

## **THEORY OF CONTRACT**

**- Book review -**

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The book we are about to present has brought university professor doctor barrister Monna-Lisa Belu Magdo, titular member of the Academy of Legal Sciences of Romania, the 2021 “I. L. Georgescu” Award of the Union of Jurists of Romania. The author successfully combined over the course of time teaching activity with a magistrate career, as she was, between 1963 and 2010, a judge, president of the Appeal Court and a judge for the High Court of Cassation and Justice.

As the author herself points out, the contract is not only the instrument which flexibly regulates social relations, movement of goods and provision of services, but it also makes up for legislation shortcomings, as a genuine extension of the law system. As it is adapted to determining economic and social factors, its theoretical base needs to be discussed given the modern perspective on the relation that exists between time and law, on the way time influences legal provisions it creates. The aspiration of the law and the contract, as well, towards stability and endurance implies taking time, and its influence on the quality of law, into consideration, but also an anticipation of its effects on the legal system. Formal intangibility of law is not about its durability outside time frame. Law endurance represents norm sustainability, continuity in time, while being able to resonate with time requirements, and the stability and endurance of legal norms are not to be confused with immobility, as it implies the ability of the norm to take the past experience, meet the present requirements, while foreseeing the future. The continuous update of the contract, the dynamism of contractual relations can no longer be conceived within the old civil law legal frame, since it tends to incorporate every aspect of national and international progress, while complying with European member states law, international law and European Union law, which aims to set up an European Contract Code.

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The present paper emphasizes the fact that the institution of contract cannot ignore its theoretical foundation in order to understand the impact state intervention has on resetting the principles of autonomy and free will, but this does not lead to a decline of the principles or a crisis of the contract.

The author states that the fundamental principles of the contract should be assessed in relation to the definition of good faith related to the tort, bad faith, with special emphasis on abuse of right and its defining elements, given the new philosophy behind the moralizing mechanisms of the contract. The principle of validity of legal appearance which gives legal effects to the appearance actually transposes two rules, one that says that nobody can transfer more rights than he actually has, and the other, named the principle of good will (faith), with numerous implications on the effects of nullity of the creditor, or the apparent successor or of apparent property.

The present book highlights the continuous evolution of contracts, as new principles come to life, namely the principle of competition, as a mandatory aspect of the contract, which leads to a certain stability as far as the behavior of the parties goes, and also the principle of permanence, which justifies the mechanisms that ensure contract durability. The principle of coherence and permanence, even though they are not to be found within any general regulations, have been stated within certain special regulations, regarding contract interpretation and the institution of hardship. The stability of long-term contractual relationships that determine customary practice between the parties, as well as mutual trust, is required by the magnitude of internal and international economic processes and also by the moral fundament of solidarity within a contract, which has gained new dimensions given the well-known principle, according to which the contract represents the law of the parties. The present theory of solidarity as a fundamental element of the contract constitutes the support of the contractual parties, in the sense that the creditor actively participates in diminishing the prejudice, and the loss and benefits are shared in case of hardship, when the fulfilment of the contract becomes excessively onerous or cumbersome for the debtor. It is solidarity alone that makes a modern approach on freedom of contract possible, while taking into consideration the binding force of the contract and the relative effect of contract obligations. Drafting a contract is to be assessed not only from a traditional perspective, in other words in cases where the parties are present or at a distance, but also according to the increasing importance of electronic trading (e-commerce) and electronic signature.

University Professor Doctor Monna-Lisa Belu Magdo reminds us that the new Civil Code gives a new approach on the error of will (where we can find a false representation of the legal nature of the agreement or of its object) as an essential impediment, sanctioned by relative nullity, while legal error

concerns the volitional side of the agreement, distinctive from the principle that says the law is presumed to be known by the parties.

Moreover, the author states that lesion as a consent error proves the intention to ensure just proportionality of contract performances and also to protect disadvantaged contractual parties. The technical mechanism of adapting the contract in case of consent alteration by error or lesion solves the fundamental opposition of two requirements, namely the protection of the party whose consent or free will has been altered, and the protection of contractual relationships. The scope, the reason on which the contract is based has a determining role in the performance and the utility of the contract. Time is not an external element of the scope, and this is the reason why the scope has to preserve the interest of the parties in relation to other determining factors, thus ensuring the quality of the content and the efficiency of the contract throughout its performance. The scope also represents the guarantee of preserving the interests of the parties by diminishing legal and interpretative intervention on contractual terms, while overcoming the obstacles against general consistency of the contract.

As the book comes to show, when assessing the key elements of the contract, the institution of nullity cannot ignore the concept of legal and conventional nullity, the confirmation of nullity regarding a contract and its conversion into a valid agreement, within the new Civil Code regulations, although the two concepts represented a topic for debate within legal literature.

Obviously, as the book points out, an important issue in setting up a contract refers to its continuous improvement through mediation instruments and pre-contractual agreements, preliminary contracts or preliminary agreements that generate the obligation to perfect the contract. The increasing number of contracts involving customers, as well as their negotiation draw attention not only on good faith, but also on the obligation of information and self-information, the obligation to ensure safety and professional confidentiality, but also the impact the obligations the professional has on the performance of the contract, and the accountability regarding intentional abandonment or reluctance in performing any of these obligations.

The author underlines another unclear issue concerning the demarcation line between performance by equivalent and the compensations required by failure to execute the contract or non-compliant performance, given the fact that each of these situations has different determining criteria. The present regulations regarding contract liability have broadened it from the impact on the subjective rights to the interests that have the appearance of subjective rights and protecting opportunities affected by unlawful actions, through a system of compensation that may be subject to doctrine and legislative interest.

Naturally, as the author noted, contract liability cannot be separated from updating debts versus currency nominalism, from the responsibilities of the

bailiff (the enforcement officer), or from conventional evaluation of prejudice under a penal norm. The legal frame establishes a reasonable balance between the principle of immutability of penalties as a guarantee of the binding force of the contract and the functions of the penal norm, to repair and to sanction, by reducing excessive penalties.

The present work emphasizes the fact that the legal frame offered by the Civil Code opens the way to patrimonial compensations for non-patrimonial prejudice in conjunction with regulations concerning ambivalent corporeal prejudice, applicable to contractual and non-contractual relations. The dichotomy between the nature of the prejudice and the way to repair unmeasurable assets or values does not comply with the principles of repairing patrimonial prejudice. The compensations are not able to repair which cannot be repaired, such as certain values, but are meant to ensure a degree of satisfaction, achieving a proper balance between the ethical requirements the victim has regarding their own behavior, at a social level, and the behavior expected from the party causing the damage, or the prejudice. Corporeal prejudice constitutes the third class of prejudice that generates patrimonial and non-patrimonial compensations, whether in a direct manner, or indirectly, by rebound. The recreational prejudice requires compensation due to a change in the victim's way of living, by restraining certain aspects concerning his social and family life. An aspect case-law and even the legislator have to define has to do with prejudice caused to victims who are in a vegetative state, since in those cases there is no certainty of personal representation of the consequences prejudicial actions might have, thus compensation is justified by the idea that every person has the right to dignity by birth, and a refusal to give such compensation would constitute a form of discrimination.

Developed at a high scientific level, the book written by university professor doctor Monna-Lisa Belu Magdo proves that the endurance of law cannot be reduced to the "formal intangibility, to law endurance beyond time, as it represents the continuity of legal norm over time and its ability to meet the requirements of time". Surely enough, legal provisions take in the past experiences, responds to the present demands and is able to foresee the future, and this represents, according to the author, the key in understanding the present shape of the theory of contract.