



Preventing Administrative Disputes: An Absolute Priority

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Abstract:

The judiciary is no longer able to keep pace with the meteoric growth in litigation, and the public justice system is experiencing both a structural and a cyclical crisis, as evidenced by the poor drafting of court decisions, the inadequate handling of cases and, above all, the great slowness that is the most striking indicator of this. In order to ease court congestion, the legislature has undertaken a number of reforms aimed at preventing administrative litigation. Indeed, the best litigation strategy remains prevention. An effective litigation prevention policy not only helps avoid lengthy and costly procedures, but also preserves the quality of relationships with users and the administration's partners.

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Introduction:

There is an increasing increase in the number of legal texts that cover a multitude of areas and activities that have traditionally been the responsibility of public entities, such as public economic enterprises or public industrial and commercial establishments, or even public services operated by public authorities, as in the case of post and telecommunications.

The market economy is thus the source of a proliferation of regulation because, unlike the interventionist period when the private sector could only intervene in limited activities, the demonopolization of a certain number of sectors such as banking, insurance, electricity, telecommunications, necessarily leads to the establishment of new legal rules intended to define the conditions of access to the profession or the market, to impose obligations on operators, to sanction behavior that is detrimental to healthy competition or that infringes on the rights of users, customers and consumers.

Such an inflation of texts combined with their poor drafting is often a source of disputes. Insofar as the administration is often a party to such disputes, it is the administrative judge who is competent to decide.

However, the judicial authority is no longer able to keep up with the rapid development of disputes, the public service of justice is experiencing a structural and cyclical crisis which is manifested in particular by a defective drafting of judicial decisions, a deficient handling of cases and above all a great slowness which is the most striking revelation.

However, in the field of business law, such slowness is unacceptable because, as the saying goes, "time is money."

Overwhelmed by pending cases, the justice system is no longer able to meet the requirements of speed and speed that the business world demands.

The same problem has arisen in the developed countries, which have taken charge of it by undertaking a number of reforms. The solutions advocated are taken up in third world countries, including Algeria in particular. In an attempt to relieve the courts of congestion, the legislator has set about initiating a number of reforms aimed at preventing administrative dispute. Indeed, the best litigation strategy remains prevention. An effective litigation prevention policy not only helps avoid lengthy and costly procedures, but also preserves the quality of relationships with users and the administration's partners.

In this regard, it is also necessary to question the key elements administrative disputes prevention.

However, this prevention first involves improving relations between the administration and the citizens, with particular attention to transparency, and each decision must be prepared (section 1), in addition to the requirement of prior administrative recourse and conciliation before the administrative judge (section 2).

Section I: Improving relations between the administration and the citizens (operators).

Public affairs management function is one of the most important tasks that may be assigned to any person, regardless of the type of management and the extent of its sophistication or modesty, but in its general sense it refers to a great responsibility that requires a fair amount of experience, and management also requires some standards that contribute to the success of the institution such as justice,

In order to improve relations between the administration and the public, this improvement first requires transparency in relations with the public (1), and each administrative decision carefully prepared, paying particular attention to its motivation (2).

1- Transparency in Relations with the Public: Example in Public Procurement Matter

The issue of transparency occupies a privileged place in the administrative discourse, as it is one of the basic values that the public administration must adhere to, and this concept is also linked to the pattern of good governance in the administrative field, which made the various legal texts, whether at the level of international law or the internal legislation of states, seek to promote and activate the principle of transparency in the field of public affairs management, and the purpose is to narrow the areas of confidentiality in public administration within the limits of what takes into account the public interest, protect the personal rights of individuals, and avoid administrative dispute.

Indeed, experience shows that certain areas are particularly exposed to the risk of litigation. Urban planning, public procurement, and the civil service account for a significant proportion of appeals. Particular attention must therefore be paid to these sensitive sectors.

thus, Algeria has made considerable efforts in this regard, and some even considered the inclusion of such a principle as the golden rule contained in the provisions of Decree 131/88¹ regulating relations between the administration and the citizen, after it was dictated by a number of publications that constituted a source of its rules to reduce the lack of transparency of administrative activity and one of the most important basic axes contained in the various presidential and governmental programs in order to restore the citizen's confidence in his administration on the one hand, and to rehabilitate the public service on the one hand.

However, since lack of transparency is considered one of the most important causes of corruption of which the administration is accused in its relations with citizens or those who deal with it, Law 06-01² on the prevention and fight against corruption as amended and supplemented, established a set of mechanisms that aim to enshrine the administration's commitment to the principle of transparency in its relations.

In accordance with Article 11 of Law 06-01, with the aim of promoting transparency in the management of public affairs, institutions, administrations and public bodies are mainly required to: Adopt procedures and regulations allowing users to obtain information on the organization and functioning of the decision-making processes of the public administration, Simplifying administrative procedures, responding to citizens' requests and grievances, justifying their decisions when they are unfavorable to the citizen and specifying the remedies in force.

Thus, Algeria sought to address its shortcomings and keep pace with global change. In the field of public procurement, the most important provisions of Law No. 23-12³ setting the general rules relating to public procurement is the introduction of new mechanisms aimed at strengthening the role of the principle of transparency in the conclusion of transactions via the electronic portal, as it aims to achieve equality between operators and equal opportunities by applying the same procedures and to all competitor; in order to strengthen efficiency and transparency in the field of public

procurement. Transparency relates to two main aspects: the first includes the clarity of procedures and the accuracy and credibility of the presentation of information, and the second aspect is related to the relationship of the beneficiaries of services and their right to obtain correct information in a timely manner.

However, the transparency in the field of public procurements is defined as the system that allows bidders, suppliers and stakeholders to ensure that the process of selecting the contractor with the government entity was carried out by clear and objective means, and the principle of transparency is one of the basic principles on which the process of concluding public procurements is based, and restricting the contracting interest at all stages of the conclusion of the public procurement by respecting the principle of transparency and its complementary principles.

As for the legal aspect, Article 03 of Presidential Decree 15/247⁴ stipulates that "to ensure the efficiency of public requests and the proper use of public funds, the principles of free access to public orders, equality in the treatment of candidates and transparency of procedures must be observed in public procurement, while respecting the provisions of this decree".

Moreover, article 09 of Law 06/01 on the prevention and fight against corruption stipulates that "the process of concluding public procurements must be based on objective criteria, so that these rules establish, in particular, the rules of transparency and fair competition, information on the procedures for concluding public procurements, the prior preparation of the conditions for participation and selection, objective and precise criteria for making decisions related to the conclusion of public procurement"...

The Algerian legislature attached particular importance to this principle in building a democratic State and guaranteed it under the Constitution in order to ensure the greatest possible transparency of procedures when concluding the transaction. The principle of transparency in procedures aims to achieve equality and equal opportunities between contractors, by treating all competitors equally.

Among the mechanisms to establish the principle of transparency in public procurements is to resort to the electronic portal for public procurements when exchanging information related to the procurement, as this portal is considered as a channel through which all public procurements are announced as a future contract, as it is a broad judiciary for all public dealers aimed at allowing the publication and exchange of information related to public procurements and the conclusion of electronic public procurements.

Indeed, the portal includes a set of functions that enable economic operators and those interested in public procurements to access them to meet needs such as publishing all information and documents, in addition to registering contracting parties and economic operators, and submitting pledges through the portal, As well as the search technology, users can access publications by clicking on the search button or via the link to the page that contains the search prototype.

Electronic dealing through the portal of public procurements is a delicate and sensitive process, given that it contains documents related to important data and information, so the exchange of these documents must be subject to a set of principles to ensure the organization of the workflow in the portal and achieve transparency of procedures.

The principles of transparency and confidentiality in electronic transactions are stipulated in Article 64 of Law No. 23-12, which obliges contracting parties to provide the economic operator with the minimum necessary information, and this procedure aims to apply the principles of equality and transparency, as it helps to achieve maximum competitiveness in the tender process, which helps in obtaining the best offers and dealing with credibility and integrity.

In fact, the legislator was also obliged, by the ministerial decision dated November 17, 2013⁵, to publish announcements of tenders, invitations for pre-selection and consultation letters, as well as the return of proposals, in addition to requests to complete or clarify offers upon exclusion. Therefore, contractors should provide the necessary protection for tenders sent electronically, by taking the necessary measures to ensure that they cannot be modified, destroyed or tampered with, while ensuring that they are not seen until the date of their opening in the sessions designated for opening envelopes and evaluating offers⁶.

Therefore, the basis of the principle of equal treatment among all participants in the request for proposals indicates as a logical conclusion that the contracting authority may not resort to discrimination between applicants of any kind, and therefore the principle of freedom of competition and the principle of equality inevitably generate the features of transparency of administrative work.

2- The Decisions Motivation

The motivation of an administrative decision consists of presenting and explaining the reasons that led the administration to take the decision.

The principle of providing reasons for administrative decisions is one of the general principles necessary for the validity of administrative decisions, requiring the administration to justify the reasons for its decisions, given its role in protecting rights and freedoms against abuse of power. Some countries have adopted this principle in an optional and non-binding manner, unless the law stipulates its necessity. However, there are certain decisions that require the need to provide reasons, otherwise they will be considered defective, particularly those that concern the rights and freedoms of individuals.

Improving the relationship between the administration and its operators is the focus of attention in countries today, and a priority of modern administration, due to the increasing interference of the administration and the extension of its authority, which makes it enter into complex relationships with the citizen, which are sometimes characterized by independence, sometimes by contractualism, and sometimes by a partnership relationship, but the dominant characteristic is inequality, which is a natural result of the powers granted to it by law in order to meet the needs of citizens and achieve the public interest, which presupposes the establishment of a good relationship between the administration and the citizen, considering that the administration is responsible for meeting its needs.

The Algerian State has resorted to adopting many reforms aimed at improving the relationship between the administration and the citizen, the result was Law 88-131 regulating relations between the administration and citizens. The law primarily focused on defining the administration's duties toward citizens, such as responding to all requests, letters, and grievances addressed by citizens and creating structures at the national and local levels responsible, among other things, for examining citizens' petitions. It also requires the administration to simplify its procedures and inform citizens of documents whose content is against them, while granting them the right to compensation in the event of abuse of power, and other rights that protect citizens' right to challenge the administration. This law, however, has been criticized for not imposing any obligation to provide reasons for administrative decisions.

Although the reasoning of administrative decisions is not enshrined in a clear legal text, the legislator may intervene in some cases in order to oblige the administration to cause some decisions, and examples of these decisions are disciplinary decisions, whose reasoning is the most important guarantee for employees, in the face of the administration issuing the decision, as well as those decisions related to prejudice to private property, including reconstruction decisions.

The motivation of decisions is one of the guarantees that ensure the fairness of the sanction, since the commitment of the disciplinary authority to motivation means that the decision includes, in addition to the sanction, the fact or facts that led to the imposition of the sanction. This guarantees the validity of the facts that require this decision and on which the disciplinary authority based its belief and conviction, as well as the demonstration of legal facts and evidence of conviction, which indicate the availability of the element of the disciplinary violation and the decision based on its justificatory reason.

In the area of discipline, the Algerian legislature has required the disciplinary authority to provide reasons for its disciplinary decisions, under penalty of nullity. In this regard, Article 165 of the Algerian Civil Service Law⁷ stipulates that the appointing authority shall make a reasoned decision on first- and second-degree disciplinary sanctions after obtaining written explanations from the party concerned. The appointing authority shall impose third- and fourth-degree disciplinary sanctions by reasoned decision, after receiving the binding opinion of the competent joint administrative committee, meeting as a disciplinary council, which must rule on the matter submitted to it within a period not exceeding forty-five (45) days from the date of notification. The same thing was confirmed by Article 170 in its second

paragraph of the same law, which stipulates that the decisions of the disciplinary board must be justified⁸.

However, the rule is that the administration is not obliged to disclose the reasons for its issuance in the body of its administrative decisions, which means that it is not obliged to explain its decisions, but the law requires that certain decisions be justified. If the administration neglects this, the decision is formally defective.

In the field of urban planning, we note that the legislator in Executive Decree 15-19⁹, which specifies the procedures for drawing up and issuing urban planning contracts, considers the justification of reasons as one of the most important formalities that the competent administrative authority must respect and comply with when issuing urban planning decisions, under penalty of nullity of the decision. What is remarkable here is that the legislator has provided for the justification of decisions relating to rejection or postponement, unlike decisions relating to the acceptance of the granting of licenses or certificates, which did not provide for the justification of reasons to the extent that they responded to the request submitted by the interested parties.

In this regard, the legislator has done well to require administrations to provide reasons for their decisions so that the person concerned knows the reasons for the decision, on the one hand, and to speed up and facilitate the task of monitoring its legitimacy, on the other. The reasons for decisions to refuse or postpone the granting of building permits and certificates are considered a limited power of the administration, and not a discretionary one, since the law requires it to provide reasons to protect those who deal with it¹⁰.

Section II: From Prior Administrative Recourse to Conciliation before Administrative Judge

Managing public law disputes represents a major challenge for public institutions. Faced with the constant increase in the number of recourse and the increasing complexity of procedures, mastery of litigation strategies becomes essential, which is why the Algerian legislator abandoned the obligation of prior administrative recourse (1) , and introduced conciliation as a method of settling administrative disputes (2).

1- The Prior Administrative Recourse

The requirement for an administrative recourse prior to referral to a judge is inspired by the desire to avoid burdening the legal system as much as possible. It can be assumed that the administration is able to correct its errors. The prior administrative appeal allows the hierarchical superior to be kept informed of the actions of his subordinates and to correct them, if necessary, which has the effect of resolving the dispute without the intervention of the judge.

Originally, referral to the administrative court was conditional on the exercise of a valid administrative appeal, which is a strict condition for binding administrative litigation. Under Law 90-23 of 18 August 1990 amending and supplementing the Code of Civil Procedure¹¹, the legislator makes a distinction between appeals before the administrative chamber of the Supreme Court, which are subject to the condition of mandatory administrative appeal, and appeals before the administrative chambers of the courts, which are now exempt from the obligation of prior administrative recourse.

Following the promulgation of organic law n° 98-01 of May 30, 1998¹², amended and supplemented by organic law 22-11 of June 9, 2022 relating to the organization, operation and attributions of the Council of State¹³, However, Article 40 provides that "procedure of a judicial nature before the Council of State is regulated in accordance with the rules of the Code of Civil Procedure". Thus, the provisions of Article 275 of the Code of Civil Procedure remain applicable.

However, with the issuance of Law 08-09 containing the Civil and Administrative Procedures Code¹⁴ repeals and replaces Ordinance No. 66-154 of June 8, 19661, as well as all amendments made to this Ordinance, the legislator abandoned the obligation to file a prior administrative grievance and make it optional, that is, leave it to the discretion of the concerned parties to do it, and as an exception, the legislator kept the administrative grievance compulsory in certain

circumstances and specific cases under special texts, such as what is the case in the Tax Law and the Urban Law. It is clear from extrapolating the text of Article 830 of Civil and Administrative Procedure Code, which deals with optional complaints, namely that: Prior administrative appeals have become optional, unlike the repealed law on civil procedure, in which appeals were mandatory.

The legislator has reduced the period during which the silence of the administration constitutes a rejection of an appeal from the three months provided for in Article 279 of the repealed Code of Civil Procedure to two months.

Finally, the new Code of Civil and Administrative Procedure abandons the obligation of prior administrative appeal before the Council of State to make it an option at the discretion of the applicant, both before the Council of State and before the administrative Tribunals¹⁵.

Regarding the time limits for appeals to the Council of State and the administrative courts, they have been unified: the appeal must be filed within four (4) months from the date of notification of a copy of the individual administrative act or the publication of the collective or regulatory administrative act.

When the applicant has filed an appeal with the administrative authority that issued the disputed act (the appeal in question must be filed within the time limit for appeals to the judge, i.e. 4 months), two solutions are possible:

- The administration rejects the administrative appeal within two (2) months, in this case, the applicant has a period of two (2) months from notification of the rejection decision to introduce the judicial appeal;
- The administration remains silent for a period of two (2) months from the filing of the complaint, in which case, silence is deemed to be rejection. The interested party has a period of two (2) months to file a contentious appeal, starting from the expiry of the two (2) month period given to the administration to respond to the claim.

2- Conciliation before the Administrative Judicial Authority

The amicable settlement of disputes has become a preferred solution for resolving administrative disputes. This major development in public litigation meets a dual requirement for efficiency and for easing tensions between the administration and its users. Faced with the growing backlog of administrative courts and the lengthening timescales for judgments, these alternative dispute resolution methods offer particularly interesting prospects.

Indeed, the Algerian legislator introduced conciliation in Law No. 08/09 on civil and administrative procedure as a method of settling disputes within the administrative justice system, in order to eliminate the slowness of judicial work and long delays in judging cases, as well as to contribute to the promotion of a culture of reconciliation between the parties in conflict, and adapt to the rapid evolution of the labor market.

Given the specific nature of administrative litigation, the Algerian legislator has defined the scope of recourse to conciliation and the competent authorities to exercise it. Administrative conciliation is exercised in matters of full litigation, in accordance with Article 970 of the Code of Civil and Administrative Procedure.

From a legislative point of view, the Algerian legislator has not addressed the definition of actions in full litigation, but has explicitly stipulated them in the Code of Civil and Administrative Procedure, but with a view to regulating the provisions of the judicial competence of administrative judicial bodies. Several disputes fall within the scope of the full litigation including:

- A claim for compensation means: A legal action brought by an individual before the court to seek compensation for damages suffered as a result of administrative actions. This legal action and the resulting compensation are subject to full judicial review, since the administrative judge, by ruling on the amount of compensation owed to the plaintiff, determines the plaintiff's personal status. Consequently, this process falls within the scope of reconciliation, as the parties may reach an

agreement on this matter.

- Disputes relating to administrative contracts are subject to the full jurisdiction of the judiciary and are therefore subject to amicable settlement. These claims concern requests for cancellation or termination of the contract, claims for financial rights arising from the performance of the contract, cancellation of decisions made on the basis of the contract, and finally claims for compensation for damages caused by the contracting parties or for any other reason.
- Disputes Related to Employee Salaries and Pensions: Disputes relating to employees' financial rights are subject to the full jurisdiction of the judiciary and may therefore be settled through conciliation, insofar as they concern the employees' personal circumstances. Conciliation is carried out in fully litigated cases before administrative judicial authorities that have regional and qualitative jurisdiction, as confirmed by Article 974 of the Civil and Administrative Procedure Act, which stipulates: "The administrative judicial authority may only conduct conciliation in disputes within its jurisdiction."

Regarding the rules of subject-matter jurisdiction, we note that administrative courts have general jurisdiction to hear administrative disputes, pursuant to Article 800 of the Civil and Administrative Procedure Act. The legislature has also specified in detail, pursuant to Article 801 of the same Act, certain disputes that are competent to hear them, including "complete judicial claims," and it is therefore permissible to resolve them before administrative courts, as they fall within their material jurisdiction.

Furthermore, the article 803 of Civil and Administrative Procedure Code refers to Articles 37 and 38 of the same law. With reference to the provisions of Article 37 of Civil and Administrative Procedure Code, it has been considered that the jurisdiction is transferred to the judicial authority in whose jurisdiction the defendant's residence is located, and if he has no known residence, the jurisdiction is transferred to the judicial authority in whose jurisdiction his last residence is located, and in the event of election of residence, the territorial jurisdiction is transferred to the judicial authority in whose jurisdiction the chosen residence is located, unless the law provides otherwise, and in the event of multiple defendants, the territorial jurisdiction is transferred to the court in whose jurisdiction the residence of one of them is located.

However, the territorial jurisdiction provided for by Article 803 admits the exceptions mentioned exclusively under Article 804 of the same law, the legislator having departed from the principle of the jurisdiction of the defendant's court. We mention some actions which fall under the full judicial jurisdiction of which the territorial jurisdiction is determined as follows:

- In disputes relating to administrative contracts, the settlement may be brought before the court in the jurisdiction of which the place of conclusion or performance of the contract is located, with the exception of disputes relating to the supply, works or rental of technical or industrial services, which may be brought before the court in the jurisdiction of which the place of conclusion or performance of the contract is located if one of the parties resides there.

Thus, the Algerian legislature has also exempted disputes between employees and state agents from the general principle of territorial jurisdiction. Consequently, disputes relating to employees' financial rights are settled by conciliation before the court of the place of their appointment¹⁶.

Referring to Executive Decree No. 22-435 of December 11, 2022, specifying the territorial jurisdiction of the Administrative Courts of Appeal and the Administrative Tribunals,¹⁷ we note that it has specified the territorial jurisdiction of the Administrative Courts of Appeal in accordance with the first annex included in its provisions. Referring to this annex, we find the six Administrative Courts of Appeal and the administrative tribunals within their jurisdiction - and the number of administrative tribunals in Algeria is 58 administrative Tribunals, according to Article 3 of the same executive decree.

Conclusion:

The best litigation strategy remains prevention. However, litigation time management plays a decisive role in the success of the adopted strategy. The appropriate use of procedural deadlines allows for the

preparation of a solid defense while preserving the interests of the community. Choosing the right time to undertake mediation or initiate parallel negotiations can prove decisive for the outcome of the dispute.

The legal argument must reflect the chosen strategy while remaining clear and convincing. The most solid arguments deserve to be highlighted, supported by relevant case law references. The formal quality of the submissions contributes significantly to their effectiveness. A clear structure, concise expression, and careful presentation of the documents reinforce the credibility of the argument.

Administrative appeals have been a concern of the legislature throughout the ages; it constitutes a decisive tool in regulating administration-citizen relations. While at one time they were organized in favor of the administration, the legislature is attempting to make them a tool for the proper administration of justice, in that they are intended to enable a balance between the prerogatives of the administration, the rights of citizens, and the prevention of litigation and the reduction of the burden on administrative courts.

If this is the objective of the legislator, it remains that the work accomplished is insufficient if it is not supplemented by a reform of the administration and its operating mechanisms: thus for the motivation of administrative decisions, the seriousness in the processing of appeals, the obligation of express responses, the clarity of texts, the simplification of deadlines, all these reforms are the true guarantees of the effectiveness of the prior administrative appeal.

It is a question of registering within the framework of a modern vision of the administration and its relations with the administered: "Administration, understood beyond its organic meaning as "action of administering", consists of a management of the general affairs of the community. Assumed within the state framework by determined authorities, it imposes constraints or offers services to the public, that is to say to all the individuals of a community, in return for the general organizational mission which has been entrusted to it", we now speak of administrative democracy and administrative citizenship.

Furthermore, new technologies now offer valuable tools for optimizing litigation strategy. Predictive analysis of the likelihood of success allows for the refinement of strategic choices. The dematerialization of procedures requires an adaptation of working methods while offering new opportunities in terms of efficiency.

However, implementing effective legal monitoring is also a key element of prevention. It allows for the anticipation of developments in case law and the adaptation of administrative practices accordingly. This monitoring must be organized systematically and its results must be regularly shared with operational departments.

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⁴ Presidential Decree No. 15-247 of 16 September 2015 on the regulation of public procurement, Official Journal No. 50 of 20 September 2015.

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