



The Effectiveness of Retroactive Effect in Protecting the Legal Positions of Parties to a Voided Contract under Algerian Legislation and Judiciary

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Abstract

This article presents an analytical study of one of the most significant exceptions to the retroactive effect of contract termination, namely the protection of the bona fide "particular successor" (successor à titre particulier). While the general rules require the contracting parties to be restored to their pre-contractual status, the unrestricted application of this retroactive effect often conflicts with the need for transactional stability and the protection of apparent legal positions. The study focuses on clarifying the concept of the "third party" entitled to protection and the fundamental distinction between the universal successor and the particular successor. It further analyzes the legal and philosophical foundations upon which the Algerian legislator has relied in safeguarding acquired rights over both immovable and movable property.

The study concludes that the principle of the relative nature of retroactive effect, grounded in the theory of apparent situations and the criterion of good faith, serves as a safety valve for real estate and commercial credit. In this framework, the interest of the "legal appearance" takes precedence over the "legal reality" whenever the objective and subjective conditions for protection are met.

Keywords: Contract termination, retroactive effect, particular successor, good faith, theory of apparent situations, stability of transactions.

Résumé

Cet article présente une étude analytique de l'une des exceptions les plus importantes à l'effet rétroactif de la résiliation d'un contrat, à savoir la protection du « successeur à titre particulier » de bonne foi. Alors que les règles générales exigent que les parties contractantes soient rétablies dans leur situation antérieure à la conclusion du contrat, l'application sans restriction de cet effet rétroactif entre souvent en conflit avec la nécessité d'assurer la stabilité des transactions et la protection des positions juridiques apparentes. L'étude s'attache à clarifier la notion de « tiers » ayant droit à la protection et la distinction fondamentale entre le successeur universel et le successeur à titre particulier. Elle analyse en outre les fondements juridiques et philosophiques sur lesquels le législateur algérien s'est appuyé pour préserver les droits acquis tant sur les biens immobiliers que sur les biens mobiliers.

L'étude conclut que le principe de la relativité de l'effet rétroactif, fondé sur la théorie des situations apparentes et le critère de la bonne foi, sert de soupape de sécurité pour le crédit immobilier et commercial. Dans ce cadre, l'intérêt de l'« apparence juridique » prime sur la « réalité juridique » dès lors que les conditions objectives et subjectives de protection sont remplies.

Mots-clés : *Résiliation du contrat, effet rétroactif, successeur particulier, bonne foi, théorie des situations apparentes, stabilité des transactions.*



Introduction

The general rule enshrined in Article 106 of the Algerian Civil Code states that "a contract is the law of the contracting parties." However, when a contract is vitiated or its balance is disrupted – whether due to a defect contemporaneous with its formation or one that arises during its performance – the legislator provides mechanisms to terminate this contractual bond. Nullity is declared if an essential element of the contract is missing or if there is a lack of capacity, while rescission applies in cases where consent is flawed or capacity is deficient during formation. In contrast, if the contract is validly formed but an imbalance occurs during performance due to one party's breach of its obligations, termination constitutes the legal sanction for ending the contractual relationship.

The effects of such termination are not confined to the future; rather, they often extend to the past through the retroactive effect. This is a decisive legal tool aimed at erasing what had been agreed upon and attempting to restore the contracting parties to their pre-contractual position. The importance of this topic lies in the law's endeavor the contract both legally and factually, thereby returning the parties to zero point – the status they occupied before entering into the contract. Nevertheless, this endeavor frequently collides with material realities that cannot be erased, such as the passage of time or work that has already been performed.

The retroactive effect is not merely a legal rule; it embodies a legal philosophy that seeks to achieve justice and equilibrium. Upon the extinction of the contract, the legal

positions of the parties shift from that of contracting parties to that of debtor and creditor in respect of restitution. Applying this effect, however, encounters complex practical realities, particularly in contracts involving continuous performance or in cases where specific restitution becomes impossible. This places the legal positions of the parties in a state of instability between the dictates of the law and the imperatives of reality.

The central research problem of this article revolves around a fundamental question: *How does the law strike a balance between the binding force of the contract and the necessity of extinguishing its effects when a defect arises? And does the retroactive effect actually succeed in restoring equilibrium to the legal positions of the contracting parties, or does it encounter practical obstacles that render such protection merely theoretical?*

To address this problem, the study adopts a dual-structured research plan based on the analytical method applied to the provisions of the Algerian Civil Code, while drawing upon established scholarly opinions and judicial precedents in this field. The first section is devoted to the legal force of the retroactive effect in restructuring the positions of the parties, while the second section examines the dilemma of effectiveness and the limits of protection vis-à-vis contractual reality.

1. The Legal Force of the Retroactive Effect in Restructuring the Positions of the Parties

The absence of the binding force of a contract resulting from a judgment of nullity or a decision of termination does not lead merely to the prospective termination of the contractual bond. Rather, it activates an exceptional legal



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guarantee embodied in the retroactive effect. The legal force of this effect manifests in its ability to pierce the barrier of time, erase the contractual past, and restructure the legal positions of the contracting parties by divesting them of the positions they had acquired under the now-extinguished contract. Consequently, the retroactive effect functions as a corrective mechanism designed to eliminate all consequences arising from the agreement and to attempt to restore the parties to their pre-contractual status. This necessitates an examination of its doctrinal and legislative foundations, as well as its vital role in activating the mutual obligation of restitution. The central question addressed in the two subsections is whether the rule requiring the restoration of the parties to their pre-contractual position is absolute or limited.

The first subsection, the doctrinal and legislative foundation of the retroactivity of extinction (nullity and termination), clarifies the nature of the retroactive effect as an inevitable legal consequence of the extinction of the contractual bond, and distinguishes between retroactivity in cases of nullity and retroactivity in cases of termination. The second subsection is dedicated to the effectiveness of the obligation of restitution as a mechanism for readjusting the legal and financial positions of the parties. It examines the enforcement mechanisms employed in restitution, as well as the limits and obstacles that may restrict the practical effectiveness of this mechanism.

1.1. The Doctrinal and Legislative Foundation of the Retroactivity of Extinction (Nullity and Termination)

A true understanding of this retroactivity requires a return to its philosophical roots that justify the restitution of what

has been paid (first branch), followed by an analysis of the nature of the retroactive effect as an inevitable consequence imposed by the logic of the extinction of the contractual bond (second branch). This foundation remains incomplete without distinguishing between the retroactivity of nullity – which is linked to a defect in the formation of the contract – and the retroactivity of termination – which arises as a sanction for breach during the performance stage (third branch). Such a distinction is essential to identify the fundamental differences that subsequently influence the stability of legal positions.

1.1.1. The Doctrinal Foundation of the Philosophy of Extinction and the Restitution of Legal Positions

The idea of contract nullity and its extinction with retroactive effect finds its roots in a system of classical legal principles that do not merely suspend the binding force of the contract but impose the erasure of its past effects as an inevitable sanction for any defect in its formation. This foundation can be traced to the following pillars:

- **First: The Principle of the Autonomy of the Will – Contractual Sovereignty and the Inevitability of Retroactive Effect**

The principle of the autonomy of the will constitutes the deepest philosophical foundation of the general theory of contract. It transcends its procedural character to become an embodiment of the individual's freedom to shape his or her legal universe. This principal rests on two essential pillars: freedom and equality. Freedom serves as the driving force of the voluntary act that creates the contractual bond and defines its effects in accordance with the interests of the



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parties, while legal equality ensures equality of opportunity in a manner that serves the public interest—which is, in essence, the aggregate of individual interests.¹

The effectiveness of the retroactive effect is evident here as the faithful guardian of this philosophy. Since the law protects only free and equal consent, any defect that vitiates it—such as mistake, fraud, duress, or exploitation—or any lack of capacity necessitates stripping the act of all its prior and subsequent effects alike. Accordingly, retroactive effect is not merely a legal sanction; it is a logical necessity for the restructuring of legal positions. When a contract collapses due to a defect in consent, the law requires the erasure of the contractual past and the restitution of everything that was transferred without legal justification, thereby restoring the parties to their original position as though the defective will had never existed. However, this sovereignty is not absolute; it is subject to objective considerations that limit it in order to preserve contractual justice and the stability of transactions, as will be discussed later.

- **Second: The Principle of Legality - Retroactive Effect as a Tool for Purifying the Public Order**

A contract does not derive its binding force solely from the meeting of minds; it also requires compliance with the principle of legality. The law demands that legal acts conform to its imperative rules and to the requirements of public order and morality. If this condition is violated—whether in the subject matter, cause, or due to the lack of capacity of one of

¹ Abd al-Ra'uf Dabbash and Hamlawi Daghish, "The Principle of the Autonomy of the Will in Contracts between Sharia and Law," Article, Journal of Human Sciences, University of Mohamed Khider Biskra, No. 44, June 2016, p. 257.

the parties—the act loses its legal justification and must be declared null.²

In this context, the effectiveness of the retroactive effect emerges as a purifying mechanism for legal positions. The law does not content itself with merely suspending the future effects of an unlawful contract; it actively seeks to eradicate all consequences that arose from it in the past. The legal force of retroactive effect in this setting aims to prevent the stabilization of any material advantage or legal position that originated from a flagrant violation of public order. Consequently, the annulment of the contract with retroactive effect constitutes an essential guarantee of the supremacy of the law, as it erases the unlawful factual situation and restores the parties to their previous position. This affirms that anything built upon a void foundation remains void in the past, present, and future.

- **Third: The Principle of the Protection of Rights - Retroactive Effect as a Guarantee for Restoring Contractual Equilibrium**

The principle of the protection of rights represents the supreme objective that civil law seeks to achieve. It does not stop at merely regulating legal positions but extends to ensuring their stability and safeguarding them against any encroachment or injustice. When a legal act is found to have infringed upon the rights of one of the contracting parties or

² Ali Filali, *Obligations: The General Theory of Contract*, Moufm for Publishing and Distribution, Algiers, 2005, pp. 183 and 192



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to have harmed the public interest, nullity intervenes as both a preventive and a remedial sanction.³

The effectiveness of the retroactive effect is manifested here as a mechanism for redressing injured positions. Full protection of rights cannot be achieved merely by suspending the contract for the future; it necessarily requires the eradication of all financial and legal effects that arose under the extinguished contract. The binding force of the retroactive effect operates by stripping the benefiting party (the one unjustly enriched) of the gains obtained at the expense of the other party. In this way, mutual restitution becomes the essential guarantee that restores rights to their rightful owners and preserves the equilibrium that was disrupted by the defective contract. Thus, the retroactive effect serves as the technical instrument through which the law translates its moral and legal commitment to protecting rights and upholding justice.

1.1.2. The Nature of the Retroactive Effect as an Inevitable Legal Consequence of the Extinction of the Contractual Bond

The nature of the retroactive effect lies in its function as a legal tool for annihilating the contractual bond *ab initio*. It does not merely terminate the contract prospectively but extends to erasing its historical and legal existence from the moment of its conclusion.⁴ This nature is characterized as a

³ Sulayman Marqus, *Al-Wafi fi al-Iltizamāt* (The Comprehensive Treatise on Obligations), Part 2, Theory of Contract and Unilateral Will, 5th ed., Dar al-Manshurat al-Huquqiyya, Lebanon, 2019, p. 248.

⁴ Ali Filali, *op. cit.*, p. 272.

civil sanction aimed at restoring both financial and in-kind equilibrium between the parties, treating the contract as if it had never existed. This, in turn, generates a reciprocal obligation of restitution – i.e., the recovery of everything that was exchanged. Nevertheless, this nature is neither absolute nor mechanical in all circumstances. Rather, it is a flexible one, constrained by the limits of material impossibility (as in contracts of continuous performance) and by the requirements of legal stability to protect the rights of bona fide third parties. Consequently, it functions as a complementary rule serving the will of the law in achieving justice upon the extinction of the contractual bond.

1.1.3. The Distinction Between Retroactivity in Nullity and Retroactivity in Termination

The fundamental distinction between nullity and termination revolves around the nature of the retroactive effect attached to each. In the case of nullity, the retroactive effect reveals that the contract never came into existence in the first place. A judgment of nullity merely declares the non-existence of the contractual bond from the moment of its purported formation due to a defect affecting its essential elements or a flaw in its conditions of validity. In such cases, the contract never acquired any legally cognizable existence.

By contrast, the retroactive effect operates as a constitutive act that brings about the extinction of the contractual bond. Termination applies to a contract that was validly formed and had produced its legal effects, intervening as a sanction for non-performance in order to dissolve that bond with retroactive force.

Despite the apparent similarity in legislative drafting in the Algerian Civil Code between Article 103 (on nullity) and



Article 122 (on termination),⁵ whereby the legislator affirms in both the principle of restoring the contracting parties to their pre-contractual position, the legal basis for this restoration differs markedly. The legislator has introduced specific safeguards that distinguish between nullity and termination, rendering the retroactive effect of nullity stricter and more particularized.

- **First: Distinction Between Termination and Nullity with Regard to the Nature of Restitution (Rule and Exception)**

Article 122 of the Algerian Civil Code regulating termination is drafted in general and concise terms: “If the contract is terminated, the contracting parties shall be restored to the position they occupied before the contract. If this proves impossible, the court may award compensation.” The only exception mentioned is impossibility, which leads to compensation. This reflects the fact that termination dissolves a contract that was initially valid, and its retroactivity aims at remedying the harm resulting from non-performance.

In the case of nullity, under Article 103 of the Algerian Civil Code, retroactivity constitutes the foundational basis for restoring the contracting parties to their pre-contractual position, since the contract is considered to have been stillborn. Algerian jurisprudence has consistently followed this approach, as illustrated in the Supreme Court decision dated 09/07/1989, which stated: “Whereas the trial judges declared the nullity of the company contract pursuant to

⁵ Algerian Civil Code, promulgated by Ordinance No. 75-58 dated 20 Ramadan 1395 corresponding to 26 September 1975, Judicial Journal No. 78 dated 30 September 1975, as amended and supplemented.

Article 545 of the Commercial Code for failure to execute it in notarial form, they were required to draw all the consequences of this nullity with a view to restoring the two parties to their previous position, in accordance with Article 103 of the Civil Code.”⁶

The legislator did not confine itself to establishing the principle of restitution but supplemented it with exceptional restrictions (paragraphs 2 and 3)⁷ that are absent in the provisions on termination. This indicates that the retroactivity of nullity is closely linked to public order and the protection of certain legal positions (such as those of persons lacking capacity and bona fide parties).

Accordingly, it may be stated that while termination aims at liquidating the legal positions arising from a valid contract whose performance has faltered, nullity – under Article 103 – assumes a punitive character. In matters of nullity, the legislator may sacrifice the principle of full restitution if such restitution would enable a party acting in bad faith to recover what was paid in pursuit of an unlawful purpose. However, if the party acted in good faith, Article 418/2⁸ of the Civil Code permits recovery and treats the contract as null only

⁶ Supreme Court Decision No. 58829 dated 09/07/1989, Judicial Journal, No. 1 of 1991, p. 79.

⁷ Article 103 of the Algerian Civil Code: “The contracting parties shall be restored to the position they occupied before the contract in the event of nullity or annulment of the contract. If this is impossible, the court may award equivalent compensation. However, a person lacking capacity, if the contract is annulled on grounds of his lack of capacity, shall only be obliged to return the benefit he derived from the performance of the contract. A person who caused the illegality of the contract or who was aware of it shall be deprived of restitution in the event of nullity.”

⁸ Article 418(2): “However, the partners may not invoke this nullity against third parties, and it shall have no effect between them except from the day one of them seeks nullity.”



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from the date of the claim for nullity. This is confirmed by the Algerian Supreme Court decision of 15/06/1985, which held: “The Court relied on Article 481 of the Civil Code, which requires contracts of partnership to be in writing under penalty of nullity. However, this article concerns the formal requirements for the partnership contract, whereas the partnership may in fact exist between the parties without registration. Moreover, nullity may not be invoked against third parties, and between the partners it takes effect only from the day one of them seeks nullity. It follows from this provision that the de facto partnership produces its effects until the claim for nullity is made. Consequently, the creditor is entitled to request the settlement of accounts and the return of the expenses incurred in establishing the partnership...”⁹

- **Second: Distinction with Regard to the Scope of Restitution**

The general rule is restitution. However, Article 103 of the Algerian Civil Code imposes a limitation on the retroactive effect in favor of a person lacking capacity in cases of nullity. When a contract is declared null due to lack of capacity, the incapacitated party is not required to make full restitution of everything received as a complete retroactive effect; rather, he or she is obliged to return only the benefit derived from the performance of the contract. On the other hand, the party who knew of the illegality or caused it is deprived of the right to recover what was paid, as a deterrent in protection of public morality. This represents a clear departure from the rule of restoring the parties to their previous position, aimed at

⁹ Decision No. 34400 dated 15/06/1989, Judicial Journal, No. 4 of 1989, p. 141.

safeguarding both the incapacitated person and society at large.

In contrast, no equivalent restriction exists under Article 122 of the Algerian Civil Code governing termination.¹⁰ Restitution here is an absolute right for both parties; neither the creditor nor the debtor is deprived of it. Moreover, compensation may be added for the injured party in cases of breach, as affirmed by Article 199 of the Algerian Civil Code¹¹ and the Supreme Court decision dated 21/03/1994,¹² which stated: “In synallagmatic contracts, if one of the contracting parties fails to perform his obligation, the other party, after putting the debtor on notice, may demand either performance of the contract or its termination, together with compensation in both cases if the circumstances so require. Accordingly, a judgment to this effect constitutes a sound application of the law. Failure to put the opposing party on notice when he breaches the terms of the contract keeps the contract in force between the parties, because putting the debtor—who has failed to perform—on notice is mandatory and not discretionary, in order to allow a claim for either performance or termination.”

¹⁰ Article 122 of the Algerian Civil Code: “If the contract is terminated, the contracting parties shall be restored to the position they occupied before the contract. If this is impossible, the court may award compensation.”

¹¹ Article 119 of the Algerian Civil Code: “In synallagmatic contracts, if one of the contracting parties fails to perform his obligation, the other party, after putting the debtor on notice, may demand either performance of the contract or its termination, together with compensation in both cases if the circumstances so require. The judge may grant the debtor a grace period according to the circumstances and may refuse termination if what has not been performed is of minor importance in relation to the entire obligation.”

¹² Supreme Court Decision No. 115182 dated 21/03/1994, Judicial Journal, No. 2 of 1994, p. 167.



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Conversely, the party responsible for the harm does not receive compensation upon termination by operation of law. This was confirmed by the Supreme Court decision dated 24/02/1990,¹³ which held: "It is established in law that a judgment terminating a lease contract due to the tenant's breach of obligations constitutes termination by operation of law and does not grant the tenant the right to compensation for eviction."

- **Third: Distinction with Regard to the Sanction and Deterrence of the Party Responsible for Illegality**

The final paragraph of Article 103 of the Algerian Civil Code establishes a strict moral and legal rule in matters of nullity: the deprivation of restitution for the person who caused the illegality of the contract or who was aware of it. For instance, a party who contracts for an object contrary to public morality is barred from recovering what he has paid. Here, the retroactive effect ceases to operate as a form of punishment against the wrongdoer.

In contrast, no such deprivation is found in Article 122 of the Algerian Civil Code governing termination. This is because the cause of termination is non-performance rather than illegality. The contracting party who fails to perform his obligation is liable for damages but is not deprived of recovering what he has given if the contract is terminated. This outcome is justified by the principle prohibiting unjust enrichment at the expense of others.

¹³ Supreme Court Decision No. 65916 dated 24/02/1990, Judicial Journal, No. 2 of 1993, p. 98.

- **Fourth: Distinction with Regard to the Discretionary Power of the Court**

The contrast between the two provisions is evident in the nature of the court's authority. Under Article 103 (nullity), the court's power is declaratory and strictly limited. The judge's role is confined to declaring the non-existence of the contract with retroactive effect, given its connection to public order. Any assessment of equivalent compensation must be governed by the need to restore precise financial equilibrium—limited to the value of the thing itself—without extending to the reparation of other damages. Similarly, depriving a contracting party of restitution constitutes compliance with a peremptory rule whenever bad faith is established.

By contrast, under Article 122 (termination), the court's authority is constitutive and highly discretionary. The judge may refuse termination altogether if the unperformed part is of minor significance, grant the debtor a grace period for performance (judicial indulgence), or, when awarding compensation, enjoy broad discretion in assessing damages in all their elements—including consequential loss and lost profits. In doing so, the court balances the interests of two parties who were bound by a contract that was validly formed.

Consequently, retroactivity in nullity is based on the premise that the contract never came into existence, whereas in termination it is based on the dissolution of a contract that had actually existed and satisfied the conditions of its formation.¹⁴

¹⁴ Muhammad Sabri al-Sa'di, *Al-Wadih fi Sharh al-Qanun al-Madani al-Jaza'iri* (Clear Commentary on the Algerian Civil Code), General Theory of



- **Fifth: Distinction with Regard to the Effect of Retroactivity on the Rights of Third Parties**

The fundamental distinction between the retroactivity of nullity and that of termination lies in the extent to which it affects the rights of a bona fide third party who has acquired rights over the subject matter of the contract prior to its extinction.

In the case of nullity, since the contract is deemed never to have existed, the retroactive effect extends by operation of law to all subsequent dispositions. What is built upon a void foundation is itself void. Accordingly, the right of the third party is extinguished along with the title from which his predecessor derived that right, regardless of the third party's good faith—subject, however, to very narrow exceptions provided by law to protect appearance. One such exception is the theory of the apparent heir. If a person purchases immovable property from an apparent heir holding a title deed or notarized certificate that is later found to be void due to the emergence of a will, a closer heir, or the invalidity of the succession distribution, the law and judiciary protect the purchaser (the third party) if he acted in good faith. In such cases, the retroactive effect of nullity does not extend to impair the purchaser's right, and his contract remains valid despite the nullity of the seller's title.

In termination, the legislator tends to strike a balance between the retroactive effect and the principle of transactional stability. If the contract has conferred rights upon a bona fide third party before termination occurs, that third party may benefit from legal protection that prevents

Obligations, Sources of Obligations, Contract and Unilateral Will, 4th ed., Dar al-Huda, Algiers, 2007-2008, pp. 258, 259, 356, 357.

the restitution of the asset from him. This protection is grounded in the fact that the contract was valid and operative at the time of the disposition. As a result, the retroactive effect of termination is less severe toward third parties compared to the absolute retroactive effect of nullity.¹⁵ Consequently, termination does not run against a bona fide possessor, in application of Article 835 of the Algerian Civil Code, which provides: “Whoever possesses a movable or a real right over a movable, or a bearer instrument, under a valid title becomes its owner if he was in good faith at the time of possession...” In such cases, the party seeking termination, even if successful, may only claim compensation where possible.^{16*}

1.2. The Effectiveness of the Obligation of Restitution as a Mechanism for Readjusting Legal and Financial Positions

The application of the retroactive effect of nullity and termination as a legal principle cannot be properly realized without an enforcement mechanism that ensures its practical implementation on the ground. This mechanism is the obligation of restitution. While a judicial decision declares the extinction of the contractual bond from a legal standpoint, restitution is what settles the material and economic effects that arose during the period between the conclusion of the contract and its extinction.

The effectiveness of this obligation lies in its capacity to reconstruct the financial positions of the contracting parties by stripping each party of what it acquired without legal

¹⁵ Bin Shuwaykh al-Rashid, *Lessons in the General Theory of Obligations*, Dar al-Khalduniyya for Publishing and Distribution, Algiers, 2012, p. 146.

¹⁶ Ramadan Abu al-Sa’ud, *Sources of Obligations*, Dar al-Matbu’at al-Jami’iyya, Alexandria, 2002, p. 300.



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justification and returning it to its rightful owner, thereby correcting the distorted financial situation resulting from a void or terminated contract. Restitution thus appears not merely as a secondary effect but as a mechanism to guarantee equilibrium and prevent unjust enrichment. Through the provisions of Articles 103 and 122 of the Algerian Civil Code, the legislator seeks to establish precise rules governing the process of restitution, striking a balance between the imperative of restoring the parties to their previous position and the need to protect certain exceptional considerations, such as transactional stability and the protection of persons lacking capacity.

To assess the extent to which this mechanism succeeds in achieving the desired financial and legal readjustment, it is necessary to examine the enforcement mechanisms employed by restitution (first branch), followed by an analysis of the limits and obstacles that may restrict its effectiveness in practical reality (second branch).

1.2.1. The Enforcement Mechanisms of Restitution (Between Specific Performance and Equivalent Compensation)

The obligation of restitution is the sole enforcement tool that translates the retroactive effect from an abstract legal concept into a tangible material reality. Once nullity or termination of the contract is declared, each contracting party becomes bound by an obligation to return what he or she received without legal justification. The obligation of restitution is a legal duty imposed on one or both parties to deliver the thing itself or its monetary value received from the other party, owing to the disappearance of the legal cause that

justified its possession, or by virtue of the very nature of the contract.¹⁷

This mechanism takes two fundamental forms expressly recognized by the Algerian legislator in Articles 103 and 122 of the Civil Code: specific restitution (in kind) and restitution by equivalent.

- **First: Specific Restitution as the General Rule for Reconstructing Financial Positions**

Specific restitution represents the ideal and complete form of readjusting financial positions. Each party is required to return the very thing it received under the extinguished contract. Specific restitution is not limited to the principal object but extends to its accessories and fruits (taking into account the rules of good or bad faith regarding the acquisition of fruits). This ensures that the financial position of the creditor of restitution is restored to its true pre-contractual state.

In nullity: specific restitution aims at erasing any material trace of a contract that was born void, in application of the rule that what is built upon a void foundation is itself void. In termination: restitution aims at restoring the parties to the position they occupied before the contract was concluded, as though the contractual bond had never existed.

- **Second: Restitution by Equivalent as an Alternative Mechanism in Cases of Impossibility**

Pursuant to Articles 103 and 122 of the Algerian Civil Code, specific restitution may encounter material or legal obstacles that render its performance impossible. In such cases, the

¹⁷ Ali Filali, *op. cit.*, p. 273.



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mechanism of readjustment shifts from specific restitution to restitution by equivalent. This impossibility arises either from the destruction or consumption of the thing subject to restitution, from the debtor's disposition of it to a bona fide third party where recovery has become impracticable, or from the fact that the contract is one of continuous performance – such as a lease – where retroactive effect is inherently difficult to apply to performances corresponding to benefits already received.

a) **The Legal Nature of Restitution by Equivalent**

Restitution by equivalent is not a sanction for damage in the traditional sense; rather, it constitutes an alternative value for the thing whose restitution has become impossible.

In the case of nullity: the compensation must be equivalent (as described in Article 103), meaning it must equal the value of the thing at the time restitution becomes due. This ensures that neither contracting party is unjustly enriched at the expense of the other without legal cause.

In the case of termination: the judge enjoys wide discretionary power. The legislator grants the creditor whose claim for termination has been upheld the right to demand compensation from the debtor who breached the obligation. Here, compensation is based on tort liability rather than contractual liability, as previously explained, due to the extinction of the contract and the disappearance of the contractual bond with retroactive effect. This transforms the fault in performance into a wrongful act that requires full reparation of all damages arising therefrom. This position is affirmed by Article 119 of the Algerian Civil Code, which allows the contracting party, after putting the debtor on

notice, to demand either performance of the contract or its termination, together with compensation in both cases.

b) The Doctrinal Basis and the Liability of the Possessor

A segment of legal scholarship considers the legal basis of restitution under Article 103 to be the rule of recovery of what was paid without justification. Accordingly, the following rules apply:

- If the thing perishes in the buyer's hands due to a foreign cause while the buyer acted in good faith, he shall be liable for such loss only to the extent of the benefit he derived. In this case, the seller recovers the damaged item in its current condition without claiming additional compensation for the deterioration.
- However, if the possessor acted in bad faith, he is obliged to return the value of the thing at the time of its destruction or damage, irrespective of the cause.¹⁸

c) The Principle of Reciprocity in Restitution

In practice, the obligation of restitution must be subject to the principle of reciprocity. Neither party may demand restitution from the other unless he himself is prepared to return what he has received. If it becomes impossible for one party to make restitution due to his own fault, the court must intervene to award compensation (restitution by equivalent) in favor of the other party. This guarantees the achievement

¹⁸ Bilhaj al-Arabi, *The General Theory of Obligations in Algerian Civil Law, Part One, Legal Acts (Contract and Unilateral Will)*, Diwan al-Matbu'at al-Jami'iyya, Algiers, 2001, p. 193.



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of contractual equilibrium and the justice that requires that neither party emerges as a loser from the process of restoring the legal positions that existed prior to the contract.¹⁹

Through this section, it can be concluded that the distinction between nullity and termination is one of essence and effect. While nullity relates to a defect contemporaneous with the formation of the contract and produces a declaratory retroactive effect that reveals the non-existence of the contractual bond from the outset, termination applies to a contract that was validly formed and serves as a sanction for breach of performance. Consequently, its retroactive effect is constitutive of the extinction of that bond. This difference in legal nature is precisely reflected in the rights of third parties. The retroactive effect of nullity is characterized by strictness and inevitability because it is based on the absence of any legal title, in application of the protective and deterrent provisions of Article 103. By contrast, the retroactive effect of termination under Article 122 tends toward flexibility and balance with the principle of transactional stability, in order to protect legal positions that arose under the appearance of a contract that satisfied all conditions of validity prior to its dissolution.

2. The Dilemma of Effectiveness and the Limits of Protection in the Face of Contractual Reality

The retroactive effect arising from the extinction of the contractual bond – whether through nullity or termination – embodies the justice of restitution, which aspires to erase the past and reshape the present by denying the material and

¹⁹ Bilhaj al-Arabi, *ibid.*, p. 193.

legal existence of the contract. This ambition fundamentally aims to protect injured legal positions by restoring them to the status they occupied before the contract was concluded.

However, this drive to reclaim the past collides with the dilemma of effectiveness, as legal logic finds itself powerless before the supremacy of reality. Time that has elapsed in continuing contracts cannot be reversed, and rights transferred to bona fide third parties become legal positions worthy of protection in recognition of the principle of legal certainty. Thus, a sharp conflict emerges between the logic of individual justice—which demands the erasure of the contract's effects—and the logic of social stability—which requires that some of those effects be preserved in order to safeguard legitimate trust in transactions.

Based on the foregoing, the problem of this section crystallizes in the following fundamental question: How can a balance be struck between the requirements of the retroactive effect as a tool for protecting legal positions and the sustainability and stability of transactions that arose under the contract prior to its extinction? More precisely: Has the retroactive effect shifted from a general rule to a restricted exception due to objective obstacles and the protection of third parties? And what are the legal limits at which this effect must stop in order to preserve positions that have stabilized under the apparent situation?

To unveil the manifestations of this dilemma and to understand the limits at which the justice of restitution becomes unable to achieve its objectives, it is necessary to trace the course of the retroactive effect when confronted with two types of obstacles: material obstacles arising from the nature of things and the impossibility of bending tangible reality to the logic of the legal text, and legal obstacles



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deliberately established by the legislator to protect positions that have stabilized and rights acquired by third parties in good faith.

Accordingly, this topic will be addressed by focusing, in the first subsection, on the objective obstacles that render the restoration of previous positions materially impossible, while the second subsection will be devoted to examining the relative nature of the retroactive effect and the protection of third parties as a legal obstacle imposed by the principle of legal certainty.

2.1. Objective Obstacles to the Restoration of Previous Legal Positions

The justice of restitution, as a general rule, requires the erasure of every material and legal trace of the contract and the restoration of the parties to the position they occupied before its conclusion, whether as a result of the contract's extinction by nullity or its dissolution by termination. However, this retroactivity encounters objective limits that make the specific enforcement of restitution impossible – what we term material impossibility. This impossibility is clearly embodied in the nature of contracts of continuous performance, which constitute an insurmountable barrier to the restitution of time that has passed and benefits that have been consumed. In such cases, neither nullity nor termination can fully extend to the past, thereby transforming the dissolution of the contractual bond into a mere prospective cancellation. Hence, this subsection will elaborate on why the law fails to apply the retroactive effect in the face of the inevitability of reality in continuing contracts.

2.1.1. The Nature of Contracts of Continuous Performance as an Objective Obstacle to Restitution

Contracts of continuous performance, such as leases or employment contracts, represent the greatest challenge to the justice of restitution. In these contracts, time is an essential element that does not admit reversal. The tenant who has enjoyed the use of the property, or the employer who has benefited from the worker's effort, has consumed a benefit that cannot be returned in kind after the lapse of the period during which it was enjoyed.

A distinction must be drawn between nullity and termination.

- **First: With Regard to Nullity**

Legal scholars differ concerning the retroactive effect of the nullity of continuing contracts. The first doctrinal trend—which this study considers preferable and which represents the majority view—holds that the nullity of a lease contract produces a retroactive effect requiring the contracting parties to be restored to their pre-contractual position, based on the general wording of Article 103 of the Algerian Civil Code. Since the restitution in kind of the benefit received by the tenant or the employer is impossible due to the passage of time, the obligation shifts to monetary compensation, which the court assesses according to the prevailing market rental value (or equivalent wage) and not according to the value stated in the void contract. This compensation is grounded in tort liability and unjust enrichment rather than in contractual will, which has disappeared with the declaration of nullity.²⁰

²⁰ Ahmad Ibrahim al-Ghul, *Retroactive Effect in Islamic Jurisprudence and Civil Law: A Comparative Study*, Mansha'at al-Ma'arif, Alexandria, 2008, p. 449.



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In contrast, the second trend argues that the nullity of continuing contracts—such as leases or employment contracts—does not produce a retroactive effect extending to the past, owing to their special nature, which makes it impossible to restore the contracting parties to their pre-contractual position. Consequently, the legal effects that arose before the declaration of nullity remain valid and operative. The employer remains bound to pay the agreed wage for the work actually performed, in addition to the worker's entitlement to monetary compensation for annual leave and the right to obtain a certificate of service. Conversely, the obligations incumbent upon the worker during the period of performance remain in force, particularly the duty to preserve professional secrets acquired in the course of employment. This legal approach, which restricts the retroactive effect of nullity, relies on the theory of the *de facto* contract²¹ and the impossibility of restoring the previous position due to the continuing nature of these contractual relationships, in which time consumes the reciprocal performances.²²

²¹ The theory of the *de facto* contract (or real contract) refers to the situation in which a continuing contract (such as an employment or lease contract) is performed for a certain period before its nullity is declared. Due to the material impossibility of restoring the previous position because of the consumption of time, doctrine and jurisprudence have settled on recognizing the effects that arose in the past as a material fact that produced legal effects which cannot be denied. The essential objective of this theory is to protect the weaker party in the contractual relationship, such as the worker, and to prevent the other party from being unjustly enriched at the expense of the effort exerted or the benefit consumed. Accordingly, the worker under a void contract is granted protective wages equivalent to the prevailing market wage for the period he actually served.

²² Ahmad Abd al-Tawwab Muhammad Bahjat, *Lessons in Social Law: Concluding an Individual Employment Contract in Light of the New Labour Law*, Dar al-Nahda al-Arabiyya, 2nd ed., 2007, p. 566 et seq.

The author inclines toward the first trend because of its adherence to the legislative unity of the legal provisions, which make no distinction between instantaneous and continuing contracts in the rules governing nullity.

- **Second: With Regard to Termination in Contracts of Continuous Performance**

Legal scholarship has expressed divergent views on the extent to which the retroactive effect of termination applies to lease contracts. The prevailing trend on this matter can be summarized as follows:

- a) **The First Opinion (the Dominant View): Non-Application of Retroactive Effect (Principle of Prospective Effect)**

The majority of scholars hold that the retroactive effect of termination does not extend to contracts involving a continuous time element, the most prominent of which is the lease contract. This is because time constitutes an essential element in such contracts. Consequently, termination does not operate retrospectively but is limited in its effect to the future, commencing from the date of the final judgment ordering termination.

This entails the following consequences:

- The contract is considered to have remained in force and to have produced its legal effects during the period preceding termination.
- The lessor is entitled to the rent for the period prior to termination in its capacity as “rent” and not as “compensation,” while retaining all legal securities such as the right of retention, the right of privilege, and conservatory attachment.



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- Termination of continuing contracts is termed “cancellation of the contract” to distinguish it from termination in instantaneously performed contracts, which is extinguished with retroactive effect.

This view relies on a set of theories, divided into two categories: those related to the nature of continuing contracts and those unrelated to it.

➤ **Evidence Derived from the Nature of Continuing Contracts**

- **Theory of the Multiplicity of Contracts:** This theory posits that a continuing contract is not a single contract but a series of successive contracts. Each segment expires upon its performance. Therefore, termination of the continuing contract does not affect what has naturally expired through performance prior to the termination.
- **Theory of the Multiplicity of Obligations:** This theory maintains that the contract generates successive and independent performances. Termination affects only future performances without touching those already executed.
- **Theory of Cause:** According to this theory, the obligation of one contracting party finds its cause in the obligation of the other party. If performance ceases from a certain date, the cause disappears only for the future. As for what was performed earlier, it had already fulfilled its legal cause.²³

²³ Yasir Ahmad Kamil al-Sayrafi, *The Retroactive Effect of Termination in Continuing Contracts*, Dar al-Nahda al-Arabiyya, Cairo, 1978, p. 8.

➤ **Evidence Unrelated to the Nature of Continuing Contracts**

- **Theory of Impossibility:** This theory constitutes the essential pillar and primary foundation upon which most legal scholars rely to demonstrate the absence of retroactive effect of termination in continuing (time-based) contracts. Proponents argue that time in such contracts is an essential and intrinsically intended element, serving as the measure of performance. Since elapsed time cannot be recovered or reversed, and the impossibility here is a natural one, restoring the parties to their pre-contractual position becomes impossible both in fact and in law.

For example, in a lease contract, if termination is decreed, the tenant cannot return the benefit he has enjoyed during the past period because that benefit has been consumed with the passage of time. This requires that the effect of termination be confined to the future only.²⁴

- **Theory of Equivalence of Performances:** This theory holds that the performances exchanged between the parties prior to termination are deemed equivalent by estimation. What one party provided represents the fair counterpart of what it received from the other during that period. Consequently, each contracting party has fully realized its contractual interest for the elapsed period, thereby eliminating any legal or practical need to restore the pre-contractual position.
- **Theory of the Implied Will of the Contracting Parties:** This theory is based on the premise that excluding retroactive effect in continuing contracts reflects the

²⁴ Yasir Ahmad Kamil al-Sayrafi, op. cit., p. 11.



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implied will of the contracting parties. Just as the parties may expressly stipulate a resolutive condition and define the scope of its retroactivity, their silence on this matter in the event of termination for non-performance is legally interpreted as an expression of their presumed intention to terminate the contract prospectively only, in deference to the nature of the obligations that have been performed and cannot be restituted.

- **Difficulty of Liquidation:** This highlights the objective obstacles facing the process of settling legal positions prior to termination. The restitution in kind of performances in continuing contracts (such as recovering the benefit of the leased property or the worker's effort) is inherently impossible. This necessitates resorting to monetary compensation as an alternative to specific restitution—a valuation that cannot achieve the precision of direct restitution. Moreover, the process involves legal and financial risks, particularly in the event of the debtor's bankruptcy or insolvency, making the abandonment of retroactive effect a necessity for the stability of transactions.²⁵

b) **The Trend Advocating Uniform Rules for Instantaneous and Continuing Contracts**

This segment of legal doctrine maintains that the termination of continuing contracts does not differ in essence from the termination of instantaneously performed contracts. Proponents argue that retroactive effect must be applied to

²⁵ Yasir Ahmad Kamil al-Sayrafi, *ibid.*, p. 11 et seq.

both. This trend relies on several legal grounds, the most prominent of which are:

- **Generality of the Legislative Provision:** Article 122 of the Algerian Civil Code is drafted in general terms that apply to all types of contracts, without distinguishing between instantaneous contracts and continuing (time-based) contracts.
- **Possibility of Compensation for Impossibility of Specific Restitution:** This trend asserts that the impossibility of returning performances in kind does not preclude the application of retroactive effect. Where specific restitution is impossible, restitution by equivalent is always feasible under any circumstances. This solution aligns with the purpose of the retroactive effect of termination, which is to prevent one contracting party from being unjustly enriched at the expense of the other.
- **Restoration of the Position in Law:** The expression “restoring the parties to the position they occupied before the contract” refers to legal restitution and not necessarily to actual material restitution. Each contracting party thereby recovers its pre-contractual legal position, ensuring that neither is prejudiced as a result of the terminated contract.²⁶

It thus appears that the doctrinal controversy surrounding the retroactivity of extinction in continuing contracts is essentially a disagreement over the method of restitution rather than over the principle of restitution itself. While some consider material impossibility to negate retroactive effect, the prevailing trend – with which the author concurs – holds that the justice of restitution remains legally valid and can be

²⁶ Ahmad Ibrahim al-Ghul, *op. cit.*, p. 464.



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adapted through restitution by equivalent (fair market value or equivalent wage) instead of specific restitution. This approach preserves the unity of legal logic and prevents unjust enrichment.

2.2. The Relative Nature of Retroactive Effect and the Protection of Third Parties as a Legal Obstacle Imposed by the Principle of Legal Certainty

While material impossibility in continuing contracts constitutes a factual barrier to the retroactivity of nullity or termination, another type of obstacle belongs to legislative policy—namely, legal obstacles. Although the retroactive effect is a tool for achieving contractual justice between the parties, it may transform into an instrument of instability if it encroaches upon the rights of third parties who have dealt with the transferee on the basis of the apparent ownership derived from a contract that is later declared null or terminated.

Hence, the principle of legal certainty emerges as a fundamental limitation that imposes the relative character of the retroactive effect. The legislator sometimes sacrifices individual justice—based on restoring the parties to their previous position—in favor of collective justice, ensuring confidence in transactions and preserving stabilized legal positions. In this subsection, we shall elaborate on how the logic of restitution yields to the rights of bona fide third parties through the following branches:

The retroactive effect is the inevitable consequence of the extinction of the contractual bond. It aims to erase all legal effects that arose in the past and to restore the contracting parties to the position they occupied before the contract was

concluded. However, the unrestricted application of this effect would undermine transactional stability and disrupt legal positions, particularly when rights have been transferred to persons foreign to the original contract (third parties) prior to the declaration of its extinction.

To reconcile the original owner's right to recover his property with the necessity of protecting the legal appearance upon which these third parties relied, the legislator has established substantial exceptions that render the effect of extinction relative, preventing it from operating against the stabilized rights of bona fide third parties. To define the scope of this protection, this subsection will first address the fundamental distinction between categories of third parties (first branch), then examine the effect of contract extinction on acquired rights in both immovable and movable property (second branch). This analysis draws upon the theory of apparent situations (third branch) and the criterion of good faith, which forms the basis of this exceptional protection (fourth branch).

2.2.1. The Meaning of "Third Party" in the Context of Contract Extinction (Distinction Between Universal Successor and Particular Successor)

In the context of contract extinction—whether by termination or nullity—the term “third party” does not refer to every person outside the contractual relationship. Rather, it specifically denotes the particular successor who has received a real right over the subject matter of the extinguished contract²⁷ prior to the issuance of the extinction

²⁷ Hasan Sa'd Hamud al-Musawi and Hasan Hantush Rashid, “The Third Party and Its Basis in the Contract: A Comparative Study,” *Journal of Human and Natural Sciences*, Vol. 6, No. 1, p. 901, published 01/01/2025.



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judgment or the registration of the related claim in the land register.

It is therefore necessary to distinguish between two categories:

The Universal Successor: Article 108 of the Algerian Civil Code provides: "A contract produces effects for the contracting parties and their universal successors, unless it appears from the nature of the transaction or from a provision of the law that such effect does not extend to the universal successor, without prejudice to the rules governing inheritance." Universal successors are those who succeed a person in his entire estate or in a portion thereof, such as heirs or trustees. The general rule is that the universal successor is regarded as standing in the shoes of the contracting party himself. Consequently, both the effects of the contract and the effects of its extinction extend to him. He is therefore not considered a third party requiring special protection vis-à-vis his predecessor.²⁸

Rights arising from the contract pass from the deceased to his heirs (universal successors) upon death. As for obligations and debts, they remain attached to the estate and do not transfer to the personal patrimony of the heir until after settlement, in accordance with the legal and Sharia rule: "There is no inheritance until debts are paid." Based on these legal solutions, whatever applied to the predecessor applies to the heir without the need for a fixed date of the contract to be opposable to him. It should be emphasized, however, that

²⁸ Farida Zuwawi, *The Principle of the Relativity of the Contract*, PhD Thesis, University of Algiers, 1992, p. 18.

in cases of simulation, the real contract—not the apparent one—is the one taken into account against the heir.²⁹

The Particular Successor: Article 109 states: “If a contract creates personal obligations and rights connected with a thing that is subsequently transferred to a particular successor, such obligations and rights shall pass to that successor at the time the thing is transferred, provided they are accessory to it and the particular successor was aware of them at the time the thing was transferred to him.”

The particular successor is defined as the person who receives from his predecessor ownership of a specific thing or a real or personal right attached to it, such as a buyer or an assignee. For the effects of contracts concluded by the predecessor to be opposable to this successor, four essential conditions must be met:

- **First condition:** The previous contract must relate to the very thing transferred to the particular successor, such that it is considered accessory to it (e.g., an insurance contract on a sold vehicle).
- **Second condition:** The date of conclusion of the predecessor’s contract must precede the transfer of ownership to the particular successor. Knowledge by the successor of the contract at the time of acquiring the right may suffice as an alternative to proof of a fixed date.
- **Third condition:** The rights and obligations arising from the predecessor’s contract must be accessory and necessary complements to the thing.

²⁹ Abd al-Razzaq Ahmad al-Sanhuri, *Al-Wasit fi Sharh al-Qanun al-Madani al-Jadid (The Intermediate Commentary on the New Civil Code)*, Vol. 1, General Theory of Obligation, Sources of Obligations, Al-Halabi Legal Publications, Beirut, Lebanon, 3rd ed., para. 346, p. 598.



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- ***Fourth condition:*** The particular successor must have been aware of these rights and obligations at the time the thing was transferred to him. Proceeding with the transaction while possessing such knowledge is deemed implicit acceptance that binds him to the effects of those prior contracts.

Thus, the particular successor is the person who receives from his predecessor a real right over a specifically identified thing (such as a second buyer or a mortgagee). This is the third party intended to receive protection, because he has built his legal position on the basis of his predecessor's title prior to the issuance of the extinction judgment.³⁰

Consequently, anyone who has not acquired a stabilized real right over immovable property is excluded from the description of "third party." Protection is confined to those who have established a specific legal position based on their predecessor's (one of the original contracting parties) title.

For example: If (A) sells immovable property to (B), and (B) subsequently sells that property or mortgages it to (C), then (C) is the third party (particular successor) who faces the risk that his right will be extinguished following the extinction of his predecessor's (B's) title upon termination or nullity of the contract between (A) and (B). This would follow the fundamental rule "one who lacks a thing cannot give it," were it not for the legislator's intervention to protect him.

It is thus clear that the protection of third parties does not extend to a mere transient third person, but rather to one who has established a publicized real right based on a legal appearance derived from the land register. This makes his

³⁰ Abd al-Razzaq Ahmad al-Sanhuri, *ibid.*, para. 350, p. 605.

legal position worthy of protection against the effect of nullity.

Based on this fundamental distinction, and having limited the protected third party to the category of particular successor, the question arises as to how the extinction of the original contract affects the real rights acquired by this successor. This requires an explanation of the legal effects on those rights, which will be addressed in the second branch.

2.2.2. The Effect of Contract Extinction on Acquired Rights

The issue of contract extinction raises the problem of whether such extinction is opposable to third parties (particular successors) in both immovable and movable property:

- ***First: In Immovable Property (Publicity System):*** Article 85 of Executive Decree No. 76-63³¹ requires the registration of actions for termination or nullity. If a third party acquires a real right and publicizes it before the claim is noted in the land register, his right remains valid and unaffected by subsequent nullity, in order to protect the stability of real estate credit.³²

³¹ Executive Decree No. 76-63 on the Establishment of the Land Register, as amended and supplemented, Algerian Judicial Journal, No. 38 dated 16/09/1980.

³² Halimi Rabia, The Third Party in the Contract: A Study in Civil Law and Certain Special Laws, PhD Thesis, University of Algiers 1, Academic Year 2016/2017, p. 258.



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- **Second: In Movable Property (Possession Rule):** To ensure the rapid circulation of movables, the legislator adopted the rule that possession of movables constitutes title to ownership under Article 835 of the Algerian Civil Code.³³ Thus, when the particular successor receives the movable from his predecessor while unaware of defects in the latter's title, his ownership remains intact and is not affected by the extinction of his predecessor's contract.

Although the legislator has established objective protection for rights acquired by third parties, as seen above, this protection is not philosophically justified by isolated provisions alone. Rather, it rests on a solid doctrinal foundation known as the "theory of apparent situations," whose foundations will be examined in the third branch.

2.2.3. *The Theory of Apparent Situations*

This theory constitutes the cornerstone of the protection of credit. It is based on the idea that the appearance in which a person places his trust should be treated as equivalent to reality in order to safeguard the stability of transactions.

The Algerian legislator has enshrined this theory in Article 885 of the Algerian Civil Code, which provides that a mortgage remains valid in favor of the mortgagee creditor despite the annulment of the mortgagor's title deed. This provision represents a clear affirmation of the theory of

³³ Article 835: "Whoever possesses a movable or a real right over a movable, or a bearer instrument, under a valid title becomes its owner if he was in good faith at the time of possession. If good faith and a valid title are present in the possessor who considers the thing free from charges and real encumbrances, he acquires ownership of the thing free from such charges and real encumbrances."

apparent situations and a protection for third parties who relied, in their dealings, on a seemingly valid legal appearance at the time of contracting.

However, for the theory of apparent situations to produce its effect of suspending the general rules of nullity, the legal appearance must be accompanied by a subjective element on the part of the third party that justifies his protection—namely, the principle of good faith, which will be addressed in the fourth branch.

2.2.4. The Principle of Good Faith as the Criterion for Exceptional Protection

In the context of contract extinction, good faith is not limited to mere moral purity of intention. Rather, it is a mental and legal state consisting of the particular successor's complete ignorance of the defect vitiating his predecessor's title and his legitimate belief that the predecessor is the apparent rightful holder authorized to dispose of the property. This belief must be grounded in an external legal appearance that justifies the third party's confidence. Such ignorance of the defect must be contemporaneous with the creation of the real right, whether at the time of registration in the land register or at the time of taking possession of the movable.

In terms of practical verification, simple ignorance is insufficient to warrant protection. The ignorance must be excusable, meaning that a reasonably prudent and diligent person in the third party's position would not have been able to discover the defect despite exercising reasonable care. If the nullity is apparent from the documents themselves, or if a prior notation of a judicial claim already appears on the land register sheet, then the third party's failure to examine and



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investigate negates his good faith and excludes him from legal protection. The law does not allow a negligent party to benefit from his own negligence. This principle was affirmed by the Algerian Supreme Court in its decision dated 30/04/1997,³⁴ which stated: “While an authentic deed has probative force so long as it has not been challenged for forgery with respect to the observations made by the notary himself, the other information provided solely by the two contracting parties and not subject to the notary’s verification—namely, the sellers’ and buyer’s joint assertion that the sellers alone were the heirs, an assertion erroneously confirmed before the notary by the buyer—has probative force until the contrary is proven. This renders the contract concluded between the sellers and the buyer null.”

The Court also ruled in a decision dated 15/07/2021: “A publicized contract of sale, whereby a person disposes of half of his share by sale to a third party on the basis of a revoked power of attorney, is not enforceable against the owner.”³⁵

In accordance with the general rules of the Algerian Civil Code, the presumption is that of a clear conscience and good faith. This is a simple legal presumption established by the legislator in favor of the third party to strengthen confidence in transactions. Consequently, the particular successor is not required to prove the soundness of his intention; rather, the burden of proof falls on the party alleging bad faith—the original owner—who must demonstrate that the third party knew of the defect or was guilty of gross negligence in making inquiries, using all legally admissible means of proof.

³⁴ Decision No. 148561 dated 30/04/1997, Judicial Journal, No. 2 of 1997, p. 47.

³⁵ Decision No. 1380065 dated 15/07/2021, Supreme Court Journal, No. 2 of 2021, p. 23.

This was confirmed by the Algerian Supreme Court in its decision of 17/09/2008,³⁶ which stated: “The Civil Code requires, for the annulment of a contract on the grounds of exploitation, proof of both the material and moral elements.”

From the study of this subsection, it may be concluded that the principle of the relative nature of the retroactive effect of contract extinction constitutes a necessary exception dictated by considerations of economic public order and transactional stability. While the general rule requires the annihilation of all effects of a void or terminated contract, this effect stops at the limits of the “particular successor” who has acquired a stabilized real right before the declaration of extinction.

This protection is manifested in the legislator’s prioritization of the interest of the “legal appearance” over the interest of “legal reality,” relying on two interrelated criteria: an objective one, consisting of compliance with publicity procedures (in immovable property) or possession (in movables), and a subjective one based on “good faith.” Thus, the nullity of the predecessor’s title no longer automatically entails the nullity of the successor’s title. Instead, the latter enjoys legal immunity provided that his ignorance of the defect is excusable and that he exercised the care expected of a prudent person. In this way, the “apparent situation” becomes a sufficient title of ownership enforceable against all.

³⁶ Decision No. 427599 dated 17/09/2008, Supreme Court Journal, No. 1 of 2009, p. 123.



Conclusion

In conclusion, the establishment of exceptions to the retroactive effect of contract extinction was not a mere doctrinal luxury but an inevitable necessity imposed by the reality of transactions and the interdependence of rights. By adopting the theory of apparent situations and consolidating the protection of the bona fide particular successor, the Algerian legislator has achieved a delicate balance between two conflicting interests: the interest of the original owner in recovering his right based on the legitimacy of the true legal reality, and the interest of the third party in preserving the stability of the position he built upon an excusably ignorant legal appearance. This legislative approach confirms that the security of transactions and the stability of credit form the cornerstone of contemporary legal policy. Nullity is no longer merely a sanction that erases the past; its effect now stops at the boundaries of the stabilized rights of third parties, thereby protecting the economy and safeguarding presumed trust.

Results

Based on the findings of this study, which analyzed the legal provisions and doctrinal principles governing the relative nature of the retroactive effect, the following recommendations are put forward with a view to strengthening the stability of legal positions and activating the protection afforded to bona fide third parties:

First: At the Legislative Level

- *Refining the Criterion of Excusable Ignorance:* The legislator is called upon to establish clearer standards for defining the concept of excusable ignorance in the context of good faith. This would ensure uniformity in judicial application and reduce conflicting rulings when assessing the compelling force of the legal appearance.
- *Mandatory Prior Notation of Nullity and Termination Actions:* It is proposed to amend the procedural rules governing land registration so as to require the notation of claims for termination and nullity immediately upon filing the action. Such notation should be considered conclusive evidence negating the good faith of any particular successor who subsequently contracts regarding the disputed property.
- *Shortening the Extinctive Prescription Periods for Nullity Actions:* It is recommended to reduce the prescription periods for actions of nullity and termination concerning registered immovable property. This would narrow the period of uncertainty surrounding the fate of real rights and thereby serve the stability of real estate credit.

Second: At the Judicial Level

- *Consolidating Judicial Oversight of the Elements of Good Faith:* The judiciary is urged not to content itself with the simple legal presumption of good faith but to investigate the subjective elements pertaining to the particular successor, particularly in cases suggesting



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collusion or gross negligence in examining prior documents.

- ***Adopting Economic Criteria as Judicial Presumptions:*** Greater use should be made of judicial presumptions drawn from the realities of the transaction (such as a substantial discrepancy between the market price and the contractual price) as tools for proving bad faith and the fictitious nature of the legal appearance.

Third: At the Administrative and Technical Level

- ***Accelerating the Digital Transformation of Land Registries:*** This should include the establishment of an “instant inquiry system” accessible to notaries and parties, ensuring permanent consistency between material reality and the register’s content.
- ***Proposing an Administrative System Granting Protective Certificates:*** A system should be introduced whereby the particular successor may obtain an official certificate immunizing his contract against challenges arising from the nullity of prior titles, provided he has fulfilled all necessary due diligence and inquiry procedures.

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