THE APPLICATION OF ADMINISTRATIVE LAW AND THE JURISDICTION OF ADMINISTRATIVE COURTS BASED ON THE CRITERION OF PUBLIC UTILITY IN ALGERIA.

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Abstract:

The Algerian legislator and judiciary have adopted the organic concept of public entity as the basis for the application of administrative law and the jurisdiction of administrative courts, without taking into account its substantive concept. The focus is on the existence of the public entity as an entity or structure in the dispute, rather than on the nature of the activity, which would otherwise justify the jurisdiction of the administrative courts. This is explained by the Algerian legislator's adoption of the organic criterion in Article 800 of the Code of Civil and Administrative Procedure, which requires the existence of a public entity as a party to the dispute in order for the administrative courts to have jurisdiction. This has had a negative impact on the quality of the legal solutions provided by the administrative courts to the cases brought before them, and has rendered ineffective the idea of specialised judges in the administrative judiciary, since the latter will apply different laws, whether general or specific, solely on the basis of the existence of a public administrative body as a party to the dispute.

Keywords: Public body, basis, organic criterion, administrative justice, jurisdiction...

INTRODUCTION:

Since independence, the Algerian legislator has relied on the organic criterion as the basis for the division of jurisdiction between ordinary courts and administrative courts. This criterion is based on the existence of a public administration as a party to the dispute, so that the latter falls under the jurisdiction of the administrative courts. However, there is an exception to the original jurisdiction of administrative courts in all disputes involving the administration, represented by the so-called material criterion.

The material criterion is based on a set of sub-criteria for determining administrative disputes, which are closely related to the basis on which both administrative law and administrative justice exist. The substantive criteria that define the nature of administrative disputes - and thus the jurisdiction of administrative courts - are the same criteria that justify the existence of a judicial body independent of the ordinary courts, namely the administrative judiciary. At the same time, these criteria are applied by the Court of Conflicts to resolve jurisdictional disputes and assign them to a specific judicial body, be it administrative or ordinary.

The public body is one of the basic substantive criteria used to determine administrative law and the jurisdiction of administrative courts. However, we question the usefulness and effectiveness of this criterion as a basis for administrative law and the jurisdiction of administrative courts, independent of other organic and substantive criteria.

In order to address this issue, we have divided this paper into two main sections:

Section One: The emergence of the public service criterion and its content

Section Two: The Crisis of the Public Facility and the Emergence of the Dual Criterion

Section One: The Emergence of the Public Facility Criterion and its Content

In this section, we will clarify the concept of the public facility as a criterion for the distribution of jurisdiction between the hierarchies of ordinary courts and administrative courts. We will also discuss its emergence and development in its country of origin, France, and its application in Algerian law and justice.

First: The emergence of the public establishment criterion

The criterion of the public authority[1] emerged in the French system through the Bordeaux School, in particular through Professors Duguit and Jèze[2], who emphasised the relationship between the public authority and the jurisdiction of the administrative courts[3].

The concept of the public establishment has two meanings or aspects: one is organic, in which the public establishment is defined as "any public organisation created by the State and subject to its administration in order to meet the needs of the public"[4]. The functional or substantive meaning refers to "any activity undertaken by a public body with the aim of satisfying a public need"[5]. It can also be described as "the organised activity of the administration aimed at meeting the general needs of individuals and achieving public benefit". In other words, the public service is a project established and managed by the state to meet the public needs of individuals[6].

The last criterion, the substantive or material criterion, is the concept adopted as the basis for the theory of the public body and as a criterion for the application of administrative law and, consequently, for the jurisdiction of administrative courts. The organic or formal meaning does not fall within the scope of the theory of the public establishment as one of the main material theories used to assign jurisdiction to administrative courts.

The French administrative judiciary has followed the same doctrinal direction that favours the criterion of the public establishment, making it the basis for determining the jurisdiction of the Council of State in administrative disputes. The French Council of State was very insistent on this criterion, which was clearly expressed in the judgment of the French Court of Conflicts of 8 February 1873 in the famous "Blanco" case.

Despite the change introduced by the "Blanco" judgement, it was not until the beginning of the twentieth century that most jurists took account of the public establishment as a criterion for the jurisdiction of administrative courts. This criterion was consolidated in the jurisprudence of the French Council of State and confirmed in its famous judgment of 6 February 1903 in the Terrier case[7]. From this judgment, the criterion of public service emerged as a distinctive standard for the

[1]- The concept of a public institution is organic; it is represented by "the structure, authority, institution or organisation, made up of a group of people and resources, created for the purpose of fulfilling a specific task, such as a university, a hospital, and units and apparatus of public administration in general". There is also a concept of functional objective: "the activity, function or service that meets the general needs of citizens, such as public education, health care, postal services and transportation, regardless of the organisation or entity that provides it". See: Mohammad Al-Saghir Ali, Administrative Law, 2nd edition, Dar Al-Uloom, Algeria, n.d., p. 25.

[2]- RachidKhloufi, Administrative Disputes Law, Administrative Litigation, Administrative Urgency, Alternative Methods for Resolving Administrative Disputes, Part Three, 3rd edition, University Publications House, Algeria, 2013, p. 328.

[3]- Amar Boudeiaf, A Brief on Administrative Law, 2nd edition, Dar Jisour, Algeria, 2007, p. 307.

[4]- The samereference, p. 307.

[5]-Dawoud Al-Baz, The administrative dispute as a basis for the jurisdiction of the administrative courts, Journal of the Spirit of Laws, No. 22, 2001, p. 10.

[6]- The facts are summarised as follows: The Council of the French province of Saône-et-Loire decided to offer a financial reward to anyone who killed a certain number of snakes, the amount of the reward being based on the number of snake heads presented. People rushed to kill the snakes and submit their heads to the designated employee, and the reward fund was quickly exhausted. However, one snake hunter, MrTirier, did not receive his reward and took the provincial council to the Council of State. Naturally, the question arose as to the jurisdiction of the Administrative Court, and the question put to the Council was: Is there a public body or not? Does the decision of the Provincial Council lead to the existence of a public establishment or not? On the basis of the memorandum submitted by the State Commissioner at the time, the Council of State decided that the Provincial Council's decision constituted a public establishment, thereby answering the second part of the question: that the existence of a public establishment does not always require a building, offices and employees, but can be manifested in the activity or work of the public authority, which is intended to meet a public need for citizens. See: Mustafa Abu Zaid Fahmy, Administrative Proceedings, Al-Ma'arif Establishment, Alexandria, Egypt, n.d., p. 55.

[7]- This was confirmed by the Administrative Court in one of its rulings, where it defined a public employee as "Anyone entrusted with a permanent position in the service of a public body administered by the State or one of

jurisdiction of administrative courts and defined the scope of application of administrative law. Public funds are those allocated to public bodies, public works are those carried out for the benefit of a public body, and a public servant is one who provides a service in a public body[1].

The importance of this decision lies in the fact that it finally unified the jurisdiction over local administrative disputes and central administrative disputes. The prevailing view was that contracts concluded by local authorities (municipal councils and provincial councils) constituted a type of civil contract, and that disputes arising from them fell within the jurisdiction of ordinary judges. This was based on the traditional concept of public authority, which distinguished between ordinary administrative acts and acts of authority. This distinction, which was initially removed by the Blanco judgment, remained in force for disputes with the local administration. However, the Government Commissioner, Mr Romeo, in his report on the Terrier case, demonstrated that the distinction between the State and local administrations should be disregarded. He argued that whenever there are collective needs to be met by public bodies, the management of those needs should not be subject to the rules of civil law, regardless of whether national or local interests are involved[2].

In his report he stated: "When national or local interests are involved, when there is a need to satisfy public needs to be met by a public law entity, the management of these interests will not necessarily be in accordance with the principles of civil law"[3].

The Court of Conflicts has also emphasised the application of the criterion of the public entity in several cases, as in the "Dauphron" case, where it ruled that jurisdiction remains with the administrative judiciary "even if the person who caused the damage while carrying out the activities of the public entity is not a public employee, but an auxiliary or subordinate hired by the administration under a contract concluded in accordance with civil law"[4].

Second: The content of the public authority criterion

According to this criterion, a dispute is considered to be administrative if it involves an administrative activity aimed at achieving a public good, even if it is not related to a public body. However, this criterion has also been criticised as being insufficient to cover all administrative activities. This is because the administration may seek to achieve the public good by means of private law, if it considers them more appropriate to serve the public interest. As a result, disputes arising from these activities would be considered ordinary disputes rather than administrative disputes, despite their aim of achieving public benefit. They therefore fall outside the jurisdiction of the administrative courts and the principles of administrative liability.

Furthermore, the administration may use public law means in the management of its public industrial and commercial establishments, adapted to the nature of the activities carried out by these establishments, if it considers that such means are more effective than private law means in

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the public law entities...". See: Majid Al-Hallou, Administrative Law, University Publications House, Alexandria, 1994, p. 74.

[1]- Rasha Abdel Hai, *Criteria for Distributing Jurisdiction Between Judicial and Administrative Courts and Their Practical Issues*, Modern Publishing House, Lebanon, 2014, p. 24.

[2]- "Whether it is a matter of national interests or local interests, as long as there are collective needs to be addressed by public authorities, the management of these interests cannot necessarily be considered to be governed by the principles of civil law". See: The Major Rulings of Administrative Jurisdiction, 14th edition, Dalloz, p. 02.

[3]- Rasha Abdel Hai, op. cit. p. 21.

[4]- This case concerns a lawsuit filed by Mr. "Brous" against the "Mensjour" Municipality, seeking compensation for injuries sustained by his son when some of the Municipality's church pillars fell on him while he was trying to climb them. The court ruled that: "Even if the place of worship is no longer considered a public establishment since the law of 9 December 1905, which separated the churches from the State, the property of these churches remains under the control of the faithful and those entrusted with performing religious rites in order to practise their religion, and the maintenance of these buildings and installations is linked to a public establishment". The court concluded that it had jurisdiction to hear the case, considering it an administrative dispute subject to the rules of administrative liability. See: Ali Abdel Mawla Abdel Aziz Awad Rahim, The Jurisdiction of Ordinary Courts in Administrative Disputes, Doctoral Thesis, University of Alexandria, Faculty of Law, 2016, p 02.

achieving public interest. This does not, however, alter the classification of disputes relating to this type of public entity as ordinary disputes which fall within the jurisdiction of the ordinary courts[1].

As far as the Algerian legislator is concerned, it has adopted the public establishment as a criterion for the jurisdiction of the administrative courts. However, it has adopted its organic concept without taking into account its substantive concept. This means that the focus is on the existence of the public entity as an entity or structure in the relationship, so that the dispute is assigned to the jurisdiction of the administrative courts, rather than the nature of the activity. This is explained by the fact that the Algerian legislator relies on the organic criterion laid down in Article 800 of the Code of Civil and Administrative Procedure, which requires the existence of a public administrative body, or more precisely, the existence of a public administrative institution in the dispute, in order for the administrative courts to have jurisdiction. The text of this article reads: **"Administrative tribunals are the general jurisdictional bodies for administrative disputes. They are competent to rule in the first instance, by means of a judgment which is subject to appeal, in all cases in which the State, the province, the municipality or public institutions of an administrative nature are parties".**

This is the same approach followed by the Algerian administrative judiciary in its various judicial applications. The mere existence of a public administrative institution in a given dispute is sufficient for the jurisdiction of the administrative courts, even if the nature of the dispute is private and unrelated to administrative law. Moreover, the Court of Conflicts has also relied on this criterion to resolve conflicts of jurisdiction brought before it, since it is always the organic presence of a public administrative body in the legal relationship that is at issue.

This is the result of the decision of the Court of Conflicts No. 000193, indexed as No. 27, in the case between the Cultural Cooperative of the Sétif Theatre and the Association of the Events Committee of the Province of Sétif. The dispute concerned a private contract concluded on 8 June 2008 between the Cultural Cooperative of the Sétif Theatre and the Association of the Events Committee, in which the former undertook to produce a play entitled "The Dinosaur", while the Events Committee undertook to pay the sum of DZD 300,000 to the Cooperative. Although the latter fulfilled all its contractual obligations, the Events Committee refused to pay the amount stipulated in the contract between the two parties.

It is clear that the contract between the two parties is of a private nature and contains mutual obligations for both. However, the Court of Conflicts, having been presented with a case of negative conflict of jurisdiction, assigned jurisdiction to the matter solely on the basis of the presence of the administration as a party to the dispute, namely the Provincial Events Committee.

In justifying this position, the court stated: "...it is clear from the documents and evidence submitted in the file that the Events Committee of the Province of Sétif was set up in accordance with the provisions of Law 12/07 of 21 February 2012 amending and supplementing the law on the provinces. This entity is considered as an administrative body in charge of providing a public service. Its objective is not to make a profit, but rather to promote and support the development of cultural and artistic activities at provincial level".

Since the dispute is between the plaintiff, a civil company (as stated in article 1 of its law), and an administrative body, the Provincial Events Committee, the jurisdiction to resolve the dispute falls to the judicial bodies subject to the administrative justice system, in accordance with the provisions of article 800 of the Civil and Administrative Procedure Code[2].

Although the administrative public body in this case appeared as an ordinary individual, without any manifestation of public authority and without any public body functions, the application of the organic criterion requires that this dispute be assigned to the administrative judge.

This leads us to conclude and affirm that, according to this approach, the administrative judge has become more of a real estate, civil and commercial judge than a judge resolving administrative disputes. He is only a judge who rules on disputes relating to public administrative bodies, be they

[1]- Ali Abdel Mawla, op. cit., p. 03.

[2]- Unpublisheddecision.

ordinary or administrative. This has a negative impact on the quality of the legal solutions he provides for the cases brought before him.

Professor RiadAissa expressed this situation by stating that "...the Administrative Chamber is not an administrative judicial body and is not specifically tasked with resolving administrative disputes; it is not a chamber dedicated to applying administrative law to the cases presented to it. Rather, it is a judicial chamber within the unified judicial organisation that resolves some administrative disputes involving one of the public bodies defined in Article 7 of the Code of Civil Procedure, regardless of whether the nature of the dispute is civil or administrative. Therefore, it does not apply administrative law alone, nor is its mission limited to the application of this administrative law"[1].

We believe that the application of the organic concept of the public body criterion as a basis for administrative law - and consequently for the jurisdiction of administrative courts - will lead the administrative judge to apply ordinary law to the ordinary disputes of public administration, rather than administrative law. This issue was raised by Professor BadranMourad, who asked the following question: **"The question is whether the administrative judge will apply the rules of private law in deciding these disputes?"** He replied directly - and we agree with him - that "logic dictates this, since private relations cannot be governed by public law rules, since the will of the parties is equal in these transactions"[2].

The application of the organic concept of the public institution in this way requires the administrative judge not only to specialise in administrative disputes[3], but also to be an all-round judge, knowledgeable in all areas of law, whether public or private. This leads us to conclude that the Algerian administrative judiciary is not governed by the French principle known as "the principle of competence follows the subject", which states that the jurisdiction of the administrative judge over a dispute automatically entails the application of administrative law[4]. As mentioned above, administrative tribunals apply all branches of law simply because a public administrative body is a party to the dispute.

Section Two: The crisis of the public authority and the emergence of the dual criterion

Legal scholars and the judiciary have long relied on the public body criterion as the foundation of administrative law and the jurisdiction of administrative courts. However, this criterion has faced a crisis that has shaken its existence. We will attempt to clarify the extent of the impact of this crisis on the Algerian legislature and judiciary, and the emergence of the dual criterion in the wake of this crisis.

First: The crisis of the public interest

For a long time, especially during the first third of the twentieth century, the criterion of the public interest served as a successful basis for the application of administrative law and as an ideal standard for the jurisdiction of administrative judges. However, the evolution of the role of the State and its increased intervention in the economic sphere during the first half of the twentieth century led to the emergence of new public bodies characterised by a legal system that mixed public and private law rules.

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[1]- Badran Mourad, op. cit., p. 119.

[2]- Lahcen Ben CheikhAthMelouia, The Selected Cases of the Court of Conflicts, Dar Houma, Algeria, 2014, p. 13.

[3]- RiyadIssa, Notes on the Amendment of the Code of Civil Procedure and its Impact on the Nature of the Administrative Chamber in the Algerian Judicial System; Symposium of Judges of the Administrative Chambers, National Office for Educational Works, 1992, p. 76.

[4]- Professor "KharbashiAqeela" defined it as follows: "... in principle, the jurisdiction of the administrative judge is determined by the subject matter of the law applicable to the dispute and, more specifically, by the concept of the cause of the dispute (individual act, contract, public property, administrative liability, etc.). There is a link between the application of administrative law and the intervention of administrative justice; therefore, jurisdiction follows the subject (cause) of the dispute". See: KharbashiAqeela, The Link Between the Jurisdiction of the Judge and the Subject of Administrative Law, Journal of Rights and Political Sciences, No. 1: Special Issue on the Maghreb Symposium Maghrebian Approach to the Criteria of Administrative Law, University of Oum El Bouaghi, Algeria, p. 128.

This situation created a crisis for the criterion, since the existence of a public entity in a relationship does not necessarily imply the application of administrative law rules and, consequently, the jurisdiction of administrative courts. This is because industrial and commercial entities often operate according to the rules of private law applicable to commercial companies. Furthermore, the mere presence of a public administrative body in the relationship does not automatically mean that the administrative courts have jurisdiction over the dispute, since the public administrative body may carry out activities similar to those of private law entities, such as concluding private contracts. In this case, the role of the ordinary judge is limited compared to that of his administrative counterpart[1]. In addition, individuals are now able to set up private projects for the public good. This situation necessitated the search for an alternative criterion to replace the public establishment criterion, which proved incapable of taking into account the fundamental developments and changes that the State was experiencing during this period.

The credit for highlighting the crisis of the public entity goes to a famous decision of the French Court of Conflicts, known as the "ELOKA" case[2], which for the first time conferred jurisdiction on the ordinary courts to resolve a dispute involving a public entity operating in a manner similar to a private company or individual.

The dispute concerned a shipping company called "ELOKA" in Côte d'Ivoire, which was involved in an incident in which a passenger drowned and a number of vehicles were damaged. When the case was brought before the ordinary courts, the representative of the administration pleaded lack of jurisdiction. The case was then referred to the Court of Conflicts, which confirmed the civil nature of the dispute and the jurisdiction of the ordinary courts. The court based its decision on the fact that the company performs a transport function under the same conditions as individuals. Consequently, the dispute fell within the jurisdiction of the ordinary courts.

In this case, the French Court of Conflicts ruled that the ordinary courts were the appropriate body to hear claims by individuals seeking compensation for damage resulting from the activities of public industrial and commercial entities, since these entities operate under the same conditions as private companies[3].

The "BakWoka" case raised the question of the similarity between public commercial and industrial institutions on the one hand and private institutions carrying out similar activities on the other. The Court of Conflicts addressed this issue and used this similarity as a reason to declare the jurisdiction of the ordinary courts, despite the fact that the colony of the Ivory Coast involved in the decision was carrying out the mission of a public entity[4].

The solution adopted in this case represents a departure from the principles established by the "Blanco" judgment and highlights one of the faces of the crisis facing the "public establishment" criterion enshrined in the "Blanco" judgment. Although the activity was related to a public establishment, its commercial and industrial nature meant that it did not fall within the jurisdiction of the administrative courts. This indicates that the public service criterion is no longer decisive after the "BakWoka" ruling[5].

As a result, we can see that the crisis of the public institution is manifesting itself in various ways, mainly through the emergence of industrial and commercial public institutions alongside social

[1]- Carl Irani, Judicial Competence in Administrative Matters in Lebanese and French Law, Doctoral Thesis in Public Law, University of Grenoble Alpes, 2014, p. 174.

[2]- See: Amar Boudeiaf, A Brief on Administrative Law, 2nd edition, 2007, p. 133.

[3]- In the reasoning of this decision it was stated that:

- "On the one hand, the Eloka ferry does not constitute a public work; on the other hand, by charging for the transport of pedestrians and vehicles from one bank of the lagoon to the other, the Ivory Coast colony operates a transport service under the same conditions as an ordinary industrial undertaking; consequently, in the absence of a specific provision conferring jurisdiction on the administrative judiciary, only the judicial authority is competent to deal with the harmful consequences of the alleged accident...".See: Carl Irani, *Op. Cit.*, p. 175.

[4]- Rasha Abdel Hai, op. cit., p. 29.

[5]- Many notable cases have highlighted the crisis surrounding the concept of public entity, including the "Guarantee Fund" case and the "Monbier" case. For more details on these cases and their facts, see Rasha Abdel Hai, Op. Cit., p. 29.

public institutions, which can fall under the jurisdiction of the ordinary courts in their disputes. In addition, the crisis affecting this criterion manifests itself in the emergence of private entities that do not have the status of public person or public institution, but which carry out activities similar to those of public entities. Disputes arising from these activities may therefore fall within the jurisdiction of the administrative courts.

As far as the Algerian legislator and the administrative judiciary are concerned, we note that the crisis of the public institution has also affected the jurisdiction of the Algerian administrative courts. According to article 800 of the Code of Civil and Administrative Procedure, the legislator has excluded disputes involving public economic institutions from the jurisdiction of the administrative courts, which means that they implicitly return to the jurisdiction of the ordinary courts.

However, the Algerian Court of Conflicts has established an exception to this rule with regard to the jurisdiction of ordinary courts over disputes involving industrial and commercial public entities. This exception grants the administrative judge jurisdiction to resolve disputes relating to public procurement contracts concluded by public institutions of an industrial and commercial nature, when such contracts are financed in whole or in part by the State budget.

The Public Procurement Law, regulated by Presidential Decree No. 15/247[1], does not explicitly confer jurisdiction on the Administrative Tribunal; it merely includes contracts concluded by these entities in the category of public contracts[2]. The judges of the Court of Conflicts are to be congratulated for having given the administrative judge jurisdiction through a large number of judgments.

This type of dispute refers to cases related to public procurement contracts concluded by public economic entities, when these entities carry out investment projects with State contributions. Such actions are subject to the provisions of Law No. 23-12, which lays down the general rules on public contracts[3], taking into account the contracts concluded by national public entities, which also fall under the jurisdiction of the administrative courts[4] within the framework of the full jurisdiction granted to them under Article 801 of the Civil and Administrative Procedure Code.

The Public Procurement Law stipulates that contracts awarded by commercial entities with state participation are considered public contracts. However, this law does not expressly confer jurisdiction over disputes arising in this regard between the administration on the one hand and the economic entity on the other, when the project is carried out with its contribution.

The fourth paragraph of article 9 of the aforementioned law on public contracts includes public contracts concluded by public institutions and public economic entities entrusted by the State or local authorities with the supervision of the project delegated.

The assignment of jurisdiction to the administrative judiciary in this type of dispute is thus a principle established by the Algerian Court of Conflicts in numerous decisions. One such decision was issued on 13 November 2007 in the dispute between (C.J.) and the Algerian Insurance Company. The ruling stated: "...In this case, there is indeed a public contract concluded between Mr (C.J.), the director of the construction company 'C.J.', and the Algerian Insurance Company (SAA), represented by its director in Béchar.... The provisions of the judgment of the Court of Conflicts of 8 May 2000 cannot therefore be fully applied in the present case, since the Algerian Insurance Company (SAA) is not a public body, but a public institution of an industrial and

[1]- According to the Decree of 24 Dhul-Qi'dah 1436 (corresponding to 16 September 2015) concerning the regulation of public contracts and the delegation of public facilities, Official Gazette No. 50 of 20 September 2015, p. 3.

[2]- Article 06 of the Public Contracts Law, Presidential Decree No. 15/247, provides: "The provisions of this section shall apply only to public contracts involving expenditure ... of public entities subject to the legislation governing commercial activities, when they are entrusted with the execution of a project financed in whole or in part by a temporary or permanent contribution from the State or local communities."

[3]- Law No. 23-12 of 5 August 2023 laying down the general rules on public contracts, Official Journal No. 51 of 6 August 2023.

[4]- Supreme Court Journal, No. 01, Documentary Section, 2012.

commercial nature, as is clearly stated in its statutes. Consequently, jurisdiction in this dispute must necessarily be attributed to the civil courts"[1].

At first sight, the Court of Conflicts seems to have applied the material criterion by granting jurisdiction to the ordinary courts, considering the Algerian insurance company to be a public body of a commercial nature. It did not consider the contract it had concluded to be a public procurement contract because it was not financed by the state budget.

Analysing this decision,it is clear that the civil courts have jurisdiction to rule on disputes arising from contracts concluded by public industrial and commercial entities when these entities are not in charge of carrying out a public project with a final contribution from the State budget. In other words, by implication, disputes arising from public procurement contracts concluded by these institutions, when they are entrusted with the execution of public projects, fall within the jurisdiction of the administrative judiciary.

We therefore consider that the Disputes Tribunal has given itself the power to add an exception to the organic criterion, namely the exception concerning disputes relating to public procurement contracts concluded by public bodies of an industrial and commercial nature. We see this as a violation of the principle of legality that it had previously instructed the judges of the Council of State to respect. This view is supported by Professor BouabdellahMokhtar, who stated: "From this reasoning, we conclude that if the contract in question had been financed by final contributions from the state budget, jurisdiction over the dispute would have returned to the judicial body responsible for administrative matters. This is where we disagree with the judges of the Court of Conflicts, because they did not take into account not only the legal provisions they referred to in the aforementioned case concerning the Council of State, but also the principle of legality itself"[2].

We criticise the approach of the Court of Conflicts from several points of view and believe that it departs far from the material criterion. In this case, it did not uphold this criterion, but rather violated it and violated constitutional provisions. Our reasoning is that the presidential decree regulating public procurement does not provide for the assignment of jurisdiction to the administrative judiciary when the contract is concluded by public entities of a commercial nature based on contributions from the state budget; it merely classifies it as a public contract.

Moreover, the presidential decree cannot address the issue of jurisdiction at all, as the determination of jurisdiction is constitutionally entrusted to Parliament through organic laws, according to Article 141 of the 2016 Constitutional Amendment[3]. Consequently, by assigning jurisdiction to the ordinary judiciary, the Court of Conflicts did not apply the material criterion. In the opposite scenario, where the contract is concluded with final contributions from the State budget, the matter would fall under the jurisdiction of the administrative judiciary.

In doing so, it violated not only the constitution but also a clear legal text, namely Article 800 of the Civil and Administrative Procedures Code, which limits the jurisdiction of the administrative courts to disputes involving the state, the province, the municipality or public institutions of an administrative nature[4].

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[1]- Decision of the Court of Conflicts No. 42, Journal of the Supreme Court*, special issue on the Court of Conflicts, *Op. Cit., p. 103.

[2]- BouabdallahMokhtar, Preliminary Report, Maghreb Symposium on the Maghrebian Approach to the Criteria of Administrative Law, 9-11 December 2014, Journal of Rights and Political Sciences, University of Arab Ben Mehidi, Faculty of Law and Political Sciences, Oum El Bouaghi, January 2015, p. 24.

[3]- This article states: "In addition to the areas designated by the Constitution for organic laws, the Parliament shall issue organic laws in the following areas:
- Organisation of public authorities and their functioning,
- Electoral system,
- Laws relating to political parties,
- Law on the media,
- Basic law of the judiciary and judicial organisation..."

[4]- AmmarBourawi, The Court of Conflicts Between Ordinary Judiciary and Administrative Judiciary, Journal of the Supreme Court, No. 1, Document Section, Algeria, 2015, p. 89.

This view is supported by the State Counsellor at the Council of State, Professor Amar Bouraoui, who states: “In our opinion, the decision of the Court of Conflicts in this direction deviates from the concept of the criterion established in Article 800 of the Civil and Administrative Procedures Code”.

The same lawyer criticises this clear violation of the provisions of the aforementioned Article 800 by questioning the rationale behind the assignment of jurisdiction to the administrative judiciary for disputes relating to public procurement contracts concluded by economic public entities with contributions from the State budget. He stresses that there is nothing to prevent the ordinary judiciary from hearing such disputes, since the latter is also accustomed to applying administrative law when, exceptionally, it has jurisdiction over certain disputes relating to the public administration, in accordance with the material criterion mentioned above, such as some disputes relating to nationality and customs.

He concludes by saying: “Personally, I do not understand the justifications of the Court of Conflicts in this direction, although I respect its position and commit myself to respecting it, in compliance with Article 32 of Law 98-03 on the jurisdiction, organisation and functioning of the Court of Conflicts”[1].

Some supporters of the jurisdiction of the administrative courts over this type of dispute - namely, disputes arising from contracts concluded by economic public entities with partial or total contributions from the State budget - may argue that the judicial interpretations of the judges of the Court of Conflicts, as well as those of the Council of State, have supported this jurisdiction based on their interpretation of Article 2 of the aforementioned Public Procurement Law. They argue that the administrative judge plays a creative role in the creation of legal rules, and therefore the attribution of jurisdiction to the administrative judiciary in this way falls within the scope of this creative role in the creation of legal rules.

This argument is refuted on the grounds that the question of jurisdiction in administrative disputes and proceedings is of great importance and its regulation is regulated by organic law. Moreover, it is not an issue that concerns only the administrative judge, who can innovate and modify it as he pleases, but it is an issue that concerns all the bodies of the judicial system, both ordinary and administrative.

Professor Sash Jaziah supports our position by stating that disputes involving economic public institutions that fall under the jurisdiction of the administrative judiciary are limited to the disputes specified in Articles 55 and 56 of the Guiding Law for Economic Public Institutions. This jurisdiction is limited and cannot be generalised, and the judiciary has no discretion to interpret it. The professor noted that: “...for some disputes involving public institutions of a commercial and industrial nature, this exception is very narrow and can only be applied in the cases provided for in Articles 55 and 56 of Law No. 88-01 mentioned above. The judge’s power to apply the material criterion is limited; he has neither the power to generalise nor the right to interpret in this field. The cases in which disputes involving public economic bodies fall within the jurisdiction of the administrative judiciary are expressly defined by law, and in other cases the jurisdiction over such disputes returns to the ordinary courts”[2].

Despite the criticisms directed at the aforementioned ruling of the Court of Conflicts, the judges of the Council of State relied on this judicial decision as a justification for assigning jurisdiction to the ordinary courts over disputes involving economic public institutions related to public procurement contracts not funded by the state budget. This was reflected in a relatively recent decision issued by them under number 058475, dated March 10, 2011, in the case of the single-person company “Public Works” (”COGEDIB”) against the National Agency for Housing Improvement and Development (ADL).

The dispute concerned an appeal lodged by the construction company against the decision of the Administrative Court, which had held that it lacked jurisdiction, on the basis of Article 7 of the

[1]- AmmarBourawi, op. cit., pp. 89-90.
[2]- Sash Jaziah, op. cit., p. 182.

repealed Code of Civil Procedure, in respect of a public procurement contract concluded between the appellant and the ADL agency. However, the Council of State decided to dismiss the appeal on the grounds that the contract was not financed by the State budget, thus conferring jurisdiction on the ordinary courts to hear the dispute. The Council based its decision on the earlier ruling of the Court of Conflicts, stating: "The Court of Conflicts has confirmed that the administrative courts have jurisdiction in cases where one of the parties is a public entity of an industrial or commercial nature and the other is a private entity, and the dispute relates to a public contract financed by the State. It is not competent if the contract is not financed by the State, as stated in the decision of the Court of Conflicts of 13 November 2007. The reasoning of this decision is as follows Therefore, the jurisdiction is transferred to the ordinary judiciary because the condition for the execution of an investment project financed by the State is not fulfilled. This means that if this condition is met, the administrative courts have jurisdiction. Therefore, the argument of the appellant's opponent that the administrative judiciary does not have jurisdiction is misplaced"[1].

The Court of Conflicts has reaffirmed this interpretation in several recent rulings, one of which is its ruling no. 132 of 12 June 2012 in the case of the Economic Public Institution for Bridge Construction "Sapta" against the National Dams Agency. The decision states: "The current dispute concerns the construction of a bridge to bypass the Bougous Dam (in the province of El Tarf), which is a public investment financed by final contributions from the state budget. In fact, the public economic entity 'Sapta' concluded a contract with the National Dams Agency, which was a public entity and became a public entity of an industrial and commercial nature by virtue of Decree No. 05-101 of 23 March 2005, for the execution of a public investment project financed by final contributions from the State budget. The contract concluded between the two parties is governed by the Public Procurement Law and any disputes arising from it are subject to the jurisdiction of the courts of the administrative justice system"[2].

The same situation recurred in a recent ruling by the Court of Conflicts, dated 26 January 2015, in the case between the company ETB (Public Works Company) and the Promotion and Real Estate Management Office of the Province of Béjaïa. The ruling states: "...these subsidies financed by the State are granted for the construction of so-called social housing, in addition to the financial contribution of the beneficiaries... Ultimately, the project owner for the construction of the social housing units is the Promotion and Real Estate Management Office. The provisions of Article 2 of Presidential Decree No. 02/250 of 24 July 2002, which regulates public procurement, are applicable in this case... Therefore, the administrative judge has jurisdiction to rule on the dispute between a legal entity governed by private law and a public body of an industrial and commercial nature financed by the State with contributions from the beneficiaries"[3].

This leads us to conclude that the Court of Conflicts, despite the criticism directed at it in this regard, continues to insist on assigning to the administrative judiciary jurisdiction over disputes arising from public procurement contracts concluded with definitive contributions from the State budget, based on the criterion of public entity.

Second: The emergence of the dual criterion

According to this criterion, a dispute is considered administrative if an administrative body is a party to it. It differs in its nature and circumstances from disputes between individuals and private entities in general[4]. In other words, a dispute is administrative when it concerns the management of public bodies using the means and privileges of public authority[5]. A public servant acquires the status of an employee because he works in the service of a public entity, and the proper functioning of the public entity requires the existence of independent rules applicable to those who work in its service.

[1]- Council of State Journal, No. 12, 2014, p. 104.
[2]- Supreme Court Journal, No. 2, 2013, p. 456.
[3]- File No. 164, Supreme Court Journal, No. 1, 2015, published by Mofim for Publication and Distribution, Algeria, p. 83 et seq.
[4]- Majid RaghebHallou, Administrative Judiciary, University Publications House, Alexandria, 2016, p. 189.
[5]- Ibrahim Abdel Aziz Shihha, Administrative Judiciary: Action for Annulment, 2002, p. 81.

Contracts are not considered to be administrative contracts unless they are related to a public entity and include certain privileges and rights for the administrative entity that have no equivalent in private law[1]. If the public body uses the means of public law and benefits from advantages and powers not recognised in private law, the dispute is administrative. Thus, the application of administrative law - and, consequently, the jurisdiction of the administrative courts over this dispute - requires the fulfilment of two conditions: firstly, it must concern a public body; and secondly, it must arise from the use of the means of public law by this body[2].

Among the decisions of the French judiciary that combine the criteria of public authority and public body, we find the decision of the French Court of Cassation of 10 April 2013[3]. In this case, the Court of Cassation overturned the decision of the Court of Appeal, which had given the administrative judge jurisdiction to hear a dispute relating to compensation for damage caused by sand dunes and damage to a forest managed by the National Forestry Office as a result of work carried out by a private company. The Office was classified as an industrial and commercial body under the law establishing it and, since its activity in this case did not involve the exercise of the prerogatives of the public authorities, the Court of Cassation transferred jurisdiction to the ordinary courts.

Therefore, if this institution had made use of the privileges of the public authorities, the matter would inevitably fall under the jurisdiction of the administrative courts. The ruling stated: "When the law classifies a public body as an industrial and commercial public body, disputes relating to its activities, such as organisation, regulation and supervision, are by their very nature outside the prerogatives of public authority. In this case, the National Forestry Office did not exercise public authority prerogatives such as regulation or supervision"[4].

In conclusion, we note that the application of the organic concept of the public body as a basis for the application of administrative law and the jurisdiction of the administrative judiciary has led the latter to operate in various branches of public and private law, rather than acting as a judge resolving administrative disputes. It has become merely a judge of administrative disputes, whether ordinary or administrative. This has a negative impact on the quality of the legal solutions it provides to the cases brought before it and renders ineffective the idea of specialisation in administrative justice, since it will apply different laws simply because of the presence of a public administrative body as a party to the dispute.

Furthermore, the attribution of jurisdiction to the administrative judiciary, on the basis of the public entity criterion, for disputes arising from public procurement contracts concluded by industrial and commercial public entities with a final contribution from the State budget, is strongly criticised for the reasons outlined above.

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[1]- Mohamed Bahy Abu Younes, Termination of Administrative Disputes by Unilateral Will in Administrative Proceedings, New University Publishing House, Alexandria, Egypt, 2010, p. 11.

[2]- The Egyptian judiciary has adopted a dual criterion for determining the nature of disputes in many of its decisions, including a 1993 ruling by the Supreme Constitutional Court, which stated: "The administrative dispute, which is the basis for the jurisdiction of the Council of State... is the procedural dispute between the individual and the administration, raised to claim a right arising from the administration's management of public institutions governed by public law and its methods, which clearly reflects the nature and appearance of public authority. Public law is the law applicable to the dispute". See: Ali Abdel Mawla Abdel Aziz Awad Rahim, The Jurisdiction of Ordinary Courts in Administrative Disputes, Doctoral Thesis, University of Alexandria, Faculty of Law, 2016, p. 9.

[3]- Cass. Civ., 10 April 2013, No. 12.13.902 - Carl Irani, Op. Cit. p. 178.

[4]- "When a public entity derives from the law the status of an industrial and commercial public entity, disputes relating to those of its activities that involve regulation, supervision or control indicate that, in this case, the National Forest Service was not exercising an activity that implements the prerogatives of public power entrusted to it in matters of supervision, regulation or control."

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