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Revista de Antropología, Ciencias de la Comunicación y de la Información, Filosofía, Lingüística y Semiótica, Problemas del Desarrollo, la Ciencia y la Tecnología

Año 36, 2020, Especial N° 26

Revista de Ciencias Humanas y Sociales
ISSN 1012-1587/ ISSNe: 2477-9385
Depósito Legal pp 198402ZU45

Universidad del Zulia
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Departamento de Ciencias Humanas
Maracaibo - Venezuela

Opción, Año 36, Especial No.26 (2020): 3059-3076
ISSN 1012-1587/ISSNe: 2477-9385

The Relationship between Pillars of the Contract and its Binding Force

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Abstract

A philosophical and practical question about the source of the binding force of the contract is raised by Latin jurisprudence trend and some of Arab laws that have influenced by this trend. Since Romans era, trends differed in understanding and answering this question. So trends moved from formalism in contracts to the given promise in canon law. Then, jurisprudence of autonomy of the will emerged where the most recent theory related to it is utility and justice theory by the French jurist Ghestin. In this research, I will present a new understanding based on the relationship between the contract and its binding force.

Keywords: Autonomy of the Will, Binding Force of the Contract, Latin Trend, Pillars of the Contract, Consent.

La relación entre los pilares del contrato y su fuerza vinculante

Resumen

Una tendencia filosófica y práctica sobre la fuente de la fuerza vinculante del contrato es planteada por la tendencia de la jurisprudencia latina y algunas de las leyes árabes que han influido en esta tendencia. Desde la era de los romanos, las tendencias diferían en la comprensión y la respuesta a esta pregunta. Entonces las tendencias

Recibido: 20-12-2019 •Aceptado: 20-02-2020

pasaron del formalismo en los contratos a la promesa dada en el derecho canónico. Luego, surgió la jurisprudencia de la autonomía de la voluntad donde la teoría más reciente relacionada con ella es la teoría de la utilidad y la justicia del jurista francés Ghestin. En esta investigación, presentaré una nueva comprensión basada en la relación entre el contrato y su fuerza vinculante.

Palabras clave: Autonomía de la voluntad, fuerza vinculante del contrato, tendencia latina, pilares del contrato, consentimiento.

1. INTRODUCTION

Legal thought in Latin trend headed by French jurisprudence, has engaged in a traditional question represented in looking for the source of the binding force of the contract. Therefore, theories varied in its scientific structure in order to explain and understand this source. A prevailing common Roman belief was that contract drew its binding force from formalism, and if formalism did not materialize, then the contract is not existed, and it does not have any force status. Accordingly, formalism -during Roman era- was the basis of the existence of the contract and its binding force.

Along with the historical development, canon law emerged, and it developed the understanding of this principle by ignoring the need for of formalism in contracts, and that the source of the binding force of a contract laid in the given promise where parties are obliged to respect it. This religious and moral explanation of the principle was not sufficient for legal thought, especially after the economic, social and intellectual development which sought a precise explanation for

the source of the binding force of the contract pursuant to the legal logic that influenced by freedoms era started particularly in Europe.

The role of canon law in developing the general idea of the binding force of contract cannot be denied. It helped to get rid of formalism and helped in relying on the principle of adequacy of the will as a basis for the existence of the contract and abandon the formalism principle that prevailed among the Romans. During freedoms era, legal thought affected by the role of free will and by the individual's role as a source of creating the contract. This affection had new repercussions in understanding the source of the binding force of the contract that led to emergence of principle of autonomy of the will as a new explanation that finds its basis in the free will of individuals.

Supporters of this principle used it to create other important principles like the contract is the law of contracting, contractual freedom principle and principle of relativity impact of contract. But the exceptions of the principle of autonomy of the will and principles explained by it led up some jurists such as jurist Duguit, German jurist Kelsen and French Jurist J. Ghestin to cast doubt its validity in explaining the source of the binding force of contract, prompting them to form new theories. It is worth mentioning that due to jurisprudential differences in understanding the source of the binding force of the contract, some of the French jurisprudence took another direction in questioning about the theory of contract: Is it true? Or it is just an illusion?

There is no doubt that the economic life complexity and social development of humanity affected contract theory by which led to

raise the question again about the source of the binding force of the contract. In this study, I have excluded The Anglo-Saxon trend because it depends on a particular Juristic method in dealing with contract concept. With deep insight to theories dealt with interpretation of the source of binding force of the contract, I divided these theories into two trends. First, it is based on the free will of the contractors, and the other one is based on the law. In this study, I will try to provide a new attempt to explain the principle of the binding force of the contract attributed it to the elements of the contract through new understanding and special indication that will lead to a new explanation of the contract binding force.

Starting from the legal question: where from does the contract draw its binding force? I will devote chapter one to study the legal disparity in explaining the source of the contract binding force. In the same chapter, I also will examine theories that were presented as an attempt to interpret the binding force of contract. In chapter two, I will discuss my understanding of the contractual justice concept which consists of two elements or pillars: consent and legitimacy as a new basis for the source of the binding force of the contract.

I believe that the reason behind disparity in legal explanation of the source of the binding force of the contract is related to the elements of the contract. In contractual relations, it is right to say that free will does not arrange any commitments that cause damage to itself. However, perception of this free will should take into consideration its lack of consensual defects, and it is not exposed to economic pressure. In addition, there are two wills in the contract each one of them seeks

to achieve benefits and gains that will affect the benefits and gains of the other one.

Saying that will be absolutely free is missing the truth, reality and logic; therefore, descriptive law with its different sources and substantive rules have an important role in achieving contractual justice, and contractual relationship includes three aspects: the parties of the contract, the law and the judiciary. Accordingly, contractors' free will may establish a contract, and no one can deny the intervention of law to correct it or at least to supervise it, in addition to the role of judiciary that sometimes modifies it.

principle of autonomy of the will is biased to the role of will in the contract or perhaps it is more ideal in understanding this role while other theories that established its grounds depending on law, comparatively overlooked the role of this will. In this chapter, the role of principle of autonomy of the will in explaining the binding force of contract will be evaluated (section one), and then I will evaluate theories that rely on law to explain the source of binding force of contract (section two).

2. METHODOLOGY

Supporters of the individual school as Domat and Kant impacted legal thought to rely on free will to understand the source of the contract binding force. Some jurists formed their thoughts based on that will has an independent entity which explains its right to conclude

contracts and to create whatever commitments on itself. Will is sufficient by itself to establish a contract, and since parties' wills are free and want to conclude contracts, so they are bound by it. Therefore, parties in the contractual relationship shall be obliged to their contract as they agreed on, shall not breach any of its provisions and shall implement it in good faith. In addition, provisions of the contract shall not be amended unless by mutual consent. According to the supporters of this principle, the obligation in the contract extends to the judge who shall respect the will of the parties and abide by when explaining the contract.

This principle rapidly clashed with the supervisory role of the judiciary over contracts and being not violated public order which emphasized by different legislations. Accordingly, public order was the first restriction on the principle of autonomy of will and on the parties' free will. And to verify the contract validity and to make sure it is not violating public order, French judiciary activates its legitimate oversight role on the parties' will in contract via cause theory. Moreover, judiciary supervisory role extends to the will of the parties in cases of arbitrary conditions and penalty clause. In these cases, judiciary may amend it or decide it as invalid. In addition to the use and activate different theories as reduction of contract theory, conversion of the contract and the imperative circumstances.

Besides to the role of the judiciary in restricting the autonomy of will, there is another restriction which is legislative restriction in the form of peremptory norms which are part of public order like the regulations of labor law. For example, article (4) of the Jordanian labor

law states: “a- The provisions of this law shall not affect any of the rights granted to the employees by any other law, employment contract, agreement or resolution decision if any of them give the employees better rights than those established to him/her pursuant to the provisions of this law. b- Every term in a contract or an agreement whether concluded before this law or subsequent thereto under that any employee waives any of his/her rights under this law shall be considered null and void.

It is shown clearly in the previous article that the law does not take into consideration the employee’s will if it accepts fewer or less rights than listed in the labor law or if it imposes commitments higher than the contained in this law, in addition to the invalidity of any clause whereby the employee waives any of the rights contained in this law. Labor law provides another example as a restriction and in the same way taking no account of the principle of autonomy of the will. This example appears in the collective labor contracts where they are being held by the majority. So, if the parties of the collective labor contracts vote by the majority in a syndicate, workers' group or the employers syndicate, the contract shall be concluded and become binding even for those who do not vote for the contract from both sides. Accordingly, how does the autonomy of the will explain the source of binding force of the contract" for those who their own free will does not agree to conclude the contract?

Moreover, in some cases we find some legislative texts oblige parties of contracts to abide by things that their wills do not declare their acceptance. For example, article (202) of the Jordanian civil code

stipulates that: 1- The contract shall be executed according to which included and, in a manner, consistent with the requirement of good faith. 2- The contract is not only limited to oblige the contractor to what is stated in it, but also deals with contract requirements according to the law, custom and the nature of the behavior.

Article (202) embodies the principle of contract is the law of contracting and the principle of good faith, but it arranges obligations on parties who their free wills do not declare to adhere commitments that are not part of the contract requirements. In addition, there are many other texts resulting obligations on parties of the contract where these commitments and obligations are not listed in the contract, for example, “commitment to keep the secrets of the employer” article (19) of the Jordanian labor law or “non-competition clause” in article (817) of the Jordanian civil code.

3. RESULT

Based on the above discussion, I clearly endorse what is said by some French jurisprudence like jurist Niboyer who states that, "There is no theory of autonomy of the will, where autonomy of the will in this way is not existed, and there is a fundamental confusion between this concept and another one which is the concept of freedom to conclude agreements which is, in fact, the only right concept where its content is quite different". In light of the above, we can say that contractual freedom is subject to public order and justice; the role of

the will is not absolute which restricts it in understanding and explaining the source of the binding force of the contract as the only explanation.

It is clearly shown that the will restriction is related to the widening of legislative role of the laws. For example, restrictions on the role of the will are increased when issuance of legislations are increased in the internal system of the state or in the international community. For example, agreements issued by the European Union in the field of competition and monopoly increased the restrictions on the will of the contractors. Commitments of these agreements are also reflected over the domestic laws of the European Union countries. The range of public order expands to many forms like social public order, economic public order, political public order, guided public order, protective public order, substantive public order and procedural public order where all of them are also reflected on the restriction of the will in the contract.

In most countries, laws have been expressly stipulated that it is not allowed to violate public order. For example, article (6) of the French civil code states, "Private agreements must not contravene the laws which concerns public order and good morals, where Jordanian civil code and Omani civil transactions law correspond to it in articles (88) and (67) respectively. From the foregoing, we realize that the will is not free as shown by the supporters of autonomy of the will when they claim that it can "conclude as many contracts as it wished ". In fact, it is constrained by many restrictions whether legislative or judicial, moreover, some of its actions may constitute crimes that may

be punished by penal code. Thus, we conclude from the above discussion that the will is either restricted or guided, so where is the autonomy of will?

It is not right to make contractual principles absolute in their legal formulation, especially ones based on the role of will. Free will does not mean to be absolute to act but free in the bounds of law. Moreover, law recognizes this freedom which according to its provisions it is not absolute. This can be seen in article (1134) of the French Civil Code, which states that: "Agreements legally formed …". It is obvious that this text chains contractual freedom- from the moment of its creation- by the provisions of the law. Therefore, I think that the contract theory is not illusion, but the legal understanding of the contract theory was the illusion, which motivates me to provide a new understanding of contract theory in line with the real and scientific significance of this theory.

Based on the above discussion, I think that the real problem in the contract theory begins with the definition of the contract itself. Regarding French jurist, Savaux who says that contract is an illusion and not real or fact, I explain it in a different way, perhaps our understanding of the contract theory is illusory, but the contract is an existing, scientific fact that needs more accurate understanding. I define the contract as, "An agreement of two wills to create a legitimate legal effect". And for me, the contract has two pillars: the material and the legal existence of the contract. This is my theory to explain the binding force of contract based on the fact that contract has

only two elements material and legal existence and by achieving them the binding force of the contract is realized.

I define this pillar as the internal restriction of the legal action which cannot be achieved without it. In this sense, if this pillar is not achieved, the contract will not be existed. Hence, we must distinguish between two things: the contract which is the agreement of two wills and the conclusion of the contract which is the correlation of the offer with the acceptance. Consequently, there may be a conclusion where the binding force is not achieved in it, as the case in the null and void contract. In order to achieve the status of binding force, the contract must be held according to our definition which is an agreement of two wills to create a legitimate legal effect.

In other words, not every contract has a binding force. If a contract in which the legitimacy corner is defective, it will lack the pillar of legal existence which means no more biding force for such a contract. Moreover, if such a contract arranges any legal effect, this is not because it is a contract but may be because it is a material event that results from the realization of the material existence pillar, which does not solo achieve a contract. For example, according to Shariah, milk brothers and sisters ‘Ridhaa' Brothers and siters’ are not allowed to marry each other. And if they get married and had children without knowing that they are brother and sister by breast-feeding, the contract between them will be null and void. And the effect established of filiation of children and the fact that they must be alimony by their father does not arise as a legal effect as a contract but rather as a material event arising from the material existence of the contract.

We note that there is confusion between the contract and the conclusion of the contract. For instance, the Jordanian civil code makes the contract and the conclusion as one thing. This can be seen in Articles (87) and (90). And we also note this confusion among doctrine. With respect to formalism in contracts, I do not think it is a condition of validity or a cornerstone in the contract, but rather it is a restriction in expressing the will with consent. In this case, expressing consent through the principle of consent is not enough for the legislator, so he/she directs the will to a special way to express itself which is formalism required by law.

Based on the foregoing, the contract shall be made in correlation with the consent of the offeror and the acceptance. When the offeror declares his/her wish to contract, it will not be enough for the existence of the contract, but such a declaration must be linked to the disclosure of acceptance to contract in accordance with their terms. And consent is void unless it meets the following: capacity, validity of consent and expressing the will correctly.

Capacity as I understand is not a pillar in contract, but it is a condition to establish consent. According to me capacity consists of two elements: perception and choice. Regarding perception, which is the situation of the one who lacks capacity. When incompetent person expresses his/her will of consent to contract it does not mean that his/her disclosure or expression of his/her will is defective. He/she may authorize the contract when reaches the legal age as it issued when he/she was at the stage of incompetency. Also, the contract may be authorized by the guardian as it is. In this case, legal effects are

arranged as a valid expression of consent. As for prodigality and imbecility are symptoms affect ability to express the will by consent, so expressing the will in these circumstances is void in order to protect the will of this person because of what has affected his perception.

As for choice, the consent is defective not the will, as the case with the defects of consent such as coercion, deception and fault. In such a case, the will expressed itself by consent to contract, but it was not free. The will is perceived, but it did not make a choice. For example, in the case of coercion, the coerced originally has wanted the contract, but the coercion was an ineffective barrier on the will and consent of the coerced, thus, the coerced has to void the contract, to invalidate it or authorizes it in accordance with the different legislation. However, there is another hypothesis says that the coerced one does not want the contract at all, but he/she expresses consent without the existence of his/her will due to coercion. In such a case, it is not true that the contract is void or null, but it is a non-existent contract for the lack of material existence element of the contract.

We must focus at an important condition of coercion which is that coercion should be the motive for contracting and realization of this condition leads to a non-existent contract rather than a possibility of nullity or avoidance of the contract. And the resulted effect is that the coerced does not want the contract at all. Thus, the relationship between cause and will is a fundamental relationship in contracting. The existence of the will without cause to contract is inconceivable except in the abstract act. The cause is the motive for the will to express its willingness to contract. In the case of coercion, there are

three hypotheses. First, the coerced actually wanted to contract before coercion, and coercion in this case did not produce an effect against the coerced in expressing the will to contract by consent, he/she shall accept the contract which is a sign of his or her consent which leads to achieve material or material existence of the contract.

Second, the coerced wanted the contract before the coercion, but after disappearance of coercion, his/her will does not show any desire to accept the contract, but a desire to break it or invalidate it according to the various legislation. We may find the legal basis for this situation in the principle of good faith at the stage of the conclusion of the contract. The bad faith of the other part to resort to coercion achieves avoidance of the contract not its nullification because the contract is convened, although nullity is relatively since the material existence of the contract was achieved in this case because coercion does not emerge. Third, the coerced does not want to contract at all, but his/her will was directed and had forced to contract, so there was no cause. In this case, there is no consent and originally contract does not exist at all, and then there is no need to terminate or invalidated it.

4. CONCLUSION

I emphasize that this article addresses the Latin legal system and excludes from its scope the Anglo-Saxon system. Contract theory is a fact not an illusion as some French jurisprudence tends to say. The illusion comes from understanding this theory. From jurisprudence

point of view, the core question in the contract theory lies in the search of the source of binding force of the contract. Theories have gone various directions. Some of them build the answer based on will and others on basis of the law. Legislations adopt different schools regarding the elements of the contract and its validity conditions, some of which have said that they are four pillars: consent, capacity, object and cause. Others have said with a single pillar which is consent, and others have focused on the conditions and terms of the contract.

By distinguishing between the element and the condition, I have concluded that the contract has two pillars: a material and a legal one. The conditions are as the means or instruments to verify these pillars. In the case of consent pillar -the pillar of material existence- capacity and valid consent are required. The pillar of legitimacy -the pillar of legal existence- is verified via the object and cause. All of this is reflected in the definition of the contract when I define it as: "The agreement of two wills to create a legitimate legal effect", thereby the definition includes and contains the existence of both pillars together. The role of will in contract cannot be ruled out, not only in its creation and establishment of the contract but also in the reflection of its role on the nature of obligations, which ultimately affects the legal adaptation of the contract whether it is binding on two or one of the parties, or it is consensual, real, formal or any other type of contract, which arranges different legal judgments depending on the circumstances. Here, the role of integrative legitimacy intervenes where will must be consistent with legitimacy to achieve the binding force of the contract.

According to the logic of the law, justice is the proper application of the law and the legal rule with its various sources must consider the principle of legality procedurally and objectively. The role of the law is to regulate and control the economic, social, political and religious life. It is inconceivable that its rules are placed in isolation from the manifestations of life that it organizes and monitors, but it is a response that affects and influences these manifestations. I believe that the contract derives its binding strength and force from contractual justice, which is achieved by two pillars: the material existence of the contract that is represented by valid consent and the legal existence which is represented by legitimacy.

The contract is formed by two wills, but it creates one will in front of law and judiciary which is the will of its parties that represents the contract itself. The contract - in its turn- represents the common will of its participants. If this will turn away from the principle of legitimacy, the law and the judiciary will intervene to amend its provisions in response to the principle of contractual justice to protect one of the parties, as in the case of arbitrary conditions, imperative circumstances or for the protection of society, especially if the contract produces an illegal cause or object that violates the public order which seeks to achieve social, economic and political security.

The contract may regulate rights related to heritage such as selling and other rights located out of patrimony such as custody and establishment of legal personality such as the company. In all circumstances, the material and legal existence of the contract lead the contractual relationship to the contractual justice which gives it the

binding force. In fact, both elements whether in a form of consent or legitimate are subject to justice.

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DEL ZULIA

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Revista de Ciencias Humanas y Sociales

Año 36, N° 26, (2020)

Esta revista fue editada en formato digital por el personal de la Oficina de Publicaciones Científicas de la Facultad Experimental de Ciencias, Universidad del Zulia.
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