JUDICIAL GUARDIANSHIP OVER THE CONTRACT (COMPARATIVE STUDY)

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Introduction:

According to Thomas Hobbes, a contract is defined as the mutual assignment of rights; therefore, can a contract between two parties be canceled without transferring the power to terminate the law in its broadest sense? This introduction must be separated into the following paragraphs in order to investigate this idea:

First, the core of the study concept:

With the expansion of the judiciary's authority to supervise contracts to the extent that it can be said that the judicial termination of a contract of its own volition, in accordance with the discretionary power granted to it by the legislator, has come to intersect with the well-established rule that "the contract is the law of the contracting parties" for what is known as the rule of "the contract is the law of the parties." The violation of this concept by the court, as well as by a large number of civilians, posed major threats to this principle. Among these abuses is the concept of contract termination by others. By third party, we mean a person who did not sign the contract and so has nothing to do with it, regardless of whether he is a foreign third party, a familial third party, or a third party with ties to the contracting party. This shows that the law places it in the hands of other parties, and here is an express legal phrase allowing him to void a contract to which he was not a party. And when the law approves this method, it is because of a moral concern.

The law instructs the court by prioritizing one interest above another in an effort to control how all social groupings interact with one another. They didn't want to give him the power to end their contract with their consent and choice because this is considered annulment by third parties as one aspect of interference in the contract against the parties' will, which constitutes judicial guardianship over the contract and results in its dissolution.

Second, the significance of the study is as follows:

What adds to the significance of the research is the current state of disagreement about whether the law can intervene with contracts to the point where it allows the judiciary to void them without the parties' consent. This controversy exists at a time when the judiciary's and the law's roles in clearly defining the contract's legal framework are not in dispute. As a result, the research is crucial since it aims to clarify the disagreement.

In the process of weeding out the contract of any flaws that could exist within it and perhaps even rendering it unenforceable to the degree that it is subject to public order and public morality. As a result, the reason for this relevance is that it is necessary to declare the jurisprudential view that is backed by the applications that support it in terms of assessing the judicial guardianship over the contract and its capacity to put things back where they belong.

Third: Research difficulty:

This issue revolves around a specific central point, which is: when the law regulated the general framework of the contract from its inception to its termination, it was motivated by a shared objective, namely to regulate and reform the terms, conditions, and obligations of the contracting parties and to ensure the stability of financial transactions.

Is it therefore proper for the law to desire to permit the court is able to repeal it rather than dealing with its problem. The courts will transfer the crisis to it and undermine its stability if anything endangers its stability and the emergency that has developed during its execution.

Fourthly: Study questions:

This study seeks to address the following key question: What legal authority did the court base its decision to nullify the contract on? In other words, have the revised provisions of the civil law diverged from the contract law's axioms, therefore permitting the concept of annulment from beyond the scope of the contract? This question generates a number of sub-questions, which are listed below.

1- Is the rule of the contract, the law of the parties to the contract, now subject to judicial oversight?

2- Is the permissibility of annulment by third parties a confirmation of the contract's crisis, which has been extensively explored in French law?

3- Does third-party annulment represent a legal intrusion into the contract system?

3-What is the definition of contractual guardianship? What are its varieties? What are its justifications?

4- Does annulment by third parties violate the idea of the contract's binding force, or is it ready to succumb to the force of the law?

Fifth: Research methodology:

This research relied on the method of the comparative analytical study, as we will scrutinize the legal texts contained in the French, Egyptian, Iraqi and Jordanian civil law, and the texts contained in other private laws and try to evaluate them and indicate the points of disagreement and agreement between them and weighting between them.

Sixthly: search scope:

The objective scope of the research is specified by the civil law of the above-mentioned nations and a few specific laws, under which it is permissible to claim guardianship over contracts and control over their dissolution without the owners' consent. About the personal scope, we will address the notion of third parties in termination, which is the judiciary, which is not regarded a contractual party, at least at the time of contract formation.

Seventh: Design Of the study:

This research will be divided into two sections: the first will examine the notion of judicial guardianship over the contract, while the second will focus on its applications.

The first subject

Judicial[1] guardianship of the contract

Whenever requested, the court takes an active role in causing or preventing annulment. This is only an exercise of his judgment [2]. Unnecessary judicial annulment provides strong support for the concept of judicial guardianship over contracts. When referring to the idea of annulment in the compared statutes, the legislator depends on the "causes" of the violation. Even if the grounds for the violation are plain and obvious, the court will not sign the document. Yet, based on his weight, he may reject the annulment ruling and offer the debtor a judicial grace period. Soft" transfers the

[1] Guardianship in language means sovereignty. Any state prevailing over others. See: Ghareed Sheikh Muhammad, the dictionary of language, grammar and morphology And the Arabs, scientific, philosophical, legal and modern terms, c, 5 without edition, Dar Al-Yazudi Scientific, Jordan, 2021 p.

[2] Mahmoud Mansour, “Payment of renting places”, without a publication, The Arab Library for Printing and Publishing, without a place for publication, 1978, p.173

creditor's contractual power to the court in favor of the debtor [3]. And because the judge may not sign the annulment, despite the fact that the parties to the contract requested it, and his discretionary power in that regard was designated by the legislature, annulment of the contract without a request is permitted as a synonym for the first order.
If the jurisprudence and court in Iraq are inclined against contract termination in the case of violation [4], then the absence of a breach does not justify contract termination; rather, contract termination is forbidden if neither party requested it. This is the conclusion reached by legal jurisprudence in the compared legislation. So how can a court cancel a contract without being requested to do so [5]?

The essence of judicial guardianship over the contract derives in the first instance from the discretionary authority provided to the judge by the legislature, and in the second instance from the legal texts that give priority to the main interest when it clashes with another interest. And we will approach it in two sections, like we did with the second subject.

The second subject
Applications for judicial guardianship on the contract

After demonstrating that the judiciary is in charge of the contract's destiny since the law gave it the authority to terminate contracts without being requested to do so, we will conclude that the judiciary has the authority to unilaterally terminate contracts. It is now necessary to get familiar with this concept's justifications.
The application of judicial guardianship over the contract may be broken into two elements, which we discuss in two separate petitions.
The primary prerequisite
Contract review

If the principle in civil litigation [6]and legal jurisprudence [7] agrees with this concept, the will of the contracting parties should not be overridden; French and German jurisprudence allowed and reversed the matter. It is acceptable for them to alter the contract since its inadmissibility is contingent on its terms being unchanged. And they find their legal foundation in the concept of good faith, in the sense that equality in duties is the ground for contracting. If equality is violated,

[3] Maysam Ghazal, Tyranny over the Contract, PhD thesis, University of Aleppo / Faculty of Law, 2020, p.377

[4] Ali Hussein Manhal, The Theory of Effective Breach of Contract (Comparative Study), PhD thesis, University of Karbala / College of Law, 186, p. 2018

[5] We can refer to this case as judicial tyranny over the contract, and its forms are: The law requires registration as a pillar of The pillars of the contract, but the judiciary has a different view: for example, what was indicated by the ruling of the Federal Court of Cassation that “the contract of Musataha if it is not It is registered in the Real Estate Registration Department in accordance with Article 1266/2 of an Iraqi civil, which is considered a private contract, and it is a long-term lease contract..." See: the aforementioned court ruling No. / 1733 AD / 2008 dated 5/8/2008. Referred to: Hadi Aziz Ali, blog. The Iraqi Civil Judiciary, The Book of Building and Planting on the Land of Others, without edition, Sabah Library for Legal Publications, Baghdad,234 , 2015, and here the will of the parties was directed only to the Musataha contract

[6] Court of Cassation, Civile, Chamber Civile 3, March 18, 2009, 08-11.011, Inedit. Available at: www.legifrance. Gouv.fr.

[7] Dr. Abdul Qadir Al-Far, Dr. Bashar Adnan Malkawi, Sources of Obligation, Sources of Personal Right in Civil Law, Dar 3, ed. Culture for Publishing and Distribution, Amman, 2011, p.127

the foundation of contracting collapses, and it becomes permissible to modify the parameters of a contract that rotate between two contradicting realms, which is consistent with "contingency theory."

As part of his 2016 amendments to the French Civil Code, the French legislator finally chose to include the idea of emergency circumstances into the concept of contract review [8] , which is regarded one of his inventions. In the context of his treatment of the principle, he did not consider it part of the public order, so he permitted the parties to the contract to agree that one of the contracting parties bears the responsibility for the change in circumstances. As a result, he was criticized for organizing the situation while simultaneously reversing it. Its effect is on one party, and this case illustrates the risk of treating this condition to be one of the standard contract terms [9]; he did, however, provide the judge the ability to dissolve the contract if required [10].

And according to the above-mentioned language of Article (1195), if discussions fail or are rejected in the first place, it is acceptable for the contracting parties to ask the court to modify the contract to fit the new conditions. discontinue it. While he or they did not request rescinding the contract, the legislator presumed that he or they wanted that it be modified.

According to the discretionary authority entrusted to him, he is the one who decides on modifications [11]. In Egyptian law, for instance, the judge's authority is limited to amending the contract without annulling it. The modification is intended to restore the onerous obligation to a reasonable degree, either by increasing the corresponding obligation, decreasing the onerous obligation, or by stopping the implementation of the contract during the time range of these circumstances, so that when the conditions are no longer present, the contract returns to its original form [12] . Considering not to create significant damage to the creditor [13].

Regarding the power to terminate the contract, which is a violation of the norms of the theory of emergency circumstances, it was determined that this was necessary to maintain the contract and restore its financial equilibrium. It is not nullified [14]

As for the individual who asserts that continuous execution contracts, which are naturally ended and cannot be retracted, are the subject matter of the theory of emergency conditions:[15], unless

[8] Bruno Dondero, the reforme of the reforme of the droit des contrats, mise a day du 12 oct. 2017: In the end of the article.

[9]Dr. Muhammad Hassan Qassem, Civil Law, Obligations, Sources, Contract Vol. 2, 1, Al-Halabi Human Rights Publications, Beirut, 90, p. 2018

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[10] Notice the text of Article (1195) of the French codification, as the Egyptian legislator dealt with the theory of emergency circumstances in Article (147/2) Egyptian Civil, and the Iraqi legislator dealt with it in Article (146) Iraqi Civil, and the Jordanian Civil Code dealt with it in Article (205). And all of them did not give the judge the power to annul without a request, and all of them made it one of the rules related to public order and it is not permissible to violate it.

[11] In this regard, consider the ruling of the Iraqi Federal Court of Cassation No. (/230 Exceptional Circumstances/) 2007 on 20/6/2007. Available. On the official website of the Supreme Judicial Council: www.hjc.iq, seen on 11/12/2022.

[12] Dr. Anwar Sultan, Brief in the General Theory of Obligations, Sources of Obligation, without edition, University Press, Egypt, 1998, p. 1972, p. 57. In French jurisprudence, see: Guillaume Lacroix, L'adaptation du contrat aux changes de circumstances, Année university, 2015, p. 9. The Iraqi judiciary proceeded at the same pace. See: Federal Court of Cassation Judgment No. (176/First Civil on 13/9/1989). Referred to: Dr. Awad Hussein Yassin Al-Obeidi, Interpretation of Legal Texts by Following the Legislative Wisdom of the Text, 1st Edition, Center Al Arabi for Publishing and Distribution, Egypt, 2019, p.9

[13]Dr. Amjad Muhammad Mansour, previous source, p.176

[14] (Our professor, Dr. Abdul-Mahdi Kazem Nasser, Economics in Dissolution of the Contract (Comparative Study), PhD thesis, University of Karbala / College of Law, 2017, p.124

the agreement additionally stipulates that it applies to immediate contracts with delayed execution, such as installment sales [16]
In summary, the fact that the legislator allowed the judge the power of contractual review gave him disproportionate authority over the contract, which a tendency in the law related to his being a third party to the deal [17]. If the parties to the contract wanted to modify it but did not ask for its termination, then their will did not demand the contract's termination, and "without the will, it is impossible to discuss the contract" [18].

Thus, the court was presented with a torrent of objections directed at the French legislator in this respect, including the termination of the contract outside the circle of its participants, which opened the door to a thorough evaluation of the deal.
At a period when Arab civil law does not confer the same power on the judge. This does not imply that the judge's authority of rescinding is withheld on the basis of emergency circumstances.
Rather, we mean that the court has the authority to terminate the contract even if the parties to the contract simply sought to change its terms and intended to retain it. [19]

The second prerequisite
Union of Occupants or Union of Owners [20]

The Owners Association has been founded to oversee the management of the floors and apartments [21] in the floors and flats. And the Egyptian Building Law [22] No. (119) for 2008 allowed non-contractors to terminate the contract in breach of the contract norm, the law of the contractual parties.

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[15] Dr. Amjad Muhammad Mansour, The General Theory of Obligations, Sources of Obligation, 1st Edition, Dar Al Thaqafa for Publishing and Distribution, Amman, 2009, 174. p.

[16] Fadel Shaker Al-Nuaimi, Theory of Emergency Conditions between Sharia and Law, without edition, Dar Al-Jahiz, Baghdad, 119.1969, p.

[17] Aynes L., Le juge et le contrat : nouveaux rôles ?, essay, available at: www.labaselextenso.fr.. Also: Munira Jerboua, Maintaining the contract between the will of the parties and the authority of the judge, a research published in the Tabna Journal of Studies
Academic Scientific, Volume (4), Issue (1), 2021, p.264

[18] Yasser Ahmed Kamel Al-Sairafi, The Role of the Judge in Formation of the Contract, Dar Al-Nahda Al-Arabiya, Egypt, 2000, p.8

[19] Dr.. Iqbal Mubader Nayef, The Stronger Impact of the Contract (Comparative Study), PhD thesis, El Alamein Institute for Graduate Studies, 2022, p.5
[20] It is defined as “an association of all owners of floors and apartments in a single building that was formed for the purpose of obtaining a material profit, and this purpose is to manage the common parts of the building for the benefit of all members.” See: Muhammad Hamid Mahmoud, The Legal System of the Owners’ Union and the Union Occupants, Journal of Legal and Political Sciences, Volume (6), Issue (1), 2017, p. 303 et seq.

[21] Common parts are defined as: parts of the property that the legislator imposed the participation of all or some of the owners in, or parts that have been allocated to be shared,
The second section is one of the divisions of ownership of floors and apartments in addition to the private sections.” See: Jamal Abd Kazem Haj Yassin, The Legal System for Shared Parts of Ownership of Storeys and Apartments (Comparative Study), PhD thesis, University of Karbala / College of Law, 2017, p.36

[22] We will first discuss the position of Egyptian law as the pioneer in regulating this paragraph without being bound by the seniority of the French law. about him.

Court found that the union of the residents may cancel the contract despite not being a party to the lease agreement between the landlord and renter. The Egyptian law has established a specific consequence for non-payment of subscriptions by the tenant to the union of occupants; if the tenant fails to pay the subscriptions, obligations, and expenses owed to the union, or even if he fails to pay a portion of them, the occupants union has the right to evict the tenant [23].
This result is contrary to the usual, since eviction for nonpayment of rent is normally demonstrated to the lessor in his role as a contracting party
[24]nevertheless, the statute granted the union the power to abandon. The French lawmaker [25], the Iraqi legislator [26] and the Jordanian legislator [27] did not achieve the same result as the Egyptian legislator In this instance, as soon as the issue reaches the Egyptian court, he will decide on rescinding the contract, even though he was not obligated to do so under the Egyptian text.

Conclusion

completing our research titled "Jurisdiction over the contract: A Comparative Study," we attempt to summarize the most significant results in the two paragraphs below.

At first: Results:

They are summarized as follows:

1. We concluded that the judiciary is involved in limiting the principle of the authority of the will, despite the fact that the law stipulates it, and that this involvement in annulment is only the result of the law allowing the judiciary to annul the contract in order to achieve a particular interest that it evaluates.

[23] Article (87) of the Egyptian Building Law stipulates that: "In all cases, non-payment of all or some of the aforementioned subscriptions, obligations, and expenses shall have legal effects resulting from non-payment of the rent."

[24] Ahmed bin Ali bin Muhammad Al-Hamidi Al-Saadi, The role of the non-contractor in the implementation of the contract, PhD thesis, Ain Shams University / Faculty of Law, 2014, p.439

[25] Where the French legislator decided another important guarantee in the event of non-payment of contributions by the member, which is a mortgage report on the part of this member-partner. Five years from the date the subscription is due, otherwise the debts remain ordinary, unsecured by a mortgage on the share of the debtor owner. See: the text of Article (19/2, 4) of the Shared Ownership Law No. 557 of 1965 before the amendment, but this article was deleted according to Amendment No. 1104 of 2021 and the matter was limited to considering all subscriptions due immediately, and the president of the association may take legal measures to reserve and sell Most apartment.

[26] Article (9) of the Law Regulating Ownership of Storeys and Apartments in Buildings No. (61) of 2001 published in the Iraqi Al-Waqa'iyyah Newspaper No. (3860) on 8/1/2001 did not include a text similar to the Egyptian text, and the Real Estate Registration Law No. (43) did not include) for the year 1971, a text similar to the Egyptian text as well. However, Real Estate Registration Instructions No. (4) of 1972 indicated how to manage common parts in floors and apartments in Article (12) thereof, and despite that, there is no similar text even in these instructions. See for more: Mustafa Majeed, Explanation of the Real Estate Registration Law, Part 3, without edition, Al-Atak for the Book Industry, Cairo, 1979, p. 337.

[27] The Jordanian legislator organized it in a different way from the Egyptian text in Article (16) of the Jordanian Law on Ownership of Storeys and Apartments No. (25) of 1968, which was repealed, as follows: "If the owner does not pay his share of the joint expenses or does not fulfill his obligations and commitments towards the owners' association despite the warning addressed to them." Through the notary public, the warning is considered as a written document. The director of the association has the right, after (15) days have passed since the date of notification of the warning, to review the salaried department and request the collection of those expenses from that owner in accordance with the provisions of the salaried employees' law.

2. We have reached the conclusion that the law has allowed third parties to the contract the legal text that authorizes him to cancel the contract to which he is not a party.
3. We have reached the conclusion that the state may occasionally compel a contract, and this compulsion may be a method of forcefully terminating the contract from the parties' perspective, as is the case with appropriation for the public good. This does not imply that coercion is the same coercion that causes a contract to be defective and suspended.
4. We concluded that the judiciary has the ability to terminate the contract based on the discretionary authority granted to it in the face of emergency circumstances, but the case of annulment arises without a request if the party affected by the emergency situation submitted a request to modify the contract, not to terminate it, and there is a distinction between the two matters. Then, petitions for annulment by third parties are not confined to the legal language that permits annulment, but rather annulment may occur at the parties' discretion via third parties.
5. We were unable to locate a legislative or judicial definition of the obligatory termination of a contract; thus, we describe it as: "the legal process through which a third party has the option to terminate a contract to which he was not a party in line with what the legislature specifies." It contrasts from rescission, which results in the impossibility of carrying out the duty for whatever reason. Rather, it approximates it by making the commitment impossible while simultaneously giving others the option of rescinding, such that the latter have the right to rescind without passing via the will of the two contracting parties.

Second: Proposals:

We suggest the following to the beneficiaries of this research:

1- Inclusion of a text in Iraqi law that allows the Owners' Association to terminate the contract if the tenant participates in paying the association's subscriptions, to be added to Law No. 61 of 2001 regulating the ownership of floors and apartments and read as follows:

"Failure to pay the subscriptions, obligations, or expenses due from the tenant to the Owners' Association shall have the consequences of non-payment of the rent."

2- In order not to exclude the role of civil law in regulating contracting systems, we suggest amending the text of Article (146/1) thereof in order to include the permissibility of termination by third parties in the civil domain and the domain for which a special text is mentioned, and to read as follows:

1- If the contract is executed, it is binding and neither of the two contracting parties may revoke it or amend it except by virtue of a text in this law or in another special law or by mutual consent.

3- We recommend the French legislator to make the provisions of the theory of circumstance contingent on the contract part of the public order by amending text (1195) of the French Civil Code.

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