RESEARCH ARTICLE

Reconciling the Rights and Obligations of the Delegate in the Local Public Utility Delegation Agreement: A Mechanism for Balancing Public and Private Interests

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Abstract

The local public utility delegation agreement represents a modern legal mechanism that enables local communities to delegate the management of public services to private or public entities through a legally regulated contractual framework. This delegation creates new legal relationships, where the public authority retains its superior status while the delegate assumes a subordinate legal position.

The success of such agreements relies on achieving a fair balance between the rights and obligations of the delegate, who undertakes the financial and operational risks of the investment project in return for the right to exploit the utility and generate profit. Delegates must be granted adequate rights to ensure the economic feasibility of their projects while simultaneously fulfilling obligations that guarantee the quality, continuity, and accessibility of public services.

However, practical experience reveals persistent contractual imbalances caused by various legal, economic, and administrative factors. These disparities often compromise the efficiency and effectiveness of the delegated projects. Addressing this imbalance is critical to fostering sustainable public-private collaboration and ensuring the public interest is adequately protected.

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Introduction

In the effort to modernize and enhance the efficiency of public utilities, the Algerian legislature has adopted public utility delegation as a legal mechanism that facilitates the involvement of the private sector in the management and operation of public services. This shift aligns with the state's broader strategy to rationalize public expenditure, improve efficiency, and enhance service quality to meet the growing needs of citizens, particularly at the local level.

The local public utility delegation agreement, once concluded between the public authority and the private (or public) delegate, establishes distinct legal roles. These roles involve a redistribution of rights and obligations. As the public authority retains administrative privileges under public law, it is in a superior legal position. In contrast, the delegate typically occupies a subordinate legal status, especially in cases involving private entities.

Therefore, ensuring contractual balance within the delegation framework is critical. Such balance must be underpinned by clearly defined legal rights and obligations for the delegate (commissioner) to guarantee both the continuity and quality of public services. At the same time, the delegate must be able to secure a reasonable return on investment, given the financial, technical, and operational risks undertaken.

The central research question addressed in this study is: **To what extent has Algerian legislation reconciled the rights and obligations of the delegate in local public utility delegation agreements to ensure a balance between private investment interests and the public good?**

To address this question, a descriptive-analytical methodology is employed, focusing on the interpretation of Executive Decree No. 18/199. This decree is analyzed to identify the rights granted to the delegate to support private interests (profitability) and the obligations imposed to safeguard the public interest (service continuity and quality).

The paper is structured as follows:

- **Section 1:** Legal entrenchment of the delegate's rights in public utility delegation agreements as a guarantee of private interest;
- **Section 2:** Legal entrenchment of the delegate's obligations to ensure the provision of public services.

Section 1: Legal Entrenchment of Delegate's Rights as a Guarantee of Private Interest

One of the most complex legal and practical issues in public utility delegation agreements is the definition and protection of the delegate's rights. This is especially critical in light of the inherent legal imbalance between the public authority—armed with prerogatives under public law—and the delegate, who often operates under private law with a profit-driven agenda.

To address this, Algerian lawmakers, particularly through Executive Decree No. 18/199, have established a set of rights for delegates. These rights are designed to facilitate the smooth execution of agreements and ensure a degree of contractual balance despite the significant legal powers retained by the public authority, such as the ability to unilaterally amend or terminate the agreement.

Upon examination of the relevant legal provisions, the rights granted to delegates may be categorized into two main domains:

- **Financial and economic rights**, which enable the delegate to recover investment costs and achieve profitability;
- **Administrative and operational rights**, which provide the autonomy necessary for effective project implementation (Hashemi, 2018).

1.1 Financial and Economic Rights of the Delegate

Financial and economic rights constitute the primary incentive for private sector participation in local public utility projects. Delegates often assume the full cost and risk of developing and operating the infrastructure, as seen in concession contracts. Therefore, legal guarantees for financial return are essential to maintaining economic balance and attracting investment.

According to Jaberi (2018), such guarantees play a pivotal role in securing investor confidence and promoting effective public-private partnerships. These rights include financial remuneration, economic rebalancing mechanisms, and the right to claim compensation.

1.1.1 The Right to Financial Remuneration

The most fundamental economic right of the delegate is the right to financial remuneration, which constitutes the principal motivation for entering into a delegation agreement. The form and source of this remuneration vary depending on the nature of the contract:

- In **concession or lease contracts**, remuneration typically takes the form of **royalties**;
- In **incentive agency or management contracts**, it is structured as **tariffs** or **grants** (Darfi & Salami, 2020).

Definition of Financial Remuneration: Financial remuneration refers to the monetary compensation received by the delegate either from users of the public service or directly from the public authority, depending on the contract type. As specified in Article 210 of Presidential Decree No. 15/247 and Articles 53–56 of Executive Decree No. 18/199, these payments may be referred to as *royalties* or *tariffs* (Presidential Decree No. 15/247, 2015; Executive Decree No. 18/199, 2018).

- **Royalties** reflect the actual cost of the service provided and are paid directly to the delegate. They must:
    - Correspond to the service rendered;
    - Maintain proportionality between price and service quality;
    - Ensure economic viability for the delegate.
- **Tariffs**, in contrast, do not always cover the full operational costs. In such cases, the public authority may subsidize the delegate to maintain service delivery and ensure profitability.

Determination of Remuneration: Remuneration may be stipulated in the contract's terms and conditions, determined by the public authority, or set by regulatory frameworks. In some instances—particularly when prices are state-regulated—neither the authority nor the delegate may determine the rates independently (Hashemi, 2018).

Forms of Financial Consideration in Delegation Agreements:

1. Concession contracts
2. Lease agreements
3. Incentive agency contracts
4. Management contracts

The structure and flexibility of remuneration mechanisms must accommodate evolving economic conditions and ensure the sustainability of public-private collaborations (Tamawi, 1991).

1.1.2 The Right to Restore Economic Balance

Another critical right is the ability to maintain or restore the economic equilibrium of the agreement. This right enables the delegate to fulfill contractual obligations and achieve sustainable profitability, especially when faced with unforeseen financial burdens.

As noted by Arslan (1978) and Hashemi (2018), this right is especially vital in concession and lease contracts, where the delegate receives payment primarily from service users rather than the public authority, exposing the project to market volatility, administrative changes, and broader economic risks.

Application of Economic Rebalancing:

- In **normal conditions**, this principle ensures the ongoing viability of public services by maintaining financial balance throughout the contract's lifecycle.
- In **extraordinary conditions**, it helps absorb unexpected shocks and fluctuations.

The World Bank, for instance, advocates for financial safeguards in developing countries, such as:

- Low-interest loans or advances;
- Inflation-indexed compensation clauses;
- Tax exemptions and investment incentives (Bettinger, 1997).

Mechanisms to Maintain Economic Balance:

- Contractual clauses mandating periodic financial reviews;
- Government subsidies in the form of financial aid or tax relief;
- Legal provisions allowing adjustment of terms in case of force majeure or structural changes.

II. The Right to Restore the Financial Balance of the Agreement in Extraordinary Circumstances

The delegation agreement for local public utility services is a long-term contractual arrangement. Its execution often extends over an extended period, during which various external factors may arise, thereby disturbing the original financial balance agreed upon at the time of contract conclusion (Arslan, 1978). These disruptions often impact the continuity of service provision, necessitating financial rebalancing to maintain the sustainability of the delegated service.

The French Council of State has established a set of jurisprudential doctrines that support the restoration of contractual financial equilibrium under distinct legal theories:

1. Rebalancing Based on the Doctrine of "Act of the Prince"

This theory applies when the financial disequilibrium results from unilateral decisions by the public authority—referred to as the "Prince"—whether through regulatory or individual acts. Such decisions may increase operational costs for the contractor (the delegatee), warranting compensation.

Compensation may be sought amicably or through administrative litigation, where a judge determines the appropriate amount based on expert opinion (Jaberi, 2018). Preconditions include:

- The agreement must qualify as an administrative contract.
- A governmental act must have been issued affecting the contract's financial equilibrium.
- The act must have caused direct harm to the delegatee.

- The act must have been unforeseeable at the time of contracting.

2. Rebalancing Based on the Theory of "Imprévision" (Contingent Circumstances)

This theory applies to unforeseeable, external circumstances that do not render contract performance impossible but impose substantial financial hardship on the delegatee (Tamawi, 1991). Conditions include:

- The occurrence of an emergency during the execution of the contract.
- The emergency must be beyond the control of both parties.
- The delegatee must experience serious hardship in performance.

3. Rebalancing Based on the Doctrine of "Unforeseen Material Difficulties"

This theory involves exceptional material hardships, unforeseeable at the time of contracting, that significantly increase performance costs. Conditions include:

- Difficulties must be of a material and exceptional nature.
- They must not fall under ordinary commercial risks.
- They must make performance financially burdensome (Arslan, 1978).

III. The Right to Compensation

Compensation is a fundamental right of the delegatee in the local public utility delegation agreement. It applies in cases of contractual breach by the delegating authority, or even in its absence under specific legal doctrines (Hashemi, 2018).

1. Compensation for Fault

Where the delegating authority is found liable for contractual breach, compensation is owed for both actual damages and lost profits. Breaches include:

- Failure to deliver the operational site.
- Failure to issue required licenses.
- Violation of agreed contractual provisions (Hashemi, 2018; Jaberi, 2018).

2. Compensation Without Fault

Even in the absence of direct fault, the delegatee may claim compensation under two main situations:

a. Unjust Enrichment

Where the delegatee performs work beyond contractual obligations, compensation may be claimed under Article 141 of the Civil Code (Order No. 75-58, 1975).

b. Termination in the Public Interest

The delegating authority may unilaterally terminate the contract to ensure service continuity or protect public interest, per Article 64 of Executive Decree 18/199 (2018). Compensation to the delegatee must then follow contractual terms. An amicable termination is also possible under Article 65.

If termination results from force majeure, no compensation is owed.

The Delegatee's Legal Obligations: Safeguarding Local Public Service Delivery

In exchange for the rights granted, the delegatee assumes a set of legal obligations to ensure proper functioning and quality of service. These obligations target both the delegating authority and public service users (Executive Decree No. 18/199, 2018).

1. Obligations Toward the Delegating Authority

These include:

a. Personal Management Commitment

The delegatee is personally responsible for contract execution, based on the trust and qualifications assessed at the time of selection. Article 7 of Decree 18/199 allows partial subcontracting only under express, prior approval.

b. Compliance with Operating Principles

Delegatees must uphold traditional and modern principles:

- *Continuity of Service:* Stated in Article 27 of the 2020 Constitution, Article 5 of Decree 15/247, and Article 3 of Decree 18/199.
- *Equality of Users:* Grounded in national and international law.
- *Adaptability:* The utility must evolve with changing societal needs (Law 88-131).
- *Transparency:* As mandated by the Constitution and reinforced by Law 06/01 and Article 84 of Decree 18/199.
- *Service Quality:* Stressed in Article 3 of Decree 18/199.
- *Efficiency:* Performance indicators and cost-effectiveness are required (Jaberi, 2018).

c. Protection and Handover of Public Property

The delegatee must preserve and return all assets, per Article 67 and 68 of Executive Decree 18/199. Failure may result in liability for restoration or monetary compensation.

2. Obligations Toward Users of the Public Facility

Although users are not contractual parties, the agreement significantly impacts them. To protect users' rights, the delegatee must:

a. Publicize Service Conditions

Article 84 mandates disclosure of service terms, operating hours, fees, and eligibility categories. This promotes transparency and allows regulatory inspections and user feedback.

b. Maintain a Public Complaints Register

Delegatees must provide a visible, accessible register for user complaints and suggestions. The delegating authority may review the register and take corrective actions, including issuing warnings or terminating the agreement in severe or repeated violations (Hashemi, 2018).

Conclusion

The local public utility delegation agreement represents an effective legal mechanism for involving the private sector in the management of public services. It allows public authorities to harness human, financial, technical, and technological resources to improve the quality, continuity, and economic efficiency of service delivery—under the supervision and control of the delegating authority.

However, practical implementation reveals several challenges concerning contractual balance, particularly regarding the legal status of the delegatee. While certain rights are theoretically protected, the delegatee often faces extensive obligations, both toward the delegating authority and the users of the public utility.

This study has demonstrated that achieving a fair reconciliation between the rights and responsibilities of the delegatee is critical for the success of the contractual relationship. Such a balance ensures the public interest is served without undermining the economic viability of the investment project, especially in the context of prevailing financial and economic pressures.

The research led to several key findings:

- Granting the delegatee the right to utilize the public facility and receive financial compensation incentivizes investment in local infrastructure projects.
- In return, the delegatee assumes substantial economic obligations, including ensuring service continuity, adhering to quality and efficiency standards, and complying with the oversight of the delegating authority—exposing them to industrial and commercial risks.
- Executive Decree No. 18/199 establishes a contractual framework aimed at ensuring balance; however, weak oversight and irregular practices at the local level can distort this equilibrium.
- Given the long-term nature of delegation agreements, evolving circumstances may lead to financial imbalance. Without effective rebalancing mechanisms, the delegatee's rights may become burdensome obligations, with limited legal or financial safeguards.

Based on these findings, we propose the following recommendations:

- Revise and update local public utility delegation contract templates to incorporate explicit, enforceable provisions ensuring financial equilibrium throughout the agreement's duration.
- Strengthen local institutional capacity, especially among municipal and state council members involved in the negotiation and monitoring of delegation agreements. Training in technical and legal aspects is essential for effective governance.
- Foster enhanced communication and transparency between the delegatee and public utility users. Promoting a participatory environment grounded in mutual trust and accountability will contribute to the stability and sustainability of investment projects.

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Conflict of Interest Statement

The author(s) declare no conflict of interest related to the publication of this article. No financial or personal relationships have influenced the findings or interpretations presented in this work.

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