

LEGAL WILL

Nicuşor CRĂCIUN¹

Abstract: *Will can be defined as the impulse that determines human activity to achieve certain goals, provided these goals exist. Will is a complex element both from a psychological point of view and from a legal point of view. Will is the individual's ability to act rationally to achieve goals that have been developed, mentally, in a forward-looking manner. Formation of consent is based on an internal will, which, in order to produce legal effects, is to be "objectified" (externalized) in the stated will. From the legal point of view, two elements are relevant: the externalized judgment - the consent, and the determining reason - the cause or the purpose of the legal act.*

Key words: *internal will, stated will, consent, legal regulation, purpose of the legal acts.*

1. Internal Will: The support of the legal act

The autonomous totality of spiritual and economic manifestations, legally and politically regulated, cosmically, biologically, psychologically and historically conditioned, represent the **social will**.

1.1. Social will, individual will and motivation

Social will is distinguished from "motivation" that "is linked to individual and impulsive actions and is a much more comprehensive notion" (Gusti, 1941, p. 17).

Will can be defined as the impulse that determines human activity to achieve certain goals, provided these goals exist.

"Will is a complex element both from a psychological point of view and from a legal point of view. From the legal point of view, will is complex because it brings together in its structure two elements: the consent and the cause (purpose)" (Boroi, Anghelescu, 2012, p. 133).

¹ *Transilvania* University of Brasov, nicusor.craciun@unitbv.ro

The "three rights of the becoming of the **social will**" are: the embryonic will, characteristic of the natural man, devoid of the notion of purpose, whose decisions are taken unconsciously, impulsively; the weakly developed will belonging to those who have means but do not have a well-defined purpose; a fully realized will that both is aware of certain purposes and possesses the means that correspond to the fulfillment of these purposes.

Individual will is in a relationship of interdependence with other psychological categories on which the human psychic system is built, an ability of man and not only his, whose premises are in the human-specific psychological potential through his voluntary activity; the achievement of the proposed goals and, therefore, the will involves the use of all psychic and moral resources, the power of man to plan (Dogaru, 1986, p. 11 and the and the following pages, Moloman, 2010, p. 14).

In the doctrine, **will** has been defined in other ways. For example, **will** is also generally understood as an "ability and mental process to drive the work in all its aspects; system of higher self-regulation as it is carried out by the second signaling system and involves deliberation, purpose and plan developed consciously, organization of own forces".

As a psychological category it has a double meaning: on the one hand we are talking about:

- **general will**, which is that of the entire society or social groups, and
- **individual will**, characteristic of one individual (Popa, 2002, p. 94).

The **expressed will** is the result of a complex cognitive process, which implies knowing reality, raising awareness of the needs and desiderata, valuing the reasons, goals, means and their correlation in terms of the exigencies of the own ego but also of the imposed objectives by society.

Will is the individual's ability to act rationally, to achieve goals that have been mentally developed, in a forward-looking manner.

The mental plan to achieve **will** is essentially composed of the following *elements* (Dogaru, Olteanu, Săuleanu, 2009, p. 28): the idea of purpose and its representation; the image of the final effect; the image of the situation in which the proposed purpose and the action to be taken will be achieved.

The analysis of the human psychological interior and the way that transforms the **psychological will** into rational will is very important, because the **psychological will** is just the substrate of the **legal will**.

From the legal point of view, two elements are relevant: the externalized judgment - the consent, and the determining reason - the cause or purpose of the legal act.

Formation of consent is based on an **internal will**, which, in order to produce legal effects, is to be "objectified" (externalized) in the **stated will**.

The two components of the **will** must coincide. **Freedom of will**, however, can be limited both in terms of the internal phase, deliberation, by altering the cognitive

premises of the **act of will**, as well as in the phase of its exteriorization, when the manifestation of the **will** can be restricted or even suppressed (Beleiu, 1998, p. 139-140; Popa, 2005, p. 89; Lupan, 1999, p. 212; Urs, 2001, p. 215; Pop, 1993, p. 130; Boroi, 2008, p. 16).

As an exception, **declared will** and **internal will** do not coincide sometimes. The discrepancy between wills is usually due to external conditions (Spasici, 2008, p. 17).

1.2. Qualified Will: Legal Will

The **will of man**, manifested with the intent to produce legal effects, is a psychological process, a fact of psychic life. Psychological phenomena are divided into deeds of intelligence, deeds of sensibility, and deeds of will, without there being an insignificant limit between them.

Consequently, **psychic will**, viewed as a complex phenomenon, includes both intellectual states and affective states (Dogaru, 2005, p. 19).

2. Internal Formation of Legal Will

The formation of **legal will** is based on a complex psychological process determined by the need that a person wants to satisfy (Gheorghe, 2010, p. 14).

In relation to the interests of man, as the representation of purpose becomes stronger, it moves from trend to desire to satisfy the need (Boroi, 2008, p. 98).

The next stage is deliberation and it involves weighing the advantages and disadvantages, which presents their desires and means of accomplishment.

Thus, by the occurrence of a decisive cause (in relation to the other ones), from the deliberation it is proceeded to the decision to conclude the civil legal act, an act that appears as a means of achieving the proposed goal.

In order for the psychological fact to become a social deed it is necessary that the decision taken be externalized, so that other people have the opportunity to get acquainted with it. (Ionașcu, 1963, p. 79-80; Ionașcu, 1967, p. 258 and the next one; Beleiu, 1998, p. 149; Pop, 1993, p. 130 and the following pages).

In civil doctrine, from the complex psychological process of the will formation, two elements are retained: the consent and purpose of the legal act.

3. Freedom of Will and Principles of Legal Will

The **legal will** is governed by civil law by two principles (Dogaru, 2002, p. 721.): the principle of **autonomy of will** and the principle of **real will**.

A. The principle of *autonomy of will* was indirectly established in art. 969 par. 1 of the old Civil Code, according to which "the legally established conventions have the power of law between the contracting parties".

The old provisions were also taken up in the New Civil Code, according to which "The valid contract concluded has the force of law between the contracting parties" (art. 1270 par. 1).

Consequently, civil law issues are free to conclude conventions or other legal acts.

The principle of freedom is manifested in three directions:

- subjects are free to conclude or not a civil legal act;
- subjects are free to amend a legal act;
- subjects are free to terminate a previously concluded legal act. (Boroi, 2008, p. 208-210)

It follows that the subjects of law are free to conclude *any legal acts* in the form they deem it necessary.

However, the limits of the principle of the freedom of legal acts are frequent. They are imposed by the imperative norms of public order and morality.

Under the terms of the 1864 Civil Code:

- according to art. 5 of the Civil Code, "it cannot be derogated from conventions or particular provisions of laws that engage in public order and good morals",
- art. 966, according to which "an obligation without cause or ground based on a false or unlawful cause cannot have any effect", and
- art. 968 of the Civil Code, according to which "the cause is unlawful when prohibited by law, when it is contrary to good morals and public order" (Ionaşcu, 1963, p. 95; Stătescu, Bîrsan, 2008, p. 16).

Under the New Civil Code, the cause must be lawful and moral. (art. 1236 par.1).

The cause is unlawful when it is contrary to law and order.

The cause is immoral when it is contrary to good morals.

Consequently, the legal will must respect the laws of public order, namely the total legal norms and the general principles of law that enshrine social and economic order.

It should be noted that the legal provisions of public policy are *imperative rules*, from which it cannot be derogated, under the sanction of absolute nullity (Pătulea, 1997, p. 24 and the following pages).

B. The principle of *real will* also governs the formation of legal will, the latter comprising a psychological and social element.

In this context, there are two relevant conceptions on the ideological plane: the subjective conception and the objective conception.

The subjective conception gives priority to the internal will, thus satisfying the static security of the civil circuit, since the validity of the legal act by which the subjective civil

right was transmitted on the grounds of the inconsistency between the internal and the expressed will (G. Boroï, 2008, p. 209).

The subjective conception was expressly established in art. 1266 par. 1 of the New Civil Code, according to which: "Contracts shall be interpreted according to the concordant intention of the parties and not according to the literal meaning of the terms" (Dogaru, 2005, p. 22).

The objective conception gives priority to the stated will, because after it has been externalized, the legal will produces effects that cannot be removed because the declared will does not coincide with the internal will.

It follows from the above that, in the field of simulation, the secret act, which is real, corresponds to the internal will, and not to the public act, which corresponds to the declared will.

As an exception, in the case of simulation, the bona fide third party cannot oppose the secret legal act, which corresponds to the real will of the contracting parties, but only the apparent legal act, since only it could be known by third parties -the credentials are entitled to invoke in their favor and against the parties the effects of the secret legal act) (Spasici, 2008, p. 18-21).

As an exception, the old provisions of art. 1191 par. 2 of the Civil Code, according to which it may be possible for the will to be recorded in the inscription not to be the real one, and yet this will produce its effects, although real will could be established by statements of witnesses, but the provision of the law does not allow it (Boroï, 2008, p. 210).

It should be noted that when there is a concordance, identity between the inner will and the externalized will, there is no question of the applicable principle, because there is practically one will.

In other situations, it is possible that there is no concordance between the two elements, and thus the problem of determining the element to be outbalanced is posed. (Spasici, 2008, p. 21).

4. The Correlation between the Internal (Real) Will and the Stated Will

Internal will is the real, true legal will, as it was developed and adopted by its subject.

In the problematic doctrine was the determination of the real will, of the ratio in which it is with the declared will and according to which the effects of the juridical act must be appreciated. (Vasilescu, 2003, p. 35.). In order to be effective, the will of the parties must be manifested, externalized, brought to the attention of the subjects of law (Boroï, Stănculescu, 2012, p. 95).

Thus, through exteriorization, "individual desire becomes a legal will capable of producing effects in the sense of the birth, modification or termination of a concrete legal relationship" (Ungureanu, 2005, p. 6).

Consequently, the differences between the two determines the existence of two wills, one internal, one real and another altered in the process of exteriorization, the stated will.

It should be pointed out that the inconsistencies between the internal will and the stated will (an inexact exteriorization of the real will) do not oppose the valid formation of the contract. Thus, distorted internal representation of essential and determinant elements of the contract as a result of the spontaneous or provoked error, in principle, allows its valid formation.

According to the subjective theory enshrined in the French Civil Code and adopted by the Romanian legislator in 2009, it satisfies the static security of the civil circuit, to the detriment of dynamic security, which is not such as to encourage law subjects to enter into contractual relations.

Instead, the declared will is the only one that produces effects, being the only reality perceived by third parties, on the basis of which they contract. In the doctrine it has been appreciated that the advantage of the objective conception is to strengthen the dynamic security of the civil circuit (since the parties, in relation to the declared will, more easily perceived, are encouraged to contract) (Spasici, 2008, p. 22).

Since its outline, Romanian civil law has admitted as a rule, the (subjective) principle of the internal will, but also establishing some exceptions in conformity with the principle of declared will (Boroi, 2008, p. 156).

Consequently, by interpreting a concrete cause, the judge will take into account the common intention of the parties and not the literal meaning of the terms used (Stătescu, Bîrsan, 2008, p. 56).

Under article 1206 1 of the Civil Code, "Consent is vitiated when it is given by error, surprised by the dol or pulled by violence." Thus, manifestation of free, conscious, real will, not the one altered by a vague consensus, produces effects.

In the doctrine (Gheorghe, 2010, p. 14) it was appreciated that the principle of declared will have an exceptional character in the Romanian civil law, as follows:

- in the case of simulation, **stated will** caught up in the public act, a lying one, is effective as to third parties, because only this type of act can be known by others;
- the impossibility of probing against a document by other means of evidence rather than a counter-inscription, may lead to the *situation in which stated will is in front of the internal one* (*idem est non esse et non probari*);
- certain types of error are recognized by Romanian law as vices of consent and sanctioned as such, but in the case of indifferent error the **stated will** prevails despite the inconsistencies with the **internal will** (Boroi, 2008, p. 156 and the following pages).

With all the above, we specify that some legal systems (usually of French inspiration) refuse to take into account the **real will** in favor of the **stated** one.

References

- Beleiu, Gh. (1998). *Drept civil roman. Introducere în dreptul civil. Subiectele dreptului civil* [Roman civil law. Introduction to civil law. Civil law subjects]. Bucharest: Șansa.
- Boroi, G. (2008). *Drept civil. Partea generală* [Civil law. The general part]. Bucharest: Hamangiu.
- Boroi, G., Angheliescu, C.A. (2012). *Curs de drept civil. Partea generală* [Civil law course. The general part]. Bucharest: Hamangiu.
- Boroi, G., Stănculescu, L. (2012). *Instituții de drept civil* [Civil law institutions]. Bucharest: Hamangiu.
- Dogaru, I. (1986). *Valențele juridice ale voinței* [The legal voices of will]. Bucharest: Editura Științifică și Enciclopedică.
- Dogaru, I. (2002). *Teoria generală a actelor cu titlu gratuit* [The general theory of free papers]. Bucharest: All Beck.
- Dogaru, I. (2002) *Drept civil. Idei producătoare de efecte juridice* [Civil law. Ideas producing legal effects]. Bucharest: All Beck.
- Dogaru, I., Olteanu, E.G., Săuleanu, L.B. (2009). *Bazele dreptului civil. Contracte speciale* [Basics of civil law. Special contracts]. Bucharest: C.H. Beck.
- Gheorghe, A.N. (2010). *Testamentul: liberalitate sau substituție de persoană?* [Will: liberality or substitution of a person?], Teză de doctorat, Universitatea „N. Titulescu” Bucharest.
- Gusti, D. (1941). *La science de la réalité sociale* [The science of social reality]. Bucharest: Academia.
- Ionașcu, A. (1963). *Drept civil. Partea generală* [Civil law. The general part]. Bucharest: Editura Didactică și Pedagogică.
- Lupan, E. (1999) *Introducere în dreptul civil* [Introduction to civil law]. Cluj-Napoca: Argonaut.
- Moloman, G.C. (2010). *Intenția liberală în actele juridice inter vivos și mortis causa* [Liberal intent in inter vivos and mortis causa legal acts], Teză de doctorat, Universitatea „N. Titulescu” Bucharest.
- Pătulea, V. (1997). *Principiul libertății contractuale și limitele sale* [The principle of contractual freedom and its limits] in *Law Review* no. 10/1997.
- Pop, T. (1993). *Drept civil român. Teoria generală* [Romanian civil law. General theory]. Bucharest: Lumina Lex.
- Popa, V.V. (2005) *Drept civil. Partea generală. Persoanele* [Civil law. The general part. Persons]. Bucharest: All Beck.
- Spasici, C. (2008) *Consimțământul contractual, civil și consumerist* [Contractual, civil and consumerist consent], Teză de doctorat, Universitatea „N. Titulescu” Bucharest.
- Stătescu, C., Bîrsan, C. (2008). *Drept civil. Teoria generală a obligațiilor* [Civil law. General Theory of Obligations]. Bucharest: Hamangiu.

Urs, I.R. (2001). *Drept civil român. Teoria generală* [Romanian civil law. The general theory]. Bucharest: Oscar Print.

Vasilescu, P., (2003). *Relativitatea actului juridic civil. Repere pentru o nouă teorie generală a actului de drept privat* [Relativity of civil legal act. Highlights for a new general theory of private law act]. Bucharest: Editura Rosetti.

Ungureanu, O. (2005). *Drept civil. Introducere* [Civil law. Introduction]. Bucharest: Rosetti.