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The Civil Service Appeal Board: A Legal Assessment and a Road Map for Reform – Executive Summary

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The legal assessment and road map for reform of the Civil Service Appeal Board was prepared as part of a consultancy agreement between the Max Planck Foundation for International Peace and the Rule of Law and the Independent Administrative Reform and Civil Service Commission in Kabul which involved the secondment of Dr. Ilaria Vianello from the Foundation to the Commission from April to July 2018. If interested in the whole report please contact: Dr. Ilaria Vianello (vianello@mpfpr.de or office@mpfpr.de) or Mr. Mujtaba Ayan (mujtabaayan@yahoo.com).

The Civil Service Appeal Board (CSAB) is the administrative review board of the Independent Administrative Reform and Civil Service Commission (IARCSC). According to practice and different (partially contradictory) laws it is responsible for reviewing the complaints of individuals¹ related to the recruitment of civil servants and to the relation between civil servants and the state as their employer (e.g. unjustified transfers, illegal disciplinary measures, etc.).² The function of the Appeal Board is to review the decisions of the issuing administration to make sure that they have taken a correct or preferable decision. In other words, it carries out administrative review – as opposed to judicial review.³ The work of the Appeal Board is not conducted in a complete vacuum of legal norms; however, the laws are often inadequate and characterised by vague and inconsistent legal provisions. The lack of legal clarity as to the procedures to be followed when presenting a complaint creates numerous challenges for individuals and the review body alike. For individuals there is legal uncertainty as to where, and based on which grounds, he or she can present a claim. The Board, on the other hand, wants to prevent individuals from being denied justice

¹ Currently in Afghanistan the administration does not necessarily adopt administrative decisions when reaching a final conclusion on a case. Therefore, the term “complaint” instead of “objection” is more accurate when describing the current administrative review mechanisms. For the sake of clarity the term “objection procedure” only refers to the review of administrative decisions as defined in the Administrative Procedure Law.

² Decree of the President No: 1289 (18.04.1396) and article 18 of the Civil Service Law. Article 28 of the Civil Servants Law restricts the jurisdiction of the Board only to cases dealing with recruitment; leaving all other instances to the dispute settlement commissions of the relevant ministries or organizations.

³ Administrative review is considered to be categorically different from judicial review carried out by courts, at least in procedural and remedial terms. Administrative review allows the reviewers to modify a decision or to revoke it to make a new decision; while courts annul a decision and remands it to the decision-maker. Procedurally, administrative review is more flexible in accepting new material that was not available at the time when the decision was made; while courts make their judgments based on the material available to them. However, in substantive terms there is a considerable overlap between the two models.

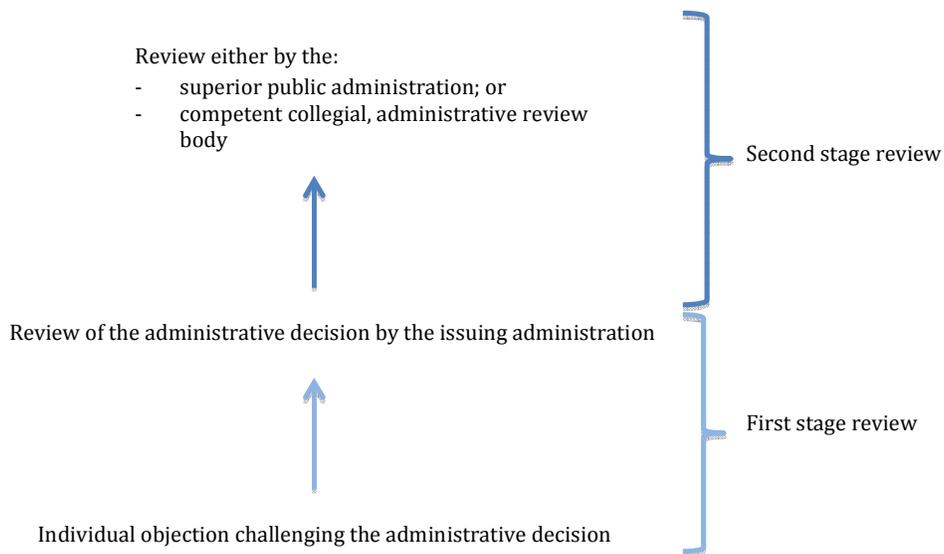
and accepts all cases. While this approach should be praised for wanting to protect individuals' rights (egalitarian model of administrative justice), it should be mentioned that this is likely done to the detriment of efficiency and cost-effectiveness (bureaucratic rationality). The lack of clarity as to the procedures to be followed is coupled with a lack of clarity as to the legal nature of the CSAB's decisions: are they new administrative decisions? Or are they orders for the issuing administration to adopt a new, revised decision?

While the legal assessment of the CSAB and the road map for reform mainly focus on procedural matters, it should be pointed out that the Board also faces difficulties when dealing with substantive matters. For example, in its legal analysis it is often required to apply incomplete, vague and frequently contradictory laws. Next to this, limited resources might make it impossible to implement a legal right of a complainant. Thus, the CSAB faces a challenging legal environment at all stages of the review process.

The CSAB in context: administrative review boards and the APL

Analysing the functioning of and the challenges faced by the Civil Service Appeal Board cannot be done in isolation: it must be placed within the framework of the administrative law system in Afghanistan and in particular take into account the recently adopted Administrative Procedure Law (APL). The APL not only prescribes to administrative authorities the main steps to be undertaken when adopting an administrative decision, it also frames the work of the administrative review boards within the administrative review process. The CSAB does not find itself in isolation as there are many similar review boards attached to ministries and other government agencies.⁴ Such boards have *prima facie* a similar function to the one of the CSAB: they are required to review administrative decisions taken by the issuing administration (e.g. taxation decisions, issuing of licences, etc.). Article 47(2) of the APL acknowledges the existence and the role of these administrative review boards. The article establishes that the issuing administration shall refer an individual's objection to the competent collegial, administrative review body in case they maintain the position contained in the original administrative decision. In other words, the administrative review boards conduct a second check on the initial decision of the issuing administration. The steps foreseen by article 47(2) APL are currently not fully reflected in practice.

⁴E.g. Media and Evaluation Commission (Law on Mass Media 2009), Labour Dispute Settlement Commission (Labour Law 2008), Custom Arbitration Administration (Custom's Act 2005), etc.



The implementation of the APL in the work of the CSAB – and in particular of article 47(2) – will prove useful in tackling some of the challenges currently faced by the Board as further elaborated below.

1. From complaint board to second stage administrative review board

The application of article 47(2) of the APL to the work of the CSAB will have numerous implications. First, the CSAB will only be required to review administrative decisions – all other types of inquiries or complaints will have to be addressed by the relevant department within the IARCSC or by the responsible ministry or government agency. Second, the CSAB will only have the obligation to accept objections regarding administrative decisions that have first been reviewed by the issuing administration. The one stop shop⁵ of the IARCSC would have the responsibility to determine the admissibility of a complaint (i.e. does it address an administrative decision? If yes, has it already been reviewed by the issuing administration?) and alternatively to direct the individual to the appropriate forum. In order to achieve this final goal, measures need to be put in place to regulate the transitional phase from mere complaint board to second stage administrative review board. In this respect, it will be crucial to strengthen the capacities of the issuing administration in order for them to be able to carry out the first stage of the preliminary objection procedure (articles 38 to 51 of the APL). During this transitional phase it would be important for those carrying out the two different kinds of review (the one dealing with simple inquiries or complaints and the other dealing with administrative decisions) to communicate

⁵The one-stop-shop offers multiple services to those who refer to the IARCSC; one of these services is to assist individuals who want to present a complaint to the CSAB.



with one another to ensure that inquiries are not confused with administrative decisions and *vice versa*. Furthermore, the APL foresees that it is the obligation of the issuing administration (if it maintains its initial position) to submit the objection to the competent collegial administrative review body. However, for

the transitional phase it is advisable to also allow individuals to bring the cases to the CSAB themselves. A radical change of the current practice cannot be expected to take place immediately. Both the individuals and the issuing administration should be guided through this reform phase. Finally, the changes to the *modus operandi* of the CSAB will have to be clearly reflected in the laws and the internal rules of procedures (*tarzulamal*) regulating its work. These same changes will have to be harmoniously reflected in all laws and *tarzulamal* governing the work of the issuing administration (e.g. the Civil Service Appointment Board, the recruitment committees, the Dispute Settlement Commissions, etc.). Ultimately, a functioning multi-tiered administrative review mechanism will be more efficient as it allows the bulk of the complaints to be resolved at the level of the issuing administration, leaving the external, second tier (i.e. the CSAB) to deal with the more difficult cases that cannot be resolved “locally”.

2. Dialogue first: the impact of review on decision-making (and *vice versa*)

Currently, the CSAB is perceived as an extra-judicial instrument of protection for the individual, while disregarding the additional value it can provide as a system of self-control for the public administration. In other words, the issuing administration feels threatened by the work of the CSAB, instead of perceiving it as an opportunity to improve its own decision-making. The CSAB itself has only recently realised the importance of establishing a dialogue with the issuing administration to comprehensively understand the challenges it faces when implementing its own decisions (e.g. lack of resources, impossibility, etc.). An enhanced dialogue between the CSAB and the issuing administration could have three important functions in improving the efficiency of the administrative justice system in Afghanistan. *First*, it may lead to a reduction of individual complaints due to an improved decision making process. Each complaint received by the CSAB is an opportunity to examine the process leading to an

administrative decision. As a result, from the complaints received by the CSAB it should be possible to identify gaps in the system and improve the on-going administrative practice. However, it is important to bear in mind that citizens pursuing formal redress for their grievances are still by far an exception rather than the rule. In this regard, it is important to remember that an overall system (e.g. a large-scale recruitment process) should not be evaluated merely based on the complaints received by the CSAB. *Second*, the CSAB, through strengthened dialogue with the issuing administration, is likely, over time, to adopt decisions that will not only consider an individual's concern, but also the needs of the state administration e.g. expediency and cost-effectiveness of the process. A decision that finds a good balance between these two sides – within the limits of the law – is more likely to be accepted and implemented by citizens and the administration alike. *Third*, it may contribute to improving the implementation of administrative decisions. The CSAB fully relies on the issuing administration to implement its decisions. Therefore, if the issuing administration is unable to implement a decision, e.g. due to lack of resources, it would be important that such information is communicated to the CSAB as part of the process. For example, if the CSAB concludes that an applicant is entitled to a pension, it would be the responsibility of the issuing administration to identify the required resources which is an obligation they might not be able to fulfil, leaving the individual with a decision that cannot be implemented.

3. Protecting flexibility while guaranteeing due process

When reviewing the decisions taken by the issuing administration (e.g. exam results, transfers to a different position, removals from the work place, etc.) the CSAB exercises all the power and discretion it deems necessary to make sure the decision at stake is the correct (in case there is only one solution) or the preferable one (in case there is more than one solution). Nowhere in the laws and *tarzulamal* regulating the work of the CSAB are limitations to be found: the Board has all the power necessary to affirm, modify or repeal the decision.⁶ While a certain amount of flexibility ought to be maintained – especially in light of the current context in which the Board is operating – the review process should be further formalised by at least introducing key procedural limits aimed at upholding the principles of due process. In this respect, the APL, and in particular the articles dealing with the preliminary objection procedure (articles 38 to 51), contains provisions that should be incorporated when drafting the new *tarzulamal* for the CSAB. For example, it would be important to define the criteria for suspending the execution of a decision (interim relief) or the steps to be undertaken by the CSAB when examining the legality and the expediency of the initial decision for example deciding on whether a complainant should be

⁶ Only article 27(3) of the Procedures on Handling of Civil Servants Complaints states the obligation of the Board to state the reasons for reaching its final decision.

heard.

4. In search of legal certainty

Another very important issue that still remains unclear is whether the rulings of the CSAB constitute new administrative decisions or whether they are instructions addressed to the issuing administration to pass a new administrative decision in compliance with the Board's ruling. Regulating and clarifying this aspect is crucial to ensure legal certainty, not only for the individual complainant, but also for the administrative justice system in Afghanistan. If the rulings of the CSAB were to constitute a new administrative decision, then the CSAB would have to respect the procedures for adopting a new administrative decision as regulated by the APL (articles 27 to 33). If, instead, the rulings of the CSAB are instructions for the issuing administration to revise its original administrative decision, then it will be important to monitor its actual implementation by the issuing administration. Finally, the legal nature of the CSAB's decisions also impacts the procedures to be followed by an individual when taking a case to court. Currently, individuals seem to be able to bring to Court both the decision of the issuing administration as well as the rulings of the CSAB – the courts seem to accept both types of appeal. This system creates a high degree of legal uncertainty, as it is not clear what happens to the other decision/ruling if only one is addressed at court or if both are dealt with by different courts or chambers. To avoid this, it will be important that only one administrative decision exists at the end of the review process, no matter what the final conclusion as to the legal nature of the CSAB decisions may be. It should then only be possible to challenge this act in court.

A blueprint for an enlarged reform

While proving helpful in the process of reforming the Civil Service Appeal Board, the APL has also raised some crucial questions as to how it should be implemented by the administrative review boards present in the country. The questions raised are particularly challenging since the CSAB is the first administrative review board going through this type of reform process. In other words, the work started by the CSAB is of a pioneering nature and could serve as a blueprint for the other administrative review boards existing in other ministries or government agencies. The role of the administrative review boards in the nascent administrative law system of Afghanistan is particularly important especially while awaiting the adoption and implementation of the Administrative Court Procedure Law. Ultimately, the internal administrative review mechanisms should constitute an important element in protecting the rights of citizens and achieving administrative justice.