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Evolution of the Competency Criteria of the Administrative Judge in Morocco

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Abstract: The identification of the area of competence of the administrative judge has historically constituted the main means of determining the scope of application of administrative law as an autonomous law. This study proposes to examine the criteria adopted by jurists to decide on the jurisdiction of the administrative judge in Morocco. Its purpose is to elucidate the position of doctrine and case law on this subject, via the presentation of jurisdictional decisions illustrating the temporal evolution and the socio-political context characterizing the choice of a given criterion in order to reconstruct its genesis, its historical context and its specificities. The work also tries to bring out the points of convergence and divergence between Morocco and France, exporting country of administrative law through colonial penetration, as to the elements which justified the competence of the administrative judge. The study revealed that the criteria adopted so that the administrative judge can rule on a specific case have known in Morocco an evolution varying between the use of the organic criterion: identification of the authority, of the person at the origin of the dispute, and recourse to the material criterion which consists of an examination of the situations encountered, the material facts or the legal acts at the origin of the dispute.

Keywords: Administrative Law, Judicial Judge, Administrative Judge, Competent Judge, Organic Criterion, Material Criterion, Jurisprudence

1. Introduction

The definition of administrative law as a body of specific rules (different in particular from common law) is not enough to characterize it. It is a question of knowing on what criterion one can define this law. Indeed, if we consider that administrative law is an autonomous law which has its own logic and domain, the question that arises is to know on what basis can we build this autonomy.

On a practical level, this question was raised at the same time as the problem of determining the competent judge. Knowing that administrative law is applied in the event of a dispute by the administrative judge, the determination of his jurisdiction presupposes that the latter determines at the same time the special rules that he will apply and the criteria on which they are based. Thus, from a historical point of view, it is the identification of the area of competence of the administrative judge which essentially determined the scope of application of administrative law as an autonomous law. Classical authors started from administrative jurisprudence to find the justification for the autonomy of administrative law. However, jurisprudence has undergone an evolution: In the 19th century, the application of administrative law in France was justified by the idea of public power, it was not until the 20th century that the idea of public service prevailed and other more recent theories appeared. Indeed, the doctrinal works of French authors constituted the starting point of the doctrine of Moroccan administrative law. For their part, the works of Moroccan authors have not been immune to the influence of French doctrine. The frequency of the concepts of public service, public power, general interest refer to the genealogical origin of the administrative regime installed during the protectorate. However, this genealogy did not prevent them from gaining a certain autonomy in the postcolonial era. The Moroccan doctrine intervening mainly at the level of the legal devices would have to draw from the particularity of the context of what to justify slight inflections compared to the French doctrinal work. It is therefore certain that administrative law does not develop in a vacuum, but rather in an institutional framework beholden to the dominant

socio-political culture, hence the interest of adopting a historical approach aimed at shedding light on today's doctrinal and legal practices. In terms of administrative law, the history of the discipline is linked to the movements of legal and doctrinal ideas initiated by French jurists under the protectorate. After independence, the question of the criteria of the jurisdiction of the administrative judge continues to preoccupy the actors of administrative justice. The historical apprehension of this doctrinal movement in its direct or indirect relationship to administrative justice is conceived in this contribution of two complementary methods.

The first method is genealogical and is intended to reconstruct the genesis of jurisprudential and doctrinal reflection on the criteria of jurisdictional competence in administrative law in Morocco from the colonial era until today.

The second method is of an archaeological type; its objective is to bring to light the context and the foundations of the adoption of a specific criterion in the field of administrative justice.

In this perspective, it seems rigorous to analyze the evolution of the criteria of competence of the Moroccan administrative judge who oscillated between the use of the organic criterion: identification of the authority of the person responsible for the litigation (A), and the recourse to the material criterion which consists of an examination of the situations encountered, the material facts or the legal acts at the origin of the dispute (B).

2. Organic Criterion

It seems that the organic criterion represents the easiest element for the determination of jurisdiction, since it is essentially based on the identification of the party at the origin of the dispute: jurisdiction is therefore administrative when the act, operation or activity giving rise to the dispute is subject to the control of a person or a public authority. Nevertheless, the simple nature of this criterion is only apparent; it was therefore not adopted by the 1913 courts which opted for the substantive basis despite the terms employed by section 8 of the Dahir on the Judicial Organization. [1] This posture was held until 1966 when the organic criterion reappeared in the orientation of the Supreme Court with the Abassi Abdelaziz judgment. [2]

2.1. Abandonment of the Organic Criterion (1913-1966)

Under the provisions of Article 8 of the DOJ, the judge is called upon to refer to the organic criterion. Said article is given to the courts of 1913 the responsibility of ruling on disputes relating to the performance of contracts concluded by the administrations, to the work carried out under their orders and to any acts emanating from them and causing damage to others. Nevertheless, under the aegis of the protectorate, the judges were in their majority of French nationality, they served in metropolitan courts and had received legal training related to the legal system in force at the time. They therefore opted for the material criterion. These judges recognized the submission of the administration to a special legal regime, and considered that the latter is not applicable to all the activities and all the acts of the administration, but only to those related to the public service and which are subject to the legal regime of administrative law. This, then, was the reason behind the definitive orientation of the case law towards the substantive criterion. In a judgment of November 10, 1936 [3], the Court of Appeal of Rabat argued that:

> *«The distinction to be established between instances of a different nature for the division of powers between the jurisdictions according to the provisions of the Dahir forming the code of civil procedure must be made in consideration of the disputes which would be in France justiciable by the administrative jurisdictions or the judicial courts. »*

The courts were thus moving towards the consecration of the material criterion whether in matters of contract, state ownership or unilateral acts. The existence of a public person is only considered as a presumption confirming that we are dealing with an administrative matter. We are thus in the presence of a method associating organic criterion and material criterion, which was fully maintained until 1966.

2.2. Partial Adoption of the Organic Criterion as the Exclusive Criterion

The Supreme Court declared in 1966, in the Abassi Abdelaziz judgment [4], the admissibility of an action for annulment for abuse of power against a decision to terminate a contract of employment of a temporary agent of the administration subject to private law, thus baptizing a new evolution of the jurisprudence towards the partial adoption of the organic criterion as exclusive criterion. The high court considers that since an administrative authority was at the origin of the decision, it is therefore competent to rule on it, without however verifying whether it is a contract of private law or administrative law., under the dahir of 1957 [5] which, while allowing this type of appeal to be brought against the decisions of the administrative authorities, it did not stipulate any distinction of this type. The Supreme Court subsequently adopted this orientation by generalizing it to decisions from directors of public, industrial and commercial establishments normally operating under the conditions of common law, namely the Office of Research and Mining Participations (ORMP) and the Marketing and Export Office (MEO). [6] It also reaffirmed this choice in a Jamila Sadiki judgment of March 1, 1990 [7], knowing that it had decided in judgment no. 96 of May 30, 1985 that, as an administrative authority, the decisions of the director of the Autonomous Transport Authority of Casablanca (ATAC) taken with the aim of ensuring the management of the public service (revocation) are administrative acts subject to appeal. Under the terms of this decision, an administrative act is one that emanates from an administrative authority. From this perspective, the usefulness of the reference to the notion of industrial and commercial public service is called into question. [8] Better still, the Court seems to confirm its position since it deemed

itself competent to rule in administrative matters on an action for damages brought against the Railways National Office (RNO) by a third party victim of an accident, even if the (RNO) is undoubtedly a public person, but which is responsible for the management of an industrial and commercial public service supposed to be subject to private law [9]. The court appealed in this context to article 79 of the DOC. In comparison with the Algerian legislator, it seems that the latter was more categorical since he stipulated the use of the organic criterion in article 7 of the Code of Civil Procedure of June 8, 1966, but only for public establishments of an administrative nature:

«The courts hear in the first instance, and subject to appeal to the Supreme Court, of all cases, whatever their nature, in which the State, the wilaya, the municipality or a public establishment of an administrative nature is a party.» [10].

The consecration of the organic criterion in matters relating to personnel seems to be at the service of the applicant, whose task becomes easier. Likewise, the applicable rules are generally adjacent whenever the regulations to which private law personnel are subject are almost similar in content to the rules to which public law officers are subject. Nevertheless, the creation of administrative jurisdictions seems to reopen the debate on the appropriate criterion of jurisdiction. If it is rigorous that their existence assumes that they are competent only for matters that escape the application of private law and for disputes relating to public persons which do not come under administrative law, the organic criterion cannot be applied.

It should be emphasized that the adoption of the organic criterion as the only element can be a source of paradoxes, even if it is applied only to administrative litigation: While conferring on the administrative judge the possibility of hearing disputes relating to private law, it prohibits him from ruling on cases relating to the public service and which involve prerogatives of public power delegated to private persons. [2]

It is therefore essential to determine the direction adopted with more precision and clarity in order to elucidate this question for those who are concerned: judges, applicants and their counsel. This is why the Supreme Court has in fact granted itself jurisdiction to rule on an action for annulment brought against a decision to punish that the Royal Moroccan Football Federation, as a private law association responsible for a public service mission and enjoying the prerogatives of public power related to its execution, has taken with regard to an arbitrator. [11]

3. Material Criterion

The adoption of the material criterion, as the basis for determining the nature of a dispute brought to justice, presupposes the examination of its content, the properties of the decision and the actions generating this dispute. By dismissing the exclusive use of the organic element in the identification of the administrative matter, the judge obviously resorts to the material criterion in the image of what was previously adopted by the French administrative judge. It therefore seems useful to proceed, even briefly, to a reminder of the French case law relating to the application of this criterion (1), in order to then crystallize the approach of the Moroccan judge on this subject (2).

3.1. French Case Law Relating to the Material Criterion

The choice of the criterion of the jurisdiction of the administrative judge in matters of French case law deserves to be recalled here in order to expose the process of the transition from its consideration as a prerogative of the jurisdiction to a modern approach according to which the jurisdiction of the administrative judge results of the very specificity of the dispute and consequently of the applicable law, thus confirming the question of the specialization of the judge.

Following the entry into force of the law on judicial organization of 1790 establishing the principle of the separation of judicial and administrative authorities, it is on the basis of the organic criterion that the cases falling within the jurisdiction of the judge of common law were identified and those on which it was forbidden to rule. In this way, any activity emanating from a public person cannot come under the jurisdiction of the courts. Limiting oneself to the adoption of the organic criterion will undoubtedly lead to results that do not seem to please the jurists of the time. In this sense, the Attorney General at the Court of Cassation expressed his astonishment at these inadequate orientations tending to remove any acts, ordinary contracts, leases, from the jurisdiction of the judicial judge and to consider them as acts of the administration. Jurisprudence and doctrine will strive, in this context, to find a reasonable criterion motivating the attribution of jurisdiction to the administrative judge. This process took place in two stages. First, by differentiating between acts of authority and acts of management, then by verifying the connection of the case to the public service.

3.1.1. Separation Between Acts of Authority and Acts of Management

The public power withdraws from the competence of the judicial judge when it is at the origin of the acts of authority by manifesting its power of command in a specific operation. The case is therefore governed by administrative law and is subject to the jurisdiction of the administrative judge. However, the judicial judge is competent and the administration is governed by the law of individuals to the extent that it carries out activities or acts for the management of its assets or that it concludes contracts or that it carries out acts of management like individuals.

The idea of management acts has been contested because of its inadequacy with material and legal reality. The operation of public services must be managed by the administration by using its power of command or by having recourse to the conclusion of certain contracts without however being carried out in situations similar to those which exist between individuals when the recourse to the contract is

intended to ensure the operationalization of the public service. This differentiation was discarded in the second half of the 19th century in favor of the criterion of public service.

3.1.2. From the Public Service Criterion to the Public Management-Private Management Criterion

Public service, as a material criterion, is any activity of general interest governed by a specific legal arsenal, in particular administrative law. It is therefore obvious that any activity of general interest inevitably presupposes the existence of a public person who is responsible for it and who represents an almost absolute presumption that we are in the presence of a public service which, at that time, is theoretically governed by administrative law. In this context, the case law that emerged from the advent of the Blanco judgment (1873) adopted the question of the relationship to public service as a criterion of jurisdiction in matters of unilateral acts, contractual relations and also for matters of liability. The criterion of public service will, however, undergo an evolution following the expansion of industrial and commercial public services and the proliferation of situations where public persons have recourse to persons and procedures of private law to ensure the functioning of the public service, hence the need to use the public management-private management criterion, which is the criterion currently applicable. Thus, in order to maintain his jurisdiction, the administrative judge requires the satisfaction of two conditions: first, the connection of the dispute to a public service activity, then the need to appeal to legal procedures relating to administrative law in order to ensure the operation or implementation of this activity: privileges of public power, legal regime belonging to public law, etc.

3.2. Use of the Material Criterion by the Moroccan Judge

The courts of 1913 were hesitant in the interpretation they were supposed to attribute to articles 8 of the Dahir on Judicial Organization and 17 of the Dahir on Civil Procedure of 1913. The adoption of the organic criterion could indeed have been the easiest way to highlight the separation of litigation. Nevertheless, these judges could not do without the fact that administrative law is not applicable to all types of administrative activity.

Between the two wars, this imbalance tended to increase due to the increasingly interventionist nature of the administration, since it often became involved in the field of industrial and commercial activities by obviously applying the rules of private law. The judge proceeded, in this context, to the examination of the nature of the acts of the administration, the content of its activities, the specificities of the actions it manages to decide on the administrative or ordinary nature of the matter. This is the case, for example, of the Court of First Instance of Casablanca concerning a dispute involving property in the private domain of the State which provided that the activities carried out for the management of property in the private domain escape the administrative matter [12].

At the same time, in terms of contracts, the judge studies their content by checking whether they include clauses that are exorbitant from common law, in particular with regard to the power of command or control of execution, etc. [13] A decision of the Rabat Court of Appeal [14] deserves to be recalled in this context:

> *«Whereas the civil or administrative nature of a proceeding does not depend solely on the quality of the parties involved, but above all on the cause and the object of the request.»*

We can speak of an administrative matter only if the cause of the request actually relates to an activity emanating from the administration, in other words, to a public service activity. This solution, which was inculcated in the case law of the courts of 1913, was to be maintained by the modern courts which succeeded the French courts in 1957: this is the criterion of public service. On their part, the administrative courts created by law 41.90 also adopted the criterion of public service. Nevertheless, the Moroccan administrative judge could have, with the encouragement of doctrinal reflection, moved towards the appropriation of new parameters which take into account the cultural, historical and socio-economic characteristics of Morocco. We recall here the adaptations affecting the initial meaning of the notion of public service following the changes and developments experienced by national and international data and realities: privatization, globalization, etc. [15] In this regard, Michel Rousset considers that despite the relationship between the Moroccan administrative system and the French one, it seems inconceivable to claim a relationship of subordination between the two systems: it is inevitable that the administrative and political authorities enjoy freedom of decision. Kinship means above all that the mimicry existing between the two systems allows them to be placed in the same family. [16]

4. Conclusion

If we must reserve to the administrative judge the application of administrative law to disputes relating to administrative matters, which seems to go without saying from the moment when, breaking with the unity of jurisdiction, we create an administrative jurisdiction, it is necessary to use the double criterion of competence: organic and material which are moreover not easy to handle. But such is the logic of a system of specialization of the judge; no one could in fact understand that the administrative judge could apply both administrative law and private law from the moment when the system of unity of jurisdiction and separation of disputes characterized precisely by the fact that the same judge applied both rights.

The Moroccan judge, inspired by the French judge, could have turned with doctrinal encouragement towards the adoption of new criteria more appropriate to the cultural, historical and socio-economic specificities of Morocco. This observation is all the more important since the notion of public service is subject to modifications that completely change its

original meaning due to changes resulting from new national and international conditions: privatization, globalization, etc. Nevertheless, whatever the degree of evolution of case law, its content can only be truly promising if it is followed by action by litigants and by the administration.

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