Analysis of §§79, 80 Albanian Civil Code according to the german legal doctrine

Kristi Vako
University of Humboldt Berlin, Germany

Introduction

The institute of the juridical action is one of the major civil law institutes. Few other institutes can be compared to it with regard to the theoretical and practical significance of the juridical act. The juridical action is of primary theoretical importance to civil law, because it is the starting point of any civil legal transaction. Also, the understanding and further development of this law institute is for countries that apply it an indisputable need, because in this way it is given a great help in addressing more accurately legal cases in practice, thus helping the courts to make fairer and more convincing decisions regarding cases related to the juridical action, but also to assist parties involved in civil litigation to have a broader recognition of their rights and obligations in relation to judicial cases that have to do with this institute. The theory of will has its beginnings in the last quarter of the IXX century in the German Reich and was one of the major institutes which, with the entry into force of the Bürgerliches Gesetzbuch BGB[1] on 01.01.1900, formed the main pillars of civil law in Germany. In the german civil law, „die Willenserklärung" or the declaration of will has an irreplaceable role either in the achievement of rights by civil law subjects, as well as in the assumption of civil-law obligations. This is because the existence of any contract or legal relationship, since it consists of at least one declaration of will, depends on the validity of this declaration of will, so for each case it becomes necessary to study the validity of the latter. Also, the primary importance of the juridical action is expressed in the

[1] BGB the german civil code.

decision given by the Joint Colleges of the High Court of the Republic of Albania, which states: „In essence, by means of a lawsuit envisaged in letter „b" of article 32 of the Civil Procedure Code, the aim is to establish the existence or non-existence of a legal transaction or a right where the juridical action is used as a probationary tool in relation to the creation or the change of a legal transaction that is subject to the judicial review."[2] Thus, this decision of the Joint Colleges of the High Court of the Republic of Albania states the very high importance of the juridical action, according to which it is a „Conditio sine qua non" regarding the existence and validity of any civil legal relationship.

Despite the fact that the term „Willenserklärung" is mentioned only in a few articles by BGB and the fact that BGB, in contrast to the Albanian Civil Code, does not contain a specific article describing what is the declaration of will, according to the german legal doctrine the declaration of will is one of the core institutions of BGB. With the entry of the twentieth century, the theory of will took an even greater importance, and today it is one of the characterizing features of german law. Distinguished jurists such as Friedrich Carl von Savigny, Gustav Hugo, Werner Flume and Claus-Wilhelm Canaris are some of the best-known names that have made an inalienable contribution to the understanding and further development of the institute of the declaration of will, denomination which is equivalent to the term juridical action in albanian law. In the albanian law, the institute of the juridical action also occupies an extremely important place. The theory of the will has increasingly found a greater space in the albanian civil legal doctrine, which is billed to the recognition and adaptation of the german law or other systems of law, which have borrowed much from the german law. It can be said that albanian law has adapted the theory of will from the german law, whether directly or indirectly. Regardless of previous attempts to deal with the institute of the declaration of will, only in 1981, with the revision of the Albanian Civil Code, this legal institute would find a special place in the Chapter II „Civil Legal Transactions and Juridical Action". This code was drafted by albanian lawmakers who had studied in russian law schools and thus achieved through their work to indirectly incorporate elements of the german law, which had largely influenced the russian law regarding the theory of will.[3] It should be said that, despite the restrictions imposed on the provisions dealing with legal relations and the juridical action in the civil code of 1981, income as a consequence of the political-economic system of the time, the step reached by Albanian lawyers was the cornerstone of codification and development of further to the institute of the juridical action in Albania. For example, in Article 11 where the description of civil legal transaction is given is stated: „*Civil legal transactions are social relations of a political and*

[2] High Court of the Republic of Albania, decision no.5, act no. 3, dated 30.10.2012, finding the absolute invalidity of the sales contract, "Dinamika SH.PK" company against Hristo Çavo.

[3] Ardian Nuni, e drejta civile – pjesa e pergjithshme, Chapter 15, Section 1, p. 273.

ideological nature, which are determined by socialist relations in production and are governed by civil law. Civil legal transactions, as political and ideological relations, have a class character; they express the will of the working class and of other working measures. Civil legal transactions are co-operation and mutual assistance connections between people, who are free from exploitation, aimed at the full construction of socialist society."[4]

This article clearly indicates the political and ideological influence on the theory of the will and the civil legal transactions in general, which limited to a considerably greater degree the development of the institute of the juridical action. The changes that followed the change of the political system in the early 1990s were also reflected in the law system in Albania, especially in relation to the civil law. Thus in 1994, with the entry into force of the new civil code, despite the extraordinary influence of italian civil law, the juridical action institute was revised for the first time in order to get closer to the german model. The Albanian Civil Code deals with the juridical action in articles §§79-111 ACC[5]. Despite the adoption of this law institute by the german law, in the albanian law there is a need for further development or even correction in some cases of some articles of the Albanian Civil Code that deal with the institute of juridical action. For example, §79 Par.1 ACC states: *„The juridical action is the lawful appearance of the will of a natural or legal person, aiming to create, change or extinguish civil rights or obligations"*.[6] This description of the juridical action fits faithfully to the description that the german legal doctrine gives to the so-called „Willenserklärung" or the declaration of will. In the german law, the declaration of will is the expression of the will of a person, which is intended to fulfill and achieve legal consequences in the field of private law.[7] However, in the second paragraph of §79 ACC there is an absolute discrepancy with the explaining that the german law gives to the declaration of will. According to §79 Par.2 ACC the juridical action may be one-sided or two-sided.[8] From the viewpoint of the german law it is impossible to have a two or multilateral juridical action. This is because the juridical action under german law is an expression of will. The expression of will is always performed by only one person. It is theoretically impossible for the expression of will to be two-sided. If the expression of the will of a person x in the form of a bid is accepted by y person, then we are dealing with two different juridical actions / declarations of will, ie the bid and the acceptance, and not with a two-sided juridical action. It is a legal transaction that can be both two-sided and multilateral, but not the juridical action. Typical example of two-sided legal transaction is the sale contract, on one side the seller and the buyer on the other. In this case the theorists of law in Albania are confused with the

[4] Civil Code of the People Republic of Albania, 1981, Chapter 2, §11, repealed.
[5] ACC Albanian Civil Code.
[6] Civil Code of the Republic of Albania, §79 sentence 1.
[7] Leipold, BGB 1 - Einführung und Allgemeiner Teil, edition 9, §10, Paragraph 9.
[8] Civil Code of the Republic of Albania, §79 sentence 2.

so-called „empfangsbedürftigte Willenserklärung“ or „nicht empfangsbedürftigte Willenerklärung“. „Nicht empfangsbedürftigte Willenserklärungen“ are those juridical actions / declarations of will that are valid even when they are not delivered to other persons, for example in the case of the testament or in the case of acceptance of the inheritance. „Empfangsbedrüftigte Willenserklärungen“ are those juridical actions / declarations of will, which are necessary to be submitted to the other party, ie to the recipient. An overriding example is an offer to purchase or sell an item, which is a juridical action / declaration of will that must be handed over to the other party. This scientific article is intended to treat theoretically from the point of view of german law specifically only the matter of juridical action in relation to Articles §§79, 80 of the Albanian Civil Code, hence the definition and description of the juridical action and the forms of its appearance. For this reason, the meaning of the juridical act „die Willenserklärung / declaration of will“ will be explained according to the German law. This will be achieved by explaining what is the declaration of will in the German law, what are the forms of its appearance, what its components are, what are the differences between it and the legal transaction (das Rechtsgeschäft), and finally these points will be illustrated with a legal case so that the declaration of will can be disclosed even in practice. In the last part of the article, during the conclusion, there will be given an opinion on what should be improved in the Albanian Civil Code so that there is no misinterpretation of Articles 79 and 80 of the ACC. The juridical action is a broad and complex institute, which is impossible to be completely exhausted in this article, and therefore the issue of the cancellation of the juridical action under the §94 ACC, a point which also has need for revision and upgrade, will not be touched in this article. However, the contestation, the german counterpart of the cancellation in albanian law will be mentioned in some cases to clarify and analyze the subjective side of tne declaration of will.

By explaining the juridical action under german law, where the theory of will is born and where there is the greatest development, there will be opened a window for theorists of law in Albania, which will help to further develop this institute in the Albanian law.

The juridical action in the German law:

The description of the declaration of will:

The german civil law is based on the principle of private autonomy.[9] The most important parts of the principle of private autonomy are the freedom of contract, the freedom of establishment and participation in legal corporations, the freedom of testament and the freedom of ownership. The most common part in practice

[9] Bitter / Röder, BGB AT, edition 3, §2, paragraph 16.

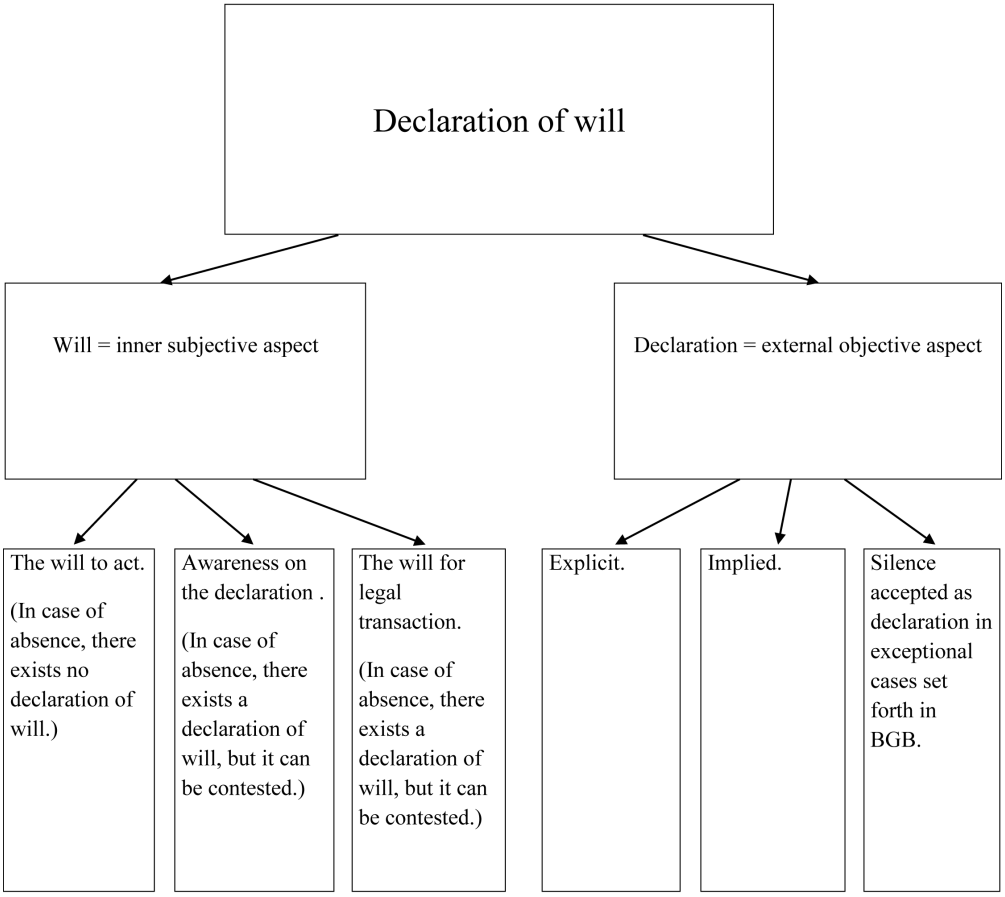
is the freedom of contract. The freedom of contract means that an individual can freely decide whether and with whom to conclude a contract (contract termination freedom), what content will this contract have (freedom of content) and in what form will this contract be (freedom of the form).[10] A detailed description of the meaning of the principle of private autonomy in german civil law can also be found in the decision of the German Constitutional Court „BverfGE 89, 214" of 19 October 1993, which clearly states: „According to the settled jurisprudence of BVerfG[11], the organization of legal relationships by the individual is, according to his will, part of the general freedom of action. Article 2 par.1 GG[12] guarantees private autonomy as an individual's self-determination in the juridical life. Therefore the private autonomy is indispensable limited and requires legal form. The private legal systems consist of a differentiated system of coordinated rules and elements that must be aligned with the constitutional order, but this does not mean that private autonomy is at the discretion of the legislative power and its guarantee under the constitutional law is depleted because of this discretion. The legislative power is obliged to meet the objective-legal requirements of the fundamental human rights and should open an appropriate activity sphere for the rights of the individual in relation to autonomy in legal life".[13] The principle of private autonomy plays an extraordinary role in the realization of free wills among legal entities participating in a legal transaction. On the other hand, this principle relies on one of the main elements of the german law. This irreplaceable element is the declaration of will, without which it is impossible to understand German civil law. Analysis and understanding of the key aspects of the declaration of will is a necessity to understand the other components of BGB.

What is the declaration of will?

In various articles of BGB, such as §§105, 116, 119 BGB is used the term of declaration of will but without defining it. According to the german legal doctrine, the declaration of will is defined as the expression of the will of a person whose purpose is the fulfillment and enforcement of a legal consequence in the field of private law.[14] In the sense of the doctrine of private law, the declaration of will qualifies as such only if it is reflected in the field of private law.[15] There can be no declaration of will in the area of public law. For example, if an authority issues a construction permit, it is not a declaration of will but an administrative act. Examples of declarations of will are the bidding for entering into a contract,

[10] Kohler, BGB AT Compact, Edition 4, §1, paragraph 1.
[11] The Bundesverfassungsgericht is the Federal Constitutional Court of Germany.
[12] Grundgesetz is the German constitution.
[13] BVerfGE 89 214, NJW 1994 36, Bürgschaftsvertäge, 53,54.
[14] Leipold, BGB 1 Einführung und Allgemeiner Teil, edition 9, §10, paragraph 9.
[15] Hirsch, BGB AT, edition 9. §2, paragraph 45.

accepting a contract bidding, contesting a declaration of will etc.[16] It is important to understand that the declaration of will and the legal transaction are two different legal institutes, regardless of their similarity. The legal transaction consists of at least one or more declarations of will. The declaration of will is part of a legal transaction, but not identical with it, though it is often confused because both terms are sometimes mistakenly used as synonyms for each other.[17] In most cases, we are dealing with a legal transaction with more than one declaration of will, for example in the case of a sales contract, which is a legal transaction that is fulfilled as a result of matching declarations of will by the seller and the buyer (the offer and acceptance). The declaration of will itself consists of various parts that are complex and contain a high level of abstraction, which are also presented in the table below.



[16] Schmidt, BGB Allgemeiner Teil, edition 15, chapter 4, paragraph 227.
[17] Brox/Walker, Allgemeiner Teil des BGB, edition 32, §4, paragraph 96.

The objective part and the subjective part of the declaration of will:

To understand what is the declaration of will to pursue and how it applies to our daily activities, we need to understand what its component components are. From the very meaning of the word in German „die Willenserklärung" (declaration or expression of will), we can conclude that the declaration of will consists of two elements related to the declaration of a will of a person.[18]

- The declaration (external expression) as an objective aspect.
- The will (internal expression) as a subjective aspect.

In the opinion of the majority, the main part of a the declaration will is its objective aspect, because the inner will is not visible and to carry out a declaration of will must necessarily have an external declaration of will.[19] This is correct, but the fact that the objective aspect of a declaration of will is decisive for expressing the will of a person who will enter into a civil legal transaction does not necessarily mean that the subjective part of a declaration of will carries a lesser weight in the conclusion of a legal transaction. According to §133 BGB „Interpretation of the declaration of will", during the interpretation of a declaration of will must be explored the real will of the person and should not be limited to the literal meaning of the declaration. This article itself argues the idea that the subjective part of a declaration of will plays an equally important as the objective aspect. The balance between the objective external side and the subjective inner side of the declaration of will has been provided by the federal high court during its decision-making. It states: „According to §133 BGB, the true will of the declarant should be considered during the interpretation of declarations of will. In doing so, it is necessary to begin with the interpretation of the statement formulation and consequently to consider what, in the first place, is objectively declared by the parties involved in the civil legal transaction. However, during the study of the will of the parties, consideration should also be given to those accompanying circumstances which relate to the true purpose of the declaration. The declaration of will that should be delievered to the other party must be interpreted in such a way that the recipient in good faith would understand from the horizon of an objective recipient."[20] On the practical side, as we will see in the next chapters, the subjective part of a declaration of will plays an important role in the right to contest the declaration of will. If someone makes a statement, a statement that does not really correspond to the true will of the declarant, then we have to do with a discrepancy of the internal will with the

[18] Rüthers/Stadler, Allgemeiner Teil des BGB, edition 18, §17, paragraph 1.
[19] Köhler, BGB AT, edition 41, §6, paragraph 2.
[20] BGH, Urteil vom 16. Oktober 2012 - X ZR 37/12.

external statement, so in this case the declaration of will can be contested under §119 BGB „Contestation because of the error".[21] The declaration of will carried out will be valid due to the protection of another person who is in good faith, but the person who has made the declaration of will, which is in discrepancy with his true will, will be entitled under §119 BGB „Contestation because of the error" to challenge this declaration of will. In this way the declaration of will carried out will be declared void with the effect of Ex-Tunc under §142 BGB „Effect of contestability". This leads to the invalidity of the legal transaction, which indicates the overwhelming importance of the subjective part of the declaration of will in a legal transaction. From this it can be concluded that the objective part of a declaration of will is very important at the moment of performing a declaration of will, while the subjective side plays a greater role in terms of its final validity.

The objective part of the declaration of will:
In interpreting a declaration of will, it is necessary not only to investigate the true will of the declarant (§133 BGB), but also to take into account the perspective of the recipient of the declaration of will, according to the so-called „objective horizon of the recipient of the declaration of will".[22] An objective aspect of a declaration of will exists if the conduct of a person who commits a declaration of will for any objective observer in the role of the recipient of the declaration of will would give the impression that the declarant is willing to enter into a civil legal transaction.[23] To make it clearer, when a person behaves in such a manner, whose actions allow others to understand that he will enter into a legal transaction, then we have to do with the objective aspect of a declaration of will.

The declarant of the declaration of will must calculate his statement in the manner that the recipient of the declaration of will would understand through the horizon of the objective observer. The declaration of will carried out remains valid until the moment of its contestation. This is true even if the declarant lacks awareness on the declaration, but has been able to calculate that the recipient of the declaration of will, in good faith, would understand his action as a declaration of will. This explanation is also underlined in a federal court ruling of 7 November 2001[24]: „Despite the lack of awareness on the declaration, the declaration of will remains valid if the declarant during the application of the care sought in the legal circulation could have known and avoided that his declaration of will, under the principle of protection of trust, to be considered by the recipient as a declaration of will".[25]

[21] Otto Palandt/Jürgen Ellenberger, BGB-Kommentar, edition 73, §119, paragraph 7.
[22] Petersen, Examinatorum Allgemeiner Teil des BGB und Handelsrecht, edition 1, §9, paragraph 7.
[23] Grigoleit/Herresthal, BGB Allgemeiner Teil, edition 2, paragraph 24.
[24] BGH The Federal High Court of the German Federal Republic.
[25] BGH, Urteil vom 7. November 2001- VIII ZR 13/01.

Declaration of will according to the objective aspect can be expressed explicitly or implicitly.

The will is explicitly expressed when the latter is expressed in words or written text.[26] To better illustrate this case let's analyze a brief case: B goes to the store and tells the seller S: Please give me a cigarette package! Seller S gives B the cigarette package and says: 6 euro please! B leaves the required amount of money on the table and comes out of the store.

In this case we are dealing with a explicitly expressed declaration of will, as buyer B explicitly expresses his readiness to buy a cigarette package. Another case in which we are dealing with a declaration of will explicitly expressed is the written form. For example: „B writes an email to F, who is a photographer with the words: I want to buy a picture where you have photographed the Brandenburg Gate for 30 euros. F returns B an email with the words: I accept your offer, the photo it is yours." Even in this case we are dealing with an explicitly expressed declaration of will, which is expressed to the recipient with a text in the form of an offer.

As I have written above, a declaration of will may also be carried out in an implied or conclusive manner.[27] A case of implied declaration of will is when a customer buys something in a supermarket, puts it in the paydesk and the cashier scans the item and finally asks for the item's price. In this case we are dealing with a behavior that a third person, in the role of an objective observer, would think that the person who placed the item in the paydesk wants to participate in a legal transaction. The Court of the State of Berlin during its decision is expressed in relation to this matter as follows: „In the case of implied declarations of will, the declarant is aware of the circumstances that make his action a declaration of will."[28]

In special cases silence can also be understood as an expression of a declaration of will.[29] However, these cases are rare, because silence is usually not considered an expression of will.[30] Silence can be understood as an external expression of a declaration of will in those cases where BGB expressly provides that silence is to be taken as an acceptance or a rejection of a bid, as in §416 par.2, §455 par.2, §516 par.2 BGB .

The subjective part of the declaration of will:

It is not enough just to analyze and explain the objective side of a declaration of will. For a better understanding of a declaration of will, it is necessary to analyze its subjective side or otherwise the internal will of the declarant. The subjective side of the declaration of will is divided into three parts, which coincide with the

[26] Schmidt, BGB AT, edition 16, §4, paragraph 232.
[27] Bretzinger/Büchner-Uhder, Bürgerliches Recht und Zivilprozessrecht, edition 2, p. 104.
[28] LG Berlin, Urteil vom 13.11.2007 - 63 S 154/07.
[29] Brox/Walker, BGB AT, edition 32, §4, paragraph 91.
[30] Grunewald, Bürgerliches Recht, edition 9, §1, paragraph 4.

psychological theories during the BGB drafting period. These parts are the will to act, the awareness on the declaration and the will for legal transaction.[31] In contrast to the objective aspect ofthe declaration of will, where it is necessary to fulfill all its elements in order to have a valid declaration of will, for the subjective side it is not necessary to fully fulfill all three of its elements in order to have a valid declaration of will.[32] It is enough to only partially fulfill the elements of the subjective side of the declaration of will in order to have a valid statement of the declaration of will. Only the will to act is indispensable, while awareness on the declaration and the will for legal transaction are not indispensable elements for giving a valid declaration of will. The effect of the lack of awareness on the declaration is contradictory among the law theorist and there is a debate whether the lack of awareness on the declaration results in the absolute invalidity of the declaration of will or the person who has declared the will is given the opportunity to challenge it under §119 par.1 BGB „contestation becauese of the error". During its decision, the Federal High Court states: „Such inaccuracy of content, which is related to a lack of awareness on the declaration or lack of will for legal transactions, implies that the person who has performed the declaration of will has a discrepancy between what has stated and what he really wanted to declare. The declarant in this case has made a declaration that does not correspond to his internal will. The declarant intended to give a voluntary declaration but did err on the meaning of the statement given. For an application of §119 par.1 BGB there is room only if the content of the statement and the awareness on the declaration were incompatible with each other."[33] Given that the Federal High Court BGH, during its decision-making, accepts the second alternative, even in this article it will be taken as well that the lack of awareness on the declaration results in the contestation of legal willpower, but not in its a-priori invalidity.

I. The will to act:

By the term „will to act" we understand the will to do a certain act.[34] If someone makes a declaration of will without the will to act, then this statement will not be counted as a declaration of will. The will to act is an essential element for the validity of a declaration of will. Without it there can not be a valid declaration of will. Cases involving declaration of will without the will to act are rare and rarely encountered in practice. The main case of a declaration withoiut the will to act is that of unconscious actions such as acts under hypnosis, reflexive movements, or sleeping actions.[35] If we are dealing with one of the above cases, this action will not

[31] Rüthers/Stadler, BGB AT, edition 18, §17, paragraph 6.
[32] Schwab/Löhnig, Einführung in das Zivilrecht, edition 18, p. 212, paragraph 468/469.
[33] BGH Urt. v. 28.04.1971, Az.: V ZR 201/68.
[34] Brox/Walker, BGB AT, edition 32, §4, paragraph 84.
[35] Schapp/Schur, Einführung in das Bürgerliche Recht, edition 4, §9, paragraph 352.

be considered a declaration of will but only a mere action as a consequence of a person's unconsciousness, and therefore no legal consequence will be produced.

II. The awareness on the declaration:

Perhaps the most interesting element of the subjective side of the declaration of will is the awareness on the declaration. In order too understand the subjective side of a declaration of will, the concept of awareness on the declaration should be comprehensively understood. The german legal doctrine gives this explanation for the awareness on the declaration: „The declarant has a awareness on the declaration if he knows that his action may constitute a statement of relevant legal relevance. He must be aware that his action causes legal consequences".[36] So the declarant must clearly understand that his action will bring any legal consequence. As mentioned above, the fact that the lack of awareness on the declaration invalidates a legal will is controversial. There are two predominant thoughts on this subject. The first is that due to lack of awareness on the declaration, there doesn't exist a declaration of will. According to this opinion, the lack of awareness on the statement has an effect equal to the lack of the will to act.[37]

The second and generally accepted opinion is that the lack of awareness on the declaration does not make the declaration of will null, but makes it contestable.[38] The reasons why most lawyers admit this opinion is because the recipient of a declaration of will due to good faith has the right to interpret the declaration given by the declarant as a declaration of will, and the declarant should have shown proper care in the course of the legal circulation to avoid the possibility that the recipient understands that statement as a declaration of will.[39] The BGH during the jurisprudence states: „With the necessary care in the legal circulation, the declarant of will must acknowledge and avoid the possibility that his statement, because of the principle of trust, is understood as a declaration of will by the recipient".[40]

III. The will for legal transactions:

The will for legal transaction means the intention of the declarant of a declaration of will is to participate in a specific legal transaction, that is, to achieve a particular legal consequence.[41] In the case of the will for legal transaction, in contrast to awareness on the declaration, it is not about any legal consequence, but for a concrete and well-defined legal consequence.[42] Anyone who makes an offer to buy a designated item also has a will for legal relationship, which is oriented to

[36] Rüthers/Stadler, BGB AT, edition 18, §17, paragraph 8.
[37] *Singer*, JZ 1989, 1030 (1034), Juris.
[38] Leenen, BGB AT: Rechtsgechäftslehre, edition 2, §5, paragraph 33.
[39] Klunziger, Einführung in das Bürgerliche Recht, edition 16, §8, p. 81.
[40] BGH, 07.06.1984 - IX ZR 66/83.
[41] Klunziger, Einführung in das Bürgerliche Recht, edition 16, §8, p. 81.
[42] Boemke/Ulrici, BGB AT, edition 2, §5, paragraph 8.

conclude a sales contract with respect to a particular item. Let's take an example: „A wants to buy the car of B for € 5430. If he makes B an offer for buying this car for € 5430, then this offer corresponds to his will for a legal transaction. But if he during the formulation of the bid has errd and instead of making this offer for the car of B, makes this offer for the motocycle of B, then in this case despite the fact that there is awareness on the statement, because A would like to bring any legal consequence, there is a lacking of the will for legal transaction because A does not want this specific legal consequence (buying the motorcycle of B for 5430 €)".[43]

It is important to say that the will for legal transactions is not a necessary component for the validity of a the declaration of will. If the will for legal transactions does not exists, the declaration of will remains valid but it may be contested in accordance with §119 par.1 BGB and thus declared invalid with Ex-Tunc effect.[44]

Illustrative case for the declaration of will

To sum it up, after a theoretical analysis of the declaration of will and its constituent parts, it is necessary that what was explained above should be presented in a concrete legal case. This case is extracted from the book „Die Fälle"[45] by the author Rumpf Rometsch and addresses the case of a contract between two persons, one of whom lacks awareness on the declaration and the will for legal transaction. Along the treatment of this case all the points explained so far will be affected.

It should be borne in mind that the solution of cases in the German system is handled in a special way. This special way of treatment is called „der Gutachtenstil", which in the english language would translate as the style of analytical expertise of the case. This way of handling the case has as a prerequisite the fact that the answer can never be given without performing first its theoretical treatment and analysis. According to the „Gutachtenstil", initially should be discussed the theoretical possibilities of solving the case and then should be proven whether these solutions suit the case in question. The order of solving the case according to the analytical expertise style is as follows: Initially there shoud be a hypotheses whic is to be proved, then should be given the theoretical definition of the legal terms related to the hypothesis in question, then the theoretical definitions should be aplied in practice, then in the end it is to be proved whether the hypothesis stays or falls. The following legal case clearly presents the style of the analytical expertise of the casus, and with a careful reading of the case the reader will also gain knowledge of the manner of how a case can be solved with this certain style.

[43] Brox/Walker, BGB AT, edition 32, §4, paragraph 86.
[44] Schapp/Schur, Einführung in das Bürgerliche Recht, edition 4, §9, paragraph 355.
[45] Rumpf Rometsch, Die Fälle, edition 5, Willenserklärung, case no. 5.

Also in the following case will not be considered the right of contestation of the declaration of will according to § 118 BGB „contestation ecause of the error".

The case:

S receives two letters in a day, which he reads due to his damaged look with his glasses. One letter includes an invitation for the 40th anniversary of his graduation, the other is a concrete offer of writer A regarding the sale of the first edition of his book „Hog Farm Kommune" at a price of 100 €. Both papers are equipped with a ready-made card. S, who has momentarily removed his glasses, signs the letter of reply to the writer with the thought that he is accepting the invitation of the graduation anniversary. Few days later, S gets the book from A. A asks from S the price of the book. Is there an obligation for S to pay the price of the book under §433 par.2 BGB[46]?

The solution

A can have a claim against S for the payment of the price in accordance with §433 par.2 BGB. This implies that there must be an effective sales contract under §433 BGB. (Hypothesis)

The sales contract consists of two consensual declarations of will, offers and admission. (Definition of contract)

An offer is a declaration of will requiring delivery to the other party by which a request is made in such a way that the other party can enter into a contract simply by the offer approval. (Offer Definition)

A declaration of will is an expression of will in the area of private law, which aims to bring a legal consequence. A declaration of will consists of an objective part and a subjective part. (Definition of the declaration of will) A has given to S a concrete written offer for the sale of a book. For this reason we conclude that the offer exists. (Subsumption)

It is questionable whether S has accepted the offer of A.

Acceptance is a declaration of will requiring delivery, by which the recipient accepts without reservation and without modification the bidder's bid. In the case of a modificated acceptance, we are not dealing with an admission but with a new offer. (Acceptance definition)

An acceptance by S is not ruled out due to the lack of an external part of the declaration of will. Looked from the outside, S signing the letter from the point of view of an objective third party (recipient horizon) suggests accepting the offer

[46] By a sales contract, the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer. The seller must procure the thing for the buyer free from material and legal defects. The buyer is obliged to pay the seller the agreed purchase price and to accept delivery of the thing purchased.

from A. However, it is questionable that S does not know what he is signing. In this case, one of the components of the subjective subjective side of the declaration of will may be missing. In principle, only the so-called the will to act is necessary. (Subsumption) At the moment of the signing of the response card, he was aware that he was doing an action, ie there is a willingness to act. However, there may be a lack of awareness on the declaration. Awareness on the declaration exists when the declarant is aware of declaring something of legal importance. (Definition of the will to act and awareness on the declaration)

S during the signing of the response card without glasses had no awareness of declaring something of legal importance. Rather, he thought he was signing a statement that related only to his private sphere (response to the invitation). However, lack of awareness on the declaration is irrelevant if, on the grounds of proper due diligence in the legal circulation, the declarant may have known and avoided that his statement contained something of legal importance. (Definition of objective recipent horizon.) This assessment is based on the principle of protection of the other party in good faith. At least he had the consciousness that without glasses, he could not read correctely, so he could have avoided giving a declaration of will by signing the offer of A. Therefore he violated the obligation to show the required care in the legal circulation , so the lack of awareness on the declaration is irrelevant with regard to the validity of the declaration of will. (Subsumption) Because of the lack of awareness on the declaration, it also inevitably lacks the so-called will for legal transaction. While S's action was not committed to bring any legal consequence whatever, then this action could not have meant the creation of a specific and legitimate legal consequence. However, there is no necessity for a will for legal transaction, in order to have a valid declaration of will. Also awareness on the declaration in this case was lacking, but also the latter was unnecessary due to the reasons outlined above. Therefore, despite the lack of awareness on the declaration and despite the lack of will for legal transactions, there exists a declaration of will in the form of acceptance. (Subsumption)

Result: There exists a sales contract between A and S for the book in question under §433 BGB because the declarations of will of the parties are valid. S has an obligation to pay the purchase price of the book under §433 par.2 BGB versus A. (Final Result and Hypothesis Response).

Conclusions

In this scientific paper, theoretical description of the juridical action/declaration of will in German law, the so-called „die Willenserklärung". Along with the declaration of will, the objective and subjective aspects of the declaration of will,

the forms of external expression of the declaration of will and the three main components of the subjective side of the declaration of will are treated. These points discussed in this scientific article correspond to articles §§79, 80 of the Albanian Civil Code, which deal with the definition of juridical action and the forms of its expressions.

First, it must be said that, despite the similarity between the German and Albanian system of law in relation to this institute, there are some visible changes that Albanian law has to revise in order to get closer to its counterpart in the German law. For example, if the albanian law wants to stay faithful to the explanation of this institute under German law, one of the main points that would need revision would be §79 par. 2 ACC, which states that juridical action may be one-sided or two-sided. If we take for granted that the juridical action is a legitimate display of a person's will with the purpose of creating, changing or extinguishing civil rights or obligations, as stated in §79 par.1 of the ACC, then paragraph 2 of Article 79 ACC should be removed or changed. This is because it is physically impossible to have a two-sided expression of will. When the person x expresses his declaration of will, then he performs a separate juridical action, the other person y, to whom this declaration of will is addressed, who can accept or oppose this declaration, with this acceptance or opposition expresses another will, which is completely separate from the will of the person x. So in this case we are dealing with two separate juridical actions, and not with a two-sided juridical action. As suggested in the preface of the article, instead of unilateral or two-sided juridical actions, the terms should be changed to juridical actions requiring delivey and juridical actions that do not require dilvery. This uncertainty in §79 par.2 ACC results in the confusion of juridical action with civil legal transactions, institutes which need to be separated from each other. This confusion is reflected in §659 ACC where the contract description is given. According to §659 ACC the contract is a juridical action by which one or several parties create, change or terminate a legal relationship. In my opinion, here is a need for correction because the contract is not a juridical action but a legal transaction, which comes to life as a result of at least two juridical actions that match with each other. The contract consists of two or more juridical actions, ie expressions of the will of the persons participating in this contract, oriented towards the fulfillment of legal consequences in private law. For example, in order to have a sales contract, there should be a juridical action in the form of a bid by the seller and a juridical action in the form of acceptance by the buyer. So we conclude that legal action is part of the contract but can not include the entire contract. The contract itself is a civil legal transaction. In the albanian law, the civil legal transaction is defined as a relationship between the subjects of the law governed by the rules of civil law and

which is intended to create, amend or terminate the civil legal consequences.[47] This explanation also fits the explanation given by German law with the so-called „das Rechtsgeschäft" or the one that provides Anglo-Saxon law to the so-called „legal transaction". On the contrary, if a juridical action is conceived by Albanian law scholars as a mix between the legal transaction and the declaration of will in the sense that it has in the German law, then this means that the scientists of albanian legal doctrine will have a difficult work in the future to further develop and enrich this institute because the declaration of will and the civil legal transaction are very different from eachother, and merging them into one would leave room for many uncertainties. Another point regarding the juridical action where albanian law needs improvement is to explain the subjective side of the juridical action. The work to improve this point is largely dependent on the enrichment of the legal doctrine and on the jurisprudence of the Joint Colleges of the Higher Court of the Republic of Albania. The subjective side of the juridical action is of primary importance with regard to cases of relative invalidity, especially in relation to the case of the error mentioned in §94ç ACC. According to §94ç ACC contestable are called juridical actions that the person has committed by being deceived, threatened, in error or because of the great need. The error is further explained in §97 ACC, which states that the error may cause the juridical action to be declared invalid only if it relates to the quality of the thing, the identity or qualities of the other person, or with such essential circumstances as without them, the party would not have committed the legal action. If we have a mistake about the qualities of the thing then the person who has performed the juridical action has a will to act, also has awareness on the declaration, but there is no will to legal transactions. This is because the declarant wanted to give a statement of will that would bring a legal consequence, but not a statement that would have a completely different effect from that what the declarant wanted to achieve. If a person carries out a juridical action by mistaking on the qualities of an item, then according to the German law, he lacks the will for that particular legal transaction, even though there is an initial compatibility between declaration and will. This juridical action has resulted from misunderstanding about the attributes of the thing and therefore it can be annulled under §94ç KC in conjunction with §97 ACC. This is one of the points that shows the importance of not only in theory, but also in practice, why the institute of the juridical action needs further development and understanding, especially for the subjective side of the juridical action.

In conclusion, it can be said that the juridical action in albanian law has not been fully adopted by German law, and there is also needed a more detailed understanding of the theory of will by the albanian scholars and the law doctrine.

[47] Valentina Kondili, E Drejta Civile 1 – Pjesa e Pergjithshme, Tirane 2008, page 77/78.

About the author

Kristi Vako, after completing his studies for Bachelor of Law at the European University of Tirana with excellent results, continued his master's degree at the Humboldt University in Berlin for „German and European Law and Legal Practice". He completed this master successfully with an average mark of 1.7. The master's thesis written by the author titled „Contestation of the declaration of will in the german and albanian law" was rated with the mark 1.3 (very good) and was therefore published in Germany.

Bibliography and list of abbreviations

Legal books:
1- Valentina Kondili, E Drejta Civile 1 – Pjesa e Pergjithshme, Tirane 2008.
2- Adrian Nuni, E drejta Civile – Pjesa e Pergjithshme, Tirane 2013.
3- Dieter Leipold, BGB 1 – Einführung und allgemeiner Teil, edition 9.
4- Bitter/Röder, BGB Allgemeiner Teil, edition 3.
5- Helmut Köhler, BGB Allgemeiner Teil, edition 41.
6- Helmut Köhler, BGB AT Kompakt, edition 4.
7- Christoph Hirsch, BGB Allgemeiner Teil, edition 9.
8- Brox/Walker, Allgemeiner Teil des BGB, edition 32 .
9- Rolf Schmidt, BGB Allgemeiner Teil – Grundlagen der Zivilrechts, edition 15.
10- Medicus/Petersen, Allgemeiner Teil des BGB, edition 11.
11- Rüthers/Stadler, Allgemeiner Teil des BGB, edition 18.
12- Otto Palandt/Jürgen Ellenberger, BGB-Kommentar, edition 73.
13- Jens Petersen, Examinatorum Allgemeiner Teil des BGB und Handelsrecht, edition 1.
14- Grigoleit/Herresthal, BGB Allgemeiner Teil, edition 2.
15- Bretzinger/Büchner-Uhder, Bürgerliches Recht und Zivilprozessrecht, edition 2.
16- Barbara Grunewald, Bürgerliche Recht, edition 9.
17- Jost Jung, BGB Allgemeiner Teil, edition 5.
18- Rüthers/Stadler, BGB AT, edition 18.
19- Schwab/Löhnig, Einführung in das Zivilrecht, edition 18.
20- Schapp/Schur, Einführung in das Bürgerliche Recht, edition 4.
21- Detlef Leenen, BGB Allgemeiner Teil: Rechtsgeschäftslehre, edition 2.
22- Eugen Klunziger, Einführung in das Bürgerliche Recht, edition 16.
23- Rumpf/Rometsch, Die Fälle, edition 5.
24- Boemke/Ulrici, BGB Allgemeiner Teil, edition 2.

Court decisions:
1- High Court of Albania, decision no.5, act no. 3, dated 30.10.2012, finding the absolute invalidity of the sales contract, „Dinamika SH.PK" company against Hristo Çavo.
2- BVerfGE 89 214, NJW 1994 36, Bürgschaftsvertäge, 53,54.
3- BGH, court decision 16.10.2012 - X ZR 37/12.

4- BGH, court decision 7.11.2001- VIII ZR 13/01.
5- LG Berlin, court decision 13.11.2007 - 63 S 154/07.
6- BGH, court decision 28.04.1971, Az.: V ZR 201/68.
7- BGH, court decision 07.06.1984 - IX ZR 66/83.

Abbrevations list:
1- ACC – Albanian Civil Code.
2- BGB – German Civil Code.
3- Par. - Paragraph.
4- § - Article.
5- GG – German Constitution.
6- BVerfG - The Federal Constitutional Court of Germany.
7- BGH - The High Court of the Federal Republic of Germany.