CONSENT IN THE ITALIAN CIVIL CODE. EVOLUTIONARY PERSPECTIVES[*]

Giovanni Sciancalepore[**]

The italian code system views the contract as the utmost expression of the dogma of private will.

The consent of the parties, which constitutes the very founding element of the contract, represents the attainment of the *in idem placitum* principle, as a manifestation of the autonomy of the contracting parties.

These statements need clarification.

First of all, it is necessary to highlight the area in which private autonomy is born and manifests itself.

In actuality, it would seem that private autonomy (apart from the cases where the legal system allows its 'unilateral' exercise) can only manifest itself in bilateral forms, through agreements.

However, for the stipulations of said agreements, none can be considered truly 'sovereign', and no decision can be made 'freely'. A contractual agreement can only be reached provided that each party is resigned to reconciling their interest with that of the other party, until a point of equilibrium is reached, which does not reflect the parties' initial views, but only the mediation achieved through the agreed-upon regulation.

Each party accepts their own sacrifice not because this corresponds to their real intent, but only because it is an indispensable sacrifice so that the counterparty is induced, in turn, to operate in the same direction.

Speaking of private sovereignty in the context of relations between *cives* is therefore misleading and tendentious.

Consequently, the recurrent effort to give absolute credence to the brocard *pacta sunt servanda* is hardly acceptable.

In reality, there has never existed a legal system that has unconditionally admitted such a principle, as legislators have always rightly claimed the need to check the

[*] Relazione del 31 ottobre 2022, svolta presso l'Özyeğin Üniversitesi ad Istanbul.

[**] Prof. ordinario di Sistemi giuridici comparati presso il Dipartimento di Scienze Giuridiche (Scuola di Giurisprudenza) dell'Università degli Studi di Salerno. Direttore del medesimo Dipartimento.

requirements of form and substance necessary for a private agreement to be considered enforceable. Furthermore, not even on a purely amicable level can it be admitted that *solus consensus obligat* stands true.

On the contrary, there is a dense web of limits which has always made it appear legitimate to revoke consent or refuse its fulfilment – if only from a merely 'moral' point of view - due to the fashion in which the agreement was reached, or unexpected circumstances or the achieved awareness of the unfairness of the exchange, etc. Thus, one cannot but be convinced that the aforementioned brocard has no intrinsic validity, as it solely emphasizes the value of keeping the word given and reaffirms the observance of normal mutual interest to give stability to intersubjective relations, without continuously calling into question the reliability of the commitments made with no justifiable reasons.

Thus, while art. 1321 of the italian civil code designates consent as an unfailing requirement for the validity of the agreement, art. 1322 specifies its scope of enforceability. The article (heading: 'contractual autonomy') recognizes the power of the parties to 'freely determine the content of the contract', albeit within the limits imposed by law.

The idea that private individuals are the best interpreters of their respective interests is recognized in contractual autonomy, in order to give the parties the opportunity to evaluate their own choices.

After all, the key insight of Adam Smith, the father of economic liberalism, was precisely that the parties in an exchange benefit from it mutually, so that, as long as the cooperation remains strictly voluntary, each exchange, in principle, is useful for both parties, thus also favouring the collective interest.

In fact, by encouraging exchanges, collective well-being is increased. Hence the opportunity to ensure that individuals place confidence in the future behavior of the counterparties, thus developing the possibility of cooperation and of the very exchanges.

Naturally, it is considered essential to set up a system for settling any disputes, entrusting the community with the task of organizing the procedures for public intervention. It can be therefore understood how private autonomy does not find in the legal system a mere 'recognition' that endorses its original effectiveness: it finds,

instead, as a determining element of its relevance, an enforcement which significantly summarizes the extent of the transformation from a merely inter-private act to an act having legal effects, even with the value of an *inter partes* 'law'.

Each legal system, however, never accepts to uncritically assume the role of unconditional guardian of private agreements.

Moreover, we have seen that even on a pre-juridical level, these do not always appear deserving of total approval: *a fortiori*, therefore, the law always claims a role of control and reviewing of the acts of autonomy, in order to decide whether, when and how, to grant enforceability to the commitments made by private individuals.

The enforceability of private autonomy in negotiating consent, therefore, necessarily takes place in a constant dialectic between the plan of freedom - marked by the power of the contracting parties to 'freely determine the content of the contract' (art. 1322, paragraph 1, of the italian civil code), and that of the authority, continually striving to define its limits.

The private will at the basis of negotiating consent is clearly born already limited by the legal system, as this is precisely the task that the legal system assumes: to define the conditions and *vestimenta* in the presence of which private commitments acquire 'legal force'.

Going back to the limits of autonomy, as previously mentioned, these must be grouped into two distinct domains.

On the one hand, you have all those concerning the procedure for setting the agreement: formal requirements of the declarations of the parties, determination of times and methods for expressing or revoking consent, factors considered impediments to the authenticity of the agreement (lack of consent, state of need, simulation, reporting requirements, etc.), specific duties of transparency or information and so on.

On the other hand, you have all the limits directly related to the content of the agreement.

In this respect, the limits to autonomy can be traced back to three main cases: the "unlawfulness" of the agreement as contrary to *bonos mores* or public order; contrariety to specific prohibitions, and finally, the most controversial category, generic contrariety to 'mandatory rules'.

Depending on how important the role of statism plays, the pendulum swings, leaving private individuals with greater or lesser margins to their power of self-determination.

Fortunately, at first glance, the most important bulwark of the freedom of individuals' self-determination appears to be firm. Beyond specific interventions by the legislator, the general rule dictated by the civil code remains the respect of the will of the contracting parties, who are free to choose their objectives and the economic instruments to pursue them with total discretion.

On this assumption it is indeed necessary to focus our attention.

The phenomena of 'contract standardization' first and 'globalization' then strongly reduce the freedom of self-determination as envisioned by the legislator.

Among the various options, the meaning we here intend to attribute to the notion of standard contract - as well as that of mass contract, uniform contract and membership contract in a broad sense, used to indicate the same phenomenon - is borrowed from practice, where the expression in question refers to a particular contract whose content is entirely prepared by the entrepreneur through the use of general contract conditions or forms (articles 1341 and 1342 of the italian civil code), to uniformly regulate the legal relationships through which the goods produced or the services provided are placed on the market.

The uniform regulation of relations, made possible by the use of the standard contract, represents the clear expression of the decline in negotiations between the parties as a consequence of the dissolution, to the detriment of the contracting party, of the power to discuss the contractual content.

With the entrepreneur's adoption of the standardized negotiating technique, the position in which the recipient of the drawn-up text finds themself substantially coincides with the alternative between take or leave, given in most cases the impossibility of an openness between the parties to a discussion regarding the content of the individual clauses of the contract. As such, the recipient of the standard text seems to have no choice but to adhere to it unconditionally or renounce the stipulation of the contract, as if the clauses contained therein were represented by mandatory provisions of law.

Furthermore, the abovementioned phenomenon often appears even more evident because of factors external to standardized negotiation, including, for example, the

characteristics of the service provided or the position held on the market by the user of the standard text.

Thus, when the good supplied or the service produced is essential for satisfying the primary needs of the community of consumers, the contracting party is not even able to freely exercise the aforementioned alternative between take or leave, having instead to provide, by force, consent to the standard text, in order to meet the needs that life poses. The same could be argued, of course, when the user of the general terms and conditions of the contract has on the status of monopolist on the market of the goods and services provided.

Indeed, in these cases also, the aforementioned alternative focuses in fact on the need to comply to the standard text, which is the only one capable of meeting the needs of the consumer public.

In view of all this, we are led to believe that the standard contract, albeit with a formally bilateral structure, is characterized, from a substantive point of view, by having an essentially unilateral connotation, at least in the majority of cases in which the recipient of the drawn-up text, limiting themself to providing a mere and neutral act of compliance, has non say, even in the slightest way, on the uniform text and therefore on the contractual content.

In the structure of the standard contract, and at least as far as can be said with reference to ordinary cases, it is therefore not possible to refer to ‘consent’’ as an expression of the common intention of the parties.

What is more, the fact that uniform negotiation occurs in the silence of the parties leads to believe that it lacks the possibility of referring to the cases outlined in articles 1321 and 1322 of the italian civil ccode, as indicated by the legislator.

While the tendency to identify ‘exchanges without agreement’ emerged with the ‘standardization of negotiation’, this has become even more relevant with the phenomenon of globalization and the exchange of goods and services via telematic or computer connection. Globalization is undoubtedly an event responsible for the incontrovertible erosion of a vision of the contract as the only meeting point for consent and the overcoming of the equivalence that binds the aforementioned concepts of contract and consent.

Specifically, looking concretely at the events with which the jurist has to deal, it is certain that technological evolution has led to a progressive and aggressive dematerialization of the spaces of negotiation, up to the minimization or even the definitive sublimation of the dialogue between the parties.

This situation has revealed a glaring inadequacy of the Italian code system to cope with the new trends in the trading market.

The italian civil code seems less and less adequate to give a solution to problems that are too distant from the code's linear logic and based on an outdated economic system.

There have been numerous questions which the assimilation of these legal phenomena within the Italian civil law system has raised. Among these is certainly that of a concrete and precise identification of the moment in which the stipulation of telematic contracts takes place.

One wonders if the contract concluded online is finalized with the 'click' of a computer mouse or if the click itself triggers the beginning of the execution, which leads to the conclusion and actualizes when the goods are shipped, as provided by art. 1327 of the italian civil code.

It is also complicated to give a legal qualification to a series of events that usually occur in telematic negotiation, such as the issue of the receipt by the seller's site, or the reservation of the goods in the virtual space conventionally called "cart" and reserved to the user for a variable time (usually 30 minutes), as if the seller were to remove the good from their digital showcase during that time, temporarily making it unavailable for the public.

Thus, there are two ways that the scholar can take to get out of the impasse of qualifying telematic deeds designed for exchange:

- a first alternative is to consider these forms of exchange extraneous to the scope of the contract, thus qualifying them as unilateral acts not yet capable per se of giving rise to a patrimonial legal transaction, which, inevitably, should only take place at an indefinite subsequent time;

- on the other hand, such behaviours can be viewed as internal to the contract, distinguishing the notions of contract and consent, traditionally tied by a bond that seems ontologically indissoluble.

The latter is the preferred path of part of the legal scholarship, according to which the contractual context should also include unilateral acts that are however characterized by a fundamental peculiarity: convergence on the same thing.
This implies the daring consequence of conceiving a contract that is not consensual.
Heresy for some, or, we should say, for many.
To be honest, even merely reporting the aforementioned subversive theses seems rather hazardous, also to the author of this paper.
This accident inevitably derives from the unripe perceptions that jurists have at a young age.
They often show a tendency to venture further afield, fascinated by different or little-travelled paths.
Thus, to social contact, the contact between the subjects of law -necessary for the stipulation of the contract - another type of legally relevant contact would be added.
This would take place between the subjects, each in their intimacy and isolation, and one thing, the very same, thus creating a particular relationship between subjects and objects of law.
The consequences of this thesis are linked, however, to the absence of consent, without which, a hardly insignificant consequence, the whole set of rules should be rethought: all its vices would disappear, be they the canonical vices of error, violence and wilful misconduct, or the so-called incomplete vices, which can only give rise to damage compensation.
In this way, a substantial reduction in the forms of protection for the contracting party would occur.
This loss could only be compensated for through the positive intervention of the legislator, who would have the burden of issuing mandatory rules that would better protect the contracting party and fill the void created.
In such manner, the autonomy of the parties would lose value, and would no longer be the basis of the negotiation, giving rise to a protection imposed by law and with the

typical effects of the nullity of private law. This, clearly, would cause an outright intrusion of the law into the phenomenology of the will of individuals.

That is the summary of the effects of the aforesaid theory.

This, however, could be overcome simply by explaining that the contract does not necessarily have to be of a dialogic nature, but can be expressed through an agreement that materializes in different forms and shapes.

Where consent is not found, this could indeed still be considered present, albeit not characterized by the dialogue between the parties who, however, would mutually direct their will towards each other through silent and implicit behaviours that would concretize the agreement, consent and therefore the exchange.

This is to say that there is always a communicative code that is followed by those who, through it, intend to make their intentions known and, in order for the negotiation to take place, it is enough that such intentions converge.

I shall conclude here.

In reality, the present discussion does not aim to (nor does it have the audacity) to examine again, in the light of the recent evolutions of contractual techniques and market trends, the sustainability of these theses, nor does it propose to investigate whether the recipients of the discussion above are scholars in the Philosophy of Law or (practical) operators of the law.

Far from it.

Rather, it is interesting to note that that, beyond the sustainability of the thesis embedded in the Italian and current legal context, a foresight emerges of the prediction of a trend, or the vision of a design that, over the more than twenty years since the first drafting of the theory of “exchanges without agreement”, has found confirmation of its concreteness in the trends of national and supranational law.

Indeed, it must be acknowledged that the aforementioned thesis had foreseen the direction that the world of law was taking, with important repercussions in the field of negotiation invalidities.

Time has proved the thesis right as to the identification of two important trends. The first is certainly the proliferation of contractual nullities; the second is the tendency, especially in the supranational law of harmonization processes, to elevate the so-called rules of conduct to rules capable of, if violated, producing no longer compensatory

obligations only, but rather nullities, with a consequent compression of the scopes of enforceability of freedom of negotiation and the autonomy of the parties, as well as a substantial change in the role of the judge with respect to the generic violation of rules.