THE VALUE OF CONTRACTS FROM A NOTARIAL INSTITUTIONAL PERSPECTIVE

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Abstract *The starting point of the theory of contracts coincides with the Roman era, but the moment related to the strengthening of the contract theory is the "social contract". Another episode relevant to this theory is represented by the trend "institutionalism". The institutional value has repercussions on the value of the concluded contracts, but we notice the link between the notary public institution and the theory of contracts, which is very important. Although the notary public institution is important in a democratic society, the analyses conducted do not indicate any connection between the number of notaries public and economic growth.*

Keywords: contracts, institutionalism, value, notary, economic growth
JEL: A12, K11, K12, K20

INTRODUCTION

Traditionally, one of the most important institutions – the private property – lies at the basis of the contemporary society. But what underpins this important institution? The answer can be summed up in one word: the contract. Whether we refer to a "social contract" or to other type of contract, we find that, in fact, institutions are related to contracts and vice versa.

Chronologically speaking, we believe that the starting point of the theory of contracts coincides with the Roman era, more exactly with the coding of the Roman law, one of its forms being represented by Justianian's "Institutions" completed in 533. Originally composed as a basic handbook, "Institutions" were invested with power of law in relation to the Roman authorities (Jakotă, 1993, p. 378). But before Justinian, in his "Institutions", Gaius also dealt with the money loan contracts, with the deposit contracts, with the pledge contracts, etc. Thus, the initial correspondence between institutions and contracts transpires from the Roman law handbooks, or in other words, the contracts appear as genuine Roman institutions.

The moment related to the strengthening of the contract theory, and also to a paradigm shift is connected to Jean Jacques Rousseau and his "social contract". The theorists of the social contract from the seventeenth and eighteenth centuries began to dissociate the theory of contracts from institutions. In the social contract we can identify the basis of any contract, regardless whether we are talking about a sale purchase agreement, an exchange agreement, or a lease agreement etc. As a form of association that sets to rights a certain protection both for the individual, and for the goods

of each contract party (Rousseau, 2004, p. 9), the social contract is the very essence of any agreement.

Another episode relevant to the theory of contracts is represented by the trend called "institutionalism", defining for the beginning of the twentieth century. Research literature (Hovenkamp, 2011) estimates that along with institutionalism, economics focuses on behavioral economics, on the importance of institutions created by men, on the rules they impose and on their direct effect in the economic field. We believe, therefore, that the most important and also the most sustainable contribution of the institutionalism is the involvement of the legal rules in the economic analyses. From this point on, the contamination of the science of law with economic elements or vice versa, of the economic science with legal elements becomes official. From this perspective, property trading becomes important for economic transactions, basically legitimizing our attempt to highlight the theory and value of contracts from an institutional, notarial perspective.

1. THE CONCEPT OF "TRUST" – A COMMON ELEMENT OF CONTRACTS AND OF INSTITUTIONS

A first common point of contracts and institutionalism is "trust", a custom element that takes the form of trust between the contracting parties, on the one hand and of confidence in state institutions, on the other hand.

Undoubtedly, the central element of the theory of contracts is the contract. From a legal perspective, in summary, the contract is an agreement that the parties invest with power of law so that it devolves upon them a series of rights and obligations which they assume, and voluntarily execute in good faith. These contracts can take the most diverse forms; they can have different provisions in order to match the parties' interests. The initial simplicity of the contracts is replaced today by provisions on the sharing of risks, on the amount of penalties, on the investor's protection or on penal clauses, etc., arising from the specialization of law and from the need to optimize the contracts.

At present, the theory of contracts is complicated due to the dissociation which has been made between the contracts that are executed at once and those which are executed in time; research literature of recent years includes only the latter category of contracts in the theory of contracts (Lyons, 1996). The same theory of contracts emphasizes the impossibility of providing for all possible situations in the drafting of contractual clauses, which means that in reality, all contracts are incomplete (Lyons, 1996, p. 29). The theory of contracts is extremely comprehensive, covering

both the pre-contractual period and the exact time of the achievement of the agreement between the parties, and then the stage of performance of the contractual obligations, and possibly of forced execution.

The link between contracts and institutions assumes the explanation of the term of "institution". Research literature defines the institution as a "complex social form" (Pina-Cabral, 2011, p. 478), a central element of the society, establishing "the rules of the game in the society" (Mantzavinos et al., 2011, p. 7). This important prerogative of the institution generally derives from the perception of the individuals on the institutions which are seen as genuine mental models, which operate according to certain rules and create their own rules. The current use of the term "institution" is rather ambiguous, being likely to create confusion between institution and organization. Thus, some institutions, in turn, create or, where applicable, apply the rules under which contracts representing documents establishing various legal entities are concluded. Economic organizations (companies), political organizations (political parties), educational organizations (universities, schools) are the direct creation of institutions; therefore, we sometimes inappropriately call them institutions. However, the difference between them is essential, being plastically described by the research literature (Mantzavinos et al., 2011): institutions make the rules of the game, but the players are the organizations. To explain this assertion, we have considered the case of the Trade Register Office, namely of the legal persons established by it. In other words, the institution is the Trade Register Office and the legal persons (the companies) established are the organizations created by means of the above-mentioned institution.

On the other hand, in regard to institutions, we believe that the effectiveness of institutions is even greater as the confidence in the respective institution is increased. Basically, institutions appear as an object and at the same time, as a source of confidence. A great number of institutions in connection with the theory of contracts are required by the very existence of the rule of law.

In the theory of contracts, trust between parties is assigned importance by means of the principle of *pacta sunt servanda* specific to civil (national) law and international law. The principle of *pacta sunt servanda* or the binding force of contracts corresponded in the Romanian regulation previous to 2011 to a fairly rigid formulation, which showed that, in fact, agreements concluded under the law could not be (for any reason) changed by courts. Current legislation (namely the new Civil Code) loosens this principle; therefore, if certain conditions provided by law are met, the court may intervene to modify or even terminate the contract in question. From this perspective, we consider that the judicial power, in fact the institution of justice (in the broad sense) leaves its mark on the very existence of a contract.

2. THE INSTITUTIONAL VALUE AND THE VALUING OF CONTRACTS BY MEANS OF THE NOTARY PUBLIC

The institutional value has repercussions on the value of the concluded contracts. From this perspective, there are two possible situations: in the first case, the interference of a certain institution in the conclusion of a contract, although not required by law valorizes the agreement of the parties; and in the second case, the interference of a certain institution is a prerequisite for the valid conclusion of a contract (Brake, 2007, p. 244). It's the classic case of requisite contracts; so, although required as an *ad validitatem* form in cases expressly and exhaustively provided by law, the authenticated form of contracts is preferred by potential contractors, even when the law does not require it. The reason lies in the intention of certain institutions to create certain rights or obligations with direct implications on the contracting parties.

From this perspective the link between the notary public institution and the theory of contracts is very important. In Romania and in other European Union member states, the notary public performs a variety of functions, including: the valid conclusion of certain types of contracts, certification of copies of original documents, and certification of the parties' signatures. From the perspective of the relation between the theory of contracts and the notary public institution, the defining element is the pecuniary, economic case, regardless whether the agreement of the parties validated by the notary falls into the category of legal relations of civil law, commercial law or family law.

Regarding the authentic form that they have to give to certain documents, first of all, the notary public has duties in terms of real estate ownership. The non-observance of the requisite in case of the conclusion of sale purchase contracts covering immovable property can be sanctioned with absolute nullity, the contract agreement of the parties being declared non-valid.

In other Member States of the European Union (Germany), the notary is acknowledged increased responsibilities regarding corporate law, the notary public being the only one who may request the registration of a joint stock company in the national register of a company and the transfer of shares to other shareholders and the change of the registered capital (Wendler et al., 2006, p. 281). The Romanian commercial law is subject to notary public duties in terms of the establishment of a company (where associates' intake consists of a building), where the company agreement must be authentic.

Also, from the perspective of family law, the notary has significant powers as a result of the changes made by the new Civil Code. Thus, marriage agreement takes a solemn form (Article 330

Civil Code), given the formalities involved, and an accessory character in relation to the solemn institution of marriage (Aniţei, 2012, p. 25). Also, the divorce can also be solved by the notary public (art. 375 paragraphs 1 and 2 of the Civil Code - when spouses agree to divorce and, cumulatively, have no minor children, or, in case they have minor children, if they agree on all aspects regarding: the name after the divorce, the parental authority which shall be exercised by both parents, the establishment of the minors' home after the divorce, the way in which personal relations between the separate parent and each child should be preserved, and the establishment of parental contribution to the cost of growth, education, teaching and training of children).

The advantages of using the solemn form of contracts, an exclusive prerogative of the notary institution lies in the full probative value of the authentic documents and in the enforceable nature of the contract authenticated.

The authentic document enjoys the presumption of authenticity and validity, its validity being ascertained exclusively by the contester, as apparent from the provisions of the New Code of Civil Procedure (art. 263-264).

As an act of public authority, the authenticated act which ascertains a clear and liquid debt is enforceable on its due date (art. 4, in conjunction with art. 67 of Law no. 36/1995, of notaries public, republished, with subsequent amendments). This means it can be enforced and that the debtor will be enforced, by means of the bailiff, without the need for court intervention. Although this text of law was challenged in terms of its constitutionality, the Constitutional Court held that this "text of law is not intended to create privileged legal conditions for a class of citizens, but seeks, on the one hand, to quickly settle the disputes with economic character and, on the other hand, to relieve courts from the disputes in which the claims are clear and liquid (Constitutional Court of Romania, 2005)."

So, the notary public institution has to valorize the contract. In other words, mediation of a contract by a notary public converts the value of a contract.

Also, from the perspective of institutionalism and of the value of contracts, we make reference to the **Trade Register Office**. This time, the contracts (the articles of association, the company contracts, and the statutes) recorded by means of the Trade Register Office do not become more "valuable" as the documents signed by the notary public institution; they become known by respecting the form used for enforceability against third parties. As above, again, the judicial institution is interposed between the theory of contracts and institutionalism because, as a public institution, the Trade Register Office is organized by the Ministry of Justice (Art. 2 paragraph 2 of Law no. 26 / 1990 on Commercial Register).

3. THE VALUE OF CONTRACTS AND ECONOMIC GROWTH

Contractual freedom develops democratic institutions and entails growth. However, the notary public is required to develop this freedom of contract and to give it the written form that the parties want, regardless whether we are talking about legal relations in civil law, commercial law, international trade law and private international law.

A link (and the most important one, from our point of view) between contracts and institutions, with reference to both the public notary institution and the Trade Register Office is economic growth. Research literature estimates that institutions of "maximum quality" are the result of economic growth (Arielle and Store, 2011. p. 585), and economic growth is also a result of the implementation of democratic institutions. Basically, in a state-nation where private ownership is guaranteed, nationals of that State are motivated to achieve long-term investment, based on the existence of strong regulations on contracts; consequently, commercial transactions and the economy of the State itself, develop (Boettke and Fink, 2011, p. 500).

The notary public institution is important in a democratic society. But the analyses conducted do not indicate any connection between the number of notaries public and economic growth, although in theory there should be one, as strong states from an economic point of view are characterized by a greater number of economic transactions, and thus develop the need for more notaries than developing states. Considering the number of notaries public and the number of people in two of the strongest European economies (France and Germany) and two of the weakest European economies (Romania and Bulgaria), we have found the following:

Table 1 - The link between population size and the number of notaries public

EU Member State	The number of notaries public in 2011	Density of notaries public compared to the number of people
France	8500	1/7698 people
Germany	7722	1/10583 people
Bulgaria	530	1/14105 people
Romania	2411	1/8871 people

Source: remarks after the Council of the Notariats of the European Union and the World Bank

Thus, we have found a greater number of notaries in France; Romania is rapidly approaching the number of notaries in France. In the midst of economic crisis (2009-2012) we have found, both in France, and in Romania, a steady increase in the number of public notaries, and a decrease of about 10% of the number of notaries public in Germany, and a constant number of notaries in Bulgaria.

CONCLUSIONS

For a higher valuation of contracts in terms of the notary institution in Romania, we plead for an institutional legislative relief, as in other European countries (such as Germany or Sweden), where the notary institution comes to identify with the lawyer. Thus, in Sweden for example, there is no specific association of notaries; the notaries are members of the Bar. Had such an idea been applied into practice in Romania, we believe that the effect that the number of economic transactions would increase. Currently, in Romania the notarial activity implies rates which cannot be in any case lower than the minimum rates (as set out in Order no. 46/2011 for approval of Norms regarding the tariff of fees for services provided by notaries public) established by law. Relaxation of law and recognition of similar responsibilities in case of lawyers, which are also specialists in law, would result in the increase of onerous transactions in Romania.

The so-called quantitative limits regarding the access to the profession of notary public were related to geographic and demographic criteria, starting from the idea that the notarial activity is a public service. As regards the qualitative limits, their maintenance is natural, given the need to preserve a certain quality, obligatory in providing such services. The differences between the various EU Member States should be harmonized in terms of mutual recognition of diplomas, but also in terms of free movement of services.

Notary market deregulation in terms of tariffs charged for notary services, and of the number of positions for notaries public, is a solution for the development of competitiveness in this market.

REFERENCES

Aniţei, N.C. (2012) *Convenţia matrimonială potrivit noului Cod civil (Marriage Agreeement based on the New Civil Code),* Hamangiu Publishing House, Bucharest.

Arielle, J., Storr, V.H. (2011) *Which institutions matter?*, Journal of Institutional Economics, vol. 7, Ed. Joie Foundation, pp. 583-588.

Boettke, P., Fink, A. (2011) *Institutions first*, Journal of Institutional Economics, vol. 7, Ed. Joie Foundation, pp. 499-504.

Brake, E. (2007) *Marriage, morality and institutional value*, Ethical theory and moral practice, vol.10, no. 3, Ed. Springer, pp. 243-254.

Hovenkamp, H. (2011) *Coase, institutionalism, and the origins of law and economics*, Indiana Law Journal, vol. 86, issue 2, pp. 499-540.

Jakotă, M.V. (1993) *Dreptul roman (Roman Law),* Chemarea Foundation Publishing House, Iaşi.

Lyons, B.R. (1996) *Empirical relevance of efficient contract theory*, Oxford Review of economic policy, vol. 12, no. 4, pp. 27-52.

Mantzavinos, C., North, D., Shariq, S. (2004) *Learning, institutions and economic performance*, Perspectives on politics, vol. 2, no. 1, pp. 75-84.

Pina-Cabral, J. (2011) *Afterword: what is an institution?*, Social Anthropology, vol. 19, issue 4, Ed. Wiley Publishing, pp. 477-494.

Rousseau, J.J. (2004) *The social contract or principles of political right,* Kessinger Publishing House, 2004.

Wendler, M., Buecker, B., Tremml, B. (2006) *Key aspects in German business law*, Ed. Springer.

*** Constitutional Court of Romania, (2006) *Decision no. 84 from May, 25 1999*, Notary law, Notarom Publishing House, Bucharest.