PRIVATE CONTRACT LAW: APPLICATION OR RENEWAL OF GENERAL PRINCIPLES

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Abstract:

The contract is one of the most important forms of legal acts, and civil law is concerned with regulating them under the title of the general theory of contracts on one hand, and private contracts on the other hand. However, with the advent of the modern industrial revolution, a new phase emerged, represented by the movement of private contracts, where they separated from the provisions of contract law and transitioned into independent branches, such as labor law and insurance law. This phenomenon reached its peak with technological and economic development, disrupting the contractual balance significantly, leaving its mark on the traditional legal system of contracts, in contrast to the increasing movement of contracts from general to specialized fields.

Algerian legislation has gone through all stages of this development, starting with the enactment of the Algerian Civil Code in 1975 until today. This resulted in a decline in the provisions of contract law in favor of special legislations that began to compete with it, as they relied on new perceptions and philosophies. The most important of these laws are Law 09-03 on consumer protection and the suppression of fraud, and Law 04-02, which defines the rules for commercial practices.

Through our research, we concluded that the legislator's aim in regulating private contracts within the provisions of contract law is to assist the contracting parties, helping to complete their contractual will without infringing upon it. However, due to the development resulting from the industrial, technological, and economic revolutions, we now face a new phase governed by the general theory of contracts (contract law) on one hand, and special legislations (private contract law) on the other.

Keywords: *General theory of contracts, special legislations, contractual will.*

INTRODUCTION:

The contract is considered one of the most important legal acts in social and economic life, and civil law is concerned with regulating it. Therefore, the general theory of contracts holds a prominent position in contemporary legislations, as it did in earlier legislations(1). However, the developments in the economic and technological fields and the evolution of society led to the emergence of varying categories of positions, disturbing the contractual balance with the appearance of strong and weak contracting parties. This left its mark on the traditional legal system of contracts, in contrast to the increasing movement of contracts from general to specialized fields.

This led to the search for legal mechanisms to soften and limit the rigidity of traditional contract principles, especially since economic transactions today have become more flexible, resulting in excessive legislative specialization. The matter is no longer confined to specific areas but has expanded to include special legislations on competition, consumption, and others, which adopt principles and methods that contradict those of the general theory of contracts, as they are based on completely different perceptions and philosophies.

Algerian legislation has undergone this development. After independence in 1962, French laws were extended, except for those in conflict with national sovereignty. In 1975, the Algerian Civil Code was

issued under Ordinance 75-58(2). In fact, this law adopted a blending approach, as the Algerian Civil Code is a direct imitation of the Napoleonic Code of 1804, a situation that placed it in a state of blind legislative dependence(3). It also includes a literal transfer of some provisions from the Egyptian Civil Code of 1948, which, in turn, also has a clear Latin influence, particularly influenced by the Napoleonic Code.

Thus, the Algerian Civil Code initially included two types of provisions within the same code: general provisions regulating the theory of contracts and specific provisions regulating private contracts. Later, some contracts were removed from its scope and became part of independent legal branches, the most important being labor law issued under Law 90-11(4), which regulates labor relations, and insurance law issued under Ordinance 95-07(5).

However, this process did not stop there, and a third stage emerged with the appearance of new types of contracts that are characterized by one contracting party's dominance, whose interests outweigh those of the weaker party, such as electronic contracts and technology transfer contracts. This led to the ineffectiveness of the provisions of contract law in applying to these highly specialized contracts, which became outdated and inadequate, resulting in what some have called the "contract crisis.(6)"

This development was accompanied by the issuance of special legislations that began to compete with contract law because they were based on new perceptions that differ from the traditional contract law.

In light of these developments that can be said to have shaken the traditional principles of contract theory, many have questioned the relationship between contract law and private contract law. Is this relationship one of complementarity or conflict? Does it signal a retreat of the general theory of contracts, or its evolution?

Thus, our study raises the question: Is the relationship between contract law and private contract law an application of the general theory of contracts, or a reform and renewal of it?

To answer the raised issue, we decided to divide the study into two sections, following a descriptive and analytical methodology, and relying on the following plan:

Chapter One: Private Contract Law as an Application of Traditional Contract Principles

Section One: Private Contract Law as an Extension of the Will of the Contracting Parties

Section Two: Private Contract Law: The Special Prevails Over the General

Chapter Two: Private Contract Law as a Renewal of Traditional Contract Principles

Section One: Independence of Some Private Contracts

Section Two: From Private Contracts to Specialized Contracts

Chapter One: Private Contract Law as an Application of Traditional Contract Principles

There is no doubt that the legislator’s goal in regulating private contracts within the provisions of contract law is to assist the contracting parties and extend their will (Section One), without infringing upon their contractual freedom. However, at times, the legislator allows for the violation of this freedom when the principle of "special prevails over general" applies (Section Two).

Section One: Private Contract Law as an Extension of the Will of the Contracting Parties

By referring to the provisions of contract law, we find that it is based on one of the most important principles, namely the principle of freedom of contract, which flourished under the individualistic doctrine, enriched by various philosophical ideas that sanctify individual freedom as the foundation

and source of contractual obligations(7). This includes economic ideas related to economic freedom within private law, which encourages individual initiatives to achieve economic balance and prosperity, based on the principle of "laissez-faire" (let it work, let it pass).

With the opening of the field of contractual freedom, the state did not intervene in the will of the parties, as its role was limited(8) to traditional functions: legislative, executive, judicial, foreign defense, and internal security. It was committed to protecting personal freedoms without restricting them. Based on this, the regulation of the content of contracts fell under the jurisdiction of the contracting parties themselves. They had the right to include any agreed-upon conditions, including the resolutory condition under Article 120 of the Civil Code and the penalty clause under Article 183 of the Civil Code. In return, neither the judge nor the legislator had the right to alter these conditions, as the contract had acquired its binding force in accordance with Article 106 of the Civil Code.

However, the obligations arising from the contract were subject to wide debate, as they were limited to what the parties intended, or whether they included obligations not anticipated by their will. In other words, the contract does not only bind the contracting parties to what is explicitly stated in it, but also to its implications under the law, custom, and rules of justice(9). This means that the contract's content includes matters explicitly mentioned within it, such as the rights and obligations of the parties, as well as issues not mentioned in the contract, whether due to oversight or the inability to foresee them, especially when transactions are expedited and focus is placed on the essential matters of the contract rather than the details. Thus, the contract may be incomplete, but this does not mean it is invalid, as the legislator permits the contract to be formed with only the essential matters, though it must still be completed(10).

Since the primary source for completing the parties' will is the law, the legislator intervenes to regulate certain contracts specifically due to their common use in daily life. These are the private contracts, or what civil law doctrine refers to as "named contracts."(11) The legislator defined, named, and regulated these contracts through special provisions within the Civil Code itself, granting the judge the authority to complete the scope of the contract by adding the obligations required by the contract, even if the parties did not intend to include them. These provisions are not seen as a replacement for the general theory of contracts but as an additional organization designed to assist the contracting parties in organizing their contractual relationships more precisely. The legislator's goal with this organization is to guide the contracting parties and spare them the difficulty of organizing their contracts, by providing a comprehensive model for named contracts with rules known as supplementary provisions to the will of the contracting parties, as well as some general rules that apply to all contracts.(12)

An example of this is the regulation of the sale contract, which is one of the most important contracts that the legislator has specifically regulated. The sale contract is governed by dual provisions: it is first concluded according to general rules when the parties agree on the essential matters, such as the object of sale and the price, without addressing details such as the time and place of delivery. In this case, the contract is valid. However, during execution, the parties may encounter difficulties due to the lack of specification of the time and place of delivery. These are considered supplementary provisions to the will of the contracting parties. To overcome these difficulties, which would have previously affected the contract, the legislator provided a model regulation for the sale contract, addressing all the details and completing the parties' intentions to ensure the stability of their contracts.

From this organization, it can be concluded that the relationship between contract law and private contract law is based on the legislator's goal behind regulating these contracts. The legislator aims either to complete the parties' will without infringing upon their contractual freedom by specifying

essential elements and obligations in ways that do not violate the principle of freedom of contract, or to unify the provisions of private contracts to make them more legally coherent. The legislator may also aim to guide the contract to align with emerging trends(13).

Thus, the legislator always considers the freedom of the parties when regulating certain contracts by relying on rules that are supplementary or interpretive, dealing with the details. On this basis, the provisions of private contracts represent the practical application of the general theory of contracts, without contradicting or undermining it, as their purpose is solely to ensure the best interests of the contracting parties.

Section Two: Private Contract Law: The Special Prevails Over the General

The general principle in private contracts is that they should align with the provisions of the general theory of contracts. However, the legislator sometimes allows for exceptions to the general rules, providing specific provisions that deviate from the general principles for certain reasons and considerations related to the nature of each contract or the specific requirements of the transaction and legislative direction(14). According to this, if the provisions of a particular contract conflict with the provisions of the general theory of contracts, such as when a specific rule contradicts a general one, the principle "special prevails over general" applies(15). This means that the specific rule applies only to the situation it addresses, without extending to other cases, while the general rule continues to apply to any situation not covered by the special rule. Essentially, when the legislator organizes private contracts, it does not merely apply the rules of the general theory of contracts but sometimes departs from them for specific reasons related to the contract itself. Certainly, many of these justifications are related to public policy(16), where the inclusion of specific provisions becomes necessary, and the applicable rules differ significantly from those derived from the general principles.

Some prominent examples of this include:

1.The Requirement for Formality in the Sale Contract:

The general principle is that the will alone is sufficient to create legal acts, and there is no need for a specific formality according to the principle of consensuality. Thus, a sale contract is generally a consensual contract that follows the general rules of contract law. However, the legislator has introduced a special provision for contracts involving the sale of real estate, where Article 324 bis 1 of the Civil Code requires a fourth element for the validity of the sale: the formal requirement. This requires the will to be expressed in a formal, official form, under penalty of absolute nullity of the contract. In addition, Article 793 of the Civil Code imposes an indirect formality, requiring the completion of real estate registration procedures.

2.The Case of a Sale by a Person with a Fatal Illness: The general rule is that a person is free to enter into transactions at any time, but this freedom is sometimes restricted, especially if it is proven that the person entered into a transaction under the influence of a fatal illness. According to Articles 408 and 409 of the Civil Code, a transaction made by such a person to one of their heirs is invalid unless confirmed by the other heirs, while a transaction made with a third party is subject to annulment. This shows that this rule is an exception that requires exceptional solutions(17), as it does not adhere to the general principles of contract law.

From this, it can be concluded that the legislator takes into account the specific characteristics of each contract. Initially, the rules of the general theory of contracts are applied, followed by the specific provisions for each type of contract, which are often practical applications of the general principles. However, when the contract in question has a particularity—often related to public policy—the legislator seeks to isolate this exceptional case with a specific rule that requires exceptional solutions tailored to both the contract theory and the nature of the transaction.

The legislator's goal in organizing contracts in this way is to simplify matters for the contracting parties and even for the judge, ensuring that they are aware of which provisions apply to each contract in order of priority. In the first place, the specific provisions provided by the legislator for the particular contract must be applied. If no specific provisions exist, then the provisions from the general theory of contracts must be applied. In all cases, whether the provisions align with or deviate from the general principles, they can only be considered an application of the general theory of contracts.

Chapter Two: Private Contract Law as a Renewal of General Principles:

As a result of the industrial and technological revolution, a new phase emerged—the phase of the appearance of special legislation. We found ourselves facing both the general law (the general theory of contracts) on one hand and special legislation (private contract law) on the other. This latter legislation emerged from the idea of the independence of certain contracts (Section One). However, the increasing specialization of contracts led to an explosion of special laws governing these contracts (Section Two).

Section One: The Independence of Some Private Contracts:

The dominance of the principle of freedom of contract is primarily due to economic factors, which fostered individualistic ideas. However, these factors also led to an imbalance between economic powers, particularly due to the crises and economic and social transformations brought about by the industrial revolution. These factors reduced the role of freedom of contract, leading to a separation of freedom from justice in contracts, causing the concept of equal rights inherent in contractual ideas to fade.

During this period, some private contracts transitioned to their own specific legislation, no longer simply aiming to assist both parties but rather to protect the weaker party in the contract. This required a renewal of the methods and foundations for organizing private contracts. Legislators became more focused on granting the weaker contracting party certain minimum rights that could not be waived or infringed upon19).

For example, the legislator in labor law and insurance law emphasizes providing various rights to the weaker party, such as the employee or the insured person, as legal guarantees in exchange for imposing strict obligations on the employer or the insurance company, depending on the situation, to ensure actual equality as much as possible. Therefore, the development in the field of contracts shifted toward issuing mandatory laws of public policy, not just supplementary to the will of the contracting parties, with the legislator almost exclusively regulating certain contracts. This is called legal framing through the mandatory rules of public policy, which provide workers with a range of guarantees that strengthen their position relative to the employer. These rules cannot be violated by the parties. Consequently, the role of the state was no longer limited to maintaining order in society but extended to an active role in the economic and social life, directing it. An example of this would be :

First: Regulation of the Employment Contract

The legislator's focus on regulating the employment contract has had a clear impact on the theory of contracts. This contractual relationship, which is based on a relationship of subordination, fundamentally involves an imbalance of power20). Despite the importance of the contractual aspect of this relationship, its organizational side has dominated, so that the employment contract is no longer governed by the freedom of contract. It no longer operates under the principle of "the law of the contract" as per Article 106 of the Civil Code. Instead, it is governed by rules that protect the weaker party—the employee—against the abuse of power by the employer, who exploits their economic position to impose conditions on workers. The legislator intervened to broaden the concept of public policy by establishing mandatory rules that regulate the relationship between employers

and employees, due to the disparity in their legal positions, all within the framework of social public policy. This intervention has aimed to define the rights and obligations of the parties, focusing more on the rights and interests of the employee. For example, the legislator has set the minimum guaranteed national wage, the maximum working hours, weekly rest, annual holidays, leave for illness and maternity, and the resolution of individual and collective labor disputes.

As a result, the employment contract has evolved from a private contract to an independent branch with its own legislation, namely Law 90-11, which has been amended and supplemented. This indicates that the legislator, in this stage, did not organize the employment contract within the Civil Code. However, it is important to note that this mandatory regulation of the employment contract does not negate the role of free will as the basis of the contract. The goal of legislative intervention is not to violate contractual freedom.

What can be concluded is that the role of free will in the employment contract has been reduced to merely the acceptance of the contract, whether or not the employment relationship will exist. It is a contract in which contractual will is limited but not eliminated, because free will is the source of all contractual obligations and cannot be entirely dispensed with. In contrast, regulatory will has expanded because the law directs this will due to the lack of actual equality between the parties.

Second: Regulation of the Insurance Contract

Initially, the legislator addressed the insurance contract within the Civil Code through Articles 619 to 643, which were derived from Egyptian law, thus subjecting it to the general principles of freedom of contract. However, over time, many of these provisions were repealed, as they required special legislation due to the unique characteristics of the insurance contract(21). This was due, on one hand, to its inherent imbalance, which conflicts with the principles of equality and freedom found in the Civil Code(22), as established by Law 80-07 concerning insurance (now repealed). Economic and social conditions had made the contract unbalanced, with the insurer, as the stronger party, having control over the terms of the contract. The insured party, as the weaker party, had little choice but to accept the pre-established terms imposed by the insurer without negotiation. In this situation, the will of the insured has no role in forming the insurance relationship, except in choosing the insurer. The stark disparity between the contracting parties, particularly in terms of economic power and technical and legal knowledge, suggests that this is a contract of adhesion(23).

Given that the insurance relationship combines both economic and social dimensions on one hand, and utilitarian and humanitarian aspects on the other, the legislator intervened to regulate the insurance contract through mandatory provisions as part of its protective role. The aim was to protect the weaker party from the stronger party, who imposes harsh and pre-set conditions, as well as to ensure that the insurance contract fulfills its social function—organizing cooperation among insured parties exposed to common risks by contributing their shares in the service of the national economy. This was done under Ordinance 95-07, which attempted to provide legal, administrative, and judicial protection throughout all stages of the insurance contract to restore contractual balance.

Additionally, the legislator now mandates the conclusion of certain contracts, reflecting the increased state intervention in this field, in line with contemporary realities. One prominent example is the mandatory vehicle insurance contract under Ordinance 74-15(24), which requires car insurance and a compensation system for damages. These contractual relationships are imposed and not freely negotiated, reflecting the realities of the situation. It is impossible to abandon these models due to their advantages in various aspects(25). However, in contrast, it is crucial for the legislator to address any imbalances within this framework in line with the concept of contractual justice.

Second Section: From Private Contracts to Specialized Contracts

The Algerian legal landscape in the 1990s and beyond was marked by the issuance of an important legislative arsenal, especially in the field of contracts, due to the scientific, technological, and societal developments that took place. Private contract law was particularly affected by these developments, especially after the emergence of different categories of actors. There was a clear distinction between professionals, as the strong party, and consumers, as the weak party. The aim of legal provisions in this area was no longer limited to protecting the individual interests of the weaker party, but rather aimed at protecting vulnerable groups in society, addressing collective interests within the framework of protective public policy.

Several factors contributed to the fragmentation of contract law, traditionally viewed as the general law, most notably:

- **Economic and Social Development**: The country experienced an increasing economic momentum, accompanied by an expanding role of the state and its intervention in various fields, particularly those requiring oversight, guidance, and management beyond individual activity. This was necessary to address economic inequalities between parties, a necessity brought about by societal progress, which ultimately led to the obligatory need for reform and a reconsideration of the general provisions of contract law.

- **Issuance of Mandatory Laws**: These laws adopted the concept of "directed contracts," without distinguishing between protective and guiding public policy(26) (economic public policy(27). Their aim was to protect weaker groups and develop the national economy. At the same time, laws related to economic public policy multiplied due to the increasing scope of their concerns. On the one hand, these laws aim to protect the greater public interest, particularly in areas that require societal guidance and management.

- **Decline of Classical Principles and Traditional Foundations of Contract Law**: New principles have emerged that oppose those traditionally accepted under individualism. The principle of the freedom of contract has receded, particularly the principle of consent, which has been replaced by a new emphasis on formality(28).

Similarly, the principle of contractual freedom has diminished due to the influence of modern legal approaches based on social utility and contractual justice(29. This allows for intervention in the will of the parties, either through legislative or judicial intervention, thus replacing the will of the parties with that of the legislator or the judge, depending on the case, in order to achieve utility and enforce balance and contractual justice.

Thus, in the case of contract fragmentation, the legislator had to adopt a new approach based on new considerations that contradict the principles of the general theory of contracts, as these new principles have emerged with a completely different philosophy from that of civil law. Unlike the latter, which is considered neutral and rooted in Latin legal traditions, the current private contract law is biased, as it was created by the legislator to address inequality.

Since private contract law has indeed contributed to the creation of new principles unknown to the general theory of contracts, it is clear that the legislator has attempted to renew these concepts. For example, in Article 3/4 of Law 04-02,(30) a new definition of the contract is introduced. If we compare the early practice of contracting with the current contractual practices, we can say that the concept of contracting has changed due to its philosophical background. The traditional concept of a contract no longer applies as it once did; it has become an economic and financial tool(31). The legislator, in this article, limited the protection to adhesion contracts, outlining their elements and scope. What can be concluded from this is that the definition in Article 54 of the Civil Code no longer aligns with current realities. The impact of economic developments on contractual practices suggests

that they fall outside the scope of the general theory of contracts(32), which reduces the applicability of its provisions, as they remain confined to classical contract concepts.

In conclusion, regarding the relationship between private contract law and the general law of contracts at this particular stage, it can be said that it represents a renewal of the general principles of contracts. Unlike the general law of contracts, which is undergoing a noticeable development based on a different philosophy, this signifies new methods and principles that challenge the traditional philosophy of contract law. Therefore, there is a pressing need to reform, renew, and revitalize these principles today.

CONCLUSION:

In conclusion, this study aimed at determining the relationship between private contract law and general contract law has led to the following results:

- The relationship between private contract law and general contract law is governed by the purpose behind the legislator's creation of specific regulations for contracts. It began with the goal of supplementing the will of the contracting parties by applying the general principles of contract theory. Later, the legislator sought to protect the weaker party in certain specific contracts, such as employment and insurance contracts. Eventually, the protection was expanded to include vulnerable groups in specialized contracts, leading to a reform and renewal of the general principles.

- It seems that the application of the general theory of contracts is now limited to simple transactions that do not require any protection from the law. Otherwise, it fails to respond effectively to the realities of today. This is because applying its provisions to current situations could create insurmountable conflicts that would burden the judiciary. In contrast, the provisions of private contracts have proven superior due to the increasing number and spread of specialized contracts.

- Private contract law has adopted a philosophy and approach that diverges from the concept and scope of general contract law.

- The law is a tool for reform and development, and this is the direction that private contract law must follow, provided it is rooted in the Algerian social reality. Relying on reforms adopted by foreign laws can serve as an incentive for countries that follow similar paths to reconsider their legislation and make it more modern.

- The phenomenon of excessive specialization of contracts, leading to an overabundance of specific legislations, has both positive and negative aspects. On the positive side, it has contributed to the emergence of principles that have revitalized the general concepts of contract theory, which should help enrich and reform the general law to create a new contractual world. On the negative side, it has led to another negative phenomenon, which is the fragmentation and complexity of private contract provisions due to their regulation across different levels.

- The debate among legal scholars regarding the abolition or persistence of contract law does not lead to a solution for managing the impact of economic transformations on contracts. Not all provisions of contract law are ineffective or obsolete; they should be adapted to incorporate the philosophy of modern private legislation.

Finally, it can be said that while the task of reforming and renewing contract law may seem difficult, it is not impossible. This serves as a strong motivation for prominent civil law scholars, judges, and specialized lawyers to explore within the provisions of contract law:

- The rules that should remain.

- The rules that have become outdated and should be abolished, such as the requirement of a cause.

- The provisions that are inadequate and need to be developed, such as the defects in consent.

- The incomplete provisions, in order to legislate for them, for example, by codifying what has been developed by the courts and scholars, through continuous updates to stay in line with new realities.

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