

LEGAL PROTECTION OF PUBLIC ENDOWMENT IN ALGERIA

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Abstract :The topic of this research paper revolves around the role of the legal system in protecting public endowment in Algerian legislation. It is a serious attempt to understand the efforts of the Algerian legislature through the existing legal system in protecting public endowment, which aims to achieve the public interest for which it is dedicated, by withholding ownership indefinitely seeking the pleasure of Allah Almighty. Hence, the importance of researching the element of protection arises through the fundamental problematic it poses, aiming to uncover the mechanisms and means adopted by the Algerian legislature in protecting public endowment as a charitable contract. To address the problematic issue, we delve into the constitutional protection of public endowment in Algeria, then uncover the protection of public endowment in general and special legal texts, leading to the protection of the independence of public endowment in general laws.

Keywords: Charitable associations; Nationalization; Private endowment; Public and private property; Public endowment; Public interest; Withholding benefit from ownership.

INTRODUCTION

Researching the role of the legal system in protecting public endowment in Algerian legislation is a serious attempt to understand the extent to which the Algerian legislature addresses this issue within existing legal regulations in safeguarding public endowment for the purpose of achieving the public interest for which it is dedicated. If the purpose of endowment is to withhold ownership indefinitely seeking the pleasure of Allah Almighty and seeking reward in the hereafter, then the importance of investigating the protection element becomes evident through the fundamental problematic it poses, aiming to uncover the objective and procedural mechanisms and means adopted by the Algerian legislature in protecting public endowment as a charitable contract. To address the problematic issue, we rely on a plan based on three elements:

1. Constitutional protection of public endowment in Algeria.
2. Protection of public endowment in general and special legal texts.
3. Protection of the independence of public endowment in general laws.

1. Constitutional protection of public endowment in Algeria

The constitutional protection of public endowments in Algeria can be observed through two constitutional texts that have played a crucial role in legitimizing endowment properties. The 1989 Constitution took the lead in safeguarding public endowments by enshrining their independence from other forms of property, as stipulated in Article 49, which states: "Private property is guaranteed, the right to inheritance is guaranteed, endowment properties and properties of charitable associations are recognized, and the law protects their allocation." (Article 49, Constitution of 1989)

Then came the 1996 amended Constitution of 2008, which reaffirmed the same content as found in Article 52, stating: "Endowment properties and properties of charitable associations are recognized, and the law protects their allocation" (Article 52, Constitution of 1996 as amended in 2008)

The same formulation is found in the constitutional amendment of 2016 in Article 64, in its third paragraph: "Private property is guaranteed, the right to inheritance is guaranteed, endowment properties and properties of charitable associations are recognized, and the law protects their allocation." (Article 64, Constitution of 1996 as amended in 2016)



The 2020 constitutional amendment maintained the same formulation regarding endowments in Article 60, paragraph 4, while providing greater protection for property rights in paragraph 2, by affirming that property "shall not be expropriated except within the framework of the law and with fair and just compensation, the right to inheritance is guaranteed, endowment properties and properties of charitable associations are recognized, and the law protects their allocation." (Article 60/4, Constitution of 1996 as amended in 2020)

From the text, it is evident that the constitutional founders affirmed the legitimacy of endowments and their legal protection, whether they are public or private.

2. Protection of public endowment in general and special legal texts

Upon reflection on the general and specific legal provisions established in Algeria post-independence to protect endowments, despite the issuance of Decree No. 64/283 dated 17/09/1964, which outlined the system of public endowment properties, this decree remained unimplemented. This signifies a significant weakness in the management of endowments at that time and contributed to the widespread loss and disappearance of endowment properties in Algeria.

The weakness in laws protecting endowments persisted throughout the 1960 and 1970 until Law No. 71/73 was enacted, which included the Agricultural Revolution Law. Article 34 of this law exempted endowment properties from the nationalization process that was in effect at the time. However, despite this provision, endowment agricultural lands were nationalized in the initial phase of the Agricultural Revolution. Additionally, in the early 1980, particularly with the enactment of Law No. 81/01 dated 07/02/1981 concerning the transfer of state properties, endowment properties were not exempted from the sale process. This had a clear negative impact on endowment properties, leading to significant difficulties in their recovery.

Subsequently, Family Law No. 84/11 was enacted to dedicate a whole chapter defining the concept of endowment. However, this was not sufficient to ensure strong and effective legal management and protection of endowments.

With the issuance of the 1989 Constitution and the laws that followed it, a new important phase for the protection of public endowments in Algeria can be declared (Khaled, 2006). This allows us to derive the most important forms of legal protection for public endowments, namely:

A. Protection of Public Endowment by Guaranteeing the Right of Use without Disposal: By granting public endowments legal personality, making them independent entities from natural or legal persons, the Ministry responsible for managing endowments, represented by the Ministry of Religious Affairs and Endowments, ensures their organization and protection according to Law No. 91/10 issued on April 27, 1991 (Law 91/10). This law was referred to by Law No. 90/25 concerning real estate guidance, particularly in Articles 31 and 32 (Law number 90-25), which explicitly referred to the referral of endowment property formation and management to a special law. Those managing endowments must ensure the right of use for the beneficiaries of endowment properties without any form of disposal. Public endowments are outside their ownership and belong to all Muslims for their benefit through utilization. The principle is that those who do not own cannot dispose of. Article 23 of the Endowment Law states that "It is not permissible to dispose of the principle of endowment ownership in any way, whether by sale, gift, transfer, or otherwise." Additionally, Article 18 of the same law emphasizes that "the right of the beneficiary in the endowed asset is limited to its production, and they have the right to utilize it in a non-detrimental manner to the asset and their right is a subsequent right to usufruct."

B. Protection of Public Endowment by Immunity from Seizure: As a general rule, seizure only occurs on properties subject to disposal, to be sold at public auction in case of debt non-repayment. Since endowments cannot be disposed of in any way because they are beyond the financial liability of the endower, seizure is impossible and therefore legally impermissible, similar to national properties. However, an exception allows execution against the beneficiaries of endowments if they fail to meet their obligations and subsequently cannot pay their debts. In this case, execution can be carried out on the usufruct, without seizing the endowed property itself, to preserve the creditor's rights.



C. Protection of Public Endowment by Ineligibility for Acquiring Through Prescription: Similar to the previous point, since endowments cannot be disposed of, they cannot be acquired through prescription. While Algerian legislation regulates the acquisition of property through acquisitive prescription by way of notoriety or possession certificates, it does not explicitly address the prescription of endowment properties. This omission led to the loss of many previously endowed agricultural lands through informal contracts in earlier periods, as some tenants prepared notoriety contracts and claimed ownership (Kennaza, 2006).

D. Protection of Public Endowment by Mandatory Declaration and Documentation: In order to safeguard endowed real estate properties from loss or alteration, the Algerian legislator required that they be documented in any of the existing forms of documentation before they are transferred to the competent authority for management. Article 41 of the Waqf Law stipulates: "The endower must register the endowment by contract with a notary public and register it with the competent authorities in charge of the mandatory real estate registry, and provide proof thereof and send a copy to the authority responsible for endowments." Upon examining the article, we find that it emphasizes the documentation of endowment contracts without rendering them invalid due to lack of formality and documentation. This implies the recognition of customary endowment contracts. In this context, the Algerian legislator remains silent on undocumented contracts directed to endowments. It is our understanding that this silence is intentional, aimed at encouraging the facilitation of charitable acts as long as there is no dispute over the ownership of the property held. In such cases, the authority responsible for endowments proceeds to document them as soon as it obtains any evidence indicating their endowment, including acknowledgment by their holders through customary contracts or oral testimony, or through real estate investigation in accordance with Law 07/02, or obtaining property registers or, in other words, possession certificates. (Law number 07-02)

E. Protection of Public Endowment from a Criminal Perspective: The Algerian legislator imposes deterrent penalties against anyone exploiting endowment properties in a covert or deceptive manner, concealing endowment contracts, documents, or falsifying them. Article 36 of the Endowment Law refers to the provisions of the Algerian Penal Code regarding crimes related to real estate, including Article 386 concerning encroachment on real property and Articles 406 and 407 concerning property sabotage (Decree No. 66-156).

2. Protection of the independence of public endowment in general laws.

By independence of endowment, I refer to its lack of ownership by any entity, regardless of its status or position. In essence, endowment belongs to all Muslims, hence the term "public endowment." However, Algerian legislation, among others, has attached public endowments to a specific entity responsible for their management, regulation, and preservation (Hadi, 1999, p. 96). This is ensured through various guarantees, the most important of which are:

A. Granting Public Endowment Independent Legal Personality: This enables it to fulfill its designated functions and obligations, regardless of changes in the natural persons managing its affairs. The legal personality and its obligations remain intact, as established by Article 05 of the Endowment Law, and Article 26 of Executive Decree 98-381, which defines the conditions for managing endowment properties (Executive Decree No. 98/381).

B. Prohibition of Dispossession or Allocation of Public Endowment: The entirety or part of the endowment cannot be dispossessed for the public benefit. Despite the potential alignment of their purposes, the supervisory authority over endowments cannot entertain any requests for dispossession, except as provided for in Article 24 of the Endowment Law, allowing dispossession in case of expanding public roads. If dispossession occurs, the nature of what is dispossessed from a public endowment changes to public ownership, subject to the fair and just compensation procedures outlined in Law 90/10 concerning dispossession of public property (Law 91/10).

In the case of unauthorized dispossession of public endowment properties by public entities with administrative or economic characteristics, we distinguish between two scenarios:



a. *Dispossession by Unlawful Administrative Decision.*

If the dispossession of a public endowment property occurs through an unauthorized administrative decision, which is rare due to administrative authorities' vigilance in ensuring the validity and legality of their decisions, the endowment supervisor has the right to file a lawsuit for annulment before the Administrative Court, which has jurisdiction to annul this unauthorized decision. Consequently, all its effects are terminated through enforcement.

b. *Dispossession by Seizure*

This involves a public administrative or economic entity seizing a public endowment property irregularly, without a formal decision, with the intention to utilize it for a specific project or for their material interests. In this case, the endowment supervisor can resort to the Administrative Court by filing a lawsuit for eviction, which mandates the eviction of the occupant who seized the endowment property, or a lawsuit for demolition, which requires the demolition of any construction or structure erected on the endowment property. Additionally, the endowment supervisor has the right to file an urgent lawsuit before the administrative judiciary to suspend any ongoing works until the resolution of the dispute. (Mahiou, 1991, p. 47)

Moreover, it is impermissible to maintain conditions set by the endower if they contradict the requirements of endowment under Islamic law, as Islamic law is the authentic source of endowment in Algeria. Hence, there is a convergence between the provisions of Article 15 of the Endowment Law and Article 218 of the Family Law, which states: "The endower's condition is implemented unless it contradicts the legal requirements of endowment, otherwise, the condition is nullified, and the endowment remains." The Supreme Court has affirmed this direction in its decision under number 204958 dated 31/01/2001, stating: "Contrary to the contentions of the parties, Team B cannot retract from the endowment, which is considered a final act, especially since the reading of the endowment contract does not show that they included conditions allowing them to retract from the endowment in accordance with Article 15 of Law No. 91/10 concerning endowments." (Azzouz, 2004)

c. *Defining the authority entrusted with regulating and protecting endowment properties in Algeria to ensure their independence:*

In this context, we can state that the Endowment Law issued on 27/04/1991 under No 91/10 embodies the authority responsible for managing and administering endowments. This authority is represented by the Ministry of Religious Affairs and Endowments, with the Endowments Director at the central level representing His Excellency the Minister of Religious Affairs and Endowments (Bulletin Judges'). By virtue of Executive Decree No. 94/470 dated 25/12/1995, the Directorate of Endowments was established, which is managed by a sub-directorate. This idea has been in place since 1965 based on the following decrees: - Decree No65/207, - Decree No. 68/187, - Decree No. 86/130, - Decree No. 89/100.

The sub-directorate of endowments attempted to address deficiencies in regulatory legal texts by relying on circulars and memoranda that specify how to organize, manage, regulate revenues, and cover the operations of endowment properties. These include: - Ministerial Circular No37 dated 05/06/1996 specifying the payment of endowment rents, - Memorandum No. 01/96 dated 03/07/1996 regarding the payment of endowment rents, - Memorandum No. 03/96 dated 17/07/1996 concerning financial report regulations (according to standardized templates) and submission deadlines, - Ministerial Circular No. 56 dated 05/08/1996 addressed to governors, inspectors, and concerning the expansion of the scope of interest in endowment properties, - Memorandum No. 01/97 dated 05/01/97 containing organizational directives for endowment management, especially regarding guiding endowment trustees, the relationship between the endowment manager and the tenant, and the required documents in endowment files, - Memorandum No. 02/97 dated 19/07/1997 emphasizing the necessity of developing and valorizing endowment properties.

Then came Executive Decree No. 98/381 dated 01/12/1998 to specify the conditions for managing, administering, and protecting endowment properties.



This decree provided a good administrative, organizational, and managerial boost to endowment management in Algeria (Executive Decree No. 98/381).

One of the effective mechanisms supported by this decree for managing endowment properties is that the endowment supervisor, who has the right to manage endowment properties, must meet certain criteria, including being Muslim, having Algerian nationality, reaching the age of majority, possessing sound mind and body, being just, trustworthy, competent, and capable of acting responsibly. Good training for endowment trustees, especially in the field of real estate ownership, is also necessary.

The General Inspection, organized by Decree 2000/164, plays an important role in safeguarding endowment properties by conducting inspection visits and monitoring to ensure the proper functioning of entities and endowments affiliated with the ministry and the exploitation of endowment properties.

There is also the Directorate of Endowments, whose tasks include searching for endowment properties, developing them, and investing in them.

At the local level, the directorates of religious affairs and endowments in the states play a significant role in managing and protecting endowments through the Guidance and Rites Department and the Endowments Foundation (Khaled, 2006).

CONCLUSION

Through the in-depth study and analysis presented in this research paper, several important conclusions can be drawn:

1. The efforts of the Algerian legislature in establishing a legal framework to protect and regulate endowments constitutionally and legally are appreciated. This is achieved by focusing on public endowments, developing them, organizing them, and safeguarding them through specific legal means, aiming to ensure their independence.
2. The independence of endowments from any intervention by public entities with administrative or economic characteristics is emphasized. However, effective legal guarantees for endowment supervisors through seeking legal protection via administrative courts are necessary.
3. Endowment supervisors have the right to resort to criminal justice in cases where the public violates the ownership of public endowments through unauthorized means, such as manipulation, deception, or forgery.
4. Encouraging the Ministry of Religious Affairs and Endowments to allocate a significant budget for the inventory and documentation of all public endowments. Additionally, developing and investing in them in ways that align with Islamic law is crucial. This aims to achieve significant humanitarian gains capable of solving various economic, social, and educational problems.

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