eISSN: 2600-609X Law and Society Journal ISSN:2335-1462
YEAR : 2022 Vol : 10 No : 02 Page : 344 - 367

CONTRACTING GUIDANCE

توجيه التعاقد

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Submission date: *28/08/2022* ***Date of acceptance:*** *23/11/2022*

ABSTRACT:

The contract has become closely associated with the phenomenon of guidance. As the legislator interferes in its establishment, its restraint from conclusion, its implementation. Whereas the role played by the will is gradually decreasing. Therefore, the contractual nature of the contract weakens and social tendency prevails over individualism.

Keywords: *Contractual balance; Social solidarity; Compulsion and restraint.*

ملخص باللغة العربية:

أصبحت ظاهرة توجيه العقد، وتدخل المشرع في انشاءه وفي المنع من الانعقاد، وفي التنفيذ تتزايد بكثرة، في حين الدور الذي تلعبه الإرادة يتناقص تدريجيا، وتتغلب النزعة الاجتماعية على الفردية.

الكلمات المفتاحية: التوازن العقدي؛ الالزام والمنع؛ الحرية التعاقدية؛ التوجيه.

Introduction:

No legal principle has gained more popularity than the one of (pacta sunt servanda). which had a special sanctity among the supporters of the will dominance principle, as it still occupies a prominent place in legal literature.

However, the principle in its traditional sense may lose much of its significance, as the legislator has become involved in the creation and implementation of the contract, as well as in the effects that result from it increasingly. On the other hand, the role of the will in the contract is constantly decreasing.

Some jurists have gone so far as to argue that whenever the economic life of society develops, the law develops in a way that robs the free will of some of its effects, and that what was dependent on the "will" will become a right acquired by the force of law, therefore the intervention of the will is no longer necessary .

It is no longer for the will, contrary to what it was, to contract with what it requires , when bargaining is refused, the contract is concluded by submitting to the conditions presented , or to criticize the details of the contract and specify its terms according to what it seeks, so it submits to the model presented in the form of a standard contract, or in a lighter form that the will obeys the general conditions prepared in advance, and is satisfied with specifying and filling in blanks that are often ineffective.

The deprivation of will continues outside these patterns within the framework of the legislator's direct intervention in the contract, whether from the commitment to contract or the prohibition from contracting, and in the form and content of the contract.

The legislator endeavors to have a market economy and benefit from its advantages, especially in light of the recurring and continuous economic crises. However, this mechanism will lead to the existence of two parties, one of them is the owner of the commodity or service, and the other needs it . As leaving the freedom to the first party to release; as it strengthens the

position of the first and weakens the second one. Therefore, the contract is inevitable, because it needs it, not because it is satisfied with it, as the will here is considered paralyzed and partially

Thus, we agree with part of the jurisprudence that " pacta sunt servanda, provided that they are equivalent and equal, however if the strength of each differs in the contract, it is unfair to say that it is their law[1] . "
In order to achieve the desired goal, which is justice and equality between the contracting parties, the peremptory texts began to replace the interpreted and complementary texts. Until the legislator began to participate with the two parties in organizing the contract with the obligations it imposes on the contracting parties.

Therefore, the legislator, on the other hand, attempts to protect the weak parties, as well as defends the values of social solidarity and justice through the use of compulsion in the contract. How does that appear and what is its extent ? what is its impact on contractual freedom ? Based on that ? what is the future of this freedom؟

The study relied on the analytical approach, as well as comparison and induction due to the objective link between legal theory and practical reality, saturated with much dynamism, flexibility and development.

Despite the complexity of the topic, we attempted to raise it on two levels:

The first topic - Legal compulsion to contract and prohibition from contracting and choosing the contractor.
The second topic - Legal compulsion in terms of the form and subject of the contract and the imposition of doctrinal justice.

1 Mohammed Abdul-Zahir Hussain, "The Legal Aspects of the Preceding Stage, on Contracting," research published in the Journal of Law, Second Issue, Twenty-Second Year, Kuwait, 1998, p. 727.

THE FIRST TOPIC
compulsion to contract and prevention of contracting and choosing the contractor.

When society needs the direction and management of the individual, it compels him to contribute to an economic and social end that he may not desire. As this includes framing and legal regulation of contracts. In some cases, the law prohibits and rejects to contract without legal reason and justification. It may also compel a person to contract with a specific contractor, and in other descriptions the contract has no legal value unless after obtaining permission from the authorities appointed by the legislator in advance[1] .

First Requirement: Compulsion to conclude contract.

One of the models in which we see the intervention of the legislator with the intention of legal compulsion is the public procurement model.

With the increasing importance of contracts concluded by the administration, the relevant legislations are increasingly interested in controlling this contractual activity, in a way that achieves the interest of the contracting administration and the public treasury at the same time .

In this regard, most public procurement legislation imposes the necessity of the administration's commitment and adherence to its contracts, with a set of procedures that will achieve this goal, from the restrictions imposed by the legislator before contracting, and compliance with which can contribute to achieving the public interest and preserving the interests of the contracting parties:

- Availability and presence entry of financial allocation. The administration cannot enter into a contract and commit itself

1 Halabs Lakhdar, "The Status of the Will in the Light of the Evolution of the Contract," PhD thesis in Law, University of Tlemcen, Algeria, 2016. p. 177.

to financial obligations without having sufficient financial funds to cover these obligations. This is required by the restriction of the necessity of having a financial appropriation for the contract, which states that every public expenditure requires the presence of a financial appropriation established in the budget.

- Contract approval entry. It varies according to the significance of the contract to be concluded. Parliament may issue approval for some important contracts by enacting a law licensing the conclusion of these contracts. In other part for concluding other less important contracts[1], approval may be issued by an administrative authority in the form of an administrative decision licensing the contract.Thus, the objective of this approval is to ensure that the administration concludes its contracts in the context of maintaining the achievement of the public interest.

The approval of the contract, imposed by the legislator, is a condition for the validity of the contract. its obtainment is obligatory for the establishment of the contractual bond. Thus, the administration's action without prior approval, "results in the nullity of the contract which is absolutely null and void ”

Reference is made to the content of Article 04 of the Algerian Public Procurement Law[2], which renders public procurements non-final unless the approval of the competent authority is obtained. Besides, the same article specifies these bodies, which are represented in the minister in relation to state deals, the approval of the official of the public authority with regard to contracts of independent national bodies, the approval of the governor regarding concluding state procurements, and the president of the Municipal People’s Assembly in relation to municipal procurements. The procurements of national and local

1 The law relating to the exercise of mining activities, which is the law and complements it. Dated July 03, 2001 Official Gazette No. 35 of 2 .

2 Article 04 of Presidential Decree 247/15/15 of 09/16/2015 regulating public procurement and public utility authorizations.

public institutions are final after the approval of the general manager or the director of these institutions .

Consulting entry before contracting. In the field of concluding public contracts, the legislator sometimes resorts to compelling the administration to consult a certain authority and take its opinion before concluding the contract. This is due to several considerations, including what is related to the legal aspect, as well as what is related to the technical aspects, "as it is not permissible to conclude some contracts except after the referendum of special bodies regarding them." This is confirmed in the regulation of Algerian public procurement, as indicated by the provisions of paragraphs 04 and 05 of Article 49, on the occasion of the administration's resort to contracting according to a simple consensual procedure, where the contract is subject to the prior approval of the Council of Ministers or approval during the government meeting, as the case may be[1].

We also find legal compulsion in work and pre-employment contracts, we indicate in this field that these restrictions may either respond to the complete organization in terms of the content of the entire contract, or may respond to a part of its parts, such as determining the duration of the contract.

In the (first case), the contracting party is considered as if it is completely restricted in the details of the contract, for example, the legislator's organization of the entire work contract, as a result of the social and economic injustice that the working class was suffering from . Since most of the essential issues in the work contract are subject to legislative regulation[2], such as wages, working hours, safety conditions, health conditions, holidays, vacations, and social security. Thus, the

1 Al-Lail Ahmed, "Pre-Constraints on Concluding Public Deals", Al-Haqiqah Magazine, Volume 17, Issue 03 September 2018. Pg. 267.

2 An example of the legal restrictions on the employment contract is what is stated in the text of Article (806) paragraph (2) of the Jordanian Civil Code, which states, "The term of the work contract may not exceed five years, and if it is held for a longer period, it is returned to five".

work contract has become a mere acknowledgment of legal texts or collective agreements, and even the termination of the contract has become subject to legislative regulation Such as wages, working hours, safety conditions, health conditions, holidays, vacations, and social security. The work contract has become a mere acknowledgment of legal texts or collective agreements, and even the termination of the contract has become subject to legislative regulation[1] .

In these cases, we find that the legal regulation is closing in on the freedom of contract, as the individual has no freedom except in a narrow measure that is limited to accepting the conclusion of the contract or refraining from concluding it[2].

Furthermore, we find a special case in the pre-employment contracts (integration contracts), which the state resorted to in anticipation of the aggravation of unemployment, its objective was[3]:

- Social integration for qualified youth.
- Promote development activities of local interest.
- Fighting poverty, exclusion and marginalization.
- These contracts cover all public interest activities.

1 Fathi Abdel Rahim Abdullah, "The Components of the Contract as a Source of Commitment," Cairo, 1979, p. 60.

2 Abd al-Rahman Abd al-Razzaq Daoud al-Tahhan, "The Contract under the Socialist System", a master's thesis submitted to the College of Law and Politics at the University of Baghdad, 1981 , p. 67.

3 Article 4 of Executive Decree No. 126/08 of 19/04/2008 related to the professional integration assistance device, J.R. No. 22 issued on 04/30/2008. Amended and supplemented by Executive Decree No. 11/105 relating to the professional integration assistance device, dated 06/03/2011. Amended and supplemented by Executive Decree No. 13/142 related to the professional integration assistance device. C R No. 21. dated 23/04/2013.

- In the event of illness, maternity, work accidents and occupational diseases, the integrated youth benefit from social insurance in accordance with the legislation and regulation in force. All of these goals are purely social, and came in the form of model contracts [1] in which the state bears the burdens of wages and grants.

The state determines the content of contracts explicitly in the contractual forms it presents to the two parties (the employer and the worker), as this is within the framework of its role to control the labor market, on the one hand, and on the other hand, creating a character of solidarity with this category of workers. Moreover, the development of the economy led to the emergence of a new set of contracts where a person finds himself committed to contract, as in the case of compulsory car insurance.[2]

The insurance law stipulated in Article 1 of Ordinance 74/15 of January 30, 1974, related to car compulsory insurance that: "Every vehicle owner shall subscribe to an insurance contract that covers the damages caused by that vehicle to others, before it is released to the road ".

As stipulated in Ordinance 03/12 of 08/26/2003 regarding natural disasters compulsory insurance in the text of its first article that: "Every owner of a built real estate located in Algeria, whether a natural or legal person, except for the state, shall write a damage insurance contract that guarantees this property from the effects of natural disasters [3].

1 Article 4 m of Executive Decree No. 126/08 of 04/19/2008 related to the professional integration assistance device, and the decision issued on 07/24/2008 specifying the forms of integration contracts.

2 Ordinance 74/15 of January 30, 1974, relating to the compulsion of car insurance and the compensation system for damages. Official Gazette No. 15. Amended and supplemented by Law 31/88 of June 19, 1988. Official Gazette No. 29.

3 Official j No. 25 of 27/08/2003.

Every natural or legal person engaged in an industrial and/or commercial activity shall write a damage insurance contract that guarantees industrial and/or commercial establishments and their contents from the effects of natural disasters.

The second requirement: Compulsion to forbear from contracting.

If the law sometimes compels the contractor to contract, in other cases it prevents him , either due to the seriousness of the subject of the contract or for reasons he deems important. Therefore, contracting is not allowed in these cases, thus the law prevents people from all actions related to the sale and acquisition of military equipment.

In accordance with Article 1 of the decree relating to the suppression of crimes of acquiring, possessing and manufacturing weapons, ammunition and explosives[1], as it states: "It is prohibited throughout the national territory to sell, acquire, possess and manufacture military materiel, weapons, ammunition and explosives , and individuals are also prohibited from concluding some contracts, such as the prohibition of conditional sale or conditional service, as well as the bonus sale as an illegal commercial practice that incites the consumer to contract to obtain money or service[2].

The legislator intervenes to restrict the freedom of will by prohibiting the performance of some contracts for violating public order or public morals, such as gambling according to the text of Article 612 of the Civil Code, except for sports betting .

1 Executive Decree No. 63/85 of 03/16/1963 relating to the suppression of crimes committed against the legislation relating to the acquisition, manufacture, possession and manufacture of weapons and explosives. JR number 14.

2 Article 60 of Ordinance 95/06 related to competition.

Likewise, judges, lawyers, and registrars are prohibited from buying all or some of the disputed rights, whether in their own name or under pseudonyms[1] .

We also find in the Labor Law a text of 15/1 prohibiting contracting with persons under 16 years of age, except in the matter of apprenticeship contracts. In other cases, it remains subject to the compulsory consent of their parents[2].

The interference of the state in the contract has resulted in which the latter is no longer the monopoly of the parties only. As the legislator may also allow the state to intervene to establish the contract and specify its parties, as well as interfere in its content. All this under cover of public order, protection of the weak, regulating the market and maintaining social balance.

Therefore, the legislator has gone even further from protecting the rights of both parties to a greater extent, which is to preserve the public interest of society as a whole. In particular, he shows it in the standard contracts and general conditions.

Thus, the contract became more organized and less individual. As contracts are no longer separated and individualized according to each contracting party at a time, but rather according to the totality of the contracting parties. Hence, a new phenomenon appeared which is the "contract association", through the legislator's increasing interference in the relations that bind individuals, in order to create social equality, as the contract was extended to become a comprehensive system for society as a whole. However , this has advantages as well as disadvantages.

1 See Article 402 of the Algerian Civil Code.

2 Article 15 of Law 90/11 of 04/21/1990, which includes the Labor Law. J.R.G.G. No. 17 issued on 04/25/1990.

The third requirement: Compulsory selection of the contractor.

The establishment of contractual freedom for the individual means that he determines the content of the contract he requires, he contracts with whomever he requires, it is preferable to contract sometimes with a particular person in particular, thus he abstains from contracting with others, on the basis that his interest is more achieved if he contracts with the first, more than a contract with others[1] .

However, sometimes it is necessary to contract with a specific person, thus restricting the freedom of the first party to choose the other party.

As we have already mentioned about the legislator's intervention in determining the content of the contract, within the framework of the integration contracts, we find that the legislator restricts the parties' freedom as well by lifting the freedom to choose the other contractor "both on the part of the worker as well as on the part of the employing institution." This is intended to strengthen social control, by directing the parties to the contract in return for what the first obtains from benefiting from wages and social services, and the second from a financial situation and tax incentives, as they shall accept only the contract submitted by the state without discussion, thus we are in front of a generalized contract for all groups .

Among the many existing examples, we mention Article 5 of Ordinance 74/15 of January 30, 1974, related to the compulsion of car insurance and the system of compensation for damages, which states: "The contract related to the compulsion of insurance [2]shall be concluded with institutions qualified to

1 Omari Lilia and Ait Okasi Nassira, "The Role of the Will in Creating Obligations", Master's Note, in Law, Bejaia University. Algeria. 2015. pg. 16.

2 Official j . No. 15. Amended and supplemented by Law 31/88, dated 06/19/1988. Official Gazette No. 29.

practice insurance operations, This is within the conditions stipulated in the subsequent laws and regulations in force.

As well as the text of Article 795 of the Algerian Civil Code with regard to the right of pre-emption, and the text of the laws related to inclusion in work in which the contractor is not selected but only accepted[1].

Compulsion is also when to choose a contractor in management transactions, as the contracting agent is chosen according to the methods determined by the legislative and regulatory texts in force, which are the methods that are intended to be followed to respect the principles that enable the administration to realize the best achievement, whether technically or financially, in order to preserve the public interest and to preserve public money.

The Algerian legislator has determined two methods for the public administration, so that the first one constitutes the general rule as it is the method that enables respect for the principles of freedom of access to public requests and transparency in dealing with candidates, as well as to establish equality, openness and honorable competition, which is the tendering or according to the mutual consent procedure as an exception if circumstances prevented from resorting to the bidding method, due to its importance, the legislator created several bodies to monitor public procurement, where their

1 Executive Decree No. 126/08 of 04/19/2008 related to the professional integration assistance device, J.R. No. 22 issued on 04/30/2008. Amended and supplemented by Executive Decree No. 11/105 relating to the professional integration assistance device, dated 06/03/2011. Amended and supplemented by Executive Decree No. 13/142 related to the professional integration assistance device. C R No. 21. dated 04/23/2013.

interventions are during the preparation of the deal, before and after its implementation.[1]

THE SECOND TOPIC
Legal compulsion in terms of the form and subject of the contract and the imposition of doctrinal justice.

If the contractual field is by the will of individuals, each party to the contractual relationship seeks by all means to achieve its own interest, which leads to many disputes , as society becomes floundering in complete chaos in the name of freedom of contract, thus the most important element on which the contractual system is based, which is mutual trust in concluding the contract, collapses. Therefore, the legislator intervenes by force in several places, whether directly or indirectly.

First Requirement: Legal compulsion in the form and terms of the contract.

The role played by the will in the contractual field is not absolute, as there are many restrictions imposed by the legislator in all the stages the contract passes through and the contracting parties are obliged to respect them, however this compulsion is justified in return.

As for compulsion in the form of the contract, where the formality required for the contract is taken as an compulsory restriction on the freedom of the will to create the contract, when the legislator sometimes requires a certain formality that is necessary for the contract to be established and arranges nullity on the grounds that it is unavailable. Furthermore, this formality is called direct formalism because it is directly related to the formation of the contract, as it shall be available as a fourth pillar in addition to the consent, the place and the reason. Consequently ,the two parties compel to write the contract. And this writing that translates the element of formality may be an official or customary writing, as well as it may also be required to be handed over in the contract for its conclusion.

1 According to what was stated in Presidential Decree 10/236 under Article 117, "the supervision to which transactions are subject is exercised in the form of internal control, external control and custodial control," which is the protection of public funds.

Whether the official formality in civil contracts according to the text of the Algerian legislator in Article 324 bis 1 of the Algerian Civil Code and through this article which required documentation and considered it a pillar for the establishment of the contracts he mentioned, if they are not documented, they are considered null and void. . Besides, one of the most important applications of official formality in civil contracts, as they are one of the components of each real estate contract, what is said in the sale of real estate regarding nullity provisions is also said in the promise of sale , it shall have the special form that must be available in the expected contract in accordance with the provisions of Article 02/71 of the law C.P.C which states that: "...if the law stipulates for the completion of the contract that a certain form shall be fulfilled, this form also applies to the agreement that includes a promise to contract." Formality according to this paragraph is considered a necessary pillar for concluding a contract of promise to sell real estate.

The official mortgage contract was considered by the legislator as formal, which can only be established by an official paper, as stipulated in 883/01 of C.P.C: "The mortgage is not contracted except by an official contract or / judgment or by virtue of the law...", as stipulated in Article 886 of the C.P.C, stating that: "...and that this designation be made either in the mortgage contract itself or in a subsequent official contract, otherwise the mortgage is void ".

Moreover, the donation contract, as the first paragraph of Article 206 C.P.C states that: " "Donation is contracted by offer and acceptance, possession takes place, and the provisions of the Documentation Law in Real Estate and Special Procedures in Movables are taken into account"…

As well as the contract of the civil company. It was stipulated in Article 418 of C.P.C that: "The company's contract shall be in writing, otherwise it will be void. Likewise, all amendments to the contract are void if they do not have the same form as that contract ."..

In addition to the official writing that the legislator stipulated in some contracts, which is considered a cornerstone of the contract, he sometimes sees the necessity of writing in the contract that the two parties perform, and it is not required that this writing be official, however he decides the nullity of the contract that takes place without it. Therefore, it is considered a restriction on the will of the

contracting parties to create the contract, and then this formality shall be observed for the validity of the contract [1] .

In terms of compulsion in determining the substantive conditions of the contract, the law restricts both contracting parties or one of them in a specific part of the contract. For example, setting a guaranteed minimum base wage where the article of Decree 407/411 states, "The guaranteed national minimum wage corresponding to a legal weekly work period of forty hours is determined, which equals 173.33 hours per month at eighteen thousand dinars per month, which is equivalent to 103.84 hours of work[2]".

As well as the restriction on the freedom of the contracting party to terminate his contract. As the contract concluded by mutual consent can also be terminated by mutual consent, however the contracting parties do not have the right to specify a period longer than what the law permits[3].

As it is understood from the text of Article 104 of the Algerian Civil Code, which states that "If the contract in one part is void or voidable, then this part alone is nullified. Concerning the rest of the contract, it remains valid as an independent contract, unless it becomes clear that the contract would not have been completed without the part that was signed void".

Article (468) of the Algerian Civil Code came to apply this rule, as "It is not permissible for a person who only has the right to carry out the administration to contract a lease for a period of more than three years. Unless there is a provision to the contrary, if the lease term is longer than that, the term shall be reduced to 3 years.

As for the other application, it is the nullity of the condition of non-liability in land transport, and among other restrictions imposed by the legislator directly on the contractual will, is the restriction that determines the amount of the fare in some contracts.

1 As stipulated in 614 and Article 615 of A.C.C..

2 The date of November 29, 2011 determines the minimum guaranteed wage.

3 Muhammad Waheed Al-Din Swar, "General Attitudes in Civil Law", Legal Library, Amman, 2001., p. 18.

In many countries, the legislator has also issued special laws that give the tenant the right to remain in the leased property after the expiry of the specified period of the lease contract despite the will of the lessor, as it did not allow the latter to request vacancy except for reasons specified in the law exclusively, which is called the legal extension of the lease contract .[1]

The legislator also enshrined the principle in Law (90-11), which includes the Labor Law, that the principle in the employment contract is of unlimited duration, except for what stipulated in Article 12, as long as the conclusion of fixed-term contracts for works of a permanent nature are inconsistent with the aforementioned principle. If the worker is bound by a fixed-term contract to carry out works of a permanent nature, except in the case of the replacement of a worker who is temporarily absent, from his work, it is in violation of what is stipulated in Law (90-11) in accordance with Article 14 of it. Which stipulates that "a work contract concluded for a limited period, contrary to what is stipulated in the provisions of this law, is considered an employment contract for an unlimited period, without prejudice to the other provisions contained in this law« .

In other words , the contract shall be concluded for the cases provided for in Article 12, which are related to works of a non-permanent nature, meaning that they relate to non-renewable works or services, or periodic works of an intermittent nature, seasonal causes, or an increase in work, or works with a fixed period . However, an exception to this is a single case, which is the succession of a proven worker, in which the work is of a permanent nature and in which a fixed-term employment contract may be concluded.

The state intervenes to set prices, from that perspective some sectors and activities are characterized by strategy, as this is an exception to the original, which is the freedom of economic agents to determine the prices of goods and services, as an embodiment of the requirements of freedom and market economy adopted by the Algerian state. Therefore the state may interfere by imposing restrictions on the freedom of economic aid by setting the prices of hearing aids and services. This is stated in Article 5 of Ordinance No.

1 Mustafa Magdy Harga, "Rental of furnished places, medical facilities, lawyers' offices and the end of lease contracts for non-Egyptians in the light of jurisprudence and the judiciary", first edition, House of Culture for Printing and Publishing, 1984 , p. 82.

12/08 related to competition: "The prices of goods and services that the state considers to be of a strategic nature can be regulated through regulation after consulting the competition council." the second paragraph of the same article adds: "Extraordinary measures can also be taken to limit the rise in prices, especially in the event of their excessive rise due to market turmoil, or a disaster and chronic difficulties in supplying"[1] .

Individual freedom is no longer the one that allows its owner to do what he requires, however it is restricted to the extent in which the interests of the individual and the general interest of society are achieved. As the legislator left room for individuals in concluding contracts, whether in their formation or implementation, however on the other hand, it intervened to limit the power of will and its individuality.

This is achieved by directing this relationship and granting it a social character, as it adheres the public interest and economic balance's aim ; as well as contractual justice, which is basically the basis of the binding force of the contract, as this takes several forms, including detracting from what the two contracting parties agreed upon. Although the Algerian legislator has permitted the contracting parties, for example, to agree on the consensual compensation in Article (184) of the Algerian Civil Code, he did not leave that to the sole will of the contracting parties, but rather linked the entitlement to the consensual compensation and the amount of the damage. However, The consensual compensation is not due if the debtor proves that the creditor did not suffer any damage, as it may be reduced if the debtor proves that the assessment was severe, or that the original obligation has been partially implemented.

To sum up, although the contracting parties may agree on the content of the contract and specify its conditions, this freedom may be restricted in directing wills to achieve a noble social goal for the legislator, which is to achieve balance and legal justice for both parties. As the frequent intervention of the legislator with peremptory texts are obvious that the contractual will is not absolute in a vast

1 Article 5 of Ordinance 03/03 of Jumada Al-Awwal 19, 1424 corresponding to July 19, 2003, relating to competition, amended and supplemented by Law 12/08, dated Jumada Al-Thani 21 1429 corresponding to June 25, 2008, J.O.R.A.D No. 36 - . Issued on 02 June 2008

space, but rather it is absolute in the space of law, thus we notice that there is a different phenomenon, which is the association of contracts .

The second requirement: Legal compulsion in imposing doctrinal justice.

The judiciary also assumed the task of evaluating some of the negatives that result from the loss of economic balance between the two parties to the contract in the adhesion contracts, and formulating the contract's formula and dictating its terms unilaterally by one of the parties, and declared that as long as the owner of the monopoly, as he is the strongest economically, has drawn up the contract after a careful study of all its terms and conditions, taking into account all the conditions and circumstances, thus he does not have to stick to the interpretation of the ambiguous conditions for his benefit [1].

That is why the judiciary tended to interpret the ambiguous phrases in the compliance contracts in the interest of the compliant party. The Algerian legislator specified in Article (111) paragraph (2) and Article (112) the way for the judiciary to interpret ambiguous phrases when it decided that "it is not permissible for the interpretation of ambiguous phrases in adhesion contracts to be detrimental to the interest of the observing party, even if it is a creditor

The legislator also granted the judge the power to amend the arbitrary conditions contained in the contracts of adhesion, and even exempt the observing party from them.

Among the other applications in which the judge's intervention in amending the effects of the contract becomes clear, is the theory of emergency circumstances. This theory was a departure from the doctrine of will "and an exception to the rule that pacta sunt servanda, the principle of the binding force of the contract, because this theory aims to modify the content of the contract without the joint will of the contracting parties, to return the commitment that the emergency made it to be reasonably burdensome ."[2] The Algerian legislator empowered the judge to amend the contract as required by justice in Article 107 Paragraph (3) of the Algerian Civil Code.

1 Muhammad Abdel-Zahir, previous source, p. 751.

2 Abdel Rahman Ayyad, "The Basis of Contractual Commitment", The Modern Egyptian Office for Printing and Publishing, Alexandria, 1972. p. 366.

Compulsion to amend, according to the facilitator's view, may be the judicial term granted to the debtor if he is insolvent. The compulsion is also to intervene in the arbitrary conditions, as this intervention is when the legislator authorizes the judge to amend or cancel some arbitrary conditions or restore the economic balance between the two parties to the contract.[1]

The judge can change and limit the effect of the actual will of individuals. Sometimes we see him expanding the content of the contract, adding to it a commitment that the two parties did not think about, and sometimes detracting from what the two contracting parties agreed upon.

An example of the first case (which is the expansion of the content of the contract) is what the judiciary has reached from a more positive stage,[2] by imposing on one of the contracting parties a commitment to ensure the safety of the other contracting party, especially in the transport contract. The judiciary adds to the contract a commitment that was not the subject of the contracting parties' agreement, or even that he did not think of it[3] .

This compulsion legal basis is found in Article 107, Paragraph (2) of the Algerian Civil Code, which expands to contain this commitment. However, it also deals with its requirements according to the law, custom, and justice according to the nature of the commitment." It is easy to say that the commitment of safety is one of the requirements of the transport contract. According to this text, the judge can add to the content of the contract what requires custom or justice in addition to it .

The legal compulsion is also the intervention of the judge in the transformation of the contract termination, as Article 105 of the Algerian Civil Code represents the legal basis for the theory of contract transformation in the Algerian one, according to which the transformation of the contract is based on the meeting of a set of objective and subjective elements, and from it the judge will seek to

1 Abd al-Rahman Abd al-Razzaq Daoud al-Tahhan, previous source, p. 71.

2 Abdul Majeed Al-Hakim, "The Brief Explanation of Civil Law", 2nd Edition, Sources of Obligation, Baghdad, 1963 , p. 36.

3 Abd al-Rahman Abd al-Razzaq Daoud al-Tahhan, previous source, p. 76.

form another valid contract avoiding the negative effects of the nullity of the contract.

With regard to the judge's intervention in the termination, he made the rule that the termination of the contract be judicial, as an exception, the termination shall be consensual, with the aim of establishing the necessary legal protection for the contracting parties and the contract at the same time, while maintaining the stability of transactions between individuals in society, and reducing the arbitrary of rights to the point of abuse and harm to the contracting parties.

However, this does not mean that the discretionary actions of the judge in the contractual field do not have disadvantages, as it opens before the judge a window through which he enters the contract for the participation of parties in its convening or in its implementation, knowing that this participation, although it appears on the surface, seems directive, but it is not possible to hide the coercion and compulsion it carries in a contract which is considered to be of the first degree from the product of its two parties, however it works by the will of the judge in particular, as we have seen that this jurisdiction is not bound by the perceptions of the contracting parties in many cases.

Therefore, the contractor finds in the same thing the pressure exerted on him by the judiciary , as he becomes not reassured about the contracts he concludes because in all cases the concept of the contract may change . Thus, the results change with it, at least those that the contractor hoped to derive from this contract due to the intervention of the judge.

Conclusion:

The economic and social conditions may compel a person to contract. As the need and the absence of an alternative, or the absence of a better alternative can necessitate contracting, thus we are faced with imposed contracts, whether they are in the form of standard contracts or adhesion contracts.

In fact, there is no total theft of the will or paralysis of the contractual freedom completely and in all its manifestations, or the phases of the contract, however it is certain that the will was not free from every restriction, this is whatever the restriction, its type or extent.

Individual freedom is no longer enshrined, and man is no longer free to contract. Rather, this freedom has become restricted to achieve the interests of the individual with the interests of the group. Ultimately, it can be said that the will is no longer an end in itself, but a means to achieve the interests of the group. Likewise, the will is no longer has power unless it departs in accordance with the controls established by the law.

In this regard, Mazo says: "The absolute freedom not to contract goes back to the era of individualism, which has begun to fade, and that the possibility of contracting, which has remained continuous, is only a theoretical issue".

The will has no authority in the sphere of public law.As social ties which are subject to this law are determined by the public interest, not the individual's will. Furthermore, in the sphere of private law, what is related to the family has no room for the will except to a limited extent. For example the marriage contract, which is the basis on which the family rests, comes from the will of the contracting parties, however the effects of the contract are not subject to the will. Rather, it is regulated by law in accordance with the interest of the family and society, as well as the rest of the family ties, in which the will has nothing to do with.

With regard to the law department of funds, we see the will operating in it gradually. In real rights, they are weaker active than in personal rights, because real rights, although the will is a source for many of them, are limited rights in which the will cannot create anything new. Moreover, the effects of these rights are rarely subject to the will of individuals. Rather, it is the law that often determines their extent

However, the will in personal rights has a wide scope, as it is the source of many of these rights, and it is the one that produces their effects. Nevertheless, we do not want to exaggerate the importance of the will, even in personal rights, however it is limited by the restrictions of public order and morals.

From the foregoing, it was concluded that a valid contract that generates an obligation is not only an agreement of two wills, but is also a fulfilment.

The proportionality between the obligations of the contracting parties, and thus the right to monitor and review the contractual

relations by the legislator and the judge in order to achieve contractual justice.

Also, the free will of the contracting party is the basis of the contractual bond, so it is necessary to take care of it legally so that it does not disappear completely in light of the development of the law and its wide intervention to protect the parties to the contractual relationship.

In light of the above, the researcher made a bunch of recommendations as follows:

First, we recommend not to exaggerate in raising the authority of the law at the expense of the authority of the will, so the legislator must balance between restriction and liberation.

Secondly, the legislator must keep pace with the latest developments in the economic and social arena, in order to maintain its steadfastness, based on the rule that the law is constantly changing.

Third, not to exaggerate the direction, then the contractor finds himself surrounded by a set of model contracts that restrict his freedom, so he resorts to evasion and circumvention of the law in various ways, and this creates a kind of instability and lack of control because the nature of legal texts.

Fourthly, opening the door for the legislator to interfere in the matter of contracting or preventing it is a window through which the contract is entered into for the parties to participate in, and although it appears to be directive, it is not possible to hide the compulsion that the intervention implies in a contract that is considered to be of the first degree from the product of two parties, so we recommend Be careful not to convert the contract into a system.

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