Judicial Council's intervention in the appointment and delimitation of judges is determined by the organic law of the Supreme Council of the Judiciary, which stipulates on the appointment of judges that the Supreme Council of Magistracy deliberates the proposal submitted by the Minister of Justice to be appointed by presidential decree before their establishment after one year of training period within judicial bodies and authorities.

By reference to the system of the employment of judges in Algeria and the procedures for their formation, we find that this system applies even to candidates for the judicial profession before they become judges. This is due to the nature of the relationship between the executive and judiciary power. This strict system paves the way for the executive authority to extend its influence on judges throughout their training period at school[26].

Article 02 of Organic Law No. 11/04 of 06 September 2004, which contains the basic law on the Judiciary, provides that the judiciary includes both the judges of the judiciary and the public prosecution of the Supreme Court, the judicial councils and the courts of the regular judicial system.

The judges of the state and the state governors were also included in the State Council and the Administrative Courts, as well as judges working in the central administration of the Ministry of Justice, the Secretariat of the Supreme Council of the Judiciary and the administrative departments of the Supreme Court and the State Council.

In Algeria, as mentioned above, Article 155 of the Constitution of November 28, 1996 authorizes the Supreme Council of Magistracy to appoint judges in accordance with the conditions laid down by law. In contrast, Organic Law No. 98/03 empowers the prerogative to appoint judges to executive authority. So, in general, the judges are appointed by one of the two methods, either through a competitive selection process or by direct appointment.

Section II

Functional dependency to the executive power

In this regard, it is important that the judicial system function properly, and in order to carry out the tasks entrusted to it with justice and equity, it must also be fully independent in carrying out these tasks as provided by Algerians constitutions and how it has been dealt with all various conditions that Algeria has experienced[27].

In this regard, many countries have similarities in how to organize the judiciary in the face of other authorities. This is despite the difference in their style in the face of the separation of powers. France, for example, takes the principle of separation between the administration and the judiciary, which it considers to be an authority with emphasis on the independence of the administrative judiciary in many legal texts.

In this regard, the changes introduced by the Algerian constitutional system since 1989 have led to a multi-party system in political practice, as well as the adoption of a flexible separation of powers in order to radically change the structure and support of bodies. Although article 138 of the Constitution of November 28, 1996 states that the judiciary is independent and practiced within the framework of the law. Article 147 of the Constitution stipulates that the judge is subject only to the law.

On the organic side, it can be said that although the Constitution of November 28, 1996 in Article 78 stipulates that the judge is appointed by the President of the Republic, which is reflected in practice by the President of the Republic since assuming office. Also, an organic law of the Judiciary system was issued and the constitution provides that judges were subject to basic judiciary law only which respects the provisions of the Supreme Council of the Judiciary. However, the Presidency of the Supreme Council of the Judiciary always belongs to the President of the Republic, and with all these legal texts we find that the professional career of judges is still exercised by the executive power through the Supreme Judicial Council,

which has not changed the texts, and it becomes the weak party in the dependency and integration equation, it draws its vulnerability from its composition, missions and prerogatives which assigned to it.

For his part, the legislator worked to reduce these powers further and to reduce the representative role of the judges when the number of judges elected was reduced from sixteen (16) judges to six (06) elected judges only, through the amendment of Law No. 89/21 of 12 December 1989, by Legislative Decree No. 92/05 of 24 April 1992[28].

In spite of Article 143 of the Constitution of November 28, 1996, the judiciary considers appeals in the decisions of the administrative authorities, but the influence of this authority and qualified it to exercise its discretion by setting limits and obstacles that do not exceed the judiciary to exercise control over the work of the administration by privileges that have as administrative body, then the executive authority turns into executive and controller in the same time. Also, the judicial authority replaces judiciary in the right to pardon and adjudicate disputes, which are within the jurisdiction of the judiciary. In addition, there is a taking away a Jurisdiction of the judiciary in controlling administrative work by limiting its activity and replacing it in the control of administration. Here we find that the situation in Algeria is not very different from other countries, so the judiciary is considered as an authority, like other executive and legislative authorities.

CONCLUSION

Since 1998, the Council of State has established and continues to exercise its judicial and advisory functions, as is the case in France, with a clear difference in effectiveness due to differences in the system of society and governance and the quality of material and human resources available. As for the Administrative Courts and in conjunction with the establishment of the Council of State, we note some delay in its installation for purely objective reasons and justifications. The first Administrative Court in Algeria was established on 24 March 2010 in parallel to the establishment of the State Council as an independent arbitrator from both the administrative and ordinary judiciary as a criterion for the success of the duality system.

Essentially, it can be observed from this study that:

- In addition, although the Algerian administrative judiciary borrowed most of its provisions from the French administrative judiciary, with the issuance of Law 09/08, which is similar to that reached by the French judiciary, but to date has not been fully installed as a separate independent structure and

activate the role of this judiciary mortgaged with practical application not only with structural setup.

- In order to promote effective judicial duality, the jurisdiction of the courts in Algeria should be extended to the advisory side and the administrative courts law may also need to be amended.

- The material and human resources in Algeria are available to install the administrative courts and to build an independent and efficient administrative judicial system and thus to say that the Algerian judicial system is dual.

- The creation of administrative courts at the level of all Algerian judicial councils fulfills the objectives sought by the Algerian legislator in 1996.

- The administrative courts enjoy general jurisdiction and general mandate in the administrative article except as expressly assigned by the law to another party. However, it is found that it does not exercise the consultative role, and the legislator only determines the general jurisdiction and the general mandate in the administrative article except as explicitly assigned to another party. That even though we find that it does not exercise advisory role and the legislator only determines the terms of reference and would have been better if granted this role, even at the local level.

- The allocation of some administrative disputes for consideration directly before the Council of State at first or final instance on the basis of the decision-maker, whether central or decentralized is a waste of most important guarantees of litigation which is the principle of litigation in two degrees.

In the light of our results, we have decided to include some recommendations or suggestions that we hope will improve the performance of the administrative judiciary in general and the Algerian judiciary system in particular in aims to protect the principle of legality. These recommendations are the following:

- Adopting specialized training and formation in the field of administrative justice by forming specialized judges in administrative disputes only and working on their promotion from the administrative courts to the Council of State according to seniority and abandoning the issue of their mobility between the chambers. This is a supplement to specialized university training when in the administrative field to work much harder.

In spite of the efforts made by the our country in this field to increase the number of graduates at the level of the National Institute of Justice and increase the number of students abroad, these efforts remain insufficient to cover the number relatively large of administrative courts..

- Accelerate the formation of administrative judges or adopt the opinion referred to by the use of graduates of the high school of administration, which would highlight the specificity of administrative justice and work on its formulation.

- To give a formation sessions for administrative judges to benefit from judicial experience in some countries that have a long history in this field, and to work in this context to support and activate participation in national and international scientific symposia and seminars for the purpose of reviewing developments and updates in comparative legislation to serve both legislative and judicial system, particularly in the administrative field.

- We also hope that the legislator will start specialized training for lawyers in the administrative field, and even make it a profession taught at a high school according to special criteria, which will enrich the administrative dispute and help the administrative judge to perform his missions.

- Improving the services of the judiciary bodies.

- Reform the Supreme Council of Justice through:

* Make it consist of just judges elected by their colleagues without any exclusion of any judicial body.

* Activate the role of the Supreme Judicial Council through a constitutional text that makes the Council able to address any violation that would prejudice the independence or impartiality of the judiciary.

* It is very important to think and work in the future on the development of administrative appeals courts to complement the existing legal structure and introduce a dual judicial and legal system in Algeria in accordance with the principle of litigation in two degrees in the administrative article in line with what is done in the ordinary judiciary in general and the legislation and administrative justice comparative, In order to ensure more protection of individual rights and freedoms.

References:

[1] Bodjadi Omar, Administrative Jurisdiction in Algeria, doctor's degree in Law - Faculty of Law Mouloud Mammeri University - Tizi Ouzou 2011,p 392 and seq

[2] Ammar Aouabdi, Interpretation in administrative law, Dar Houma for Printing, Publishing and Distribution, Algiers 2002 - p. 48.

[33] Skanki Baya, Role of the Administrative Judge between the litigant and the Administration, Dar Houma for Printing, Publishing and Distribution, Algiers 2006, p 123.

[4] Ben djazia Youssef El-Zein, Judicial Organization, Graduate Certificate for the High School of the Judiciary, High School of the Judiciary, Algeria, 2009, p 15

[5] Ben Jazia Youssef al-Zein, Judicial Organization, op. Cit., P 65.

[6] Ben Mansour Abdel Karim, the dual judiciary in Algeria, Thesis for a PhD in Law, specializing in Law., University of Mouloud Mammeri 2014-2015,p 356 and seq.

[7] See article 807 of the Code of Civil and Administrative Procedure ,08/09 of 25/02/2008. The Official Journal, Issue 21, 2008.

[8] Nabil Saqar, Al-Waseet in explaining the Civil and Administrative Procedures Law, Dar Al-Huda for Printing, Publishing and Distribution, Algeria 2009, p 72.

[9] See Article 800 of the Code of Civil and Administrative Procedures 09/08 ,op.cit

[10] Ammar Boudiaf, Reference in Administrative Disputes, First Section of the theoretical framework of Administrative Disputes, djossour for Publishing and Distribution, Algiers 2013, p 180.

[11] See Article 109 of the Code of Civil and Administrative Procedure 08/09, op. Cit.

[12] Messaoud Shihoub, General Principles of Administrative Disputes, Part II, Comparative Judicial Systems and Administrative Disputes, University Publications, 2005, p 09.

[13] See Council of State Decision, Chamber IV, 3/05/1999, 132 Index, referred to in the State Council Resolutions - ath melouya - Part 1, Dar al-Houma 2002, p 129.

[14] Amor Salami, The Law of Administrative Disputes, Part II, Second Edition, University Publications, Algeria, 2002, p 79.

[15] See Article 39 of Organic Law 04/11 of 6 September 2004, which contains the Basic Law on the Judiciary, Official journal No. 57 of 07/09/2004.

[16] See Executive Decree 05/303 of 30 August 2005, which includes the organization of the High School of the justice, which defines the modalities and conditions of enrollment and the system of study therein, and rights of students and judges and their duties, Official journal No. 59 of 01/09/2005.

[17] Dr. Messaoud Chihoub, From Unilateralism to Dual Jurisdiction, Council of State, Studies and Documents, Algiers, 1999, p 28.

[18] Mohammed Sulaiman Al-Tamawi, brief in governance and administration systems, Dar Al-Fikr Al-Arabi, Cairo, 1962, p 361.

[19] Ben mansour Abdel Karim, The dual judiciary in Algeria, Thesis for the Doctoral Degree in Law, Mouloud Mammeri University, 2014-2015, p 99.

[20] Dr. Messsoud Chihoub's intervention, from unilateralism to duality of justice, op. Cit., P. 32.

[21] Ammar Boudiaf, Reference in Administrative Disputes, op. Cit., P 154.

[22] Boubchir Mohand Amokran, on the selection of the judiciary in Algeria, PhD in Law, Mouloud Mammeri Tizi Ouzou University, 2006, pp 18 and 19.

[23] Pacteau Bernard, Duality of jurisdictions and duality of procedures, RFDA, N: 6 September- October 1990, p 755.

[24] Drago Roland, Judiciary Judge, Administrative Judge, RFDA, N: 6, September-October 1990, p 759.

[25] See Organic Law 98/03 of 3 June 1998 concerning court dispute jurisdictions and organization and functions, Official journal No. 39 of 1 July 1998.

[26] Mouloud diden, the formation of the judge and his role in the Algerian system, PhD thesis in law, Faculty of Legal and Administrative Sciences, University of Algiers, 2003, p 40

[27] Boubchir Mohand Amokran, on the selection of the judiciary in Algeria, op.cit, pp 18 and 19.

[28] Legislative Decree No. 92/05 of 24 October 1992 amending and supplementing the Basic Law of the Judiciary, Official Journal No. 77 of 26 October 1992.