

Legislative Proportionality in Disciplinary Penalties

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ABSTRACT: Legislative policy has its particularity in disciplinary penalties, especially regarding the proportionality of punishment to the violation. While it is generally the legislator's responsibility to ensure proportionality, the negative consequences resulting from this have pushed disciplinary legislation to adopt another approach to compensate for the deficiency in proportionality. This can be done directly by specifying a particular penalty for certain violations in some laws or by restricting the authority to impose penalties through exclusionary penalties. It can also be done indirectly by employing principles and tools such as the use of graduated penalties to express proportionality, imposing the punishment by analogy, or relying on judicial oversight.

Keywords: Legislative Policy, Disciplinary Penalties, Punishment by Analogy

Introduction

The legislator seeks to adapt the principle of legality as much as possible to achieve the goal of promoting security and tranquillity by avoiding surprises. One of the requirements for implementing an effective legislative policy in the disciplinary field is continuous adaptation to the developments that affect the professional domain. This ensures that the legislator's preventive policy does not harm employees' interests, while providing them with guarantees and reassurance against administrative arbitrariness. Legislative proportionality is understood as a balancing process performed by the legislator when enacting a penalty. This balancing process takes into account the expected severity of the violation and the impact of the prescribed punishment, within the limits of the purpose of the penalty and the rights and freedoms defined by the constitution without excess or omission. Proportionality differs from appropriateness and authority, as appropriateness is more comprehensive than proportionality. It is not necessary for the legal text containing the penalty to include proportional elements. It may be proportional in terms of cause and place, but it is not appropriate because the legislator did not choose the appropriate time for intervention. Every appropriate penalty assumes proportionality, but not every proportional penalty necessitates appropriateness. In other words, appropriateness encompasses proportionality. In order for a penalty to be appropriate, it must also be proportional. Proportionality is one of the most important elements of appropriateness, along with assessing the necessity of intervention and choosing the timing of

intervention. Thus, appropriateness includes proportionality, and the latter is a part of it.

The Relevance of the Research

The principle of achieving proportionality assumes that it is entrusted to the legislative authority; the legislative authority is the one responsible for establishing the link between penalties and violations in the disciplinary aspect, in order to strike a balance between the wrongdoing and the resulting punishment. The legislator's concern for the necessity of proportionality between the penalty and the severity of the violation stems from the need for the punishment to be satisfactory and just in the public perception.

Research Hypothesis

The nature of legality in disciplinary penalties imposes on the disciplinary legislator the obligation to delegate the authority to impose the penalty by ensuring proportionality between the penalty and the violation. However, the legislator has imposed certain principles such as gradation, the necessity of imposing the penalty, and activating judicial oversight in order to compensate for this legislative oversight.

Research Problem

The research problem revolves around several axes:

What are the means used by the legislator to compensate for the lack of legislative proportionality between the penalty and the violation?

To what extent are these means effective in achieving proportionality between the penalty and the violation?

Are there other means of achieving legislative proportionality?

Research Methodology and Structure

The study relies on a comparative analytical methodology, including a comparison of Iraqi, Egyptian and French legislation. It also adopts a critical approach, drawing on the opinions of scholars and the judgments of the judiciary, with the aim of evaluating the legislator's policy towards the legality of disciplinary penalties.

The research topic is divided into two sections. First, the thesis examines the direct legislative intention regarding proportionality, and second, the indirect legislative intention regarding proportionality.

The First Issue: Direct Legislative Intent in Proportionality

If proportionality is primarily the responsibility of the legislative authority and if this principle finds full application in the field of criminal penalties, its application diminishes in the field of disciplinary penalties. In disciplinary matters, the legislator relinquishes his authority to impose proportionality to the executive or judicial authorities, which are responsible for balancing the severity of the violation with the type and degree of the imposed penalty, according to the circumstances of each case under investigation.

This research is enriched by a comparative perspective, and presents the position of relevant legislative systems as follows:

First Branch : Legislative Proportionality in France

Constitutions and international agreements explicitly include the principle of proportionality. Article 8 of France's Declaration of Human Rights (1879) stipulates the necessity "that the law should provide only necessary and proportional penalties in line with the severity of the offense and the interests infringed upon." This provision obliges the legislator to consider proportionality between the seriousness of the unlawful behaviour and the resulting punishment.

The French Constitutional Council has decided to consider legal texts in violation of the Constitution based on the lack of proportionality between the punishment and the committed offence. However, the French legislator did not specify a specific punishment for each violation itself, which grants the administration the authority to determine the proportional punishment based on the nature of each case and its circumstances.

Second Branch : Legislative Proportionality in Egypt

In Egypt, the legislative system adopts a similar approach to the French legislator, as there is no direct link between the violation and the disciplinary penalty. Nevertheless, the constitution prohibits restricting freedom except to preserve human dignity. Article 80 of Law No. 48 of 1978, which regulates the rights of civil servants, obliges the imposition of a penalty commensurate with the employee's position and the circumstances of the committed violation.

Third Branch : Proportionality in Iraqi Legislation

The position of the Iraqi legislator does not differ from French and Egyptian legislation. The current constitution implicitly refers to this principle by stating that no restriction can be imposed on exercising any of the rights and freedoms enshrined in the constitution except by law. However, such restrictions should not substantially infringe upon the essence of the right or freedom. Thus, proportionality is considered one of the constitutional principles that limit the policy of the legislator when enacting laws.

Although the Iraqi legislator did not specify a specific punishment for each specific violation in the Discipline of State Employees Law, it limits the discretionary power of the administration within the maximum boundaries, in line with the principle of proportionality. The legislator recognized the seriousness of these penalties on the rights of employees and their families and retained its inherent jurisdiction in determining proportionality, rather than leaving it to the administration, which may abuse this authority.

In conclusion, through the above analysis, we can observe that comparative and Iraqi legislation considers proportionality a constitutional principle that the legislator cannot exceed, as it is subject to constitutional review. The above-mentioned legislations have delegated the process of proportionality to the authority that imposes the penalty. The Iraqi legislator has specifically restricted the authority of the administration in conducting proportionality assessments regarding penalties that result in the termination of employment relationships.

The Second Issue: Indirect Legislative Intent in Proportionality

This section explores the indirect legislative policy of proportionality. We find that the legislator applies the principle of proportionality by gradation in disciplinary penalties, guiding the authority imposing the punishment to implicitly choose a penalty that corresponds to the violation. It serves as a substitute for legitimacy in the disciplinary field. If the authority imposing the punishment exceeds the discretionary power granted to it for proportionality, the legislator's control function comes into play.

The First Branch: Gradation as an Indirect Basis for Legislative Proportionality

If the principle in administrative decisions is not to adhere to causation, the disciplinary legislator has seen fit to stipulate the necessity of causation in disciplinary penalty decisions as a formal and substantive condition. Failure to meet this requirement leads to the nullification of the penalty. The reason for this is that disciplinary decisions have a judicial nature, and the default assumption is that they should be causative unless the law states otherwise.

If the constitutional legislator did not require the ordinary legislator to specify the causes of its legislative outputs due to the flexibility inherent in legislation, this does not mean the absence of constitutional oversight. Rather, this oversight focuses on the legislative suitability in choosing solutions by the legislator, without focusing on the social reasons for legislation. Therefore, constitutional oversight of legislative proportionality involves the legislator's choice of solutions. It can be either a lack of proportionality or deviation when these solutions conflict with constitutional principles or texts. To determine the legislator's intention and the spirit of the legislation, if this is not explicitly mentioned, one should be guided by the preparatory works and the surrounding circumstances.

If the legislator did not oblige the imposing authority to state specific reasons, it does not mean absolute freedom in this regard. Rather, it requires the authority to mention the reasons that justify the imposition of the penalty and achieve its purpose. Although the legislator grants the imposing authority broad discretionary power in determining the justifiable reasons for imposing the penalty, it has defined a specific purpose for the causation of the penalty, which is to achieve its objective. This is what is meant by the principle of specifying goals. In this sense, the judgment of the Supreme Administrative Court in Egypt stated, 'Although the administration has discretionary power in disciplinary punishment within the limits of the legal threshold, it is necessary for this discretion to be based on the complete existence of the cause.'

Furthermore, there is another requirement arising from the necessity of causation in disciplinary decisions, which is that the cause must be sufficient for imposing the penalty and proportional to it. In this regard, when the judiciary exercises its oversight over disciplinary penalties, there is an apparent aspect that includes the cause of the penalty (violation) and its place (the penalty) as a result of the legislator's restriction of the administration's authority in these aspects. The administration cannot impose a penalty in the absence of a violation. In addition to this apparent aspect, there is a vague aspect, which is the validity of assessing the penalty in relation to the violation. In such cases, the penalty must be graduated and proportional to the violation. Thus, causation is the guiding light for the judiciary in its oversight of the vague aspect in the disciplinary decision, represented by proportionality.

If the disciplinary decision imposes restrictions on rights and freedoms, judicial oversight is not limited to the cause of administrative intervention. It goes beyond that to include whether the procedures taken are proportionate to those reasons approved by the legislator for their intervention.

Hence, the relationship between the cause of the penalty and its objective becomes evident. While the theoretical perspective suggests that each of them is independent of the other, as they are pillars of the decision, with the cause being the actual or legal situation (violation) and the necessary premise for making the penalty decision, the objective, however, is a more personal element as it represents the point of arrival and the final stage of the decision. Yet, in practical terms, they converge to the extent of integration by the jurist under one term called 'motivating causes.' Although some deny this connection, acknowledging the close relationship between them, the separation between them is very

narrow. Committing a violation by the employee is the cause of the disciplinary decision, while its objective is always to maintain the proper functioning of public facilities.

Based on this premise, the French legislator has been committed in successive employment laws to mention the cause for disciplinary action. Initially, it was limited to specific penalties or specific categories of employees. However, the current effective Civil Service Law No. 1574, issued on November 24, 2021, obliges disciplinary boards to specify the cause for the disciplinary penalties they issue, stating that "the opinion of this body must be the cause for the decision to impose the disciplinary punishment."

Egyptian legislator have been keen in all successive employment laws to oblige the authority imposing the punishment to specify the cause for the disciplinary action, regardless of whether it is a presidential authority or disciplinary courts. This is evident in the current Employment Law (the decision issued must feature the punishment's cause), and is emphasized in its executive regulations, which state that "the employee must be informed in writing of the signed punishment decision and its reasons."

In Iraq, the legislator has mandated in the effective Law of Discipline for State Employees that the authority imposing the punishment should specify the cause for its decision to impose the dismissal penalty. The same applies to the isolation penalty. The investigative committee has also been obliged to specify the cause for its decision.

The Second Branch: Judicial Oversight and its Role in Enforcing Proportionality

To clarify the role of oversight in enforcing proportionality, it is necessary to distinguish between constitutional oversight exercised by constitutional courts over legislative proportionality and administrative courts' oversight over disciplinary decisions. This is due to the difference in the scope of each type of oversight in terms of its basis, effectiveness, and subject matter. The following points can be made:

First: The role of constitutional oversight in enforcing legislative proportionality.

The discretionary power enjoyed by the legislator is not absolute as it is limited by the constitution and its boundaries, which require the consideration of proportionality in any type of penalties imposed. Constitutional oversight in cases where the constitutional rule is specified and clear is a matter of constitutionality and cannot be considered as oversight of proportionality. The latter only arises when the legislator enjoys a certain degree of freedom. The extent of constitutional oversight exercised by constitutional courts over legislative proportionality may differ from Iraqi legislation in the comparative cases.

1. The position of the French Constitutional Council on oversight of legislative proportionality:

The French Constitutional Council considers proportionality to be a constitutional principle established in the Declaration of the Rights of Man and of the Citizen of 1789. It states that necessity requires proportionality, and there can be no necessity without proportionality. The French Constitutional Council relies on the theory of manifest error (the obvious error) in its oversight of legislative proportionality. One of its applications is the ruling of unconstitutionality of a tax fine for concealing income when the fine is disproportionately related to the hidden income. This penalty often lacks apparent proportionality to the act committed. The French Constitutional Council also relies on the principle of proportionality in the field of time in legislation. For example, its decision on July 20, 1993, declared the unconstitutionality of legislation that deported foreigners outside the country if they did not acquire French nationality due to the apparent disproportionality of this measure. Thus, the theory

of manifest error is used by the French Constitutional Council as a basis for ruling legislation unconstitutional due to lack of proportionality.

2. The position of the Supreme Constitutional Court in Egypt regarding legislative proportionality:

The Supreme Constitutional Court in Egypt considers proportionality as a constitutional principle and a limitation on the legislative authority to enact penalties proportionate to the prohibited acts. In one of its judgments, the Court stated that "the principle of proportionality in criminal, civil, disciplinary, or financial penalties is that they should be proportional to the acts prohibited by the law and graduated according to their seriousness. Excessive or exaggerated penalties are not permissible."

The judiciary of the Supreme Constitutional Court also emphasized the necessity of proportionality between the punishment and the justified violation in the legislative field, stating that "human rights, dignity, and the integral personality fall under a category of rights related to personal freedom, guaranteed by the Constitution in Article 41. It considers them among the natural rights that should not be violated. Among these rights is that the punishment imposed by the state in its legislation should not be inherently demeaning or excessively harsh." The disciplinary punishment should not be excessively severe to the extent that it does not correspond to the violation.

The Supreme Constitutional Court revealed its position when it criticized the legislature for determining a single penalty without considering the circumstances that may require a graduated (differentiated) punishment, whether mitigating or aggravating. The legislature should not have the authority to impose only one prescribed penalty without providing the discretion to choose different and graduated penalties in terms of type and severity, based on the circumstances that warrant mitigation or aggravation. In such cases, the legislature is blamed for excessive punishment in the disciplinary field.

From the above, we can see that the Egyptian Supreme Constitutional Court has taken upon itself the task of reviewing the legitimacy, necessity, and proportionality of the burdens or restrictions imposed by values upon which the constitutional system is built.

3. The position of the Federal Supreme Court in Iraq regarding legislative proportionality:

By examining the rulings of the Federal Supreme Court, it becomes apparent that the Court has not issued judgments that include its review of legislative proportionality in the field of disciplinary penalties, despite the activation of the Court of Employees' Judiciary in reviewing proportionality before the French Council of State and the Supreme Administrative Court in Egypt, as will be explained.

Therefore, there is a need to extend the jurisdiction of the Federal Supreme Court to review legislative proportionality in disciplinary penalties. This judicial oversight represents protection against the deviation of the legislature in its discretionary authority, which involves weighing various alternatives according to its own judgment to regulate a specific matter. It is broader and more comprehensive than the authority possessed by the administration to choose a penalty from a list of penalties, especially since the constitutional restrictions granted to the legislature are considered broad enough to allow it to choose from several solutions. Thus, the need for constitutional oversight over legislative policy in the proportionality of disciplinary penalties is even greater than the need for administrative courts to review proportionality in decisions of imposing penalties issued by administrative authorities. The former can require the legislature to establish a new penalty that does not exist in the list of penalties, while the latter is limited to reducing the penalty to an existing penalty on the list without the ability to deviate from it.

Despite the Federal Supreme Court's negative stance towards the principle of proportionality, the Federal Cassation Court considered proportionality as a legal principle. Based on this opinion, it has been argued that the concept of proportionality lies in the fact that the philosophy of the constitution is based on limiting the boundaries of the legislative authority in its decisions regarding penalties through its actions that guarantee rights and freedoms and fulfil the requirements of democracy. It is based on balancing constitutional thought and social thought, upon which its authority to issue punishment relies.

Secondly, the role of administrative court supervision in implementing the principle of proportionality differs between comparative systems and Iraq:

1. Administrative court supervision of proportionality in France:

The supervision of administrative courts over proportionality in France went through two stages. In the first stage, prior to 1978, the Council of State refrained from supervising proportionality and limited its oversight to the material existence of the facts and the legal adaptation of those facts. At this stage, the Council of State's oversight was limited to the administration's application of a legal provision to a specific incident and its verification of the description of the incident to impose the prescribed penalty. The Council ruled in the case of "Berges" that "the petitioner does not challenge the authority's decision; he merely argues that the measure taken against him is too severe considering the seriousness of the penalty. However, assessing the disciplinary penalty is not a subject of discussion." Thus, this stage limited the Council's oversight to the apparent error in assessing the circumstances and the facts.

The second stage involved expanding the Council of State's oversight to the apparent error in the proportionality of the penalty to the offense committed by the employee. This introduced the second type of oversight, known as oversight of the apparent error, which became clear in the ruling of the administrative judge on June 9, in the case of "Lebon" in 1978. Thus, the theory of the apparent error was established, with the agreement of the disciplinary decision with its cause, which is the oversight of the apparent disproportion between the disciplinary penalty and the committed violation as a reason for imposing this penalty.

2. Administrative court supervision of proportionality in Egypt:

Although the Supreme Administrative Court in Egypt preceded its French counterpart (the Council of State) in establishing its oversight over proportionality, it went through four stages.

The first stage dates back to the establishment of the Administrative Judiciary and lasted until 1951. This stage was characterized by the Court's lack of review of proportionality in disciplinary penalties. Instead, it left the assessment of proportionality to the disciplinary boards, and its rulings stated: "It is not the court's role to assess the severity of the disciplinary penalty... or the proportionality of the penalty to the subject of the discipline, as this falls within the jurisdiction of the disciplinary boards." However, this stage excluded judgments related to religious leaders, mayors, and students, as the policy of the Administrative Court enforced its oversight over these groups due to their importance in society. Its rulings emphasized the need to measure the penalty based on proven guilt.

The second stage witnessed the Administrative Judiciary's abdication of its oversight over proportionality without any exceptions. This trend prevailed in its rulings from 1955 to 1961, leaving the disciplinary authorities to determine the proportionality between the subject and the cause.

The third stage involved the establishment of the Supreme Administrative Court in 1955 alongside the Administrative Judiciary. Some argue that the policy of the Administrative Judiciary dominated in the field of proportionality in disciplinary decisions, while others believe that the Supreme Administrative Court extended its oversight over the proportionality between the penalty and the committed violation.

The fourth stage was represented by the ruling of the Supreme Administrative Court on November 11, 1961. This stage was characterized by extending the Court's supervision over the proportionality between the penalty and the violation, in addition to the existence of material facts. It was not limited to specific categories as it was under the policy of the Administrative Judiciary. Instead, it made it a general principle that applies regardless of the individual against whom the disciplinary penalty is imposed. The ruling stated: "Although the disciplinary authorities, including disciplinary courts, have the authority to assess administrative guilt and determine the appropriate penalty without being bound by it, the legitimacy of these authorities is subject, like any other discretionary authority, to the avoidance of excesses. One form of such excesses is the apparent lack of correspondence between the severity of the administrative offense and the type and amount of the penalty. In this case, the results of the apparent lack of correspondence conflict with the objective that the law aims to achieve through discipline." We argue that this ruling laid the foundations for the beginning of the theory of excessiveness in Egypt.

2. Administrative Judicial Control over Proportionality in Iraq:

The position of the Iraqi administrative judiciary regarding proportionality control has distinguished itself from its counterparts in Egypt and France. While it appeared relatively late and gradually in the latter two countries, the Iraqi legislature was keen to establish the proper foundations for effective control by establishing the General Discipline Board since the first decade of the formation of the Iraqi state. This reflects the maturity and foresight of the Iraqi legislature in establishing the foundations of proportionality in disciplinary decisions.

The General Discipline Board was granted the authority to review appeals against disciplinary sanctions, whether submitted by the minister or the employee. The Board has the power to increase or reduce the punishment or replace it with a more or less severe one. The policy of the Iraqi legislature regarding the jurisdiction granted to the Board in overseeing the proportionality of disciplinary sanctions with their causes remains consistent. The General Discipline Board and subsequently the Administrative Court of Employees have relied on the theory of excessiveness in their control over proportionality in disciplinary sanctions. In one of its decisions, the Board stated, "The objector violated the instructions and did not adhere to official working hours. Upon considering the punishment, it was found to be severe and disproportionate to the violation, indicating excessive estimation of the punishment."

Under the effective Law of State Employees' Discipline, the Administrative Court of Employees exercises control over proportionality and has the authority to approve or revoke a decision to reduce or cancel the punishment. The legislative policy in this regard is based on the well-known principle in criminal law that the appellant is not harmed by lodging an appeal. One recent judgment in the oversight of the Administrative Court of Employees resulted in the cancellation of a reprimand imposed on an employee for not providing accurate information about their political affiliation. The court deemed the punishment to be severe and lacking sufficient justification, thus deciding to cancel it. After the administration appealed the decision, the Supreme Administrative Court affirmed the jurisdiction of the administrative judge in exercising control over the proportionality between the

punishment and the violation, including the power to reduce the punishment if the administration had exceeded reasonable limits.

Based on the above, it is evident that the policy of the Iraqi legislature in granting administrative courts the authority to oversee proportionality, which has been legislatively established since the establishment of the General Discipline Board in 1929, differs from the gradual and judicially based oversight of proportionality by administrative courts in France and Egypt. However, the constitutional judiciary in Iraq, represented by the Federal Supreme Court, has overlooked the oversight of proportionality as if it has accepted that administrative judicial control is sufficient to achieve proportionality. It should be noted that legislative proportionality differs from proportionality in imposing punishment, and the former is at the core of the administrative courts' jurisdiction. Despite the General Assembly's acknowledgment that proportionality is a legal principle, and despite its claim that "severe punishments have not succeeded in eliminating crime or reducing crime rates to the minimum required to achieve societal security", its rulings have fallen short of extending its oversight to the proportionality of penalties.

Conclusions and Recommendations

The research into "Legislative Proportionality in Disciplinary Penalties," has reached several conclusions and recommendations, which can be summarized as follows:

Conclusions:

1. In both Iraqi legislation and the comparative cases of Egypt and France, proportionality is considered a constitutional principle that the legislator cannot exceed. The legislator cannot leave the implementation of the principle to the discretion of the disciplinary authority. More specifically, the Iraqi legislator has specifically limited the authority of the administration in determining proportionality concerning penalties that terminate the employment relationship.
2. The policy of the Iraqi legislator in granting administrative courts the competence to oversee proportionality is based on legislative foundations dating back to the establishment of the General Discipline Council in 1929. This differs from the gradual and judicial basis on which administrative courts in France and Egypt obtained the authority to oversee proportionality. However, the constitutional judiciary in Iraq, represented by the Supreme Federal Court, has neglected oversight of proportionality as a result of its novelty, as if it has accepted that administrative judicial oversight is sufficient to achieve proportionality. However, legislative proportionality differs from proportionality in the imposition of penalties, and the former is within the core competence of the constitutional judiciary. When making decisions, the scope of the court's oversight does not extend to the field of disciplinary penalties, despite the fact that the General Assembly acknowledged in one of its judgements that proportionality is a legal principle (please see recommendation below).

Recommendations:

1. We recommend that the Supreme Federal Court expands its oversight over legislative proportionality in disciplinary penalties, since it is more effective than the oversight performed by administrative courts. This is because the Supreme Federal Court has the authority to introduce new penalties or remove them from the list of penalties, while the role of the

administrative courts is limited to reducing or cancelling the implementation of penalties without affecting their essence or existence.

2. We recommend that the disciplinary legislator in comparative and Iraqi law adheres to the principle of legislative proportionality when enacting disciplinary penalties. This includes adopting effective legislative formulations that oblige the disciplinary authority to comply with the application of proportionality between the penalty and the violation.

CONFLICTS OF INTEREST

There are no conflicts to declare.

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