

**Proportionality as a Facet of Judicial Review of the Appropriateness
of Administrative Decisions
(the French experience as a case study)**

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Abstract:

Historically, administrative judges have refrained from reviewing the administration's assessment of the significance and gravity of the facts leading to its decisions, as well as the proportionality between the reasons for the administrative decision and the actions taken on its basis. This was justified by the notion that the administration has the autonomy to assess the appropriateness of its decisions without judicial intervention. However, this principle has recently been called into question. Judges have expanded their review to include aspects of reasonableness through proportionality review, particularly with respect to decisions affecting individual rights and public freedoms, as seen in

disciplinary matters or administrative decisions related to public regulation.

Consequently, proportionality is a crucial aspect of reasonableness in administrative decisions, aiming to achieve a balance between the effectiveness of administrative action and the requirements of safeguarding the rights and freedoms of individuals.

Keywords: Proportionality review, administrative judiciary, appropriateness review, administrative policing, disciplinary sanctions.

1. INTRODUCTION

At first glance, the role of administrative courts in annulment disputes appears to be limited to monitoring the factual occurrence of events and their legal classification, without extending to reviewing the administration's evaluation of the significance of the factual reasons and the proportionality between their importance and severity, and the administrative action taken based on them. This is justified by the notion that such a review would constitute a departure from the administrative judge's role as guardian of legality and would involve them engaging in the functions of the administrative authority. In this case, the judiciary acts as if it were the administration itself, becoming a higher administrative authority over the source of the decision¹.

Distinguishing between the review of the legal qualification of facts and the assessment of the appropriateness of administrative measures is undoubtedly an

¹- Ali Khatar Chatnawi. Encyclopedia of Administrative Jurisprudence. Volume II. Dar Al-Thaqafa for Publishing and Distribution, 2011, p. 917.

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extremely delicate and difficult task, especially since administrative courts only recognise the legality of regulatory measures if they are necessary to maintain public order and its four components. Therefore, it is essential to assess whether there is a necessity, which inevitably leads to an examination of all the circumstances surrounding the issuance of the regulatory measure and the legal means available to the source of the measure².

While the judiciary has historically rejected reviewing the appropriateness of administrative decisions, leaving it to the administration to assess without judicial oversight, it has begun reviewing the administration's assessment of the gravity and importance of facts through the principle of proportionality. This review defines what is known as appropriateness control (Contrôle de proportionnalité ou Contrôle de l'opportunité).

The principle of proportionality is one of the general principles of law. It is the administrative judiciary that has played a key role in highlighting its importance and incorporating it into the rules of administrative law.

The principle of proportionality refers to the equivalence between the actions taken by the administration and the intended objective³. This involves examining the appropriateness of the administrative decision and the proportionality between it and the reasons upon which the administration relied⁴.

²- J. Rivero. Administrative Law. Paris, D, 1983, p. 265.

³- A. de Laubadère. Treatise on Administrative Law. L.G.D.J, 1992, Volume 1, p. 732.

⁴- Abdelghani Basyouni Abdullah. Administrative Judiciary. 1996, Manshat Al-Maarif, Alexandria, p. 647.

Proportionality also involves selecting a measure that is commensurate with the significance of the facts that prompted the decision⁵. If it is established that there is an inappropriate fit between the administrative decision and the facts it was issued to address, the administrative decision becomes subject to annulment.

When carrying out judicial review, the administrative judge refrains from reviewing the administration's assessment of the importance and gravity of the facts underlying its decision, as well as the proportionality between the reasons for the administrative decision and the action taken based on it. This is because it is believed that if the administrative judge were to do so, they would be straying from their role as a judge and encroaching upon the functions of the active administration, thus becoming a superior authority to the administration. The administration is deemed to have the discretion to evaluate the appropriateness of its decisions without judicial intervention. However, the administrative judiciary has recently begun to deviate from this principle, particularly with regard to regulatory decisions, examining their appropriateness and the proportionality between their content and their reasons as an exception to the general rule governing its oversight of administrative actions⁶.

Previously, legal scholars regarded the concept of legality as contradictory to the idea of reasonableness, arguing that the discretionary power of the administration implies the freedom to base its decisions on what is outside the scope of legality, leaving the assessment of reasonableness to the discretion of the

⁵- Issam Abdul Wahab Al-Barzanji. *Administrative Discretion and Judicial Control*. 1971, Dar Al-Nahda Al-Arabiya, Cairo, p. 418.

⁶- Mohammed Hassanein Abdel Aal. *The Concept of Cause in Administrative Decisions and the Cancellation Lawsuit*. 1971, Dar Al-Nahda Al-Arabiya, Cairo, p. 71.

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administration⁷. Since administrative judicial review is a review of legality, it should remain within the bounds of legality, without going beyond the realm of reasonableness, which is left entirely to the discretion of the administration⁸.

However, scholars quickly changed their perspective on the nature of judicial review, as the expansion of administrative intervention significantly influenced the evolution of the administrative judge's oversight, aligning it with the public interest on the one hand, and the protection of rights and freedoms on the other. This evolution has led to the extension of judicial review to the core of the administrative decision, namely proportionality or adequacy⁹.

Consequently, proportionality is the most important aspect of the reasonableness of administrative decisions, with the aim of achieving a balance between the effectiveness of administrative action and the requirements of safeguarding the rights and freedoms of individuals. The inclusion of the administrative judge's review of proportionality - previously outside the scope of judicial review - has become one of the primary methods of judicial supervision of the appropriateness of administrative action. Many legal scholars have begun to use proportionality review and reasonableness review interchangeably, although there is no complete equivalence between the two concepts.

⁷- Adel Al-Tabtabai. "Judicial Oversight on the Principle of Proportionality between Disciplinary Penalties and Employment Violations". *Journal of Law. University of Kuwait*, Volume 6, Issue 3, 1982, p. 80.

⁸- Salah Youssef Abdel Aleem. *The Impact of Administrative Judiciary on State Administrative Activity*. 1st Edition, 2007, Dar Fikr University, Alexandria, p. 82.

⁹- Philippe Foillard. *Administrative Law*. 2012 Edition, Paradigme Orléans, p. 153.

In legal terminology, reasonableness refers to the adaptation of legal acts to the circumstances of time, place and considerations surrounding their issuance from all aspects¹⁰. Thus, reasonableness is a characteristic of the administrative decision, acquired by the latter when it is issued in a manner that takes into account the various aspects of its issuance, including the assessment of the need to intervene or refrain from intervening, the timing of this intervention, and the choice of an action that corresponds to the seriousness and importance of the reasons¹¹.

Accordingly, if the concept of reasonableness means the adaptation of the administrative decision to all the factors and circumstances surrounding it from all points of view, the concept of proportionality means the following:

This means ensuring that the action taken, which is the subject of the administrative decision, is proportionate to the reason that prompted its adoption. Therefore, if the significance of the facts and the action taken or the objective behind it are not proportional, the decision is inappropriate.

From this perspective, the fundamental issue raised by this topic is understanding how effectively the administrative judge can protect public rights and freedoms through proportionality review. More specifically, what guarantees can the administrative judge provide through proportionality review to protect public rights and freedoms? Does the administrative judiciary today play a genuine role in overseeing the appropriateness and proportionality of administrative actions?

¹⁰- Issam Abdul Wahab Al-Barzanji. Previous Reference, p. 164.

¹¹- Mohammed Hassanein Abdel Aal. Previous Reference, p. 72.

Attempting to answer these questions requires the topic to be divided into two main sections. The first section will address the French administrative judiciary's application of proportionality review in the realm of administrative policing. The second will focus on the French administrative judiciary's application of proportionality review in matters of disciplinary sanctions.

2. Section One: the French administrative judiciary's application of proportionality review in the realm of administrative policing¹².

Various areas of judicial review concerning the appropriateness and proportionality of administrative decisions have emerged. The initial area where this review was exercised was in regulatory decisions, where the judiciary effectively assessed the administration's evaluation of the seriousness of threats to public order and the means necessary to preserve it. Subsequently, proportionality review expanded to encompass disciplinary sanctions.

Since 1933, the French administrative judiciary has established the bases and rules for its judicial review of the appropriateness and proportionality of administrative decisions relating to public order and the means necessary to maintain it. This review was initiated in the

¹²- Ali Khatar Chatnawi. Encyclopedia of Administrative Jurisprudence. Volume II, Previous Reference, p. 924.

Benjamin case of May 19, 1933¹³, in which the Council of State examined the appropriateness of a regulatory measure taken by a mayor to prohibit a public meeting for a lecture because of concerns about possible disturbances that could disrupt public order.

The decision of the Council of State in this case is considered a landmark in this field, as it annulled the decision of the Mayor of Nevers, who had prevented Mr. Benjamin from holding a public meeting on the grounds of potential disruption to public order¹⁴.

The administrative judge overturned the mayor's decision after finding that the meeting did not pose a significant threat to public order. Thus, the prohibition of the lecture was deemed disproportionate to the objective sought by the administration, which was to protect public order. The court noted that there were alternative, less severe regulatory measures that the administration could have taken to maintain public order while still allowing individuals to exercise their freedoms¹⁵, rather than outright banning the public meeting.

In its decision, the Council of State stated: "It is clear from the

¹³- Yves Gaudemet. *Treatise on Administrative Law, Volume 1 (General Administrative Law)*, 16th Edition, 2011, Librairie Générale de Droit et de Jurisprudence, Paris, p. 733.

¹⁴- G. Dupuis, M. José Guédon, P. Chrétien. *Administrative Law*, 12th Edition, 2011, Dalloz, p. 664.

¹⁵- Yves Gaudemet, *op. cit.*, p733.

investigation that the potential disturbances cited by the council to prohibit the public meeting were not of a sufficiently serious nature. The council could have maintained public order and issued regulatory measures without prohibiting the meeting"¹⁶.

This review defines three elements that, together, form what is referred to in legal doctrine and jurisprudence as the "principle of proportionality". These are the factual situation, the intended objective and the actions or means employed¹⁷. The decision in the Benjamin case was annulled due to a lack of proportionality between these three elements: the factual situation represented by the lecture; the objective of maintaining public order; and the measure of prohibiting the lecture.

The Council of State continued its judicial interpretation regarding the seriousness of the factual grounds on which the administrative decision was based. It upheld the administration's assessment of potential disturbances concerning the regulatory measure prohibiting a religious demonstration¹⁸. However, in another ruling, the Council of

¹⁶- G. Dupuis, M. José Guédon, P. Chrétien, *droit administratif*, op.cit, p 664.

¹⁷- Sami Jamal Al-Din. *Judicial Discretion and Administrative Authority*. 1992, Dar Al-Nahda Al-Arabiya, Cairo, p. 244.

¹⁸- C. E. 02/7/1953. Yves Gaudemet, *ibid*, p733

State rejected the administration's assessment of the seriousness of the disturbances used to justify the prohibition of a public meeting. Through its investigations, the Council determined that the proposed public meeting did not threaten public order¹⁹.

The Council of State adopted a similar approach with regard to trade and industry freedoms, ruling that mayors could not prohibit street photography or impose restrictions on it unless it was necessary to address risks to public order based on local circumstances in each municipality²⁰.

The Council annulled the decision of the Mayor of Paris to prohibit street photographers from operating in the streets and squares of the city. The Council stated: "While the mayor is entitled to take the necessary measures to prevent the risks posed by this activity to traffic and pedestrians on public roads, he may, if necessary, prohibit this profession on certain streets and at certain times of the day when traffic is heavy. He cannot, however, impose an absolute prohibition, since this would unduly interfere with the freedom of trade and industry in a wide area of the city, where the volume of traffic varies considerably"²¹.

¹⁹- C. E. 23/1/1953. Yves Gaudemet, *ibid*, p733.

²⁰- Yves Gaudemet, *ibid*, p734.

²¹- C. E. 15/10/1965. Yves Gaudemet, *op.cit*, p734.

In other circumstances, however, the Council of State upheld the legality of the mayor's decision to ban street photographers from the Mont Saint-Michel area during the tourist season. This decision was based on investigations which showed that the activities of these individuals in the crowded tourist area obstructed vehicular traffic and posed significant risks to the maintenance of security and order, such that less severe regulatory measures could not adequately address these issues²².

Finally, the Council of State generalized its previous interpretations to all regulatory measures taken by administrative bodies. It annulled a mayor's decision prohibiting the total and absolute passage of vehicles in a certain part of a street from 8 a.m. to 1 p.m. on Sundays, Tuesdays and Fridays (market days in the area). The reasoning was that the establishment of the market on these days did not involve a high degree of importance or seriousness to justify a complete prohibition of vehicle passage, even for specific hours. Other, less burdensome regulatory measures could be implemented to manage traffic without completely restricting freedom of movement on public

²²- C. E. 13/3/1968. Yves Gaudemet, *ibid*, p734.

roads to avoid potential congestion caused by the market²³. The Council also ruled against the legality of a regulatory measure prohibiting the use of advertising carts on public roads²⁴.

In the same context, the Council of State ruled against the legality of a regulatory measure that limited how many times a film could be shown in a certain area. The Council argued that showing the film would promote corrupt concepts and values that could harm education and social integration. However, the Council found that the risks associated with showing the film could be addressed without an outright ban. Thus, a prohibition in this case was deemed proportionate to the existing circumstances. However, limiting the number of screenings was considered an excessive infringement of trade freedom that was not justified by the aforementioned reasons²⁵.

The Council also ruled against the legality of a regulatory measure prohibiting the display and distribution of a particular newspaper in public places on the grounds that the articles it contained posed a serious threat to public order. However, the Council found from the documents and circumstances of the case that the alleged dangers did

²³- C. E. 30/10/1963. Yves Gaudemet, op.cit, p734.

²⁴- C. E. 02/4/1954. Yves Gaudemet, ibid, p734.

²⁵- Ali Khatar Chatnawi, Encyclopedia of Administrative Jurisprudence. Volume II, Previous Reference, p. 923.

not justify a complete and absolute ban that was overly broad in scope²⁶.

There has been some debate among legal scholars about the nature of proportionality review in the area of regulatory oversight. Professor Yves Gaudemet stated: “It is sometimes said that the administrative judge reviews the necessity of the regulatory action rather than its appropriateness. However, scholars argue that the judge’s review of the necessity of the action implies a review of its appropriateness and proportionality with respect to the seriousness of the disturbance threatening the public good. Even those who support the view that the review focuses on the necessity of the action clarify that regulatory measures must be necessary, which means that they should be proportionate and appropriate to the risk of disturbing public order. Thus, the judge not only examines the legality of the regulatory measures, but also supervises the appropriateness of the measures taken by the administration in relation to the facts that necessitated them”²⁷. This shift indicates a transition from being only a guardian of legality to also becoming a guardian of appropriateness.

²⁶- C. E. 23/11/1951.

²⁷- Yves Gaudemet, *op.cit*, p733.

3. Second axis: the French administrative judiciary's application of proportionality review in matters of disciplinary sanctions.

The French Council of State has traditionally rejected proportionality reviews of the relationship between the actions attributed to public employees and the disciplinary sanctions imposed. The judiciary would only verify whether the employee's actions constituted a violation deserving of disciplinary punishment, and whether the penalty was included in the list of disciplinary sanctions. They would not consider whether the severity of the administrative offence was proportional to the type and amount of the imposed penalty²⁸.

For a long time, the courts refused to extend their review to consider the proportionality or reasonableness of these decisions, based on the belief that the determination of the penalty for a violating employee was within the absolute discretion of the administration, without judicial review. Thus, the administrative judge had no authority to assess the proportionality between the severity of the penalty and the violation.

²⁸- C.E. 12/10/197. A.J.D.A 1980, p. 368. Taken from Ali Khatar Chatnawi, Encyclopedia of Administrative Jurisprudence. Volume II, Previous Reference, p. 922.

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However, this position was reconsidered, since it gave the disciplinary authority a wide discretionary power and deprived employees of essential disciplinary guarantees, in particular judicial guarantees²⁹.

On June 9, 1978, the Council of State revised its position in the "Lebon" case and, for the first time in the field of employment discipline, required a minimum standard of proportionality and consistency between the seriousness of the breach of conduct and the severity and nature of the penalty imposed³⁰.

In the Lebon case, a teacher at the Academy of Toulouse was accused of making inappropriate gestures to female students. The Council concluded that this conduct constituted a misdemeanor warranting dismissal and that the sanction imposed was not manifestly

²⁹- Mahmoud Salama Jabr. "The Council of State's Oversight on Clear Errors in the Administration's Assessment of Facts in Cancellation Lawsuits". Journal of the State Litigation Authority. Year 37, Issue 1, March 1993, p. 70.

³⁰- C.E. 09/6/1978, A. de Laubadère, J. Venezia, and Y. Gaudemet. Treatise on General Administrative Law (Organization and Actions of the Administration, Administrative Jurisdiction), 15th Edition, 1999, L.G.D.J Paris, p. 697.

erroneous³¹.

It can be concluded that although proportionality is practiced in the French judiciary, there is no developed theory of the principle of proportionality in France. The role of this principle is overshadowed by other concepts applied by the French administrative judiciary, such as the theory of manifest error of judgment, the principle of balancing benefits and harms, abuse of power, and the review of the legal qualification of facts. The most important term embodying the concept of proportionality is “reasonableness”, as the two terms are often used interchangeably in most legal literature to express a single concept³².

4. CONCLUSION

The commitment of the administrative judiciary to balance the discretionary powers granted to the administration with the rights and freedoms enjoyed by individuals has led it to develop methods that limit administrative abuse and the continuous violation of citizens’ rights. This allows for a bold and thorough supervision of the assessment of administrative power in various areas of administrative activity, with proportionality review being one of the latest techniques.

³¹- Adel Al-Tabtabai. "Judicial Oversight on the Principle of Proportionality between Disciplinary Penalties and Employment Violations", Previous Reference, p. 93.

³²- Philippe Foillard. Administrative Law Ibid, p. 153 .

Thus, the administrative judge is not only a guardian of legality, whose sole task is to ensure that the actions of the administration comply with the principle of legality, but also a judge of reasonableness, who is vested with broad powers to create and innovate solutions that reconcile the public interest with individual private interests.

the French Council of State, extending its supervision to aspects of reasonableness through the examination of proportionality, particularly in decisions affecting individual rights and public freedoms, as seen in disciplinary matters and administrative control decisions.

As a result of these findings, the following recommendations can be made:

The optimal solution for the protection of individual rights and public freedoms is to subject administrative actions to appropriate judicial oversight. This oversight can only bear fruit in the establishment of justice if the judge is empowered to examine the facts and the proportionality of the content of the decision with its reasoning through a proportionality review.

Therefore, while the judge has made significant progress from merely ensuring legality to also addressing reasonableness, there remains a need for greater boldness and commitment in the area of

proportionality review. It is essential to activate the control mechanisms available to the administrative judge in this regard in order to protect the rights and freedoms of the public.

5. Bibliography List :

- A. de Laubadère. Treatise on Administrative Law. L.G.D.J, 1992, Volume 1.
- A. de Laubadère, J. Venezia, and Y. Gaudemet. Treatise on General Administrative Law (Organization and Actions of the Administration, Administrative Jurisdiction), 15th Edition, 1999, L.G.D.J Paris.
- Abdelghani Basyouni Abdullah. Administrative Judiciary. 1996, Manshat Al-Maarif, Alexandria.
- Adel Al-Tabtabai. "Judicial Oversight on the Principle of Proportionality between Disciplinary Penalties and Employment Violations". Journal of Law. University of Kuwait, Volume 6, Issue 3, 1982.
- Ali Khatar Chatnawi. Encyclopedia of Administrative Jurisprudence. Volume II. Dar Al-Thaqafa for Publishing and Distribution, 2011.
- G. Dupuis, M. José Guédon, P. Chrétien. Administrative Law, 12th Edition, 2011, Dalloz.
- Issam Abdul Wahab Al-Barzanjy. Administrative Discretion and Judicial Control. 1971, Dar Al-Nahda Al-Arabiya, Cairo.
- J. Rivero. Administrative Law. Paris, D, 1983.

Proportionality as a Facet of Judicial Review of the Appropriateness of Administrative Decisions (the French experience as a case study)

- Mahmoud Salama Jabr. "The Council of State's Oversight on Clear Errors in the Administration's Assessment of Facts in Cancellation Lawsuits". Journal of the State Litigation Authority. Year 37, Issue 1, March 1993.
- Mohammed Hassanein Abdel Aal. The Concept of Cause in Administrative Decisions and the Cancellation Lawsuit. 1971, Dar Al-Nahda Al-Arabiya, Cairo.
- Philippe Foillard. Administrative Law. 2012 Edition, Paradigme Orléans.
- Salah Youssef Abdel Aleem. The Impact of Administrative Judiciary on State Administrative Activity. 1st Edition, 2007, Dar Fikr University, Alexandria.
- Sami Jamal Al-Din. Judicial Discretion and Administrative Authority. 1992, Dar Al-Nahda Al-Arabiya, Cairo.
- Yves Gaudemet. Treatise on Administrative Law, Volume 1 (General Administrative Law), 16th Edition, 2011, Librairie Générale de Droit et de Jurisprudence, Paris.
- C.E. 02/4/1954. Yves Gaudemet, Ibid, p. 734.