Summary

As we aimed at the beginning of our scientific endeavor, by means of the present doctoral thesis we approached a complex subject, that of the impact that the positive law has on the agreement of the topics of contractual law relationships.

Our paper described in detail, analyzing the essential aspects in a neutral and pluriangular manner, the main philosophical-legal doctrines that govern the contractual relations, as well as the concrete modality by which the regulation can affect, by form and content, the agreement of the contracting parties.

In terms of the contract, the main coordinate governing such legal relations was and is constituted by the **principle of autonomy of will**. Thus, the central idea that we supported in our scientific endeavor was that the contract is always based on the exclusive will of those that engage in the contract, nothing being likely, basically, to prejudice it. The fact that the will, in contractual terms, is autonomous means that the will of the contracting parties and nothing but their will leads to the creation of the contract and to all the effects directly resulting from it. The fact that the will is autonomous contract means that only contractors and it will only lead to the creation and to all effects arising directly from it.

The evolution of the human society proves the fragility of this postulate due to the concrete inequality position of the subjects of the contractual relations, so that the **interventional etatism** by the regulation in the contractual sector asserts at present at a general level under the form of **contractual dirigisme**.

The legitimacy of the state intervention resides, on the one side, in the **necessity of the protection of the subjective rights of the contracting parties**

situated on inferiority positions, and, on the other side, in the demands imposed by the **public order**. The limit and the form of this statist intervention must be exactly determined, as well as the legal effects that they provoke in the plan of the agreement of the parties, that is to be expressed or that was previously expressed. The determination of these limits of the state action gravitate around the legal value that the law system and the jurisprudence of the constitutional court assigns to the **principle of contractual liberty**.

The assignment of a constitutional value implies the fact that the "contractual law" asserts to be respected by the state law, as the provenience of the first one may be considered as having a supra-legislative nature, that is the fundamental human right to govern himself by the own will, namely **the individual liberty**. The contract becomes, thus, compulsory and generates legal effects not because the law desires it, but because it results from the exercise of a **fundamental right that asserts even to the legislator himself**.

Considering the contractual liberty as simple subjective civil law automatically attracts a high degree of regulatory intervention in the field and the possibility of circumstantiating or affecting the contractual agreement.

In terms of structure, our paper consisted of two main parts, relatively balanced as dimensions. Each of the two parts included two titles, each of them divided into two chapters, so that our paper includes a number of eight chapters that deal with the chosen topic in a manner balanced from a quantitative point of view, according to the requirements of each title alone. The chapters are also divided into sections and subsections.

In the first title we dealt in detail with the relations of the positive law with the main doctrines that regulate the contractual nature relations, that is the principle of autonomy of will and the contractual liberty arising from this principle.

The principle of autonomy of will implies the existence of contractual liberty, meaning the freedom of legal acts, as provided in article 1169 of the Civil Code - "*The parties are free to conclude any contracts and determine their content within the limits imposed by law, by public order and by good morals*", as well as the principle of real will, which postulates the fact that will assumes the existence of an internal element (psychological) and of an external element (social). Difficulties arise when there is no concordance between internal will and exteriorized will, that are solved by the Romanian legislator, prioritizing the subjective conception according to which the internal (real) will must prevail.

The normative coordinates of the principle of autonomy of will are not found only in the sector of the private law, being consecrated by the Civil Code and by other normative documents, but also in the sector of the public law, in the fundamental law. Nevertheless, at the level of the Constitution of Romania there is no express consecration of the contractual liberty (and, implicitly, of the principle of autonomy of will), but also regulations by which indirectly results a constitutional protection of the contractual liberty.

The concept of the contractual dirigisme treated in the present paper is in fact a critique brought to the principle of autonomy of will.

The state, using the prerogative of legislating, regulated very strictly during the last period the contractual relations, the situation of the business environment, it punishes much more severely the breach of the contractual obligations, etc. We are dealing with a dramatic decrease of the autonomy of will, although this principle appears everywhere in law, expressly upheld by the new civil codes appeared lately, but also by the rules of constitutional origin, even if it is a default consecration.

Lately, there were discussions about a real contract crisis[1], in the modern world of law.

Lately, the sector of the adhesion contracts develops excessively, new types of contracts drawn up by the economic agents appear, agents "detaining a monopoly or dominant position on a certain market or segment of market, but also by predetermination by law of the contractual clauses, limiting the will of the parties (as, for example, the abusive clauses in the standard contracts provided by Law no. 193/2000) or the apparition of the so-called "forced contracts", the conclusion of which is compulsory according to law. For example: compulsory civil liability contracts, according to Law no. 136/1995, that all vehicle owners must have, but also those corresponding to some enterprises detaining the monopoly of some performances, of the extension of the obligation - under certain circumstances - of the lease contracts for accommodation, of the life insurance contract in the case of credit contract, etc."[2]

Also in the first part of our paper we analyzed in detail the contractual liberty as being the abstract possibility of the person to act in contractual plan and, as well, at the legal value and at its limits.

The contractual liberty appears practically as "the liberty of being bound" of a person by another one by means of a legal, contractual instrument, that is an agreement that creates obligations for the parties, which, at first sight, may appear as a paradox determined by the annexation of two opposed terms in essence: liberty - binding. In order to make sense, the expression designating in the simplest manner the liberty to alienate part of the liberty, must have a postulate that fundament it, and

[1] G. Marty, P. Raynaud-*Droit civil*, vol II, *Les obligations,* Sirey, Paris, 1945, page 35; Henri and Leon Mazeaud, Jean Mazeaud – *Leçons de droit civil*, vol II, pag. 92; Boris Starck, *Droit civil, Obligations*, Libraries tehniques, Paris, 1972, pages 343-348.

[2] L. Dumitrescu, *Aspecte privind libertatea contractuala (Aspects regarding the Contractual Liberty)*, page 105

this may be but the autonomy of will: the person may not be constricted but by a bound that such person wanted, and only in the measure of what such person wanted. So, the autonomy of will implies the contractual liberty.

The contractual liberty is not intangible, and its exercise may be limited by the state law, the Civil Code and the Constitution providing this possibility, but also in certain situations and for certain reasons expressly determined. The state law may and has to establish a minimum of compulsory conditions that must be observed in order to conclude a contract with the purpose of assuring an "order" and an "equilibrium" at the level of the human society. Thus, the contractual liberty is a relative liberty that comports some necessary limitations, the most important ones and, moreover, the general limits appertaining to the capacity, the consent (manifestation of the decision of concluding a legal act), the cause of the legal act (the concrete scope aimed by the conclusion of the respective act), the public order and the good morals.

Even though at the level of the supreme law a consecration *expresis verbis* is not known, **the contractual liberty is more than a simple subjective civil law**, by the indirect and implicit references of the constitutional texts, **it tending to become a principle with constitutional value nowadays**.

However, the contractual liberty, consequence of the application of the autonomy of will theory, knows its own **limitation points** by means of the norms with imperative character (pertaining either to the public law or to the private law); all for the use of the individual that is part of the social scope as citizen, or that enters in private law legal relations as person.

The second title of the first part deals with the **doctrine of the contractual solidarism**, the modality of reaching such doctrine, the relations between the individuals, but also between the individuals and the state, as well as the modality of

state formation, according to the doctrines of the social contract. This second title ends by emphasizing the role that the state has in realizing the **social law**, that is that category of norming that comes to support the social individual that lives in the community.

The solidarity concept, once shaped from a political and social point of view, achieved new valences in the legal world, where its maximum manifestation is found in the **theory of contractual solidarism**.

One of the force-ideas of democracy, as A. Fouillée named it, the solidarity is a general principle of the political action, with direct and powerful influence in terms of public law, especially.

If we cross the sphere of the private law, the area of distribution of this concept is extremely broad: the solidarity existing between spouses during marriage; the solidarity existing between people in different degrees of kinship (children in relation to parents and nephews, and vice versa); the solidarity (here synonymous with protection) in the case of individuals that need protection, such as minors (by the solidarity offered by parental authority), in case of legal interdiction (by the institution of custody), or even solidarity with capable persons, not only incapable ones, as is the case of the institution of the conservatorship, etc.

The solidarity also appears in the land of the commercial law, if we speak about the situation of the associations within a commercial society, but also in the land of labor law, if we speak about the solidarity that exists between employees (whose interests are protected by syndical representation), between owners (ownerships), or even between employees and employers, with the purpose of achieving the common interests of the respective legal person, or in the case of work injury, or for retired persons, etc..

The solidarity is at the same time a matter of pragmatism and social efficacy, entering into the sphere of left-wing politics, opposed to the excesses of individualist-liberalist[3] type, in which the most trained and competent survives by his own powers, without the aid of the different structures and without the aid of the state.

The solidarity is constituted in the nowadays society in a **new doctrine**, likely to negate the fundamental character of the autonomy of will and to offer a new paradigm, both in the French law and in the Romanian law, of the liberty of contractual order or, as states, "if in the French model, once with the observance of the contractual liberty transformations in the practice of law, to the autonomy of will were opposed in the doctrine new theories, with a plus of realism, that negate the quality of fundament of the contractual liberty, by proposing new explanations in the field - the positivist theories, that of usefulness and rightfulness, the theory of solidarism and of social voluntarism -, in the Romanian model remain but incidental, even recently, the skeptical doctrinal opinions in relation to the autonomy of will and that substitute for it new values by substantiating the contractual liberty."[4]

The theory of contractual solidarism is founded on the **solidarity concept**, being at the same time condition of the contract, but also effect of the same. It is condition of the contract because without the idea of solidarity, of chasing a common purpose - that of producing legal consequences by "binding" the wills - we could not talk about contract and common intention of the parties, manifested by a positive instrument in the sense of the text drafting, of the contract form.

---

[3] Gheorghe Danisor, *Filosofia drepturilor omului (Philosophy of the human rights)*, Universul juridic Publishing House, Bucharest, 2011, page 31 : "În modernity, even though the individual independence affirmed more and more, the autonomy was still present asserting itself. Thus, the democracy could not affirm itself under the threat of individualist-independent decomposition".

[4] Summary of the doctoral thesis of M. Nica, Libertatea contractuală în dreptul public şi privat român şi francez, (*Contractual liberty in public and private law, Romanian and French*) page 2, http://cis01.central.ucv.ro/lucrari_dr/docs/131_rez-ro.doc, accessed on March 29th, 2014

It is effect of the contract, as the wills, once met, consent the compliance with the negotiated clauses and want, follow the production of legal effects in the same measure and with the same implication. The contract is not only "the law of the parties", but also "the child" of the parties, because, by its basic and form elements, any contract is unique in its way, wearing the specificity of the interest of the contracting parties that overcomes the simple interest promoted by them by the contractual clauses. The odds of winning or losing move this time the parties of a contractual relation on the same part of the barricade: the maintenance into force of the contract and the production of legal effects, as considered by the parties that are now in a legal cooperation relation, mutually beneficial.

The achievement of the contractual justice represents assuming the contract by the parties, with all its effects, that consider both the modality of achieving the rights, as the modality how the obligations deriving from the contractual relation are executed.

The social contract is based on the principle of human association, that, in its run towards the existence, is aware of the necessity of co-existence, as mean for a more easy realization of the own purposes. The social contract operates with apparently simple concepts, but in reality extremely difficult to comprise in words, as: state of nature, state of society, contract between all the members of the society, etc.

The doctrines of the social contract have in their center the works of three relevant authors, two of them English - Thomas Hobbes and John Locke – and a Swiss, Jean Jacques Rousseau, who, in their works, found the state, the law and the society on human will and on the use of the exercise of the two stets: that of nature and that of society. The state of nature must not be understood as a proper existence, physic, but more as an association exercise of the pre-social state and of the reasons

that led to it, as well as of the modality in which the creation and the maintenance of the human society were reached.

The contractual justice between natural and/or legal entities of private law can be but a consequence of the creation of a larger climate, due to the apparition of the changes that the state goes through. From Hobbes to Locke and ending with the ideas of Rousseau, the passing from the fictive/illusory natural state (in fact, nothing else but the pre-state and pre-legal condition) towards the apparition of the society and of the state, was an arduous struggle of human with himself and only secondarily with the created structures. Wheather we speak of a first pact of the association after which a second one comes - of obedience to the sovereign, whether we consider the common good and the achievement of our owl liberty through the state, we must understand that we can not talk of free and creative will in law (and by law!), but in the context of reporting to the doctrine of contractual solidarism that makes from the parts of a legal contractual relation more than mere co-contractors.

It is paradoxical how the private interests of the parties of a contract actually intertwine through the "trick" of the contractual solidarism and ends by the precise compliance with the obligations undertaken. By reporting everything in terms f passing from the state of nature (individual interests) to the state of society and to the creation of the state (solidarism) we apply also in public law the principles originated in the private law and understand why the solidarity concept is primarily a philosophic one, and only secondarily of legal order. Solidarity is based on the sociability of the human being, stemming from Aristotle and likely to provide the explanation of a legal world in which the desideratum is the convergence, the communitarianism and the solidarity that, in their turn, will create all the premises for the development of private interests.

We must understand that the authority of the society on the individual must be diminished, but in such manner that the individual become he himself more responsible, without having to stand an interference, from the group, in his sphere of private life. Is the society asserting and the individual bending to? - could be a legitimate question. When, in fact, according to the liberal vision and, moreover, according to the ideas promoted by John Stuart Mill, the society would gain more if it respected the individual liberty. As long as the facts of one person do not have negative consequences on other person, as long as the private spheres barely touch, they are tangent, without intersecting and without raising clashes of interests, such person must be left living by her own rules (in agreement with the social ones!) and not by norms imposed from the outside, by an autonomised and a binding mechanism, as the state appears to be, according to the vision of certain liberalist doctrinaires.

The modern theory of the contractual solidarism, born from the sociologic an philosophic solidarity concept, presupposes an intrinsic, complex and profound connection, that a contract originates in its parts. These shall be obliged in solidarity to touch the effects of the contract, being "partners equally in gaining, but also in the risks that its execution presupposes."[5]

In other words, „**The contractual solidarismi s another type of individualism**, arised at the level of partnership, that the contract between parties create, able to redefine, reorient and correct the excesses or the omissions of the three classic principles of the bilateral contracts."

In other words, we do not talk anymore of an individualism, but of "individualisms", that report themselves at the level of each part once, but the second

[5] According to Gh. Piperea, in http://www.drept.unibuc.ro/Gheorghe-PIPEREA-Prof.dr.-Facultatea-de-Drept-Universitatea-din-Bucuresti-Introducere-in-teoria-solidarismului-contractual-s312-a571-ro.htm, accessed on March 29th, 2014

time these converge in the sense of the common interest: the applicability and the efficacy of the contract in relation to the parties that aim, each of them, reaching a certain scope by the contractual relation they agreed to.

The theory of contractual solidarism extracts its essence from the concept of utilitarianism, "and the obligation of cooperation, translated by the duty of tolerance, is a common and mutual duty of the parties to cooperate in order to achieve the contractual purpose."[6]

Here it is, therefore, the entire trajectory of the idea of interdependence, through the concept of solidarity and reaching the contractual solidarism theory, which comes as a response to the autonomy of will theories and as a modern solution by means of which the contractual liberty may accomplish.

We conclude that, beyond the social role the state has in achieving the social law, which is essential, "what matters first and foremost, when the idea of solidarity enters in Law, is the political philosophy or, even more, the social project to which it rallies; depending on its nature or on its contents, solidarity will have multiple and contrasting facets…"[7]

If **the first part of our paper** considered more the contractual foundation from the perspective of the public law and of the relations established between the individual and the state and less of those established between the individuals themselves, **the second part of the paper** highlighted the pragmatic side of the theories governing the contractual relations, emphasizing the bench-markings, but also the limitations that the contractual dirigisme knows when it intervenes within the sphere of the private contractual relations.

---

[6] Ibidem

[7] *Dictionnaire de la culture juridique*, under the coordination of Denis Alland and of Stéphane Rials, Quadrige/Lamy-Puf Publishing House, 2010, page 1430

In the second part of the paper, we aimed to deal with and to analyze the modality in which the state effectively intervenes by reporting to the will of the parties of a contract.

This part is divided into two titles:

a) The first title, that regards the manner in which the legislator may interfere by regulation, that is by a legal norm.

b) the second title, analyzing the content of the norm, that is of the concrete, legal prescriptions, by means of which the state manifests its interventionism.

In the first title we concluded that the legal norm should be circumscribed to exigencies of legislative technique, with the need of being subordinated at the same time also to the principles of the state subject to the rule of law in normative terms.

If the legislative technique concerns aspects in their turn regulated by the law targeting the transposition in logical form of the idea of law, the part of the paper regarding the subordination of the norm in relation to the principles of the state subject to the rule of law deals with more complex aspects, more difficult to classify from which we tried to extract some principles, among which we remember:

- The principle of the non-retroactivity of the law,
- The principle of the accessible and predictable public character of the norm.

An important aspect that we dealt with in this first title of the second part also regards the legal norm, but this time analyzing it in its intermediary phase, that is in the phase immediately precursor to the application, that is its interpretation. If, with the occasion of the proclamation of the norms, the state cannot and neither must

forecast all the particular cases to which the norm is destined (the generality - essential characteristic of the legal norm), this stage preliminary to the application is focused precisely on the attempt to identify the legislator will in relation to the situation under review.

The importance of treating this legal approach in the contents of the present study is a major one, because precisely the interventionist norm is the one that requires to be interpreted in the light of these demands, principles of interpretation, because this is the one that alters the will of the parties.

The second title is aimed to be oriented strictly towards the moment of the application of the norm, primarily by reference to the conditions in which the parties may conclude a valid contract, respectively the analysis of the juridical act conditions (chapter I).

In this respect, we analyzed the form of the juridical act, in the idea that, although our civil law consecrated the principle of the power sharing, there are situations when this asserts a certain contractual formalism, which is likely to intervene and even to alter the parties' will by the penalties applicable for not complying with the form.

Further on, we analyzed the substance of the legal act formation, namely: capacity, consent, object and cause (art.1179 of the Civil Code). We revealed the innovations brought by the New Civil Code in matters of background conditions, of the valid conclusion of a legal act, focusing mainly on the consent vices.

The second chapter treats the principle of the compulsory force of the contract, as well as the exceptions provided by this principle. In the contents of this chapter, we tried to identify some concrete examples in which either this principle is restricted

in the sense that the legal act ceases its effects before the term, or it is extended, prorogued.

Our paper ends with three illustrative themes, that we submitted to analysis and tries to emphasize those mechanisms that the state puts into motion or at least puts at reach of the legal power in order to intervene in a manner or other in the formation of the legal will comprised in a civil contract.

In the last section of this paper, we selected from the multitude of concrete state interventionism situations those that we considered as relevant and at the same time representative, respectively the situation of the contracts imposed by law (RCA, compulsory insurance for housing), the theory of unpredictability (intervention of the judge, beyond the contractual clauses, by which this either reestablishes the contractual equilibrium, or disposes the ceasing of the contract), the adhesion contracts, the abusive clauses and the protection of the consumer (also confers the possibility of the court to interfere during the execution of the contract in an attempt to reestablish a contractual equilibrium, but this time by protecting the part that is in an obvious situation of inferiority in relation to his co-contracting party).

The proposals of lex ferenda (future law) exposed in our thesis and the case studies presented at the end of the paper served to emphasize how energetic the intervention of the state can be, in order to limit the contractual liberty of some of the professionals, by putting at the reach of the courts and of the jurists in general some efficient tools to rebalance those contracts that, by abusive clauses deliberately hidden under different faces and pretexts, do nothing else that distorting the very purpose of the law, subjugating the contractual partner.

We hope that by the work volume engaged, by the attempt to clearly, concisely, exhaustively and multi-angularly analyze the subject of our doctoral thesis, we had succeeded in clarifying at least partially the impact of the legal norm on the

agreement of the contractual relations subjects in the legal world, where is very difficult to maintain an equilibrium relation in the case of the contract governed by the contractual liberty, by the theories of contractual solidarism, but, at the same time, also by the exigencies and by the limits that the contractual dirigisme, by the form and the content of the regulation, imposes to the agreement of the parties.