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The Impact of the Judicial Nature of the Administrative Judge in Fostering Justice and Creating Administrative Law Rules

أثر الطبيعة الإنشائية للقاضي الإداري في تكريس العدالة وخلق قواعد القانون الإداري

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Abstract:

The administrative judge enjoys considerable autonomy and independence in crafting appropriate solutions to legal issues arising in the realm of public law, particularly in the interactions between the administration, when managing public services, and individuals. The judge has the discretion to apply legal norms that correspond to these relationships and may adapt these norms to ensure greater alignment. Furthermore, the administrative judge plays a crucial role in the formation of administrative law, sometimes surpassing the legislature in this capacity. Consequently, when the judge formulates judicial principles that regulate the discretionary powers granted to the administration, they effectively oversee these powers, acting as a judge of discretion, all while ensuring no conflict arises between this discretion and the pursuit of justice.

key words: Administrative Judge; Legality; Discretion; Justice; Creation of Legal Rules.

الملخص:

يتمتع القاضي الإداري بحرية واستقلالية في ابتداع الحلول المناسبة للروابط القانونية التي تنشأ في مجال القانون العام بين الإدارة في قيامها على المرافق العامة وبين الأفراد، فله أن يطبّق القواعد القانونية ما يتلاءم معها، وله أن يطوّرها بما يحقق هذا التلاؤم؛ كما يمارس القاضي الإداري دورا فعالا في إنشاء قواعد القانون الإداري، قد يفوق في ذلك دور المشرع. ومن نتائج ذلك أن القاضي عندما ينشئ القواعد القضائية التي تضبط حرية الملاءمة الممنوحة للإدارة، فإنه يباشر رقابته على هذه الحرية كقاضٍ للملاءمة، دون أن يكون هناك تعارض بين هذه الحرية وتكريس العدالة.

الكلمات المفتاحية: القاضي الإداري، المشروعية؛ الملاءمة؛ العدالة؛ خلق قواعد القانون.

1. Introduction:

Judicial oversight functions as a critical safeguard for individuals, especially in cases where the administration oversteps its authority or engages in abuse of power. However, the framework for judicial oversight is not always perfectly structured or comprehensive, diminishing its effectiveness in direct proportion to the flaws in its design. (Al-Barzanji, 1971)

In the pursuit of balancing the discretion inherent in administrative functions with the protection of individual rights and freedoms, judges have gradually expanded the scope of their oversight. This expansion moves beyond the mere assessment of factual events and their legal categorization to critically evaluating the substance of administrative decisions and actively regulating discretion.

As a result, the administrative judge has become a central figure in shaping legal principles that constrain the administration's freedom of action. By establishing and applying these principles, the administrative judge transcends the traditional role of merely applying the law or validating the legality of administrative actions. This shift represents a profound transformation, marking the evolution of the administrative judiciary from a passive body to a constructive one, capable of formulating solutions to a variety of challenges and developing a coherent legal framework of its own. In doing so, the administrative judiciary has introduced distinct theoretical frameworks that set it apart from ordinary courts.

Research Problem:

The central research problem of this study is to explore the role of the administrative judge’s constructive nature in promoting justice and in the creation of administrative law principles. Specifically, how does the administrative judge’s proactive engagement contribute to the development of legal principles that regulate administrative discretion?

Study Objectives:

- To shed light on the nature of the administrative judiciary through doctrinal discussions and an analysis of the practical reality of judicial oversight.

- To demonstrate the active role played by the administrative judge in fostering justice and in the formation of administrative law principles.

Methodology:

This study adopts a descriptive, analytical, and comparative methodology. Through this approach, the study aims to describe, analyze, and compare various legal theories, opinions, and texts that influence the subject matter, thereby providing a nuanced understanding of the administrative judge's evolving role.

Study Outline:

To address the research question posed, the study is organized into two primary sections. The first section explores the doctrinal debate concerning the distinction between legality and discretion, as well as the nature of the administrative judge. The second section examines the evolution of the administrative judge's role, from one concerned primarily with legality to one that focuses on the regulation of discretion.

2. The Doctrinal Debate on the Distinction Between Legality and Discretion, and the Nature of the Administrative Judge

Doctrinal debates reflect the tension between two key principles: first, the principle of separation between the administrative body and the administrative judiciary, and second, the principle holding the administration accountable, which asserts that the administrative judge serves as the ultimate authority over the administration.

Depending on which principle is emphasized, the role of the administrative judge in oversight may either manifest as pure judicial oversight, where the judge confines their role to reviewing legal issues alone, or as a more hierarchical form of oversight, with the judge exerting authority over administrative actions.

The question arises: what is the validity of each of these theories, and what stance does the Algerian administrative judiciary take? (Abdel Alim, 2007, p. 74) To explore this, the study will first examine the theory of pure judicial oversight, followed by the theory of the administrative judge as the highest authority over the administration.

2.1 The Theory of Pure Judicial Oversight

This theory is grounded in the notion that the administrative judge's role should be limited strictly to assessing the legality of administrative actions, without delving into their appropriateness. Discretionary power should remain solely with the administrative authority. The judge must respect the administrative body's autonomy in decision-making and refrain from infringing upon its sphere of discretion. (Bonnard, 1923, p. 365) The purposes of the two parties are distinct: while the administration acts in the pursuit of public interest, the judge, when making rulings, must prioritize justice, which is encapsulated in the application of the legal rule.

2.1.1 The Content of the Theory of Pure Judicial Oversight

Advocates of pure judicial oversight ground their theory in both theoretical and practical considerations. What are these underlying considerations?

A- Theoretical Considerations:

In fulfilling its duties, the administration is afforded a certain degree of freedom. While this freedom is not absolute, the law establishes its limits. When the law does not specifically dictate the administration's course of action, the administration retains discretionary power, which must be respected by the administrative judge.

The scope of this discretion varies, and the judge must acknowledge it. In some instances, the law prescribes the exact decisions the administration must make, thereby restricting the judge's role to applying the law to the specific case. In most cases, however, the law provides the administration with multiple options, leaving it to exercise discretion. This specific power of choice is the administration's discretion, which the judge must honor, not only for the sake of justice but also to maintain the efficiency of administrative functions. (Michoud, 1913, p. 28)

In the interest of justice, the distinction between the judge's role and the administration's role was established to safeguard individual rights and freedoms, ensuring that the administration does not assume both the roles of adjudicator and party within the same case.(De Laubadère, Venezia, & Gaudemet, 1999, pp. 691-692)

Moreover, if the judge were to exercise broad discretionary powers, as required by judicial oversight of discretion,(Lombard & Dumont, n.d., p. 75) there would be a risk of compromising their objectivity and clarity in applying the law, both of which are essential to maintaining the integrity of the judicial process. (Michoud, 1913, p. 28)

From the perspective of administrative functions, the judge should refrain from intervening in the administration's discretionary domain, particularly when it concerns the appropriateness of its decisions. Such decisions fall under the purview of parliamentary oversight, which delineates the administration's responsibilities. (Bonnard, 2010, pp. 242, 366)

Should the judge subject administrative actions within this domain to oversight and subsequently nullify them, the situation would involve two administrative authorities, one holding responsibility, while the other does not (Michoud, 1913, p. 31). By substituting their judgment on appropriateness for that of the administration, the judge effectively usurps the administration's role, thereby infringing upon its lawful powers. This action would contravene the principle of separation of powers. (Seillier, n.d., pp. 242-243)

Indeed, the principle of separation of powers functions as a constraint on the administrative judge's ability to make determinations related to the appropriateness of administrative decisions. It is also undeniable that a degree of flexibility must be afforded to the administrative authority. On one hand, the administration's role is not to mechanically apply predefined rules but rather to exercise discretion based on real-world circumstances. (Chapus, n.d., p. 816)

On the other hand, the presence of discretionary power is an inevitability, as it is impossible to foresee and regulate every possible scenario in advance. Furthermore, the administrative judge is ill-equipped to assess the appropriateness of administrative decisions, as they do not have access to all the factual circumstances surrounding the administration's decision-making process, save for what is provided in the case file before them. (Seillier, n.d., p. 243)

Another theoretical consideration is that judicial oversight is only triggered when there is a legal issue at stake. Consequently, a judicial ruling represents a resolution of a legal matter. The legislator has clearly defined the scope of the administration's

authority, allowing the administration to act only when specific factual conditions arise. If the administration acts without these conditions, it exceeds its authority; similarly, it oversteps its bounds if, despite the existence of these facts, it acts in contravention of the law. (Bonnard, 2010, p. 366)

B- Practical Considerations:

From a practical perspective, assessing the appropriateness of decisions does not fall within the usual domain of the judge. The judge is neither responsible for nor an administrative superior. Regardless of the research or information presented in the case, the judge cannot fully assess the appropriateness of an administrative decision or grasp all the circumstances surrounding it, as they are typically distanced from these real-world conditions.

The judge's knowledge is confined to the case file presented to them. Moreover, the judge's ruling comes after a considerable amount of time has passed. In contrast, speedy decision-making, which is vital for the efficient functioning of public administration, is not characteristic of the judicial process. These practical limitations underscore the necessity for a clear division between judicial and administrative authority: the judge's role is to "judge, not manage." (Abdel Alim, 2007, p. 76)

According to this theory, the judge's role is confined to overseeing the legality of administrative measures, ensuring they comply with the law. This approach guarantees that the judge remains within the boundaries of their judicial function. In contrast, if the judge were to monitor the appropriateness of administrative decisions, they would effectively limit the discretionary power granted to the administration by the law. (Jeze, 1944, p. 63)

2.2.2 Evaluation of the Theory of Pure Judicial Oversight

Legal scholars who advocate for the theory of pure judicial oversight argue that restricting the judge's role to reviewing the legality of administrative actions serves the interests of administrative justice. By respecting the delicate nature of executive authority, the administrative judge ensures the best protection of individual rights in their interactions with the administration. Judges are expected to exercise oversight over administrative acts only when they are certain that such scrutiny will

be limited to the legal aspects, thus ensuring that the administrative judge does not encroach upon the administration's autonomous domain. (Abdel Alim, 2007, p. 77) In this context, the judge must not impose actions or inactions upon the administration by substituting their own judgment for that of the administration.

Some legal scholars, while offering qualified support for this theory, reject the absolute notion that judges should monitor the appropriateness of administrative actions. If the judge were to engage in such oversight, it would signify the end of the administration's discretionary authority. (Abdel Alim, 2007, p. 77) Conversely, if the judge claims the right to assess the appropriateness of administrative actions, it would imply that they have replaced the administration or assumed the role of a superior administrative authority, which is not within their mandate. (Michoud, 1913, p. 31)

One notable scholar, Dr. Yahya El-Jamal, has commented on the recent trend where the administrative judiciary has extended its oversight to encompass all administrative actions, albeit without explicitly asserting oversight over the appropriateness of these actions. He contends that this expansion is achieved by broadening the scope of legality, rather than merely adhering to the minimal legal standards governing administrative discretion.

The notion of appropriateness is not always confined to the discretion of the administration. In some instances, the appropriateness of an action can and should be questioned. In such cases, the judge may review the administrative act itself. For instance, administrative procedures that affect public freedoms, such as measures related to public order, can only be deemed lawful if they are necessary and achieve their intended effect, namely the preservation of public order.

This implies that the judge cannot simply accept the administration's assertion that the action was necessary; they must verify the factual existence of the circumstances that prompted the action and how these circumstances relate to the administration's decision. By doing so, the judge exercises oversight over the appropriateness of the measure without stepping beyond their role as a judge of legality. (Fahmi, 1979, p. 381)

In such cases, the concept of appropriateness becomes an integral aspect of legality. Therefore, in this instance, the judge performs their function as a judge of

facts and examines the relationship between these facts and the administrative decision made in response. From a purely legal standpoint, they are not a judge of appropriateness, though in practical terms, their role may occasionally seem akin to it. (Labib, 1973, p. 162; as cited in Abdel Alim, 2007, pp. 78-79)

While respecting the arguments put forth by proponents of pure judicial oversight, it is important to recognize the limitations of this perspective. The administration's absolute discretionary powers, when exercised without any form of judicial oversight, could lead to a state of unchecked authority, which would be highly susceptible to abuse and corruption. The decision-makers within the administration, as ordinary individuals, are not infallible. Their authority, if left unchecked, could lead to violations of individuals' rights and freedoms or result in the mistreatment of citizens. Thus, the absence of judicial oversight over the exercise of discretion by the administration could pave the way for significant harm to individual rights and the erosion of the rule of law. (Waline, 2010, p. 632; as cited in Gaudemet, 2011, p. 733)

Therefore, subjecting the administration to effective judicial oversight stands as the most viable solution for safeguarding and upholding individual rights and freedoms. Judicial oversight can only fulfill its role in delivering justice if the judge is empowered to examine the facts and assess whether the decision aligns with its justifications through oversight of appropriateness.

A judge committed to ensuring justice does not limit their oversight solely to the legal content of the law. They must also ensure that the administration cannot hide behind its discretionary authority to evade judicial scrutiny, thus leaving room for potential violations of rights and freedoms without any judicial intervention. Judicial oversight over administrative appropriateness does not equate to the abolition of discretionary authority, as some scholars argue, but rather its regulation.

The current state of the judicial process confirms that the judge continuously monitors the administration's discretion to uncover any abuses or excesses in its actions. Why, then, does legal theory remain hesitant to explicitly recognize this oversight? Why is there reluctance to acknowledge the shift of the administrative judge from a judge of legality to a judge of appropriateness?

Excluding administrative actions, particularly those involving discretionary authority, from judicial review would place the administration above the judiciary, thereby disrupting the foundational principle of the separation of powers. Subjecting the administration to ineffective or inadequate judicial oversight results in a breakdown of the system of checks and balances, ultimately undermining the protection of rights and freedoms. So, why, when legal scholars previously attributed the title of "judge of legality" to the administrative judge, did they limit the judge's role to reviewing only legality, without considering appropriateness, while now, when the judge exercises explicit oversight over appropriateness, there is hesitation to openly acknowledge this expanded role?

To reconcile the apparent contradiction in the positions of those advocating for pure judicial oversight, another group of legal scholars contends that the administrative judge has, in fact, long exercised oversight over the appropriateness of administrative actions. Some scholars justify this view with two main arguments:

The first reason:

Legislators often link the legality of an administrative decision to elements concerning its appropriateness, making it natural for the judge to extend their oversight to appropriateness within this context. A prime example of this is decisions that restrict public freedoms. It is widely accepted that administrative authorities may only limit individuals' freedoms to the extent necessary to preserve public order. This relationship between the subject of the decision, restricting a freedom, and the objective of the decision, maintaining public order, becomes an inseparable component of the decision's legality. (Vedel & Delvolvé, n.d., p. 533; Rouault, 2011, p. 144)

The second reason:

The administrative judiciary plays an increasingly active role in the creation of administrative law. A significant consequence of this is that, when the administrative judge generates new legal rules, they impose constraints upon the administration's authority. This, in turn, broadens the scope of restricted jurisdiction

and narrows the discretionary authority and appropriateness left to the administration. (Rouault, 2011, p. 145)

In essence, the creation of law by the administrative judge shifts the boundary between legality and appropriateness, (Abdel Alim, 2007, p. 79) transforming certain aspects of administrative decisions, previously viewed as matters of appropriateness and left to the discretion of the administration, into legal matters subject to judicial oversight. (Vedel & Delvolvé, n.d., pp. 534-536)

2.2.3 The Theory of Administrative Judge as the Supreme Head of the Administration

Supporters of this theory do not dispute that the judge's primary function is judicial. However, they argue that, in practical terms, there are occasions when the judge may assume the role of the head of the administration. What is the essence of this theory, and how is it viewed by legal doctrine?

A. Essence of the Theory:

Proponents of this theory acknowledge the judge's fundamental role as a judicial figure but assert that, in certain instances, the judge may be required to perform administrative duties, effectively acting as the head of the administration.

The rationale for discussing this theory and considering the administrative judge as the supreme head of the administration is based on the following key points: (Rouault, 2011, p. 146)

- The function of the administrative judge extends beyond the mere application of the law in the cases before them or a restricted focus on legality. In practice, the judge often ventures into the realm of appropriateness, carrying out tasks that resemble those typically undertaken by an administrative head.
- The foundation of judicial oversight exercised by the administrative judge lies in the public authority law that established administrative courts. When making decisions, the judge is guided not only by legal principles but also by the pursuit of justice and the public good. In this respect, the judge often operates in a capacity more aligned with the role of an administrator than a judge constrained solely by the law.

- Another argument advanced by proponents of this theory is that the rules of good administration, or the standards of administrative conduct imposed by the judge on the administration, function as regulations governing the discretionary powers of the administration. These rules represent internal regulations formulated by the judge within the framework of the discretion granted by law to administrative authorities.

- Some legal scholars contend that, in certain instances, the judge may follow the administration's actions, even in violation of the principle of legality, particularly when there are internal or external threats to the state. In such circumstances, the judge may prioritize the defense of the administration, sacrificing strict adherence to legality in favor of urgent appropriateness, as seen in the theory of exceptional circumstances.

- These scholars also highlight the judicial oversight of administrative measures pertaining to public order, which, from their perspective, elucidates the hierarchical nature of the oversight exercised by the administrative judge. Through the regulation of such measures, the judge effectively establishes a more structured legal framework, which is then imposed upon the administration. In this manner, the judge performs a role similar to that of any executive authority overseeing the administration's actions. Indeed, once the judge's duty becomes the safeguarding of the balance between individual rights and administrative privileges, which is necessary for the public good, they are inevitably drawn into the assessment of the public interest and its scope. This transformation casts them as a central figure in the administration itself. (Guettier, 2000, p. 174) This phenomenon is particularly evident in the case of the French *Conseil d'État*, which has frequently acted not merely as a judge, but as the supreme head of the administration when exercising oversight over discretionary powers. (Cadreit de la Charrière, 1957, pp. 78, 91, 107)

B Evaluation of the Theory that the Administrative Judge is the Supreme Head of the Administration

Legal opinions regarding this theory have been divided, with both critics and supporters offering differing viewpoints. Critics of this theory raise two primary objections: (Abdel Alim, 2007, pp. 80-81)

First Consideration:

When the administrative judge reviews an administrative action, their role is not to replace the administration but rather to verify that the action aligns with the public interest. Specifically, the judge ensures that the decision does not arise from an inappropriate exercise of judgment by the administration. Therefore, the judge does not supplant the administrative official; the judgment has already been made by the administration. The judge's function is to oversee that judgment in the context in which it was made.

Second Consideration:

The judge's role in reviewing such judgments remains confined within the boundaries of their primary function, which is to monitor the legality of administrative actions. The judge does not usurp the administration's authority to make decisions. Instead, their intervention serves to prevent the abuse of power, ensuring that discretionary authority is not exercised in an arbitrary or excessive manner.

Regarding the legal opinion that supports the theory of the administrative judge as the supreme head of the administration, proponents argue that the reality is quite different. They suggest that, through their interpretive role in legal texts, the administrative judge plays a significant role in shaping the legal framework that governs administrative actions, alongside the legislator. (Abdel Alim, 2007, p. 82) The judge, in applying the law, simultaneously contributes to its formation, thus playing a role in creating legal rules that restrict the administration's discretionary powers (De Laubadère, Venezia, & Gaudemet, n.d., p. 694). In this sense, the judge's influence may even surpass that of the legislator in shaping administrative law.

However, this evolving role of the judge raises complications and generates contradictions. The increasing scope of judicial oversight over administrative actions has exposed the inadequacies of the traditional criteria used to distinguish

between legality and appropriateness in administrative activities. Professor Dubisson, in his analysis of the concepts of legality and appropriateness, emphasized that these two ideas do not follow the same trajectory and cannot be viewed as direct opposites.

Legality pertains to an action's adherence to legal norms, and thus is defined by the legal system. In contrast, appropriateness is a more practical concept, concerned with whether an action is suited to a specific situation or context, taking into account factors such as time, place, and surrounding circumstances. While legality reflects an action's conformity to binding legal rules, appropriateness concerns its practical or factual value, which is not governed by strict legal norms but instead involves non-binding judgments that still warrant respect. (Jamel Eddin, 1992, p. 313)

In this context, Professor Waline advocates for abandoning the notion that the administrative judge, in annulment cases, only reviews legality and ignores considerations of appropriateness. Such an approach could create a false dichotomy between legality and appropriateness (Guettier, 2000, p. 174). Appropriateness, being a relative concept, involves an element of personal judgment. A decision may be appropriate at one moment but harmful or ineffective at another, even if it was once deemed suitable. (Gaudemet, 2011, p. 733)

Although the views presented consistently uphold the principles of legality and express concern about potential encroachments on the administrative judge's powers, a different perspective has emerged in Egyptian legal theory. (Dubisson, 1957, p. 37) This view clarifies that while legality is derived from the legal system, appropriateness remains a practical concept concerned with assessing how well an action fits a specific situation, factoring in variables such as time, place, and surrounding context.

Consequently, it becomes apparent that legality and appropriateness are not aligned concepts, nor are they opposites. The opposite of legality is illegality, just as the opposite of appropriateness is inappropriateness. Thus, legal decisions can be inappropriate, and illegal decisions may still be appropriate. This suggests that there is no inherent barrier to integrating considerations of both legality and appropriateness into a single decision. In fact, appropriateness can, in some cases, become a condition for the legality of an action. This is particularly evident in legal

provisions that require administrative actions to be necessary or essential for their validity. In such instances, the appropriateness of a decision becomes integral to its legality.

This view concludes that, while the administrative judge's role in annulment cases should primarily focus on legality, it is essential to acknowledge that the broad powers held by the administrative judge, including the ability to create and establish new legal rules, enable them to incorporate elements of appropriateness within the framework of legality. Thus, under existing law, there is no formal oversight of appropriateness. (Abdel Alim, 2007, p. 84) However, when establishing new laws, the judge can address appropriateness by creating legal rules that extend the scope of legality. In fact, this perspective is compelling, as it aligns closely with prevailing judicial practices, while respecting the principles of legality and ensuring their primacy.

3. The Evolution of the Administrative Judge's Role from a Judge of Legality to a Judge of Appropriateness and its Impact on Consecrating Justice and Creating the Rules of Administrative Law

Judicial oversight by the administrative judge is not uniform; it varies depending on the specific case. To understand the true nature of the administrative judge's role, it is necessary to examine the judicial reality. Therefore, what is the actual nature of the administrative judge in practice?

To answer this question, we will first explore the concept of judicial oversight and then trace the evolution of the administrative judge's role, from that of a judge focused solely on legality to one that also considers appropriateness.

3.1 The Choice of Judicial Oversight

The administrative judge is granted considerable discretion in determining how to exercise their oversight. This oversight may either expand or contract based on the areas it addresses, allowing for substantial room for administrative discretion. (Waline, 1956, p. 27)

As a general rule, when the administration has the freedom to choose from different solutions, the administrative judge does not, in principle, have the authority to review the choice made by the administration. However, the judge may deviate from this rule and exercise full oversight over the proportionality or appropriateness of the decision. (Abdel Alim, 2007, p. 84)

So, what is the general direction of judicial policy regarding the oversight of appropriateness? Under what circumstances does the judge opt to exercise oversight over appropriateness, and when do they refrain from doing so?

3.1.1 The General Trend of Judicial Policy

Regardless of whether the rules defining the administration's freedom are legal or judicial in nature, the administrative judge supervises this freedom. There is no inherent conflict between this freedom and its subjection to judicial oversight, as the judiciary performs this oversight, at least in cases explicitly addressing the appropriateness of decisions. Therefore, while the administration’s discretionary freedom remains intact, it is subject to judicial oversight. This oversight distinguishes it from arbitrary or absolute power. (Abdel Aal, 1971, p. 71)

The administrative freedom of action is not only governed by the conditions outlined in legal texts but also by a broad discretion exercised by the administrative judge. The judge uses various oversight techniques to define and limit the scope of this freedom through practical and evolving judicial decisions. (Abdel Aal, 1971, p. 71)

3.1.2 The Role of Judicial Oversight in the Field of Fact-Assessment

The administrative judge’s role in overseeing the assessment of facts is undeniably creative. This is because, when the judge forms a legal opinion regarding the claims of the parties, it represents the judicial perspective, which is rooted in the judge’s understanding of the law and their interpretation of the facts. (Venezia, 1958, p. 102; Auby & Drago, 1984, pp. 37, 52)

Fact assessment, as a judicial act, reflects the judge’s will. What the judge imposes on the parties is not the objective legal status but rather the judge’s opinion regarding that legal status. The law itself grants the judge a certain degree of freedom in forming this opinion. If the state is considered to represent the law, it

acts or makes decisions solely through its members, with the judge serving as its judicial representative. Consequently, the judge imposes, on behalf of the state, their judicial opinion on the parties involved. (Dupuis, Guédon, & Chrétien, 2011, p. 671)

A. The Nature of Judicial Oversight on Fact-Assessment

Judicial oversight of the administration's assessment of facts raises important questions about the nature of the oversight exercised by the administrative judge in this regard. Is it a review of legality or appropriateness?

Scholar Dubisson argues that when the administrative judge reviews the assessment of facts, they effectively substitute their personal judgment of the facts for that of the administration. In this respect, the judge's actions transcend a mere review of legality, entering the realm of appropriateness review. (Abdel Aal, 1992, p. 492) Therefore, judicial oversight today extends beyond the review of legality and theoretical analysis, encompassing the review of appropriateness as well. (Dupuis, Guédon, & Chrétien, 2011, p. 669)

In this context, Professor Mohamed Hassanein Abdel Aal contends that the judge's authority to review the legal assessment of facts differs fundamentally from their authority to interpret the law. He highlights the confusion between the processes of fact assessment and legal interpretation, noting that fact assessment is much broader than mere interpretation. It involves a greater degree of freedom in evaluating the facts to determine the applicable legal rule. This process of fact assessment, whether performed by the administration or the administrative judge, opens the door for reviewing appropriateness. (Abou Al-Ainin, 1996, p. 481)

Judicial oversight in these cases occurs whenever the judge substitutes the administration's fact assessment with their own. Thus, it can be argued that the nature of judicial oversight of the legal assessment of facts, whether through the judge's personal judgment of facts or legal interpretation, reveals that the administrative judge is not solely a judge of legality, but also one of appropriateness.

B. Exceptions to the Judicial Oversight of Fact-Assessment

There are certain decisions that the French *Conseil d'État* cannot review regarding the assessment of facts. These fall into two main categories: decisions

related to administrative police measures and decisions that require technical judgment or involve facts of a complex technical nature.

• **Decisions Regarding the Regulation of Foreigners' Activities and Residency**

These concerns involve a series of administrative decisions where the *Conseil d'État* ensures that the administration is granted considerable freedom of action, particularly in areas that pose significant risks to the security and safety of the state, such as those concerning the regulation of the activities and residency of foreigners in France. (Ibrahim, 1982, p. 352; as cited in Abdel Alim, 2007, p. 94)

In this domain, some scholars argue that the *Conseil d'État*'s approach cannot be justified purely by legal considerations. They note that in cases of regulatory decisions regarding the residency and activities of foreigners in France, the judiciary abstains from reviewing the legal assessment due to practical reasons, specifically the judiciary's desire to leave the administration with a broad margin of discretion. However, the *Conseil d'État* does review the legal assessment of facts in relation to similar types of decisions when they concern French citizens rather than foreigners. (Dubisson, 1957, p. 37)

The Egyptian *Conseil d'État* has adopted a similar approach to its French counterpart, excluding regulatory decisions concerning the residency and activities of foreigners from judicial oversight, thereby granting significant discretion to the administration. (Abdel Alim, 2007, p. 84)

Regarding the regulation of foreigners' activities and residency in Algeria, the legislator addressed this issue in Law No. 08/11, dated June 25, 2008, which defines the conditions for foreigners' entry, residency, and movement within the country. (Vedel & Delvolvé, n.d., p. 535)

An alien residing in Algeria may engage in activities that violate public morals, disrupt public order, or involve conspiracies against the state, or even partake in acts that threaten the state's political system. Such actions justify the public authorities in Algeria expelling the foreigner from the country. (Abdel Aal, 1971, p. 28) Expulsion is carried out by a decision from the Minister of the Interior, while

deportation to the border is executed by a decision from the relevant governor. (Waline, 2010, p. 632)

Both expulsion and deportation are administrative measures that target foreign individuals whose presence poses a risk to national security, safety, or the political, economic, or social stability of the state. These measures fall squarely within the discretion of the administration, specifically vested in the Minister of the Interior and the governor of the relevant region. (Morand-Devillier, 2001, p. 752)

However, these measures are accompanied by legal and judicial guarantees. If the foreigner disagrees with the expulsion decision, they may challenge it before the administrative urgent court outside of Algeria. This lawsuit must be filed within five days of being notified of the decision. Given the gravity and sensitivity of the measure, the judge is required to rule on the case within a maximum of 20 days from the date the case is registered with the court.

An exception to the general principle of judicial oversight over decisions involving foreigners is that a deportation decision is not subject to appeal, according to Article 22, paragraph 5, of Law No. 08/11. This provision applies in cases where the residence permit of a foreigner is revoked due to activities incompatible with public morals, national interests, or criminal convictions related to such actions. In such instances, the foreign national is expelled immediately after the completion of the relevant administrative or judicial procedures, without the right to appeal.

• Decisions of a Technical Nature:

In certain cases, the French *Conseil d'État* refrains from intervening in the review of the accuracy of material facts, particularly when the matter involves technical assessments. (Abdel Alim, 2007, p. 99) The judge may conclude that reviewing the facts would lead them beyond their jurisdiction, particularly in cases involving the evaluation of specialized expertise, such as the expertise of specialists (Law No. 08/11, 2008, Official Gazette, Issue 36), accountants, the approval of certain technical products, or the measurement of poison levels in substances. (Law No. 08/11, 2008, Article 30)

Similarly, the Egyptian *Conseil d'État* follows a comparable approach, excluding judicial oversight of legal assessments in cases requiring technical or scientific expertise. For example, in cases concerning the evaluation of research submitted to scientific production review committees, judicial oversight is generally limited. The Egyptian *Conseil d'État* holds that the state's higher interests necessitate granting the administration broad discretion in these matters, as the administration's specialized technical bodies are better equipped to properly assess the facts. (Law No. 08/11, 2008, Article 36)

A general conclusion can be drawn from this: when judicial oversight of the legal assessment of facts is absent, the administration is granted greater discretion. This allows the administration to determine the reasoning behind its actions and the appropriate consequences, in addition to its inherent freedom in selecting the cause and effect.

From the variability of judicial oversight, it is evident that the discretion allowed to the administration in evaluating facts or determining causes is a result of an evolving judicial approach. In some cases, the judiciary refrains from exercising oversight, while in others, it intervenes to ensure accountability. (Law No. 08/11, 2008, Article 31, paragraphs 3 and 4)

Similarly, Algerian administrative courts follow the French and Egyptian models, abstaining from overseeing the administration's actions in technical or scientific matters. They explicitly state that they will not intervene in appropriateness assessments without the aid of expert testimony.

3.2 The Relative Distinction Between Legality and Appropriateness and the Nature of the Administrative Judge

As the administrative judge's role expands to scrutinize the administration's use of discretionary powers, they have moved beyond merely reviewing the legal assessment of facts. The focus has shifted towards evaluating the substance of the decision and taking more decisive steps. If the administrative judge intervenes to assess the appropriateness of the circumstances or the conditions under which the administration makes its decisions, does this imply that the judge has evolved into a judge of appropriateness?

To answer these questions, we must first explore the relative distinction between legality and appropriateness, and thereby understand the administrative judge's evolving role and influence. Following that, we will examine the trends in Arab administrative courts in imposing their oversight on appropriateness.

3.2.1 The Relative Distinction Between Legality and Appropriateness and the Reality of the Administrative Judge:

The theory of judicial review traditionally operates on a clear distinction between legality and appropriateness, reserving the latter as an area for administrative discretion. For this theory to hold, legality must be regarded as an absolute concept. However, in practice, this is not the case. The administrative judge frequently extends their review to elements that are not legally defined. At times, the judge even supports the administration in breaching the law, refraining from annulling an illegal act due to its appropriateness. This highlights the relativity of the concept of legality and underscores the pivotal role, as well as the risks, the administrative judge faces in defining it. This reality can be understood through the following points:

A. In certain cases, when reviewing the legality of an administrative decision, the judge may be tasked with interpreting the law, which could be vague or imprecise. In doing so, the judge provides the law with concrete meaning. This interpretation may differ from that of the administration, and in such cases, the judge may annul the decision for its illegality, even if their interpretation does not align with the legislator’s intent. (Abdel Alim, 2007, p. 99)
B. In other instances, the issue at hand may not be the ambiguity of the law but rather the legislator’s silence on a particular matter. Here, the judge faces a choice: either they acknowledge that the administration is free to make any decision it deems appropriate, given the absence of specific legal rules, or they create a legal rule to fill the gap left by the law. This rule, though not legislative, is judicial in nature and becomes a binding framework imposed on the administration, whether the judge derives it from the spirit of the law or creates it through judicial reasoning. (C.E. February 22, 1952)

C. Finally, even in the presence of a clear and specific legal rule, the judge may opt to disregard or supplement it to achieve the public interest. In such cases, the judge may apply principles that contradict the written law. In this context, the legality that the administration must adhere to is not necessarily the one defined by the law, but rather the one established by the administrative judge (C.E. Ass. April 27, 1951). Often, the administrative judge imposes judicial principles alongside legal rules that the administration is required to follow. (C.E. November 6, 1963)

Despite recognizing the judiciary as a primary source of administrative law, many scholars limit its role to that of mere interpretation or revelation of the legislator's intent. In practice, however, whenever a judge creates judicial principles, they impose specific constraints on the administration, which must then respect these principles in exercising its powers. (Abou Al-Ainin, 1996, p. 502) These powers were previously left entirely to the administration’s discretion under the law.

This becomes especially evident when considering that the creation of judicial rules by the judge typically responds to considerations of appropriateness. Judicial rules often stem from the judge’s assessment of whether the administration's decision is appropriate in the given context. While these rules may limit the judge's future freedom, since they must follow the principles they have established, the reality is that judicial rules are often flexible enough to allow the judge to adapt and apply them in varied and evolving contexts.

Thus, it is clear that administrative justice is not simply a court of application concerned with verifying the legality of administrative acts. Rather, it is a fundamentally creative judiciary, responsible for generating appropriate solutions to complex facts. In doing so, it establishes a legal system that is distinct from ordinary courts, shaped by the unique nature of administrative law, the needs of public services, and the operational requirements of these services. (Fahmi, 1979, p. 382) This judiciary has developed its own set of theories, which differentiate it from general courts. Consequently, the rules created by the administrative judge are rules of appropriateness, designed to impose constraints on the administration within the framework of legality. The judge's oversight, ensuring administrative

acts comply with these rules, consequently becomes a review of appropriateness. (Bonnard, 2010, p. 252)

It is also worth noting that the role of the judge is not confined to the realm of annulment actions alone. This role extends to cases involving compensation claims, where the judge, when assessing the administration's liability, frequently resorts to evaluating appropriateness and exercising judgment accordingly. This explains why not every administrative mistake necessarily leads to liability. On the contrary, liability can be established even in the absence of any clear error attributable to the administration. (Abdel Alim, 2007, p. 84)

This behavior by the judge reflects the central nature of administrative judicial review, illustrating how it can either positively or negatively influence the determination of the administration's goals and the methods it lawfully employs. However, it is important to note that the judge does not impose their review in a rigid, standardized manner. Instead, they tailor their approach based on the facts and circumstances of each specific case, often leaving the administration considerable discretion in many instances. (Jamel Eddin, 1992, p. 314)

3.2.2 The Basis for Reviewing Appropriateness:

The general trend emerging in administrative courts, wherein they exercise their review of appropriateness, marks a significant departure from rigid doctrinal theories or the administration’s own claims. This evolution reflects a more flexible, justice-oriented approach to judicial review, emphasizing fairness in all its forms.

For instance, in the area of administrative regulation, the legislation typically does not prescribe an appropriate measure for each specific situation that the administration faces, nor does it establish a clear standard for determining the most suitable course of action. As a result, the administrative court, in reviewing the administration's actions, contributes to the creation of new legal rules that are added to the body of administrative law.

These rules mandate that any regulatory measure must be necessary, proportional, and commensurate with the facts at hand. Based on this legal principle, which has been shaped by judicial reasoning, the court then reviews the appropriateness of regulatory actions, with appropriateness becoming a legally

regulated matter defined by judicially developed standards. (Abou Al-Ainin, 1999, p. 105)

In cases involving disciplinary decisions, the administrative judiciary has justified its review by pointing to the discrepancy between the severity of the administrative offense and the corresponding penalty. When the penalty appears disproportionate to the offense, the court considers such a decision to be inconsistent with the law's intended objectives for disciplinary action. This leads to the reclassification of the judge's review from the realm of legality to the domain of disproportionality or appropriateness. In such cases, it is incorrect to describe an administrative decision involving a disproportionate penalty as merely unlawful; it should also be seen as inappropriate, thus warranting judicial intervention to restore balance and fairness.

Conclusion:

The significant and bold development in the review conducted by the administrative judge has led to important questions about the true nature of the judge's role. After analyzing the judicial policy and examining the nuances of this issue, it becomes clear that the foundation for judicial review of appropriateness does not lie in equating appropriateness with an element of legality, as some legal scholars suggest.

These scholars claim that appropriateness is the only domain where the administrative judge can intervene. However, the judicial review of appropriateness is better understood as arising from judicial rules created by the judiciary itself, which is a *creative* judiciary, not merely an *applicative* one. The review of discretionary power, and the act of the judge positioning themselves in place of the administration, takes form in the context of administrative appropriateness as determined by the judge.

The rules formulated by the administrative judge are, in essence, rules of appropriateness. Consequently, the administrative judge is not just a guardian of legality, ensuring that the administration's actions conform to legal principles. Rather, the judge serves as a dual figure: both a judge of legality and a judge of

appropriateness. The judge possesses broad powers to innovate and create legal solutions and principles that ultimately serve the interests of justice and the public good.

Recommendations:

Based on the preceding analysis, the following recommendations are proposed:

- It is incorrect to argue that when the judge reviews the appropriateness of measures taken by the administration, they are exceeding their judicial role and encroaching on the administration's powers or the principle of the separation of powers. Such a view is rooted in a misunderstanding of the principle of separation of powers and does not reflect the judicial reality. Therefore, it is important to understand this principle accurately, in line with current judicial practice, rather than relying on outdated or doctrinal perspectives that do not align with modern administrative jurisprudence.
- There must be an acknowledgment of the administrative judge's creative role, which extends beyond the boundaries of merely reviewing legality.

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