

CONTRACTUAL JUSTICE: AN ADJUSTMENT TO MORALIZE THE PRINCIPLE OF AUTONOMY OF WILL



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Abstract:

Free-will in contracts has been the subject of a fierce controversy for a long time, considered as the biggest myth in the contractual field. According to the philosophy of the principle of autonomy of will, the contractual balance is achieved by the simple fact that the two parties accepted to contract, and the formed contract must be respected by law. But when contract turned to a tool of domination and a source of injustice, the need of a true contractual justice has emerged. And from moral considerations, legislators and judges were allowed to interfere into contractual relations in order to keep some justice in unbalanced contracts, in order to prevent or at least limit consequences of parties free-will who seek only to satisfy their own interests.

Keywords: Legislator interference, judge interference, unbalanced contracts, commutative justice, distributive justice.

ملخص:

العدالة العقدية: ضابط لتهديب مبدأ سلطان الإرادة

لقد كانت الإرادة الحرة في العقود موضع جدل حاد لزمان طويل، لطالما تم اعتبارها أكبر خرافة في مجال التعاقد. وطبقا لفلسفة مبدأ سلطان الإرادة فإن التوازن العقدي يتحقق بمجرد قبول الطرفين التعاقد، وأن العقد واجب الاحترام من قبل القانون. إلا أنه عندما تحولت العقود إلى أداة للسيطرة ومصدرا للظلم، ظهرت الحاجة إلى عدالة عقدية حقيقية. ومن منطلقات اعتبارات الأخلاق، سُمح للمشرعين والقضاة بالتدخل في العلاقات العقدية في محاولة منهم للإبقاء على شيء من العدالة في العقود غير المتوازنة، لمنع أو على الأقل الحد من عواقب إطلاق حرية أطراف لا تسعى لتحقيق مصالحها الخاصة.

الكلمات المفتاحية: تدخل المشرع، تدخل القاضي، عقود غير متوازنة، العدالة التبادلية، العدالة التوزيعية.

Justice contractuelle :

Un ajustement pour moraliser le principe de l'autonomie de la volonté

Résumé :

Le libre arbitre dans les contrats a longtemps fait l'objet d'une féroce controverse, considéré comme le plus grand mythe dans le domaine contractuel. Selon la philosophie du principe de l'autonomie de la volonté, l'équilibre contractuel est atteint par le simple fait que les deux parties ont accepté de contracter, et le contrat formé doit être respecté par la loi. Mais lorsque les contrats sont devenus un outil de domination et une source d'injustice, le besoin d'une véritable justice contractuelle est apparu. Et pour des considérations de moralité, les législateurs et les juges ont été autorisés à intervenir dans les relations contractuelles en essayant de remettre un certain niveau de justice dans les contrats déséquilibrés, afin de prévenir ou au moins limiter les conséquences du libre arbitre des parties qui ne cherchent qu'à satisfaire leurs propres intérêts.

Mots Clés: Intervention du législateur, intervention du juge, contrats déséquilibrés, justice commutative, justice distributive.

Introduction :

According to article 54 Algerian Civil Code (A.C.C)¹, the contract is a convention by which one or several persons obligate themselves to one or several others to give, to do, or not to do something. So basically, the contract is a convention, an agreement, by which the parties and not the law set the commitments.

In the 19th century, with the dominated liberal doctrine of free-market, “Autonomy of Will” became a central principle in the general theory of the contract from its formation to its end. In a few words, autonomy of will means that only the will would be the source of obligations.

Main legal principles have been generated by the principle of autonomy of will, regarded as the “golden rule” and widely used in the field of contracts². But, this principle has not survived the centuries without damages. It has been criticized and its effects have, over time, been restricted by “the invisible hand” that guides market to satisfy the general interest, especially when contracts turned into a source of injustice.

“The contract is binding only if it is fair”³, this is how jurists found an access to control unbalanced contracts, even formed by wills. The relationship between will and justice has always been controversial. It’s to be noticed that the majority of legal systems does not require the existence of equivalence between obligations⁴.

So we can ask whether the will of parties is sufficient for the formation of an equitable contract?

To explore the tension between the principle of autonomy of will and contractual justice, we will discuss in this paper, the notion of will autonomy by focusing on the fundamental aspects of free- will in contracts (the first topic). Followed by the concept of contractual justice that allows the interference in contracts (the second topic).

¹Ordinance n° 75-58 of September 26, 1975, on Civil law, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 78, of September 30, 1975, amended and supplemented.

²Yitong WANG, Discussion on Autonomy Principle in Law of the Application of Law for Foreign Civil Relations, 2nd International Conference on Economy, Management and Education Technology, China, (ICEMET 2016/05), p.1483.

³ «Le contrat n'est obligatoire que s'il est juste». Jacques GHESTIN, Le contrat en tant qu'échange économique. In: Revue d'économie industrielle, vol. 92, 2e et 3eme trimestres 2000, p.96.

⁴Mariusz Jerzy GOLECKI, Synallagma and freedom of contract : The Concept of Reciprocity and Fairness in Contracts from the Historical and Law and Economics Perspective, German Working Papers in Law and Economics, Paper 18, 2003, p.1.

I. Meaning and aspects of will autonomy principle.

Before we discuss the aspects of the principle of autonomy of will (B), an idea should be given about the meaning of this principle (A).

A. Meaning of will autonomy principle.

We will study the meaning of autonomy of will principle first as a concept (1) and then as a result of historical changes (2).

1. Concept of will autonomy principle.

“A person cannot be subject to other laws than those he/she gives to himself/herself”¹. This is how “Kant” expressed his philosophical conception of the principle of autonomy of will (Ipso Facto²). According to Kant, it is our reflective capacities, which are the distinctive mark of human beings, that must play the central role in a philosophical approach to freedom and responsibility. These intellectual capacities allow us to form evaluative judgments about good and evil and to represent the moral law³. This is the famous “Fouillée”’s adage “Contractual is fair”⁴.

The main idea in autonomy principle is “Individual freedom”⁵. The freedom of individual can be restricted only by his own will and the obligation can come only from the individual himself and not from an external authority.

The principle of autonomy of will considers contracts as tools for realizing individual self-determination by means of voluntarily entering legally binding agreements⁶. An individual must have the freedom to undertake obligations by contract in his own deal when he desires, on conditions he thinks fit, to discuss and negotiate freely these conditions and the effects and extinction of the obligation with the other contracting party as of right⁷.

¹ « Une personne ne peut être soumise à d'autres lois que celles qu'elle se donne à elle-même ». See : Innocent Fetze KAMDEM, L'autonomie de la volonté dans les contrats internationaux, Les Cahiers de droit, Vol. 40, n° 3, 1999, p. 647.

² A Latin terminology meaning “by the fact itself”. Available online: <https://dictionary.law.com/Default.aspx?selected=1028#:~:text=ipso%20facto,entitled%20to%20a%20driver's%20license.%22> Accessed on : January 7, 2023 at 10:27 a.m.

³ François SCHROETER, L'autonomie de la volonté: une idée périmée? Revue philosophique et théologique de Fribourg, n°53, 2006, p.742.

⁴ « Qui dit contractuel dit juste ». See : Louise ROLLAND, « Qui dit contractuel, dit juste » (Fouillée) en trois petits bonds, à reculons, MCGILL LAW JOURNAL / REVUE DE DROIT DE MCGILL, Vol. 51, 2006, p.769.

⁵ MeleseWondmagegnehu BELETE, The “Principle of Autonomy” in Contract under the Civil Code of Ethiopian: Is It an Absolute Principle? Beijing Law Review, Vol.10, n°4,2019, p. 797.

⁶ Thomas GUTMANN, Theories of contract and the concept of autonomy, Münster 2013/55: Available online: https://www.uni-muenster.de/imperia/md/content/kfg-normenbegrueundung/intern/publikationen/gutmann/55_gutmann_contract_and_autonomy.pdf Accessed on: December 27, 2022 at 5:52 p.m.

⁷ MeleseWondmagegnehu BELETE, *Idem.*, p. 797.

In contractual relationships, the principle of autonomy of will clearly provides that parties are free to regulate their legal relations, and each individual is entitled to enter into a contract. Contracting parties are free to regulate their relations independently and willingly, in their own interest. Their will is to be strongly observed and applied¹.

2. A historical overview.

As a historical overview, Roman Law did not recognize, in any of its ages, the principle of autonomy of will. Roman Law was a formalist law². The binding force of contract was therefore based on the respect of certain forms. Thus, although the will played a role in the formation of the contract, it was never its basis³. Contracts needed particular forms and were surrounded by some signs, words and writings. The only agreement of wills (Nudum Pactum⁴) couldn't create a contract or generate an obligation⁵.

Canon law⁶ opened the way for consensus in the Middle Ages, as it stipulated that every agreement should be binding, even if it was devoid of formality. During the Middle Ages, theologians and canonists were still remained faithful to roman solutions. Consensus did not have basis in positive law, the concept was just moral. It is with the Modern Natural Law School and particularly with "Grotius", that the passage from formalism to consensus took its effect. Later, Domat affirmed consensus as a principle in French Civil Law⁷.

"Loysel" expressed the principle of autonomy of will clearly at the beginning of the 17th century when he said: "We bind the cows by their horns and the men by their words"⁸.

¹Shyhrete KASTRATI, The Principle of Will Autonomy in the Obligatory Law, Iliria International Review, 2015/1, p. 228.

²Élise M. CHARPENTIER, Le rôle de la bonne foi dans l'élaboration de la théorie du contrat, Une communication au Colloque de réflexion en droit civil, La bonne foi : Rôle et exigences, tenu à l'Université du Québec à Montréal, le 31 octobre 1996, [Revue de droit de l'Université de Sherbrooke](#), Vol. 26, n° 2, 1996, p.306.

³Élise M. CHARPENTIER, *Idem.*, p.307.

⁴A Latin terminology meaning a "naked contract". Available online:

<https://dictionary.cambridge.org/dictionary/english/nudum-pactum> Accessed on: January 7, 2023 at 10:36 a.m.

⁵عبد الرزاق أحمد السنهوري، الوسيط في شرح القانون المدني الجديد، نظرية الالتزام بوجه عام، مصادر الالتزام، منشورات الحلبي الحقوقية، بيروت، 2000، ص 154.

⁶Canon law is the law of Christian Church. Available online:

https://www.law.cornell.edu/wex/canon_law#:~:text=Canon%20law%20refers%20to%20the,and%20administration%20of%20the%20church. Accessed on: January 7, 2023 at 10:41 a.m.

⁷Élise CHARPENTIER, Un paradoxe de la théorie du contrat : l'opposition formalisme / consensualisme, Les Cahiers de droit, Vol. 43, n° 2, 2002, p.281.

⁸«On lie les bœufs par les cornes et les hommes par les paroles ». See : Elena DAMIAN, «De L'Histoire Du Droit Français: Antoine Loisel (1536–1617)», FIAT IUSTITIA, Dimitrie Cantemir Faculty of Law Cluj Napoca, Vol. 13, n°2, October 2019, Romania, p.25.

This principle reached the peak of its glory in the 17th, 18th and 19th centuries, and the reason for that was the emergence of the liberal doctrine with the theory of individualism during that period of time, which gave importance to the individual as the center of society and law. According to it individuals should be free to pursue their own obligations¹.

Liberal doctrine called to prohibit the interference of judges in contractual relationships. The essence of the theory of individualism was that judges should have a non-interference role in contracts. The basic idea of the principle of non-interference of judges is that the parties are free to enter the free-market, choose their own contracting party, determine the terms of the contract and sign it².

In this period of time, the contract was submitted to a set of legal principles derived from philosophical and economic ideas on which the liberal society was based.³

- According to philosophical ideas, this doctrine believed that man enjoys natural and basic rights, and that society is only a means to protect these natural rights. Moreover, man has no power over others, and subjecting individual to others laws is considered contrary to moral. Therefore, a person should be subject only to his own legitimacy.

- According to economic ideas, liberal doctrine was based on freedom of property as a natural human right and free-market which must be subject to the law of supply and demand.

This doctrine that aims to limit the interference of state for the benefit of individual freedoms has been concretized in the field of law by the principle/theory of autonomy of will. By which a person is bound by a contract just because he wanted it, and because he chose to submit to constraints and fulfill obligations. Consequently, it is only the will of parties that gives force to the contract.

B. Aspects of will autonomy principle.

Important legal consequences on contractual relationships result from the principle of autonomy of will. Freedom of contract (1), consensus (2) and the binding force of contract (3).

1. Freedom of contract.

¹ محمد صبري السعدي، شرح القانون المدني الجزائري، النظرية العامة للالتزام، مصادر الالتزام، التصرف القانوني، دار الهدى، الجزائر، 2004، ص 44.

² Luan HASNEZIR, The Principle of Autonomy of Contractual Will, European Journal of Multidisciplinary Studies, Vol. 8 Issue n° 1, January - June 2023, p. 140; See also : Élise CHARPENTIER, Les fondements théoriques de la transformation du rôle de l'équilibre des prestations contractuelles, Les Cahiers de droit, Vol. 45, n°. 1, mars 2004, p. 86.

³ علي فيلاي، الالتزامات، النظرية العامة للعقد، موفم للنشر، الجزائر، 2010، ص 48 وما بعدها.

Freedom of contract is one of the most important aspects of autonomy of will principle. It is defined as “the freedom to contract or not to contract, the freedom to choose the contracting party and the freedom to decide for the content of the contract”¹. It is the ability to enter in a contractual relationship without the influence, control or authority of sovereign power².

In other words, freedom of contract is the right of individuals to make contracts without state interference³. According to this principle:

1. Each party can choose whether he/she enters into a contractual relationship or not.

2. The parties must be free to choose the other party as a partner in concluding the contract. Both parties must have chosen each other by consensus⁴. The criteria for selecting the contracting party need not be rational⁵.

3. The contracting parties are free to determine its content, in accordance with their legitimate interests. Based on freedom of contract principle, the parties can freely choose the type, subject and terms of the contract⁶. They are free to enter into other contracts that are not expressly provided for and not regulated in the civil code⁷. And neither state nor third parties are entitled to interfere or influence the will of the parties in determining the content of the contract, provided that it does not infringe the rights of others and does not come contrary to a mandatory rule of law⁸.

The freedom to determine the content of the contract justifies the non-mandatory character of some rules applied to contracts. It also justifies why we take into consideration the inner will of the party victim of error, and why we search for the intention of contracting parties and not the literal meaning of the contract when the terms are ambiguous and require interpretation⁹.

2. Consensus.

¹ «La liberté de contracter ou non, liberté de choisir son cocontractant et liberté de déterminer le contenu du contrat», See : Charlie BOBILLIER, La liberté contractuelle à l'épreuve du droit des marchés financiers, sous la direction d'Yves Reinhard. - Lyon : Université Jean Moulin (Lyon 3), 2015, p. 162.

² Ibrahim GÜL, Freedom of Contract, Party Autonomy and Its Limit Under Ciscg, Hacettepe HFD, Vol. 6, n° 1, 2016, p.82.

³ M. POHAN, Principle of Freedom Contracts at a Company, Utopía y Praxis Latinoamericana, vol. 26, n°. Esp.1, 2021, p. 158.

⁴ Luan HASNEZIRI, *Op. cit.*, p.140.

⁵ LueTämäArtikkeli SUOMEKSI, Freedom to Choose a Contracting Party. Available online: <https://virtuallawyer.fondia.com/en/articles/freedom-to-choose-a-contracting-party/#> Accessed on: December 30, 2022 at 11:03 a.m.

⁶ Onur ALPER & İrem BULUT, Freedom of Contract, Articleletter, JULY 2011, p. 20.

⁷ Luan HASNEZIRI, *Idem.*, p.143.

⁸ *Idem.*, p.135.

⁹ علي فيلالي، مرجع سابق، ص 50.

After freedom of contract, which has been considered for a long time as a fundamental principle in the formation of contracts, the principle of consensus comes second.

In Roman Law, and with the rigidity of formalism, consensus was radically excluded¹. Today, the consecration of consensus by modern civil laws as a fundamental principle has put formalism in the rank of exceptions².

In Algerian Law, the principle of consensus is considered as a principle and a general rule in the field of contracts according to article 59 A.C.C which provides that the contract is formed once the parties have exchanged their concordant wills, without prejudice to legal provisions. Formalism is just an exception³.

According to this principle, the contract is the product of the consensus “the meeting of the minds”⁴ of contracting parties, and only the consent of parties is sufficient for the formation and the validity of contracts, without any required formality. These are consensual contracts⁵. They are formed once the parties have exchanged their wills.

Contracts are formed by offer and acceptance. Offer is the first will in the contract, and it is an expression of willingness to contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed⁶. Acceptance is the second will in the contract. It is the

¹ Henri BRUN, Les origines du consensualisme en matière de transfert de propriété et des mitigations apportées au principe par le droit civil québécois. Les Cahiers de droit, Vol. 9, n°2, 1967, p. 275.

² See in this sens : Philippe ROPENGA, Les évolutions du formalisme. Entre légalité et légitimité, *Revue interdisciplinaire d'études juridiques*, Vol. 81 n°2, 2018, p.16.

³ “It can be seen that nowadays, at a time when electronic commerce makes transactions much faster because of modern means of telecommunications, consensus is widespread in the world, at least in industrialized countries. But a significant return to formalism in different branches of law can be also observed. This resurgence seems paradoxical, but it undoubtedly has its own reasons. Understanding consensus and formalism would not be as simple as it once was”. See : Minh Hang NGUYEN, Vente internationale et droit vietnamien de la vente, Presses universitaires François-Rabelais, 2010, p. 119-149. Available online: <https://books.openedition.org/pufr/2999?lang=fr#ftn1> Accessed on: January 2, 2023 at 3:00 p.m.

⁴ Zheng YUNRUI, Studies on Certain Issues of the General Principles of Contract Law, Singapore Journal of International & Comparative Law, Vol. 7, 2003, p.30.

⁵ محمد وحيد الدين سوار، شرح القانون المدني، النظرية العامة للالتزام، مصادر الالتزام، مطبعة العجلوني، جامعة دمشق، 2004/2003، ص 53.

⁶ A definition cited by: Sarah FIELD, Introduction to the law of contract, Formation of a contract, 1st edition, 2016, p.13. Available online: <https://studylib.net/doc/25185005/sarah-field---introduction-contract-law> Accessed on: May 5, 2023 at 12:35 p.m.

manifestation of will of the party to whom the offer was made, to accept the offer and thus leads to the formation of the contract¹.

Consensus means also that contracts can be formed in different ways depending on the different circumstances of contracting parties². The party can declare his will verbally, in writing, or by the signs generally in use, or by a conduct such as to leave no doubt in the true intention of its author. The expression of will may be tacit, when the law or the parties do not require it to be express³.

3. The binding force of contract.

According to article 106 A.C.C the contract is the law of the parties, it may be revoked or modified only with their mutual consent or for causes provided for by law.

The binding force of contract is the force attached by law to legally formed agreements⁴. This principle is related to the performance of contracts⁵.

The binding force of contract principle has two aspects: towards contracting parties themselves, first, but also towards judge, law and third party:

- For contracting parties, the binding force of contract is manifested by the right to forced execution and the unilateral irrevocability of the agreement⁶. The absence of voluntary performance of the contract gives the injured creditor the right to choose one of many ways. He may waive the forced execution, and claim the resolution of the contract, with or without indemnity⁷.

- For judge, based on this principle, the contract should be respected by the judge and by the law. If the parties adhere to their agreements, the court should not interfere into agreements of the parties by evaluating them as being made unreasonably or negligently. If the parties adhere to their agreements, then the court cannot release one of the parties for non-fulfillment of the obligations arising from these agreement. The judge does not have the right to re-evaluate the adequacy of the

¹ يراجع في تعريف القبول: محمد صبري السعدي، مرجع سابق، ص 114.

² Shawn J. BAYERN, Offer and Acceptance in Modern Contract Law: A Needless Concept, 103 CAL. L. REV. Vol. 67, 2015, p.69.

³ Art. 60 A.C.C.

⁴ Art. 1134/1 French Civil Code (Old version : from February 17, 1804 to October 01, 2016): «*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*». Available online: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006436298/1804-02-17#:~:text=Les%20conventions%20l%C3%A9galement%20form%C3%A9es%20tiennent,%C3%AAtre%20ex%C3%A9cut%C3%A9es%20de%20bonne%20foi. Accessed on : January 21, 2023 at 6:29 p.m.

French legislator inspired this principle directly, and almost literally, by Domat. And Domat quoted the principle from the Digest. See: Laurent AYNES, Le contrat, loi des parties, Cahiers du Conseil Constitutionnel, N° 17, (Dossier : Loi et Contrat) - MARS 2005, p.1. Available online: <https://www.conseil-constitutionnel.fr/node/3072/pdf> Accessed on : January 1, 2023 at 12:42 p.m.

⁵ Karl LAFABRIE, La force obligatoire du contrat à l'épreuve des procédures d'insolvabilité, Bibliothèque de droit privé tome 595, LGDJ, Lextenso, 2020, p.5.

⁶ Laurent AYNES, *Op.cit.*, p.2.

⁷ Art. 119 A.C.C.

legal interest or the principles on which the contracting parties were based in concluding the contract¹.

- For law, the contract is superior to the law, because it proceeds from a “supra-legal source”: the fundamental right of man to govern himself by his will. The roots of the contract lie in “human rights”. So the contract is obligatory, not because the law wants it to be, but because it proceeds from the exercise of a fundamental right, that legislator must respect².

- For third party, for those who were not contracting parties at the moment of the conclusion of the contract and did not become one thereafter, the contract is not a law³. This means that the agreement has no existence outside the circle of the contracting parties. The rights and duties that result from the contract concern only the parties, this is the principle of relative effect of contracts⁴. The contract does not oblige third parties, but it can give rise to rights for their benefit⁵.

II. From will autonomy to contractual justice.

Contractual justice tries to rebalance contracts overshadowed by the principle of autonomy of will. In this part we will show the meaning of contractual justice (A) and then we will demonstrate how contractual justice gives access to contracts (B).

A. Meaning of contractual justice.

A brief concept will be given about contractual justice (1) followed by the most controversial kinds of contractual justice (2).

1. Concept of contractual justice.

If we attribute the victory of the principle of autonomy of will to the economic factors led by the liberal doctrine in the 19th centuries, those same factors will be the cause of the decline of this principle. After the development and establishment of large industries, of huge companies with the organization of classes of workers, an imbalance of powers appeared between economic forces and weak parties⁶. Balanced positions between business actors and workers were not always fulfilled because the strong parties always tended to dominate weaker ones⁷. These factors reduced the impact of the principle of autonomy of will in the field of economic transactions⁸.

¹ Luan HASNEZIRI, *Op. cit.*, p.140.

² Laurent AYNES, *Op.cit.*, p.2.

³ *Ibid.*

⁴ علي فيلاي، مرجع سابق، ص 51.

⁵ Art. 113 A.C.C.

⁶ عبد الرزاق السنهوري، مرجع سابق، ص 158.

⁷ M. POHAN, *Op.cit.*, p.159.

⁸ “According to the philosophy of freedom of contract, law is revealed as a space open to the imagination of individuals, who have full ability to shape the terms and content of their contracts according to their own needs. They are not required to obey the rules that law placed at their disposal. Such is freedom of contract in all its force”. Cited by : Hervé Magloire Moneboulou

This principle was widely criticized for many reasons, the main critical was “contractual justice”.

“Justice is one of the most prestigious and also most confused notions of our spiritual universe. Justice designates a value that everyone invokes and that no one dares to disavow. In this sense, justice is a universal value. It plays a huge role in guiding our action”¹, this is how “Perelman” considers justice. The word “justice” has several meanings. Justice can be understood in the restricted sense of what is in conformity with the law².

In his book “Traité de Droit Civil” (France - 1980) “J. Ghestin” demonstrated that the principle of autonomy of will cannot justify the binding force of the contract. In fact, this must be supplemented by the idea of justice and loyalty, because of the many references in the civil code to the moral notion of ‘good faith’ and ‘security’, which protect both ‘trust’ as a moral notion and ‘credit’ as social and economic need³. The contract cannot be studied without being situated with regard to social usefulness and justice, between which exist indisputable links, since both contribute to the general interest and to the harmony of the social body⁴.

2. Commutative and distributive justice.

There are, in fact, several kinds of contractual justice. Traditionally, in contractual relationships, the first notion of justice increasingly invoked in debates to justify solutions for interfering and correcting imbalances between obligations in contracts is the “commutative justice” which means equality in exchange⁵. Aristotle used the notion of “corrective justice”⁶ in order to pinpoint the punishment for the damages or wrongful acts based upon the principle of arithmetic proportionality¹.

MINKADA, La question de la définition du contrat en droit privé : Essai d’une théorie institutionnelle, Juridical Tribune Vol. 4, Issue 1, June 2014, p.96.

¹ Ch. PERELMAN, Réflexions sur la justice, Extrait de la revue de l’institut de sociologie, Les éditions de la librairie encyclopédique S.P.R.I, Bruxelles, n°2, 1951, p.1.

² Brigitte LEFEBVRE, La justice contractuelle : Mythe ou réalité ?, Les Cahiers de droit, Vol. 37, n°1, 1996, p.22.

³ See : Louis PERRET, Une philosophie nouvelle des contrats fondée sur l’idée de justice contractuelle. Revue générale de droit, Vol. 11, n° 2, 1980, p.540.

⁴ Jacques GHESTIN, *Op.cit.*, p.90.

⁵ Guido SMORTO, La justice contractuelle, Revue internationale de droit comparé. Vol. 60, n°3, 2008, p.587.

⁶ According to Aristotle, commutative or corrective justice is the second kind of particular justice which is exercised in the distribution of honors or wealth or other advantages which can be distributed among the members of a political community. Unlike distributive justice, which is concerned with the respective value of people and their unequal merits, it establishes an equivalence between things and things. Commutative justice ignores the differences between individuals and gives everyone the same share. Available online: https://fr.wikipedia.org/wiki/Justice_commutative
Accessed on: January 11, 2023 at 3:45 p.m. For more details see: Augustine A. ADEYINKA, George IKIOUMOTON, and Fibainmine G. PAULLEY, The concepts of justice in Aristotle’s

The main leader of this conception of contractual justice is “Ghestin” inspired by the Canonist doctrine². He gave the following definition: “Contractual justice leads to the requirement that the contract not destroy the balance previously existing between the patrimonies, this implies that each of the parties receives the equivalent of what he/she gives”³. This perception of contractual justice assumes an equality in terms of quantity and requires an equivalence of benefits. Commutative justice is linked to the fact that the contract is mainly perceived in its function of exchange of goods, wealth and services⁴, while the contract is not only a reciprocity of benefits but also a reciprocity of rights and obligations⁵.

The inequality of the parties may be due to the fact that the consent of a one party has been vitiated by error or violence, or even by inaccurate or insufficient information. The inequality can also be observed by taking into consideration the imbalance from which an entire category of contracting parties suffers, usually in a situation of inferiority through the effect of constraint or ignorance, consumers or employees. In this second hypothesis, it is legitimate to ensure in a particular way the protection of the consent of these categories of contracting parties. The inequality of the parties is therefore indistinguishable from that of the benefits of which it is the cause⁶.

This is where contractual justice took a larger sense beyond the economic exchange between parties, taking in consideration all the content of the contract (powers, prerogatives, freedoms, faculties, charges...)⁷. Hence the concept of “distributive justice” which consists in giving each one the part which is really due to him/her⁸. The accent here is put on the equality which should reign between all the contracting parties as values and not just as subjects of an exchange.

But the reality is quite different, and it is utopian to believe that inequalities can completely disappear. However, the legislators in different legal systems try to achieve this by creating various categories of persons and property with their own

philosophy: Implications for socio-political life in Nigeria, Nigerian Journal of Social Studies Vol. 20, n° 2, October, 2017, p.156.

¹Mariusz Jerzy GOLECKI, *Op.cit.*, p.13.

² Hélène VILLAIN, *Contrat d'adhésion et justice contractuelle, étude comparée franco-québécoise*, Thèse Pour obtenir le grade de Docteur en Droit, Université de Lille, France, 2022, p.12.

³ « *Il ne faut pas qu'il détruise l'équilibre qui existait antérieurement entre les patrimoines, ce qui implique que chacune des parties reçoive l'équivalent objectif de ce qu'elle donne* ».

Jacques GHESTIN, *Op.cit.*, p.96.

⁴ Gabriel-Arnaud BERTHOLD, *Peut-on donner d'une clause et reprendre de l'autre? Essai sur la cause comme instrument de contrôle de la cohérence matérielle du contrat*, Mémoire présenté à la Faculté des études supérieures pour l'obtention du grade de maître en droit (LL. M.), Faculté de droit, Université de Montréal, 2015, p.38.

⁵ Hélène VILLAIN, *Op.cit.*, p.13.

⁶ Jacques GHESTIN, *Op.cit.*, p.99.

⁷ Hélène VILLAIN, *Op.cit.*, p.13.

⁸ Brigitte LEFEBVRE, *La justice contractuelle : Mythe ou réalité ?*, *Op.cit.*, p.22.

legal treatment¹. And any argument invoked for the benefit of special categories of people (the poor, the disabled, consumers, savers, workers) without reference to a theory of justice would be without value².

Seems that we should admit the duality of the two forms of justice in the general theory of the contract, each one explaining different rules³. Commutative justice presupposes distributive justice, and it cannot be understood independently of distributive justice⁴. While distributive justice means the distribution of goods by reference to the merit of individuals, commutative justice takes care of the objective equality of the shares exchanged by the contract⁵. They both intend to reflect the conception of justice that fit or should fit the modern society.

B. Aspects of contractual justice.

Contractual justice is a justification to allow the interference in contractual relationships. Justice considerations are invoked by legislator (1) as well as by judge (2).

1. Interference of the legislator.

Based on contractual justice, contracts as well as their content can, if necessary, be forced by the interference of the legislator, because law also provides norms based on justice and equity. In addition, parties cannot provide terms for every probable conflict. In these cases, law regulates their contracts with its own rules. So, it is difficult to say that the parties are free to regulate their own contracts and some restrictions are indispensable⁶.

The first aspect of justice adopted by Algerian legislator is found in the first article of Algerian civil code providing that judge resorts to justice as a source of law. The interference of Algerian legislator in contractual relationships is clearly seen through many provisions, whether in civil law or in special legal texts. The most important aspects of legislator interference are:

1.1. The principle of good faith.

Algerian legislator provides in article 107 A.C.C that the contract must be executed in accordance with its content and in good faith. One of the main aspects of contractual justice adopted by Algerian legislator is “the principle of good faith”.

¹*Ibidem.*, p.22.

² Guido SMORTO, *Op.cit.*, p.591.

³ Hélène VILLAIN, *Op.cit.*, p.14.

⁴ Élise CHARPENTIER, *Les fondements théoriques de la transformation du rôle de l'équilibre des prestations contractuelles*, *Op.cit.*, p.72.

⁵ Faustine JACOMINO, *Le contrôle objectif de l'équilibre contractuel. Entre droit commun des contrats et droit des pratiques restrictives de concurrence*, Thèse présentée en vue de l'obtention du grade de docteur en droit d'Université Côte d'Azur, France, 2018, p.197.

⁶ Melese Wondmagegnehu BELETE, *Op.cit.*, p.797.

This principle is in its essence a moral rule more than a legal rule¹, and “trust” seems to be part of the essence of good faith².

To be in bad faith implies reprehensible behaviour, whether it is the intention to harm the contracting party or, more simply, disregard for the interests of this one. Acting in good faith implies a benevolent and proactive attitude, intended to maximize the benefits of the contract for each party³.

The principle of good faith includes a duty of loyalty and a duty of collaboration: “The duty of loyalty is based on a negative mode. It doesn’t prohibit only the free omission to perform, but it also condemns any attitude that aims to deprive the other party from the benefit she/he expects, any undue charge, or any behaviour that put the contractual partner in a bad position . The duty of collaboration is based on a positive mode. It imposes on each party an active behaviour, intended to assist the co-contracting party, in particular to warn him during the contract, of any event he must know, necessary to perform the contract”⁴.

1.2. Quality of consent.

Another reinforcement of contractual justice by legislator is the control of the will of contracting parties. In case the consent of the party is absent or vitiated, a kind of sanction will be applied to the contract. First of all, Algerian Civil Law ⁵ requires, for a valid contract, that the parties must have the legal capacity to contract. Second, the consent must be free of any vices of consent. Error⁶, fraud⁷, duress (Violence)⁸ and exploitation⁹ vitiate consent when they are of such a nature that, without them, one of the parties would not have contracted or would have contracted under different conditions. Vices of consent cause the relative nullity of the contract¹⁰.

1.3. Public order.

Public order is one of the factors that allows the legislator interference as a limitation of the principle of autonomy of will. The idea of justice in this case extends beyond the contract to the whole society. State interferes through its laws to control the content of contracts.

¹ زمام جمعة، العدالة العقدية في القانون الجزائري، أطروحة لنيل شهادة دكتوراه علوم في الحقوق، كلية الحقوق، جامعة الجزائر 1، 2013-2014، ص 311.

² Élise M. CHARPENTIER, Le rôle de la bonne foi dans l’élaboration de la théorie du contrat, *Op.cit.*, p.305.

³ Didier LLUELLES, La bonne foi dans l’exécution des contrats et la problématique des sanctions, *La revue du barreau canadien*, Vol. 83, 2004, p.188.

⁴ *Idem.*, p.189.

⁵ From Art. 40 to 44 A.C.C.

⁶ From Art. 81 to 85 A.C.C.

⁷ Art. 86-87 A.C.C.

⁸ Art. 88-89 A.C.C.

⁹ Art. 90-91 A.C.C.

¹⁰ From Art. 99 to 105 A.C.C.

Legislator often uses mandatory rules to enforce norms that must be respected by the parties. Mandatory rules are those provisions that should be necessarily observed by the contracting parties when they make a contract. They are the “rules of the game” which the parties have not chosen, and most of which are not within the powers of the parties to disregard or waive by agreement¹. It is only by respecting these rules of the game that the deployment of individual initiatives will be validated².

Algerian legislator adopted many mandatory rules to protect contracting parties. An example of legislator interference as a clear breach of freedom of contract principle, what is provided in law n° 04-02 relative to Business practices, in prohibiting the refusal to sell a commodity or perform a service without a legitimate justification, if this commodity is offered for sale or if the service was available³.

1.4. Formalism:

Formalism can be defined as a “purely formal conception of justice”⁴. As a limitation of the principle of autonomy of will, Algerian legislator adopted formalism as an exception to the principle of consensus, in order to protect the parties from the contract itself. In some contracts (solemn contracts), the form plays a dangerous role since it requires strict respect for its requirements. It often has the effect of sanctioning the parties if the contract did not wear a particular form⁵.

1.5. The Duty to inform.

The duty to inform finds its source in the inequality between the contracting parties⁶. Most often, contracting implies to adhere to a contract which is not negotiable because some people still have no competence and no information. Such is the case with the consumer and the patient. From here a duty to inform must be

¹MeleseWondmagegnehu BELETE, *Idem.*, p.798.

² Jean van ZUYLEN, Les rapports entre la loi (supplétive, impérative) et l'autonomie de la volonté, In: Les sources du droit revisitées, vol. 2, normes internes infraconstitutionnelles, Anthémis (Limal), 2012, p.853.

³ Art. 15/2 of Law n° 04-02 of June 23, 2004, on the Rules applicable to business practices, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 41, of June 27, 2004, amended and supplemented by Law n°10-06 of August 15, 2010, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N°46.

⁴ Élise M. CHARPENTIER, Le rôle de la bonne foi dans l'élaboration de la théorie du contrat, *Op.cit.*, p.301.

⁵ See for example Art. 324 A.C.C.: “The authentic act is the one in which a civil servant, a public officer or a person in charge of a public service notes, in the legal forms and within the limits of his power and his competence, the facts which took place in his presence or statements, to him, made by those concerned”.

⁶ عزام جمعة، مرجع سابق، ص 293.

imposed by law to establish contractual justice¹. Especially when it comes to a relationship between a professional and an “ordinary” citizen.

Algerian legislator adopted the duty to inform in many special legal texts. For example, Law n° 09-03 relative to Consumer protection provides that every intervening party must inform the consumer of all information related to the product that he puts for consumption by marking or by any other appropriate means². Law n° 04-02 provides that the seller has the obligation to inform customers of the prices and tariffs of goods and services and the terms of sale³. Law n° 18-11 relative to Health also imposes a duty to inform between doctors and their patients. The patient must be informed about his health condition, the treatment he requires and the dangers to which he is exposed⁴.

2. Interference of the judge.

Judge interference is an indirect interference of the legislator. Experience shows that contracts are sometimes instruments of exploitation of weaks and a source of injustice that the legislator is unable to apprehend in their totality and their diversity⁵. Contractual justice does not aim for absolute equality between the contracting parties, it is a kind of punishment for excessive imbalance⁶. The idea of autonomy of will is based on a premise of equality which is false from the beginning. Legislator and judge have the obligation, if necessary, to interfere in order to restore the imbalance of parties powers⁷.

The “voluntarist” definition of contract overstates the importance of the will of parties, their equality and their freedom. However, this equality and freedom are just theoretical. In fact, the inequality between the parties is not new and the society is fundamentally unequal⁸. Autonomy principle takes for granted that the contract is fair because the contracting parties are equal. In addition, it supposes that the contracting parties act in the common interest, whereas, in reality, each party seeks to ensure and protect its own interests. Legal equality should not be confused with equality in practice⁹.

¹ عزام جمعة، المرجع نفسه.

² Art. 17 of Law n° 09-03 of February 25, 2009, on Consumer protection and fraud repression, amended and supplemented by Law n° 18-09 of 10 June 2018, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 35.

³ Art. 4 and next of Law n°04-02 on the Rules applicable to business practices.

⁴ Art. 26 of Law n° 18-11 of July 2, 2018, on the Health, amended and supplemented by Ordinance N° 20-02, OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 50.

⁵ Jean Pascal CHAZAL, Justice contractuelle, Cadiet, Loïc. Dictionnaire de la justice, Presses Universitaires de France (PUF), 2004, p.6.

⁶ Faustine JACOMINO, *Op.cit.*, p.197.

⁷ Brigitte LEFEBVRE, La justice contractuelle : Mythe ou réalité ?, *Op.cit.*, p.20.

⁸ Hervé Magloire Moneboulou MINKADA, *Op.cit.*, p.97.

⁹ Brigitte LEFEBVRE, La justice contractuelle : Mythe ou réalité ?, *Op.cit.*, p.20.

It seems that autonomy principle does not constitute a solid basis to justify the binding force of contracts¹. This principle tends to decline because of the evolution of the jurisprudence. Technically, many concepts have been used to justify the interference of judge (interpretation, equity, good faith, abuse, economic violence ...)².

The contractual inequality is aggravated by the practice of adhesion contracts where the terms are both “offered and imposed” by one party. The parties do not have the same economic strength and the most powerful can dictate his law to the weakest one. This is the hypothesis of contracts of adhesion invented by Saleilles in 1901³.

In Algerian Law, legislator authorized the judge to interfere in some unbalanced contracts in order to establish a certain level of equality. This appears either through civil law or in special legal texts. In civil law it is provided that when the contract is formed by adhesion, the judge may, if the contract contains arbitrary clauses, modify these clauses or exempt the adhering party from them, and this in accordance with the rules of equity⁴. And when, as a result of exceptional unforeseeable and general events, the performance of the contractual obligation becomes excessively onerous the judge may reduce the obligation become excessive⁵. In special texts, we can cite what is provided in Law n° 04-02 as it authorized the judge to interfere in the contract if it contains arbitrary terms stipulated in article 29.

¹ Jean van ZUYLEN, *Op.cit.*, p.852.

² Jean Pascal CHAZAL, *Op.cit.*, p.7.

³ Hervé Magloire Moneboulou MINKADA, *Op.cit.*, p.97.

⁴ Art. 110 A.C.C.

⁵ Art. 107/3 A.C.C.

Conclusion :

It was shown in this paper that critics of autonomy of will principle consider that the purpose of this principle was to put law at the service of will, while experience proved that will is not enough by itself to create an equitable contract. In addition, autonomy of will principle is not completely denied but its effects are modified, it is all about to promote a balanced contract.

Must be reminded that contractual balance is not one of the conditions of the formation of contracts, but that does not prevent the legislator from interfering directly, or indirectly through judge, in the unbalanced contractual relationships in order to establish a certain level of justice.

We have reached the following results:

- The principle of autonomy of will is still the cornerstone of the general theory of the contract and the majority of contracts is formed by free-will even restricted by law for justice considerations.

- Contractual justice is an adjustment of the principle of autonomy of will and the purpose is to show that the role of contractual justice is to transcend the will of parties.

- Contractual justice is not a sanction for the contract but a protection for the parties. The contract is equitable only when both parties assume the damages and not only the profits.

- Algerian law includes several provisions related to contractual justice whether in civil law or in special texts.

- The provisions included in law n° 04-02 amended and supplemented, and law n°09-03 amended and supplemented, aim to guarantee contractual balance not only between the parties, but also towards economic market.

However, a strong reinforcement of contractual justice by a clear and direct principle in Algerian Civil Code giving judge access to contracts for justice considerations, will minimize the number of unbalanced contracts.

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4. Law n° 18-11 of July 2, 2018, on the Health, amended and supplemented by Ordinance N° 20-02 , OFFICIAL JOURNAL OF THE ALGERIAN REPUBLIC N° 50.