Absolute Invalidity of Contracts

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Abstract: Obligations created by the will of the subjects of the right, natural persons and legal persons, are based on a contract. These obligations are voluntary obligations. The initiative for the establishment of civil-legal relations, and in particular the contractual right based on dispositive provisions, requires us to be careful, primarily in the choice of the contracting party, the subject matter of the contract and other elements of the contract, since its creation up until the completion of the contract. Kosovo's legislation stipulates that in case of violation of legal-imperative norms, constitutional principles or social morals, the absolute nullity of the contracts is caused because the general interest in our legal order is violated. In cases where the interests of the parties are violated, as a result of the disclosure of the will of the party, the relative invalidity of the contract is caused.The invalidity of contracts is a very complex issue, so the purpose of this paper is to examine issues arising from the absolute invalidity of contracts, first of all under applicable law in Kosovo but also in the comparative law. Lack of care for the indispensable elements of the contract has consequences both in the individual interest but also in the general interest. If the content of the contract is inconsistent with constitutional, imperative and moral provisions, it cannot produce legal effects. Violation of the general interest entitles the public prosecutor, citizens or contracting parties to request the invalidity of such contract and the elimination of the consequences caused by the null contract.

Keywords: Contracts; Terms of Contracts; Effects of the absolute invalidity of contracts

1. Introduction

The need for studying the validity of contracts is indispensable and of interest to our society that creates civil legislation for the first time. Kosovo has moved to a different social and economic system, it has taken the first steps towards the change of law on obigations. The research for this paper has started from the subject of contacts to continue to the comparative study of the causes of the absolute invalidity

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of contracts as well as the distinction of void contracts because they are also a special type of invalid contracts.

The invalidity of contracts is a very complex matter, so the purpose of this paper is to examine issues arising from the absolute invalidity of contracts in the first instance under applicable law in Kosovo, but also in the comparative law.

The absolute invalidity of contracts contains a number of elements that make such a contract invalid. Initially they are the case, the basis, and the motive of the contract. It is quite disturbing the fact of entering into a contract with a bonus, as a contract that violates the rights of one of the contracting parties in post-war Kosovo.

The paper initially contains general notions, continues with the elements of the contract, with the contractual terms, and later on proceeds with the forbidden contracts and the consequences of these absolutely invalid contracts.

The start of notary services in Kosovo, we believe will contribute towards to raising the awareness of contracting parties to enter into full contracts and eliminate the consequences of material disproportion caused by contracts.

2. Contractual Right

We often wonder where the origion of many judicial institutions is. It is known that the right is a result of the initiatives risen from the needs of society, and as such any social regulation with legal norms is the product of the social reality, of the level of economic, cultural development, ... Unlike many other legal institutions, the contract represents one of the main sources of obligations (Kodi Civil Italian, 2014, p. 213).

Obligations represent those legal relationships between two persons, from which the relationship a person called a creditor gains the right or authority to request from the other party called a debtor, a grant, a rendering, a stoppage, or a refrain. Article 419 of the Civil Code of the Republic of Albania defines the *Obligation as a legal relationship by which a person (debtor) is obliged to give something or to perform or not to perform a certain act for the benefit of another person (creditor) who also has the right to ask for something to be given, or to carry out or not an action.* (Dauti, 2010, pp. 29, 55)

Since the obligations possess a wide range of regulation, the most important and most applicable source for them is the Contract Source!

Contracts represent the main instrument of the circulation of rights from one person to another person. But what is the contract?! We can say that the contract represents that agreement of the will of the contracting parties in order to achieve some effect. Civil Code of Kosovo in Article 26 "The contract is deemed to be affiliated when the contracting parties have agreed upon the essential parts of the contract!" The Civil Code of the Republic of Albania also defines the notion of contracts as "*a legal action by which one or several parties create, change or terminate a legal relationship."* (Milloshevič, 1987, p 37) Article 676 of the CKRA (Mandrro, p 350) stipulates that the contract is concluded when the parties have mutually expressed their will by agreeing to all its essential conditions. The emergence of the will may be expressed or tacit.

The contract is expressed as the most dynamic and most developed category of the right of obligations. The contract represents a legal instrument for the circulation of rights and obligations at the will of the contracting parties. In some legislation, the contract represents a source for the transfer of ownership, but also serves as a basis for ownership issues. We say that the contract is the most important source, thanks to its broad applicability in nearly all other branches of law. Not only in terms of obligations, but also in financial, family, inheritance law, labor law ... But it can not apply to Criminal Law (Dauti, 2010, pp. 29, 55).

For the contract, there are many notions that match in some elements but they also have many distinctive elements. They are presented as the Convention, the Covenant, the International Treaty, the Agreement, the Accordance.

2.1. Term of Contracts

In order to be effective the consent of the parties' will, certain conditions categorized as essential elements of the contracts must be met.

Those elements can be expressed as:

a. General Terms and Conditions

b. Special conditions

As general conditions appear – Ability to Act, Consent, and Contract Subject. (Dauti, 2010, p. 61*)*. As special conditions appear, when required for the contract to be valid, these conditions- the actual delivery, the conclusion of the contract on the basis of the prescribed form and when the consent of the parent or permission from the guardianship body is required (Milloshevič, 1987, p. 125).

2.2. Meaning of Invalidity of Contract (Invalid Contract)

The permissible actions of one's sake are one of the legal facts of particular importance. These human actions are the declarations of the will to create, change, or terminate civil-legal relationships. This declaration of will is manifested through the conclusion of a contract, which represents an agreement between the parties for the achievement of the intended purpose. The well-known professor of Civil Law, Andrija Gams states: *"legal affairs are considered to be voluntary declarations which the parties deliberately undertake in order to establish a juridical-civil relationship". He also considers legal affairs as a means of legal-economic circulation* (Andrija, p. 212).

The contract is an agreement between two or more parties for the purpose of establishing or terminating any civil-legal relationship between them (Françesko, p. 264).

According to our positive legislation, there are two types of intensity of contract invalidity: the null and void contract. The null contract is also termed as the absolute invalidity of the contracts, while the void contract is presented as the relative invalidity of the contracts. Law on Obligations of Kosovo on the Invalidity of Contracts – Null Contracts are regulated in Articles 89 (Nullity), 90 (Nullity Consequences), 91 (Partial Nullity), 92 (Conversion of Invalid Contract), 93 (Late Termination of the causes of nulliety), 94 (Responsibility of the person guilty of nullity of the contract), 95 (Nullity search) and 96 (Unrestricted search for nullity).[1]

With the contracts we can often distinguish the entering into contract phase and the phase of contract fulfillment. The contract entering phase includes all the actions that precede reaching the will of the parties in relation to the essential elements of the contract such as: seeking a contract party, making a bid, negotiating, entering a pre-contract, achieving compliance with the essential elements of the contract in the form prescribed by law, in a simple form or determined by the will of the parties (Ilija, p. 395).

Legal literature states that absolutely invalid legal affairs are those that do not produce legal effects that would be produced as if they were valid, (Vedriš, p. 130) and are

[1] The text of the Law on Obligations was taken from the final version prepared by the Ministry of Justice of the Republic of Kosovo and the same was sent for approval to the Assembly of Kosovo. The Law on Obligations proposed in the part which deals with the invalidity of contracts - the null contract, is the same as the 1978 Law on Obligations, which is currently in force in Kosovo.

considered absolutely invalid legal affairs that act as if they were not legally bound. Legally they do not exist (Vedriš, p. 130).

Absolute invalidity is caused ex lege, while the court in this regard carries out ex officio (Vedriš, p. 131). It is stated in the paper that a contract that is in conflict with the constitutional order (public), imperative norms, and social morality is absolutely invalid. When it comes to these contracts, we also present the opinion of Prof. Vedriš who states: *The causes of absolute invalidity are: the inability of the parties to act, lack of free will, impossible or inflexible case, non-existence or denial of the base and the absence of the foreseen form* (Vedriš, p. 131).

2.3. Prohibited Contracts (null)

If contracted, a contractual content expressed not in harmony with:

a. Constitutional norms,

*b. Imperative and Cognate (*Bikič, 2004, p. 176) *norms*

c. Moral norms[1] *and*

d. Principles of good business practices.[2]

Prohibited contracts are considered those containing:

a. Invalidity of the case (case is indefinite, disallowed, forbidden),

b. Invalidity of a legal basis (the basis does not exist or is not allowed),

c. Forbidden Motives,

d. When the consent of the will is unclear, not serious, or simulated (Dauti, 2010, p. 93).

From these conditions defined by legal provisions, we find that violation of constitutional, imperative, and moral norms occurs. Therefore these contracts are considered absolutely invalid.

In the Civil Code of the Republic of Albania, in the Contracts part, it is determined that the contract is absolutely invalid when:

[1] The contract is forbidden, where, according to the old tradition, the girl's father has been promised a lot of money in order to give the girl to another person.

[2] A contract that is contrary to public order, the ordering provisions, the morale of the society is invalid if the purpose of the violated rule does not lead to any other sanction or if the law has not set something else.

a. Contracts are contrary to the law provisions,

b.Actions are committed to mislead the law,

c. Actions committed under the age of 16,

d. Arrangements of the parties are simulated or fictitious affair (without the intent to create effects) (Latifi, 2007, p. 241).

III. Consequences of Absolutely Invalid Contracts

Absolute invalidity results in the invalidity of the contract as of the date of the conclusion of the contract. With its annulment, its legal effects cease. Article 105 of the CKRA stipulates that *"legal action declared invalid is called such, from the moment it is committed".* Even in Roman law is treated the institute of the invalidity of contracts (Ardian, Ilir & Asim, 2010, p. 113).

Such effect of the invalidity of contracts is reasonable, considering that the interest to be affected is general, undermining the public order laid down in constitutional, imperative and moral provisions. Their existence damages this harmony in society. Article 90, point 1 and 2 of the LORK stipulates that in the case of contract nullity it is an obligation to return to the party what has been received under such contract; in the event that this is impossible or if the return is prevented by the nature of what is fulfilled, appropriate compensation shall be made in cash according to the price at the time of the announcement of the court decision, unless otherwise provided by law.

The Spectrum of persons interested in declaring this invalidity is wide: the public prosecutor, the contracting parties and their successors and any other person who has an interest in declaring it invalid and possesses evidence of such invalidity of the contract (Article 160 LOR).

It does not apply to the rules of prescription and preclusion. The court ex officio takes care of the annulment of these legal affairs, so none of the subjects can claim performance. Through this legal remedy, the vital interest of society is protected. (Latifi, p. 264).

Sanctions for the invalidity of the Contracts are as follows:

a) None of the parties has the right to request the return of what has been realized (in cases where the restitution is not allowed,

b) If the restitution is permissible, both parties are obliged to recover what they have executed,

c) If only one party has executed, it has the right to recover what has been executed.

3.1. Restitutio In Inegrum (Return To The Previous Situation)

What unites the absolute and relative invalidity is expressed in the effect of restitutio in integrum, where the parties are obliged to return to the other party all that they have received under the contract. This retrieval should always be done if the obligation is possible to return, if the nature of the case allows for the return to the previous situation.

This previous return occurs by reinstatement of the loans that the contracting parties have agreed upon each other at the moment of the conclusion of the contract. The court needs to ensure that in the event of the restitution to verify the reasons for the invalidity of the contract in a material way and the situation created in the event of restitution (Dauti, 2010, p. 47).

CKRA determines these two cases when the restitution is returned for the two contracting parties:

a*) The contract has been concluded by a minor who has not reached the age of 14 and*

b) A contract concluded by a minor who has reached the age of 14 but does not have the consent of the parents or the permission of the guardianship authority.

In this case, the interest of the minor is protected and, in addition to the restitution, the party that has the capability of action must reimburse the juvenile for the damage suffered by such contract.

If the subject matter of the contract is the sale of the immovable property, the immersion rates require that the contract form should be in writing. If such a form is not met, the parties must make the double return, but the trust of the parties also has its own role. If the return of the case is not possible in a natural way then the parties are obliged to realize the countervalue in cash.

The price that returns as restitution supports the theory of monetary valorisation, contained in the 2004 law of obligations, which is determined by value to return at the moment of the fulfillment of the obligation (Latifi, 2007, p. 268).

3.2. Restricting Restitution

When the contracting parties have entered into a contract contrary to the law and deceiving the law, it is not allowed to return to the previous state, but the parties are obliged to return the values to the state (Latifi, p. 265). This is defined in Article 106 of the CKRA (Gerard, 2000, p 98).

When the subject of the offense violates the law and makes a deception of the law, the restitution of the values is not made to the contracting parties but to the state. These cases appear as legally ill enrichment. However, when the court evaluates the restitution, it takes care of the principle of good faith and may permit only one of the contracting parties to return the subject matter of the contract by one-sided acting (Milloshevič, 1987, p. 137).

3.3. Acquiring Cases in Favour of the Municipality

When the parties that have caused the contractual invalidity, during the report of their contract have been irresponsible, they are not entitled to seek restitution of the case, and the subject is given to the church. This rule has been novelty for the former socialist system. If a gift is promised for the work, knowing it is in contradiction with the law, public order, or morals, it is not obliged to pay, but if paid, there is no right to be asked, whether or not such work has been done. Such value shall be returned to the municipal culture fund, normally in the territory of which the place of residence is situated.

If a person during the performance of official duty is obliged to return that value to the territory of the municipality in which he has his/her place of residence (Latifi, 2007, p. 262).

3.4. Unilateral Restitution

It could happen that in the execution of the subject matter of the contract, one party was responsible. That party may be relieved of the task of returning to the previous state, while the irresponsible party is obliged to return the case to the municipality. This case of restitution to relative nullity is expressed in the following ways:

a) When the contract is concluded as a result of fraud,

b) When the contract is concluded as a result of a miscount and

c) Contract signing as a result of a great need (Latifi, 2007, p. 269).

This unilateral restitution is expressed as the duty of the party that has caused the deception, the miscount or the threat, to return the property value to the municipality, whereas the embezzled and misled party is not obliged.

From the declaration of absolute and relative invalidity of the contract derives the right of the parties to seek the obligations that were executed under the contract. (Galogano, 2004, p. 341).

3.5. The Principle "Nemo Auditor Propriam Turpitudinem Allgenas"

This rule of Roman law expresses the right of the person who knew about the legal prohibition which causes the absolute invalidity of the legal work, to request the cancellation of such a contract, a person who is called upon his shame. No one is allowed to rely on his shame to invoke legal protection.

Such a legal definition prevents the irresponsible party's legal protection. Whoever has done something dishonest, prohibited and embarrassing and requires from the other person a reward, he is not obliged to realize it, to accept the reward.

Such principle may not have been determined by legal provisions, this is also evidenced in the division of theorists for acceptance or non-acceptance of this rule of Roman law. However, such admission is in line with the fundamental requirements of justice (Sllobodan, 1975, p. 232).

If the contract relates to a rent for a brothel, the person who has maintained it cannot claim a return to the previous state because such activity is the result of immoral actions. Or a person in the capacity of the co-contractor is liable for the remuneration he receives from a co-contractor due to his influence or belief in a particular circle; this co-contracting of trust brings certain benefit.

3.6. The Volume of Contract Invalidity

In a contract, its content may be strictly inadmissible or partially invalid (null), it is logical because it may in principle be a completely invalid contract. Usually, the parties attempt to hide an invalid element with valid provisions. Article 91.1 of the LORK: *The nullity of any provision of a contract cannot therefore result in the nullity of the contract itself, if the contract can remain without the invalid provision and if that provision was not the decisive condition or motive for the contract.*

Thus the contract may be wholly invalid and partially valid. If it is completely invalid, it is deemed unfeasible, while the other party is obliged to recover what has

been executed, but if nothing is executed then such contract is termed ineffective (Latifi, 2007, p. 264).

For example, a relatively ineffective contract can be expressed in the contract with usury, if the element of the contract disproportion is removed, then the contract remains valid (Dauti, 2004, p. 141). This part will be better handled in the part of conversion of the absolutely invalid contracts.

3.7. Conversion

Conversion of legal affairs is presented as institute in the civil law and in particular in the obligations. It is an institute of the Roman law, also presented in Digesta. However not every invalidity of contracts brings their validity over time.

It may happen that a juridical or legal affair, because of its composition does not respond to what the parties have wanted, but may respond to other legal affair, for which can also be considered an assurance that the parties have desired that and start from the normal situation, because the broader objective contains the narrowest objective (Aliu, 2004, p. 127).

Conversion is the transformation of one legal affair into another, in accordance with the conditions of the LOR. (Article 106 of KCRRSH-s). Conditions for making an absolutely invalid contract into a valid one, parties wishing to convert it, should be instructed into another contract. In order to do this, the contract must be reached to the goal that the parties have desired. Article 91.1 of the LORK*: The nullity of any provision of a contract cannot therefore result in the nullity of the contract itself, if the contract can remain without the invalid provision and if that provision was not the decisive condition or motive for the contract.*

Primarily, conversion occurs when the parties have no knowledge of the necessary legal terms of conclusion of legal affairs established by legal provisions. Its result is that the parties have concluded legal affairs in contrary to the legal provisions, and such affair does not exist but meets the requirements for any other legal affair, and thus achieves the same goal and expresses the will of the contracting parties (Dauti, 2010, p. 13).

If the property of the subject of the right was violated, if the cessation did not meet the conditions set forth by the legal provisions, the provisions on the gift contract would apply.

The German Civil Code in Article 140- stipulates that an invalid legal affair meets the conditions for the validity of any other valid legal affair and if that legal affair is

desirable to its parties even though they are aware of the absolute invalidity of the existing legal affair.

For the purpose of keeping the contract, thanks to the pacta cun servanda principle, the contract is interpreted in order to realize the common goal of the contracting parties. It is interpreted to achieve the specified contractual effect (Dauti, 2004, p. 13).

The effect of invalid affair suggests that once it is declared invalid, each party must return what it has received as a legal basis. However, in some affairs there is no restitution - it is forbidden, immoral, or the parties have wanted to put the law into play. In addition, the parties must compensate for the damage.

The contract that is absolutely invalid is likely to be converted. The conversion of the absolutely invalid contract is by the implementation of a general principle and that is the retention of the contract (Galogano, 2004, pp. 338-339).

3.8. Compensation for Damage

The very fact of existence of invalid contracts implies the requirement of additional measure such as damage compensation. The forbidden act of invalid contracts may result in damages. Causing damage by one of the contracting parties entitles the other party to seek compensation for the damage.

In order to claim this compensation, the condition of the defendant's ignorance or conscience should be sought as a result of not knowing the absolute invalidity of the contracts.

Why Compensation for Damage Is Required? - Due to the fact that the contracting party has not undertaken anything to avoid violating legal norms and morals.

3.9. The Difference between Absolute and Relative Invalidity

It is important to know the different and similar points of absolute and relative invalidity, thanks to their effects, validation and conversion, as well as limitation periods.

Invalid legal actions may be annulled, but relative actions are declared by the court as invalid, while absolutely invalid ones are invalid from the time of their creation, and the court only finds it invalid, it is not necessary to evaluate them as such as by the court (Dauti, 2010, p. 142).

Absolutely invalid actions are considered ineffective or without legal value, while relatively invalid ones have value and legal effects until the moment of the declaration of invalidity.

The annullability of the relatively invalid actions depends on the request of the persons concerned to declare it invalid and must be assessed by the court as such, and the absolutely invalid ones are not declared void because as such they have never been valid, they are null from the beginning (Milloshevič, 1987, p. 139).

The consequences of the cancellation are almost the same, both parties are obliged to compensate for the damage and to return to the previous situation.

It is also worth mentioning the author J. Latifi who in her book "Civil Law" (the general part) points out that between the absolute and relative invalidity of legal action there are substantial differences.

Relatively invalid legal actions are null and void by the court, and absolutely invalid legal actions are invalid at the time of their commission and are not necessary to be annulled by the court, they also have legal consequences until they are declared invalid, and only after they are declared invalid they are called as such, and not from the moment they are created.

This state of affairs is not characterized by absolutely invalid legal actions, since they are not declared invalid, but are found as such because they are null and void from the moment of their realization (Latifi, 2007, p. 261).

4. Conclusions and Recommendations

Although contractual law is based largely on dispositive provisions, there are legal rules that cause the invalidity of contracts, in cases where the conditions set out by the state legal order, imperative norms (ius cogens), and social morality are not respected and there is also lack of a declaration of free of will. In all civil codes, as well as in the positive law of the Republic of Kosovo, it is not permissible for the parties, by their agreement in the field of contracts, to violate the general interest - the state interest. Positive legislation also protects those who enter into contracts under the influence of violence, threats, fraud or miscount, and those who conclude the contract and do not have the full capacity to act. The positive right in Kosovo recognizes two types of invalidity of contracts, or legal actions, absolute invalidity and relative invalidity, often called null and void contracts. To determine the invalidity of contracts is a very serious issue, because the reasons that cause

invalidity are always in the process of change, same as the civil-legal relations themselves.

Determining the invalidity of contracts, especially the boundary between absolute and relative invalidity, although at first glance it seems obvious, presents a particular difficulty. This is especially unclear when it comes to questioning the ability to act and the impact of violence on the invalidity of contracts.

In particular, care should be taken in determining social morality as a cause of absolute invalidity, when it is known that all contracts with usury in essence violate social morality. In law, even a belief may be the reason for canceling the contract, and on the other hand there are endless theoretical discussions of what is belief and is it needed.

My opinion is to specify precisely the causes that cause invalidity and anullment of contracts, especially the issue of restitution, where there is an excessive freedom of the court, which in some cases may allow restitution from the invalid null contract, or reduce the return of the case, or not return it at all and leave it to the municipality. This is particularly the case with immoral contracts. The absolute invalidity of contracts, the more studied in theory, the more it increases the dilemma about causes of absolute invalidity and relative invalidity.

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