The principle of "Proportionality" in French Administrative Law: a Lesson Suggested for Jordanian Law

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Abstract:

This study considers the test of proportionality as one of the levels of examining the reasons given to administrative decisions in French law and the need to adopt the test in Jordanian law as it is applied in French law. The subject of this study is of great importance as it represents a new era of examining the legality of administrative actions. As far as the writer of this study knows, there is no relevant study in English examining this issue in Jordanian or other Arab legal systems, it is therefore an attempt to fill the gap in this area. Issues of this study are examined throw two main sections, the first one examines the traditional approach in examining the reasons given to administrative decisions in French law, whereas the second examine deeply the test of proportionality the need to adopt it in Jordanian law.

Section one

The traditional approach to examine the reasons of administrative decisions in French law

This section gives first a general glance of the French administrative law, and then considers, briefly, the traditional approach to examine the reasons of administrative decisions in French law.

(A)
A General Glance of the French Administrative Law

Issues to be considered under this section are the following: a historical and constitutional background of French law, litigation before the French administrative courts, and grounds for judicial review established in French law.

(1) historical developments of French Administrative Law

French judicial system has a "dual" courts system. Before the Revolution of 1789, the control over the legality of administrative actions was rested in the hands of regular courts which were known as "parliaments". These courts had a long history of interference with royal executive authority, which became inappropriate to the revolutionaries who adopted a strict explanation to the theory of "separation of powers" according to which the regular courts were prevented - in the 1790 law - to examine cases concerning administrative acts(1). The 1790 law provides that judicial functions are distinct and separate from administrative functions. Judges in the civil courts may not concern themselves in any manner whatsoever with the operation of the administration, nor shall they call administrators into account before them in respect to the exercise of their official functions. If governmental bodies act illegally proceedings can only be sought before the administration itself, so that the administration became the judge of its own cases(2).

This situation had been criticized as that the administration would be the litigant and the judge at the same time. In 1799 the French administrative law witnessed a new era when Napoleon created the Council of State in Paris, which was eventually to become all important in the area of the administrative law. At that stage direct access was denied to the Council of State. A plaintiff should take his case to the appropriate ministry, then, on appeal, he or she could go to the Council of State. The Council, as part of the governmental body, was considered

(1) Brown, N and Bell, J, French Administrative Law, (Clarendon Press, 5th ed., 1998), p. 9.
(2) Schwartz, B., French Administrative Law and The Common -Law World, (New York University Press, 1954), p. 6.

to be a legitimate forum for such litigation. Decisions of the Council, on the other hand, should be approved by the president of the State to be enforceable on the ground(3).

In 1889 the Council of State decided -in the "Cado" case - that a plaintiff no longer had to take his case first to the ministries but rather he could go directly to the Council(4). Another important development is this regard was that the Council was authorized, according to the 1872 law, to issue its decisions directly rather than as advisory to the president(5). In the light of the enormous cases presented before it after World War II, the Council of State became - since 1953- basically an appellate body to hear appeals against lower administrative courts, whereas as the "general" jurisdiction of administrative cases was basically vested to these courts. These courts, which are called "administrative tribunals", were created in 1879 to exercise limited local administrative jurisdiction, but since 1953 they have a general jurisdiction concerning administrative law litigation as a result of the over wileming of the Council of State. They are composed of highly trained magistrates who were graduated from the National School of Administration(6).

It is not always easy to decide whether a case is within the jurisdiction of the administrative courts or of the regular courts, therefore, a special tribunal was established to decide the question of jurisdiction, which is called the "Tribunal of Conflicts"(7). In 1987 the Appeal Administrative Court was established for the purpose of examining cases decided by the lower administrative courts, so that the Council of State would have enough time to hear certain types of administrative disputes, in addition to its jurisdiction as an adviser to the Government(8).

(3) Al-Badawi, T., Principles of Administrative Law (Cairo, 1968) p. 63.
(4) Al-Helo, M., Administrative Law Cairo: 1999, pp: 39-42.
(5) Ibid.
(6) Brown, N and Bell, J, French Administrative Law, op. cit., no 1, p. 48.
(7) This tribunal has functioned consistently since 1872 and is composed of three members from the Court of Cassation and three from the Council of State, together with two others and two alternates selected by the original six members. The minister of justice, also a member, presides..
(8) Brown, N and Bell, J, French Administrative Law, op. cit., no 1, p. 52.

(2) Litigations in front of French Administrative Courts

Litigations before the administrative courts in France are divided into the following categories[9]:

(a) Application for annulment: This type of application includes not only an application for annulment of an administrative act or decision, but also an application for review of the decisions of inferior administrative courts or tribunals given in an administrative context.

(b) Application to the "full jurisdiction" of the Court: Such an application is brought by an applicant whose rights are violated by the administrative act in question and besides asking the court to annul the defected administrative act he may claim other relief, such as damages, the recognition of a right in the applicant, or the prevention of an excess of power.

(c) Application for interpretation: In examining the legality of administrative decisions the administrative court will of necessity interpret legal provisions bearing upon the issues in the case before it. A civil court before which the meaning of an act or decision has arisen incidentally in the course of a civil suit may also give an interpretation as to the meaning of the act or decision in question. It is also possible for an interested party to institute proceedings directly for interpretation of an administrative decision in the sense of explaining its legal meaning or implications.

(3) Grounds for Judicial Review in French Law

It has been established in French law that judicial review of an administrative act is possible on the grounds of defects of jurisdiction, form, cause, contents (subject matter) and motive[10].

Incompetence

(9) For more details in this regard see in English Schwartz, B., French Administrative Law and The Common -Law World, op. cit., pp. 109-131, and see in Arabic Al-Helo, M., Administrative Jurisprudenc,e Cairo: 1999, pp: 285-289, Al-Khalayleh, M., . Administrative Law, Dar Ithraa, Amman: 2010, pp: 32-35.

(10) For more details in this regard see in English Brown, N and Bell, J, French Administrative Law, op. cit., no 1, pp. 239-250, and see in Arabic Al-Helo, M., Administrative Jurisprudence op. cit , pp: 379-463.

Incompetence denotes a lack of authority of the administrative organ to take the decision which it has in fact taken. Incompetence may arise because of the territorial area of jurisdiction of the administrative authority concerned. The exercise of jurisdiction may also be limited by law to a certain period of time, so an administrative body may only exercise its power within the limit of such a period, otherwise its decisions would be declared as to be invalid.

Vice de form

This ground of review concerns a breach of procedural or formal requirement. A failure to observe a substantial procedural formality will be enough to lead to avoidance of subsequent proceedings. Irregularities which are of a substantial nature can affect the validity of an administrative process but less serious, immaterial irregularities do not affect such validity. In reaching an administrative decision the administration, though not obliged by law, may prefer to follow a certain procedure. In such a case, it is not necessary that the administration should follow the same procedure in the revocation of the decision. One of the procedural requirements is that an administration has to carry out certain consultations and seek the opinion of certain bodies. The law may further lay down that the opinion received shall be binding on the administration, so a decision that is incompatible with the issues put forward in the process of consultation will be annulled.

Misuse of power

This ground of judicial review denotes the use of power or discretion for a purpose other than that for which the power was given. When there is an allegation of a misuse of power the court would examine the motives of the administration to find out whether it has acted for motives other than in the public interest. A deciding authority may act for a personal purpose for example.

Violation 0f law

In this context the word "law" is understood not simply in its usual meaning of written law, but may be a rule of the constitution, a statute passed by the legislature or ministerial regulation. Non-compliance with a judicial decision is also to be considered as a violation of law.

(B)
Aspects of the "Traditional" Approach to Examine the Reasons of Administrative Decisions

Traditionally the French administrative law has set out with a distinction between questions of legality and questions of merits. The judicial control operates on the former only to check that the power has been exercised within the limits set by the law, but not to enter into the appropriateness of the exercise of a power. It is recognized then that this approach would provide too rigid framework for the effective judicial control over discretionary powers, and therefore the boundaries between the two categories have been re-drawn so that the new grounds of control over discretionary power better ensure that judicially-defined standards of "good administration" are adhered to(11).

It is not the purpose of this study to examine all developments in this area over recent years. Instead, a focus will be made on the judicial review of reasons given for decisions. The basic grounds for the control of reasons given for administrative decisions were established in the years just before the First World War. The long-established areas for the control of reasons offered for decisions were two: error of law and material error of fact(12). The former empowered the Conseil to quash decision where the decision-maker had made an error of law about the scope of the applied powers. Thus, in Abbe Olivier case, powers were granted to forbid all processions relating to religion, but funeral processions were specially regulated. An attempt by a mayor to ban funeral processions by clergy dressed in vestments on the ground that this might upset people's religious sensibilities was held to be unlawful. The power was limited to cases of serious public disorder(13).

This notion of error of law was extended to the categorization of facts(14). So where a Prefect had power to refuse planning permission if a development affected a "vista of monumental quality," when the facts

(11) Shatnawi, A., Administrative Jurisdiction, (Amman: Dar Al-thaqafah, 2004), 894.
(12) John Bell, the expansion of judicial review over discretionary powers in France, PL, 1986, p. 102.
(13) Ibid.
(14) L. Neville Brown and J. Garner, French Administrative law, (3rd ed., 1983) pp. 143-148.

alleged in the dossier about a development in the Place Beauvais in Paris did not come within the proper interpretation of that category, the refusal of planning permission was quashed. The legal conditions for exercising power did not exist(15).

Given the last decision, it was an easy step to decide that the Conseil should verify that the material facts on which the decision was based did in fact exist. Thus, the dismissal of a mayor for causing the cemetery to be locked when a rival came to be buried was quashed where it was shown that these allegations had no foundation and that other allegations were irrelevant to his performance of the job of mayor(16).

A distinguish is drawn between the intensity of review appropriate to different areas. In all areas, the law must be properly interpreted and the facts must be materially exact. However, it is in the area of the application of legal categories to the facts where the difference in intensity is felt. That is to say, the courts will certainly look to see if the power is being applied to a circumstance to which in law it should not be applied, and to see if the grounds for the decision are accurate.

The intensity of examination depends on the nature of the discretion given to the administration and the subject matter of the case. Taking into account the way in which discretion is approached, the judicial control over the reasons on which a decision is established are classified by Auby and Drago to main three categories as itt follows(17):

(1) Minimum Control

The court checks here merely that there has been no error of law and that the facts are materially correct. This level of control does not involve any concern with the question of whether a legal category had been properly applied to the facts. Thus, if an administrative body is bound to issue a hunting licence to any one who satisfies certain conditions required by law, it must then issue the licence to a person who meets these conditions and it has no power to refuse the application on the ground,

(15) C.E. 19-2-1909.

(16) C.E. 14-11-1916 .

(17) See Auby and Drago, Traite de contentieux administratif, Volume, 11, 2nd Ed., Paris 1977, p. 1176. John Bell, the expansion of judicial review over discretionary powers in France, op. cit., p. 104-105, Brown, N and Bell, J, French Administrative Law, op. cit., p. 253-261.

for example, that he or she is a bad shot. The main areas in which this approach was adopted are the following:

General Public Order Measures.

The Conseil was reluctant to become involved in challenging administrative discretion on public order. This covered areas such as immigration, the grant of passports, the permission for foreign journals to enter the country, etc.

Technical Standards.

The legal conditions for the exercise of power may involve the determination of some technical issue, on which the administrative judges have no expertise, and therefore they used to refuse checking whether these conditions have been properly applied or not.

Internal Discipline of the Civil Service.

To prevent a conflict with often political judgments about the appropriate kinds of people in the service, a very limited kind of review has been operated in this area. This approach was reinforced by the purges of office-holders at the Liberation and again in the early 1950s when the victims were Communist sympathizers.

Where Legal Conditions for Exercise of Power are not Determined by the Law.

The legislature may provide a few indications for exercising power and leave it up to the administration to complete the list. Given the obvious preference of the legislator that the administration should determine the appropriate circumstances, the administrative judges have been reluctant to restrict the liberty thus granted. This can be clearly noted in the area of powers over the economy, where the wide discretion and the political sensitivity of the issue made strong control inappropriate. It is also the case in the area of expropriations of property, which were exercised after the Second World War not merely for reconstruction and the building of new towns but also to restructure agricultural lands.

(2) Normal Control

In cases where the conditions for exercising power are fairly specific the judges have long been willing to look carefully to see whether the

facts justifying the decision are sufficient to fit within the legal category. This obviously leaves a margin for judgment, for all that has to appear from the dossier is that there are facts of the kind which would justify the decision in law. As it appears from the case law the Conseil is prepared to say it just does not think that the case has been made out. To the extent that the criterion adopted is general and involves judgment, the idea that the law has laid down the standard in advance is more a matter of degree rather than a clear- cut difference from the powers subjected to minimum control.

(3) Maximum Control

In this level of control, to be further discussed in section three, the court would check not merely whether the requisite legal conditions for the exercise of the power are met, but also whether the measures adopted are appropriate. This occurs in cases of exceptional public order measures where the freedom of the individual is at stake. The leading case in this area is Benjamin, where a notorious right-wing speaker was banned from addressing a public meeting organized by a literary society on a literary theme on the ground that certain left-wing groups had threatened public disorder if he spoke. The Conseil held that the grounds for banning the meeting were insufficient in that it had not been shown that exceptionally serious threats of public disorder were posed and that the only way of dealing with the situation was to ban the meeting. The latter motif relied on by the Conseil introduces clearly the control of "disproportionality" of the administrative action in this area, but this fact was not clearly mentioned in the decision above. From this judgement, it may be inferred that the judge does leave some margin for discretion, but is exceedingly scrupulous about the way in which the facts fit a broad discretionary standard(18).

The appropriate level of intensity of review seems to be a function of the nature of the subject-matter and the degree to which the legislator has determined in advance the conditions under which the power becomes exercisable. The judge seems to be balancing the need for administrative

(18) See M.Long, et Autres, , Les grands arrõts de la jurisprudence administrative. Dalloz, 12e Õdition, Paris, 1999, P.298 .

flexibility, the political sensitivity of the case in question, and the competence of the court against the interference with the liberties of the citizen. Where fundamental liberties are at stake, then even the most general and discretionary power seems to come in to scrutiny. In recent years, administrative judges are more eager to review the way in which legal standards are applied in areas traditionally subject to minimum control, and this had led to some blurring of the distinction between the various levels of judicial review, but there has not emerged a uniform standard for all areas(19).

Section Two
The Principle of Proportionality

This section will respectively examine the following issues: the meaning and implications of proportionality, justification of the proportionality test, fields of the test, and the need to adopt the test of proportionality in Jordanian law as it is applied in French law.

(A)
Meaning and Implications of Proportionality

In cases where the legislature prescribes the condition for exercising power in a very general way and leaving much to be settled by the administration itself, then the courts are in a difficulty as to the kind of control which they can exercise without appearing to exceed on the legitimate area of discretion of the administration. The answer was expressed by Braibant (a Commissaire du Gouvernement) stating that "even when they have power to do what they want, administrative authorities cannot be authorized to do absolutely anything at all."(20) The readiness of the Conseil d'Etat to extend its control over administrative decisions in this area is well illustrated by the development of the doctrine of 'manifest" error and the test of proportionality.

Although its roots go back into earlier case-law(21), the doctrine of manifest error, as will as the test of proportionality, is a development of

(19) Brown, N and Bell, J, French Administrative Law, op. cit., p. 260.
(20) C.E. 13.11.1970.
(21) see for example DENIZET, CE 13 November 1953.

likely the last five decades. In the 1960s the Conseil d'Etat felt the need to intervene in what had hitherto been accepted as undoubtedly the domain of appropriateness for the administration, such as to render this aspect of the decision not open to judicial review: It was felt that the principle that appropriateness was for the administrator and not the judge needed a safety valve to enable justice to be done in extreme cases. That is, although making no mistake in its finding of facts, the Conseil was prepared to quash the decision of the administration if it committed a 'manifest" error in the assessment of those facts. To put it in another way, the decision maker has the right to err, to decide wrongly, but not to make a manifestly wrong decision(22).

Error manifest in this sense is an error committed in the course of an evaluation and it is therefore a part of an intellectual process. The introduction of the concept was intended to extend judicial review beyond an error of law and to the realm of fact. It is very important, therefore, since it allows an extension of judicial review into areas -such as the use of police powers to regulate immigration or censorship- where the courts had exercised only minimum control. The doctrine has now been applied to all the areas of minimum control, thus strengthening it overall. It has been held applicable to general public order measures, internal management and even discipline of the civil service. It has also been applied to technical questions, such as the evaluation of the quality of land in rural reorganization.

The area of economic interventionism - in which the discretion left with the administration is very wide - has also been subjected to such an examination(23). The Maison Genestal is an illustrative example. In the early 1960s French law imposed tax on real property transactions for value, and there was an exemption for property acquired in the course of certain specified operations, including the regrouping of commercial undertakings. To obtain the exemption it was necessary to have the prior assent of the relevant Minister and the Secretary of State for Finance,

(22) Jaber, M., "the Role of the State Council to Review the Manifest Error in evaluating the merits", State Cases Body Journal, Cairo, 1993, p. 69.

(23) John Bell, the expansion of judicial review over discretionary powers in France, op. cit., p. 109. see also: Wong, G., "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality", [2000] PL.

who were themselves bound to consult an administrative body. Maison Genestal were a firm of customs forwarding agents who operated in a number of ports including Le Havre. They were interested in buying an old rice mill in which they proposed to regroup their existing activities. Their application was turned down. The minister of Construction, who had received an unfavorable report by the Conseil de Direction, felt unable to support the application and his view was supported by the Finance Minister, who in communicating his decision to the Maison Genestal, said only that the proposed operation "did not appear to him, in the public interest, to have sufficient economic advantage to justify his agreement the consequences of which would be a substantial reduction in tax.". When the matter came before the Conseil d'Etat which observed that the reasons given by the Minister were formulated in terms too general to allow the court to judge whether the decision under attack was vitiated by a mistake of fact, an error of law, or a manifest error and were accordingly insufficient. Thus, the court was entitled to look at the assessment by the Minister of a concept as indefinitely expressed as "general economic interest", not to substitute its view of this concept but to see whether there was anything inherently wrong in the reasoning adopted by the Minister. Nonetheless, the decision will be examined not only for an error in law but for a manifest error as well(24).

It is worth mentioning in this regard that the error committed by the deciding authority in the course of its evaluation must be so obvious and self-evident one, as the name of the doctrine indicates(25). That is, an administrative judge would abstain from sanctioning administrative errors which do not appear as self-evident from the dossier of the case. This approach can be understood as that the application of doctrine aims to safeguard the principle of discretionary power but to exclude its most shocking aspects. To put it in another way, the discretionary power of the administration remains intact as long as it is used in a reasonable manner(26).

(24) CE 21 June, 1968, Rec. 62 .

(25) Thierry Cathala, Le contrle de la lÕgalitÕ administrative par les tribunaux judiciaire L.G.D.J, Paris, 1966, P.101 .

(26) Brown, N and Bell, J, French Administrative Law, op. cit., p. 263.

The doctrine of manifest error may be linked with the concept of proportionality or "disproportionality", which involves some idea of balance between competing interests or objects and embodies some sense of an appropriate relationship between means and aims(27). It originated in Germany(28) and has then been adopted in many other legal systems, including French law from which the principle was exported to Jordan. Guy Braibant, the originator of the principle in French law, explained proportionality in a simple way, saying that one ought not to shoot a swallow with a cannon or to crush a fly with a sledgehammer(29).

Proportionality may appear in the balancing test, the necessity test and the suitability test. The first formulation requires a balance between the ends sought and the means used. The second one is concerning the case where an objective can be achieved by more than one means, so the least restrictive one should be used. Administrative bodies are required, according to the suitability test, the third formulation, to employ means which are appropriate to the accomplishment of a given law(30).

(B)
Justifications of Proportionality Test

It is argued that the examination of proportionality of administrative decisions may be considered as an interference in the exercise of discretionary powers of the administration. This kind of control may lead to substitute the evaluations of administrative judges for those of the executive. The test of proportionality has however been justified on several grounds(31).

(27) See in English Craig, P. Administrative Law (Sweet & Maxwell, 4 rd Ed. 1999), p. 591, Thomas, P., "The Reformation of English Administrative Law", LSE Law, Society and Economy Working Paper, 2007, London School of Economic and Political Science- Law Department, p.3. See in Arabic Al Tabtabai, A., "Judicial Control of Proportionality Between Disciplinary Penalties and Offences Committed by Civil Servants" [1982] Kuwait, The University of Kuwait, Law Journal, p. 77.

(28) Lord Hoffmann, 'The Influence of the European Principle of Proportionality upon UK Law', The Principle of Proportionality in the Laws of Europe (Ellis ed., 1999) 85, p. 107.

(29) Jowell and Lester, "Proportionality: Neither novel nor dangerous", New directions in Judicial Review (Jowell and Oliver ed., 1988), p. 54.

(30) John Bell, the expansion of judicial review over discretionary powers in France, op. cit., p. 113.

(31) See in English Brown, N and Bell, J, French Administrative Law, op. cit., p. 263-267, Iddo, P., "Proportionality and the culture of Justification", American Journal of Comparative Law, 2010, p. 13. See in Arabic Jaber, M., "the Judicial Developments concerning the review of Proportionality between Offence and Penalty" , State Cases Body Journal, Cairo, 1991, p. 72.

First, in deciding that an administrative action is disproportionate the administrative courts do not suggest any other measure to be adopted by the deciding authority instead of the one that held to be disproportionate. Instead, the matter is always sent back to the deciding authority itself to select an appropriate measure.

Second, the test of proportionality can be classified in some cases under the head of error of law as that a disproportionate administrative decision would violate a new general principle of law, that is, the principle of proportionality. It can be classified in some other cases under the head of error of facts. It may happen that facts are given an incorrect weight (over or under estimated), such as the case where the administration regards a mistake in the construction of a building as very dangerous for the safety of the public while in reality the mistake is trivial. Here proportionality serves as an instrument of ensuring that the administration gathers and evaluates correctly the facts on which an administrative decision is based.

Third, only a manifest, flagrant disproportionality between means and aims will result in a judicial intervention. It can, therefore, be concluded that when there is just a lack of reasonable proportion between means and aims judge will not intervene.

Fourth , the test of proportionality is justified as on the ground that it would protect the rights and freedoms of people, which is the main aim of the French Constitution. This can be illustrated by contrasting two decisions of the Conseil d' Etat one of them in 1964(32) and the other in 1974(33). The facts of both cases are almost identical: An administrative declaration of utilite publique for the expropriation of private property for the construction of an airport of about 1000 inhabitants. In 1964, the abstract notion of utilite publique led the Conseil to find for the legality of the project, whereas in 1974 the application of proportionality test led the same court to quash the project. The test of proportionality also safeguards all the potential interests of those citizens whose conditions of life may be affected by an expropriation. Before the incorporation of proportionality into French public law, it was enough for the

(32) CE 23 May 1964
(33) CE 26 October 1974

administration simply to submit that the contemplated expropriation would serve a purpose which could be classified as being of utilite publique. Thus it is quite clear that the introduction of the concept of proportionality has restored the traditional role of the judge as a guardian of legality and patron of civil liberties.

(C)
Fields of Proportionality Test

The test of proportionality has been applied in many areas in French law, which is a lesson that the Jordanian law may learn from this study. The most notable area of proportionality has been in the area where civil servants are disciplined. Traditionally, judicial control was confined to examine the correctness of the facts alleged against a plaintiff civil servant and whether they falling within the category of disciplinary offences. The administrative court did not examine whether the penalty fitted the crime as that this was the job of the administration itself.

This approach has changed and it became within the power of the administrative court to examine the extent to which the imposed penalty is appropriate to the offence committed by a civil servant. In other words, the decision to impose a disciplinary action can be analyzed into two successive stages, and each stage constituting a decision per se. The first is the decision to penalize a mistaken civil servant, whereas the second is the decision on the choice of the appropriate sanction. The second stage concerns the balance between the fault and the penalty to be imposed under the circumstances(34). The following are two illustrative examples.

In VINOLAY case the director of a local agricultural committee sought proceedings against the administrative decision to dismiss him for his delay in replying to an inquiry from the Ministry of Finance. The Conseil was of the view that the delay was an illegal practice, but quashed the decision to dismiss on the ground that the penalty was disproportionate(35). In BERNETTE case the Conseil came to the same conclusion. Here, the fault alleged against Bernette was considered not sufficiently

(34) Al-Helo, M., Administrative Jurisprudence op. cit., pp: 454-456.
(35) CE 26 July 1978

grave to justify the decision of the Minister of Agriculture to dismiss him from office, and therefore was held to an illegal administrative decision(36).

The test of proportionality has also been applied in the area of fundamental rights to safeguard liberties and control municipal police powers. There has to be a reasonable proportion between the means employed by the administration and its desired ends. French administrative courts examine not only whether certain decision is necessary but in accordance with the public interest as well. Liberties should not be restricted more than is absolutely necessary for the protection of public interest. This was the case when the Conseil d' Etat held that a mayor, by forbidding the holding of a lecture, had gone further in interfering with the right of assembly, than required by the need to maintain law and order; the court concluded that the risk of disturbances was not so acute so that it could not be averted by less drastic measures(37).

The test of proportionality has also been applied in regards with emergency situations. French law allows derogations from the ordinary laws in cases of exceptional circumstances but only if these derogations are indispensable to deal with the situation. The Conseil d' Etat, therefore, in the famous "Affaire Canal" quashed a death penalty imposed by a military court, since the derogation from common standards of judicial procedure was not indispensable to achieve the independence of Algeria(38).

Proportionality has also been applied to cases involving questions of urban planning and land development. The judge examines here whether the encroachments on private property, financial implications and social inconvenience resulting from an administrative measure or project are excessive or not with regard to the public interest. This view was so obvious in VILLE NOUVELLE EST DE LILLE case(39). The facts of the case were as follows. New faculties of law and arts for the University of Lille were to be built on the outskirts of that city. As experience had

(36) CE 5 May 1976.
(37) CE 19 May 1933.
(38) CE 19 October 1962.
(39) CE 28 May 1971

shown the undesirability of segregating students from the rest of the population, it was proposed to build a whole new town adjoining the faculties in order to form a single residential and academic complex. To acquire the extensive site (involving the demolition of some hundred houses), the usual procedures of compulsory purchase were set in train. The consequent public inquiry provoked a storm of protest led by a 'Defence Association' of threatened property owners and residents. The Association challenged the subsequent declaration of the minister that the acquisition was in the public interest.

This challenge was upheld by the Tribunal Administratif of Lille on account of certain procedural irregularities, and the declaration was quashed. The minister appealed to the Conseil d'Etat, which found that there had been no irregularity in the procedure leading to the declaration. The Conseil extended its previous case-law so as to examine whether the minister's decision was warranted by the evidence before him, holding that "an operation cannot be legally declared d'utilite publique unless the inference with private property, the financial cost, and, where it arises, the attendant inconvenience to the public is not excessive having regard to the benefits of the operation".

(D)
The Need to Adopt the Test of Proportionality in Jordanian Law

According to the 1952 Constitution and its latest amendments in 2011 the courts in Jordan are three types: the Regular courts, the Religious Courts and the Special Courts(40). Section 100 of the Constitution provides for the establishment of the "High Court of Justice", which has the power to review the legality of actions and decisions made by administrative bodies and agencies according to the High Court of Justice Act 1992 .

The 1992 Act provides - in Section 10 - that proceedings against administrative actions must be based on one of the following grounds of review: incompetence, statutory infringement, failing to observe

(40) See Al- Kaswani, S., Principles of Constitutional law with a particular analysis of Jordanian Constitutional System, (Amman, Al-Kaswani Press, 1983) Section 4; Al - Gazwi, M., The Political and Constitutional System in the Hashmiate Kingdom of Jordan, (Amman, Dar Al-Thaqafah, 1996) pp. 65-69.

procedural requirements, and misuse of power. The High Court of Justice may examine under the "misuse of power" grounds of judicial review whether a 'manifest error' has been committed in appreciating the relevant facts(41).

Although the principle of proportionality is adopted in Jordanian law in general, the case law of the High Court of Justice shows that the it is still operating within a very narrow area in comparison with the French administrative law.

The main field in which the principle of proportionality is applied is basically concerning cases where civil servants, students and members associations are disciplined. In many occasions the High Court of Justice was of the view that there must be a balance between penalties imposed and offences committed. Case (201\2004) is an illustrative example. In this case the Council of the Jordanian Bar Association decided to prevent a lawyer from practicing his profession for three years as a penalty for his offence. According to the facts of the case the applicant (the lawyer) was found guilty on the ground that he deceived his client by asking him to sign some papers one of them includes assignment of a case still hearing before the judiciary.

When the case came before the High Court of Justice it was argued on behalf of the applicant that the Council of the Jordanian Bar Association had 'exaggerated' in preventing the applicant from practicing his profession for three years. It was submitted that this behaviour is punishable, but the penalty was manifestly disproportionate. The High Court concluded that the decision under attack was illegal as that there was no balance between the offence committed and the penalty imposed on the applicant(42).

Comparatively speaking, the Jordanian law adopts, to a large extent, the "traditional" approach in examining the reasons given for administrative decisions, but it is still hesitate to adopt the "new" trend in this regard. The High Court of Justice may examine whether a

(41) See Al- Gwairey, A., Administrative Jurisdiction in Jordan, (Amman: Dar Al-thaqafah, 1989), 427; Kan'an, N., Administrative Jurisdiction in Jordan, (Amman: Dar Al-alafaq, 2012, p. 307.

(42) For a similar position see Case 85\79 LAJ , 28, 608, Case 511/98 L.A.J, 48, 114, Case 329\96 L.A.J, 45, 4330.

discretionary decision was based on existing and sound factual basis, but the examination of whether a deciding authority had committed a 'manifest error' in appreciating the relevant facts or came to a disproportionate conclusion still operates in a very limited area concerning basically, as stated above, cases where civil servants are disciplined.

The discussion shows that the test of proportionality has been applied in many areas in French law, which is a lesson that the Jordanian law may learn from this study. The test of proportionality has been applied in the area where civil servants are disciplined. It is also adopted in the area of fundamental rights to safeguard liberties and freedoms of people. According to the French case law, there has to be a reasonable proportion between the means employed by the administration to keep the public order and the necessity to protect and not infringe rights and freedoms of people.

The case law of the High Court in Jordan has no direct reference to the test of proportionality in the area concerning the rights and freedoms of people as it is the case in French law. An explicit reference to the test of proportionality is required in this area if the High Court of Justice would be a guardian for the rights and freedoms of Jordanians. It is not enough to talk about the rights and freedoms of people in national and international occasions. There must be a group of guarantees through which these rights and freedoms are protected in reality, notable among them the rule of the High Court of Justice in examining the legality of administrative actions concerning the rights and freedoms of people.

The test of proportionality is adopted in French law in other fields out of discipline and safeguarding the liberties and freedoms of people. As the discussion shows, it has been applied in emergency situations, and in cases involving questions of urban planning and land development. The study would argue for extending the areas in which the test of proportionality is applied in Jordanian law as it is the case in French law, which is the main lesson to be taken from the comparison of this study.

Conclusion

This study examines the test of proportionality in French administrative law. It contains two main sections, the first one examines the traditional French law approach in examining the reasons of administrative decisions, whereas the second considers deeply the test of proportionality and the need to adopt it in Jordanian administrative law. The study shoes that although the High Court of Justice in Jordan may examine whether a decision was based on existing and sound factual basis, it still adopts the test of proportionality, the "high" level of examining the reasons of administrative decisions, in a very narrow area, mainly where civil servants are disproportionality disciplined. A useful lesson can be taken here from the French law where the test of proportionality is adopted in many other areas, including cases concerning the infringement of liberties and freedoms of people.

Bibliography

Books and thesis:

- Al-Badawi, T., Principles of Administrative Law (Cairo, 1968)
- Al - Gazwi, M., The Political and Constitutional System in the Hashmiate Kingdom of Jordan, (Amman, Dar Al-Thaqafah, 1996)
- Al- Gwairey, A., Administrative Jurisdiction in Jordan, (Amman: Dar Al-thaqafah, 1989)
- Al- Kaswani, S., Principles of Constitutional law with a particular analysis of Jordanian Constitutional System, (Amman, Al-Kaswani Press, 1983)
- Al-Khalayleh, M., . Administrative Law, (Dar Ithraa, Amman: 2010)
- Al-Helo, M., Administrative Law Cairo: 1999
- Al-Helo, M., Administrative Jurisprudenc,e Cairo: 1999
- Auby and Drago, Traite de contentieux administratif, Volume, 11, 2nd Ed., Paris 1977
- Brown, N and Bell, J, French Administrative Law, (Clarendon Press, 5th ed., 1998)
- Craig, P. Administrative Law (Sweet & Maxwell, 4 rd Ed. 1999)

- Jowell and Lester, "Proportionality: Neither novel nor dangerous", New directions in Judicial Review (Jowell and Oliver ed., 1988)
- Kan'an, N., Administrative Jurisdiction in Jordan, (Amman: Dar Alafaq, 2012)
- Neville Brown and J. Garner, French Administrative law, (3rd ed., 1983)
- Lord Hoffmann, 'The Influence of the European Principle of Proportionality upon UK Law', The Principle of Proportionality in the Laws of Europe (Ellis ed., 1999)
- M.Long, et Autres, , Les grands arrõts de la jurisprudence administrative. Dalloz, 12e Õdition, Paris, 1999.
- Schwartz, B., French Administrative Law and The Common -Law World, (New York University Press, 1954)
- Shatnawi, A., Administrative Jurisdiction, (Amman: Dar Al-thaqafah, 2004)

Articles:

- Al - Tabtabai, A., "Judicial Control of Proportionality Between Disciplinary Penalties and Offences Committed by Civil Servants" [1982] Kuwait, The University of Kuwait, Law Journal.
- Iddo, P., "Proportionality and the culture of Justification", American Journal of Comparative Law, 2010
- Jaber, M., "Judicial Developments concerning the review of Proportionality between Offence and Penalty" , State Cases Body Journal, Cairo, 1991.
- Jaber, M., "the Role of the State Council to Review the Manifest Error in evaluating the merits", State Cases Body Journal, Cairo, 1993
- John Bell, "The expansion of judicial review over discretionary powers in France", PL, 1986.
- Thomas, P., "The Reformation of English Administrative Law", LSE Law, Society and Economy Working Paper, 2007, London School of Economic and Political Science- Law Department.
- Thierry Cathala, Le contrle de la lÕgalitÕ administrative par les tribunaux judiciaire L.G.D.J, Paris, 1966.

- Wong, G., "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality", [2000] PL.