The Principle of Will Autonomy in the Obligatory Law

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Abstract

The principle of autonomy of will is legislated with the Article 2 of the Law no. 04/L–077 on Obligational Relationships[1], thereby providing the legal grounds for the regulation of legal relations between parties in obligational relationship. This study aims to provide a contribution to the theory and practice, and also aims at providing a modest contribution to the obligational law doctrine in Kosovo.

The purpose of the paper is to explore the gaps and weaknesses in practical implementation of the principle, which represents the main pillar of obligational law.

In this paper, combined methods were used, including research and descriptive methods, analysis and synthesis, comparative and normative methods.

The exploration method was used throughout the paper, and entails the collection of hard-copy and electronic materials.

The descriptive method implies a description of concepts, important thoughts of legal science, and in this case, on the principle of autonomy of will, thereby using literature of various authors.

The analytical and synthetic methodology is aimed at achieving the study objectives, the recognition of the principle

[1] The Law on Obligational Relationships was adopted by the Assembly of the Kosovo on May 10th, 2012, and entered into force six (6) months upon the p the Official Gazette of the Republic of Kosovo.

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of autonomy of will, practical implementation thereof, and conclusions.

The comparative method was applied in comparing the implementation of the principle in the Law on Obligational Relationships of Kosovo and the Law on Obligational Relationships of the former Socialist Federal Republic of Kosovo, and the Civil Code of the Republic of Albania.

The normative method was necessary, since the topic of the study is about legal norms.

Key Words: law, autonomy, will, contract, freedom, relationships, obligations.

1. Introduction

The basic principles of the Law on Obligational Relationships provide the foundations of obligational law. The principles in applicable provisions express the determinations of the legal order. The object of study of this paper is the autonomy of will, which is a product of traditional regulation of contractual relations in the field of obligational law. There are different schools of thought in studying the principle in legal theory, and therefore, this matter is always of current and high relevance, and not only the theory thereof, but also the practical implementation of the principle. In studying the topic, I have also addressed and analysed the principle of autonomy of will in contractual relations, freedom to enter contract, practical implementation, limitations to freedom to enter contract, advantages and relevance of the principle of autonomy of will, and finally, conclusions of the study.

2. The principle of autonomy of will in contractual relations

The autonomy of will is a basic principle of the Law on Obligational Relationships, delineated in the Article 2 of the Law. This Article provides on the freedom of entering obligational relationships, thereby stating, in its paragraph 1, inter alia: "Participants in obligational relationships, in accordance with binding provisions, public order and good custom, are free to regulate their relations according to their will". This provision shows that the legislator has determined on three key issues. The first is the freedom of parties to regulate the circulation of goods and services in obligational relationships. The first paragraph of this Article provides on

the rule, and also requiring observation thereof, of the parties in legal relations, such as observing good custom and public order, while the third is related to the meaning of freedom of expression and the limitations to such freedom, in which the parties in such relations are allowed sufficient room to enter into legal relations upon their own will. Paragraph 2 of the same Article provides the following: "Participants may regulate their relations differently from what is provided by the present law, unless the provisions of the present law do not provide otherwise in the meaning and purpose of the law". This means that the freedom of will is of special relevance in contract law, and that the legal order provides contracting parties the freedom to enter contract, in due observation of their own interests within the bounds of law. Parties are allowed to independently regulate their own activities, and if the contracting parties are not able to regulate their property relations upon their own will, the rules on such relations shall be determined by the state. Such a provision is also found in the Albanian Civil Code, Article 420, titled the Occurrence of Obligation, which provides that "obligations occur upon a contract or law".[2] Even according to the representatives of the autonomy of will (19th century philosophers), obligations are created by the will of the parties. The will of the parties has a binding effect, and it is above the law: ''Le contract est superieuer a la loi – a Contract is above the law". The contents of the contract are freely determined by contracting parties. When they are determined, they shall have the value of law for the parties.[3]

To enter into contract, the parties may express their will in various manners. The Law on Obligational Relationships, in its Article 18, Declaration of Intention, paragraph 1, the legislator has provided: "The intention to conclude a contract may be declared through words, customary signs or any other action from which it can reliably be concluded that the intention exists". The words, the signs or conduct of the party wishing to enter into contract shall be indicative of the intent to enter into such contract. Paragraph 2 of the same Article provides: "The declaration of intention must be free an genuine". Free will is when the contract is entered into, free of any pressure, deception or threat.

[2] Civil Code of the Republic of Albania, Tirana, May 2012, page 77.

[3] Dauti Nerxhivane: Obligational Law (General and Specific Part) (E Drejta e Detyrimeve (Pjesa e përgjithshme dhe e veçantë)), University of Prishtina, Prishtina, 2008, page 58.

Of high importance is for the party wishing to enter contract to be clear on why and how it plans to enter contract. On the other hand, the ultimate agreement to enter contract is provided by Article 15 of the Law on Obligational Relationships, which provides: "A contract shall be deemed concluded when the contracting parties agree upon essential elements of the contract". The fact that a contract is an agreement between two or more parties implies that to enter such contract, both contracting parties must agree, and therefore, this article precisely provides on the entry into contract only by agreement and consent of both sides.

A group of scientists have discussed the principle of the freedom to enter contract in the circulation of goods and services, thereby discussing that this principle also applies on the autonomy of will. The discussion on the principle of freedom of contract entails also the principle of regulation of relations in legal order, while the freedom of will is discussed in the sense of philosophical teachings, and the eventual results of such teachings in legal order. Some other scholars have discussed the principle of autonomy of will in Obligational Relationships or the contractual law. Therefore, it must be underlined: what does the principle of autonomy of will say to us, and what is the freedom to regulate relations in legal order? In the former manner, we have a philosophical concept of the autonomy of will, while in the latter, we have the manner of concrete regulation of contractual relations and the meaning of freedom in these relations.[4]

In the Law on Obligational Relationships, the principle of autonomy of will clearly provides that parties in Obligational Relationships, with their free will, may regulate their legal relations, and that each legal entity is entitled to enter contract. Contracting parties are free to regulate their relations independently and willingly, in their own interest. Therefore, their will is to be strongly observed and applied. Undoubtedly, for each contractual obligation there must be permissible grounds, which are provided upon by Article 39, paragraph 1, while paragraph 2 of the Article 39 provides: "The basis shall be deemed impermissible if it contravenes provisions of the public order, compulsory regulations or moral principles". It is clear then that there cannot be any valid contract without a legal basis, therefore, paragraph 4 of the same Article provides that if there

[4]Alishani, S. Alajdin: Basic Principles of the Law on Obligational Relationships (Parimet Themelore të Law on Marrëdhëniet e Detyrimeve), ''Kosova'', Prizren, 2000, pp. 25, 26.

are no permissible legal grounds, the contract shall be null and absolutely void.

3. Freedom to enter contract

The freedom to enter contract is amongst the foundational principles of contract law.[5] The freedom to enter contract is a possibility for the parties in Obligational Relationships to determine, in their own will, their contractual partner, to determine the contents of contract, format and manner of entering into contract, and surely, the parties may in their free will decide to amend or cancel the contract.

Authoritative scholars such as Savinji, Windsheid, Salmond, Planiol have held the view that the first and essential condition for a contract is the agreement of two personal intents, for a contract to be valid.[6] This is also the first condition as provided by Article 663 of the Civil Code of the Republic of Albania, the necessary conditions for entering a contract and contract validity, which explicitly provides that the necessary conditions for a contract to exist are the consent of the party assuming obligation, a lawful ground for the obligation, the subject matter of the contract, and its form as required by the law.[7]

So what does the Law on Obligational Relationships of the Socialist Federal Republic of Yugoslavia have to say in terms of qualifying a contract as complete? According to Article 26, it is explicitly provided that a contract is considered valid when contracting parties agree on the substantial items of a contract.[8] Meanwhile, the Law on Obligational Relationships of the Republic of Kosovo stipulates the entering into a contract in its Article 15, thereby providing that a contract is considered complete when contracting parties agree on the substantial elements of a contract.

Therefore, as one can see in the Law on Obligational Relationships of the Republic of Kosovo, the law of the former SFRY, and the Civil Code of Albania, the contracting parties are left the autonomy of will to set legal

[5]Dauti, Nerxhivane: Obligational Law (General and Specific Parts) (E Drejta e Detyrimeve (Pjesa e përgjithshme dhe e veçantë)), University of Prishtina, Prishtina, 2008, page 57.

[6] Tutulani – Semini, Mariana: Obligational and Contract Law, General Part (E Drejta e Detyrimeve dhe e Kontratave, Pjesa e përgjithshme), Real Stamp, Tirana, 2006, page 40.

[7] Civil Code of the Republic of Albania, Tirana, May 2012, page 118.

[8] Law on Obligational Relationships, Socialist Federal Republic of Yugoslavia, Belgrade, no /30 March 1978, page 34.

rules to their own activities, to choose the activities they shall undertake, and the obligations that shall derive from such activities. In general, parties are free to evaluate their own interests, obviously within bounds of the law. In any legal system, one would necessarily find a typical method of regulation of property relations in terms of obligational law, namely the free will of contracting parties entering into such relations.

With the proclamation of the freedom of contract, the society (and the legislator) guarantees that a contract entered into by contracting parties shall have the effect of law" (contractus contrahendibus lex est – what contracting parties define by contract is law to them)''.[9]

The autonomy of will involves a wider and even more inclusive range in terms of freedom of parties in the legal order to express their intentions in various business terms and in the circulation of goods and services, while the freedom of contract is of indisputable relevance, both in practice and theory. In both definitions, parties are free to choose and determine the provision of their own services, although the wording is more limited (only in contracting freedom). The autonomy of will generally means an authorization of legal entities to enter contractual relations, upon existence of will, and to enter legal relations and to establish contractual terms thereby determining their own ways, forms and content. Nevertheless, although contracting parties are free to decide about the other party they will enter into a contract with, and about the content or subject of such contract, such contracting freedom must be within legal bounds.[10] This matter is also stipulated by the Civil Code of the Republic of Albania, Article 660, thereby providing that parties shall freely determine the contents of the contract, but always within legally set boundaries.[11] The freedom of contract means that every legal entity is entitled to freedom of decision to enter or not enter a certain contract, free choice of the person to enter contract with, free determination of contract contents, format and

[9] Dauti, Nerxhivane: Contract Law – Practicum (E Drejta Kontraktuese, Praktikum), Prishtina, 2011, pp. 15, 16.

[10] Dauti Nerxhivane, Berisha Ruzhdi, Vokshi Adem, Aliu Abdulla: Commentary to the Law on Obligational Relationships, Book 1 (Komentar, Ligji për Marrëdhëniet e Detyrimeve, Libri I), Prishtina, 2013, page 6.

[11] Civil Code of the Republic of Albania, Tirana, May 2012, page 108.

manner of entering, and free choice in amending and cancelling the contract.[12]

4. Practical implementation

The principle of autonomy of will finds its application with its rules mainly in the area of freedom to enter contract. It may though freely be stated that these rules are present in many fields of law. In obligational law, parties regulate their relations by the will of the parties, which is also specified in the Article 2 of the Law on Obligational Relationships. In the obligational law area, contracts are entered into according to the intention of the parties, as per Article 15 of the Law. Nevertheless, there are occasions in which the will of the parties may be limited or excluded, such as in Article 17.1.2. In their own free will, contracting parties may also cancel a contract, or dissolve a contract due to non-performance, as legislated with the Law on Obligational Relationships, in its articles 106 – 115. A contract may be cancelled also due to changing circumstances, as per Article 116 – 119. Further, in real and personal means of security of execution of contract, parties in their own will may contract by earnest, as stipulated by Articles 67 – 69 of the Law. Further, the Article 70 on withdrawal, and Article 71 on earnest as withdrawal money, apply when contracting parties may withdraw from the contract on their will. Further, we have Articles 253 – 260 of the Law on Obligational Relationships on contractual penalty, and further the extinction of obligation by performance, parties may agree on the time, place, and manner of performance, all rules provided by Articles 277 – 304. In alternative obligations, as per Articles 387 – 392, the consent between will of parties is found also in negotiations, in the Article 20.1.2.3.4., entering into contract, Article 22.1. offers. In material defects in general, contracting parties may limit or exclude liability of seller for material defects, as per Article 469.1., Article 593.1. Contractual exclusion or limitation of liability in obligations of the lessor. Article 496.1, on liability for legal defects in sale, and further the Articles 325 – 328, according to which the creditor may unilaterally forgive the debt to the debtor, and the debtor must agree.

[12] Dauti Nerxhivane, Berisha Ruzhdi, Vokshi Adem, Aliu Abdulla: Commentary to the Law on Obligational Relationships, Book 1 (Komentar, Ligji për Marrëdhëniet e Detyrimeve, Libri I), Prishtina, 2013, page 6.

The practical implementation of the autonomy of will is definitely present in terms of freedom to contract and in merchant law, different forms of enterprise, and also in the appearance of parties in the circulation of goods and services. In such relations, due to circumstances often requiring rapid contract development, the autonomy of entities is required to regulate various trading relations. Due to their specifics, priority is allowed in regulating relations in the circulation of goods and services. The Law on Obligational Relationships provides on such circumstances with the following Articles: Contract on Sale - Article 438, Contract on Exchange - Article 534 – 535, Loan Contract - Article 567 – 576, Contract on Lease - Article 585, Lessor's Obligations - Article 586 – 597, Lessee's Obligations - Article 598 – 605, Alienation of Leased Item - Article 606 – 609, Termination of Lease – Articles 610 – 614. Further, the Contract for Work – Articles 615 – 644, Building Contract - Article 645 – 661, Transport Contract - Article 662 – 699, Contract on License - Article 705 – 725, Deposit Contract - Article 726 – 743, Storage Contract - Article 744 – 762, Contract of Mandate - Article 763 – 784, Commission Agency Contract - Article 785 – 803, Commercial Agency Contract - Article 804 – 833, Brokerage Contract Article 834 – 847, Shipping Contract (delivery) - Article 848 – 867, Contract on Control of Goods - Article 868 – 879, Contract on Organized Travel - Article 880 – 900, Contract on Lease of Hotel Capacity (Allotment) - Article 906 – 917, Insurance Contract - Article 918 – 986, Contract on Partnership - Article 987 – 999, Community - Article 1000 – 1008, Surety Contract - Article 1009 – 1031, Transfer Contract (Assignment) - Article 1032 – 1046. Similar relations are also found on articles 217 – 244, providing on securities. As is visible, the specifics in trading relations allow for legal relations to be regulated at a certain speed and autonomy of entities to enter contract, and to regulate such relations between contracting parties by their own will, and in full autonomy, in full accordance with binding provisions as provided by the Law on Obligational Relationships of the Republic of Kosovo. Obviously, the freedom to enter contract in such relations has its limitations in rules of business ethics, rules of good custom, and legal order.

5. Limitations to the freedom of contract

The freedom to enter contract for legal entities is not boundless. The freedom to enter contract may be limited in terms of possibilities of choosing the contracting partner, in terms of content of contracts, by

adhesive contracts, formal contracts, collective contracts, and in cases when for entering a contract, consent is required.[13] The limitation to the freedom of contract is usually applied and stipulated by law, with a view of protecting and observing the legal order, and most frequently, this is related to the entering into contract and its contents. Therefore, the legislator, in its provisions of the Law on Obligational Relationships, has adopted certain limitations, in a way of combining individual will, and the society's will.

The limitation to the freedom to contract in the Law on Obligational Relationships is provided upon by Article 34. The object of obligation in the contract, where the obligation of the contract is its subject matter, as an example, in the contract on the gift, its matter is the delivery of the promised item to the gifted; in the rental contract, its matter is delivery of the item rented. If the item for delivery is impermissible, there is a limitation to the freedom of contract in the matter of contract in the Article 37 of the Law on Obligational Relationships, when the object of obligation is impermissible. This article explicitly requires that "The subject of an obligation shall be deemed impermissible if it contravenes provisions of the public order, compulsory regulations or moral principles".[14] A limitation is found also in the Article 39, Permissible Basis, which in its paragraph 2 explicitly provides that: "The basis shall be deemed impermissible if it contravenes provisions of the public order, compulsory regulations or moral principles". The contract is valid only with a lawful basis, since the basis represents the intent of obligation, while the object is the obligation indebted.[15]

The Article 55 of the Law on Obligational Relationships, Sanction for lack of necessary form, its paragraph 1: "A contract not concluded in the prescribed form has no legal effect, unless it follows otherwise from the purpose of provision by which the form is specified". In the paragraph 2 of the same Article 55, it is provided that: "A contract not concluded in the agreed form has no legal effect if the parties agreed that the special form would be a condition for the validity thereof". In paragraphs 1 and 2 of the

[13]Dauti, Nerxhivane: Obligational Law (General and Special Part) (E Drejta e Detyrimeve (Pjesa e përgjithshme dhe e veçantë)), University of Prishtina, 2008, page 58.

[14]Dauti Nerxhivane, Berisha Ruzhdi, Vokshi Adem, Aliu Abdulla: Commentary to the Law on Obligational Relationships (Komentar, Ligji për Marrëdhëniet e Detyrimeve), Book I, Prishtina, 2013, page 51.

[15] Ibid, page 53.

Article 55, both for the legal form and the contract form, it is provided that the contract shall not have any legal effect if not entered into in the set form.

In the Article 61, paras 1 and 2, there is a limitation with the suspensive or dissolving condition, because the contract is invalid when the inducing or dissolving condition is in contradiction with the compulsory provision, the public order or the society's morals. If the contract is entered into by an impossible inducing condition, it is invalid, while if entered into by an impermissible dissolving condition, it is considered inexistent.[16] Article 89.1. Nullity also provides on a limitation to the freedom of contract, because a contract which is in contradiction to the compulsory provisions, public order or society's morals, is null or invalid, unless the intention of the provision provides otherwise. The set limitations to the contracting freedom in principle 2. of Autonomy of Will are evident in many cases, having in mind the nature of contractual relations.

Further, the Law on Obligational Relationships, Article 41. Contract by person without legal capacity – the capacity to act of contracting parties is a general condition required for entry into contract. In the paras 1, 2 and 3 of the same Article, it is provided that if a contract is entered into by a person without his/her capacity to act, such a contract shall not produce any legal effect.[17] Further, the Article 46.1 provides on substantial deceit, thereby stating that if via an impermissible threat a contracting party or a third person causes justifiable fear on the part of the other party such that the latter concluded the contract for this reason the other party may request the annulment of the contract. In the paragraph 2 of Article 46, it is provided that fear shall be deemed justifiable if it appears from the circumstances that there is a serious threat of danger to the life or to the physical or other well-being of the contracting party or anyone else. Therefore, we have a limitation to the freedom, because it cannot be used in deception in contract relations. If one deceives the other party, this contract may be challengeable.

The contracts entered into by insufficient will, as provided upon with Article 46.1, are limited in freedom, because according to such an article, a

[16]Alishani, S. Alajdin: Basic Principles of the Law on Obligational Relationships (Parimet Themelore të Ligjit për Marrëdhëniet e Detyrimeve), ''Kosova'', Prizren, 2000, page 52.

[17]Dauti Nerxhivane, Berisha Ruzhdi, Vokshi Adem, Aliu Abdulla: Commentary to the Law on Obligational Relationships, Book I (Komentar, Ligji për Marrëdhëniet e Detyrimeve, Libri I), Prishtina, 2013, page 56.

contract with deficient wills shall not create any effect between contracting parties. Further, in the consequences of invalidity, as per Article 97 on Challengeable Contracts, it is provided that: "A contract shall be challengeable if concluded by a party that has limited capacity to contract, if during conclusion there were errors regarding the parties' intention, or if so stipulated in the present Law or any other act of law".

An outcome of such contracts may be annulment or revision of contract, which ensues due to changing circumstances. In such cases, if upon entry to contract, there are circumstances rendering difficult the performance of obligation by one party, or in case that due to such circumstances, the purpose of the contract cannot be met, the legal order shall be subject to the principle *pacta sunt servanda*, thereby obliging the challenged party to perform its obligation any way, or to allow the party to dissolve or amend the contract.[18] Article 116. Rebus Sic Stantibus Clausula, also known as the principle of *pacta sunt servanda*. In this case, the Article 117. Obligation to Notify, provides: "A party that owing to changed circumstances is entitled to request the rescission of a contract must notify the other party regarding the intention to request a rescission as soon as the former learns that such circumstances have arisen. A party that fails to do so, shall be liable for damage incurred by the other party because notification regarding the request was not provided on time". As one may see, even in Article 117, the consequences of entering into contract by deficient will, bear consequences not only on the contracting party under substantial threat as per Article 46, but also for persons failing to report in time when in possession of such knowledge. Article 117. Such a limitation is again appearing in unjust acquisition, the general rules of Article 194.1, which provides: "Any person that without a legal basis becomes enriched to the detriment of another shall be obliged to return that which was received or to otherwise compensate the value of the benefit achieved". The limitation to the freedom of contracting in this case is in terms of what and how much shall the person return to the damaged party, and the acquiring person is obliged to return the benefit, or otherwise return the value of benefit achieved by unjust enrichment.

In the Article 247. Contractual expansion of liability, it is provided: "A debtor's liability may be expanded by contract to cover a case in which the debtor would otherwise not be liable, unless this is not in contravention of

[18] Ibid, page 132.

the principle of conscientiousness and fairness". The limitation of freedom consists in the fact that the agreement cannot be in contradiction to trust, otherwise there cannot be any contractual expansion of liability. Article 427. Liability for collectability, its paragraph 1, provides that The assignor shall be liable for the collectability of the assigned claim if such was agreed, but only up to the amount received from the recipient, and for the collectability of interest, costs in connection with assignment and costs in proceedings against the debtor. Also, according to the paragraph 2 of the same Article, it is not possible to agree on greater liability for an assignor acting in good faith. The freedom of parties in ceding is limited, because the compulsory provision does not allow for other action from what is provided with the Law on Obligational Relationships.

Another limitation to the freedom of contract is found in the Article 837, Cancellation of mandate for Brokerage. In this case, support is given to the mandator in revoking the mandate for brokerage, if the mandatory has not waived such possibility, and on the condition that such cancellation is not in breach of good faith. Therefore, according to the Article 837, one cannot exercise freedom of contract when in contradiction to the rules of legal order. This is also valid for other similar cases, such as for example when one party is guilty or is negligent and excluding its own liability, as provided upon by Article 248 in the Law on Obligational Relationships. The limitation and exclusion of liability, where in the paragraph 1 it is explicitly provided that: "It shall not be possible to exclude the debtor's liability for intent or gross negligence in advance by contract". In such cases, upon a request of the contracting party, the court may cancel a contractual clause on the exclusion of liability for slight negligence, if such an agreement is a result of a monopolistic position of the debtor, or due to unequal relations between contracting parties.[19]

5.1. The limitation of freedom to contract by legal provisions, or the freedom of choice of contracting parties

These cases appear when for example a producer of industrial plants must deliver its products to the processing facility, or to those as provided by law. Therefore, the manufacturing entity does not enjoy a possibility of entering contract on its own will. Limitations of such nature are found in

[19]Dauti Nerxhivane, Berisha Ruzhdi, Vokshi Adem, Aliu Abdulla: Commentary to the Law on Obligational Relationships, Book I (Komentar, Ligji për Marrëdhëniet e Detyrimeve, Libri I), Prishtina, 2013, page 324.

the Law on Obligational Relationships, explicitly provided upon by Article 663. The obligations of the carrier in linear transport, where the carrier is limited in its contracting, if the capacities are not sufficient to keep regular, timely and orderly the route proclaimed. According to Article 754, Obligation to issue warehouse receipt, where the warehouse worker is obliged to issue a warehouse receipt to the depositor at the request thereof for the goods accepted into the warehouse. In the contrary, there is no freedom of contract between the warehouse and the depositor.

5.2. Limitations in cases of required consent for entering into contract

Consent is required for protecting individual interests, e.g. a custodian shall provide consent for the person under custody.[20] The legislator has provided on various circumstances and possibilities in the Law on Obligational Relationships, and therefore, in regulating obligational relationships, e.g. in the Article 19, paras 1 and 2, there is a general provision on consent, when for entering into contract, a consent of a third party is required. Further, we have specific provisions in other cases, such as in Articles 41 – 44 of the law in terms of capacity, and further provisions on establishment of obligations, such as in Articles 73, 75, which provide generally on representation, Article 84 which provides on the rights of travelling sales' representative, and further, Article 211 Approval, Article 286 authorized person, in Chapter II, which provides on performance, and further in Article 603, Termination due to non-permitted lease, Article 719 when the provider may refuse a license, Article 727.1. safekeeping of foreign items.

5.3. Limitations in terms of contract content

Appear in cases of set content of contracts. Article 17 of the Law on Obligational Relationships, Mandatory conclusion and mandatory content of contract, paragraph 2, contains a limitation, since the provisions by which the law mandates the content of contract, the contracting parties are obliged to apply the same. Again according to the same Law, its Article 923, Policy and Confirmation of Coverage, there is a clear limitation to the freedom of contracting, because in this case, all the content of insurance policy is already set forth. In the Article 885, Obligation to Inform, there are

[20] Dauti, Nerxhivane: Obligational Law (General and Special Parts) (E Drejta e Detyrimeve,(Pjesa e përgjithshme dhe e veçantë)), University Universiteti i Prishtinës, 2008, faqe 59.

obligations of the travel organizer to provide the travellers with all necessary information before entering the contract. Article 755 of the Law on Obligational Relationships, Composition and content of warehouse receipt, explicitly provides on what a warehouse receipt will contain. In the sales contract, Article 446, Prescribed Price, there is a limitation in the pricing set by the respective body, which cannot be changed. One could say that there is some limitation to the freedom of contracting also in the Article 447, when daily prices are agreed.

5.4. Limitation of freedom to contract in adhesive contracts and formulaic contracts in the circulation of goods and services

In such contracts, the content of contract is set forth beforehand for both contracting parties, independently of their will. While in formulaic contracts, the general terms and conditions are set by one party, while the other may only choose to accept or refuse. Hence, in the general terms of the contract, as per Article 124, paras 1, 2, 3, 4 of the Law on Obligational Relationships, we have the obligation, and the limitation of the freedom is found precisely in general terms, which are set forth by one contracting party. Further, in securities contracts, as per Article 218, Essential Components, and specifically paragraphs 1 and 3 of the present Article, Surety Contract as per Article 1009, whereby the provider of surety is obliged to perform the valid and due obligation of the debtor, if the latter fails to do so.

5.5. Limitation of freedom of contract in formal contracts

In which the form is provided by law or contract. Articles 51 – 58 of the Law on Obligational Relationships provide on the form of contract, thereby providing on the general requirements of form. Further, in sale in instalments, as per Article 526, there is a provision on the form of contract by payment of price in instalments for the sale of moveable items. The contract on the gift - Article 541, Article 561 Contract on Lifelong Maintenance, License Contract - Article 701, Article 805 – Contract on merchant representation, where there is a contract form. Article 907 of the Law on Obligational Relationships contains a contract form for allotment of capacities, and further in the Article 1010 in the surety contracts. Hence, in these and other cases, when the contract is required in written as per law or contract, undoubtedly that the contracting parties lack freedom of expression of will and there is a limitation of contracting freedom.

Based on what is stated above, one could freely say that the freedom of contracting is not fully excluded, but is rendered into rational boundaries set by any society, setting from the values that the society has set to itself to defend. Nevertheless, any limitation to the freedom of contracting is adopted only to protect the legal order.[21]

6. Advantages and importance of the principle of autonomy of will

The principle of autonomy of will is stipulated in the Article 2 of the Law on Obligational Relationships as a substantial principle of the law. From the explorations made, there is a clear relevance of the principle, especially for parties in circulation of goods and services. The essence of the principle of autonomy of will is precisely in the freedom of parties in general Obligational Relationships, with a special emphasis on the contract law. The essential idea of the principle is the possibility of parties regulating their obligations in legal order, since such regulation may be done within bounds of the legal order.[22]

Therefore, the relevance of the principle of autonomy of will in acquiring rights and establishing obligations for entities in circulation of goods and services is rather large, and especially for contract law.

The legal order provides sufficient room for parties to evaluate the circumstances in entering a contract, and full autonomy to establish legal rules of their own performance, by observing the legally set rules. Even in cases when there are limitations to the autonomy of will in the provisions of the Law on Obligational Relationships, they are primarily limitations to serve the parties in the circulation of goods and services, because any right has consecutive duties, and limitations only allow for the parties to exercise their contractual relations in the autonomy of their own will, obviously within the bounds of rules of legal order. By observing the legal order, the greatest benefit in the labour market will be enjoyed by the parties themselves, and obviously thereby contributing to the preservation of the social order in general, and creating stability in the legal order in general, and surely a better environment for a normal functioning of the rule of law

[21]Dauti, Nerxhivane: Contract Law, Practicum (E Drejta Kontraktuese, Praktikum), AAB University, Prishtina, 2007, page 22.

[22]Alishani, Alajdin: Basic Principles of the Law on Obligational Relationships (Parimet Themelore të Ligjit për Marrëdhëniet e Detyrimeve), ''Kosova'', Prizren, 2000, page 77.

in the Republic of Kosovo, taking therefore an appropriate direction towards the observance of international law.

7. The autonomy of will in the Law on Obligational Relationships of the Republic of Kosovo, the former Socialist Federal Republic of Kosovo, and the Civil Code of the Republic of Albania

The legislator has ranked the autonomy of will in its core principles, the Article 2, paras 1 and 2 of the Law on Obligational Relationships in the Republic of Kosovo. The paragraph 1 provides on the freedom of parties in Obligational Relationships, the observation of compulsory provisions, and good custom, the parties may determine their relationships in their own will. Further, the paragraph 2 of the Article 2 of the Law on Obligational Relationships, allows a possibility to the parties in legal order to exercise their freedom of contracting, by exercising their interests within bounds set by law. The parties are entitled to regulating their own legal rules of their own affairs, but in case the contracting parties fail to regulate their relations on their own will, the rules of regulating such relations are provided upon by the state.

Therefore, the legislator has provided in the Article 2 and other provisions of the Law on Obligational Relationships,[23] thereby providing on the freedom of parties in regulating their contractual relations in their own will, thereby establishing a rather advanced legal system in Kosovo, or specifically an advanced and functional Law on Obligational Relationships for a practical implementation of parties in the circulation of goods and services.

The fact that the obligational law is one of the most important branches of civil law, and the fact that the autonomy of will involves a wide range of obligational relationships for the parties in legal order to exercise their will in various business terms. It would be rather encouraging if the legislator would provide in its own principles a distinct principle of freedom to enter contract, since the freedom to enter contract is one of the core principles of contract law, and providing upon it as a specific principle would be of relevance for the parties in legal order, also for the fact that the contract entered into between contracting parties has the effect of law upon them.

[23] See provisions of the Law on Obligational Relationship for the freedom of parties in obligational relationships in their will, in this study, practical implementation, pages 5 – 6.

Therefore, the freedom of contracting as a distinct principle would only enrich the Law on Obligational Relationships in Kosovo, and quite surely a facility in terms of practical implementation by the parties in legal order.

The Law on Obligational Relationships of the former Socialist Federal Republic of Yugoslavia, in its Article 10, provides on the principle as the freedom to regulate obligational relationships. According to such a provision, the parties freely provide on their own Obligational Relationships, but they cannot regulate them in contradiction with the constitutional principles of social order, compulsory provisions and the morals of the "Socialist Self-Governing society". Also, the Article 10 of the law provides on the freedom of parties in legal order, in due observation of constitutional principles, compulsory provisions and the social morals. The parties in legal order may establish their Obligational Relationships at their own free will, by observing the rules set by law.

In terms of autonomy of will in the Republic of Albania, we see that Obligational Relationships are provided upon by a Civil Code. Several provisions of the Civil Code provide on the freedom of parties in contracting relations, and the autonomy of will in their obligational relationships, the observation of rules in establishing contractual relations, and their performance.

For a difference from the two aforementioned laws, in which the autonomy of will is stipulated as a core principle, the Civil Code of the Republic of Albania does not specifically stipulate on such a principle, but in the other hand, the Obligational Relationships for the parties in legal order are considerably implemented.

From the explorations, I could say that the principle of autonomy of will in the Law on Obligational Relationships in the Republic of Kosovo is rather comprehensive, and visibly much more advanced than the Law on Obligational Relationships in the former Socialist Federal Republic of Yugoslavia and the Civil Code of the Republic of Albania. Nevertheless, there is still room for further perfection of the Law on Obligational Relationships of Kosovo.

8. Conclusions

In exploring and studying the principle of autonomy of will in the Law on Obligational Relationships of the Republic of Kosovo, we have derived the following conclusions:

1. The principle of autonomy of will is a substantial principle in obligational law, and represents a pillar of obligational law. Parties in obligational relationships express their free will, and in compliance with legal provisions, they may establish, amend or cancel an existing obligational relationship. This means that parties in legal order regulate their obligational relationships in compliance with the law.
2. The will of the parties in the circulation of goods and services in obligational relationship may be limited only if the expressed will is in contradiction to imperative legal norms, the constitutional order and the society's morals. If a contract is entered into in contradiction with the legal order, compulsory provisions and the society's morals, such contract shall be null.
3. The will expressed in a contract, in compliance with the law, has the strength of binding the parties into performing as per contract, and the contract itself has the effect of law on parties (*pacta sunt servanda* or *contractus contrahendibus lex est*).
4. The observation of rules of the principle of autonomy of will by parties in legal order safeguards the legal certainty, and supports such parties in entering contracts with obligational relationships.
5. Viewed in detail, the rules of the principle of autonomy of will, as a substantial principle of the Law on Obligational Relationships in the Republic of Kosovo, one may conclude that there is a basis of content of obligational law and constitutional law.

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