THE INTER-RELATIONS BETWEEN PRIVATE AUTONOMY AND THE SOCIAL FUNCTION OF CONTRACTS

A INTER RELAÇÃO ENTRE A AUTONOMIA PRIVADA E A FUNÇÃO SOCIAL DOS CONTRATOS

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ABSTRACT

To present to the market as an institution that has its own rules to influence people's behavior, as well as the contractual relations that fall, the numerous situations that are observed in the market, especially economic freedom, the need for standards is noticeable that regulate and legitimize the market as it is an economic and legal institution. In this work we intended to demonstrate the relationship between the contract social function and private autonomy.

KEYWORDS: Private Autonomy; Social Contract function; Contractual relations; Marketplace.

RESUMO

Ao apresentar ao mercado como uma instituição que tem suas próprias regras de influenciar o comportamento das pessoas, bem como as relações contratuais que se inserem, as inúmeras situações que são observadas no mercado, especialmente a liberdade econômica, a necessidade de normas é perceptível que regulam e legitimar o mercado como ele é uma instituição econômica e jurídica. No presente trabalho temos como finalidade demonstrar a relação entre a função social do contrato e autonomia privada.

PALAVRAS-CHAVE: Autonomia Privada; Função Social dos Contratos; Relações Contratuais; Mercado.

INTRODUCTION

In order to enter the main theme of the relationship between social function of a contract and private autonomy it is necessary to establish the scenario in which there are contractual relations: the market.

Thus, we present the market as an institution which has its own rules of influencing people's behavior, as well as the contractual relations that fall within it.

The numerous situations that are observed in the market, especially economic freedom, a need for standards is noticeable that regulate and legitimize the market as it is an economic and legal institution.

Within the market and economic freedom turns out both the importance of private autonomy as the social function of the contract, from which the holding of a reconciliation between public interest and individual is required and competence of the law to determine the individual and collective responsibilities, contributing to the realization of an economic democracy centered on the person and entrepreneurial skills.

The private autonomy embedded in the Contract Law has been cemented in the constitution, as a major component in the process of historical understanding of good faith, seeking to achieve social justice effecting the social function of the institutes found in civil law.

The current legal and ideological nature of private autonomy goes beyond it is the nuclear and fundamental principle of all private law because the incorrect

positioning of this principle can bring numerous setbacks to the private legal system, especially the contract.

The private autonomy is embodied in the ideal modern world of private law at the time it shows how the fundamental principle of any legal system based on the logic of the relevance of the human will or can the person's self-determination, whether relating with the legal business, the power granted to self-regulation of private interests.

The principle of private autonomy is part of the normative order as the private system core, radiating power to the legal acts developed by law enforcement officers in the prism of their individuality in relation to another, operating in terms of established legal framework.

The regulation of this principle rests on individuals through the exercise of his own will, but it is bringing the question about the effect that the social function because the principle of private autonomy.

Necessary to make a brief report on the subject of the social function that was introduced in the Brazilian legal system by the Constitution of 1946 through the social function of property and for a long time this principle became associated with political science or metajurídico plan. The social function, by an individualistic perspective, be configured in legal principle, but in metajurídico postulate, which corresponded to the role that the contract should play in fostering the trade and commercial practice.

The Institute of social function has become the subject of further reflection from its introduction in art. 421 of the Civil Code of 2002, as follows: "The freedom to contract will be exercised by reason and within the limits of the social function of the contract."

You could understand the social function of the contract as a limiting of autonomy?

For the social function of the contract demonstrates the social value of contractual relations, demonstrating the importance of these relations in the legal field, conceiving the social function of the contract as a way of strengthening the contractor's protection even in the face of others.

Thus, the social function of the agreement is intended to ensure the contractual position but also impose duties to contractors, including non-contractual duties, socially relevant and constitutionally protected.

It brings also the understanding that the social function extends to the contract area the notion of public policy, since the social function is considered order to carry out the imposition of non-derogable and not be avoided precepts by which the will of the parties is justified .

Thus, we must analyze more deeply each of the institutes presented, in order to reach a reasonable conclusion about the problem presented.

1. THE MARKET

To deepen the theme is first necessary to conceptualize market, visualizing how the contracts are performed, thus verify its social function and outcomes of contractual relations.

The market has different meanings, it is understood sometimes as a producer establishment of own rules for the determination of prices and behavior, and ideological sense, as freedom reputable area to structure the actions of individuals. While self-regulated contains within its scope the same social relations, contribute to transform and influence consistent with the tendency to be a reality that pervades the entire society and all societies, which can be set free only when ensure the widest autonomy individuals participating in the exchange in their fight price and competition. (Perlingieri, 2008, p. 501)

Thus, the market as weakening instrument of social relations results from its unbridled freedom, which translates into struggle and conflict, at the risk of relegating the personal dignity to a mere exchange value, revealing the vulnerable subjects, subjugated or exploited to marginalization, leading men to an endless commodification. Conflict that finds no reduction or mediation in politics without limiting economic freedoms, without corrupting civil liberties, as well as democracy itself. Thus, economic freedom becomes political freedom. The economy dominates politics (PERLINGIERI, 2008, p. 503)

> “The market takes the institutional role of social relations organizer and redistribution of wealth and large corporate groups, which perform the function of government >> << private society lend themselves to cooperation and sponsorship compatible with egoism, but nothing available to gestures and forms of sincere solidarity. Then << >> minimal state, less government, no state, deregulation, and more freedom of society and youth anarchism; then, at the constitutional level, the tendency to delimit the powers of intervention,

> regulatory and administrative, in economic matters (the so-called economic constitutionalism) and, in general terms, a cultural attitude aimed at minimizing << to resort to internal ethical constraints and / or those imposed external legal and political to human behavior>>". (PERLINGIERI, 2008, p. 504-505)

In this context, the market is irreducible to the society through the role of morality and law, since the institutionalization of the market, in its historical perspective, confirms that it can not fail to assume an external guarantor, either the moral or the right. Society can not be reduced only to the market and its rules, it is the right regulation of society, it is who shows the limits and corrective, dictated not only by the pursuit of wealth and its distribution, but the values and nature of interest diverse. (Perlingieri, 2008, p. 505-506)

The market needs rules that regulate and legitimize, not between market and one right before or after, but a logical and historical inseparability, so the market is both an economic and legal institution, represented by own normative status, characterized by political choices. The market is a place, at least partially artificial, conditioned by the cultural and regulatory context in which it occurs (Perlingieri, 2008, p. 507)

In proposing reconciliation between public interest and individual interest is attributed to a significant support to the market economy in moral terms. (Perlingieri, 2008, p. 509)

Thus, the economic rationale is not independent of the reasons of politics and law, it is the policy and law assume responsibility for its own development of theory and economic practice. (Perlingieri, 2008, p. 510)

The market dominance and the need for corrective regulation lies with the distribution, redistribution and social solidarity.

> "It is necessary to find the underlying causes of individual and collective responsibility, engage in the political culture of the plan in order to contribute to achieving a focused economic democracy on the person and especially on entrepreneurial skills preventing holders, anonymous or not , large companies are also the government possessors. A regulation created not for the market, but to carry out corrective social policy lex upmarket. It needs control of the invasive power of the market. This also tends to create conformity needs to goals that produces and invading the liberties and critical abilities of people in a perverse system, advertising and informative, that as a real new tyranny of the contemporary era, puts in crisis, focusing on culture mass, the very formation of public opinion and popular control system. At stake are the function of the rules and the democratic basis of the same, the hope legality of

> policy and politics, with ever greater difficulty in control of policy-relevant operations.” (PERLINGIERI, 2008, p. 511-512)

It should be mentioned also about the defense market, adequacy and reasonableness of control and instrumentality of equity situations, may verify that the defense market is in defense of private enterprise as qualified act of economic initiative which, to survive, inevitably needs rules that prevent the activity is developed in contrast with the social utility or to cause damage safety, liberty and human dignity, therefore, public and private activities, jointly and through common law, may be subject to controls and timely programs to be made coordination for social purposes. (Perlingieri, 2008, p. 520-521)

The market appears to be reasonably foreseeable risk as competition between initiatives, guaranteed by rules and limits, the function of the market that it follows the values that link economic freedom and power of constitutional significance, consisting therefore the inseparable connection between freedom of economic initiative and personalist and solidarity values. (Perlingieri, 2008, p. 521)

It is possible that economic activity is exercised as a monopoly, it does not mean the end of the market economy, but must prevail antitrust perspective that links economic freedom in terms of coordination and cooperation with another initiative. (Perlingieri, 2008, p. 524)

There are interests and not realizable values from the market, and needs to be defended the expansion of its rules, such as human dignity, health, environment, etc., should be imposed as a market game limits. (Perlingieri, 2008, p. 530)

About the person, citizen and consumer is worth emphasizing that are distinctive because even though significant intersection of moments in legislative terms, they never come to be identified. Consumer protection is designed in a uniquely equity perspective, so that the protection of fundamental rights can not be confused or replaced by consumer protection. (Perlingieri, 2008, p. 542)

The person's status and citizens have absolute value, unlike the consumer, which is a condition linked to the specific circumstances and effective contracting arrangements, the consumer is therefore a contractual position to be individualized and investigated every situation. (Perlingieri, 2008, p. 542-543)

It is bringing also the basic consumer rights that are expressed by advertising, loyalty, transparency and equity in contractual relations. (PERLINGIERI, 2008, p. 544)

Therefore, the market is driven by contracts and private law is a constitutive role that must combine the utilitarian and ethical aspects, so that the State permits the utility and morality of contractual relations, thus it is said that: the contract will fulfill social function as permitting maintenance of economic exchange. (FERREIRA DA SILVA, 2003, p. 137)

2. PRIVATE AUTONOMY WITHIN CONSTITUITIONAL LEGALITY

After explained the market context, there was the need to introduce the concept of private autonomy watching the Federal Constitution.

The constitutional principle attributed to the private autonomy shows up as a major component in the process of historical understanding of good faith.

The revised concept of freedom of choice was named private autonomy, characterized contrary to the freedom of choice as it is a business autonomy, applied to contracts, defined by law, so the objective law overrides on the subjective right, giving rise to the notion of power granted by the State to the individual to govern their interests by setting a limit. (CORDEIRO, 2009, p. 130)

Prevails therefore seized a contractual relationship with the social reality in which valoram typical behaviors of subjects drawing legal consequences. Thus, the valuation of the typical social behavior near the private autonomy to the person, who in their activities creates independent contractual relationships with legal requirements. (CORDEIRO, 2009, p. 132-133)

> “Such limitations is not characterized the dismissal of the will as a core precept of the law, but also lead to a qualitative transformation of its conceptualization, functionalizing it to social, ethical and human principles. The new delimitation of private legal space, then, is reflected in the opening of the legal system values.
> The qualitative transformation of private autonomy notion implies the recognition of the value of negotiating freedom inherent in it.” (CORDEIRO, 2009, p. 133)

Excessive attachment to the will of the parties appears as an obstacle to the acceptance and development of contract review. What is sought is the contractual justice for the opening of contract theory. (CORDEIRO, 2009, p. 137)

The failure to protect a factual part of the Brazilian social reality consists in the insistence of viewing the model encoded as a point of arrival and not the starting point

of lawyer activity. The code is the end product of the legislature, so that should not overshadow the lawyer's work, because if they do can radicalize the feel of the Judiciary inability to achieve social justice, effecting the social function of civil law institutes. (NALIN, 2006, p. 15)

> “The consecration of the fundamental institutions of civil law in the Brazilian constitutional sphere, in a contemporary bias, identified as "entitlements, the legal traffic and parental project", indicates new paths to be threshed, especially by the national judiciary, which no longer can watch the debate of civil procedure as a spectator, once adopted such a stance so characteristic of the twentieth century, under the principles of procedural inertia and disposal of privatísticos interests involved.
> Above all, one can not conceive the model encoded as was done in the eighteenth century, whose paradigm, as well as complete, claimed to be "full", and thereby absolute and immutable. On the contrary, "Si shows cosìchelaposizionestoricadel codex non There carattereassoluto et immutabile" claiming political sensitivity and exercise historiographical relativity therefore in line comparative and historical, developed here by IRTI, the Constitution served to tie in its internal system, give reason and lend protection to the civil laws.”(NALIN, 2006, p. 15-16)

Overcoming and also the saturation of coded system, nuclear itself, or its failure, led the search for a new theoretical level that gives consistency to the current contractual system coming into play, as a suggestion, constitutionalization of civil law and its own contract to give constitutional recognition of the relevance of interprivadas relations. (NALIN, 2006, p. 16)

About the 2002 Brazilian Civil Code, system failure of the problem shows up apparently resolved in order to demonstrate no need for interpretation between the private and constitutional infra plans, specifically for being a code later created the Constitution of 1988. Yet , the Civil Code requires a permanent reading and perhaps a constitutional update, even though a later legislation to the current Constitution. (NALIN, 2006, p. 17)

The Constitution is the instrument that will enable the right of the operator to fill the regulatory framework of the general clauses that are inserted into parts of the new code, not only to locate indeterminate concepts but to describe the regulatory framework and also establish its sanctions. (NALIN, 2006, p. 18)

The positive contractual system demonstrated realize relativize the principles of contractual private nature, in order to establish a starting strength of the Consumer Protection Code innovative principiológico regime on the matter as a whole, as a process also of constitutional origin, as the CDC covers the principles of transparency,

trust and fairness in objective good faith, which in civil law seemed a tendency within its recoding (NALIN, 2006, p. 19), this way:

> “[...]private autonomy deserves some consideration beyond the light and consecrated opinion of the case, she, nuclear and fundamental principle of all private law. To follow ahead and uncover the current legal and ideological nature of autonomy because, as will be understood, the incorrect positioning of this principle, in terms of their constitutional legality, can bring immense setbacks to the private legal system, especially the contract.
> Still relevant aspects of the structure, function and contract scope lack a detailed analysis, always taking as a basis the new constitutional values and the man as the ultimate purpose of the legal system, established from October 1988. The new contract subject, or repersonalization the subject, (maybe) remembered by the current Civil Code, the basis for all reflections and proposals verified after 1988, authored by airier doctrine. In broader lines, the human person is remembered as the "[...] nuclear center of civil law [...]", which entails the functionalization of Private Law "[...] as a result of man.” (NALIN, 2006, p. 20)

The subject of law was remembered by the current Civil Code, in view of the original theme of the insertion of personal rights in its general section, the subject of the 1916 coding was the bourgeois, on this basis the legal individualism is enshrined in the Civil Code of 1916, recognized as dogma of civilística doctrine, the dogma of the will, such will to dogmatic stature has the historical and ideological source doctrine that places the will of the subject in the center of the legal system. (NALIN, 2006, p. 20-21)

The problem that arises today is to know what the subject expert for coding, because it is a comprehensive code that seeks to maintain a certain neutrality to multiple contemporary interprivadas relations, moving away from the model laws were intervening in nature, such as the CDC, the Elderly Statute, the Statute of Children and Adolescents, which are fruits of a welfare state, marking the post-1988 Constitution legislative process for these legal models the subject's situation is anticipated, so that some particular subject the legal relationship turns out to receive special protection of the law. (NALIN, 2006, p. 20-21)

The Civil Code provides different direction, it is guided by the principle of equality, not worrying elected in pre-trial, one of the two subjects of the contractual relationship as deserving special protection, for example. Thus disregards the quality of the subject and refers to possible protection to the concrete context of the legal relationship, guardianship, therefore, it is in the later time of the events, in particular the relationship plan, taking into account the action of the subject, resulting the objective good faith. (NALIN, 2006, p. 22)

> “On the other hand, it is essential to remain ever attentive to the fundamental guidelines of the current Brazilian Civil Code, in the present case of ethics and sociality, all available in its explanatory memorandum, and also in several texts already published, under penalty of taking the errant path of neutrality and abstraction, reincidindo the unique qualification of a subject model as worthy of protection as the Civil Code is not intended to be the law of a single class, whether bourgeois, whether proletarian, consumer, entrepreneur or supplier etc.; on the contrary, aims to be plural and serve the Brazilian society as a whole. The challenge is to be general, without being abstract; identify the system operator as a concrete person without contemplating it in a neutral perspective and hypothetical.” (NALIN, 2006, p. 22)

Thus, the Civil Code serves the individual, not individualism, so employ the person and not individual expression, to identify these new subjects, engaged with the collective spirit upon the exercise of powers and individual rights. Focus on private autonomy in its constitutional dimension, fits perfectly to the design of a new Civil Law, allowing for private autonomy as a constitutional dictates. (NALIN, 2006, p. 23)

The private autonomy in the ideal modern world of private law is embodied from the moment the private autonomy shown as a fundamental principle of any legal system based on the logic of the relevance of the human will or power of the person's self-determination, thus the principle of private autonomy is related to the legal business, the power granted to self-regulation of private interests, of self-government of their legal spheres, ultimately, in a power modeling of civil life. (NALIN, 2006, p. 23)

> “The so-called "private autonomy crisis" reveals subtle but undeniable, even in the current Brazilian civil code source, by identifying a previous prevalence subjectivist the contractual relationship that gives way to the current superiority of objectivist profile of this same contract, a phenomenon also recorded by Roppo, in view of European contractual changes, since the passage of the nineteenth and twentieth centuries.” (NALIN, 2006, p. 24-25)

The passage from subjectivity to objectivity of private autonomy is the will that is no longer dogmatic and totalizing to serve, or be conjugated to other legal interests in question is the other contractor, is third, hit by the effects of the contract, which expresses the social function of the contract in its intrinsic and extrinsic prospects. (NALIN, 2006, p. 26)

The evolution of contractual relations proves to be sensitive to factors: social, political, economic and cultural, thus, this phenomenon led to contractual dirigisme in states that emerged from the liberal setting to another market policy composition, the

principle of freedom of choice , the contractual freedom of the plan was not sheltered from such influences thus left boosted the membership contract in Europe since the early twentieth century, through the depersonalization of the market and the redefinition of this market based on mass ratios. (NALIN, 2006, p. 28-29)

The private initiative is part of the normative order as the private system core, radiating power to the legal acts developed by law enforcement officers in the prism of their individuality versus another, declaratário known or unknown, arising from the authorization granted by the State to achieving the movements of the subject and the pursuit of legal effects aim to operate, so in the established legal framework plan, the subjects upon exercise of certain private autonomy. Therefore, such an institute is a power that individuals require regular, through the exercise of his own will, relations of participating, establishing content and its legal discipline that concern them. It can highlight two elements in well formulated, namely: the power and the will so that the will of the subject of law is fraught with legal power which operates at the level of relational legal situations, which are composed of: subjective right, potestative law, legal duty, burden, bondage, power and duty, colleges, among others - which is intended to regency of his life, private autonomy is, in its broadest sense, the power attributed to the individual will of midwifery legal relations concrete, planned, permitted and regulated in the abstract by law. (NALIN, 2006, p. 29-30)

The nature of private autonomy concept is relative, as it is a mere shell of overriding ideological values, for example, when verticalizes private autonomy notion of the kind of autonomy or contractual freedom in order to approach it as power concerning legal relations equity. The interprivado legal system can be made or modified by simply changing the guiding contents of private autonomy, which appears in the economic free market systems in this way, the swing around the state ideological axis define the extension of power by the individual . (NALIN, 2006, p. 30)

As the limits of private autonomy it turns out that the limit was incorporated at the beginning, so they are inseparable. This way:

> “The first possibility doctrine that reveals ripe for the purpose of explaining the meaning of the limits to autonomy is one that associates them with a will (legally qualified will) negotiating filled by interest worthy of protection. In simpler terms, the autonomy of the part does not fit the power of a wish on empty. Such reasoning leads to the cause analysis and business reasons to which you want to assign legal effect, and from the acceptable finding the cause and, as well, the reason, the current Brazilian coded systematic (CC,

> art. 140) get would be a legitimizing summary of the legal system to business. From this perspective, the limit would rest in the cause and legal business reason.
> [...]
> On the other hand, it is appropriate to consider the limits to private autonomy not pass only when analyzing the existence of any restrictions on the exercise of freedom of contract and the proprietary and possessory entitlements, if not, that such restrictions are, perchance, justified in the light of social values that form the constitutional guarantee of property (as also guarantee the property) and to market operators and other interprivadas relations.
> [...]
> Understanding the radiant virtue of the principle of private autonomy, structured socially functional basis also leads to the conclusion that its derivatives institutes - the acts and interprivados legal transactions - contrary to what a superficial analysis could lead to imagine, are a function social; they have no social function."(NALIN, 2006, p. 32-33)

A third current that is relevant in explaining the limits to private autonomy, fills its appearance based on public order and morals, because private autonomy is limited by the supremacy of law and order. (NALIN, 2006, p. 34-35)

Thus, the interventionist and limiting reasons of public order, in the private sphere when it appears founded on constitutional scopes. (NALIN, 2006, p. 36)

The private autonomy on the constitutional legality is expressed in the sense that even if the principle of private autonomy is not in the Brazilian Constitution, with a concrete or stable description in no way subtracts its being a cornerstone in the private legal system, nor is it is such a principle in the rules of the Civil Code, or so it stops being reputed as an apt design for the development of a type of market economy and therefore protected by the current Brazilian Constitution in the chapter on economic order. (NALIN, 2006, p. 36)

> "Such constitutional supremacy of the principle of private autonomy is that it took the Civil Code to list the social function of contract and property as legal situations relating to public order, retroactive to the celebration of time, to achieve the acts and business formerly conducted the current code.
> Even, due to the abstract condition of this principle in constitutional source, and thus implicitly means that private autonomy is a general principle of constitutional source of law, it is to assert its nature once positioned in the rules of the Constitution. In general line of the above, on the modern building featuring private autonomy, Lorenzetti identifies three major evolutionary moments of the principle: 1st freedom of choice as pre-state law (natural law and jus-rationalist); 2nd party autonomy recognized by the state (allocation of merit); 3rd party autonomy as a fundamental right.
> [...] It is understandable, therefore, that the Constitution shaped (note, not only recognized!) Individual liberty and self-determination as a fundamental achievement of the person (natural or legal) within the political model and economic, boosted by the Constitution to society."(NALIN, 2006, p. 39)

The structuring of private autonomy in the constitutional rules is guided in building a new civilística in order to achieve all of civil law institutions, starting with the constitutional values, seeking to bring a breakthrough for the Brazilian society. (NALIN, 2006, p. 42)

We must be aware that the private sector, although inserted in a market that works faithfully, physiological and transparent manner, would not be enough to achieve solidarity objectives that the Constitution prescribes. (Perlingieri, 2008, p. 532)

The harmonization between economics and justice, complementarity of regulation and competition. Human rights and market: the actuality of personalism and solidarismo - humanity should modify its criteria to offer what really counts, ie, a satisfaction that no amount of money can buy, a sense that important values can produce, it should creating adequate sensitivity not to give concessions towards the weak thought or towards nihilism and which is founded on the enduring values of personalism and solidarismo, becoming the reason for a commitment of free and responsible consciences. (PERLINGIERI, 2008, p. 538)

3. THE SOCIAL FUNCTION OF A CONTRACT

There are three positions in the panorama of Brazilian private law that sought to define the content and scope of social function, with the first one argues that the social function of the contract is not equipped with autonomous legal effect, it is a kind of constitutional legislative policy stance which reveals the importance and effectiveness not in itself, but in many institutes which justify or authorize specific regulatory solutions. (TEPEDINO, 2000, p. 2)

The second position states that the social function of the contract demonstrates the social value of contractual relations, demonstrating the importance of these relations in the legal field, conceiving the social function of the contract as a way of strengthening the contractor's protection even in the face of third parties so that the principle of relativity of contracts would be interpreted under the vision of the principle of the social function of contracts. (TEPEDINO, 2000, p. 3-4)

Such an understanding reduces social function to an instrument more to ensure the contractual position, but the social function seeks to impose duties to contractors and not expand the means of contractual protection. (TEPEDINO, 2000, p. 4)

Ultimately the social function imports in imposing the contracting of non-contractual duties, which are socially relevant and protected constitutionally, it does not mean an extension of the protection of the contractors themselves, but becoming subservient to individual and financial interests, since they are protected by the contract. (TEPEDINO, 2000, p. 4)

Thus, as has been presented about the principle of private autonomy, along with the contract function even if the parties Wills are declared there is a form of protection that imposes contractual obligations and seeks protection including third parties so that even if there is the will of the parties, there are a number of pre duties, post and non that must be taken into account, including the constitutional and civil protection on the subject.

Contractual relations must comply with both principles not only in its uniqueness, but also on the interrelationship that have, as well as its limitations.

4. THE SOCIAL FUNCTION OF A CONTRACT AND THE PUBLIC ORDER

The existing system, the social function extends to the contract area the notion of public policy because the social function is considered purpose for which realization of imposing non-derogable provisions and which will not be avoided by the party is justified. (TEPEDINO, 2000, p. 5)

The social function is associated with functionalization of the legal system, ie the process that reaches all legal facts. (TEPEDINO, 2000, p. 6)

The principle of the social function of entails contracts is mitigated relativity of contracts, or the relativity of reality, by imposing duties to contractors and can not be understood only as a tool for expansion of contractual guarantees in the event of contractual damage caused by third accomplice. (TEPEDINO, 2000, p. 7)

The contemporary notion of function does not instrumentalize the individual interests of any supraindividual entity, but the full realization of the human person and his existential relations. (TEPEDINO, 2000, p. 7)

The limits of freedom of contract can not be internal or essential to business, but outside, in order to counter the freedom the interests of public policy, for compliance with the specific outer limits, determined by the State legislature, could develop the free contracting activity any restriction or conditioning in order to be valid

the legal act, the contractors would be provided sort of safe-conduct, which would give them the right to exercise freedom of contract in qualitatively absolute terms, although delimited. (TEPEDINO, 2000, p. 7-8)

For Gustavo Tepedino

> "[...] The use of function reveals the dynamic mechanism of linking the right structures, especially the legal facts, the centers of private interest and all legal relationships, the values of society as enshrined in order, from their hierarchical apex, the Constitutional text.
> It is the function that allows social control is not limited to examination of structures or types abstractly considered - according to which, for example, a lease whose purpose was lawful would always legitimate - giving way to examine the worthiness of protection of the kind in concrete - to find what the economic and individual that function that location in this case.
> Therefore, the function consists of internal element and ground permitting the private autonomy. Not to subjugate the private sector entities or individual institutional elements above - repeat it once again - but to instrumentalize the legal structures of the planning values, allowing dynamic control and concrete of private activity.
> Such an approach will only be possible with the application of constitutional norms as a precedent normative core, higher-ranking and prevalent for the unification of the system, avoiding the constitutional principles, because they have less concrete, lose their normative force in the practice of interpretive activity before the rules, endowed with greater density and regulatory detail. It is important, therefore, to revisit the civilísticos concepts from the constitutional provisions because "the constitutional rules appear to be part of the dogmatic of civil law, reshaping and revitalizing its institutes, around your reunificadora power system". (TEPEDINO, 2000, p. 8-9)

The social function thus appears with the role of defining the structure of the powers of the contracting parties in this case are relevant to verify the legitimacy of certain contractual terms, reaching directly outside interests to the contractual structure. (TEPEDINO, 2000, p. 9)

The social function, ultimately - internal element of the contract - imposes on contractors the obligation to pursue, together with their private interests, the contractual interests that are socially relevant, under penalty of not deserving protection of the freedom of contract. (TEPEDINO, 2000, p. 9)

It has been intended to protect the contract not only the interests of the contractors, but also the interest of the community. In consumer relations function is intrinsic to the destination of goods towards their use by the final recipient, who is in a vulnerable position, thereby defining the legal discipline that should be applied. (TEPEDINO, 2000, p. 10)

Thus, it must be overcome using the subsumption technique for the application of legal rules. (TEPEDINO, 2000, p. 11)

The principle of autonomy should be reviewed and interpreted in view of constitutional values and not be conceived as absolute right. (TEPEDINO, 2000, p. 11)

About the social role of companies, it can be said that has historical foundation as the economic theory of social function of property or the exercise of property rights. (BITELLI, 2000, p. 235)

From the sociological bias the social function of property corresponds to the length of the individual right to property, the individualistic framework for polissegmentado in which converge all levels of society. Social function is the satisfaction of the multiplicity of individuals, groups and social classes. (BITELLI, 2000, p. 236-237)

The social function in the legal universe appears with the potestative right to be able the owner to use, enjoy and dispose of their own good, which evolved into the need to impose restrictions on the exercise of property rights, so that these limits are being accepted by individual, so no one is impressed by the town planning restrictions, zoning, environmental protection, expropriation and land occupancy limits. (BITELLI, 2000, p. 237)

> "Similarly, the company, contemporary form of exercise of the properties, or ownership of property, historically evolved from simple merchant to globalized transnational corporations.
> Caring for the theory of the social function of property for the study of theories of business, we can accept that this implementation was the cradle of what we now know as the economic right.
> This Law sector has regular interaction of businesses with the community.
> The theory of the social function of the company, according to the doctrine, imposes positive behaviors as a real power and duty to pursue the development, to be an owner-entrepreneur. Many came to define that economic power is one of the community service function.
> Companies, especially large ones, have taken care duties towards their employees, forming social securities funds, retirement plans, fostering professional training of its members, housing some of the functions that originally would be the state. Institutional form, perform enhancement projects or restoration of the environment, historical and cultural heritage, promoting basic education, child care, transportation of employees and other community investments." (BITELLI, 2000, p. 237-238)

The difficulty is how to reconcile the theory of the social function of companies with the given object, which is a producer of profit organization. (BITELLI, 2000, p. 239)

Comte advocated that the property is a social function and not a subjective right. Engels attributes the advent of private property linked to sindiásmico wedding move to monogamous, bringing the family origins the land issue. Josserand understand the property as right-function. (BITELLI, 2000, p. 241)

The property is of utmost importance, so much so that the 1988 Constitution reserve you space among the guarantees and individual and collective duties in Title II, art. 5 "is guaranteed the right to property", as in item XXIII of the same article states that "property must fulfill its social function", regulating the XXIV expropriation, highlighting the social interest and public utility. (BITELLI, 2000, p. 244-245)

Brought forward b the idea that the figure of the company's social function:

> “So, being the social role of companies is to be interpreted differently in relation to micro and small enterprises; for medium and large domestic companies; multinational companies (or international) and transnational. It is clear that small and medium sized local companies could charge only if social commitments related to regional community or under the micromercado that influence. The majorities, an enlargement of this distance, perhaps reaching the national community and the macromercado that influence. In the face of multinational and transnational course not whether there will be like "putting the good of Brazil, above the group as a whole interest and sacrifice their overall profitability to economic and social development of the Brazilian nation," in the words of Comparato.“ (BITELLI, 2000, p. 268)

The social function of the new millennium should migrate to a concept of social responsibility, which is embodied in the relationship between the company and its business environment, since the social responsibility of organizations refers to economic, legal, ethical and social expectations that society expects companies to meet in a given period of time. (BITELLI, 2000, p. 269)

CONCLUSION

From what has been built is possible to understand the historical development of the market highlighted a progressive need for legal and ethical direction of economic life. Being able to understand the market as a producer establishment of own rules for the determination of prices and behaviors as well as reputable free area to structure the actions of individuals.

Still, it is possible to regard the market as the weakening instrument of social relations due to their unbridled freedom thus making economic freedom for political freedom.

The market needs rules that regulate and legitimize, as there is between the market and one right before or after, but a logical and historical inseparability, so the market is both an economic and legal institution.

It is intrinsic to the market is made of contractual relations, so has life through economic initiative, but it must follow the rules that respect the social utility, ie public and private activities may be subject to controls and programs to is made coordination for social purposes.

In this way, it can enter the two main concepts of this article, namely: private autonomy and social function of the contract, covering the issues on the market, namely freedom of choice of contractors in compliance with the social function of protection.

The constitutional principle attributed to the private autonomy shows up as a major component in the process of historical understanding of good faith. The failure to protect a factual part of the Brazilian social reality consists in the insistence of viewing the model encoded as a point of arrival and not the starting point of lawyer activity. The code is the end product of the legislature, so that should not overshadow the lawyer's work, because if they do can radicalize the feel of the Judiciary inability to achieve social justice, effecting the social function of the civil law institutes.

The positive contractual system demonstrated realize relativize the principles of private contractual nature through the creation of the Consumer Protection Code, bringing an innovative principiológico regime, which in civil law appeared only as a tendency within its recoding, so private autonomy must be understood in terms of their constitutional legality, to avoid its misinterpretation.

The Civil Code provides different direction, it is guided by the principle of equality, not worrying elected in pre-trial, one of the two subjects of the contractual relationship as deserving special protection, for example. Thus disregards the quality of the subject and refers to possible protection to the concrete context of the legal relationship, guardianship, therefore, it is in the later time of the events, in particular the relationship plan, taking into account the action of the subject, resulting the objective good faith.

Private autonomy so is embodied in the ideal modern world of private law from the moment the private autonomy shown as a fundamental principle of any legal system based on the logic of the relevance of the human will or power of self-determination person, so that the principle of private autonomy is related to the legal business, the power granted to self-regulation of private interests, of self-government of their legal spheres, ultimately, in a power modeling of civil life.

The exercise of autonomy, through the election of non-state justice within the framework of interests that do not collide on public order and not jeopardize unavailable and not property rights, is also consented by the State, so as not to break the constitutional legality of private autonomy.

The private autonomy fits into the larger plan of the legal voluntarism, which becomes more discreet and understated, due to the emergence of other values to be overcome or to pair with selfish individualism, such as socialization, despatrimonialização and repersonalization the Civil Law, whose movement, reaches the highest levels of state intervention in interprivadas relations, as can be seen in the Civil Code itself, in seeking to establish greater equity in contractual relations.

It should be mentioned also about the passage from subjectivity to objectivity of private autonomy, which is the will that is no longer dogmatic to serve others is legal interests of the other contracting or third parties affected by the effects of the contract.

The private autonomy shows itself as a power that should be regulated by individual through the exercise of his own will, namely relations of participating, establishing content and its legal discipline that concern them.

Thus, one can point out two factors in well formulated, namely: the power and the will so that the will of the subject of law is fraught with legal power which operates at the level of relational legal situations, which are composed of: right subjective, potestative law, legal duty, burden, bondage, power and duty, colleges, among others - which is intended to regency of his life, private autonomy is, in its broadest sense, the power attributed to the individual will of midwifery concrete legal relations, planned, permitted and regulated by law in the abstract.

In observance of constitutional legality private autonomy is expressed in the sense that even if it is not in the Constitution, nothing you subtract its importance in the private legal system.

Entering the topic about the contract the social function it is worth mentioning that the social function of the contract demonstrates the social value of contractual relations, demonstrating the importance of these relations in the legal field, conceiving the social function of the contract as a way of strengthening the contractor's protection including third side.

Thus, social function appears as one more tool to ensure the contractual position, although it imposes duties to contractors and not expand the means of contractual protection.

Thus, it can be said that the social function imports the imposition of contractual duties, socially relevant and constitutionally protected, making it subservient to individual and financial interests, as they are protected by the contract.

Therefore, it is concluded through the institutes presented the interrelationship of private autonomy and the social function of the contract in the following perspective: within the market place contractual relations, coming from the private autonomy, that is, the will of the parties to contract, But there are rules that can be applied to protect such contractual relations, in order to observe and be bound by the constitutional provisions as well as the Civil Code, can not forget the very institutions created, such as the Consumer Protection Code, which in this case does not apply, so in order to determine the equality of the Contracting Parties.

Once applied to equality, declaring the contracting parties on an equal footing and away the vulnerability usually present, must comply with certain rules aimed at protecting the parties and the contract regulations in this regard not only the private autonomy lies present but also the social function of the contract, which determines not only what has been agreed must be fulfilled, but also the non-contractual duties that include contractual relations, protecting including third parties.

Thus, as the relationships are set by society, it must govern them them in order to balance the private interests with public interests, thus both presented the principles governing the contractual relations and the parts that compose them, thus verifying a limiting the will to hire - private autonomy, the social function of the contract, which imposes duties to be fulfilled, pointing to a safety and security of relations signed.

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