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THE CHARACTERISTICS OF LIBERAL INTENTION

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Abstract: *As manifestations of will with the purpose of causing legal effects, liberalities are legal acts whose free character makes them dangerous for certain categories of people; this is why they are subject to a special legal regime, which derogates from common law.*

Key words: *donor, animus donandi liberal intention, intuitu personae character, liberality.*

1. Introduction

Liberal intention can be defined by using its legal characteristics, by compatibility with the donor's interest of achieving the act of donation (Gheorghe, 2010).

The main traits of liberal intention are: the *intuitu personae* character and the unilateral or bilateral character.

The *intuitu personae* character of the liberal disposition act is the most important trait. The *intuitu personae* character is inherent to the notion of liberal intention (Grimaldi, 2001).

2. The *intuitu personae* Character

The notion of *intuituu personae* represents a disposition made with the consideration of a certain person.

The notion is used to characterise the operations or conventions in which the personality of one of the parties is essential, given his personal of professional skills or certain services he performs (Gheorghe, 2010, p.124), etc.

Thus, the *intuitu personae* character is "inherent" to the notion of liberal intention.

The *intuitu personae* character of liberal intention is illustrated by a series of rules which pertain to the legal regime of donation, as is the clause by which the donor can state the return of gifted goods to his patrimony, in case the donor dies before the beneficiary or in case the donor and his descendants die before the beneficiary of the donation, as this clause can only be regulated in favour of the donor, thus having an *intuitu personae* character (Nicolae, 2014, p. 84).

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This clause entails the hypothesis in which the donor understands that the liberality is made only to the profit of the beneficiary, thus completely excluding the members of the beneficiary's family, the receiver of the donation and his descendants.

Such a clause represents an "exacerbation of the "*intuitu personae* character", expressed by the donor by his disposition.

If considering the gratified person is essential for the liberal intention manifested by the donor, the latter is not entirely free to choose the person he gratifies (Lambert, 2006).

We must state that the liberality by which the gratified person is chosen can sometimes be reduced by the special capacities of giving or receiving by donation. The legal incapacities thus restrain the donor's freedom in choosing the person he gratifies.

3. The Unilateral or Bilateral Character

As a general rule, the donor manifests his liberal intention by donation contract, thus providing an advantage to the receiver of the donation.

However, in case of unilateral legal acts, the liberal intention can only be based on the will of the unique donor.

We must state that, in the matter of donation, we ask the following question: (Gheorghe, 2010): does the *animus donandi* liberal intention represent the will of just one of the parties (the donor) or that of the receiver of the donation as well (as the contract represents an agreement of wills)?

In the above-mentioned context, doctrine made several considerations.

Liberal intention arises from the donor's intention and becomes irrevocable after the contract is concluded. Thus, according to article 1015 of the Civil Code: "*Donation is not valid when it entails clauses which allow the donor to revoke it by his own will*".

Thus, the following donations are void:

The donation which is affected by a condition whose achievement depends exclusively on the will of the donor; (Nicolae, 2014, p.87);

a) The donation which obliges the receiver of the donation to pay the debts the donor might contract in the future, if the maximum value of these debts is not determined in the donation contract;

b) The donation provides the donor with the right to unilaterally rescind the contract;

c) The donation which allows the donor to dispose of the donated good in the future, if the donor dies without disposing of that good. If the disposition act entails only a part of the donated goods, annulment operates only in regard to that certain part of the donation.

Thus, liberal intention is characterized above all by the manifestation of will of the donor, as without this manifestation of will, the liberal intention wouldn't exist, as it is defined as *the intention of the donor to gratify the receiver of the donation without obtaining a service which is the equivalent of the performed donation* (Moloman, 2010).

But, as it is expressed within a donation contract, the agreement of the parties' will is indispensable for the valid formation of a contract. The agreement of will entails two distinctive people who share the mutual intention of granting and accepting a liberality.

The valid conclusion of a donation requires acceptance from the receiver. As a consequence, in order for the liberal intention to cause effect, it must be subordinated to the act of acceptance of the gratified person. (Nicolae, 2014).

„The liberal intention does not have legal existence unless the donation is accepted by the receiver, as without its acceptance, it has no legal value.

Only by the beneficiary's acceptance, the donor's will to gratify acquires legal value" (Grimaldi, 2001, p.56).

4. The Liberal Will in the Remuneration Donation

Remuneration donation is a "donation" only by name: its legal nature would be that of an *onerous contract* by which a certain debt of conscience is paid, a debt which is equivalent to a service which can be evaluated in money.

In its classical understanding, that of *non-typical payment,* situated at the confluence between liberalities and onerous contracts, remuneration donation would not be subject to reduction for overpassing the available part of inheritance, nor to successor partition, thus the rules regarding the revocation of donation do not apply (Goicovici, 2007; Vasile, 2010).

The ambiguity expressed by the analysts of the remuneration donation has somewhat strong doctrine roots. Initially, the intensity of the repulsion felt by the judges for the donors which reconsider the donation after it is achieved led to the validation of those conventions as *onerous mutual contracts,* which can be rescinded only by *mutuus dissensus*. (Lambert, 2006)

In supporting the onerous character of the remuneration donation, we present the following two opinions:

- the remuneration donation would represent the counterpart of a patrimonial service, performed for free, thus, along with the execution act, it would "in time" form an onerous and mutual contract:

- this remuneration contract would be placed at the limit between free and onerous contracts, as it is excepted from applying the formal and substantial requirements of donations; in regard to rigour, the remuneration donation would represent a liberality, but *a different species* of liberality form the two known ones (donations and legates).

The above-mentioned opinions can't be accepted, as the request for acknowledging *sui generis* liberalities is opposed to the entire theoretical ensemble on which the regime of manifestation of liberal will is built. (Gheorghe, 2010).

Liberalities represent an *elite* category of legal acts, with only two separate categories: one among the living (donation) and one with a succession clause (legates).

As a conclusion, the following considerations can be made:

- as for the legal nature, the remuneration donation represents a donation which is subject to the same form and validity rules as ordinary *inter vivos* donations:

- the remuneration donation entails the existence of a licit service whose payment is not mandatory for the donor; in the contrary case, as it is no longer a donation, but a payment, it is additionally required for the service to have a patrimonial nature (pecuniary).

- the notion of "remuneration donation" entails - as an essential premise - that the service not be previously entirely paid, at its real economic value: thus, if the performance of a service occurred within the execution of an onerous contract, it is necessary that the initially agreed upon fee to be paid, but it must not have been sufficient to cover the financial value of the performed service;

- if the service was performed within the execution of a free contract (unpaid deposit, free mandate, no interest *mutuum,* contract of free use), the remuneration donation pertains to the value of the service, for moral reasons (debt of conscience).

From the perspective of the successor regime, the remuneration donation is treated in a manner similar to ordinary donations, thus subject to reduction and report; from the perspective of its effects, remuneration donation generates typical relations of donation between partiers, with the consequence of the possibility of revoking the donation for ingratitude, according to article 1023 of the Civil Code.

We must also mention that the French doctrine appreciates that contractual freedom explains and justifies the "jerky" process of formation of the contract.

If the parties are free to conclude the final convention, they are just as free to agree, within the contract, upon the means to "sever" the legal bond which is created between them.

The theory of the progressive formation of conventions (of contractual consent) emphasizes the evolutionary character of the "gestation" which certain contracts borrow by the nature of things (such as the consummation contract) (Goicovici, 2007).

5. **The Natural Obligation and the Liberal Intention of the Donor**

The natural obligation essentially manifests in the area of influence of liberalities. As a principle, French doctrine is divided in two conceptions: *the classical theory* (or objective theory) and *the modern theory* (or subjective theory).

According to the classical conception, the natural obligation and the civil obligation are of the same nature, as the natural obligation is an *imperfect civil obligation.*

According to the modern conception, the natural obligation is subject to a *requirement of conscience.*

In the above-mentioned context, the differentiation of liberalities is difficult.

When it entails the elimination of formal conditions and when it refers to the removal of certain rules regarding the efficiency of the liberality, the qualification by the court of a natural obligation is of service as the act is no longer subject to the strict regime of liberalities. (Grimaldi, 2001).

In the separation of these two notions, doctrine stated two theories: the thesis of incompatibility of the natural obligation with the liberal intention and the theory of compatibility between the natural obligation and the liberal intention. (Gheorghe, 2010).

5.1. The Theory of Incompatibility between the Natural Obligation and the Liberal Intention

The incompatibility of the natural obligation with the liberal intent was phrased by the classical authors who saw natural obligation as an imperfect civil obligation. (Lambert, 2006). Thus, the presence of natural obligation would exclude the qualification of liberality and its legal regime.

By supporting the identity in nature of natural obligations and civil ones, it is appreciated that the performance executed on the basis of a natural obligation can't be a donation (as the debtor only pays what he owes).

In the above-mentioned situation, the liberal intention is missing. Thus, the author of the payment does not have the feeling that he is becoming impoverished by transmitting a patrimonial value without receiving its equivalent, but that he is merely paying a *pre-existent obligation.*

According to this concept, the inexistence of the intentional element of donation is established merely as a consequence of the objective element.

The basic analysis resides in the provisions of article 1235 of the French Civil Code which states that any payment entails a debt, thus establishing the obligation to return any undue payment.

The admission of coexistence between the natural obligation and liberality entails *acknowledging the relativity of both notions* as within each act, "each occupies … the ground of the other", a fact which entails the inherent duality of this qualification:

- the act will be a liberality from the perspective of rules which protect the legal heirs from *de cuius'* free patrimonial transfers, but also
- the payment of a natural obligation in regard to the rules which entail the integrity of the will of the person (Maury, 2002).

5.2. Theory of Compatibility of the Natural Obligation with Liberal Intent

The theory of incompatibility was criticised by its opponents for the following reasons:

The arguments of classical authors are insufficient. Thus, affirming the identity of nature between the civil obligations and the exclusion, according to the text of article 1235 second alignment of the French Civil Code, the possibility to demand repetitions based on the model of undue payment, as arguments in favour of the idea that we are in the presence of turning in an unduly good, thus has a new interpretation.

The idea that *solvens* does not provide the beneficiary with nothing more than what he is owed based on the pre-existent legal relation, attractive by its simplicity, is not as solid is it looks at first sight.

By paying a debt to *accipiens,* a debt whose execution the latter was unable to claim before a court of law, it thus acquires mandatory force, as *solvens* agrees to an incontestable sacrifice, without receiving an equivalent in return (Maury, 2002).

As for the positive law, the beneficiary enjoys an advantage as opposed to his previous situation; he had already received payment, whether his debt, previously natural, acquired full efficiency based on the debtor's obligation to pay.

The imperfection of the natural obligation makes its analogy to civil obligation unusable on a technical level. First of all, acknowledgement by text of the validity of payment in case of natural obligation does not provide sufficient clues for the qualification of the act as onerous.

From the interpretation of the previously mentioned provision we can see that, despite the discretionary character of the execution of payment, everything happens as if solvens would be held by a pre-existent obligation.

Free acts give rise to certain obligations whose ending by corresponding execution is, from the point of view of the legal technique of article 1092 first alignment of the 1864 Civil Code, still a payment. (Nicolae, 2014).

The individual freedom results in its natural responsibility.

However, it must not be understood only as a mechanism created artificially by positive law in order to ensure social cohesion, as a counter performance of freedom, but also as an intrinsic element, which justifies it.

The voluntary payment of the obligation signifies acknowledgement of the responsibility which obliges the debtor to pay any debt resulted from his acts or facts which generate obligations.

The sentiment of justice which animates the voluntary execution can't be omitted in case of the obligation which gives possibility for a justice action.

Under this aspect, between paying the natural obligation and paying the civil one, there is an incontestable similarity.

For certain, by paying, the debtor aims to free himself from the obligation, but the meaning of this desired freeing from obligation does not result in the possibility of constraining him to execute his obligation, which is characteristic for civil obligation.

In any case, removing the danger of foreclosure can't be seen as the counter equivalent which is selfishly pursued by the *solvens*, which would justify the qualification of the act as onerous.

If the payment appears to be selfish, it will exist independently of the nature of the debt whose termination is desired and will have more of a metaphysical significance rather than one which can be used by legal technique.

As a conclusion, the lack of the creditor's right to demand foreclosure does not bring a substance modification of the act of voluntary execution of a natural obligation.

5.3. The neoclassical Qualification: Liberal Intention: *Yes,* Liberality: *No*

In the French doctrine, the classical conception was rephrased as the *neoclassical theory of natural obligations.*

By acknowledging the classical views with regard to the legal character of the natural obligation, the neoclassical theory provides a technical explanation in relation to the dual strict nature of the civil obligation.

In general, the natural obligation is accepted as a substantial relation of debt deprived of the constraint of the civil obligation.

By voluntary payment or the promise to execute the natural obligation, the debtor provides his creditor with (just) an advantage which the latter did not previously have.

In the situation of the natural creditor, in case of the promise to execute the obligation, the initially natural debt becomes civil, as its payment can be obtained by the constraint of a civil obligation (Pop, 2012).

The psychological element of gratuity is present: the act was concluded by providing privilege for the interest of the other party, thus with liberal intention.

However, the pre-existing debt excludes the material component, necessary for the act to be considered a liberality (Nicolae, 2014).

As constraint is an accessory to the substantial debt relation, the act is similar with that in so far as it constitutes the guarantee of execution of the obligation.

It results that we are in the presence of a free act, which is not a liberality (but an uninterested act).

Given all the facts mentioned above, a part of contemporary doctrine states the classic justification, namely: the execution of the natural obligation is an owed payment (so it is not a free act).

Although the neo classical theory aims to cover the insufficiency of the classic argumentation, considered to be too simple, the same theory is criticised (or ignored) as its mechanisms are considered to be too complicated.

French doctrine stated that "*Perhaps it is time to wonder not about the relationship between paying a natural obligation and a liberality, but especially why it is so difficult to explain it by means of legal tools*" (Carbonnier, 1995).

We conclude by stating that we appreciate the relation between the natural obligation and the liberal act as complex.

Practically, regarding the legal mechanisms to be applied, the option in favour of the exclusion of the regime of liberalities for the execution of natural obligations appears to be necessary (Lambert, 2006).

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