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The Role of the Administrative Judiciary in Protecting the Rights of Contractors within the Framework of Public-Private Partnerships

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Abstract:
This research paper aims to conduct an in-depth legal and analytical study to clarify the role of the administrative judiciary in protecting the rights of contractors within the framework of public-private partnerships (PPPs). Determining the nature of disputes arising from partnership contracts between the public sector and the contracted party identifies the applicable law and competent judiciary for these disputes, along with the resulting legal consequences. Furthermore, the study examines the manifestations of the administrative judge's intervention in resolving disputes related to this type of contract concluded by the state, some of which are subject to judicial oversight, while others are excluded from the control of the administrative judge and submitted to arbitration as an amicable means of dispute settlement, particularly in disputes involving states within the framework of international economic relations.

Keywords: Administrative Judiciary, Partnership Contracts, Contractor Rights, Arbitration, Dispute Settlement.

Introduction:
Public-private partnerships (PPPs) represent one of the modern contractual methods for embodying public utilities, aiming on the one hand to combine the fulfillment of continuously growing public needs across all areas of public life, and on the other hand to enhance the role, efficiency, resources, and capabilities of the private sector, encouraging private entities to invest and contribute to the execution, financing, and management of public utilities. This is especially true since practical reality has demonstrated the public sector's inability alone to cover the public's general needs or finance public projects, leading to the accumulation of public debt, declining development levels, reduced service quality, and lower performance efficiency in the public sector. This justifies states' inclination toward more efficient, effective, and successful strategies, shifting the state's role from executing and managing basic infrastructure projects and public services to establishing general policies for various sectors and involving the private sector in their completion or implementation. Consequently, the administration's recourse—as a public moral person—to the contractual method as a technique for managing public utilities to provide public services through PPPs raises numerous disputes. These include disputes concerning contracts concluded by public moral entities with states or private moral persons, given that disputes involving the state possess a distinct specificity. Most of these relate to contracts subject to administrative judicial oversight, while others are subject to arbitration when disputes arise with states in the context of international agreements. Arbitration undoubtedly relieves the burden on the judiciary and features rapid dispute resolution, making it one of the most important legal means for resolving disputes in administrative contracts in general and PPP contracts in particular.
Given the novelty of PPP contracts—with their multifaceted political, legal, administrative, economic, and social dimensions—this topic has garnered significant attention from states and bodies worldwide, emphasizing the role of public-private cooperation in achieving sustainable development goals under supportive legal and regulatory policies and mechanisms. Because the execution or implementation of PPP contracts frequently triggers various disputes—whether during the award phase, execution phase, guarantee of execution, or even post-execution—PPP disputes constitute one of the most critical issues raised by contractual legal relationships, the nature of these disputes, the competent authority to review and adjudicate them, and the mechanisms for settling PPP disputes.
This study also aims to clarify the role of the administrative judge in protecting the rights of contractors in PPP contracts concluded by public moral entities, whether with public moral persons or with states. This raises the following question:

What is the role of the administrative judge in ensuring and protecting the rights of the contractor within the framework of public-private partnership contracts? To answer this question, a descriptive-analytical methodology appropriate to the nature of the topic was adopted, following a structure focused on determining the nature of partnership contract disputes between the public sector and the contracted party, and outlining the manifestations of the administrative judge's intervention in resolving PPP disputes.

Section I The Nature of Partnership Contract Disputes Between the Public Sector and the Contracted Party:

Public moral persons conclude numerous contracts to promote the national economy, serving as one of their primary instruments for improving and developing any given sector. Contracts in general are the convergence of two wills; an administrative contract, much like a civil contract, is formed through the agreement and matching of two wills with the intent of producing a legal effect—namely, creating, modifying, or terminating an obligation—which must be executed in accordance with prescribed procedures, forms, and conditions to produce its valid effects.

From an organic-formal perspective—as provided in Article 800 of Law No. 08/09 relating to Civil and Administrative Procedures—a contract concluded by public moral entities is considered an administrative contract if its parties include a public administrative entity competent to conclude this type of contract. From a substantive perspective, if the contract concerns the establishment or operation of a public utility to achieve the public interest and contains exorbitant conditions unfamiliar in private law rules, contracts concluded between the state (public moral persons) and an investor (individual or company) for the purpose of developing and exploiting natural resources within the host state's territory are investment contracts. Discussing the judicial jurisdiction to resolve disputes arising from this type of contract necessitates examining the legal nature of investment contracts concluded by the state with private moral persons. Legal jurisprudence has varied in determining the nature of such contracts: one view considers them administrative contracts subject to the rules and provisions of administrative law; another view regards them as civil contracts subject to private law rules; and a third view considers investment contracts to be private contracts of a mixed nature, subject to both public and private law provisions.

In this context, it is necessary to define the concept of public-private partnership (PPP) contracts (First), and to outline their legal nature (Second).

First The Concept of Public-Private Partnership (PPP) Contracts:

Public-private partnerships are modern concepts expressing a new strategy for managing public utilities. Their concept varies depending on the perspective adopted or the targeted objective:

- **The International Monetary Fund (IMF)** defines them as arrangements that enable the private sector to contribute to the provision of infrastructure assets and services that are traditionally the monopoly of the state or public law entities, such as constructing hospitals, schools, roads, tunnels, and airports.
- **The European Economic and Social Committee** defines PPPs as a dynamic and flexible economic tool utilized to achieve sustainable development goals.
- **The Asian Development Bank** defines them as contractual relationships established between the public and private sectors for the purpose of financing, designing, implementing, operating, and maintaining infrastructure projects and services that are the monopoly of the public sector.
- **The World Bank** defines a partnership as a long-term contract between a private sector institution and a government body to perform public works and services, wherein private sector financing funds the public project and the private sector bears the risks arising from it.

From a legal standpoint, PPP contracts are administrative contracts whereby a public law entity entrusts a private law entity with financing public investment projects in infrastructure or public utilities for a specified period, along with associated legal consequences.

- **The Tunisian legislator** defines a partnership contract as a written, fixed-term contract by which a public entity entrusts a private partner with the total or partial design, establishment, construction, modification, or maintenance of physical or non-physical infrastructure or equipment necessary to provide a public utility, in exchange for financial consideration paid to the partner (a private moral person or project company) throughout the contract duration, without including a delegation to manage the public utility.
- **The Moroccan legislator** (Article 1 of Law No. 86.12) defines it as a fixed-term contract by which a public entity entrusts a private partner with a comprehensive mission including design, total or partial financing, construction, rehabilitation, maintenance, or operation of a facility, infrastructure, or provision of services necessary to provide a public utility.
- **The French legislator** defines partnership contracts as administrative contracts by which the state or a public institution entrusts another party for a fixed term—based on the extent of investment achievements or financing arrangements—with a comprehensive mission primarily concerning the financing of investments, works, and equipment necessary for public service through the construction, transfer, maintenance, and operation of works and equipment, alongside other services contributing to contract execution as appropriate.
- **The Egyptian legislator** defines a PPP contract as an administrative contract whereby administrative authorities entrust a project company with financing, establishing, equipping infrastructure and public utilities, and making their services available, or financing and developing these utilities, with the obligation to maintain what is established or developed and provide necessary services and facilities until the project is usable for production or

continuous service delivery throughout the contract period, provided the contract duration is not less than five years and not more than thirty years from the completion of construction and equipment works.

It is notable that the Algerian legislator has not explicitly regulated partnership contracts despite numerous practical applications confirming the adoption of contractual methods within the framework of PPPs. This indicates that PPP contracts fall within the organization and scope of investment laws, considering them as investment contracts generally subject to the provisions of Law No. 22-18 dated July 24, 2022, relating to investment. These contracts include the acquisition of assets within the framework of creating new activities, expanding production capacities, and/or rehabilitation, as well as contributions to company capital. Meanwhile, the draft law concerning the conditions and implementation of public-private partnerships is currently being enriched and discussed by specialists and researchers before submission to Parliament for enactment. A segment of legal jurisprudence has defined a partnership contract as a formal cooperative contract between public and private sector entities, where one or more government bodies form a non-hierarchical partnership or joint venture with one or more private entities to execute a specific action plan, typically formed to achieve services or execute activities publicly regarded as governmental services and activities.

SecondThe Legal Nature of Public-Private Partnership (PPP) Contracts:

Since partnership contracts between the host state's public sector and a foreign partner fall within the scope of international investment contracts, they impart a special character on disputes arising from the legal relationship between the contracting parties. These are associated with infrastructure investment contracts that require self-financing and risk sharing, contributing to economic achievement through investment contracts concluded within the framework of partnerships between the host state's public sector and the foreign partner.

Conversely, the regulatory legal character of PPP contracts often overrides their consensual character, imparting specificity to their regulatory and contractual nature. Although the legislator has not formally acknowledged the administrative nature of these contracts, they are considered administrative according to the organic criterion and their connection to the public utility as a public project aiming to achieve public interest objectives. Furthermore, they incorporate exorbitant clauses granting the contracting public entity exceptional powers vis-à-vis the contracted partner. All economic sectors are considered amenable to PPPs, particularly the state's strategic projects whose subject matter involves financing, establishing, equipping, developing, and maintaining infrastructure and public utilities—such as constructing and preparing roads, bridges, airports, and dams, investing in transportation sectors and services, and rendering projects usable for production or other infrastructural projects.

It must be noted that determining the legal nature of PPP contracts is of paramount importance in the administrative field, as it determines the applicable law and competent judiciary for disputes arising from PPP contracts, alongside the resulting legal consequences. This is particularly critical when the contracting party is a foreigner, raising issues of applicable law and the competent judiciary to adjudicate disputes arising from actions or breaches of contractual obligations by both parties.

Section II Manifestations of the Administrative Judge's Intervention in Resolving PPP Contract Disputes:

The scope of administrative judicial intervention in resolving PPP contract disputes requires understanding the legal nature of this type of contract, which sparks considerable debate due to the presence of two unequal parties in its formation: the public moral person wielding public authority privileges and administrative law methods, versus the contracted party. Considering that countries adopting a dual judicial system grant the administrative judge jurisdiction over administrative contract disputes in general, and partnership contracts in particular, covering various administrative acts performed by public authorities acting as such, anything outside this scope falls outside administrative jurisdiction.

This has been settled by the Egyptian administrative judiciary, which holds that all disputes related to administrative contracts, including partnership contracts, fall under the jurisdiction of the administrative judiciary. Consequently, as long as administrative law rules, provisions, and principles apply to partnership contracts governing public authorities in terms of formation and activity as public authorities, alongside private (civil) judiciary whose rules in contracting serve as general law—though in some countries, notably Jordanian law (Public-Private Partnership Law), dispute resolution for this type of contract is attributed elsewhere.

Contracts Concluded by the State Not Subject to Administrative Judicial Oversight:

The law empowers the state or public moral entities to conclude contracts either internationally or within the framework of private law, placing them outside the scope of administrative judicial oversight since the latter lack public authority privileges and act like ordinary individuals, or are subject to international arbitration in case of disputes between them and the investing state or foreign investor.

Legal jurisprudence has defined arbitration as: *"The method chosen by parties to resolve disputes arising from a contract, adjudicated before one or more persons called arbitrator(s) without resorting to the judiciary."* Others define it as: *"A system for dispute settlement through natural persons chosen directly by the litigants or through another method they agree upon, enabling parties to exclude their disputes from the jurisdiction of courts authorized by law, in order to be resolved by natural persons of their choosing."*

Accordingly, arbitration is a means to resolve disputes without resorting to the judiciary as an exceptional procedure based on the agreement of the disputing parties. Comparative laws vary regarding recourse to arbitration in administrative contracts: some permit its presence in contract disputes, others reject its application, and some permit it under conditions and restrictive controls. The French legislator affirmed the possibility of arbitration to resolve disputes between individuals inter se, whereas for administrative contract disputes concluded by public moral entities, arbitration is not applied unless explicitly provided by law. In Egyptian legislation prior to the 1994 law, recourse to arbitration was prohibited because the Council of State had exclusive jurisdiction over administrative contract disputes as a matter of public policy that cannot be derogated from by agreement. However, with the issuance of Law No. 27 of 1994, arbitration was permitted in disputes arising from public works, supply, and concession contracts by stipulating the permissibility of settling disputes arising between the state and others (legal or natural persons) via arbitration through a valid arbitration agreement.

In this framework, the Algerian legislator, through Article 1006 of the Civil and Administrative Procedures Code, stipulated that arbitration may be resorted to in rights of which parties have absolute disposal, but is prohibited in matters related to public policy or personal status and capacity. Public moral entities may not request arbitration except in their international economic relations or within the framework of public procurement. Contracts concluded by the state within the framework of investment contracts are subject in their disputes to international arbitration through dispute settlement centers, where their relations with investing states are governed by bilateral or multilateral agreements.

Consequently, the stance of Algerian jurisprudence and judiciary regarding the application of arbitration in contracts concluded by public moral entities has varied. One jurisprudential trend supported its application, while another rejected it, prompting the Algerian legislator to intervene through Article 1006 of the Civil and Administrative Procedures Code with an explicit text prohibiting arbitration for the state and public moral entities, with the sole exception of their international economic relations or within the framework of public procurement.

It is concluded from the foregoing that not all contracts concluded by the state and public moral entities are subject to administrative judicial oversight; some are subject to international arbitration in the event of international contracts based on agreements between the state and the investing state—such as investment contracts, petroleum contracts, industrial cooperation contracts, and other contract types in this field. Consequently, arising disputes are referred to arbitration for resolution.

Manifestations of the Administrative Judge's Intervention in Public-Private Partnership:

An administrative contract is an agreement between two parties: the public moral person on one hand, and the private moral person on the other hand, passing through stages from formation until termination upon completion of the contract's subject matter. This generates a set of mutual rights and obligations between the contracting parties. Thus, judicial oversight manifests during the award phase—through compliance with general principles governing administrative contracts generally and partnership contracts specifically, such as publicity, transparency, equal treatment of competitors, and procedural publicity as stipulated either in Presidential Decree No. 15-247 relating to public procurement and public utility delegations, or special texts. The publicity principle covers all contract award stages up to provisional award; any violation empowers the aggrieved party to use legal means to claim rights, as stipulated by Article 5 of Presidential Decree No. 15-247 regulating public procurement and public utility delegations.

In this context, the administrative judiciary has jurisdiction over disputes resulting from breaches of advertising rules by the authority competent to announce competition (the contracting authority), relating to the mandatory advertising requirement per Article 61 of the aforementioned decree. Alongside the publicity principle, the legislator established the principle of free and fair competition, mandating compliance with competition rules per Article 66/4 of Presidential Decree No. 15-247, alongside setting deadlines to open competition among bidders.

Consequently, any dispute arising from breaching free competition rules is subject to legal remedies before competent authorities. In addition to respecting publicity and competition, Article 5 of the presidential decree added the necessity of respecting the principle of equal treatment of competitors and procedural transparency. The law mandates observing this principle, and any dispute in this framework is subject to the oversight of the administrative judge.

Judicial Oversight during the Execution Phase:

The contracting administration in partnership contracts enjoys a set of powers granted by law or applicable regulations to ensure the proper management of public utilities, aiming to satisfy the general needs of public utility users or provide them with public services. The public entity possesses control and supervisory authority over the execution of the concluded contract and bears responsibility for ensuring the continuity of the public utility in serving the public. The concept of supervision and control by the contracting administration includes monitoring the execution of the partnership contract and ensuring that the co-contracting party complies with executing contract clauses according to the agreed form. Furthermore, administrative oversight over contract execution extends to the power of direction, enabling the contracting administration to guide the co-contracting party regarding work methods, technical and artistic means of execution, and selecting the most appropriate techniques to provide optimal services to public utility users.

Additionally, the contracting administration holds the power to unilaterally modify and rescind contract clauses without the co-contracting party's consent. Among the most prominent manifestations are modifying contract clauses, delaying or amending the contract for reasons related to the public interest, or canceling the contract by reclaiming the management of the public utility subject of the contract.

It is worth noting that the contracting administration's right to unilaterally modify contract clauses finds justification in public authority privileges granted by law or regulation, or public interest requirements targeted by the public utility. However, this administrative power is governed by restrictions and controls: modifications must be confined to regulatory clauses rather than contractual clauses, which cannot be touched except by mutual agreement. Concluding administrative contracts in general, and investment contracts in particular, involves regulatory provisions governing the contract and its execution, alongside contractual provisions determining the rights and obligations of each party. This generates disputes between the parties during execution, whether initiated by the contracting administration or the co-contracting party upon mutual breach. The administrative judiciary has jurisdiction over all judicial disputes, whether under full jurisdiction or through the annulment of administrative decisions separable from the administrative contract.

- **Jurisdiction of Full Jurisdiction in Partnership Contract Disputes:** The administrative judiciary has jurisdiction over all judicial disputes arising between administrative contract parties, adjudicating all matters related to contract formation, validity, execution, and termination. Administrative contract disputes inherently fall under full jurisdiction. Full jurisdiction refers to the role played by the administrative judiciary regarding challenged administrative acts—examining their legality, annulling them, modifying them, or awarding damages for resulting harm.
- **Powers of the Judge in Full Jurisdiction:** The judge in full jurisdiction over administrative contract disputes in general and partnership contracts in particular possesses broad powers. They can modify decisions taken by the administration, replace them with new decisions imposing obligations, and order financial fines. The judge possesses broad powers such as appointing experts, rescinding the contract, awarding damages, invalidating actions, or modifying certain acts. Forms of disputes concerning administrative contracts under full jurisdiction vary according to their objective: actions for contract nullity due to defects in formation or validity, actions to recover financial sums resulting from harm caused by a co-contracting party for any reason, or actions to invalidate administrative actions violating contractual commitments. If the contracting administration acts contrary to its contractual commitments, the other party may claim a judgment invalidating those actions through full jurisdiction, even if limited to requesting the annulment of an administrative decision issued in its capacity as a contractor.
- **Contract Rescission and Summary Jurisdiction:** Alongside the contract rescission action, a contractor may request contract rescission within specific limits, such as in cases of force majeure or grave administrative danger, within the framework of full jurisdiction. This is because administrative judiciary jurisdiction in investment contract disputes associated with public entities is absolute and comprehensive regarding the origin of such disputes and their derivatives. In this framework, when exercising summary jurisdiction, the full jurisdiction judiciary possesses discretionary power to assess elements of the challenged dispute, limited only by urgency and non-prejudgement of the merits. Urgency is the pressing necessity to resolve a dispute where rights are feared to be lost due to the passage of time. Consequently, the administrative judiciary rules on urgent aspects of administrative contract-based disputes not merely as suspension requests derivative of annulment requests.
- **Financial Equilibrium of the Contract:** To ensure the financial equilibrium of the contract—which the contractor seeks to achieve through contracting with the administration—circumstances beyond the parties' expectations may affect contract clauses, damaging the contractor's financial interests and undermining the public interest the contract aimed to achieve. This violates the administration's duty of good faith, which requires providing assistance to the contractor to execute the contract smoothly and overcome difficulties. These circumstances give the contractor the right to claim partial or total compensation for harmful effects accordingly, based on theories applied by the French Council of State: administrative risks (Theory of the Prince's Act) and economic risks (Theory of Unforeseen Circumstances). The administration is bound to compensate the contractor for all incurred damages to restore the financial equilibrium of the administrative contract.

Thus, the scope of the Prince's Act is strictly limited to measures issued exclusively by the contracting administration, not extending to other administrative bodies whose actions might cause severe harm to the contractor. To apply the Prince's Act, jurisprudence and judiciary require that the measure occurs within an administrative contract, originates from the contracting administration, is lawful, and inflicts special, unexpected harm on the contractor. Regarding economic risks—restoring financial equilibrium according to the new principle stating that if new unforeseeable circumstances arise leading to a severe imbalance in contract terms, the administration must contribute to bearing part of the loss incurred by the contractor. If the financial imbalance stems from the contracting administration, the Prince's Act applies; whereas under unforeseen circumstances, the contracting administration has no hand in the source of imbalance, which is an external, extraneous occurrence. Therefore, unforeseen circumstances require an exceptional, general, unforeseeable event during execution, independent of the parties' will, inflicting heavy losses on the contractor. The purpose of unforeseen circumstances is for the administration to extend assistance to the contractor to fulfill contractual obligations, preserving public utility continuity.

Rules of Annulment Appeals against Decisions Separable from the Administrative Contract:

Separable decisions are administrative decisions forming part of a legal process, falling under the jurisdiction of ordinary or administrative courts depending on their competence. Separable administrative decisions emerge in contract fields passing through multiple stages involving various elements.

It is worth noting that separable administrative decisions within administrative contracts are subject to the same rules governing administrative decisions separable from administrative contracts. The general rule prevailing in the French Council of State is that any interested party may challenge decisions contributing to contract formation via annulment for illegality. A distinction can be made regarding stages traversed by administrative contracts: formation and conclusion, execution, and termination. These stages vary; decisions issued during contract conclusion are either prior to or simultaneous with contract conclusion, such as decisions by supervisory authorities authorizing or approving the contracting procedure. Decisions accompanying or simultaneous with contract conclusion are preliminary and prior thereto.

Decisions issued during the contract execution phase either aim to compel the contractor to execute or impose penalties on a defaulting contractor, or relate to executing modifications in administrative contracts based on unilateral modification powers. Consequently, annulment appeals against administrative decisions separable from administrative contracts, like annulment appeals against administrative decisions generally, require establishing grounds of illegality affecting the administrative decision.

Conclusion:

In conclusion, contracts concluded by the state or public moral entities within the framework of partnership contracts are among the most crucial contracts for achieving development and investment promotion, alongside contracts concluded with states or foreign investors (companies or individuals). The legal nature of this type of contract varies: some are subject to public law, others to private law, and others to a mixed system of special nature.

A set of conclusions has been drawn, most notably:

- Partnership contracts concluded by the state or public moral entities have their disputes subject to the competent administrative judiciary.
- The legal nature of partnership contracts determines judicial jurisdiction for resolving disputes arising during contract formation.
- The role of the administrative judge in resolving partnership contract disputes is confined to a specific scope, meaning not all contracts concluded by public moral entities fall under their jurisdictional scope.
- Partnership contracts concluded by the state with foreign states or investors are subject to international arbitration.
- Arbitration plays an effective role in resolving partnership contract disputes without resorting to the judiciary due to simplicity, procedural ease, and flexibility.
- The administrative judge enjoys broad powers under full jurisdiction in administrative contract disputes, unlike annulment jurisdiction.
- The administrative judge plays an active role in partnership contract disputes from contract formation until termination.
- The administrative judge under full jurisdiction exerts authority over contract parties in case of breach of obligations.
- The administrative judge under full jurisdiction issues coercive fines against the contracting administration upon breach, rescinds contracts, invalidates contracts, and orders other measures.

Based on these findings, we propose the following recommendations:

- Necessity of enacting comprehensive legislation regulating public-private partnership contracts.
- Necessity of activating arbitration as a mechanism for partnership dispute resolution in Algerian law, expanding its adoption by public moral entities (the state or public moral entities).
- Necessity of defining the legal framework for administrative judicial competence by the legislator.
- Necessity of granting the administrative judge broad authority to annul administrative decisions separable from public-private partnership contracts.

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