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Freedom to Contract in The Romanian Legal System

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Abstract: The freedom to contract represents a component of the right to individual freedom, this being a fundamental citizen's right. This right can be exercised, however, under the conditions and with the limits provided by law. In capitalist democratic societies, the contract represents a cell in an infinite labyrinth of legal relations that unfold between the participants in the civil and economic circuit. From this perspective, the contract must be analyzed at the micro level, but also at the macro level. In order to ensure a state of balance and equity at a general level, often the individual freedom to contract can be limited in order to ensure a collective freedom, in order to achieve a common interest, often economic.

Keywords: released; will; contract; principle; limit; Romanian law

1. Introduction

Freedom to contract is a principle of civil law. Together with the principle of freedom of disposition and the principle of free movement of goods, this principle is a component of the fundamental right of personal freedom.

2. Legal will and Autonomy of will

The legal will represents a decision of a person to commit an act or a fact producing legal effects. The procedure of making the legal will, as a result of a complex psychological process, involves the successive completion, over time, of several stages: a) the reflection or representation in the human consciousness of a material or spiritual need that must be satisfied; b) outlining, under the impetus of this need, the means to satisfy the respective need; c) mental deliberation on the reasons and means of satisfying the respective need; d) the interference of the determining reason, as well as the intellectual depiction of the pursued goal; e) the decision to finalize the legal contract obligatory to achieve the intended purpose.

In legal terms, the will appears as a process of reflection through which the individual man assumes commitments that go beyond the scope of simple complacency, simple courtesy. The legal will is undoubtedly governed by the principle of autonomy of will. This principle is enshrined *expressis verbis* also by the provisions of the current Civil Code (Law no. 287/2009 and Law no. 71/2011), which under art. 1169 provides: *"The parties are free to conclude any contracts and determine their content, within the limits imposed by law, public order and good morals".*

The principle of autonomy of will is expressed, in essence, in the fact that a party is bound by the contract only because he has expressed his will in this sense and only to the extent that he wanted this, because the legal act is the work of human will (Tita-Nicolescu 2016). Thus, indicating that only the will creates the right, the autonomy of the will has the natural effect of considering that anyone can have any behavior they want, as long as it does not harm the interests of other people.

The content of this principle can be expressed as follows:

- the human will is free (unrestricted and autonomous); the parties being able to conclude any legal act;
- the foundation of the contract resides in the consent of the contracting parties;
- each person is free to conclude a certain contract or not; whoever wants to contract is free to choose his co-contractor; no one has the right to force another to conclude a contract against his will;
- this principle ensures full contractual freedom, both in terms of substantive freedoms (respectively to introduce all kinds of clauses) and in terms of freedom of form (the parties have the freedom to choose the form of the contract);

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- the content of the contract, by which the rights and duties of the contracting parties are understood, as well as other clauses, are determined entirely by the agreement of the parties;
- contracts have the force of law between the contracting parties, according to the rule pacta sunt servanda (Vasilescu 2012). In the opinion of this author "the contract is generically superior to the state law, in the matter of contracts, the law has only a subsidiary role, that of replacing the unexpressed will of the parties when necessary");
- the *pacta sunt servanda* rule is imperative, imposing itself with the same intensity on the court;
- a contract cannot harm third parties, but neither can it profit them, in other words the contract produces relative effects, which gives expression to a Latin adage: *res inter alios acta allis neque nocere neque prodesse potest* (who is a stranger to the conclusion of the contract must be alien to its effects).

In principle, the conclusion of any contract is free, in this sense we are talking about the principle of freedom of will in the matter of contracts. In the specialized literature, it was stated in this sense that the will is not only necessary to create the contract, but in most cases, it is sufficient to give the contract a mandatory legal existence. The legal will, together with the cause of the legal act, forms the consent that represents one of the validity conditions of any agreement [1].

Another principle that governs the conclusion of contracts is the principle of freedom of contract, according to which people are free, by their simple will, to conclude any kind of contract and create any kind of obligations, provided that they do not public order and good morals are affected.

In this sense, it was stated in the doctrine (Hamangiu et al. 1998) that the parties can freely decide the results of the concluded contracts, and this freedom has no limits other than the prohibitive and imperative prescriptions of the law. In the matter of conventions, most legal provisions are interpretative; they are written only for the case when the parties have not ordered otherwise in the contract and contain only the presumed intention of the parties. That is why it is said that modern law is consensualist and that it is dominated by the principle of autonomy of will.

3. The limits of the freedom to contract

The freedom to contract is a key component of the content of the civil capacity of natural and legal persons, being enshrined at the legislative level. Hence, the right to conclude legal acts is enshrined and acknowledged by art. 11 Civil Code[2] where it is ordered: "It is not possible to derogate through conventions or unilateral legal acts from the laws that concern public order or from good morals". Moreover, the Civil Code expressly regulates in art. 1169 of the Civil Code the principle of freedom to contract, providing in this sense: "The parties are free to conclude any contracts and determine their content, within the limits imposed by law, public order and good morals". The principle of freedom to contract is in close correlation with the principle of free movement of goods, enshrined in art. 12 of the Civil Code entitled freedom to dispose, according to which: Anyone can freely dispose of his goods, unless the law expressly provides otherwise.

We mention the fact that the principle of contractual freedom is complemented by the principle of the binding force of the contract provided by art. 1270 para. (1) Civil Code "The concluded valid contract has the force of law between the contracting parties". From the corroborated interpretation of the two legal texts, it follows that contractual freedom is acknowledged for all subjects of civil law, with general limits of public order and good morals (Adam 2017).

A. Public order, which is a difficult notion to specify, meaning first of all the totality of the regulations that make up public law. Public order includes all essential bindings of public and private law through which the institutions and basic values of society are defended, the progress of the market economy and the social protection of all persons are ensured (Pop et al. 2012). Besides growth of society, this notion experienced a considerable development, having both a national and a community side. Hence, at the European Union level, numerous essential rules have been opted that ensure the key freedoms, besides restrictions brought to these principles, imposed by "community public order". These include for example freedom of movement of goods, freedom of labor, freedom of movement and establishment of persons in the community space, freedom of services and freedom of capital movement.

Continuing the same legal reasoning, we mention the fact that public order, be it classic or modern, includes a series of norms and rules, which determine its classification into:

- the political public order aimed at the defense of the institutions and fundamental values of society, expressed in general legal norms that prohibit contracts and other legal acts that affect the institutions and social values that they defend;
- economic public order, regarding the realization of the directed economy, it is expressed in the legal norms regarding directed economic activities and directed contracts;
- social public order, which refers to social protection measures, expressed in social legislation.

The fact that legal provisions regarding public order are imperative does not mean that any imperative legal provision is also public order. For example, some legal provisions regarding the form of solemn contracts are imperative without being of public order.

In judicial practice[3], it was decided that if, contrary to the rules of social coexistence, one contractor took advantage of the ignorance or the state of coercion in which the other was, in order to obtain disproportionate advantages compared to the benefit he received from then, the respective convention cannot be considered valid, since it was based on an immoral cause (Dogaru and Drăghici 2014). We conclude by pointing out that the conclusion of a contract without respecting the imperative rules of public order is sanctioned with the total or partial nullity of the respective contract.

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1 art. 1179 Civil Code

2 *Ibid*

3 *Supreme Court, Civil Section, decision no. 73/1969, in C.D. 1970, p. 83*

B. Good morals represent the totality of the rules of conduct that have taken shape in society's consciousness, the observance of which has been necessary, by vast experience and practice, to obtain the general interests of a given society (Albu 1994).

In an attempt to capture a definition as comprehensive as possible of this concept, we consider it essential to initiate from the origin of this notion. Thus, we must consider the two sides that this phrase includes the religious as well as the empirical side.The religious side imbues this phrase with moral norms from Christian dogmatics. Thus, morality is seen as a virtue that plays an important role in educating the individual regarding the way of perceiving and experiencing certain situations.

In order to better understand the notion under discussion, but also its implications in substantiating the expression "good morals", we mention the fact that morality also has a social dimension, divided in turn into two categories:

- public morality is made up of the totality of moral perceptions acknowledged by a given human collective, as rules of coexistence and behavior;
- personal morality consists in the moral convictions of each individual and his behavior in accordance with these convictions.

Among the moral obligations enshrined as principles of law, we mention: civil responsibility, the prohibition of unjust enrichment, the execution of contracts and the balance of benefits, the exercise in good faith and non-abusive of the rights conferred by law. The empirical side considers those rules of a sociological nature, seen as natural skills or acquired through tradition and education of individuals and communities, regarding what is good and what is bad. Legal doctrine (Popa 2002) calls these rules "norms of custom". Synthetically habit can be defined as a rule of conduct, established within human coexistence through long use. Its application is usually achieved by the consensus of the members of the collective, according to the belief in the justice of its regulations. As social norms, customs are patterns of behavior that a social group imposes on its members. The custom is generally incorporated in oral formulas, and its authority is established as it is the result of an old and indisputable practice. As far as civil law is concerned, the legislator sanctions the conclusion of contracts in violation of the notion of "good morals" by canceling them for immoral reasons. For example, the conventions regarding the physical person himself and his bodily integrity are absolutely void, since it is immoral for someone to dispose of his body or expose it to dangers (Pop 2009).

In the judicial practice, the contracts through which the respect due to the human person was disregarded, those through which one or both contracting parties sought to achieve an immoral gain or that contrary to sexual morality, were considered contrary to good morals. "The convention by which a married man undertakes to compensate his concubine if he does not divorce his wife is void, as having an illicit cause." Practically, between the two concubines, an agreement is concluded, whereby a man offers to pay a certain amount of money to his concubine, in order to induce her to maintain the cohabitation relationship. We complete this legal landscape by mentioning the fact that, according to the provisions of art. 309 para. (1) Civil Code, "Spouses owe each other respect, fidelity and moral support"[4].

C. Exercising subjective rights according to their economic and social purpose, in good faith and reasonably. In civil law, the principle is that the exercise of a subjective civil right is not mandatory, being left to the discretion of the holder. However, in the hypothesis that one opts for its exercise, it will have to be exercised according to its economic and social destination, which cannot be changed. This principle was expressly recognized by the legislator within the provisions of art. 14 and 15 Civil Code.

Regarding the exercise of these rights in good faith, art. 14 of the Civil Code states as a matter of principle that good faith resides in the fact that any natural or legal person must exercise their rights and fulfill their obligations in accordance with public order and good morals. Regarding the reasonable nature of the exercise of a right, art. 15 Civil Code states that no right can be exercised with the aim of harming or damaging another or in an excessive and unreasonable way, contrary to good faith. This legal text regulates the abuse of law by defining it and establishing its characteristics, the echo of doctrinal and jurisprudential support being heard by the legislator.

In this sense, regarding the abuse of law, in a guidance decision, the supreme court[5] ruled that subjective rights, being recognized only for the purpose of satisfying legitimate interests, "exceeding this purpose and exercising a subjective right without interest, disregarding its purpose economically and socially legitimate, constitutes an abuse of law". The abuse of law is defined as the deviation of the right from its purpose, expressed in the purpose for which it was recognized and guaranteed, or, in other words, the "use" of the right for completely different purposes than those envisaged by the legal norm what is its basis (Adam 2005). Therefore, the manifestation of will in contracts cannot exceed these economic and social goals that limit the freedom of will of the parties. All contracts or contractual clauses that would violate these general limits of the freedom to contract are sanctioned with absolute nullity. Also, exceeding the limits of the exercise of subjective civil rights, which also includes the right to contract, constitutes grounds for incurring tortious civil liability.

In the system of the current Civil Code, the cause must exist, be lawful and moral (art. 1236). This is qualified as being illegal when it is contrary to the law, public order or when the contract represents the instrument by which it is desired to evade the application of an imperative legal norm[6], a fact that will attract the absolute nullity of the contract (art. 1238). *Per a contrario*, the Civil Code does not regulate the prohibition of the sale of goods between spouses, as provided by art. 1307 C.civ. from 1864, which allowed the sale between spouses only for the purpose of liquidation.

The legislator has regulated extra-contractual liability in several legal provisions, such as: violation of the obligation of confidentiality in negotiations, violation of the obligation of good faith in negotiations, revocation of the offer in the case of the offer without a deadline and not maintaining a reasonable deadline, etc. In such situations we are in the presence of the violation of the obligation of good faith or the abuse of law that attracts tortious civil liability. Administrative contracts also appear as a limitation of the individual will to contract (Dinu 2023). Thus, the fundamental rights can be restricted under the conditions of the constitutional provisions, but they can also be limited under the conditions of the provisions of organic or ordinary laws, or the provisions of the courts, which can operate limitations of the will of the contracting parties, such as for example the situation of unpredictability (Bularca 2023).

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4 *The Supreme Court, Civil College, Decision no. 1912/1955*

5 *The Supreme Court, Plenary, guidance decision no. 24/1962, in C.D. 1963, p. 102*

6 Fraud on the law - art. 1237

4. Conclusions

In most situations, the contract is concluded as a result of the agreement of free will of the contractors. However, recently there has been a growing increase in forced contracts, respectively imposed by law, but also in adhesion contracts, respectively in contracts dictated by one of the parties. Freedom to contract can be limited by administrative contracts. Recently, especially after the pandemic caused by the Sars-CoV-2 virus, the principle of freedom to contract has been increasingly limited. Constitutional provisions can restrict fundamental rights. Similarly, other ordinary laws, or the provisions of the courts, can also restrict the freedom to contract.

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