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The Legal Ways To Constitute The Private Real Estate Of The State In The Algerian Legislation

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Abstract:

The National Property Law n° : 90-30, of December 1990, relating to the national property, as amended and supplemented, and based on the new constitutional provisions, defines the nature of the State's national property as well as its components.

This was confirmed by Executive Decree n° : 12-427, which in turn set out the conditions for the administration and the management of the State's private and public property, and regulates the ways of this, as well as other regulatory provisions.

Keywords: The State**,** Real Estate, National, Property, Public Law, Private Law.

Introduction:

What can be seen through the induction of the legal system of property in general and of national property in particular, in Algeria, is that volatility and instability, from independence until the current National Property Law. This is due to the Algerian State's failure to adopt a unified political and economic system, from a socialist economic system, which enshrines the principle of collective ownership of public property, since the State is the sole owner, and there is no room for the free initiative of individuals, to a Liberian economic system that perpetuates duplication of property, narrows public property and protects private property. This is after exiting one-party control to multiparty pluralism.

This qualitative leap from one economic system to another is quite the opposite, which can be derived from this extreme contradiction between the provisions of Law n° : 84-16 of 30 June 1984, concerning the national property, and the Constitution of Algeria of 23 Feffrey 1989, the latter of which announced a new political and economic trend, adopting two important principles: The principle of guaranteeing private property and the distinction between public national property aimed at achieving public benefit, as well as national property belonging to the State and its local groups.

Similarly, it has been noted at the level of legislation, where a series of laws have been enacted, all under the new orientation of the Algerian State, by once again proposing the

idea of distinguishing between the public property of the State and its local communities. Perhaps the most prominent of these laws are :

1- The Law n° : 90-25, of 18 November1990, relating to the agricultural directive, as amended and supplemented[1],
2- The Law n° : 90-30, of december 1990, relating to the national property, as amended and supplemented which showed the new composition and the new division of property, in accordance with constitutional rules. This was subsequently confirmed by its executive decrees[2].

Accordingly, the legal texts contained in the Constitution, the National Property Law , the Agricultural directive Law and other laws, have all been attributed to the pre-existing bilateral division of national public and private property. Thus, public national property, by its nature or by its use by man, is of a public good, and is thus non-concessional and non-property, making it subject to three important basic principles, namely, inalienability, non-custodial and non-statutory. They are thus subject to the rules of common law. Private national property is possessed by the State and its public group, just like private property, and constitutes its total property.

From what has been said previously, the subject of our study will be determined in the second type of national property, namely, private national property, specifically in State real estate, so that public national property and local community property will be excluded from the study. Given the crucial importance of real estate for desired social and economic development, and since the State's real estate stock is substantial, the study will specialize in private State property only without movable property.

Based on what have been mentioned before, we present the following problema :

What are the legal means by which the State's private national property is constituted in the Algerian legislation ?

To give an answer to this problem, we used the obvious known methods in the legal sciences. First the descriptive method that focuses on the legal topic in such a specific way, by presenting the definition of the State's private national property. On top of that, we used the analytic method where we mentioned the legal rules and analyzed them to know reasons and find solutions that suit the Articles from laws with what is happening in the actual moment.

Furthermore, to reach and achieve the objective of this study, we divided our study into two sections, section one deals with the definition of private property of the State, as well as its legal nature, whereas the second section deals with the ways of forming such

[1] - The law n° :90-25, dated in 18 November1990, contaning the real estate orientation law, as amended. and supplemented.
[2] - The Law n° : 90-30, dated in 01December1990, containing the national properties law as amended and supplemented.

property. After that we addressed in the conclusion the main points that were studied in this topic and we gave an explanation to the results that we reached through this study.

-Section One: The Legal Nature of the State's Private Real Estate

Determining the legal nature of the state's private real estate is highlighted by defining the criteria known in the traditional theory, to differentiate the latter from the public real property of the state, in particular the criterion for the purpose of exploiting the property or the purpose for which the funds is intended[3]. Whenever property is not subject to private ownership, by its nature or purpose, it has entered into a public property. Private property according to this criterion is those that do not fall within the range of public property.

-First: The Definition of the State's Private Real Estate

The article 3, paragraph 2, of the National Properties Law defines private property of the State as such property which is not classified as public property and which performs a property and financial function and is governed by the principle of territoriality.

However, this does not entail the full application of private law rules to such property, as it constitutes the private property of a public legal personality[4].

-Second: The State's Private Real Estate Components

The article 19 of the National Properties Law, mentioned above, stipulates the components of the State's private property. Where they were mentioned exclusively. In addition to the property that has been de-allocated or classified, as well as legally converted property, or that has been seized, these property contains :

- All buildings and lands not classified in public national property owned by the State and allocated to public facilities or administrative bodies, whether or not they are financially independent,

- All buildings and lands not classified in the public national property acquired by the State, transferred to it and to its institutions or administrative bodies, or that it accomplished and remained its own,

- Properties with residential, professional or commercial use. As well as the commercial shop that remained the property of the State,

- Properties allocated to the Ministry of National Defence, which represents the means of support,

-Properties allocated or used by diplomatic missions and consular offices accredited abroad,

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[3] - Laila Zarouki, Omar Hamdi Bacha, Real Estate Litigation, Houma Edition, Alegria, 2002, p90.
[4]- Omar Hamdi Bacha, Transfer of Real Property, Houma Edition, Alegria, P 11, 2002.

-Properties belonging to the State through endowments، testaments and successions without heirs, vacant properties, landless real estate and shipwrecks and treasures,

- Real properties seized or confiscated that the State has acquired once and for al,

- Transferred rights and values acquired or achieved by the State, which represent the value of the quotas or supplies provided to public institutions,

- Agricultural lands or agricultural oriented lands, as well as pastoral lands owned by the State,

-Bands and securities representing the value of properties and various rights, provided by the State in order to contribute to the formation of economic mixed enterprises in accordance with the law

These are most, if not all of the state's private real estate components, which differ in the way they are formed, as well as their inclusion. This is what you keep studying in the next section.

-Section Two: Composition of The State's Private Real Estate

The public person's acquisition of the State is a prerequisite for his acquisition of the owner's status title, noting that the means of gain or acquisition vary for the State in two categories ;

-Earn money by private law methods, similar to those used by individuals to earn their own properties,

-Earn money by common law methods, whether by ordinary or unusual ways.

The distinction between both types is attributable to the State's capacity to use that means, so that when it intervenes as a sovereign public person, it has the power and influence to obtain public funds, which in this intervention must be subject to the rules of common law, and the ل in such cases is referred to the administrative judge. However, if a State intervenes by using a means that is not characterized by the privileges of public authority, in this case it is subject to the rules of private law, and in the case of a dispute, the cases are referred to the ordinary judge.

In the above-mentioned Law No : 90-30, the Algerian legislature deals with the State's acquisition of funds, particularly in articles 26 and 39 of the Law, which, in turn, refers these operations to legislation and regulations promulgated in this area[5]. From the foregoing, we shall first deal with the ways and methods of public law, and then with the ways and methods of private law, secondly, focusing on possible ways in both types, as follows :

- First: Composition of The State's Private Real Estate by Commun Law Ways

[5] - The articles 26 and39 of the Law n° : 90-30, containing the national properties law as amended and supplemented.

The above-mentioned article n° : 26 of the Law No : 90-30 stipulates that One of the means of forming the private property of the State, which is governed by the rules of public law, is the expropriation of property for public benefit as well as the administrative preemption. These two means are addressed by the State in specific cases and are the most important means, in addition to the abolition of the classification of public property, as well as the devolution of lost objects to the State.

1/ Expropriation of Property for Public Benefit :

Expropriation for public benefit is one of the traditional systems that we find worthwhile in the Islamic system, where it was considered a restriction on ownership in the Islamic sharia, which aims to achieve an interest. The Islamic Sharia also came up with holistic rules that permit the seizure of a portion owned by individuals to collect this benefit.

At times, the public interest may require the Governor to seize individuals' property for the benefit of all Muslims since he has a mandate to care for public affairs[6]. This is what Muslim scholars have established from fundamentalist rules, from which we mention :

- Private damage is incurred to pay public damage, which means that the public interest of Muslims is considered and respected. This interest is presented on the private interest when there is a conflict between them,

-The rule of greatest damage may be resolved by the lesser damage,

- Preventing corrupts better than bringing benefits.

Through what has been said, many statutory legislation in the Arab countries have taken into account the Islamic sharia in this regard[7], including the Algerian legislature.

Algerian legislation defines expropriation for public benefit as an exceptional measure or method of acquiring property and real estate rights. And the State has the responsibility to ascertain that the beneficiary of this procedure has previously made a friendly attempt to acquire the property to be expropriated from its original owner[8]. Expropriation for the public's benefit, cannot be initiated unless it is ascertained that all friendly attempts have failed[9]. After only this, the Administration can initiate the expropriation process, the general framework of which was first established by the Constitution of 1989, gamended by the 1996 Constitution.

If the method of expropriation for public benefit gives the administration the opportunity to acquire private property for individuals, even without their consent, this

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[6] - Moundir abd el Hassen, Social Function of Private Property in Islamic Law and Statutory Law, University Publications Office, Algeria, p160.

[7] - Moundir abd el Hassen, op.cit, p163.

[8] - The second article of the Law n° : 91-11, dated in 27 April 1991, determines rules on expropriation for public benefit as amended and supplemented,

[9]- The second article of the Executive Decree n° : 93-186, dated in 27 july 1993, determines how to apply the Law n° : 91-11on expropriation for public benefit.

method also gives the greatest guarantees to the owner of expropriated property. These guarantees are the Administration's respect for the procedures provided for by law, as well as equitable and fair indemnity. This will be summarized successively as follows :

A- The Administration's Respect for The Procedures Provided for by Law :

The third article of the Law n° : 90-11, stipulates that expropriation for public benefit shall be subject to certain previous procedures, namely [10]:

- Declaration of public interest,

- Identification of the list of property involved in the process,

- Assessment of real estate and rights,

- Administrative decision on waivability,

- Final decision to transfer property[11].

B- Obligation to Pay Indemnity in Advance and Fair

The guarantee of expropriation, which is fair indemnity, and which is of great importance to the violation of the rights and freedoms of individuals, in relation to their property, from which no one may deprive them, has been confirmed by various legal texts, which began with the Constitution and then the Civil Code, the Expropriation Law and the Land Directive Law thereafter.

-Legal Basis for Indemnity Under the Constitution of 1990:

The article 20 of the Constitution stipulates that expropriation of property shall take place only under the law. This process shall entail fair and equitable tribal indemnity[12].

- Legal Basis for Indemnity in Accordance With the Civil Code :

According to the Civil Code, no one may be deprived of his property except in the circumstances and conditions prescribed by law. However, the Administration has the right to expropriate all or some of the real estate property or to expropriate the rights in kind for public benefit in exchange for fair and fair indemnity [13].

-Legal Basis for Indemnity Under the Land Directive Law :

[10] - The third article of the Law n° : 91-11, previously mentioned.
[11]- For more details, revise the articls from 02 to 30 from the Executive Decree n° : 93-186, previously mentioned. As well as : Ismaiin Chamma, Legal System of Real Estate Directive, Houma Edition, Alegria, 2002, p164, 166,167.
[12] - The article 20 of the constitution of 1990, previously mentioned.
[13] - The article 677 of the civil code, previously mentioned.

The Land Directive Law also stipulates that expropriation for public benefit carries fair and equitable tribal indemnity, either in the form of monetary indemnity or in the form of property similar to expropriated property, if possible[14].

-Legal Basis for Indemnity Under Expropriation Law:

The law n° :90-10, which determines rules on expropriation for public benefit, stipulates that the amount of Indemnity for expropriation shall be fair and equitable, covering all damage suffered and loss of profits resulting from expropriation.

The amount of this compensation is determined by the real value of the property, and by what results from the evaluation of its nature, inclusions or actual use, by its owner and other real rights holders, or by traders, manufacturers and artisans[15].

The doctrinal basis adopted to justify compensation in the case of expropriation is administrative liability, without fault, which is based on equality before public burdens, which includes compensation originally for material damage, while moral damage merits compensation only an exception.

What can be seen on the expropriation procedure, it is a complex procedure, so that all the issues that were the subject of this procedure are mostly unfinished, and no final proceedings are known, and this is either the existence of disputes in compensation or the completion of its proceedings, or the completion of contracts on the one hand. On the other hand, with regard to the process of restitution of property by its owners in the absence of the start of work within the prescribed period, which is stipulated in article 32 of Law n : 91-11, there is nothing to reflect it in fact, since there are a large number of projects that remain too deserving, even if this procedure is applied.

It remains to be said, however, that the expropriation procedure is one of the most important means of acquiring the State's real property.

2/ Administratif Preemption:

The aforementioned the National Properties Law, affirms the State's right to preemt property and considers it an exceptional route by which it can acquire property and thus include it in its own property[16].

Algerian legislation stipulates the State's right to administrative power in a number of other laws, including the following :

-Registration Law:

The article 118 of the Registration law stipulates that the State has the right to use the preemption on real estate، real estate rights or shops، or the right to rent، or the promise

[14]-The article 72 of the the real estate orientation, Law, previously mentioned.
[15] -The article 21 of the Law n° : 91-11, previously mentioned.
[16]- The article 26 of the National Properties Law n° : 90-30, previously mentioned.

thereof that falls on the property، whether all or part of it, in case it considers that the sale price is insufficient, or the amount authorized.

- Land Directive Law:

The public authority for real estate regulation exercises the right of preemption, and in addition replaces beneficiaries whose rights have been dropped. The right of the State and local communities to the preemption is established in order to provide for the needs of the public interest and of the public good, regardless of the possible resort to the expropriation procedure. The preemption's right applies by certain public interests and bodies determined through regulation, and this right is exercised in the rank preceding that specified in article 795 of the Civil Code[17].

It should be noted that the administrative preemption is different from that contained in the Civil Code,the difference is highlighted in the fact that the administrative preemption is determined solely for the benefit of public persons, such as the State, and local communities, while the civil preemption is designed to protect the interests of private law persons[18].

In terms of purpose, the administrative preemption aims to pre-impact real estate transactions in order to avoid any abnormal price rise. Statistics usually show that resorting to them is minimal, which confirms that their role is threatening and protective. While the purpose of the civil preemption is the beneficiary's own repairs, which are often in order to eliminate communism or for property to remain within the family[19].

3/ Abolition of The Classification of Public Real Estate Property:

The abolition of the classification of public real estate property is one way of forming private real estate property for the state. This process is stipulated in the National Properties Law n° : 90-30[20].

Property to be allocated or classified must be classified as public property. Because the classification process confers on the property the character of the public property, by a prior right or by means of common law. Such property is required to be prepared according to the job for which it was allocated.

The devolution process that falls on public property, whether artificial or natural, and its allocation means that the latter has become useless for the public bodies that have been allocated to them, and therefore it is necessary to cancel their allocation, or that it has no role in the performance of the public service. This character must therefore be dropped. In both cases, formal action must be accompanied by actual implementation,

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[17] - The article 62,71 of the Land Directive Law n° : 90-25, as amended and supplemented, previously mentioned.

[18] - The persons are mentioned in the article 795 of the ordinance n° : 75-58 contained the Civil Code.

[19] - Ismaiin Chamma, Legal System of Real Estate Directive, Houma Edition, Alegria, 2002, p 172.

[20]-The article 17 of the National Properties Law n° : 90-30, previously mentioned.

namely, the upgrading of the allocation for public use. If the money is natural, in this case it has lost its natural qualities that have prepared it for the acquisition of a public quality.

In this case, it should be noted that, if the natural property is de-classified, it may return to its own owner, if the natural property was originally extracted from its own property by virtue of its circumstances, and this is required not to be prolonged by its own ownership, which remains merely an exception to the rule.

As stipulated in the article 72 of the same Law , if a property belonging to the national public property loses its function or allocates it, it results in its return to the State's private national property, if initially in its possession[21].

It is noted that the departure of the property from the public domain and its persistence in the State's private property results in changes, which are generally summarized as follows :

- Property ownership is subject to the rules of the Civil Code of private property, and change in the jurisdiction,

- Public property may be disposed of or sold,

- The property is outside the scope of criminal protection of public funds.

However, this method remains an important means of forming the State's own real estate.

4/ Devolution of Lost Objects to The State :

The article 39, paragraph 4, of the National Properties Law n° : 90-30 stipulates that the State or one of its bodies shall be entitled to real property resulting from the right to property, especially treasures, (as a property due to its underground presence) and excavations[22].

It is noteworthy that the devolution of these things to the State is particularly relevant to the mobiles, and therefore is of little importance in the formation of the State's real property.

- Second : Composition of The State's Private Real Estate by Private Law Ways

Private property of the State may also be consisted of contractual legal means, whereby ownership of real property is annexed to this type. The article 26 of the aforementioned national properties Law, stipulates most of these means, including purchases, exchanges, wills, donations, etc.

1/Purchase and Exchange:

-Purchase:

[21] - The article 72 of national properties Law n° : 90-30, previously mentioned.
[22]-The article 39, paragraph 4, of national properties Law n° : 90-30, previously mentioned.

Procurement is a direct and essential process in the formation of the State's property. Articles 150 to 161 of the Law n° : 82-14, dated 30 December 1982, which represents the Finance Law of 1983, amended and supplemented. this process and identified the ways and means and forms the State, or one of its public institutions of an administrative nature, can carry out in order to ensure the proper functioning of its property.

According to the above-mentioned articles, public institutions and administrative bodies of the State cannot make purchases unless they have consulted the State's property service. Especially with regard to the price and the process of prepping and preparing the contract. Article 98 of Executive Decree n °:12-427, stipulates that financial observers or authorized agents shall not indicate in their place any document that is bound by expenditures or any order for payment or authorization of credits or transfers relating to procurement or the provision of leases that have not been made in articles 95 to 97.[23]

As indicated in the second paragraph of the same article, under the expenses section, accountants caution against payment orders for the performance of credit and amounts due under procurement contracts that do not meet the general conditions.

It should be noted that, in accordance with the Registration Law, in particular articles 271, 353 and the articel 161 of the Law n ° :82-14, these purchase contracts are not subject to registration or publicity. Because it is exempt from all that.

Upon completion of the release of the contract by the Directorate of State Property, the process of registration of these new real property is initiated, in the respective registries, i.e., of the State's private real property.

- Exchange:

An exchange, like a purchase, is one of the legal methods or means that have an impact on the formation of private real estate. This is expressly stipulated in article 26 of the aforementioned Law n° : 90-30, previously mentioned. It considered it to be a legal instrument subject in its provisions to the rules of private law.

Exchanges are often conducted in two forms, either between the State and the local group, on the one hand, or between the interests of the State, on the other. Notably, this last process has no role in formation. They were referred to only in detail, since property in this case was considered to belong to the State in advance.

Exchanges are often conducted in two forms, either between the State and the local group, on the one hand, or between the interests of the State, on the other. Notably, this last process has no role in formation. They were referred to only in detail, since property in this case was considered to belong to the State in advance.

There is also another aspect of the exchange, which highlights a significant role in the formation of private real estate properties of the State, as opposed to real estate

[23] - Executive Decree n °:12-427, dated on December 2012, defines the terms and conditions for the administration and management of public and private property belonging to the State.

properties owned by private persons or individuals[24]. In this case, this process is subject to the rules and provisions of the Civil Code, as a public asset, because in this case the State deals or disposes of its own property and is completely equal to that of individuals[25].

2/Wills and Donations:

Gifts and wills are one of the ways in which the State acquires real property that is subject to private law. Gifts and wills are one of the ways in which the State acquires real property that is subject to private law. This is stipulated in articles 18 and 26 of Law n° : 90-30, previously mentioned. Accordingly, the State or its public institutions may issue a will or a gift from the private party. Such conduct is subject to the rules of private law if it considers it to be in the public interest.

In the Civil Code, Algeria's legislation stipulates that a will, as a legal act, is intended to donate certain funds and has made it subject to personal status and related laws. Article 39 of the Law n° : 90-30, previously mentioned stipulates that the private State's property consists of gifts and wills granted by private persons, whether directly to the State or to one of its public institutions. These means are free of charge, where the State is legally prepared to accept wills and gifts, as long as they are unconditional and do not conflict with the public interest or public order.

According to article 44 of the Law n° : 90-30, previously mentioned, gifts and wills to State public institutions, whether overburdened or not, can only be accepted with a joint licence from the Minister of Finance and the trustee Minister of the beneficiary institution.

The exchange process must be confirmed by administrative contracts prepared by the competent body in accordance with article 47 of the same law, which is the administration of the State's property, as well as the completion of all procedures relating to registration, publicity and others.

Any notary who trusts a will containing a voluntary contributions to the State or one of its public institutions shall inform the prefect, in his capacity as the representative of the State in the prefecture, of the place of opening of the estate. This information shall be attached to the literal version of the testator arrangement for the benefit of the State, together with a statement of the names and titles of the heirs and their occupation, their relationship and their addresses[26].

The Conclusion:

At the end of this study which dealt with the legal ways that constitute the State's private national property, in Algerian legislation, we concluded that the Law n° : 90-30, on national property, added the new, with regard to national property in general and private national property in particular. It is distinguished from its predecessor by features that allow for good control and proper management of property, as well as its visibility of the

[24] -The paragraph 2 from the article 92 of the Law n°: 90-30, previously mentioned.
[25]-The articles 32 to 38 of the Law n° : 90-30, previously mentioned.
[26] - The article 169 of the Executive Decree n °:12-427, previously mentioned.

notion of private ownership of the State, in line with the new constitutional provisions. It is also a legal guide to distinguish between the State's public real property and its private property, in particular in terms of the legal system governing each type of State property, in terms of identifying them as well as ways of forming them, in particular private property.

Nevertheless, this law is prejudiced by the fact that most of its provisions are far from realistic, especially in the absence of clear perspectives and structured ideas in our country, which once again raises the problem of distinguishing between the private property of the State and that of individuals, where the nature of power is still predominant.

We also note from the law that most of its provisions regarding the ways of forming the State's private real property are abstract and public, especially in the absence of explicit regulatory texts. The inflexibility of its provisions has made it difficult to apply them, especially in a transitional phase of the political idea of the country. This is confirmed by the employees of the Directorate of State Property, who emphasized that these difficulties caused at the practical level within the interest to disrupt or delay many cases, due to incompatibility with social and economic conditions. Thus, the Administration applied customary provisions, which had been introduced, and thus those provisions remained unambiguous in practice, which had widened the gap between legal and practical realities.

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