

The concession as a mode of rational water use In Algerian law

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Abstract:

We highlight water as an essential environmental element deserving protection, particularly due to its association with the natural hydraulic public domain. Law 05-12 aims to balance conflicting interests regarding water use, emphasizing the importance of concession contracts as a regulatory tool. The presentation is divided into two parts: firstly, an exploration of the concept of concession outlined in Law 05-12, and secondly, an examination of the legal framework surrounding these concessions.

Keywords: Water , concession , . Water resources , Public properties of water resources .

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1. INTRODUCTION

The water is one of the elements of the environment and therefore deserves to be protected as such. Water also maintains a direct relationship with the public domain since it belongs to the natural hydraulic public domain¹.

This implies that the legislator must be attentive to conflicting interests and attempt to reconcile them. On one hand, there is the protection of the environment, and on the other hand, there are the interests of users. This is what Law 05-12 aims to achieve, and one of its tools is the concession contract².

To address this topic, I have divided my presentation into two parts. The first part is dedicated to the concept of concession as established by Law 05-12. Then, I will discuss the legal framework of this concession.

Section I: The Concept of Concession

The law uses two legal modalities to allow the use of water resources: authorization and concession. It is the latter that attracts our attention due to its importance as it relates to highly advanced forms of use.

Before delving into the regulations governing concessions, we need to clarify it to dispel the ambiguity associated with it, which can lead to confusion with other related administrative acts. We will successively address the reasons for resorting to concession (§1) and then the distinctive elements of this concept (§2):

§ 1 Reasons for Resorting to the Concept of Concession

According to Article 77 of Law 05-12, the concession regime applies to the following operations:

The requirement to obtain a concession is primarily justified either due to the scarcity of water, as is the case with "the drilling of wells for water extraction from fossil or low-renewable aquifer systems, for agricultural or industrial purposes, especially in Saharan areas." Or due to the significance of activities related to water exploitation, such as "the establishment of facilities for extracting groundwater or surface water, including connection to water supply systems, to ensure independent supply to industrial zones or units." Additionally, "the establishment of seawater desalination or brackish water demineralization facilities for reasons of public utility or to meet specific needs" also justifies the requirement for a concession.

These justifications reflect the dual purpose of concessions: addressing the challenges posed by water scarcity and ensuring effective management of water-related activities. The legislative framework, as outlined in Article 77 of Law 05-12, recognizes the critical nature of these operations and establishes the concession regime to regulate and oversee them.

The requirement for concession is also justified by the impact of water on public health, as seen in the case of "the development of infrastructure intended for the use of treated wastewater for individual or collective agricultural purposes or for industrial use." There is no doubt that the use of treated wastewater must adhere to strict regulations as it poses a risk to consumer health. In fact, the decree includes provisions aimed at preventing risks associated with the use of wastewater.

This highlights the need for a concession in situations where water resources, specifically treated wastewater, are utilized for various purposes. The concession framework ensures that such activities comply with strict regulations and safeguards to protect public health. The legislative measures, as outlined in the decree, play a crucial role in mitigating risks associated with the use of treated wastewater and contribute to the overall safety of water-related activities.

The concession as a mode of rational water use In Algerian law

§ 2 Distinctive Elements of the Concession Concept

The concession, as used by Law 05-12, is characterized by certain elements that need clarification.

I. It is an administrative contract:

Although Law 05-12 emphasizes that it is an act of public law, certain indicators attest to its contractual nature. The first indicator is found in Law 90-30 concerning the national domain. This law serves as the legislative reference in this matter, making it entirely normal to refer to it to find the answer to the question of the nature of the concession.

Law 90-30 recognizes the concession as a contractual mode alongside authorization. This is evident from Article 64 bis, which defines the concession as "the act by which, the conceding authority entrusts [something] in the form of a contract."

This characteristic is also acknowledged in French law, where, since the decree-law of June 17, 1938, occupations of public domain are considered administrative contracts.

The second clue to the contractual nature is found in the texts related to the concession of the use of water resources³. These confirm that the concession follows the rules pertaining to administrative contracts. Thus, the specifications attached to Decree 07-69 stipulate that the concession is signed by two parties⁴.

The decree provides for termination of the contract against the concessionaire and not revocation, as is the case with the authorization for the use of water resources, or withdrawal, as in the case of the concession for electricity distribution⁵. The contractual nature of the concession related to the use of water resources encompasses everything related to administrative contracts: the concession cannot be annulled by the legality

judge - the concession falls under full jurisdiction, so administrative courts have jurisdiction in this matter.

II The concession pertains to the public domain: Similar to the concession established by Law 90-30, the concession in water matters is related to the public domain, except that it involves two different domains. The first entails the exploitation of "a dependency of the natural public domain or the right to finance, build, and/or operate a public facility for public service." As for the second, it concerns the use of water resources, which belong to the hydraulic domain.

3 / 3

III The concession is not linked to public service:

Contrary to a widely held belief, the use of the term "concession" in legal texts does not always represent a mode of managing public services. The term is indeed versatile; it is used both in public law and private law. Within public law, the use of the term corresponds either to a contractual form falling within the broad category of public service delegation contracts or simply to a form of occupation of the public or private domain.

In the latter case, the concessionaire is not considered a manager of public services; they are simply a user of the public domain. Law 05-12 employs the term "concession" to express both uses. The concession as a mode of managing public services is outlined in Title VI of this law, titled "Public Water and Sanitation Services." Article 101 dedicates this concession exclusively to the State and municipalities, which can delegate the management of public water services to public legal entities.

The second concession we are concerned with is limited to the use of the hydraulic public domain. However, the legislator foresees two scenarios in which the concessionaire becomes a manager of public services. These scenarios involve the construction and operation of seawater desalination or brackish water demineralization facilities for public utility purposes.

Regarding the second scenario, it can be deduced from Article 93 of Law 05-12, which states that "support and assistance (...) implementing operations, including:-the development, establishment, or modification of

The concession as a mode of rational water use In Algerian law

technology, processes, facilities, or equipment that enable water savings, recycling, and valorization-the use of treated wastewater to enhance the value of treated water."

IV The concession is a framework contract: The concession, as established by Law 05-12, serves as the framework for various concessions. Thus, after the adoption of this law, several decrees have been issued, establishing various concession contracts:

- Concession for the use and operation of thermal waters⁶.
- Concession for the use of treated wastewater for irrigation purposes.
- Concession for the establishment of an aquaculture facility.

Section II

- Section II: Legal Framework for Concession in the Exploitation of Water Resources

- The legal framework for concession in the exploitation of water resources is characterized by two aspects: compliance with certain principles inspired by public domain law and environmental law §1, and concession allocation rules §2.

- § 1 Principles Governing the Concession:
 - Law 05-12 draws inspiration from rules concerning the private occupation of the public domain:
 - I. The concession is granted in compliance with environmental requirements and the public interest:
 - According to Article 85 of Law 05-12, the concession request is denied if the needs to be met are not justified, if their satisfaction harms the quantitative and qualitative protection of water resources, or if it infringes upon the public interest or the duly established rights of third parties.

- By introducing harm to the public interest as a factor justifying the refusal of concession issuance, Law 05-12 has endowed the administration with discretionary power. Indeed, the administration can assess, based on factual elements, whether the public interest allows or hinders the concession issuance. This results in subjecting the refusal decision to a restricted or minimum level of control, meaning the judge ensures that the administration has not made a manifest error in judgment.

- II. The Precariousness of Water Resource Exploitation:

- Similar to the private occupation of the public domain where "the precarious nature of exploitation is common to all occupations of the public domain," the exploitation of water resources can be modified, reduced, or revoked at any time for the public interest. Two scenarios are conceivable in case of revocation: if revocation occurs due to the non-compliance with the conditions and obligations imposed on the concessionaire, they are not entitled to compensation.

On the other hand, if revocation occurs solely for the public interest, the holder of the concession is entitled to compensation if they have suffered direct harm.

III. Exercise of Administrative Powers towards the Concessionaire:

The administration, by virtue of its control power, can order:

- The modification of equipment or works not complying with the conditions.
- The demolition of structures built without authorization or concession, or in case of the forfeiture of rights, the restoration of the site.

IV. General Obligations Regarding Exploitation:

The concession as a mode of rational water use In Algerian law

Article 89 imposes certain obligations on water resource operators in the name of the public interest:

- The rational and economical use of water.
- Compliance with provisions regarding the conditions for commissioning and operation of hydraulic structures.
- Respect for the rights of other water users.
- Submission to control interventions carried out by authorized agents.
- Payment of a fee.

The exploitation of water resources under authorization or concession entails the payment of a fee set by the finance law. Thus, Law 05-12 establishes the rule.

§ 2 Concession Issuance Procedures

We can only note the absence of a competitive bidding process in the grant of the concession, even though this procedure can be useful to select the operator best suited to exploit water resources in a reasonable manner. Competition can be a viable solution when multiple operators seek to exploit the resources.

The Court of Justice of the EU considers that when the number of occupancy permits is "limited due to the scarcity of natural resources," a competitive bidding process is required, at least when the permit is necessary for the exercise of an economic activity. This solution was necessary regardless of the nature of the domain, as community law did not make a distinction between public and private domains.

In the case of thermal resources, both requirements of the EU Court of Justice are met. Thermal resources are considered scarce, meaning that there is a risk that certain operators interested in obtaining the concession contract may not be able to benefit from the exploitation of these resources⁷.

The second requirement is also present because the concession is a formal act "to be obtained by providers from national authorities to be able to engage in economic activity." Instead of establishing a competitive bidding process, Decree 07-69 establishes a non-competitive procedure that involves submitting a request to the Minister responsible for thermalism through the locally competent wali.

Upon receiving the request along with the documentation transmitted by the wali, the minister submits the request to the examination of the thermalism technical committee. This committee has a period of one month from the date of its referral to make a decision.

The committee can either provide a favorable opinion, an unfavorable opinion, or attach conditions to its favorable opinion for the applicant to fulfill. It is important to note that the concession request can be denied in two additional cases, in addition to the previous ones. These cases are as follows:

- When the applicant has undergone a permanent withdrawal of the concession.
- When it is established that the waters subject to the concession request have undergone alteration, pollution, or bacteriological contamination.

Conclusion: As we have seen, the concession contract represents a mode of access to water resources used by Law 05-12 to strike a balance between the exploitation of these resources and their preservation, given their environmental importance.

Indeed, the concession allows effective control over rational and compliance with the requirements of the public interest while providing the opportunity for operators to exploit water resources for commercial or agricultural purposes.

However, in our opinion, the legislator should intervene to address two shortcomings in Law 05-12:

The concession as a mode of rational water use In Algerian law

- The ambiguity of the nature of the concession contract, whether it is indeed a contract or a unilateral act. It is crucial to amend Article 76 of Law 05-12 to specify that "the concession is a public law contract."
- Contracts for concession should be subject to competitive bidding.

¹ The natural resources, including hydraulic resources, are considered by the domain law 90-30 (Article) of December 1, 1990, JORADP of December 2, 1990. The law 05-12 (related to water dated August 4, 2005, JORADP of December 4, 2005) merely confirms this affiliation.

² Water, according to Law 03-10 (Article 03) of the law dated July 19, 2003, related to environmental protection within the framework of sustainable development, JORDP of July 20, 2003. In this regard, this law dedicates its Chapter 03 to the regulations for the protection of water and aquatic environments.

³ André de Laubadère Yves Gaudemet , « Traité de droit administratif ,Tome 2 ,LGDJ ,2002, p 188 .

⁴ Décret exécutif n 07-69 du 19 février 2007 fixant les conditions et les modalités d'octroie de la concession d'utilisation et d'exploitation des eaux thermales , JORADP du 21 février 2007 .

⁵ L'article 07 du décret n 08-148 du 21 mai 2008 fixant les modalités d'octroie de l'autorisation d'utilisation des ressources en eau ,JORADP du 25 mai 2008

⁶ Décret exécutif n 07 -149 du 20 mai 2007 fixant les modalités de concession d'utilisation des eaux usées épurées à des fins d'irrigation ainsi que le cahier des charges –types y afférent , JORADP du 23 mai 2007 .

^{7 7} Directive 2006 /123 /CE du 12 décembre 2006 relative au services dans le marché intérieure .