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Abstract

The border crossing is considered a manifestation of Iraq's sovereignty to the world, as the first impression of a visitor from any country is formed the moment they enter Iraqi territory and observe the laws applied and the services provided. From this standpoint, border crossings have a special importance that surpasses many other state facilities. This prompted the legislator to regulate them with Law No. 30 of 2016, which is the legislative basis for the newly established Border Crossings Authority, in accordance with the discretionary power granted to the legislator to establish independent bodies under Article (108) of the Permanent Constitution of the Republic of Iraq of 2005. However, the regulation came with shortcomings that were reflected in the relationship between the federal authorities on the one hand, and the authorities of the region and the governorates not organized into a region on the other hand, as a result of what was stipulated in Article (114) of the Constitution of the Republic of Iraq of 2005, which made the administration of customs a joint jurisdiction between the aforementioned authorities, contrary to what is the case in comparable federal countries

Introduction

The reality of work at the border crossing requires multiple departments to facilitate the movement of goods and travelers. This means the existence of many departments that differ in terms of their administrative affiliation. Some of them are affiliated with the Ministry of Interior, such as the Customs Police Station and the Residence and Passports Office, and others are affiliated with the Ministry of Finance, such as the Customs Center, the Tax Unit, and the National Insurance Company office. Other departments are affiliated with the Ministry of Health or Agriculture, and so on. Each department has the law that regulates its work. Legislations in federal countries have differed in terms of regulating border crossings. Some of them have entrusted the management of this facility to a central body affiliated with one of the state ministries, as is the case in the United States of America, while other countries have adopted a different approach by establishing a federal authority that is linked to the Council of Ministers, as is the case in the United Arab Emirates and Iraq. Following the political transformation that Iraq witnessed in 2003, the organization of border crossings went through several phases. During these phases, various branches of the Iraqi Ministry of Interior assumed supervisory and regulatory responsibilities over the departments operating at the border crossings without a legal basis. As a result of the Iraqi legislature's awareness of the rapid development in trade and passenger traffic, and its understanding of the importance of regulating this facility, which is considered the second largest source of revenue for the public treasury, Law No. 30 of 2016 was enacted, establishing the Border Crossings Authority and granting it legal personality and financial and administrative independence. In order to establish the legal basis for regulating border crossings, it is necessary to examine the constitutional texts before addressing the legislative regulation. This requires dividing this examination into two sections, as follows:

First requirement

Constitutional basis: First, we will try to explain the position of comparative constitutions before addressing the position of the Iraqi constitution:

First branch

The position of comparative constitutions: Constitutions in federal states typically follow one of two paths regarding the distribution of powers between federal authorities and the regions or states. The first path defines the powers of the federal authorities exhaustively, leaving all others to the regions or states. The second path, the opposite of the first, defines the powers of the states exhaustively, leaving all others to the central federal authorities. In this case, the latter holds general jurisdiction, while the former holds specific jurisdiction. The exceptional jurisdiction, and the drafters of the current United States Constitution of 1789, as amended, followed the first path (¹Article (1/Paragraph 8) defined the exclusive powers of Congress, and the Tenth Amendment of 1791, which is part of the Bill of Rights, affirmed that (powers not delegated to the United States by the Constitution and whose exercise is not prohibited to the States are retained by each of those States or the people)²).

The US Constitution does not explicitly state whether border control falls under the exclusive jurisdiction of the federal government or the states. Since regulating this facility involves matters related to the movement of trade and travelers, it can be argued that it falls under the exclusive jurisdiction of Congress. This is inferred from certain provisions of Article I, Paragraph 8, which states that "Congress shall have the power to regulate the border crossings." Powers: 1. To impose and collect taxes, duties, revenues, and excises to pay debts and provide for the common defense... 3. To regulate trade with foreign countries, between the different states, and with the Native American tribes... 4. To establish a uniform system of naturalization... Article 6, Paragraph 2 also stipulated that "This Constitution, the laws of the United States made pursuant to it, and all treaties made or to be made under the authority of the United States shall be the supreme law of the land. The judges of all the states shall be bound by it, and any provision in the constitution or laws of any state contrary thereto shall be invalid." Furthermore, the United States Supreme Court has affirmed in numerous cases the exclusive jurisdiction of Congress over matters related to the operation of border crossings, such as the imposition of customs duties, including its 1933 decision in the case of (Board of Trustees of University of Illinois V. United States)³ Or regulating immigration, as in Her decision issued in 2012 in the case (Arizona V. United States)⁴.

In the United Arab Emirates, the drafters of the amended 1971 constitution did not deviate from the traditional path regarding the distribution of powers between the federation on the one hand and the emirates on the other, whereby the exclusive powers of the federation were defined and the rest were left to the emirates.⁵ However, a method was adopted to divide exclusive federal powers into two types: the first is exercised in the field of legislation and implementation (⁶The second is practiced at the legislative level without implementation.⁷).

The constitution did not include explicit provisions specifying whether the regulation of border crossings falls within the exclusive jurisdiction of the Union or is left to the jurisdiction of the Emirates. However, by referring to the provisions that regulate trade and travel, it can be said that they fall within the

¹ Edward D. Re, Federal-State Relations: The Allocation and Distribution of Powers of Government in the United States, St. Thomas L. Rev, Vol. 15, Issue 2, 2002, P 266.

²For more details on the Tenth Amendment, see:

Gary Lawson, A Truism with Attitude: The Tenth Amendment in Constitutional Context, Notre Dame L. Rev, Vol. 83, Issue 2, 2008, PP469-504.

³The facts of this case are that in the 1920s, the university imported (Illinois) Some equipment used for research purposes was subject to customs duties paid on the imported materials in accordance with the Federal Tariff Act of 1922. The university's Board of Trustees filed a lawsuit demanding a refund of the duties, arguing that the university, as part of the state and performing governmental functions, was exempt from duties. After appeals and the case reaching the U.S. Supreme Court, the court issued its decision in March 1933, clarifying that Congress's authority to regulate trade with foreign countries is an exclusive prerogative, explicitly enshrined in the Constitution. States may not impose duties on imports or exports without congressional approval, and Congress has the power to exempt states and their institutions from customs duties on imported materials. See:

Decision of the Supreme Court of the United States of America 289 US 48 (1933); available via the online link <https://supreme.justia.com/cases/federal/us/289/48/> Date of visit: 13/4/2025

⁴The facts of this case are that in 2010, as a result of growing concern in some states, especially those bordering Mexico, about illegal immigration, the state of (Arizona enacted the Border Security Support Act (SB 1070) when it felt the federal government was failing to address illegal immigration and the resulting security, economic, and social threats. The law was characterized by its strictness in granting local police unprecedented powers in dealing with immigrants. Article (B/2) obligated police officers to verify the legal status of a person detained if there was reasonable suspicion that their presence in the country was illegal. Article (3) criminalized the failure to carry the residency documents that must be issued by the federal authorities, while Article (C/5) prohibited illegal immigrants from working or seeking work in the state. Article (6) allowed local police to arrest anyone suspected of committing a crime that warrants deportation without the need to obtain a judicial warrant. Only a few months later, the US Department of Justice filed a lawsuit against the state, demanding a stay of the law's implementation based on the principle of the supremacy of federal laws stipulated in Article Six of the Constitution. When the case reached the Supreme Court, it issued its decision in 2012 by a majority of (5-3). Judges ruled three of the disputed legal provisions unconstitutional and upheld Article (B/2) on the condition that rights were not violated, such as through unjustified detention or arrest for discriminatory reasons. The court concluded that immigration policies could not be managed through 50 local policies, but rather through a unified national policy formulated and implemented at the federal level. This case marked a turning point in the history of the balance of power between the states and the federal government, particularly in matters with international security implications. See:

Kristina M. Campbell, Commentary on Arizona V. United States, 567 US 387 (2012), Gonzaga University - School of Law, 2024, PP 265-292.

⁵Articles (116-122) of the amended Constitution of the United Arab Emirates of 1971.

⁶Article (120) of the Constitution of the United Arab Emirates of 1971, as amended.

⁷Article (121) of the Constitution of the United Arab Emirates of 1971, as amended.

exclusive jurisdiction of the Union. This is what was stated in Article (11/1), which stipulated that (the Emirates of the Union shall form an economic and customs unit, and federal laws shall regulate the appropriate gradual stages for achieving that unit) and Article (120), which stated that (the Union shall have exclusive legislative and executive powers in the following matters...3. Protecting the security of the Union from threats from outside or inside...6. The finances of the Union, taxes, fees, and federal revenues...16. Federal citizenship, passports, residency, and immigration...) Article (126) also stipulated that (the public revenues of the Union shall consist of the following resources: 1. Taxes, fees, and revenues imposed by federal law in matters falling within the legislative and executive jurisdiction of the Union).

To affirm the Union's exclusive jurisdiction in regulating border crossing policies, the United Arab Emirates ratified, by Federal Decree No. 85 of 2007, the Unified Customs Law of the Cooperation Council for the Arab States of the Gulf⁽⁸⁾ Article (179) of it stipulates that (the unified customs "law" system in the GCC countries, after its entry into force, shall replace the customs regulations and laws in force in the member states, within the limits of the constitutional rules and regulations and basic systems in force in each country, and in a manner that does not conflict with them).

Branch Two

The position of the Iraqi constitution

Referring to the constitutional rules that sit at the top of the legal hierarchy, we find that Chapter Four of Part Three of the Permanent Constitution of the Republic of Iraq of 2005 is entitled "Independent Bodies," and by examining...Articles (102-108) of the Constitution, which regulate the provisions of these bodies, can be said to be divided, in terms of constitutional basis, into two types: the first is established by the Constitution, such as the Independent High Electoral Commission and the Integrity Commission.⁹⁾The Central Bank of Iraq and the Financial Control Bureau¹⁰⁾As for the second, its creation was referred to the legislator as needed and necessary.¹¹⁾The Border Ports Authority belongs to the second type, as it was established by the legislator according to his discretionary authority granted under Article (108) of the Constitution, and since Iraq is a federal state consisting of a capital, a region, and decentralized governorates⁽¹²⁾Therefore, it is necessary to examine the powers of the federal authorities on the one hand, and the powers of the region and the provinces not organized into a region on the other hand.

The current constitution has charted a different course regarding the distribution of powers between the federal authorities on the one hand, and the regions and provinces that are not organized into a region on the other, where the exclusive powers of the former have been defined⁽¹³⁾The shared responsibilities between them were also defined.¹⁴⁾Everything else was left to the regional and provincial authorities, in addition to the text⁽¹⁵⁾The latter's laws take precedence over those of the federal authorities in matters falling within shared jurisdictions in case of disagreement between them.¹⁶⁾

The constitution does not contain explicit provisions regulating the operation of border crossings. However, Article (110) stipulates that "the federal authorities shall have the following exclusive powers: First...formulating sovereign foreign economic and trade policy. Second – formulating and implementing national security policy, including establishing and managing armed forces, to ensure the protection and security of Iraq's borders and to defend it. Third – formulating fiscal and customs policy, issuing currency, and regulating trade policy across the borders of the regions and governorates of Iraq... Fifth – regulating matters of citizenship, naturalization, and residency..." Thus, regulating this matter falls within the exclusive powers of the federal authorities.

The issue of shared jurisdictions has been, and continues to be, a significant challenge to the legal framework in Iraq, particularly concerning the regulation of border crossings. This is exemplified by Article 114 of the Constitution, which stipulates that "the following jurisdictions shall be shared between the federal authorities and the regional authorities: First - Customs administration in coordination with the governments of the regions and governorates not organized into a region, and this shall be regulated by law..." This provision contradicts Article 110, Paragraph 3 of the Constitution, which restricts the authority to formulate customs policy to the federal authorities. Further complicating matters is Article 115 of the Constitution, which stipulates the primacy of regional and governorate laws in...Disagreement with federal laws regarding shared jurisdictions⁽¹⁷⁾It would have been more appropriate to leave the regulation of all matters related to customs affairs to federal laws, regulations, and instructions, given the importance and impact this has on the volume of imports and exports and the balance of trade with the outside world, thus ensuring the implementation of policy and the achievement of its objectives.¹⁸⁾This is what the constitutions of comparable federal states have adopted, but keeping up with the constitutional reality in Iraq requires distinguishing between the term "customs policy" mentioned in Article (110/Third) and the term "customs administration" mentioned in Article (114/First) of the Constitution.

Customs policy is an essential part of economic policy, and is defined as "a set of programs implemented by the state in accordance with its customs legislation to align with its general orientations to achieve the financial, political, economic and social goals it aspires to in supporting national production, facilitating the economic development process, raising the standard of living and supplying the state treasury with the necessary revenues"⁽¹⁹⁾.

As for the term Customs Administration, it was embodied in Clause (Second/1) of Cabinet Resolution No. 13 of 2019, which stipulated that (the administration of all ports in the region shall be subject to the Border Ports Authority in accordance with the Border Ports Authority Law No. 30 of 2016, provided that employees from the residents of the Kurdistan Region with experience and specialization who work on the staff of the Border Ports Authority are employed and rotated among the ports within the region in accordance with the law). From this it is concluded that policy has a broad and comprehensive concept, while administration is merely a tool for implementing policy.

The federal government, through the aforementioned decision, attempted to subject the Kurdistan Region's border crossings to the control of the Federal Border Ports Authority in order to unify customs procedures and embody what was stipulated in Article (110/Third) of the Constitution, in exchange for granting the management of the crossings to employees from the region who are rotated in the crossings located within its scope exclusively, while the rest of the Authority's staff are rotated regardless of their place of residence. For our part, we see that this decision represents a clear reflection of the term coordination stipulated in Article (114/First) of the Constitution, with our reservation about the organizational mechanism represented by a decision issued by the Federal Council of Ministers in violation of what the Constitution requires (and this is regulated by law).

Despite this, the Kurdistan Region's border crossings remain outside the control of the federal authorities, in addition to the existence of smuggling routes and unofficial crossings not recognized by the federal government or the regional government.²⁰⁾Furthermore, no representatives from the governorates

⁸⁾The UAE courts have referred to this system in several decisions, including the Abu Dhabi Court of Cassation's ruling in Appeals 292, 302 and 309 of 2018 (Criminal), which held that initiating criminal proceedings in customs smuggling crimes or directly starting their conduct before the investigating authorities is not permissible before the issuance of a written request from the Director General of the Customs Department based on Article (150) of the Unified Customs Law of the Gulf Cooperation Council States ratified by Federal Decree No. 85 of 2007, and the Federal Supreme Court's ruling in Appeals 1429 and 1443 of 2022 (Criminal), which held that the rulings issued by the appellate courts have the status of final based on the provisions of Article (164) of the Unified Customs Law of the Gulf Cooperation Council States. See: Collection of rulings issued by the Supreme and Cassation Courts of the GCC countries based on common regulations (laws), Legislative and Legal Affairs, 2024, pp. 36-40.

⁹⁾Article (102) of the Constitution of the Republic of Iraq of 2005.

¹⁰⁾Article (103) of the Constitution of the Republic of Iraq of 2005.

¹¹⁾Article (108) of the Constitution of the Republic of Iraq of 2005.

¹²⁾Articles (116-117) of the Constitution of the Republic of Iraq of 2005.

¹³⁾Article (110) of the Constitution of the Republic of Iraq of 2005.

¹⁴⁾Articles (112-113-114) of the Constitution of the Republic of Iraq of 2005.

¹⁵⁾Article (115) of the Constitution of the Republic of Iraq of 2005.

¹⁶⁾Zana Rasool Mohammed Amin, Financial Competencies Among Levels of Governance in Fiscal Federalism (A Comparative Analytical Study), PhD Thesis submitted to the Council of the College of Law, University of Sulaimani, 2021, pp. 74-75.

¹⁷⁾In this regard, the Legal Committee of the Babil Provincial Council requested the Federal Supreme Court to provide a legal opinion on Article (115) of the Constitution, specifically regarding whether a law enacted by a provincial council or a regional council is considered an amendment to or repeal of federal laws that conflict with it. After review and deliberation, the Court unanimously concluded that, based on an analysis of the aforementioned article, the law of the regions and provinces not organized into a region takes precedence in cases of conflict between them, unless it contradicts the Constitution, with respect to shared jurisdictions. A law enacted by a provincial council is not considered an amendment to or repeal of a federal law. See: Decision No. 6/Federal/2009 of the Federal Supreme Court of Iraq; available online. https://www.iraqfsc.iq/krarid/6_fed_2009.pdf Date of visit: 19/4/2025.

¹⁸⁾Sanaa Muhammad Sadkhan Al-Baydani, The Distribution of Financial Powers between the Federal Authority and the Regions and Governorates (Iraq as a Model), PhD Thesis submitted to the Council of the College of Law, Tikrit University, 2012, p. 143; Ahmed Khalaf Hussein Kadhim Al-Dulaimi, The Distribution of Financial Powers between the Federal Authority and the Governorates (Iraq as a Model), Master's Thesis, College of Law, Mansoura University, 2020, p. 84.

¹⁹⁾Hussam Yassin Mohsen, The Future Impact of Iraq's Accession to the World Trade Organization on the Management of Tax and Customs Revenues, Master's Thesis submitted to the Higher Institute for Accounting and Financial Studies, University of Baghdad, 2011, p. 60.

²⁰⁾Book of the Border Ports Authority/Department of Operations and Plans/Operations Section/Coordination and Liaison Division No. C/1/4046 dated 9/3/2023 (unpublished).

of (Duhok-Sulaymaniyah-Erbil) were nominated to the Board of the Border Ports Authority, in accordance with Article (4/First) of the Authority Law No. 30 of 2016.²¹Which stipulated that (a council for the authority called the “Border Ports Authority Council” shall be formed, consisting of...c- one representative from each governorate that has a border crossing...) This contradicts what was stipulated in paragraph (4) of the twelfth item (the financial and banking sector) of the axes of the ministerial program of the current government, which was voted on by the Iraqi Parliament, which stated: “Controlling the border crossings with the aim of implementing decisions to support the local product and activating the inspection of imported goods in accordance with the approved specifications, increasing non-oil revenues, and implementing the provisions of Cabinet Resolution No. (13) of 2019, which regulates the relationship between the center and the region with regard to the ports and customs...”.

Based on the directive of the Prime Minister of the Federal Government to hold a joint meeting with the relevant authorities in the Kurdistan Region to identify official and unofficial border crossings, and to study the possibility of recognizing the latter in accordance with constitutional and legal frameworks, on 2/13/2023 a joint meeting was held between representatives of the Federal Government and representatives of the Kurdistan Regional Government at the headquarters of the Border Ports Authority. Minutes of the meeting were prepared, including the necessary recommendations to resolve the outstanding problems. After the Federal Government requested the Regional Government to sign the minutes, and despite repeated follow-up and communications, the signing did not occur, reflecting a lack of seriousness in resolving the issue and an evasion of implementing the provisions of the ministerial program.²²This prompted the Prime Minister of the Federal Council to instruct the formation of a joint working group from the Border Ports Authority, the Customs Police Directorate, the Northern Region Customs Directorate, and the Joint Operations Command, whose mission is to identify the locations of federal customs control and inspection points on the roads linking with the Kurdistan Region.²³Given the negative impact on the commercial level and the resulting decline in government revenues due to the region’s non-compliance with the provisions of prohibition and restriction and decisions to protect the product and consumer, which fall within the scope of drawing up customs and trade policy and are considered among the exclusive powers of the federal authorities in accordance with the provisions of Article (110) of the Constitution.

The constitutional flaws were not only reflected in the relationship between the federal authorities and the Kurdistan Regional Government, but also extended to the relationship with the provinces not organized into a region. This included what was raised in the meeting of the Border Ports Authority Council No. (11) of 2018 regarding the Wasit Governorate Council collecting sums at varying rates, reaching (200,000) thousand Iraqi dinars, from truck drivers entering the Zurbatiyah border crossing by establishing a yard near the gate of the crossing that does not provide any kind of services. The Council unanimously recommended instructing the Wasit Governorate Council to stop collecting the sums, which negatively affect the movement of trade exchange.²⁴

The council also discussed the issue of the Diyala Provincial Council collecting (1%) of the value of imported goods at points located outside the border crossings, and unanimously recommended canceling this procedure because it violates the provisions of Article (18/First) of the Federal Budget Law No. 9 of 2018, which granted the provinces the authority to impose new service fees and charges and amend current fees and charges, with the exception of sovereign fees stipulated under the applicable federal laws.²⁵

Wasit Governorate continues to collect the aforementioned sums.²⁶The Diyala Governorate recently established a collection point approximately one kilometer from the gate of the Al-Mundhiriya border crossing directorate, where a fee of (15,000) thousand Iraqi dinars is collected for each truck entering the crossing.²⁷For our part, we believe that what the two aforementioned governorates are doing constitutes a constitutional violation, as it leads to a disruption of the customs and trade policies that fall within the exclusive jurisdiction of the federal authorities under Article (110) of the Constitution. We can imagine that the cost of goods imported through the Trebil or Arar border crossings is less than the cost of goods imported through the Al-Mundhiriya and Zurbatiya border crossings, based on the funds collected in the governorates of Diyala and Wasit, according to local legislation.

In order to reach a radical solution, and to prevent other governorates from taking the same measures, we see the necessity of presenting the dispute to the Federal Supreme Court based on the provisions of Article (93) of the Constitution and Article (4) of the Federal Supreme Court Law No. 30 of 2005 amended, which stipulated that (the Federal Supreme Court shall have jurisdiction over the following...Fourth - adjudicating disputes that occur between the Federal Government, and the governments of the regions, governorates, municipalities and local administrations...) and by following the procedures specified in the Internal Regulations of the Federal Supreme Court No. 1 of 2025.

Second requirement legislative basis

Before examining the Iraqi legislator's policy on regulating border crossings, we will attempt to clarify the position of comparative legislation, as follows:

First branch

The position of comparative legislation

In the wake of the events of September 11, 2001, serious concerns arose regarding national security in the United States, and one of the responses taken by the US government was the merger of Customs and Border Protection.(US Customs and Border Protection – CBP) was placed under the Department of Homeland Security on March 1, 2003. This change in organizational structure led to an ideological shift in roles, given that the traditional framework for the work of customs administrations involves collecting taxes and duties and supervising import and export activities. This explains why customs administrations are subordinate to the Treasury Department, or as it is called, the Ministry of Finance in many countries of the world.²⁸

The legislative basis for the creation of U.S. Customs and Border Protection is the federal Homeland Security Act.(Homeland Security Act of 2002 – Public Law 107296) Title IV, entitled (Border Security, Maritime Navigation, and Transportation), assigned to the Secretary of Homeland Security the responsibility of preventing terrorists from entering the United States, securing the borders, territorial waters, ports, and air, land, and sea transportation systems, including managing and coordinating functions transferred to the Department at ports of entry, in addition to carrying out immigration enforcement duties authorized to the Commissioner of Immigration and Naturalization, as well as establishing and administering the rules governing the granting of entry visas to the United States to non-citizens and lawful residents.²⁹The same law also included provisions for transferring the responsibilities, personnel, and obligations of the U.S. Customs Service, which is part of the Treasury Department, including the Treasury Secretary's powers related to it; the Transportation Security Administration, which is part of the Transportation Department, including the Transportation Secretary's and Under Secretary for Security's powers related to it; and the Federal Protective Service, which is part of the General Services Administration, including the General Services Director's powers related to it, to the Department of Homeland Security.³⁰The text also stated that the U.S. Customs and Border Protection agency, which is linked to the Department of Homeland Security, would be headed by a commissioner.³¹Appointed with the approval of the Senate, he performs numerous duties, such as coordinating security functions, facilitating trade, protecting borders, ensuring the prevention of illegal entry of persons and goods, and apprehending terrorist elements, drug traffickers, and human traffickers, in order to avoid what might undermine the security of the United States.³²

²¹ Book of the Border Ports Authority/Office of the Head of the Authority No. 1689 dated 1/25/2024 (unpublished).

²² Book of the Border Ports Authority/Department of Operations and Plans/Operations Section/Coordination and Liaison Division No. C/15/6095 dated 4/18/2023 (unpublished).

²³ Book No. 3084/2324186 of the Office of the Prime Minister/Personal Secretary to the Commander-in-Chief of the Armed Forces dated 22/8/2023 (unpublished).

²⁴ Book of the Border Ports Authority/Office of the Head of the Authority No. 16273 dated 9/12/2018 (unpublished).

²⁵ Book of the Border Ports Authority/Office of the Head of the Authority No. 16086 dated 6/12/2018 (unpublished).

²⁶ Wasit Governorate/Governor's Office Book No. 1/9/737 dated 7/4/2025 (unpublished).

²⁷ Book of the Directorate of the Al-Mundhiriya Border Crossing/Operations and Plans Department No. A/11/5465 dated 24/12/2024 (unpublished).

²⁸ World Customs Organization, World Customs Journal, Vol. 6, Number. 2, September 2012, p 109.

²⁹ Homeland Security Act of 2002, Pub. L.No. 107-296, Sec (402); Vivian C. Jones, Marc R. Rosenblum, US Customs and Border Protection:Trade Facilitation, Enforcement, and Security, CRS Report for CongressPrepared for Members and Committees of Congress, 2013, P 8.

³⁰ Homeland Security Act of 2002, Pub. L.No. 107-296, Sec (403).

³¹ It was (Robert C. Bonner was the first Commissioner of Homeland Security to head U.S. Customs and Border Protection (CBP) when Tom Ridge was Secretary of Homeland Security under President George W. Bush. The CBP website is available at [website address].<https://www.cbp.gov/about/history/march-1-2003-cbp-born>Date of visit: 24/4/2025.

³² Homeland Security Act of 2002, Pub. L.No. 107-296, Sec (411).

In the United Arab Emirates, the legislator adopted a comprehensive approach to regulating border crossings by addressing the fragmentation of administrative structures and assigning management to a single entity, as reflected in Federal Decree-Law No. 14 of 2021.⁽³³⁾Article (2) thereof stipulates that (1. A federal authority called the "Federal Authority for Identity, Citizenship, Customs and Ports Security" shall be established, reporting to the Cabinet, and shall have legal personality, financial and administrative independence, full legal capacity and the executive and supervisory powers necessary to carry out its work in accordance with the provisions of this Decree-Law and the regulations and decisions issued in implementation thereof. 2. The authority established under the provisions of this Decree-Law shall replace the Federal Authority for Identity and Citizenship established under the provisions of Federal Decree-Law No. 2 of 2004...and the Federal Customs Authority established under the provisions of Federal Law No. 8 of 2015...and the General Authority for Ports, Borders and Free Zones Security established under the provisions of Federal Decree-Law No. 6 of 2011...3. The authority established under the provisions of this Decree-Law shall replace the aforementioned government entities in all financial and legal rights and obligations...).

The founding decree established the Authority's headquarters in Abu Dhabi and authorized its chairman to create branches or offices within the country to achieve its objectives.⁽³⁴⁾These objectives can be summarized as follows: regulating nationality and passport affairs, entry and residence of foreigners in the country, enhancing the security, efficiency and readiness of ports, borders and free zones, and organizing and managing customs work in the country in accordance with international standards and security requirements.⁽³⁵⁾

Branch Two

The position of Iraqi legislation

Following the political transformation that Iraq witnessed in 2003, the Ministry of Interior/Border Guard Forces Command assumed the task of controlling the border crossings by forming the Border Complexes Command linked to the border region commands, and in 2005 the General Directorate of Border Crossings was established and linked to the office of the Minister of Interior.⁽³⁶⁾In 2006, the aforementioned directorate was detached from the Minister's office and reattached directly to the Border Guard Forces Command in terms of administration, command, and financial funding, within the formations of the Ministry's Agency for Supporting Forces Affairs.⁽³⁷⁾As a result, the agency reconnected the border crossings with the field border commands as follows:

1. Land and air border crossings in the Kurdistan Region: First Border Guard Command.
2. The border crossings (Rabia-Al-Walid-Turaibil-Arar): Second Border Guard Command.
3. The border crossings (Zurbatayah-Al-Mundhiriyah): Third Border Guard Command.
4. The border crossings (Safwan-Shalamja-Shaib-Basra Airport): Fourth Border Guard Command.
5. Baghdad International Airport: Headquarters of the Border Guard Forces Command⁽³⁸⁾.

In 2008, the General Directorate of Border Ports was detached from the Border Guard Forces Command/Ministry Agency for Supporting Forces Affairs and reattached to the Minister's Office.⁽³⁹⁾It was then reassigned to the Border Guard Command in 2011 before being detached and attached to the Office of the Undersecretary for Federal Security Affairs in January 2012.⁽⁴⁰⁾In February of that year, the Prime Minister/Minister of the Interior issued the following directive:

1. Disconnect the Rabia and Al-Walid border crossings from the General Directorate of Border Crossings and link them to the Border Guard Forces Command in all aspects except financial.
2. The General Directorate of Border Crossings shall not interfere in the work of the two crossings for any reason whatsoever.
3. The commander of the border guard forces shall send a force to the two border crossings to monitor cases of smuggling, infiltration and corruption in the border crossings and neighboring areas.
4. Granting the above-mentioned managers the authority of the highest-ranking disciplinary officer to suspend or punish employees when necessary.⁽⁴¹⁾

In 2014, a guide to work procedures at border crossings was published.⁽⁴²⁾He specified the requirements for establishing the border crossing and the departments operating within it, and defined the tasks of each department separately. He assigned to the director of the crossing, who is affiliated with the General Directorate of Border Crossings linked to the Federal Security Agency in the Ministry of Interior, the authority to monitor and supervise all operating departments. This situation continued until the establishment of the Border Crossings Authority.

The lack of a unified vision and the absence of a clear strategy in managing border crossings during the previous period reflect a years-long struggle to control a facility that is almost second in importance only to oil facilities.⁽⁴³⁾It was linked to several observations related to financial corruption, including the ruling by the Central Anti-Corruption Criminal Court against the former employee of the Trebil Customs Center, the convicted (M.H.), sentencing him to five years of severe imprisonment and a fine of thirty-eight billion, nine hundred and sixty-nine million, three hundred and thirty-four thousand Iraqi dinars for the value of the illicit gains, according to the provisions of Article (19/Third) of the Integrity and Illicit Gains Law No. 30 of 2011, as amended, and stipulating that he would not be released after the expiry of his detention period except after paying the aforementioned amount, according to the provisions of Article (19/Fourth) of the aforementioned law.⁽⁴⁴⁾

After the Iraqi legislature recognized the need to unify the management of border crossings and improve their organizational structure, it issued the Border Crossings Authority Law No. 30 of 2016. However, the Authority did not actually begin its duties on 1/8/2017 after the issuance of Diwani Order No. 283 of 2017.⁽⁴⁵⁾Article (1) of the aforementioned law stipulates that: (First - A body called the "Border Ports Authority" shall be formed, affiliated with the Council of Ministers and possessing legal personality, and shall be represented by the head of the Authority or his designee. Second - The headquarters of the Authority shall be in Baghdad, and it may open branches at the border ports in the region and the governorate not organized into a region. Third - The Authority shall be headed by an employee of a special grade who holds at least a bachelor's degree and shall be appointed in accordance with the law. Fourth - The Authority shall have a deputy head with the title of Director General who holds a bachelor's degree and has no less than (15) fifteen years of service and shall be appointed in accordance with the law).

The preceding text makes the following clear:

1. The legislator established the Border Ports Authority in accordance with his discretionary power stipulated in Article (108) of the Constitution. It can be said that the need and necessity that led to the enactment of this law can be inferred from Article (2), which stipulated that (this law aims to achieve the following: First - Raising the level of employees at border ports through coordination with ministries and non-ministerial entities that have departments operating at border

³³Published in the Official Gazette, Issue No. 709 (Supplement) - Fifty-oneth year - 17 Muharram 1443 AH, corresponding to 26 August 2021 AD.

³⁴Article (3) of Federal Decree-Law No. 14 of 2021.

³⁵Article (4) of Federal Decree-Law No. 14 of 2021.

³⁶Contrary to the established practice in organizing administrative structures, which require hierarchy and subordination to achieve command and control, the directorates of land, sea, and air border crossings at that time were at the level of general directorates, managed by officers appointed as directors-general. These directorates were linked to the General Directorate of Border Crossings. See the Ministry of Interior/Undersecretariat for Administrative Affairs/Directorate of Administration/Personnel No. 15921 dated 23/8/2005 and the General Secretariat/Department of Ministerial Affairs No. Sh W/8/1/11974 dated 21/9/2005 (unpublished).

³⁷ Ministry of Interior/Minister's Office letter No. 25113 dated 9/12/2006 and Ministry of Interior/Ministry Agency for Administrative Affairs/General Directorate of Personnel Management/Personnel Directorate letter No. 27817 dated 17/12/2006 (unpublished).

³⁸ Ministry of Interior/Office of the Undersecretary for Supporting Forces Affairs, No. 23, dated 22/1/2007 (unpublished).

³⁹ Ministry of Interior/Minister's Office letter No. 21025 dated 9/13/2008 (unpublished).

⁴⁰ Ministry of Interior/Ministry Agency for Administrative and Financial Affairs/General Directorate of Human Resources Management/Personnel Directorate No. 1973 dated 1/14/2012 (unpublished).

⁴¹ Ministry of Interior/Minister's Office letter No. S N/3673 dated 2/18/2012 (unpublished).

⁴²The guide begins with a statement by Prime Minister Nouri al-Maliki, in which he says, "Because border crossings are the face of the state and its system, and the first gateway that opens to those arriving in our beloved country, their system and the personnel working there represent the bright face of Iraq if the crossing is sound, and the dark face if it is corrupt and a haven for bribe-takers and thieves. Therefore, I commend this initiative, which has produced what is contained in this professional booklet as a legal and administrative basis that all ministries and agencies must adopt, and they must select competent and honest personnel to work according to this document, in order to protect Iraq's security, economy, and reputation." See the Guide to Operational Procedures at Border Crossings, prepared by Major General Inspector Sabah Hussein al-Hamdani, Ministry of Interior, 2014.

⁴³This was confirmed by retired Major General (Hamid Abdul Muhammad), currently an advisor at the Border Ports Authority.

⁴⁴Decision No. 13/J M/2024 of the Central Anti-Corruption Criminal Court dated 11/1/2024 (unpublished).

⁴⁵ Border Ports Authority Book No. 1 dated 1/8/2017 (unpublished).

ports. Second - Identifying and addressing all violations and negative aspects. Third - Providing and developing service facilities from a technical standpoint). There is also another, more important necessity, which is to unify the management of border ports and ensure the proper application of the law and instructions that regulate the work of government departments therein, in order to ensure the smooth flow of work and the entry of people and goods, raise the level of service, and present it in a manner befitting its status as the gateway to Iraq.⁴⁶⁾

2. The law did not address the issue of the Kurdistan Region's border crossings being subordinate to the Border Crossings Authority, and no branch of the Authority was opened there. The region's border crossings are still outside the scope of federal control, in addition to the existence of unofficial crossings that are not recognized by the federal government, contrary to the provisions of Article (110) of the Constitution.

3. The appointment of the head of the authority, according to the law, is made upon a proposal from the Council of Ministers and the approval of the House of Representatives, as he is one of the holders of special grades.⁴⁷⁾Here, the question arises as to what is meant by the special grade: is it the grade of a minister or an undersecretary? One opinion holds that it is the grade of a minister, by analogy with other independent bodies such as the Hajj and Umrah Authority, considering that the latter is linked to the Council of Ministers, just like the Border Ports Authority.⁴⁸⁾From our perspective, we believe that he holds the rank of Undersecretary, and if the legislator had intended to grant him the rank of Minister, he would have explicitly stated so, as stated in Article (4) of the Integrity and Illicit Gains Commission Law No. 30 of 2011, as amended, which stipulated that "the head of the commission shall hold the rank of Minister and shall be appointed based on a proposal from the Council of Ministers and the approval of the House of Representatives for a term of (5) years." Moreover, the head of the Border Ports Authority receives the salary of an Undersecretary according to what is stated in the salary scale for senior grades attached to Council of Ministers Resolution No. 333 of 2015.⁴⁹⁾

It should also be noted that the legislator did not require actual service for those assigned the position of head of the authority, while it required this for his deputy, the directors general, the director of the border crossing, and even the director of the office of the head of the authority.⁵⁰⁾All that is required is that he obtain at least a basic university degree, and we believe that this is due to the impact of the political decision on the legislative will.

4. The law did not specify the powers of the Vice President of the Authority, except for what was stated in Article (5/Second), which stipulated that (the Vice President shall replace the President in his absence) in his capacity as Vice President of the Board of the Border Ports Authority, which holds its meeting periodically once every month.

Conclusion

Having finished, we must state the most important conclusions we reached, and the proposals we have regarding them, as follows:

Conclusions:

1- The Iraqi constitutional legislator deviated from the approach followed in comparable federal countries regarding the regulation of border crossings by stipulating that the management of customs is a shared responsibility between the federal authorities and the authorities of the regions and governorates not organized into a region.

2- The Border Ports Authority Law No. 30 of 2016 contains shortcomings with regard to assigning positions, defining jurisdictions, and regulating the relationship between state authorities.

3- The Iraqi legislator limited the role of the Border Ports Authority to supervising and monitoring the performance of the departments operating in the border port, in contrast to comparative legislations that adopted the comprehensive approach and the unity of administration by granting executive roles in a way that limits the overlap of jurisdictions and defines responsibilities.

4- The legislative shortcomings were reflected in the practical reality, as the Kurdistan Region's border crossings are still outside the control of the Border Ports Authority, and do not adhere to the federal customs policy, contrary to the provisions of Article (110) of the Constitution of the Republic of Iraq of 2005.

Recommendations:

1- Amend the Constitution of the Republic of Iraq of 2005 and restrict the regulation of border crossings to the federal authorities in terms of policy and administration.

2- Amend the Border Ports Authority Law and include in it what stipulates the separation of the departments that play key roles in the border port (land-sea-air) such as the General Company for Iraqi Ports, the Directorate of Airports, the General Authority of Customs and the Customs Police, and link them to the Authority administratively, in accordance with the legislation of comparable countries.

3- Obliging the region and the governorates not organized into a region to work with the federal customs policy - until the constitution is amended - based on the provisions of Article (110), and to participate in the management of customs in accordance with the provisions of Article (114) of the Constitution of the Republic of Iraq of 2005, and to implement Cabinet Resolution No. (13) of 2019, which outlined the mechanism of joint customs management, and which is part of the ministerial program of the government voted on by the Iraqi Parliament.

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⁴⁶⁾The reasons justifying the Border Ports Authority Law No. 30 of 2016.

⁴⁷⁾Article (61) of the Constitution of the Republic of Iraq of 2005 stipulates that (the House of Representatives shall have the following powers...Fifth - to approve the appointment of each of...B - ambassadors and holders of special ranks upon the proposal of the Council of Ministers...) Article (80) also stipulates that (the Council of Ministers shall exercise the following powers...Fifth - to recommend to the House of Representatives the approval of the appointment of undersecretaries of ministries, ambassadors and holders of special ranks...).

⁴⁸⁾Ali Qahtan Adnan Muzahim, The Legal Organization of the Border Ports Authority (A Comparative Study), Master's Thesis submitted to the Council of the College of Law, University of Babylon, 2020, pp. 54-55.

⁴⁹⁾Book of the Border Ports Authority/Administrative and Financial Department/Administration Section No. 224/1110 dated 9/17/2017 (unpublished).

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