

## THE WILL IN *MORTIS CAUSA* LEGAL DOCUMENTS

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**Abstract:** *The will of a person is a complex process that includes acts of intelligence, emotional acts and volition ones. The notion of liberal intent is a complex, uncertain, subjective and evolutionary one. In trying to define the concept of "liberal intention" (for the legislature is reluctant to formulate such a definition) one must start from the premise that liberal intention is the essence of liberality and it is based on the ruler's desire to minimize his/her heritage unselfishly, to impoverish him/herself in favour of another. At first glance, the notion of liberal intent seems simple, but a more thorough examination raises a number of difficulties. In this sense, in defining the notion, two streams have emerged - one that emphasizes the objective conception on the intention to reward and another one that emphasizes the subjective concept.*

**Key words:** *will, liberal intent, liberality, legal.*

### 1. Legal will

#### 1.1. The concept and conditions of legal will

Human will is a complex process that includes acts of intelligence, emotional acts and volition ones. The boundary between them is not unsurpassable for each of them contains elements of the others [21]. In case these facts concern legal aspects, then will acquires legal character.

Legal will is a decision, a judgment of a person to commit an act or a deed producing legal consequences. In order to acquire legal character, it is necessary that the psychological need of a person be conscious, free, declared and externally manifested [5]. In other words, will gains legal meanings when taking the form of the legal act.

Like any will, legal will also has a psychological nature. Its formation is based on a complex psychological process triggered by the need that the person wants to satisfy [11].

After the emergence of a need, it is processed by the mind of the individual, and later, his/her mind foreshadows the instrument to satisfy the need [22].

If there are multiple needs, the individual's mind weighs and considers which of them is decisive. Thus, when concluding a legal act, the individual starts from foreshadowing the goal s/he pursues through the conclusion of the document and the investigation of the reasons for his/her decision. This is the cause of the legal document. After the appearance of a decisive reason, the next step is passing from the idea to its realization, i.e. to its external manifestation through expressing

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the consent to the composition of the legal document. Through externalization, individual will becomes legal will, capable of producing effects [27].

Therefore, in order to acquire legal character, it is necessary that a person's psychological will meet the following conditions [19]:

- be deliberately conscious
- be free
- be externalized

In law, the role of will has a double meaning: on the one hand there is the general will, belonging to social groups or to the whole society, determined by certain general interests, and on the other hand, individual will belonging to each individual, manifested in the enforcement of the law. General will, formalized through state activity becomes legal will expressed by laws and defended by the state [19].

## 1.2. Principles of legal will

The doctrine [7] is the one which revealed the existence of two legal principles that govern legal will, respectively the principle of personal autonomy and the principle of real will.

### A. The principle of autonomy of will

The principle of autonomy of will or freedom of contract implies the fact that individual will makes the law, and it is but a synonym of human freedom. [23] The Constitutional Court by Decision no.365 of 5 July 2005 provides a definition of freedom of contract in the following sense: "the freedom of contract is the possibility given to every law subject to conclude a contract, within the scope of mutuus consensus, of the product of his/her manifestation of will converging with the other party or parties, to establish its contents and determine its subject, acquiring rights and assuming obligations

whose observance is binding on the contracting parties. "

This is not a will guided by impulse, but a rational and conscious will in itself [6] Will itself lacks the power to give rise to rights and obligations. It acquires this power by law.

The origin of the phrase "freedom of action" is in private international law. Ideologists Brocher and Weiss were the first who used this phrase to describe the possibility of the parties to choose the law applicable to the contract with foreign elements [24].

The principle of autonomy of will is associated with the beginning of modern voluntarism law and is related to the understanding of the individual as a being endowed with will and consciousness [23], the most remarkable representatives being I. Kant and J.J. Rousseau.

Having its origins in canonical law and the natural law school, this principle reflects a subjective conception on law and is intimately linked to the individual freedom expressed in the fact that:

- anyone can conclude a legal act or not
- parties to a contract are free to decide the content and form, within the limits imposed by law for the contract derives its binding force exclusively from the will of the parties [26]

Freedom of contract is the legal corollary of freedom understood as the product of conscious and free will, a social reverberation of this will [8].

Opposed to the subjective conception on the law and contract, conception is based on the autonomy of will. Over time several currents were born which have shaped an objective conception in terms of the contract.

Among them stood legal positivism and the theory of solidarism. Legal positivism always turns to the law, justifying reality outside concrete legal will and outside morality.

In view of legal solidarism, will do not create the right, the individual having only the possibility to choose whether s/he wants to be subject to an objectively predetermined law. [23]

If initially the principle of autonomy of will had a character that tended towards the absolute, in the sense that it rejected any intrusion of the state in shaping the contract, this being considered superior to law, in time, observing that contractual freedom without limits could be diverted from its legal purpose, freedom of will manifested a pronounced decline.

This was manifested by: inserting in the legislation mandatory provisions on the formation and validity of contracts [30], by increasing the importance and frequency of other sources of obligation of extra-contractual nature such as illegal acts and unjust enrichment with the consequence of the decline of the importance that the contract theory used to have; by the existence of contracts whose key terms are set by law or by one of the parties, the other party having the possibility to accept them or not (contracts of adhesion); through the emergence of the category of forced contracts, regulated by law, such as buildings insurance, or internal transposition of the European contract law.

In contemporary law, although it still acknowledges the principle of autonomy of will, the latter is no longer unlimited, but must be linked to the abidance by the law, individual will becoming an instrument for achieving social needs [10].

Thus, the Civil Code establishes the principle of contractual freedom by art.1169, regulating the fact that parties are free to enter into any contracts and determine their content, within the limits of law, public order and morals and by art.1178, it consecrates the principle of freedom of form: a contract is concluded by the mere agreement of the parties,

unless the law requires a certain formality for its conclusion to be valid.

From this provision, two important consequences are drawn: first, the subjects of law are free to conclude not only legal acts known but unnamed legal acts and secondly, when the law does not expressly provide otherwise, parties are free to choose the form that they will give to the legal act.

In regard to the legal provisions, we find out that the freedom of contract has a relative character [12], limited by public order, morals, and civil mandatory rules.

## **B. The principle of real will**

The principle of real will, the rule of interpretation of legal documents and also a criterion capable of establishing the real will of the parties, is the second principle governing legal will formation.

Legal will comprises two elements: an internal, psychological element, and an external, social one, which is declared.

Internal or real will is "the will that comprises the intimate decision to enter into a legal act ... is the volitional essence of the convention" [23].

External will is the will declared and shared with third parties upon the conclusion of the legal act. The distinction between internal will and stated will is only relative, because, technically, "will cannot be totally separated from its psychological roots" [17].

The will declared through the conclusion of the legal act must correspond to internal will, thus the legal protection of subjects on which the effects of the legal documents is exercised thus becomes achievable.

For this, it is necessary that the manifestation of will come from a conscious person should not be corrupt and be expressed with the intention of producing legal effects, as the valence of will manifestation in itself which gives it

the quality of legal will is that the volitional attitude of the subject of law must be intended to produce legal effects [15].

To produce legal effects, internal will must meet the following conditions:

- be free and conscious
- be driven by the intention to produce legal effects
- be externalized

The freedom of an individual to make informed choices is inextricably linked to the idea of autonomy of will. In law, personal freedom manifests as freedom to choose and decide, so the freedom of internal will is just a consequence of contractual freedom.

Because it is a process that is completed by the externalization of consent, it is necessary that the manifestation of will come from a conscious person. The doctrine held that the lack of information or their erroneous character is equivalent to the lack of free and conscious will, which will attract the abolition of the document for the total lack of consent or vitiated consent [23].

In order to produce legal effects, it is necessary that will be animated by this purpose.

The legal document is void when the intent of giving rise to legal relations is missing or is futile.

The intent lacks only when will is not driven by the intention to bind legally or where will is expressed under a mental reservation; intention is not serious when consent is given in jest (*jocandi causa*) or perfunctorily, or when given under the pure potestative condition from the one who commits him/herself (see article 1403 of the New Civil Code which provides that the obligation contracted under a suspensive condition that depends solely on the will of the debtor produces no effect.), but also when the manifestation of will is too vague [3].

Finally, in order to become consent, it is required that legal will be externalised, i.e. to be communicated to third parties.

Inner will does not become legally effective if it does not take an external form, but its encounter with another will is able to create, modify or extinguish legal relations.

Related to these issues, the doctrine held that externalized will fulfils two functions [28]:

- represents the means by which s/he who expresses her/himself intends to produce legal consequences
- it is an act of social communication, the externalization of will being the means by which it is communicated to the outside world

Legal will can be externalized in various forms, civil law establishing the principle of mutual consent as a general rule. However, there are situations when it is necessary to respect the solemn form, its absence being sanctioned by absolute nullity of the legal document.

### **1.3. Real will in opposition to declared will**

When internal will coincides with declared, externalized will, it does not raise any issue.

There are many situations in which internal will does not coincide with external will. In this case, in the doctrine, the question was born whether to give valence to internal will in order to maintain the freedom of will arising from the privacy of every individual, or declared will be given valence, the only one ascertained by others in order to protect and ensure the safety of the civil circuit. In formulating a response, two trends have emerged.

According to the subjective conception adopted implicitly by the New Civil Code, in the elaboration of the legal document,

valence must be given to internal will in order to meet the state security of the civil circuit.

According to art. 1266 of the New Civil Code, contracts are interpreted by consensus between the parties and not in the literal sense of the terms.

In contrast, the objective conception [29] supports the need for the recognition of declared will in order to ensure the dynamic security of contractual relations [2].

Besides the two classical theories on will, a third concept was born recently, that of validity, which favours the idea of correlation between internal and declared will, externalized will representing a modality of disclosure of internal will [16].

Related to the legal provisions, art. 1266 paragraph 1 of the New Civil Code provides that the interpretation of contracts is done by "consensus between the parties, and not in the literal sense of the term." Also, according to art. 1289 paragraph 1 of the New Civil Code, "the secret agreement between the parties produces effects only between parties and, if the nature of the contract or the stipulation of the parties does not indicate otherwise, between their universal successors or those with a universal title."

The Romanian doctrine held that the legislature adopted the subjective conception regarding will [23], estimating that declared intention has an exceptional character only applicable in certain situations, such as simulation (simulator is "the unitary legal operation that creates a legal appearance which does not correspond to the reality by the concurrent completion of two legal acts: a public one whose effects are removed or modified, in whole or in part, and another secret act, which contains the agreement itself, explicitly or implicitly, of the simulation") [1] the impossibility of proving an act whose object has greater value than £ 250

than by a secret agreement or in case of an indifferent error.

In finding the real intention of the parties, the primary appeal must be to the intrinsic elements of the act and the existing data therein, but the real intention may result from external facts or circumstances, therefore from extrinsic elements.

Inconsistencies between internal, real will, and the externalized one, do not contravene the valid formation of the legal act. However, declared will is the only one producing effects, this being opposable to the third parties.

## **2. Free will. The liberal intent. Objective conception versus subjective conception.**

The notion of liberal intent is a complex, uncertain, subjective and evolving one. In trying to define the concept of "liberal intention" (for the legislature is reluctant to make such a definition) one must start from the assumption that liberal intention is the essence of liberality and is based on the ruler's desire to minimize his/her heritage unselfishly, to impoverish him/herself in favour of another.

This concept was first used in the nineteenth century doctrine during intense doctrinal debate on the gratuitous or onerous nature of legal acts. The term liberal intent was originally used by Aubry and Rau [9].

At first sight, the notion of liberal intent seems simple, but at a closer inspection, it raises a number of difficulties. Perhaps this was the reason why the legislature avoided the provision of a definition.

In this sense, in defining the notion, two currents have emerged - one that emphasizes the objective conception on the intention to reward and another that emphasizes the subjective concept.

In the objective or abstract conception, the liberal intention consists in the

consciousness and intention to give without receiving anything in return, the reasons which prompted this gesture being irrelevant - love, selflessness, philanthropy, religious reasons, etc. This view has been criticized on the grounds that it would mistake liberal intention for consent. The argument formulated was later rejected, the argument put forward being that the intent to gratify precedes consent which can be vitiated by a defect of consent that does not affect the liberal intention [25].

In its subjective sense, "*liberal* intention involves not only a wilful impoverishment, deliberately wanted, but also a radically disinterested one, consent being based on pure, immaculate altruism" [13].

In the subjective conception it was considered that in order for liberality to exist, it is necessary that the ruler should not be animated by any material or moral interests when committing the act of generosity. From this point of view, liberal intention is the criterion that separates the free documents from the onerous ones.

Finally, most of the doctrine expressed itself on behalf of adopting the objective conception on liberal intention, the subjective reasons which determine an act of generosity having no relevance except to the extent to which they are illegal or immoral.

The doctrine also expressed itself in the sense that there will be a gratuitous act whenever the interest, material or moral is to be found together with the intention to do good, among the reasons determining the act.

When interest is the only reason determining the act, i.e. when the "*liberality*" is made solely for the interest to materialize, the intention to do good is missing. Anyway, if it existed, it is just a consequence of this interest. So, for a liberality to exist, it is necessary that the interest coexist with the liberal intention,

so that the latter is not subject to interest [20].

The solution is natural given the fact that every human action is justified by an interest, whether material or moral. The human being is a rational being who plans and externalizes his/her will. A legal act is nothing but the result of human will manifested in the open, will that is justified by a reason and an interest. In this sense, moral reward, even if it turns out to be critical to the completion of the legal act is not likely to impede the liberal nature of the operation, being the reason for the liberality. So, unless s/he is not in full command of their mental faculties, no one is willing to become poorer without waiting for anything in return, but as long as the matter is not measured in monetary terms, the purity of the liberality is not affected [18].

In case the ruler tries to obtain a patrimonial advantage, then one must carefully verify whether his/her act is a gift or a gratuitous legal act. It is the case of liberality affected by a goal. It is certain that the temptation is great to assert vehemently that getting a patrimonial advantage in return to the services of the ruler is not compatible with the idea of liberality and liberal intent. However, before we venture to make statements with an absolute character, it must be born in mind that the law explicitly regulates liberties with tasks, in which case if the value of the load does not exceed the ruler's benefit, the idea of liberality cannot be disposed of *de plano*.

Moreover, the task involves essentially the materialization of a proprietary interest, so if we accepted the idea of incompatibility of the proprietary interest with the liberality, then obviously we would end up eliminating this category of legal acts.

In conclusion, the liberal intention can be defined as "the consciousness and intention

to make a material sacrifice in favour of another" [4], is the very essence of liberality [14]. The emotion related to doing good, the valences of compassion, the gracious procession of the example of meekness and generosity do not lack in any legal discourse dedicated to the theme of liberal intention, which is in this light, the very materialization in the field of contracts of the mercy that the human being is capable of [13].

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