JURIDICAL WILL IN CONTRACTS

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Abstract

In the business law, almost all judicial relationships of private law are obligational juridical relationships which are made up of legal acts and facts. The most important legal act is the contract since it is the basis of the social life in any community meaning that it represents the most important economic and juridical instrument for the participants to a contract. The persons are free and equal in society and, consequently, no power is valid and fundamental unless it relies on their consent, namely on a contract. So, the existence of a civil contract relies on the principles of consensualism, a perception based on moral rules to observe one's promises, to have good faith and to observe the interests of your fellow creature. The exterior manifestation, the expression or declaration of the juridical will constitutes the consent of such person in making the structure of contract. The declared will must correspond to the person's real will and the adoption and declaration of the juridical will must take place consciously. Any contract that does not derive from juridical will is null and the civilizing character is inexistent. The principles giving sense to consensualism is the one of agreement between parties so as to produce legal effects by itself and it is enough for the conclusion of a contract, regardless of the form in which it is exteriorized, a principle expressed by the Latin adagio pacta sunt servanda.

Keywords: *business law, principles of consensualism, juridical will, contract.*

1. Introduction

The liberty of contract principle has been initially taken over by the private international law in terms of the conflict of laws, and then it was consecrated in the internal law of the European states starting with Napoleon's Civil code, a codification work massively taken over by the Romanian Civil Code of 1864, then in the New Civil Code which take effect from 2011. We might say that by the recognition of the liberty of contract and the fact that the subjects of law are free to conclude or not any contracts and to establish their content in an unhampered manner being able to modify or extinguish the assumed obligations, the science of law has evolved from the rigidity of the quiritarian Roman law to the flexibility of consensualism from the modern era of law.

Will is undoubtedly one of the words having a high frequency in the current language mainly due to the fact that this term is associated to the human being's will to tend to something, to achieve something, to attain certain goals, to obtain the things necessary for the daily life, to fulfill a dream etc.

In the field of law, the will is met very often in cases such as the will of state incorporated into the juridical norm (the juridical norm being the expression of such will), the individual (unilateral) will that may manifest to achieve some agreements

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or to exceptionally produce legal effects by itself; the legal effects of human being's actions or inactions differ sometimes depending on the fact whether they are voluntary or involuntary.[1]

The principle of the free will in contractual matter means the liberty to conclude contracts but not in the sense of a perfect free will, but in the sense of liberty conditioned by the social life and the legal norms[2].

The word given by exteriorization of will in any contract represents the formation of the legal act, a fact leading to its definition as being the manifestation of will performed with the intention to produce legal effects, namely to create, modify or extinguish a judicial relationship and it contains three notions[3]: it is a manifestation of will which must come from a conscientious person since it is a product of such person's thought; the will must be manifested, namely exteriorized, so as to be efficacious from a juridical viewpoint; the manifestation of will is made to produce legal effects[4] to create, modify or extinguish a certain juridical situation.

This definition highlights the fact that the manifestation of will expressed to produce legal effects is the essence of the legal act, this will constituting the fundamental element of the legal act.

2. Content

The juridical will is a psychological act[5] and both from the psychological viewpoint and the juridical viewpoint the will is a complex element[6]. The will is complex from the psychological viewpoint because its formation represents a complex psychological process comprising a series of stages. The will is complex from the juridical viewpoint because its structure is made up of two elements: consent and cause and, consequently, the correlation between consent and juridical will is of the part-whole type.

When speaking of a contract, an offence or any legal act, one must take into account the psychological will which really took place in the consciousness of the subject of law in question. But the law has mechanisms that filter it by resorting to a series of extremely accurate juridical concepts and this way the will is turned into completely something else than the de facto will, namely an ideal will that the subject of law should have had and which has a logical nature and not a psychological one.

The will manifested by the contracting party must not be erroneous or determined by a vice of consent such as an error, an act of violence or by fraudulent maneuvers; the expression of will has to be the result of one's own decision, of autonomy without being influenced in any way or the result of a constraint or dubious methods. Only this way, the will incorporated into a contract really is one's own psychic process, a capacity of the contracting party to propose goals and to attain them.

Pacta sunt servanda principle, conventions must be observed, a principle relying on keeping one's word lays at the

[1] Ion Dogaru, *Legal valences of will,* (Bucharest, Stiintifica si Enciclopedica, 1986), p. 11.
[2] Constantin Statescu, Corneliu Barsan, *Civil law. General theory of obligations*, (Bucharest, All, 1993), p.19.
[3] Ion Deleanu, *Legal fiction,* (Bucharest, All Beck, 2005), p. 249.
[4] Liviu Pop, *Treaty of civil law. The general theory of obligations,* (Iasi, Chemarea, 1994), p. 60.
[5] Mircea Djuvara, General Theory of Law. Law rational, sources and positive law, (Bucharest, All Beck, 1999), p. 228.
[6] Denisa Barbu,*Genocidul,infracțiunile contra umanității și cele de război. Repere în Codul penal român în raport cu Statutul de la Roma*, (Iasi, Lumen, 2015), p.19.

bottom of the entire organized society[7] expressing the rule of consensuality of conventions according to which parties' will is sufficient for the validity of a convention, except when we speak of real or solemn contracts, and the execution of obligations is made as they were assumed. The convention or contract, the legal act having the mission to civilize states, peoples, and persons, represents the basis of life in any community.

The theory of autonomy of will was enunciated and developed in the individualism climate of the 18th century by J.J. Rousseau and I. Kant.[8] In the Kantian philosophical system, autonomous will is a categorical imperative which justifies by itself: the most profound aspect of the human being is their free will. In order to have free wills, they must reciprocally limit themselves so as to ensure the social order. This order is the result of a social contract but not of a contract which intervened sometimes in history, as they thought, but of a contract resulted from the human mind itself.

The theory of autonomy of will[9] was considered for a long time as a postulate of the social life. Later on, mainly in the 20th century, they noticed that this theory contains numerous errors and exaggerations such as: the affirmation that the human being was initially free and that they gave up a part of their liberty by a social contract for social coexistence is pure fiction; will may not be autonomous since the human being lives in society and the social life imposes numerous obligations; there are no absolute liberties but only concrete liberties, namely determined by action or inaction.

The contemporary legislation and doctrine[10] based on the ideas, principles and norms of the continental law system identify two qualification criteria of the civil contract, more precisely the consensus and the legal purpose. The latter is considered as a subjective orientation of consensus and is totally subjected to parties' discretion to produce juridical-civil effects. Based on these criteria of uniform qualification of civil contracts, contractual agreement becomes binding for the parties regardless of other objective factors such as the form taken by the agreement or the effective transmission of right based on it, or especially the recognition by the legislator of such case in quality of content of contract sanctioned by the positive law. In other words, the construction of the civil contract relies on the principles of consensualism[11], the perception based on moral rules to keep one's word, to have good faith and to observe the interests of your fellow creature.

To be considered as a source of law, the will must be conscientious and rational. The consent, as an element of exteriorization of will, must be vice-free and expressed in full knowledge of facts. The theory of consent vices reinforces the free character of will. Thus, the consensus lacks the juridical sense where will is not free since it cannot create law.

The real will expressed with the intention to generate legal effects is the only one creating law, the altered or putative will is considered not to have existed upon the

[7] Alain Supiot, *Homo juridicus*, translation Catalina Teodora Burga, Dorin Rat, (Bucharest, Rosetti Educational, 2011), p. 138.

[8] Eugeniu Sperantia, *Introducere in filosofia dreptului*, (Sibiu, Cartea Romaneasca, 1944), p. 157.

[9] Robert-Henri Tison, *Le principe de l'autonomie de la volonte dans l'ancien droit francais*, (Paris, Domat, Montchrestien, 1931), p. 15.

[10] Zephaniah Benjamin, *What is the will ?*, (Bucharest, Enciclopedica Romana, 1969), p. 12.

[11] Gabriel Boroi, *Civil law. The general part. a second ed.*, (Bucharest, All Beck, 1999), pp. 162-163.

occurrence of consent. The sanction of expressing such a will is the cancelation of the likeness of law generated this way[12] (theory of nullity).

Internal will creates law. The exteriorization of will is a logical condition for the creation of contract whereas the interior one may not disclose its valences. In case of contradiction between the real and expressed will, the former prevails because will shall be appreciated as it must (*sollen*) be, and not as it is (*sein*), described. Real will remains the essence and the exteriorized will remains the phenomenon.

To manifest in the law and to produce legal effects, the will must be exteriorized either by words, written documents or by any other material means. If it was not exteriorized, psychological consciousness does not mean anything in law. Incontestably, the manifestation of will does not have a juridical significance either unless there is also a psychological will behind it. In the light of this psychological will which was the source, the legal ground resides in the external manifestation in that two parties contracted something after they have thought about it and the volition acts took place from the psychological viewpoint and this is manifested at the exterior by words, sometimes even written words. This external manifestation is the only proof of will: will is intangible without this filtration through the external manifestation. Consequently, what we must consider as essential in law is not the psychic will but the external manifestation of such will.[13]

The rational individual defines liberty by themselves through their will to get engaged judicially thus creating their own juridical reality.14 In the private law this is characterized by the fact that will is the intellectual fundament of the contract and the source of its binding force.he role of law is only limited to the guarantee of execution of contract and sanction is the only role of state in a contract. The explanation resides in the fact that the human being is a free individual whose activity may not be limited but by their will (intrinsic element) and not by the juridical norm (extrinsic element). At the same time, will is considered as the unique source of justice. The contract as a paradigm of voluntary self-limitation of individual freedom is not only the source of rights and obligations, but also embodies the idea of justice since only the contract, by self-accepted limitation, ensures the liberty of conscious will. The contract is genetically superior to the juridical norm, consequently the juridical norm may not limit individual's liberty but to the extent to which it guarantees the preservation of one's fellow-creature's liberty.

The requirements related to the form or registration of contracts as well as the rules of invalidity of contracts, most of them being an image of public limitation[15] of individual liberty, are tightly correlated and they are present in a large number of juridical norms.

The general conditions regarding the form of contract establish the form that the consensus must have so as to be acknowledged by the public authority[16], regardless of parties' will. In this case, even if the registration of a contract takes place after the conclusion of agreement related to

[12] Octavian Capatana, *Treatise of Civil Law, vol I*, (Bucharest, Academia RSR, 1989), pp. 234-235.
[13] Mihail Niemesch, *General Theory of Law,* (Bucharest, Hamangiu, 2014), pp. 156-157.
[14] Alex Weill, *Les obligations*, (Paris, Dalloz, 1971), p. 50.
[15] Véronique Ranouil*, L'autonomie de la volonte: naissance et evolution d'un concept*, (Paris, Presses Universitaires de France, 1980), p. 61.
[16] Jean Jaques Rouseau, *Du contract social*, (Paris, Flamarion, 1992), p. 126.

the contractual clauses, the failure to make it shall lead to the nullity of contract from the viewpoint of the public authority and shall deprive the parties of the possibility to defend in court.

The juridical consequence of parties' failure to reach an agreement regarding all the essential clauses of contract differs from the consequences of the principle of formalism, namely the failure to conclude a contract means its inexistence as a juridical fact generating civil rights and obligations.

The form of expression of will upon the conclusion of a contract is analysed in tight connection with its content conditions knowing that in the Romanian law the rule of consensuality operates according to which parties' consensus17 is sufficient for the valid elaboration of a contract. We may not also overlook the issue of proof of the juridical operation in the sense of negotium juris for which purpose they require the written ascertainment of parties' will (the document is required ad validatem) or the existence of an inception of a written proof which completed by other evidence proves this operation. In the cases when the written form of contract is required under the sanction of absolute nullity (ad validitatem), the will of contracting parties shall be expressed and mandatorily be ascertained in writing.

"We may legitimately think that the Contract law is a universal law adapted to all epochs and all peoples, places and circumstances, that it is founded on the fundamental principles of good and evil coming from the natural reason and that they are unalterable and eternal".[18]

If the contract represents an adhesion to certain special juridical objects, it creates general situations meaning that when a person concludes such a contract or they become a borrower, seller or buyer they understand to be applied all the dispositions from the juridical norms referring to the specific legal object – loan, sale-purchase, entire chapters from the civil law comprising the provisions related to the specific legal acts as well as other entire chapters of law interpretation that the specialists in the domain constitute in an enormous quantity of information that make up thick treatises of civil law.

The question is whether the individual who concluded a contract and who most of the time does not have juridical knowledge may know all this huge volume of clauses incorporated automatically in their document. Most often, even an experienced lawyer could not provide them all, the more so as most individuals who are profane could not do this. The entire legislative system of a state, and not only, is involved in every manifestation of an act of will of each inhabitant of such state but, of course, not by an act of psychological will. When concluding a legal act, individuals think of a very limited number of conditions and for the rest they understand the law shall apply or they are constrained to obey it. Consequently, the effect of the legal act is, to a very limited extent, the product of the individual's psychological will and much more the product of hypothetical will as the individual had to have it when they consented to the conclusion of the legal act. Thus, between the legislative systems of a state and the individuals that are subject to the laws there is a continuous stream of legal communication.[19]

[17] Ioan Albu, *Contract and contractual liability*, (Cluj-Napoca, Dacia, 1994), p. 27.

[18] Wesley Addison, *Traite des contrats*, 1847, apud Patrick S.Atiyah, *Essays on contract*, (Oxford, Clarendon Press, 1986), p. 17.

[19] C.R.Butculescu, *Considerations regarding Law as an instrument of communication*, Juridical Tribune, vol. 4, Issue 2, December 2014, (Bucharest, ASE, 2014), pp.22-23.

Exemplifying for this purpose is the obligation of execution, a case in which will produces future effects even between living persons. Relevant is the situation when a person is lent a sum of money that they undertook to reimburse upon maturity the contract establishing implicitly that if they fail to fulfill such obligation they shall be liable to the rigour of the law. Upon maturity, if they failed to pay, the will that they manifested in their legal act long ago would produce effects upon maturity. Though they no longer want, they must pay the amount due. Thus, the psychological will disappeared much but the juridical will continues to subsist and produce effects. Another example may be given in case of the inexistence of will in infants and mad people, and yet as a person it produces juridical effects by the acts of their representatives since we do not speak of psychological will.

3. Conclusions

In conclusion, *the juridical will* requires the entire society to keep their word given in contracts, the observance which any contract is governed by the principle of free will or also known as the principle of liberty of contracts, according to which the parties are free to conclude any convention, to establish any clause by mutual agreement, to modify or to extinguish any obligation. The principle of free will manifests, in terms of content, by consensualism meaning that the parties are free to adapt the contract pursuant to their juridical will necessary upon the conclusion of a legal act and which supposes the fulfillment of two conditions: the existence of a will and the juridical intentionality thereof. According to the principle of consensualism, contracts may be validly concluded and produce legal effects by the simple consent of the parties, regardless of the form in which the consent is expressed. Based on the principle of free will, the parties create by themselves, exclusively by their will, the juridical norm meant to govern their juridical relationships agreed upon and mutually advantageous.

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