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The principle of overturning postulates in civil law: Comparative study

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Abstract

The basic rules of law are generally abstract and binding and coupled with a penalty imposed by the public authority on its violators. However, what if that rule does not achieve what is desired because of the rigidity of the text in the face of the technical development and economic openness? In this case, measures are taken to mitigate this deviation in the function of the legal base, including the principle of overturning postulates in civil law. This principle means overturning a situation that has stabilized in legal transactions and judicial surveys and reassuring people of their existence in their dealings because of a realistic need for them.

Keywords; postulates, overturning, the emerging contracts, flexibility, development

1. Introduction

1.1 An overview of the research subject

The rules of law are characterized by relative stability that makes them reversible after the emerging contracts of trans-state, and arrival of the global technology in markets. So, the jurisprudence called for the modernization of the text. Although the civil legislator has developed a kind of flexibility which the judiciary can employ to suit the text to reality. However, that was not enough, and we as researchers will shed light on this problem.

1.2 The importance of research

Legal rules play an important role in the lives of individuals, and sometimes the rule conflicts with the spirit of the law. Therefore, it was necessary to find alternative means to alleviate the stalemate suffered by the legal rule in the face of technical development. One of these means comes the importance of the principle of overturning postulates.

1.3 The problem of research

The problem is to find the meaning of the postulates and to reach the manner and conditions in which they are reversed in order to determine the practical applications of them. This is in order to reach the conclusion whether this principle in question exists in limited or various ways.

1.4 Research methodology and structure:

In this study, we adopted the inductive approach by analyzing the texts of the law, the opinions of jurists, and comparing them with each other and in several axes.

2. The concept of the principle of overturning postulates

If all legal rules are binding, this does not mean that they are on the same degree of obligation. Hence, this underlies the importance of researching their definition and showing their advantages, which give them the status of reversing of postulates, nothing else.

2.1 Defining the principle of overturning postulates in law

The definition of overturning postulates requires us to identify them and distinguish them from other cases and as follows:

2.1.1 Defining the principle of overturning postulates

In language, it means against the law, which is litigation, overturning and annulment. For

example: ‘overturning the ‘, i.e., issuing a judicial ruling to annul an earlier ruling and declaring invalid. Another example: ‘the order and so on will be overturned': nullification after its ruling. Another example ‘the abrogation of the treaty’ , which means declaring it annulled. Another example (revoking loyalty and obedience) i.e. any rebellion against the legitimate authority (Al-Razi, 1981, p. 458; Ibn Manzur, 1990, p. 429).

Postulates in a language: this word means axiom that does not need proof or persuasion. Postulates are the established facts or the priorities in every matter or axioms in it (Mustafa *et al.*, 1993, p. 116).

The term "reversing postulates" as a common term is not expressly defined. However, the conventional meaning of it is: a method of appeal in which the appellant asks the judge to change the sentence imposed to another one that differs from the first ruling in accordance with the different circumstances and conditions (Anqari, 2001, p. 33).

As for postulates, it is one of the legal terms that were borrowed from philosophy. In philosophy, it is one of the most important peculiarities of formal logic, or logic the perceptions of which based on pure reason. The mind directly admits the existence of rational primary axioms. Were it not for the postulates, the value of rational arguments and the reasons for proof would be meaningless. This is because they are the basis upon which logic is based. There is reliance on postulates in every scientific or social theory so that it is the basis for developing premises, then hypotheses, and then discussion in order to reach the conclusion (Al-Nashar, 2017, p. 190).

Jurisprudence, legislation and the judiciary have provided phrases that approach the meaning of the term "reversal of postulates", which is the case in the law. Article 5 of the Iraqi Civil Code No. 48 of 1951 stipulates that: (the change of rulings are not denied as time changes) i.e. the possibility of overturning and changing certain rulings if circumstances change as the time changes. The provisions of the Iraqi Civil Code, whether general or special, are not fixed but are subject to change and development according to the legal development in line with economic or technical progress.

As for the jurisprudence, it is noted that the objective theory of liability that assumes the error and does not require its existence in practice for the establishment of liability (Fayed & Fayed, 2008, p. 12). Also, the rule of possession that was applied to all transfers in the contracts of dependency, some transfers or so-called transfers of a special nature such as the ship and the aircraft are subject to the registration system and can be mortgaged without the transfer of possession of the mortgage. Rather, it is sufficient to register them to confirm the mortgage (Al-Zalami, 2014, p. 37).

It was stated in the jurisprudence that the violation of the material criterion distinguishes between real estate and movable property. This is used to confine real estate to the non-transferability and transferability without damage. In addition, movables alone are no longer subject to this characteristic, but this characteristic has also been transferred to real estate in some cases.

Accordingly, we can deduce a definition for reversing the postulates in the law by saying that it can be defined as: reversing a situation that has been established in legal transactions and the judiciary arenas, and people are reassured about its existence in their dealings because of the existence of a realistic need that resulted from the technical and economic development that has taken place. It may also be a change in a legal rule that has been settled due to a change in the legal state-of-affairs, so the reversal of the postulates came after that ruling was followed for a long time after the circumstances changed.

2.1.2 Characteristics of the principle of reversing postulates in law

From the above we conclude a number of characteristics:

First, it is a principle that responds to a general, abstract and binding social legal rule:

The law is a social phenomenon (Lutfi, 2008, p. 21), but does the situation remain the same if the rule itself is not feasible in the rhythm of the system and the achievement of justice? Will individuals accept obeying a legal rule that is not useful enough for them? Will the punishment imposed by the public authority be enough for its violator? It will certainly not be enough, but

individuals will resort to circumventing the law in order not to bow to it.

From this point of view, the principle of reversing postulates came from the rules that were previously recognized and became insufficient in order to maintain the status of a social legal base that serves society and maintains its stability.

Second: It is an exceptional principle: It is limited to the situation for which it existed, and it reverses the situation that is no longer useful to reality and is not expanded to include everything that may be subject to the legal rule (Manhal, 2017, p. 16).

Third: It is a principle in which there is a departure from the general rules:

Overturning postulates is a departure from the general legal rules adopted by the Iraqi legislature more than half a century ago, and settled on dealings for justice. Also, the periods of appeals related to legality and illegality, a principle that comes with new rules that were not previously known.

From the above, we find that overturning postulates is a principle created by the social need to replace binding legal rules that narrow the handling of rules commensurate with the nature of transactions and keep pace with their development in cases where they require it without expanding the violation of legal rules but dealing with each case according to its own merits.

2.2 Distinguishing suspected legal status

The principle of overturning postulates with other legal situations may be suspected as we will show next.

2.2.1 Distinguishing it from legal ploy

Legal ploy or legal assumption is a system created by the Romans and some of its models still exist in modern laws, including Iraqi civil legislation, such as the assumption of moral personality (Yakin, 1965, p. 63).

The basis of this method is to work to amend the legislation and mitigate it to achieve justice. However, its use as a means of amending legislative texts has become less than its use in the old legislation. This has been in tandem with the growing of the principle of amending laws by copying or explicit and implicit amending. This is done through the parliaments that is playing its role in countries that adopt the principles of democracy and the most prominent work of which is making laws more appropriate to reality by their enactment or amendment (Faraj, 1965, p. 106).

And it is similar to overturning the postulates in that they change the provision of the text. The result of their respective realizations on the fact is to enjoy the rule of law without modifying that rule but rather to benefit from its provisions, with its conditions not applicable to the incident and at the same time, not extending the amendment to that rule that is used from it. The difference is that the legal ploy relates to the making of an untrue description of the incident that is in accordance with the legal rule, while individuals or judges in the matter of overturning the sentence and changing it and putting the legal reasons. Moreover, justifications for that overturning even amount to ascertaining the availability of it in the legal situation. This is in order to change it and overturn it to another ruling.

2.2 2 Distinguishing it from the doctrine of “unforeseen circumstances”

The doctrine of unforeseen circumstances is defined as a set of rules and provisions concerned with dealing with the harmful effects on a person who is disabled and which can result from changes in the circumstances under which the contract was built. Three pillars must be integrated to apply the doctrine of unforeseen circumstances, and these pillars are that there is a contract obligation that is lax to implement and it should be one of the duration contracts or immediate time contracts in which time is an essential element. Another pillar is that it there should be an accident after the conclusion of the contract and before its implementation where the debtor is neither expected nor able to pay it (El-Sanhuri, 1964, p. 705; Sewar, 2003, p. 334; Al-Tarmanini, 1971, p. 21). The debtor should have no hand in its occurrence.

The third pillar relates to the impact of that incident on the contractors, namely, that there is an imbalance in the contract that the obligations are cumbersome for the debtor and threaten him/her with a heavy loss if it is implemented (Al-Dabbagh, 2014, p. 1667).

They are similar in purpose, both are exceptionally applied and are not being expanded, and the objective criterion is the one adopted in both legal situations.

However, the law neither regulated overturning postulates nor showed interest in it. Rather, the principle is derived from the spirit of law and the principles of justice. The legal text was meant to examine the unforeseen circumstances and address their provisions and the status of our pillars and conditions and their impact on the one hand. On the other hand, we find that the scope of the work of the doctrine of unforeseen circumstances is clear and distinct from others, which is the continuing contracts to be implemented and deferred if they are immediate. This is not the same for the principle of overturning postulates.

3. The extent to which the principle of overturning postulates has been achieved in civil law

Since the principle of overturning postulates is one of the principles that is used when needed. So, it was necessary to determine the extent to which it had been achieved by explaining its terms and applications.

3.1 Conditions for fulfilling the principle of overturning postulates

In order for the principle of overturning postulates to be applied, certain conditions must be met and as we will show as follows:

3.1.1 Conditions for the overturned text

Not all legal texts are subject to the principle of overturning postulates as there are some texts that must be followed literally as they are and should not violate other rules because there is no legal justification for overturning them and reversing the sentence to another. We can summarize the conditions relating to the text that is overturned into three conditions and as follows:

1) the rigidity of the text in keeping up with technical development.

2) Not violating public order and public morals (Tareq, 2007, p. 5).

3) It is not suitable for the rules of justice (Tnaghou, 2008, p. 2).

3.1.2 Conditions related to implementation:

1) It should be issued by the judge on the occasion of the interpretation of the text or diligence in which it is contrary to a previous judgment or decision.

When the legislator sets the legal rules and concludes their formulation to be binding on individuals, the legislator in this step deals with cases with high accuracy and professionalism and is influenced by the extent to which these rules are incorporated into society. It becomes difficult for the legislator to single out a specific measurement of all the parts dealt with by these rules. Moreover, the legislator cannot imagine what the situation will develop in the future to establish rules for these situations that arise according to that development. For example, an electronic contract may encounter a range of legal problems. These interalia include proving the electronic bond in terms of the availability of the written bond and the data it contains and the signature of the parties, the multiplicity of copies, the law applicable to international contracts and how it is presented to the court that considers the dispute. In order to deal with such cases, the judge may resort to the interpretation of the text first. Article 3 of Evidence Act 1979 No. 117, as amended, stipulates that ((the judge must use the means of scientific progress in devising judicial evidence).

Under these texts, the legislator has allowed the development and use of other means to expand the jurisdiction of the judge's discretion to use the texts, whether by interpretation, amendment and cassation, or by any other means aimed at expanding the application of legal texts and activating their role. The aim of this is to resolve disputes, achieve the desired justice between litigants and to maintain as much stability as possible in transactions (Abdul-Aal, 1998, p. 6). Among these means granted by the law to the judge are: interpretation and jurisprudence. With regard to interpretation, if the text presented to the judge finds ambiguity, deficiency, material defect, or conflict in the texts, the judge must explain it in order to reach the ruling to be applied in order to resolve the presented dispute. This is a positive means through which the legal rules can be developed, and this solution is close to the case before the judge.

As for jurisprudence, the judge is limited by a scope granted by the legislator and cannot exceed it and act as the copying judgment of the postulated text.

2) The measure should be in the mutual interest of both parties

This is to avoid conflict between them and giving priority to the interest of one individual over another as the ultimate goal of the law is to achieve the interest of individuals. German jurisprudence sees that the contract is the scope in which the conflict of interest is achieved because its parties aim for one goal and that is to achieve the benefit behind the contract. However, this does not mean conflict of interest is necessary as a result of the contract because the main purpose of the contract is to achieve party goals. Therefore, it is a means to achieve the interests of both parties. Hence, overturning in the field of the contract is required to lead to achieving a balance between the interests of the contracting parties (Abdul-Latif, 1997, p. 187), and neither of them may amend the contract by addition, cancellation or exemption except by agreement between them in accordance with Article 145 of the Iraqi Civil Code. In addition, it is necessary that there is good intention in the stage of contractual negotiations. The Paris Court, in its judgment issued on May 23, 1992, defined contractual negotiations as an agreement whereby its parties are obligated to initiate or continue negotiating in good faith the terms of a contract to be concluded in the future (Abu Zayd, 1995, p. 12).

3.2 Applications of the principle of overturning postulates

There are several applications to the principle:

3.2.1 Objective applications

These include overturning the traditional contract in the nominated contracts, the tangible standard of the property, the effective breach of contract, and overturning liability based on the existence of the error and working on this assumption.

1) the traditional contract in the so-called contracts.

The general rule in contracting according to Article (73) of the Iraqi Civil Code stipulates that ((the contract is the link of the offer issued by one of the contracting parties to the acceptance of the other in a way that proves its effect on the contracted upon)). This traditional method of contracting has been invalidated through technical development, which included the confirmation of the contract. It has possible through technical means, where the contract can be done via the Internet, as in Article (10/1) the Iraqi Electronic Signature and Electronic Transactions Law No. (78) of 2012 that ((the contract is the link of the offer issued by one of the contracting parties to the acceptance of the other in a way the effect of which is proven in the contract concluded by electronic means)). This removed the scope of the contract from the traditional methods of concluding the contract, whether in person or in absentia, to a contract through electronic means.

The reversal also included the offer and acceptance, which the general rule referred to in Article (79) of the Iraqi Civil Code "Just as the offer and acceptance are verbally..)). It was appealed by article (18/1) of the Iraqi Electronic Signature Act ((the contract may be offered and accepted by electronic means)).

Thee reversal is based on a combination of e-mail and audio-visual rooms, and that the network is also capable of integrating writing, audio and video. This is in reference to the text of Article (79) that it is permissible to express the will in any form that leaves no room for doubt as to its evidence of the truth of the intention, the absence of paper documents for transactions in e-commerce, where the user can complete the entire commercial transaction without needing to use paper documents. It had a role in reversing the completion of transactions through paper documents, using electronic documents (Ibrahim, 2006, p. 6). The UNCITRAL Model Law defines it in Article 2 as "means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy) as well as the Iraqi Electronic Signature and Electronic Transactions Law in Article (1/10), which defines them as ((edits and documents that are created, merged, stored, sent or received in whole or in part by electronic means, including electronic data exchange or e-mail, telegram, telex or telegraphic copies and bears an electronic signature)).

It was necessary to adopt these documents as evidence of proof. This is because the transactions are completed through it, and this is a violation of the evidence of paper. Moreover, the adoption of the electronic signature in electronic transactions is a violation of the general rules that require signature by hand or thumbprint. As a result, this is what led the Iraqi legislator to issue the electronic signature law, which defined it as ((a personal mark that takes the form of letters, numbers, symbols, signs, sounds, etc., and has a unique character that indicates its identity.

Accordingly, it becomes clear to us that the legislator has violated a rule that has always been one of the accepted rules with another rule due to the technical development that has taken place.

2) Reversing the tangible standard in real estate and movables.

In terms of their stability and movement, things are divided into real estate and movables (Ibn Maajuz, 1990, p. 23). This is what modern laws today, including Iraqi civil law, are moving towards. Article 62 of this law defines the property as: ((Everything that firmly established so that it cannot be moved or converted without damage, including land, building, planting, bridges, dams, mines, and other real estate objects)). “Moveable” is defined as: ((Everything that can be transferred without damage, including money, offers, animals, scales, weights and other movable things). Accordingly, the land, according to this criterion, is at the forefront of real estate. Also considered real estate is everything related to the land by a connection of resolution and stability (Eid, 1979, p. 27). However, if these things lose the status of stability and consistency in the land, they lose accordingly their real estate status. Building rubble and the minerals extracted from it are considered movable from the time of their separation from the earth (Mursi, 2005, p. 12).

At the present time, the tangible criterion for real estate is presented based on the idea that real estate is everything connected to the land in a stable and consistent manner. Because of the technical development, it has become possible to move the property from its place. This will certainly lead to a change in the law governing the property given the change in its character from stability and consistency to movement and instability. In this case, we can measure it on the property according to the outcome, which in turn corresponds to the idea of the immovables by destination. Immovables by destination is an exception to the general origin of the real estate because it is movable and acquires the status of real estate legally. Because of the development in the possibility of transferring, which is an exception, the property is considered an exception to the general origin of the transfer, where it becomes a real estate, given its movable nature, which in turn is based on what it will be like in the future, and this is the violation of the recognized rules.

3) effective breach of contract

Failure to implement contractual obligations is described as a breach of contract. The breach of contract has multiple forms and different types, such as failure to implement, execute or perform in a defective or partial manner. One of the types of breach of contract is the actual breach that occurs on the time of its implementation. Another type is the anticipatory breach that occurs before the predetermined contractual end date (Al-Bakri, 1971, p. 34). The theory of efficient breach of contract has come to say that breach of contract in all its forms and types may be efficient and then must be dealt with in particular and confronted with sanctions commensurate with it. This theory recently emerged based on the data of a school that combines the study of law and economics called the "School of Economic Analysis of Law". This theory violated the general rule of "contract law contractors", which means that the contract derives its strength from the agreement between the parties. The theory of efficient breach of contract is defined as " parties of a contract are allowed to breach a contract and pay damages if doing so is more efficient from the economic point of view than performing under the contract.".

The breach of contract occurred because the committed contractor had found another offer more profitable than the existing contract, or had recalculated it and discovered a deviation in it in relation to the costs the contractor had already estimated to carry out its obligations. The rule is that failure to execute makes the default party responsible to the other party. This is unless the reason of this failure is an external one such as force majeure in which case he/she is exempted

from responsibility (Zaki, 1978, p. 76), or an unforeseen circumstance that gives it the right to request a rebalancing of contractual obligations (Manhal, 2017 , p. 10). Proponents of the theory claim that the breach in these two images is efficient and should not be faced with forcing the debtor into delivery or obliging him/her to pay excessive compensation beyond the creditor's harm in violation of the postulate rule requiring him/her to compensate his/her creditor for the breach (Manhal, 2017, p. 44).

The position of the Iraqi legislator agreeing to this implementation is deduced from Resolution No. (1198) for the year 1977 as regards refusing the transfer of ownership of the sold property. This decision cut off the way for the seller when this assumed the presence of a third party and offered an amount higher than the amount for which he/she sold the property. This was the reason behind the refusal and failure to register the sold property in the Real Estate Registration Department. So, the seller must compensate the buyer, provided that this compensation includes, in addition to the value of the property at the time of sale, the difference of the two allowances at the time of sale and the time of renunciation. This in effect is the theory of effective breach of contract.

3.2.2 Procedural applications

The applications of overturning the postulates have objective applications, as they have procedural applications, namely:

I. Overturning the duration of the appeal

The duration of the appeal against the Civil Arguments Act is fixed. This results in the failure to observe its dates as it is a public order (Nayef, 2017, p. 83) (including article (204) of the Law of Arguments (The period of appeal by way of cassation is thirty days for judgments of the courts of first instance and of cassation, and ten days for the courts of personal status)). However, this period was overturned by the Court of Cassation. The Federal Court of Cassation decided on 4/22/2008 to accept the appeal against a judicial ruling concerning personal status although the deadlines for appeal have passed This was an exception to the general rule which stipulates against the appeal outside the deadlines as it was decided that the appeal is attached to the provisions of the solution and the sanctity of Islamic Sharia. And because these provisions are considered the right of public order under Article (2/130 civil), the appeal, therefore, is considered submitted within the legally and formally accepted period even though it was submitted outside the legal period.

2. Compensation for moral damage in tort liability.

Jurisprudence plays an important role in overturning the postulates, and this was evident in the new jurisprudential interpretation of the text of Article (205) of the Iraqi Civil Code regarding the extent to which the right to compensation for moral damage is transferred, which stipulated in the third paragraph of it (The compensation for moral damage shall not be transferred to others except if its value is determined by virtue of an agreement or final judgment) (Al-Budeiry, 2003, p. 45).

As it is clear from the opinion of jurisprudence in Iraq for its interpretation of this paragraph, the compensation claim that arose as a right of the aggrieved person that this right does not transfer to his/her heirs in the event of his/her death unless the value of the compensation is determined by virtue of an agreement or a final judgment. Adopting this opinion leads to the loss of the right to compensation for moral damage that leads to death because of the severe pain caused by the damage in the event of the death of the aggrieved person. The severe injury leading to death immediately after the injury does not transfer the right of compensation for it to the heirs according to this opinion (Muhammad, 1995, p. 79; Anwar, 2005, p. 56; Tulba, 2005, p. 56).

On the other hand, another opinion (Yousif, 2009, p. 88) goes to the effect that in order to achieve the desired justice, a distinction must be made between two assumptions when looking at the issue of this transfer. These are: either imposing the transfer of compensation between the living by transfer, or imposing the transfer of the compensation claim in the event of the victim’s death to the heirs, as the text of Article (250) in its third paragraph was limited to the first hypothesis rather than the second. Also, there is no restriction on establishing the transfer of the right in the lawsuit for compensation for moral damage to the heirs in the event of the death of the aggrieved person in his/her

inheritance. This is based on the rules of inheritance, like the rest of the rights that are established in the inheritance of the aggrieved in the event of his/her death. Thus, this opinion went against the postulate to another rule in order to achieve the spirit of law and the principles of justice.

3. Mortgaging the tangible transfer without transferring its possession

Mortgaging a movable property without transferring its possession to the mortgage creditor is a type of mortgage on movables that is added to the possession mortgage. However, it differs in its provisions from the possession mortgage, as according to latter the mortgagee moves to the possession of the mortgagee, and this is enough of a guarantee for the creditor that enables him/her to imprison the mortgagee until the debt is repaid (Al-Mudhaffar, 1970, p. 33). However, this mortgage causes harm to the creditor as it deprives him/her of benefiting from the mortgaged money as it is in the possession of the mortgagee throughout the mortgage period. It is often depleted from the credit value of the mortgaged (Salman, 1970). Based on the foregoing, many forms of have appeared for mortgaging some tangible movables without transferring their possession to the mortgagee creditor. Rather, they remain in the possession of the present owner, as is the case in the insurance mortgage on real estate. This is done by legislative texts regulating the provisions of this mortgage in every application, whether in Iraqi or Egyptian law, except that the French Civil Code ordinance No. 346 of 2006 issued on 3/23/2006. This latter ordinance stated the principle of mortgaging movables without transferring its possession to the mortgagee creditor and making it a type of mortgage of movable property in addition to the movable mortgage by transferring its possession to the mortgagee creditor. Both the Iraqi and Egyptian legislators mentioned setting a legal rule within the rules of mortgaging tangible movables that stipulates the possibility of mortgaging movable property under a contract between the two parties to the mortgage, without transferring its possession to the mortgagee creditor. This is executed in a manner that does not conflict with the principle stated in the French Civil Code (Al-Saadi, 2918, p. 34).

The principle of overturning postulates in this case lies in the fact that the movable is not transferred by mortgage from the hand of the mortgagee to the hand of the mortgagor. This stands in contrast to the accepted rule, which requires that the movables be transferred to the hands of the mortgagor and remain under his/her possession until the full debt and expenses are met.

Conclusion.

We have discussed the principle of overturning the postulates in the law, the principle that was not stipulated in a text but rather stemming from the need of the legal reality for it to address the rules that were presented and were no longer sufficient to achieve the goals of the law for which it was established. From our research on this subject we reached a number of results and recommendations, the most important of which can be presented as follows:

First – the results:

1- The cassation is only a response to several factors, the most important of which is technical development versus the rigidity of the legal base. It is not a violation of the law, but rather an application of the rule of changing rulings with the change of time.

2- it is an exceptional principle

Recommendations:

It is hoped that the legislator will amend the civil law in the articles relating to the conclusion of the contract and the contract position in accordance with what is stipulated in the Electronic Signatures Act.

It is also hoped that the legislator will keep up with the development and amend the laws accordingly.

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