الشفافية الإدارية في الجزائر: بعض التطبيقات

سارة بن محمد*، سالمي وردة*

DOI:10.15849/ZUJJLS.220730.05

* جامعة الاخوة منتوري قسنطينة، قسنطينة، الجزائر.
* للمراسلة: Ouarda.salmi@yahoo.com

تاريخ استلام البحث 2022/03/02 .
تاريخ قبـول البحث 2022/05/24.

الملخص

لقرون، ظلت القرارات الإدارية العليا سرية. حكم شرع حتى ذلك الحين بسيادة السلطة التنفيذية وحقها الملكي. اليوم ومنذ التطور المجتمعي المتصل بالعولمة ، تم فرض قواعد على الإدارة للتخفيف من سريتها ومحاربة الفساد والعجز الديمقراطي الذي عرفه النظام السابق لفترة طويلة. وفي الجزائر، والدول الديمقراطية الحديثة كذلك، فإن المسألة تتعلق بعمل تنظيمي بغية التقليل من الأسرار أو حتى إزالتها فعليًا لصالح الشفافية الإدارية. توضح هذه الدراسة الجانب القانوني للشفافية الإدارية لدى المشرع الجزائري. ومن خلالها، سيتم التعامل مع مسألة الإطار القانوني والصكوك القانونية، تليها الرقابة الإدارية.

الكلمات الدالة: الشفافية الإدارية، التنظيم، الرقابة الإدارية.

Administrative Transparency in Algeria: Some Applications

BENMAHAMMED Sara *, SALMI Ouarda *

*** Université Frères Mentouri Constantine, Constantine, Algérie**
*** Crossponding author: Ouarda.salmi@yahoo.com**

Received: 02/03/2022.
Accepted: 24/05/2022.

Abstract

For centuries, the so-called supreme administrative decisions have been secret. A provision legitimised until then by the sovereignty of the executive power and its regalian right. Today and since the societal evolution linked to globalisation, rules are imposed on the administration to attenuate its secrecy and fight against corruption and the democratic deficit that the former regime has known for so long. In Algeria as well as in modern democratic states, it is a question of regulatory work to reduce or even virtually eliminate secrets in favour of administrative transparency. This study explains the legal aspect of administrative transparency in Algerian legislation. In this study, the question of the legal framework and the legal instruments will be dealt with, followed by that of administrative control.

Keywords: Administrative Transparency, Regulation, Administrative Control.

I. Introduction

Secrecy is as old as society itself, and if in its universal conception it is better to keep it, in public administrations the risk linked to secrecy is so great that popular uprisings can take place. The attitude of the Administration has -often- consisted in hiding the information, this conduct attenuated the exchange. And as a consequence, it distorted the relationship: Administration / citizens.

Nowadays, whether in developed or developing countries there is talk of transparency, this is certainly due to the impact of the communication and information revolution at all levels.

Transparency has become one of the principles on which all state systems are based, and it is also a means of eliminating corruption, since non-transparent transactions often conceal illegal acts. Thus the spread of this principle makes secrecy an exception.
Moreover, in the current climate of Covid risk19 , administrative transparency is a more than relevant issue.

Algeria is the heir - par excellence - of the French system in general and of its administrations in particular. Indeed, Algerian administrative law is strongly inspired by and similar to French law. Algeria also applies this concept of transparency and has made it a constitutional principle[1 (constitution)] Article 32 of the Algerian constitution states as follows: "*Fundamental freedoms and the rights of man and citizen are guaranteed. They are the common heritage of all Algerian men and women, which they have a duty to pass on from generation to generation to preserve its integrity and inviolability*.
Article 39: "*The privacy and honour of citizens are inviolable and protected by law. The secrecy of correspondence and private communication, in all their forms, is guaranteed*", which means that it applies to all areas:

Transparency is also considered one of the most important principles of good governance; sought by all governments and administrations because of its importance in the management of public affairs.

Administrative transparency is of such importance today, that in the current situation linked to the health crisis and all the measures undertaken by the State, the study and application of administrative transparency makes sense.

The importance of the subject is first of all pragmatic, because administrative transparency is of general scope for the citizens, it intervenes in their daily life, it is necessary for the good development of their exchanges with the State. On the other hand, administrative transparency is a guarantee of the durability of the executive power.

The aim of our research is to examine the ways in which administrative transparency can be applied through various examples. These examples are to be found in both private and public law.

The problem of our study revolves around the application of administrative transparency and its means of control. In order to answer this question, several questions will be raised: the legal framework for the application of administrative transparency? The means put in place to do so? And finally the control carried out against administrative transparency?

Verifying the application of all these notions presupposes that we first give some indications of the method used: the concepts, notions and legal categories used will be borrowed from both common law, administrative litigation law and tax procedure law, thus showing both the unity and the divergence that exist.

The approach will therefore be inductive, based on the examination of the texts, fed by the analysis and the synthesis of the solutions which it seems possible to combine, just as to avoid the dangers of simple description, the comparative study is used.
The subject of administrative transparency has previously been the subject of much research in comparative law, particularly in France. Its study with regard to the particularism that may exist and the prospect of an evolution could contribute to a better understanding of Algerian administrative litigation. To better serve our study, the plan is as follows:

I-Introduction,

II-The legal framework of administrative transparency in Algeria,

III-Control of Public Administrative Transparency, and

IV-Conclusion.

II. The legal framework of administrative transparency in Algeria

The Algerian legislator has organized the administrative transparency in several laws and regulations; texts that tend to enforce this principle more and more, following the example of the decree n°88-131 of July 4, 1988 organizing the relations between the administration and the citizens[2] (Decree n°88-131, 1988) (Decree No. 18-199 of 2 August 2018 on the delegation of public services, 2018).

The administration must inform citizens of the regulations and measures it issues, and in this context it must use and develop all appropriate means of dissemination and information (art. 8).

The persons administered must also have the possibility of accessing administrative documents and information (article 10), so that consultation on the spot or the delivery of a copy is perfectly possible and any refusal to do so must be justified by the Administration. This decree is not an isolated one, in fact the law 06-01 of 20 February 2006 on the prevention and fight against corruption, regulates the principle of transparency from the very first article[3] (Law No. 06-01 , 2006) "*The efforts of the sector come in an important context, marked by the continued implementation of the instructions of the President of the Republic in order to build a transparent, modern and quality*

administration, focused on a professional public service and free of any bureaucratic hindrance", (M.MEDEGHRI, 2017)

In the same sense, we could mention the law 11-10 of 22 June 2011 on the municipality, in which the principle of transparency is mentioned in several articles[4] (Article 32); "*Subject to the legislative and regulatory provisions relating to respect for the privacy of citizens, the confidentiality of information and public order, any person with an interest is entitled to consult the minutes of the deliberations of the wilaya People's Assembly on the spot and to take a copy of them, in whole or in part, at his or her own expense*. The municipal People's Assembly takes all measures to inform citizens about their affairs, and everyone is also allowed to see the result of the deliberations (Article11).Moreover, the sessions of the municipal council are public and open to the citizens of the municipality (Article26). The law 12-07 of February 21, 2012 relating to the wilaya, which, like the previously mentioned law 11-10, gives the right to each citizen concerned by the deliberation to be informed about it.

The application of the principle of administrative transparency is illustrated in several examples:

1)The right of access to public information:

"The right of access to information could contribute to making Algerians full-fledged citizens"[5] (HADJAD), because access to public information certainly encourages citizens to participate in the management of the State; they become partners in the administrative process.

Several legislations have already illustrated this principle, and as previously mentioned, the municipal laws favour this by the introduction of administrative exchange.

This right is all the more important as its consecration is of constitutional value and in all Algerian constitutions since independence the right to access to information has always been illustrated, the expression "*access to information*" is perhaps not mentioned, but replaced by "*obtaining information, documents, statistics and their circulation are guaranteed to the citizen*" (Article 51 of the Constitution).

2) Transparency of public finances:

The action of the Public Administration is mainly concerned with finances, because taxes are a real source for the State and have a considerable value.

Therefore, linking administrative transparency to taxation is quite simple and this is due to the very nature of taxation; how can one tax without informing? In reality, the Algerian tax system is declarative and is based on exchange and communication.

Moreover, tax control in all its forms is based on this idea of administrative transparency.

The tax rescript is also a perfect illustration of the notion of transparency between taxpayers and the tax administration. Part of a reform instituted by the Finance Act 2012, Article 174 bis and 174 ter provides for a new procedure that guarantees the rights of taxpayers through legal certainty, it is thus defined by Article 2 of Executive Decree No. 12-334 of 8 September 2012[6] (Executive Order No 12-334, 2012), in these terms: "*the tax rescript is a formal position of the tax administration, seized by a bona fide taxpayer within the competence of the Directorate of large enterprises. This rescript constitutes a precise and definitive answer to the request of the taxpayer who wants to know the taxation applicable to a factual situation with regard to the tax legislation in force*".

The tax rescript is an individual step taken by a taxpayer in good faith allowing him to question the tax authorities on his situation with regard to a tax text. It is therefore a guarantee of legal security and tax transparency for the taxpayer.
Legal certainty in tax matters is therefore a legitimate demand to secure relations that are sometimes conflictual between the administration and taxpayers (F.Douet, 1997,381p) (J.BUISSON, 2011,221.p.)[7].

Whereas the request for information has a broader scope, in other words the scope of application of the request for information is not limited to factual situations, but extends to the Administration's interpretation of legislative texts[8]. Moreover, the responses to requests for information may vary in form and content from one Administration to another, whereas the rescript remains centred at the level of the DGE and, as a result, the request for information is not a tax rescript.

The realization of administrative transparency in taxation is also explained by thevarious existing appeals in this area. This concerns especially the administrative phase with its compulsory preliminary appeal and in which the taxpayer expects to have compulsory motivated answers.
The appeal before the appeal boards is particularly heterogeneous in its composition and is only intended to facilitate a transparent exchange of views, the response to which is also reasoned.

Administrative transparency also takes shape in the motivation of administrative acts, and a simple reading of the Code of Civil and Administrative Procedures confirms this.

The law n°11-10 relating to the commune[9] (commune, 2011), in article 60 evokes the motivation of the Wali's decree, the latter is in the obligation to justify his administrative decisions, of this fact the citizens are in right to know the reasons which brought the public Administration to take a decision unfavourable to their against.

3) Administrative transparency and public procurement:

The adoption of the principle of market economy is considered one of the most important features of economic globalization, which requires the parallelism of two indispensable elements, namely the principle of free trade and the need to control market movements in order to ensure the realization of the public good.

Competition is a word that originates in the economic dictionary, as its concept is determined in the field of economic activity more than in the legal field, so it has been defined as "*a mechanism that allows a specific market to set prices through supply and demand*", and based on this definition, competition is of wide application. It can therefore be included in the field of public procurement, especially since the latter evokes the characteristics of the embodiment of modern management.

Article 2 of the Competition Act 5-10, as amended and supplemented, refers to the principle of competition throughout the public procurement process, from the publication of the tender notice to the final award of the agreement. However, it should be noted that although competition law restricts the application or implementation of the principle of the tender procedure, which is the "*request for proposal procedure*", the Public Procurement Law has expanded the service that embodies this principle to conduct a consensual approach after consultation.

Mentioning competition is not insignificant, as this principle undoubtedly evokes transparency. The envelopes relating to the application file, the technical and financial offers are opened in public session. At the same meeting, on the date and at the time provided for in Article 66, all candidates or contractors shall be invited to attend the envelope-opening session. In this capacity, the envelope opening and tender evaluation committee carries out the tasks assigned to it under the legal provisions.

4) Administrative transparency and the law to prevent and combat corruption:

The field of public transactions is the most important channel through which public funds move. A vital area for corruption in all its forms. Thus, the principle of transparency in the organization of public transactions is one of the most important mechanisms in this struggle. In Article 09 of the Anti-Corruption Act, the legislator has emphasized the most important principles of public procurement: the principle of transparency in procedures, disclosure of information and the rules of fair competition.

5) Administrative transparency and business practices:

Because of the great importance of economic transactions, the relationship between the consumer and economic agents must be characterised by a high degree of transparency. Environmental regulations at the legal and institutional levels are at the forefront of international policy. The United Nations Environment Programme (UNEP) requires

countries to. In this sense, information is becoming essential, based on transparency, the Rio de Janeiro summit on the environment and development in 1992 granted the right to consult documents and data on the environment.

The law 04-02 of July 27, 2004, amended and supplemented by the law 06-10 of August 15, 2010[10] (06-10, 2004), sets out a series of obligations that allow a high transparency, so the economic agent must not only inform the customer of the price, but also to charge it.

In addition, the law 09-03 relating to the protection of the consumer and the repression of the fraud evokes the protection of the consumer by informing him[11] (repression, 2009). The intervention of the State in this process is obvious, insofar as law 88-01 subjects the public company to commercial law. As a result, the State becomes an economic actor of great importance.

Administrative transparency is also present in the relationship between economic agents and the administrative regulatory authorities, which by their reasoned administrative decisions promote this principle.

Indeed, Article 19 of Law 03-03 of 19 July 2003 on competition, requires the Competition Council to give reasons for its decisions taken against economic agents[12] (competition, 2003) See also in this sense article 44: "*The Competition Council shall examine whether the practices and actions referred to it fall within the scope of articles 6, 7, 10, 11 and 12 above or are justified by the* application *of article 9 above*.

6) Administrative transparency in environmental protection:

The 1972 United Nations seminar in Stockholm also recalls the responsibility of everyone to protect the environment and the development of information in this field.

Algeria, in response to law 03-10 on environmental protection, has made information a basic principle[13] (development, 2003), and above all, it makes the citizen an indispensable partner.

The impact study referred to in Article 16 confirms the idea of transparency, since it embodies a post-project assessment, which makes it possible to calculate the extent of the damage to the environment[14] (03-10).This ensures that administrative transparency is fully guaranteed.Moreover, the consultation is a procedure mentioned in the law 20-04 relating to the prevention of major risks and the management of disasters within the framework of sustainable development[15] (development L. N.-2., 2004),it agrees to the collaboration between the public institutions, the territorial communities and the economic operators (article 9).

III. Control of Public Administrative Transparency

The application of the principle of administrative transparency implies the principles and foundations of good governance, which allows the conduct of public affairs, The principle of good governance appeared at the end of the eighteenth century in 1878, and was used in the field of development only in the late nineteenth.

Its definition varies from one community to another, depending on the trends and interests of each. Good governance was defined by the World Bank in 1992 as the means by which power is exercised in the management of economic and social resources to achieve development.

This means that the decisions taken and their implementation are carried out in a transparent and well known way, while ensuring easy access to documents. (Access to information in a direct and free manner, easy to understand (accessible to all groups)).

In Algeria, it is the orientation law 06-06 that established good governance[17] (06-06, 2006) (article 2), : "*The general principles of urban policy are Good governance: according to which the administration listens to the* citizen *and acts in the general interest within a transparent framework.*

Information: according to which citizens are permanently informed about the situation of their city, its evolution and its perspectives by enacting a series of principles including transparency; decisions taken and their implementation are executed in a transparent and well known manner, while guaranteeing easy access. This good governance also and above all requires efficient control.

Administrative control is the first form of control, and it must be effective in order to prevent any failure of the administrative system. Thus, the Algerian legislator has subjected public procurement contracts to a variety of controls, depending on their importance, which can take several forms:

1. Internal control:

This type of control is carried out by the Administration; its only objective is to reveal shortcomings without sanctioning them.

Internal control is also practised by regulation, and for this purpose two commissions are set up to open the envelopes and analyse the bids and the related prices (articles 121-125 of decree 10-236)[18] (the presidential decree 10-236, 2010) Article 121: "*As part of internal control, a standing committee for the opening of bids shall be set up in each contracting department.*

The head of the contracting department shall decide on the composition of this committee in accordance with the legal and regulatory procedures in force.

Article 125: "A standing committee for the evaluation of tenders shall be set up in each contracting authority. This committee, whose members are appointed by decision of the head of the contracting authority, and which is composed of qualified members chosen for their competence, shall analyse the tenders and, where appropriate, alternative tenders with a view to identifying the proposal(s) to be submitted to the authorities concerned...".

Presidential Decree No. 15-247[19] (Presidential, 2015 OJ No. 50)aims to develop public service through the impartiality of the administration and by reducing bureaucracy, as well as the development of e-government by creating a single commission for the opening and analysis of tenders.

2. External control:

It follows the internal control, which under Article 163 of Decree 15-247 has the purpose of analyzing the degree of compliance and evaluation of the contracting party. In this regard, the following can be noted:

1- The new presidential decree abolished the use of national procurement and service commissions, as well as the use of ministerial commissions, in order to decentralize control over public procurement and thus reduce bureaucracy.

2- He divided the commissions into two parts: the contracting department's contracting commissions and the sectoral contracting commissions.

3. Control under guardianship:

Control is exercised over the authorities that are not territorially centralized by the Central Administrations in order to achieve political, economic and social unity. It is exercised by the supervisory authority and its main objective is to ensure the conformity of public contracts with the main features of the country's economy. In order to do so, a report of the charges and the conditions of realization is sent to the minister or the wali but also to the specialized external control establishment.

For the communes, they are obliged to transmit the complete file of the contract to the wali and the publication of the tender in the national newspapers and the official journal of the public operator's contracts. In this way it can be checked whether the contract was awarded to the best bidder.

The wali has a period of 30 days to validate the legitimacy of the report, he also has the right to correct the mistakes and cancel the deliberation.

IV. Conclusion

In the course of this study, we have tried to present the rules applicable to administrative transparency in Algeria in the light of the doctrine and legislative texts. It is now appropriate and useful to attempt to draw up a general assessment and to raise the issues that call for reform.

1. Results:

- Administrative transparency is illustrated in Algerian law, its application is multiple and varied; indeed the examples given demonstrate the extent of this principle.
- The examples cited cannot claim to be exhaustive, other practices can be cited, particularly in the case of tax law. The tax rescript is a perfect example.
- However, its concept in the strict sense is still utopian insofar as there are several obstacles:
- Application in Algeria of old systems inherited from the French public administration, thus bureaucracy becomes predominant.
- Internal, external and trusteeship controls are still the most common forms of control, in addition to the complaints of citizens who have been harmed by the lack of transparency in administrative decisions (for example, the prior appeal resulting from the act of taxation).
- Control under tutelage applied to public contracts has been dealt with in only one article, so the return to common law is quite frequent, a shortcoming in our opinion because this sector is characterised by a high degree of complexity.
- Finally, there is no coordination between the different controls exercised in Algeria.
- The administration needs clarity and objectivity, because where corruption is rife there is little room for transparency, and public contracts often bear witness to this.

2. Recommendations:

These shortcomings can be overcome by legal solutions:

- It would be necessary to proceed with an administrative reform and to develop all the tools of transparency linked to management.
- The creation of a code of the relationship between the administration and the public, which would make it possible to settle upstream the various disputes related to administrative transparency, as is the case in France.
- Strengthening the control of administrative contracts.
- Creating a legal framework for administrative liability.
- The contribution of the administrative judge is essential to the development of administrative law in general and administrative transparency in particular.

Bibliography

- (s.d.).
- 03-10, l. (s.d.). Article 16.
- 06-06, '. L. (2006, février 20). JO n° 15.
- 06-10, L. 0.-0. (2004, july 27). OJ n° 46.
- Article 2. (s.d.).
- Article 3. (s.d.).
- Article 32. (s.d.).
- Article 44. (s.d.).
- Article1. (s.d.).
- Commune, l. N.-1. (2011, june 22). Oj no. 61.
- Competition, l. N.-0. (2003, july 19). Oj no. 43.
- Constitution, t. A. (s.d.). Article 32 et article 39.
- Decree n°88-131. (1988, july 4). Oj n°27.
- Decree no. 18-199 of 2 august 2018 on the delegation of public services, j. N. (2018, august 2). Decree no. 18-199 jo no. 48 . *The delegation of public services* .
- Development, l. N.-1. (2003, july 19). Oj n° 43.
- Development, l. N.-2. (2004, december 25). Oj no. 84.
- Executive order no 12-334, .. (2012, september 8). Oj no. 50.
- F.douet. (1997,381p). , *contribution à l'étude de la sécurité juridique en droit fiscal interne français.* , lgdj, coll. Bibliothèque de droit privé, .
- Hadjad. (s.d.). , president of the algerian association for the fight against corruption.
- J.buisson. (2011,221.p.). *La sécurité fiscale.* L'harmattan, coll. Finances publiques, .
- Law no. 06-01 . (2006 , february 20). *The prevention of and fight against corruption.*
- M.medeghri. (2017). *Report on the study day of tuesday.* Organized by the national school of administration,.
- P. D.-2. (2015 oj no. 50, september 16). The organization of public procurement and public service delegation.
- Repression, l. N. (2009, february 25). No. 15.
- The presidential decree 10-236. (2010, october 7). Oj n°58. The organization of public markets.