

Public service delegation in Algeria: between the constraints of the field and the challenge of efficiency

تفويض المرفق العام في الجزائر بين إكراهات الواقع وحتمية كسب رهان النجاعة

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Abstract

In a context characterized by imbalances and economic crises, and in light of the deficiency that has become a defining feature of the public sector and overwhelms the political will to form a dilemma that must be overcome and out of it in front of the citizens' request to provide a decent living..

Thus, the legislator's adoption of a system that guarantees the efficiency of commercial and industrial public services in particular has become unavoidable, insofar as the State has given itself the challenge of reducing obstacles and striving of greater public service efficiency by delegating their management to private investors.

That said, in this article, we will try to define the concept of the public service delegation contract, the formulas and the procedures of concluding it in order to read between the lines the shortcomings and political implications in the legal reference of the public service delegation contract.

Keywords: The delegation of public facility; the political implications; the Algerian legislator.

ملخص

في سياق متسم باختلالات وأزمات اقتصادية، وفي ظل القصور الذي أصبح يرسم ملامح القطاع العام ويطن على الإرادة السياسية ليشكل مأزقا لا بد من تجاوزه والخروج منه أمام طلب المواطنين بتوفير العيش الكريم، أصبح تبني المشرع لنظام يضمن نجاعة المرافق العامة التجارية والصناعية خاصة أمر لا مناص منه، وغدت الدولة أمام تحدي تذليل العقبات ورهان إحقاق نجاعة المرفق العام من خلال تفويض تسيرده للنحواس، وهذا ما سنتناوله دراستنا من خلال تبيان وعرض لصيغ وإجراءات إبرامه في محاولة لقراءة بين السطور للنقائص والدلالات السياسية في المرجعية القانونية لتفويض المرفق العام.

الكلمات المفتاحية:

تفويض المرفق العام؛ الدلالات السياسية؛ المشرع الجزائري.

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1. INTRODUCTION

Algeria had to adopt the modern perception of the role of the state, as the Algerian legislator's issuance of Presidential Decree No. 15/247 of 2 Dhu al-Hijjah 1436 corresponding to September 16, 2015, which includes the organization of public deals and the mandates of the public utility, did not come out of nowhere, follow it with Executive Decree No. 18-199 of Dhu al-Qi'dah 20, 1439 corresponding to August 02, 2018, relating to the mandate of the public utility, which provided the conditions and modalities for delegating the general facility to regional groups.

In light of several facts, the most prominent of which is the state's desire to reduce the burdens of the budget for running public utilities, which are overburdening them, especially those related to local groups characterized by increasing financial deficits and a catastrophic decline in the quality of services.

In an attempt to establish the foundations of what has been termed authorizing the public utility as a method of exploitation in line with the needs and economic constraints of the state as an effective tool to create the partnership between the public and private sectors within a contractual framework whereby the state delegates a public utility to others, whether from the public or private sector, in order to provide related services in exchange for collection he won.

The public utility has removed the burden of its management from the state by delegating to one of the characteristics, will it be removed from it its responsibility in preserving the idea and concept of the public utility that forms the basis and justification for every authority and privilege it gets?

And will the state be able to ensure that the mandated public utility provides services that ensure the satisfaction of the public's needs of the citizen with basic guarantees against slipping and behavior contrary to the principles and ethics of the public service in an attempt to consecrate its effectiveness and challenge all economic, political and organizational obstacles?

Hypotheses:

-Creating a legal system that seeks to balance the interest of the citizen by providing quality public services and the interest of the private sector by enabling it to collect a reasonable profit margin and to preserve the public facility that alone can solve the problem.

-Activating the role of oversight and strengthening its apparatus to address the regulatory and legal slides and obstacles.

- Combating all forms of corruption and legal breaches by using deterrence methods and tightening the screws on the gangs of the economic sector.

Research Methodology:

The research is based on a study of the mandate of the public utility in Algeria, therefore, the reliance on the analytical deductive method of theoretical foundations and Algerian legal texts.

Research importance:

It sheds light on the practical and legal challenges and difficulties facing the modernization of the public facility by authorizing it and examining the shortcomings of this mechanism.

2. First Subtitle: Public utility delegation contract between ambiguity of the conclusion formulas and the limitations of its procedures

The originality of the Algerian legislator's experience in the context of the mandate of the public utility has prevented the development of a precise, understandable and integrated legal framework that is not deficient or ambiguous, which greatly affected the attempt to analyze it and gain awareness with its requirements.

In the following, we will present the definition of the mandate of the public utility, according to what was stated by the Algerian legislator first, and then we will address the conclusion of a contract of delegation of the public utility in terms of deficiencies in terms of color and procedures.

First: Definition of Public Utility Delegation

A: Defining the mandate of the public utility. Language:

A source of action delegated, the matter to him walk him and make him the ruler in it

B: Defining legally mandating the public utility

The Algerian regulator has devoted the technique of delegating public utility according to Article 207 of the aforementioned Presidential Decree No. 15-247 which states the following:

"The legal person subject to public law who is in charge of a public utility can delegate its conduct to the delegate, unless there is a legislative provision to the contrary and the delegate's wage is guaranteed mainly from the exploitation of the public facility and the delegated authority that acts on behalf of a legal person subject to public law authorizes the running of the public facility Under an agreement

To be followed by Article 02 of Executive Decree 18/199, defined the mandate of the public utility as follows:

"The mandate of the public utility, in the concept of this decree, means transferring some non-sovereign tasks of public authorities for a specified period to the delegate mentioned in Article 04 below with the aim of the public interest.

The aforementioned Article 04 states:

Regional groups and public institutions of an administrative nature subordinate to them and in charge of a public utility that is called in the body of the text the "delegated authority" may delegate a public facility to a public or private legal person subject to Algerian law who is claimed in the body of the text delegated to him under an agreement (Executive Decree 15/247 , Monday Dhu al-Hijjah 1436 corresponding to September 16, 2015)

C: Defining the mandate of the facility in its jurisprudence

Algerian jurisprudence tried to give a definition to the mandate of the public utility, despite the novelty of this system in the Algerian legal system, so Professor Nadia Dharifi knew it. "The delegation of the public utility is the contract through which a person of public law is authorized by the state, local groups, and public administrative institutions, to operate and exploit a public facility with all responsibility and what He shall bear profits and losses that differ from the public transaction, in terms of exploitation and the method of collecting the financial compensation for the operation and exploitation of the royalties of the users in exchange for the performance of the service, or through the administration, but the consideration must be related to the exploitation of the facility and result

from its operation, and this exploitation for a certain period may include the utilities. The delegate is chosen according to clear procedures that include both transparency and competition to choose the best "best offer" with the aim of ensuring a better and better public service towards the users according to a contract that defines the rights of the delegate and his obligations with all the restrictions of the facility in terms of equality, continuity and the need to adapt to the internal environment. And external (Souhaila, 2018)"

We said earlier that the analyst for this definition can deduce the foundations and characteristics of the mandate of the public utility as follows:

1- Existence of a public, delegable facility:

The type of public facility varies according to the task entrusted to it according to its nature, so we throw various public facilities, including economic and merchants, and others that take a social character such as prisons and health facilities and other scientific ones such as schools and universities within the educational structures of all kinds.

Therefore, the constitution prohibits the participation of the private sector in implementing certain types of public utilities (Othman, 2014/2015).

According to the classification of the constitution, we find two types of public facilities:

Constitutional public utilities: they are not defined according to the law, but according to the constitution (Druply, 1988), despite the very difficulty in that, as there are no precise indicators to determine them. According to some of the French jurisprudence, the group of constitutional public utilities finds us that cannot be found (al-latif, 2000), but the concept of constitutional public facilities is mainly limited to a facility that binds state sovereignty, such as defense, the judiciary, and international relations.

Although there are non-sovereign constitutional facilities such as education, culture, and social assistance, they accept the presence of the private sector.

Main facilities for the state: They are represented by the facilities that constitute a realistic or legal monopoly despite being unconstitutional, as

well as the facilities associated with the state's political and economic independence, which are of great importance for its attachment to state security.

Therefore, it was necessary to determine whether the activity entrusted with the public utility could be entrusted to others and that it met the conditions that the activity constitutes a project subject to the supervision of the state and aims to achieve public benefit.

2-Contractual nature:

It was necessary to define a framework for the general facility agreement that included casting it into a contractual template that meets the requirements of formalism and objectivity in order to strengthen legal guarantees and give authenticity and legitimacy.

3-connection of the financial compensation with the results of exploiting the public facility:

The existence of a delegated public utility that provides a public service is not sufficient for the public utility to be delegated, and if there is a contract between the state and the private partner, it does not fulfill its principles and it is not a delegate contract for the global facility unless the exploitation of the public facility is linked to a financial consideration that the delegate receives in return for running the public utility, and it does not happen. This can only be done through two conditions, the first of which is the exploitation of the public facility with the risks it carries, and the second is the link between the financial compensation and the results of exploitation.

Types of public utility contracts and delegation (Tajin, 2007):

The Algerian legislator has defined the contracts that the French jurisprudence has adapted on many occasions, and which the French legislator has adopted in different texts in one legal text, and this is what is counted for him and is considered an unprecedented legal achievement, and he mentioned it in Executive Decree 18-199, respectively (Al-Qutb):

. 1- The concession contract:

Article 53 of Executive Decree 18/199 aforementioned states, "Concession is the form by which the delegated authority undertakes to the delegate to either complete the facilities or acquire property necessary for the

establishment and exploitation of the public facility, but he is only entrusted with the exploitation of the public facility."

The concession of delegating the public utility is considered at the first level of risk, so that in the case of this contract, the delegate does not bear any risk, and the delegate finances the exploitation of the public utility himself.

Concession of a Builder: As stated in Article 53 of Decree 18/199, the delegate, through him, is entrusted with the implementation of his facility.

Concession of management: that is, the authorized person is authorized to acquire properties necessary for the exploitation of the public facility only.

And the Algerian legislator set the maximum concession period of 30 years, which can be extended only once, to four years only.

2- Lease Contract:

Article 54 of Executive Decree 18/199 states, "Rent is the form in which the delegated authority entrusts the delegate to manage and maintain the public facility in exchange for an annual royalty that he pays for it and the delegate acts for him on his own account with bearing all risks and under partial control of the delegated authority ..."

The delegate bears less risk in the lease contract in delegating the public utility than in the concession. The legislator has set a period of 15 years, which can be extended once for a maximum of three years.

3- Motivating agency: Article 55 of the aforementioned presidential decree came: "Motivating agency is the form through which the delegated authority entrusts to the delegate to operate or maintain the public facility ..."

The risk ratio for this contract diminishes as it does not exceed commercial and industrial risks. While its maximum period is set at 10 years, which can be extended by two years only for one time.

4-Management: It is stated in Article 56 of Executive Decree 18/199: 'Management is the form in which the delegated authority entrusts to the delegate to operate or maintain the public facility without any risk to the delegate'...

As indicated by the legislator in this article, the risk percentage is zero in the management contract while its period does not exceed 5 years, which can be extended once for a maximum period of one year.

Article 210 indicated that this classification is not exhaustive, as the delegation can take many forms other than these contracts that have been referred to. "... The delegation of the public utility may take other forms than those shown in the following according to the conditions and modalities specified by the regulation .(al-Din, thesis Abi Bakr University in al-Qaid)."

In an attempt to open the way for other forms of mandate that could emerge from the Algerian economic experience.

Second: Conclusion of a contract for delegating the public utility

It was mentioned in the provisions of Article 209 of Presidential Decree 15/247 related to public procurement and public utility authorizations, which stipulated that agreements to delegate the public utility in their conclusion are subject to the principles stipulated in Article 5 of this decree.

As stated in Article 8 of Executive Decree 18/199: "The agreement to delegate the public utility shall be concluded according to one of the following two forms:

- The demand for competition, which represents the general rule.
- Consent that is the exception" .

The provisions of Articles 09 to 21 came to clarify these two formulas and detail their cases.

However, the legal reading of these articles in parallel with Article 05 of Presidential Decree 15/247 reveals an explicit violation of the provisions of the latter and an infringement of the most important principles of governance of the public service, namely transparency.

This takes place and takes shape during the summoning of the candidates who have been selected without informing the owners of the rejected files, as stated in Article 12 (Executive Decree 18- 199, 20 Dhu al-Qadah 1439 corresponding to August 2, 2018).

This would prevent them from taking the appeal procedures guaranteed by the law, and which the decree did not address in this regard, whether in terms of procedures or deadlines, or in terms of cases in which the appeal is acceptable.

The legislator also neglected to specify the method for summoning the successful candidates, and did not intend to mention the procedure that would take place in a letter, advertisement, etc. to make this part vague.

Among the points that raised great questions and asked Ink specialists in the field of public procurement, cases of uselessness in the Executive Decree 18/199, in the event that no candidate qualifies for the first time, how can the commissioner return the lawsuit to the competition.

This is not the last problem that characterizes the executive decree, as the reader soon clashes with Article 17 of it, in which the legislator touched upon mutual consent after consultation, and in which the book of conditions which is subject to consultation was not specified.

Likewise, it is not possible to overlook the compulsion of individual legislators for a legal article in this decree for urgent cases, because of its utmost importance.

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3. Second Subtitle: the political implications in the legal reference to the mandate of the public utility

The analyst of the requirements of the Algerian legislation in the field of delegating the public utility extracts several political visions that aim in their entirety to adopt a legal system for the advancement of the public utility, and he reads through it a political orientation in a democratic approach.

First: The political factor in the mandate of the public utility

The state has consecrated its will to activate the partnership with the private sector through the mandate of the public utility. In this context, the jurist John Jacques Chevalier emphasized that the state is no longer based mainly on the traditional conception of its function and the means of its work ((J.J)).

He considered that the traditional hegemony of the spread of the state across its region needs a deep review within the horizon of reducing the centralization of the state, so the state has tended to support local groups (Kassem, 2016/2017) through a system that enables them to delegate their facilities, and this idea met the response of the political will in Algeria, announcing a change in the socio-economic structure This reality has led to a shift in old practices and foundations for visions in which the private sector with technological development and economic potential has become an important element in the field of public service as an effective strategic option.

It was necessary for the legislator to adopt a supervisory authority due to its importance.

Concerned oversight is oversight in its broad sense, meaning that it is not limited to overseeing the delegated authority, but also includes oversight by other authorities such as the legislative and judicial authorities (Jaber).

Legislative oversight: is concerned with framing legal texts and setting up mechanisms to ensure this.

Whereas, judicial oversight is considered a guarantee to protect the parties to the contract with impartiality, and there is also the control exercised by the beneficiaries of the public facility, while the supervision of the most effective and effective donor remains and a guarantee to protect the contract.

Talking about censorship leads us to a topic in which there has been a lot of controversy recently, namely, fighting corruption and the ethics of public administration through the development of deterrent laws as an expression of the political will of its desire to create a fair administration.

Administrative corruption is a scourge that has become plaguing the economies of developing countries like Algeria, and its spread is due to a number of reasons and motives:

1-The reasons related to the public employee: including those related to the low standard of living in which the public employee became floundering in light of inflation and low standard of living, and the psychological factor may affect the behavior of the public employee in an attempt to fill the psychological deficiency or as a kind of stupidity and mental deficiency.

2- Administrative reasons: They are reflected in the weakness of oversight, accountability, and hiring by charitable persons without adopting the necessary competencies.

3- Subjective employment and promotion policies: In addition to these two reasons, there are legal, judicial, political and economic reasons concerned with the spread of corruption. The manifestations of corruption are reflected in the mandate of the public utility in breaching the principles of concluding and implementing contracts for public utilities. The Algerian legislature has established several mechanisms to prevent corruption in the field of delegating the public service, represented in the codes of conduct for public officials, the regulation of procedures for concluding contracts, as well as the establishment of the authority to regulate public procurement and public utility authorizations.

With the strengthening of the powers of the National Anti-Corruption Commission, the Central Bureau for the Suppression of Corruption, in addition to the judicial bodies and oversight of the administrative judiciary.

Second: Consolidation of the principles of governance by political will to achieve efficiency

The state's tendency to crystallize the democratic trend was evident through the legal texts that empower local groups to approve the form of

public utility delegation, which comes from its discretionary power to achieve the public good and to consecrate its efficiency by providing the best services and means to advance the public utility, and to embody the principles that support this technology. The general aim is to create a new category with what is termed the service universal, which Professor Lucien-Rapp defines as: "an economic and commercial concept linked to a sector dominated by the idea of competition" (esplugas, 2002) constitutes:

1- The principle of continuity is one of the most important principles of the public utility and is based on two basic ideas:

A- Continuity of the state and people of public law.

B- Continuous fulfillment of the public's social, economic, and political and security needs.

These needs are necessarily linked to political foundations related to state sovereignty. Without the continuity of some public facilities, there is no continuity of the state.

What is taken on this principle is some of its shortcomings, for it were first, for example, in the postal facility, if it adheres to the principle of continuity, that it be in service without interruption throughout the days of the week and night and day in order to satisfy the needs of the citizen.

The principle of the ability of the public facility to develop, modify and adapt in an attempt to keep pace with the economic developments that have become characterized by modern technology, as the criterion of development at the present time is scientific progress and modernization of the mechanisms of running facilities of all kinds.

2-The principle of equality in public utilities, meaning non-discrimination:

Equality in front of the public utility is not intended to benefit all persons in an equal and similar manner. Rather, it is intended to benefit according to the conditions and restrictions defined by law.

This does not mean the equality of the beneficiaries only, but also the equality of utility workers and others, such as contractors.

3- The principle of transparency:

This was defined by Professor Michel Mazex as follows: «A means of monitoring the services performed by the public utility in order to ensure

that the economic interests of the beneficiaries or consumers are actually taken into account by the person in charge of realizing the public utility " (Gribal, 1995)

Transparency, then, is one of the most prominent and most necessary principles to ensure the efficiency of the technique of delegating the public utility, and it is considered a consecration of the state's will to achieve the public good, as stated by the French researcher Frederick Valued:

“La volonté de gérer les services publics locaux comme des entreprises privées comporte un aspect symbolique de rigueur par la mesure performances”

Establishing the principles of governance in the management of public utilities, such as transparency and equality, the principle of equal opportunities and non-discrimination in the use of public utilities, are among the most important pillars of democracy and the means of their embodiment at the same time.

4. RESULTS AND DISCUSSION

The financial crisis that afflicted the Algerian economy, was a result of several factors, the most important of which is the drop in oil prices, as a result of political maneuvers between the powers that dominate the oil market and the global economy as a whole, and the corruption that has ravaged the Algerian economy for many years, as a result of ideologies and practices that were affiliated with a gang that caused a rift in the economic structure and caused a historic financial crisis that these institutions have made Algeria relieve the burdens of running public utilities, by adopting the legal system to authorize the public utility, which has become imperative to prevail the risk of efficiency, develop the public service and advance it to the aspirations of citizens to keep pace with the global economic development, which prompted the state to create a legal framework for authorizing the public utility from Through Presidential Decree No. 15 /247 of Dhu al-Hijjah 1436 corresponding to September 16, 2015 containing the organization of public deals and authorizations of the public utility, followed by Executive Decree No. 99 of 20 of its seat in 1439 of August 2, 2018, related to the mandate of the public utility, which defined its conditions and how The mandate of the public utility to the regional groups is that it takes on the set of the abovementioned laws several points of trouble on the newness legislator's era with this legal experience, but it established a general framework for the delegation of technology through

which it strengthened the partnership between the private sector and the state and opened the way for investment in the public facility. Adopting a special tax system to authorize the public utility that carries privileges for economic dealers and financial and tax incentives that push them to participate in the commissioning of the public utility, the advancement of public services, and the support of the economy with modern technology and modern methods.

4. CONCLUSION

The financial deficit that afflicted the Algerian economy caused the state to reduce the burden of running public utilities so that the legal system for authorizing the public utility would come into being. This has become inevitable in order to win the stakes of efficiency and turn the public utility in Algeria into the ranks of the world's great economies. Several pillars must be laid for it, the most important of which are:

A fiscal and financial system that carries privileges for economic dealers - the delegated - and financial and fiscal incentives that push them to participate in the commissioning of public services, the advancement of public services, and support for the economy with modern technology and modern methods.

Devoting and respecting the principle of governance, and benefiting from global experiences in delegating public services, similar to the two neighbors, Tunisia and Morocco.

Filling legal loopholes in decrees authorizing public utility and attempting to clarify the ambiguity and ambiguity in them.

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