The Case of S. Al Obaid v. Ministry of Justice

The Legal Impact of Discharging 560 Employees from the Department of Expertise of the Ministry of Justice (DEMJ)

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Abstract

This paper examines the impact of the Court of Cassation's judgment to dismiss several decisions taken by the Ministers of Justice (DEMJ) on the grounds that the employment procedures were unlawful. The ruling had a great impact on the fate of 560 employees that were appointed according to procedures executed by the DEMJ. The judgment started intense discussions between legal experts in regards to the legal status of the dismissed experts, the legality of their actions, the responsibility for the stated violations, as well as other important aspects in connection with the court jurisdiction. This study sheds light on this unprecedented decision, answers vital questions, and offers legal solutions.

Keywords

Court of Cassation − Ministry of Justice − Administrative Courts − Responsibility of Public Employees − Ministerial Trial − De Facto Employee

1 Introduction

On the 19th of November 2019, the Court of Cassation in Kuwait declared that several decisions made by two Ministers of Justice were null and void. The judgment was founded on the grounds that the employment procedures taken by the Department of Expertise in the Ministry of Justice (DEMJ) were unlawful. This ruling was unprecedented as it concerns the fate of 560 employees appointed according to the alleged procedures. The court decision was very harsh, yet necessary to deliver the administration a strict message in order to correct its path in how to establish and execute legitimate procedures to choose between candidates.

The case goes back to 2015, when the DEMJ announced the need for Experts in Accounting and Engineering. One of the candidates was Miss S. Al Obaid who had a degree in accounting and had passed the competition and the following required procedures. Accordingly, a decision No. 2012/2016

was taken by the Minister of Justice Mr. Yaqub Al Sanea[1] to appoint Al Obaid among others in the required posts. Unfortunately, the decision was retreated by the new Minister of Justice Mr. Faleh Al Azab.[2] On the 12th of December 2017, Al Obaid raised a case against the Minister of Justice[3] requesting the elimination of the following decisions: a) Decision No. 2597/2016, b) decisions No. 53-283/2017, and c) decisions No. 595,687,785,814,822/2017 to appoint other candidates due to the harm caused to her, as they passed Al Obaid in rank and position.

The Court of First Instance accepted the case, however it refused to respond to the first and second requests on the grounds of lack of direct personal benefit for the litigant to

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[1] Minister of Justice decision No. 2012/2016 on 11th Oct 2016.

[2] Decision No. 2597/2016.

[3] Court of Cassation, Administrative Branch No 2, 19th Nov 2019. The case included the Minister of Justice, Deputy Minister of Justice, Manager of Department of Expertise, and the Head of Civil Service Diwan Council).

eliminate the previous decisions, because in practice, neither she nor the other applicants, in fact, held the post in concern. Nonetheless, the court decided to terminate decisions No. 595,687,785,814,822/2017 on the grounds that the plaintiff was found more qualified than the other candidates.[1] Therefore, the court decided that the department should appoint the litigant in the required post.[2]

The judgment was challenged by the administration before the Court of Appeal on the 23rd of December 2018. The court accepted the case and came to the same conclusion as that

[1] According to records, the grads were the following: The litigant Miss S. Al Obaid, 60 on the writing test WT, 70.2 on the personal interview PI, overall, 65.1%. Mr. M. Al Huraigy, 36 WT, 55,2 PI, overall, 45.6%. Mr. M. Al Reshidi, 56 WT, 72 PI, overall, 64%. Mr. H. Alhimidi, 32 WT, 36 PI, overall, 34%. Mr. A. Al Tiwigiri, 42 WT, 83 PI, overall, 62.5%. Mr. S al Nashman no grades were found).

[2] Court of First Instance, Administrative Branch No 2, court decision in case No. 1063/2017, on 28th Dec 2017.

of the Court of the First Instance.[1] The administration also challenged the previous decision before the highest court in the system; the Court of Cassation. Surprisingly, due to unlawful procedures taken by the DEMJ, the Court of Cassation decided to eliminate all the decisions that were taken by both ministers.

In order to attain a better understanding about the case in concern, it is of importance to examine the Judiciary system in Kuwait, in addition to the structure of Administrative Courts in the Judiciary.

2 The Judiciary System in Kuwait

The judiciary power is autonomous. The Kuwaiti Judicial System is based on the Egyptian model; it is a combination of Islamic law, English Common law, and the Ottoman Civil Code, in addition to the presence of French jurisprudence in

[1] Court of Appeal, Administrative Branch No 3, Public employees Petition, court decision in case No. 37/2019, on 17th Mar 2019.

terms of administrative law. The judicial system is divided into two categories: the Constitutional Court[1] and the ordinary courts. The two lowest ordinary courts are the Traffic Court and the Summary Court. Above the Summary Court is the Court of First Instance, then the Court of Appeal, and the highest of them all, the Court of Cassation[2]. It is necessary to

[1] The Kuwaiti Constitution, issued at Al-Seef Palace on the 14th of Jumada al-Thani, 1382, corresponding to the 11 of November 1962, Art.173. declaring, "Law shall specify the judicial body competent to decide upon disputes relating to the constitutionality of laws and regulations and shall determine its jurisdiction and procedure". The tribunal that has jurisdiction to decide these cases is the Constitutional Court in Kuwait).

[2] Amiri Decree No. 23 of 1990, Regulation of the Judiciary Law, Kuwait Al-Yaum News Paper, 18th Mar 1990, No.1867), p 4-23. For more information see; Brown, N. J., The Rule of Law in the Arab World, Courts in Egypt and the Gulf. Cambridge Middle East Studies, Cambridge University Press, USA, New York, 1997), pp 157-187, Kuwait's court system is unified. The civil courts have three levels. Initially, Courts of First Instance consist of Summary Courts Juz'i) and General Courts Kulli), takes cases according to their gravity. The next level is the Court of Appeals Esteanaf) which has jurisdiction over the appealed rulings of the Court of First Instance in pursuance of law.

emphasise that among this system, there are special circuits (i.e. chambers) that deal with administrative litigations.

2.1 Administrative Courts in the Judiciary System

The Kuwaiti Administrative system was derived from the Egyptian practice. The latter was strongly influenced by the French; therefore, it is not surprising that the Kuwaiti Constitution contains a number of principles similar to those in the French Constitution. Most importantly is Article 169 of the Kuwaiti Constitution, which deals with 'Administrative Jurisdiction,' that states the following:

"The law regulates the settlement of administrative suits by means of a special Chamber or Court, and prescribes its organization and the manner of assuming administrative jurisdiction including the power of both nullification and

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Nonetheless, Courts of Cassation Mahkamat al-Tamyiz) stands at the apex of the system and considered as the supreme court of all Kuwait courts and contributes to establishing legal rules and unifying, interpreting and applying laws).

compensation in respect of administrative acts contrary to law." [1]

Rather than establishing a separate court system like the existing one in France, Kuwait has generally favoured a unified approach. The legislature opted to construct circuits (i.e. chambers) in the existing court system for administrative disputes. These circuits are within the body of Al-Mahkamah Al-Koleyah (the General Court).[2] Moreover, as an attempt to correspond with the French Council of State (Conseil de Etat), Article 171 of the Kuwaiti Constitution determined that:

"A Council of State (Majlis Dawla) may be established by law to assume the functions of administrative jurisdiction,

[1] Article 169, of the Kuwaiti Constitution, supra note 7.

[2] Amiri Decree No 20 of 1981, amended by Amiri Decree No 61 of 1982 regarding the establishment of the Administrative Court.

rendering legal advice, and drafting bills and regulations, mentioned in the preceding two Articles." [1]

In this regard, we can begin by confirming that the Administration can choose to act as a private entity, particularly when it is necessary to run Public Utilities and State-Owned Enterprises with a commercial or industrial nature. This type of action is governed by the civil law and falls within the ordinary court's jurisdiction.

It has long been accepted that a public authority may confer a private character upon some of its acts or activities,

[1] Kuwaiti Constitution, supra note 7. Art.171. Article 170 of the Constitution, declaring the "Law shall organize the body which shall render legal advice to ministries and public departments and shall draft bills and regulations. Laws shall also regulate the representation of the State and other public bodies before the Courts").

since engaging in commercial or industrial enterprises is normally subject to the civil law.[1]

Similarly, a public authority may own what is deemed as private property (domaine prive) as distinct from its public property (domaine public), and legal questions concerning private property will be governed by Civil Law (droit civil), which is decided in the ordinary courts. Property is regarded as private when it is managed and exploited by public authority in the manner of a private owner.[2] However, the general principle is that the acts of public authorities are

[1] Brown, **L. N. and Garner, J. F.**, French Administrative Law, 5th ed, Clarendon Press, Oxford 1998) at pp 141-202, Tribunal des Conflits in TC 22 January 1921; 'BAC D' ELOKA').

[2] Nicholas, B., French Law of Contract, 2nd ed, Oxford, 1992), p 27, Tribunal des Conflits in TC 25 June 1973; Conseil de Etat in CE 28 November 1975, OFFICE NATIONAL DES FORETS, GIUDICELLI Conseil de Etat in CE 3 November 1950), holding that the forest fire-fighting service was held to remain a public service subject to the jurisdiction of the administrative courts).

normally subject to the droit administratif [1] and fall within Administrative Court's jurisdiction.[2]

Although Administrative Courts in Kuwait have the power to review executive actions, some actions and decisions are immune to court revision. These exceptions are: (a) the Sovereign acts (i.e. the acts of the Executive (government) in correlation with the Legislator (parliament) and the acts related to foreign affairs) and (b) the executive decisions in regards to

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[1] Ibid. at, 27; See, also, **Brown and Garner, supra** note 12, at 141-202, The rules on administrative contracts have a number of peculiarities compared with private law contracts. These concern the formation, content and performance of contracts. The rules stem from the underlying need to recognize the predominance of the public interest. The public interest must prevail to extent of overruling the express terms of the contract. The French regard an administrative contract as an arrangement between unequal parties. It is characteristic of the whole of administrative law that the administration has the privilege of execution d' office. It can take whatever steps necessary to enforce or supervise the contract without invoking the assistance of the administrative courts. The administration is never the plaintiff).

[2] **Brown and Garner**, supra note 12, at 141.

citizenship, licensing places for religious worship, and the residence and deportation of foreigners.[1] However, in terms of reviewing matters related to citizenship, administrative courts have developed new meanings of intervention.

3 The Legal Grounds for the Court's Judgment

In the case in concern (S. Al Obaid v. Ministry of Justice), the Court of Cassation built up its judgment on a number of interesting legal justifications. At the beginning, the court confirmed that rule of law and legality of actions is a fundamental source for judgment. The court affirmed that the administration must adhere to this doctrine in every action when executing its responsibilities. Rule of law means fairness and equal opportunity between citizens. Accordingly, the administration holds legal obligation to establish and execute objective procedures to fulfill the connotation of the this principle. In this regard, the Administrative Court has full competence to examine the legality of the actions and

[1] Amiri Decree No 20 of 1981, supra note 10.

decisions of the administration. Accordingly, the court scrutinizes the decisions in concern and observes whether it fulfills the legal principles or not[1].

The court confirmed that the rule of law acquires fairness and equal opportunity between citizens. In this regard, the court referred to article 21 of the Universal Declaration for Human Rights, which states the following:

[1] It's of importance to point out that according to administrative law administrative decision requires the existence of four main elements :a) Competence la Comptence): to be issued by a competent authority according to law, b) the Form la Forme): should match the form and procedures determined by laws and regulations. c) Motive Le Motif): the legal or factual incident behind releasing the decision, for example the motive behind administrative disciplinary decision is the offense committed by a public employee, d) Object L'objet): the administrative decision should achieve a legal effect that is possible and in accordance to law. e) Goal Le But): any given decision must target public interest L'interet public); P. Delvolvé: L'acte administratif. Collection de droit public Sirey Paris 1983. P.9 et ss; Suliman Al Tamawi. The General Theory of Administrative Decisions, 5th ed, 1984.p284.

"(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country." [1]

The court also recalled article 25 of the United Nations International Covenant on Civil and Political Rights.[2]

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[1] The Universal Declaration of Human Rights UDHR) proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A). https://www.un.org/en/universal-declaration-human-rights/

[2] Which state the following: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

1. To take part in the conduct of public affairs, directly or through freely chosen representatives;

2. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

3. To have access, on general terms of equality, to public service in his country". The International Covenant

on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A XXI) of

Moreover, the court drew attention to the norms established in articles 7, 8, 26, 29, and 41 of the Kuwaiti Constitution.[1] For example, article 7 affirms:

"Justice, Liberty and Equality are the pillars of Society; co-operation and mutual help are the firmest bonds between citizens."

Furthermore, the court stated the terms and conditions in laws and regulations related to this case, specifically Law No.

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16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_2200AXXI)_civil.pdf.

Kuwaiti Constitution, supra note 7. Art. 8. "The State safeguards the pillars of Society and ensures security, tranquility and equal opportunities for citizens". Art. 29. "All people are equal in human dignity, and in public rights and duties before the law, without distinction as to race, origin, language or religion". Art. 41. "Every Kuwaiti has the right to work and to choose the type of his work. Work is a duty of every citizen necessitated by personal dignity and public good. The State shall endeavor to make it available to citizens and to make its terms equitable".

15 of 1979 on Civil Service, Amiri Decree on Civil Service Order of 1979, Law Decree No. 40 of 1980 on Expertise Order amended by Law No. 14 of 1995, and the Civil Service Council Decision No. 6 of 1993.

After recalling all these doctrines, the court stated that given the facts presented in this case, the administration had failed to establish and execute the objective measures necessary to fulfill the connotation of fairness and equal opportunity. The methods implemented by the administration to favor between candidates witnessed serious violations. The violations were stretched over the whole process whether in regards to the procedures that were taken in the era of the earlier Minister of Justice or the following procedures taken by his successor. A fact-finding committee was established by the Minister of Justice in 2016 to investigate the claims raised by the rejected candidates about the unlawful procedures taken by the department of his predecessor.[1] On the 25th of

[1] Minister of Justice Decision No. 513/2016.

December 2016, the committee delivered a report with the subsequent findings: there were 21 errors on grades related to the written exam and the committee had reported 13 errors on grades related to the personal interview. The following tables demonstrate examples of these errors.

Examples on the Errors Related to the Written Exam:

Candidate Name	Registered Grade	Correct Grade upon Revision
A. Al Qahtani	47%	74%
M. Qassim	24%	42%
F. Al Mutiri	32%	42%
B. Al Azmi	22%	47%
S. Al Dirbas	23%	79%

F. Al Otaibi	24%	50%
M. Al Misbah	25%	51%
M. Al Otaibi	50%	40%
A. Al Difiri	47%	73%

Examples on the Errors Related to the Personal Interview:

Candidate Name	Registered Grade	Correct Grade upon Revision
M. Al Quod	80%	88%
A. Al Awadi	26.3%	40.3%
F. Al Hajeri	34%	44%
B. Al Azmi	22%	47%

Moreover, in terms of calculating the final grades, the committee noticed variations in 18 cases as follows:

Examples on the Errors Related to Calculating the Final Grades:

Candidate Name	Registered Grade	Correct Grade upon Revision
S. Al Harban	51.6%	77.5%.
K. Al Otaibi	42.4%	96.4%
F. Al Azemi	33.2%	48.2%
H. Abdulnabi	69%	78.5%
D. Hamzah	58.7%	45.2%.
F. Al Ajmi	38.2%	53.2%

Even more seriously, the committee remarked alterations made on the original evaluation documents. For instance, many grades on the original evaluation documents were modified using a corrector with no signature or evidence declaring who had made the changes. In regards to the personal interview, some grades were scratched with a pen and changed to higher grades. These modifications altered the status of many applicants and undoubtedly eliminated many of a chance to be selected. These modifications signify forgery and should be investigated accordingly.[1] Those responsible for such crime should be brought to justice. Unfortunately, instead of taking this indispensable legal action, the Minister of Justice merely decided to retreat the alleged decision[2]. However, it appears that the Minister's response to these allegations was in committing more violations. After

[1] The Kuwaiti Panel Cod No. 16 of 1960. Art. 257.

[2] Minister of Justice' Decision on 18th Dec 2016 to retreat the decision of the former Minister of Justice No. 2012/2016 in regards to appointing experts in the DEMJ.

retreating the later decision due to the reported abuses, the Minister decided to appoint a number of engineers and accountants (as experts and assistant experts) in the required posts. Some of them did not pass the required exams and some had scored very low grades in the evaluation process.

For example, the final grade for M. Al Huraijy, appointed according to decision No. 595/2017 was 45.6%, the final grade for H. Al Humaidi appointed according to decision No. 814/2017 was 34%, and the final grade for A. Altuwajiri appointed by the latter decision was 62.5%. Moreover, in terms of engineering skills, some of the candidates did not pass the tests and yet they were appointed for the job as the case of A. Al Najim, F. Al Saife, and B. Burasl. The Minister of Justice had also violated article 28 of Law Decree No. 40 of 1980 on Expertise Order by assigning several people through a direct order and without engaging any

examinations.[1] Finally, as reported by the Administrative Court of Appeal,[2] the Minister of Justice decided to transfer M. Al Mutairi from his previous job, as an administrative personal, to occupy an engineering expert position without undergoing any examination. It is necessary to assert that according to article 28 of Law Decree No. 40 of 1980, appointment in the DEMJ requires the following: a) a public announcement to illustrate the job description, the conditions, and the required qualifications, and b) executing objective measures by a qualified impartial committee to favor between candidates.

The administration's breach of conduct did not stop at that level, the Court of Cassation affirmed that the administration disobeyed a direct order from the Court of First Instance to deliver the documentation in relation to the appointment

[1] As in the cases of S. Al Namshan appointed by decision No. 785/2017, A. Al Dihani, D. Hamadah, and M. Al Ajmi.

[2] Administrative Court of Appeal, court judgment in Appeal No. 1474/2018.

process and the candidates' evaluation procedure.[1] Moreover, the administration failed to deliver the alleged documentation before the Court of Appeal. The Court of Cassation defined such action as evidence of misconduct and abuse of power on the behalf of the administration.

In the light of these violations, the Court of Cassation declared that the administration had breached a constitutional principle, i.e. fairness and equal opportunity, had violated the laws and regulations in concern, and misused its power. Therefore, the Court decided to declare all the alleged decisions in relation to the appointments in the DEMJ made by both Ministers, beginning from the 26^{th} of October 2014 to the 24^{th} of December 2017, null and void. Accordingly, the court ordered the administration to release a new announcement to fill the posts and open the door for candidates who meet the terms and conditions.

[1] According to the Administrative letter directed to the Technical Office, Ministry of Justice, on 27 Mar 2016.

The court recognized the implications of its decision, especially in regards to the dismissal of 560 employees appointed a few years back, and the complexity involving this matter. The court also acknowledged the consequences of this judgment on the status of the dismissed individuals. Nonetheless, the court clearly confirmed that justice is a fundamental principle that accepts no remedies. In this harsh yet necessary decision, the court sought to deliver a strong message to the administration in order to adhere to the rule of law and put an end to the corruption and misuse of power. Undoubtedly, this judgment sheds light on all the alleged violations and exploitation of power in the contemporary administration.

4 Responsibility for the Violations

One of the most appealing questions in the current case is about the responsibility for the violations in concern. In this regard, it is of importance to discuss the responsibility of the public employees, the administration, and its ministers.

4.1 The Accountability of Public Employees

Article 26 of the Kuwaiti constitution verifies the following:

"Public office is a national service entrusted to those who hold it. Public officials, in the exercise of their duties, shall seek public interest."

Accordingly, public employees are obliged to defend public interest. In Administrative Law, a public employee (fonctionnaire public) can be defined as "a person who is appointed or elected by a legitimate authority to serve, in a permanent manner, in a public utility[1] directed and governed

[1]According to Administrative Law, Public Utilities Service Public) can be defined as: "Public activities that are governed and supervised by the administration in order to deliver public services". G.Vedel. Droit Administrativ 7'ed Themis Paris 1980 p. 1020 et S. Referred to on Mahmoud Hafiz, the Theory of Public Utilities, Egypt, Cairo University Law School,1963-1946, p16. Generally, Public Utilities can be defined as: "The provider of a service to the public such as transport, energy, telecommunications, waste disposal, or water and any other public goods and services".

by the administration".[1] This definition, however, may vary according to the law in concern. For example, the Penal Code establishes a broad meaning for public employees in order to expand more protection on public funds and public office.[2]

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[1] Est Fonctionnaire public tout individu "qui occupe Volontairement et a titreprofessionnel un employ dans les cadres permanents de services publics". Jean De Soto, Droit administrative, 1973, P24. Referred to on Dr. Azizah Al Shareef, The Responsibility of the Public Employee in Kuwait, Kuwait University, school of Law 1997, p13); Majed Al Helo, Administrative Law, 1983, p 210); Taemah Al Garf, Administrative Law and General Principles for Regulating Public Authoreties,1978, Dar Al Nahdah Al Arabia, 4th Ed, p 662); Addel Al Tabatabae, The New Civil Service Law, Kuwait University, 1983, p 32); Yousri Al Assar, Principles Established by Constitutional Supreme Court in regard to Public Office, School of law, University of Cairo, 2011.

[2] The Kuwaiti Panel Cod No. 31 of 1970 modifying law No. 16 of 1960 determine: "According to the provisions of this law public employees include the following: a) Employees, servants, and workers of utilities owned by the government or falls within government supervision. B) Elected or appointed members of public and local councils. c) Arbitrators, experts, prosecutors, liquidators, and judicial guards. d) persons who are in charge of a public services. e) Members of the board, managers, employees, servants, of any institution, company,

Be that as it may, public employees are responsible for their actions during service, and hence, their accountability is determined according to the nature of the committed violation. Accordingly, a public employee is accountable before the administration and before Administrative Courts for administrative violations. In addition, he/she will also be accountable before the Criminal Court when the committed violation is a crime in nature. Besides, the accountability before the Civil Courts for compensating against the harm caused by their actions. However, in some cases, a single violation may comprise of all the responsibilities mentioned above. In this regard, the Kuwaiti Administrative Legislation and Consultation Department (ALCD) affirmed the following:

"According to the conditions of the committed violation, an act of vandalism, theft, or loss of school's tools, machineries, or other appliances should entail administrative, criminal, or civil

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society, or establishment that the government or public authorities share in its capital."

responsibility. Nonetheless, one of these actions might embark all these responsibilities at the same time."[1]

According to article 31 of the Civil Service Law, leaving office for any reason shall not parish responsibility for actions committed during service.[2]

4.1.1 The Nature of Administrative Violation

It is necessary to indicate that the nature of the violation in the administrative legal system differs from the violation in the criminal legal system. In the latter system, crimes and violations are determined by law. Hence, the general principle is "Nullum Crimen, nulla poena sine lege," which means no punishment may be imposed except for crimes determined by law. While in the administrative legal system, due to the distinctive nature of responsibilities in public utilities, it is

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[1] Administrative Legislation and Consultation Department ALCD), Consultation Decision No.2/2160 on 3rd May 1975, 2nd collection, p 294.

[2] Law No. 15 of 1979 on Civil Service, published in Kuwait Gazette Kuwait Al Youm), Year 7, 274.

difficult to decide all the duties of public employees.[1] Hence, any action by a public employee that disrupts the regular functioning of a public utility or violates his duties represents an administrative violation.[2] In this regard, article 23 establishes a general principle that "public employees should defend the honor of their profession, and maintain decency in their actions". [3] In addition, article 28 determines that "any employee that violates his duties or perform contrary to decency, required in this post, shall subject to disciplinary penalties".[4] Accordingly, the alleged violation is determined by the public employee's superiors, with the fact that such

[1] However, some duties were mentioned in general in articles 23-26 of the Kuwaiti Civil Service Law. Public employees are required to: a) Accomplish work with care and dignity, obey and respect the orders of superiors, refrain from engaging other professions, maintain the confidentiality of information in concern, and uphold the dignity of their position. Ibid.

[2] Mustafa M. Afifi, The philosophy and purpose of Administrative disciplining, PhD thesis, a comparative study, 1976, p 158.

[3] Civil Service Law, supra note 31. Art. 23.

[4] Ibid., Art. 28.

decision can be challenged before the competent authority and fall within the Administrative Courts' jurisdiction. Although it is difficult to define the duties of public employees, the penalties that apply are clearly verified in the Civil Service Law. There are two types of penalties that apply to public employees: a) penalties that are applied on public employees occupying general positions, which include: 1) note of warning, 2) salary deduction, no more than 15 days for a single penalty, and no more than 90 days in 12 months, 3) salary reduction, 25% of the salary no less than 3 months and no more than 12 months for a single penalty, 4) degrading, for the previous grade in order, and 5) discharge of service. b) Penalties that apply on those who are in leadership positions as for 'Deputy Minister' and 'Assistant Deputy Minister', these penalties include: 1) ministerial warning letter, 2) censure note, and 3) discharge of service.[1]

[1] Ibid.

Moreover, committing certain offenses would end the career of a public employee. According to articles 68, 70, and 71 of the Penal Code, being sentenced to confinement for committing a felony, or crimes that breach the code of honour and decency would cause end of service.[1] Since neither laws nor jurisprudence provide a clear definition for crimes that breach the code of honour and decency, it is decided by the competent court according to case in concern. Nonetheless, the ALCD tried to provide some examples for such crimes as for "rape[2], forgery[3], and theft or dishonesty"[4]. It also asserted that these types of crimes "diminish person's recognition and question his integrity and decency. Hence, such person

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[1] Penal Code, supra note 29.

[2] LCD, supra note 30, Consultation Decision No.2/2460 on 13th Jun 1976, 3nd collection, p 83.

[3] Ibid, Consultation Decision No.2/3689 on 24th Jun 1980, 6th collection, p 136.

[4] Ibid., Consultation Decision No.2/403 on 24th Sep 1964, 1st collection, p 305.

should not attain public office".[1] In this manner, it is of essence to declare that according to the Civil Service Order, an "applicant charged of imprisonment for committing a felony, or crimes that breach the code of honour and decency, unless in case of rehabilitation, shall not be accepted for public office ".[2] This condition is required not only for primary appointment in post but also for continuation in public office. Nonetheless, an exception was made from this condition, as the first precedent (i.e.sentence) will not be counted.[3]

[1] Ibid.

[2] Decree on Civil Service Order of 1979 on 9th Sep 1979, article 1.

[3] Penal Code, supra note 27.

4.1.2 No Accountability for Actions

According to article 27 of the Civil Service Act, a public employee shall be immune from any disciplinary penalties if proven that the alleged action was taken according to a written order from his superior after notifying him that such action violates laws or regulations, and the responsibility in this case will be on the person who issued the order.[1] However, if the alleged action is considered a crime, then a public employee should refrain from executing such order or he/she will be held responsible for his/her actions.

In addition, according to the Civil Law system, a public employee is also exempt from responsibility for the actions that he performs according to the authority given by law, or by executing orders that law obliged him to follow, or for

[1] Civil Service Act, supra note 29. Art. 31, part2.

legitimate reasons, of which he believed that has the authority to take such an action, or follow such an order.[1]

4.2 Responsibility of the Administration

A legitimate question can be raised in regard to the responsibility of the administration in terms of compensation for the harm caused by public employees. After all, they are appointed by the administration, carry out its mission, and work under its supervision. The general principle in this regard is the following,

“Public employees are responsible for the actions they carry out based on Personal Error. While the administration is responsible in case of Administrative Error. A personal error can be envisaged in cases involving serious violations, or committing the violation for personal motivations, like the act of vengeance in order to harm the establishment or others, or

[1] The Kuwaiti Civil Law No. 67 of 1980.Issued at Al Seef Palace on 1st Oct 1980. Art. 237.

even seek personal benefit for himself or others known to him."[1]

An administrative error can be found when there is a flaw in the system or when the administration applies improper procedures to deliver the service. Hence, the harm caused by a public employee following the system, or applying the alleged procedures, or using administrative equipment to deliver the service in good intentions is considered administrative error.[2] In this sense, it is rational to declare that the Ministry of Justice is responsible before the Ministry of Finance for the financial funds that were spent to fund the candidates' contest and the entire qualification process.[3]

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[1] General Court, Administrative Branch, court decision No. 108/8 on 15th Nov 1988.

[2] Ibid.

[3] It is of importance to reveal that on 22nd Nov 2017 the Ministry of Justice Faleh Al Azab announced that the ministry has asked the Government for 11.6 million KD as an additional fund to supply the appointment of 550 experts, online at:

4.3 Responsibility of the Ministers

According to article 130 of the Kuwaiti Constitution: “Every Minister supervises the affairs of his ministry and executes therein the general policy of the Government. He also formulates directives for the ministry and supervises their execution.”[1]

The judgment in concern revealed many violations committed by the administration, therefore one might question the responsibility of the minister on such breach, especially

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https://www.aljarida.com/articles/1511288993824916000/,accessed 18th Apr 2020, 9:25 pm.

[1] Kuwaiti Constitution, supra note 7. Art. 130. In addition, article 131 of the Constitution determine: “While in office, a Minister may not hold any other public office or practice, even indirectly, any profession, or undertake any industrial, commercial, or financial business. Furthermore, he may not participate in any concession granted by the Government or by public bodies or cumulate the ministerial post with membership of the board of directors of any company. In addition, during the said period, a Minister may not buy or otherwise acquire any property of the State even by public auction, nor may he let, sell, or switch any of his property to the Government.” supra note 7.

that this violation revealed that both ministers have practiced misuse of power. The question that should be raised at this point is the following: Do ordinary courts have the jurisdiction to put to trial ministers on such violations?

Article 132 of the Constitution answers this question as follows:

"A special law defines the offences which may be committed by Ministers in the performance of their duties, and specifies the procedure for their indictment and trial and the competent authority for the said trial, without affecting the application of other laws to their ordinary acts or offences and to the civil liability arising therefrom."

Accordingly, law No. 88 of 1995 concerning the Trial of Ministers established a special court to examine crimes committed by ministers.[1] The court includes five Kuwaiti

[1] Law No. 88 of 1995 concerning Trial of Ministers, amended by Law No 29 of 2014Issud at Al Seef Palace on 17th April 2014. Kuwait Gazette, Yr 60, No. 1181), 27th Apr 2014.

judges (consultants) chosen by the Judiciary Supreme Council, in addition to two as substitutes. The court shall commence its sessions at the Court of Cassation or any other place deemed appropriate for the court master. According to article 1, ministers shall be held accountable before the court on crimes committed during public service.[1] Leaving office for any reason shall not parish responsibility.[2] The crimes in

[1] Azizah Al Shareef, supra note 28, at 411-456.

[2] Besides the accountability before the Ministerial Court Ministers are accountable before the Amir as the Head of State, and before the National Assembly parliament). In regards to the Amir article 65 of the Constitution sustain:

"The Amir, after the traditional consultations, appoints the Prime Minister and relieves him of office. The Amir also appoints Ministers and relieves them of office upon the recommendation of the Prime Minister….", Ministers are also accountable before the National Assembly in this Article 99 determines that :"Every member of the National Assembly may address to the Prime Minister and to Ministers interpellations with regard to matters falling within their competence……Subject to the provisions of Articles 101 and 102, an interpellation may lead to the question of no-confidence being put to the Assembly". Kuwaiti Constitution, supra note 7.

concern include, among others, those stated in the Panel Code, crimes specified in law No. 31 of 1970 on National Security[1], and last but not least, crimes identified in Law No. 1 of 1993 on the Protection of Public Funds.[2] The Public Prosecutor shall refer the indictments to a special committee that comprises of Three Consultant Judges from Court of Appeal. The members are chosen by the Court's General Assembly for two years to examine and investigate the charges. The committee has the full competence to proceed with the case or drop the charges by a unanimous specified decision. Moreover, search warrants, arrest, confinement, or any other procedure taken against the accused minister shall be determined by the committee on a unanimous decision. During trial, the prosecuted minister shall be on a compulsory

[1] law No. 31 of 1970 on National Security modifying Penal Code No 16 of 1960. The crimes stated on this law are the following; Misconduct of public office, Mistreatment of individuals, Homeland Security crimes, Embezzlement of Amiri funds, and Treachery.

[2]Public Funds Protection Law No. 1 of 1993, issued at Al Seef Palace on 7th Feb 1993. Crimes and Punishments Art.9-23.

leave from public office and should not exercise any work related to his post. According to article 8 of law No. 88 of 1995, the Ministerial Court has the competence to judge the accused minister standing as a prime suspect or a partner. The court also has the power to trial other suspects in relation to the crime in concern. In terms of appeal and according to article 11 of the same law, the Ministerial Court judgments shall be appealed before the Court of Cassation. According to article 3 of the law in concern, any person shall have the right to inform the Public Prosecutor about the alleged crime.[1]

On the 30th of November 2019, both Ministers, Al Sanea and Al Azzab, were referred to the Ministerial Court. The indictment was made by private attorney Mohammed Al Anssari.[2]

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[1] law No. 88 of 1995 concerning Trial of Ministers, supra note 50, Art. 3.

[2] Al Anba Newspaper, online at: https://www.alanba.com.kw/ar/kuwait-news/incidents-issues/939699/09-12-2019. also, Al Qabas newspaper,

In addition to the procedures taken in accordance to the previous law, it is important to reveal that according to Law No.2 of 2016 on the Establishment of the Anti-Corruption Authority, the authority shall have the competence to receive and examine the reports, complaints and information submitted to concerning corruption offences.[1] When an alleged offence constitutes a suspicion of a crime, such reports shall be referred to the competent investigative body.[2] The provisions of the this law shall apply, among many others, to Ministers and experts at the Ministry of Justice.[3] As an

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online at: https://alqabas.com/article/5730315, both accessed 18th Apr 2020, 9:15 pm.

[1] Law No.2 Of 2016 Establishing Anti-Corruption Authority and the Provisions of Disclosure of Assets and Liabilities, issued at Al Seef Palace on 24th Jan 2016, Art 2.

[2] Ibid., Art. 5, section 2.

[3] Ibid., Art. 2. "The Provisions of this Law shall apply to: 1. The Prime Minister, deputies of the Prime Minister, the Ministers and whoever holds an executive office at the ministerial rank. 2. The speaker, deputy-speaker and members of the National Assembly. 3. The president and members of the Supreme Judicial Council, president and justices of the

Constitutional Court and the Technical Department of the Court, judges, members of the Public Prosecution, the president and members of the Fatwa and Legislation Department, the Director General and members of the General Administration of Investigations at the Ministry of Interior, the Legal Department of Kuwait Municipality, arbitrators, experts at the Ministry of Justice, liquidators, receivers, agents of creditors, notaries and the registrar at the Departments of Real Estate Registration & Authentication at the Ministry of Justice . 4. The Chairman and vice-chairman and members of the Municipal Council. 5. The chairman and members of boards, authorities and committees which undertake executive functions, which a law, decree or resolution is issued by the Council of Ministers on the formation thereof or appointment of their members. 6. The Chief of the Finance Controllers Body, his deputy and heads of sectors and finance controllers. 7. The Leaders are as follows: ● Holders of the group of leading positions in the general schedule pay scale Senior ranked positions / Undersecretary / Assistant Undersecretary). ● Members of Boards of Directors and general managers and their deputies or assistants and secretaries-general and their deputies or assistants in the public bodies or institutions or any government agency. ● The equivalent of a leader, such as heads of departments or administrative units and their deputies or members entrusted to the public bodies and institutions. ● Directors of the departments and the equivalents, such as heads of the organizational units, which depend in the structures thereof on a level of management or higher. ● The provision of the above two paragraphs apply to the military personnel, diplomats and civilians in the ministries, governmental

encouragement to deliver information about any case of corruption, the whistleblowers shall be protected.[1] Among the objectives of the authority is a) implementing the United Nations Convention against corruption, approved by the Law No. 47 of 2006 and any anti-corruption international

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departments, public bodies and institutions and the agencies with independent or supplementary budget whenever they undertake the responsibilities or enjoy the privileges prescribed for the office, whether they hold the office regularly or temporarily. The Authority shall, 16 Law No. 2 of 2016 and the Provisions on Disclosure of Assets and Liabilities in coordination with the concerned agencies on a regular basis, define and update the holders of these offices under the provisions of this law. 8. The chairman, vice-chairman, members of the Board of Trustees, the Secretary General, Assistant Secretaries-General, directors and the technical staff of the Kuwait Anti-Corruption Authority. 9. The chairman, vice-chairman, deputies, directors and the technical staff of the State Audit Bureau of Kuwait. 10. Representatives of the State in the membership of the Boards of Directors of the companies in which the State or one of the governmental agencies, public bodies or institutions or other public legal entities directly contribute in a proportion not less than %25 of the capital. 11. The members of the boards of directors of the cooperative societies and sports authorities".

[1] Ibid., section 4.

conventions and treaties approve, b) combat corruption, prosecute its perpetrators, confiscate and recover funds and proceedings resulted from the practice thereof, and c) Protecting the State's agencies from bribery, exploitation and abuse of power in order to achieve personal benefits and prevention of mediation and nepotism.[1]

In accordance to the previous provisions, on the 30th of November 2019, MP Abdullah Al Kandiri reported the violations committed by both Ministers Al Sanea and Al Azzab to the Anti-Corruption Authority.[2]

5 The Validity of the Discharged Employees' Actions

One of the most important questions that can be raised when discussing this case is about the validity of the actions

[1] Ibid., Art. 4.

[2] Al Qabas newspaper, online at: https://alqabas.com/article/5730025-, accessed 18th Apr 2020, 9:40 pm.

of the 560 dismissed experts. The general principle in terms of the legality of administrative activities is that “administrative activities are considered valid when practised by a competent authority.” The Court of Cassation determined that the procedures to appoint the experts in the DEMJ were illegal, and hence, they are not recognised as public employees.[1] Accordingly, one can argue that actions taken by those experts during service are not valid because it came from a non-competent authority. The theory of the De Facto Employee may answer this question.

5.1 The Theory of the De Facto Employee (Fonctionnaire de Fait)

[1] The Egyptian Administrative Supreme Court ruled that: “One of the basic elements in recognizing a public employee is to be appointed by legal procedures”. Court Decision on 19th May 1969, Appeal No. 983, year 9.

Administrative Law includes a range of theories and principles to preserve the continuity and consistency of public utilities. The necessity of this matter lies within the fact that it provides basic services and fulfills public needs[1]. A critical theory that applies in this case is the “Theory of the De Facto Employee.” In simple words, the de facto employee is a person who works in a public utility without being appointed by a competent authority, or there has been an omission in his appointment.[2] The French Council of State (Conseil de Etat) established the de facto employee theory to be applied in ordinary conditions in order to protect the rights of individuals of good faith, dealing with a person who appears to be a

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[1] The French Council of State Conseil de Etat) considered that the regular functioning of public utilities as a fundamental principle since the Winkell case decision on 7th August 1909; Abu Zaid, Mohamed Abdulhamid, The permanent functioning of public utilities, comparative study, third edition, Dar Al Nahda Al Arabiyah, margin 219,2002, p13); Shehara, Tewfiq, The Principles of the Administrative Law, Part 1,1955, p.507.

[2] Majdi Yousef, The legal grounds of the De Facto Employee theory, 1988.

public employee but is not. In extraordinary conditions, in addition to the previous goal, the theory is used to operate public utilities if left by workers in extraordinary circumstances.[1] The same theory applies in the administrative legal system in Kuwait. As in extraordinary conditions, one can argue that this theory was applied during the invasion of the Iraqi forces to Kuwait on the 2nd of August 1990. At that critical time, many workers left their posts in public utilities. Consequently, many others volunteered to fill the gap to maintain such public services.

[1] A. De Laubadere ouvrage cite No 1285 P. 334. According to extraordinary conditions, France had to apply "The De Facto Employee Theory" for the first time during the Allies invasion of France. When the mayor and members of the Municipal Council of one the cities had to leave their posts, a group of individuals formed a de facto council which seized the goods and food and supplied it to the residents. The Council of State Conseil de Etat) ruled that their actions were justified, and the implicit mandate was also found among the theory applications in extraordinary conditions. CE.5 Mars 1948, marion et autres, Rec P. 113 S. 1948,3.53.

Under ordinary conditions, this theory applies on the case in concern. The Court of Cassation determined that the procedures to appoint 560 experts in the DEMJ were illegal, and hence, they are not recognised as public employees. However, during their work, they surely dealt with many public and private entities requiring their service. In addition, numerous consultations and expert reports were delivered, especially in cases required by the courts. Applying the de facto theory means to recognize the activities of these employees in order to protect the rights and the legal status of the people who have dealt with them.[1] Accordingly, these activities are considered valid as long as they were performed in compliance with laws and regulations. It is necessary to state that the de facto employee adheres to certain laws and regulations that govern public employees. For example, the

[1] In France the Court of Cassation ruled that: “the marriage contract that was issued by a public employee, who works in the Mayor’s office, is valid even when he lacks the authority to do so”. Cass. civ.7 août 1883 Affaire de mariages de Montrouge S. 5/1/1884.

activities and decisions of the de facto employee are scrutinized by the administration, as he/she subjects to the authority of their superiors. In addition, the previous activities fall within the domain of the administrative court. Moreover, in terms of civil and criminal responsibilities, the de facto employee is responsible for his/her actions before the court in concern. However, the de facto employee is not eligible for the benefits of the public post. Hence, he/she has no right to request the administration for reappointment, nor demand remuneration or pensions in case of discharge. Nonetheless, the de facto employee is surely eligible for a reward in return for his/her service.[1] In terms of the benefits he/she has received while being in service, complying to the general principle of "labor for money," the de facto employee is not obliged to return what he/she has earned as he/she received it in return for service.

[1] Azizah AlShareef, supra note 28, at 38.

6 Jurisdictions of the Court of Cassation

The Court of Cassation is the supreme Court in the Judiciary System. The Court has the authority to examine the decisions made by the Court of Appeal. The Court of Cassation was established according to Law No. 23 of 1990, and it is consisted of the president, vice president, and a sufficient number of judges (consultants) who are appointed by Amiri Decree. [1] Each chamber of the said court shall consist of five judges who will deliver a verdict on a majority base.[2] The court shall commence its sessions in the quarters of Court of Cassation or any other place deemed appropriate for the court master.[3] The main role of the court is to examine whether the Court of Appeal and the Court of First Instance

[1] Law Decree No. 23 of 1990 Establishing the Court of Cassation. Art. 4. Before the establishment of this court the jurisdiction to examine the appeals on the decisions made by the Court of Appeal was given to special branches of the Court of Appeal. Amiri Decree No 19 of 1959, and Law No. 40 of 1972 concerning the Judiciary System.

[2] Ibid:

[3] Accordingly, a decision will be made by the Minister of Justice.

has proper understanding to laws and provisions governing the case. This means that the court shall scrutinize the findings of the previous courts and check whether the decision was based on a sound legal provision or if there was a lack of interpretation that may affect the judgment.[1] Accordingly, the court shall not examine any new evidence that was not brought forward before the previous courts.[2] As a supreme court, it delivers final and conclusive decisions that cannot be challenged.

An appealing question that was raised in regards to this case was the following: Did the court exceed its functions and ruled beyond its jurisdiction?

One of the harshest responses towards the judgment in concern was the statement of the Guild of Experts of the

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[1] Court of Cassation, Civil Affairs Branch, court decision on appeal No. 1/148 on 23rd Apr 1984.

[2] Court of Cassation, Commercial Affairs Branch, court decision on appeal No. 60 and 68/84 on 27th Mar 1985. In addition to decisions number; 9/5 labor, 3rd Jun 1985, 10/85 labor, 10th Jun 1985.

Ministry of Justice. On the 28th of November 2019, the Union released a statement declaring that the Court of Cassation has exceeded constitutional and legal doctrines. It affirmed that the judgment was defective and unjust toward the experts in the DEMJ, on the grounds that the court should have only terminated the decision related to the litigant Al Obaid and should not have discussed the decisions connected to other employees as they are not among the parties of the litigation. Hence, the syndicate determined that the court has exceeded its function and ruled beyond its jurisdiction, that is beyond the demands of the litigants.[1]

The Court of Cassation is not compelled by the demands of the appellant; it has the power to examine the whole administrative process in order to stand on the legality of the alleged decisions. The legality of actions is a cornerstone in protecting the Public Order. In this case, the court found

[1] Statement of the Guild of Experts of the Ministry of Justice, 28th Nov 2019.

serious violations and came to a conclusion that the whole process was invalid and so were the decisions based upon it. The judgment reflects the prolonged illegal behavior of the administration, the scale of violation and authority abuse. Therefore, the court was rational to determine such judgment regardless of who it may affect.

Finally, it is worth noting that the court judgment included an unexplained decision in regard to the discharged employees. The court decided to exclude the employees from applying to the posts in the DEMJ. I, among many others, would certainly question why the court would take such a harsh decision.

Indeed, the findings revealed many administrative violations in the qualification procedures, in addition to some violations in the appointment process. Therefore, one might argue that the candidates may have used personal influence to be accepted for the job. However, the court did not discuss any allegation in this regard and there was no evidence on

such claims. In fact, even if this was the case for some candidates, why should others, those who did not commit any violation, be excluded from applying to the DEMJ posts? Since the Court of Cassation has not provided an adequate answer to this question, the discharged employees should have the right to apply for the posts and participate in the qualifications.

It is of importance to reveal that on the 9th of March 2020 and in compliance with the previous court judgment, the Minister of Justice issued a decision to discharge the alleged employees and begin an application process for the vacant posts. However, contrary to the decision of the court, an official announcement was made exclusively for those who applied for the previous announcement, that is from the 8th to the 26th of November 2015 (exclusively for the same employees who were discharged by the court).[1] Of course,

[1] Ministry of Justice website, Monday 8th Mar 2020, online at: https://www.moj.gov.kw/AR/pages/DisplayAnn.aspx?ItemID=772, accessed 18th Apr 2020, 9:50 pm.

this serious defiance to the decision of the highest court in the judiciary system is a solid evidence of the prolonged illegal conduct of the administration. Undoubtedly, this biased and illegal decision will be challenged before the court of law and will be terminated, and the members of the administration who participated in such a decision, along with the Minister, shall be held responsible for such actions, as revealed in the course of this study.

7 Conclusion

The case in concern sheds light on the role of the judiciary in protecting principles of equity, justice, and legality of actions when applying to public office. In this unprecedented harsh yet necessary judgment, the Court of Cassation attempted to deliver a clear message that the administration should adhere to law and stop violating and abusing the power invested in them to appoint public employees.

It is of necessary to assert that the decisions of this court, as a supreme court, are respected from lower courts in the judiciary system. The judgment of the Court of Cassation is considered as a principle and set guidance to lower courts. Accordingly, the Court of First Instance and the Court of Appeal should apply its principles and examine the whole administrative process in order to establish sound judgment. In this regard, one might argue that this judgment will set the foundation for similar judgments in the near future.

One of the most interesting observations to the studied case is that the court considered the administration's denial of providing the required documents, which were ordered by the Court of First Instance, as evidence to the illegality of actions and authority abuse.

The violations studied in this paper were very serious and stretched over the whole process of employing experts in the DEMJ. The violations occurred in the era of two Ministers of Justice, some violations have established a case of forgery, in addition to the fact of misuse of power. This establishes the responsibility of the ministers before the Ministerial Court and the responsibility of public employees before the Administrative and Criminal Courts in concern, along with the responsibility of both sides before the Civil Courts in case of compensation. Moreover, the DEMJ is responsible as a whole before the Ministry of Finance for the financial funds that were used to fund the candidates' contest and the entire qualification process.

Essential discussion was created about the legality of actions made by the discharged employees during service. Therefore, the theory of De Facto Employee was presented to guarantee the legality of these actions as long as it adheres to law and regulation. The French Council of State (Conseil de Etat) established this theory in order to protect the legal rights of the persons who dealt with the alleged employees during service. It was determined that the same theory applies in the Kuwaiti Legal System and to the case in concern.

Although the Court of Cassation made a sound judgment to terminate all the administrative decisions in concern based on illegality of action and authority abuse, it was unsuccessful in its judgment to exclude all the discharged employees from applying to the DEMJ posts. The court did not provide any reason for such decision, and therefore, a firm legal explanation is required.

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