



DE GRUYTER
OPEN

Research Article

© 2017 Adrian Leka et al.
This is an open access article licensed under the Creative Commons
Attribution-NonCommercial-NoDerivs License
(<http://creativecommons.org/licenses/by-nc-nd/3.0/>).

The Concept of Legal Action and Historical Overview

Dr. Adrian Leka

"Luigi Gurakuqi" University, Faculty of Law

Doi:10.5901/ajis.2017.v6n1p53

Abstract

In its very existence the human society, and people with one another develop relations between them. This is also supported by the laws of physics that say that the bodies in nature always interacted with each other. As it is already universally accepted that for their nature but not only people are free to decide on their own and to choose what seems right and good for them. But on the other hand this leeway is limited not only by the principles of justice and the interests of other persons but also these necessarily lawful, possible and moral. Legal action by its nature entered in the category of legitimate actions of people. Given the importance that legal actions have civil in relations, our legislation has given importance in its treatment concerning the meaning, form, validity and invalidity of legal actions, condition and term of juridical actions. In a narrow sense of the notion legal actions will be understood as legitimate manifestation of the will of the individual, physical and legal persons, that aim to create, change and/or erase civil rights and obligations that the parties undertake. While in the wide sense of the notion we will understand the legal actions not only as legitimate show of will and as a goal set by the parties but interpretations must also be seen, parties behavior, care, trust shown by them and the effects arising during the implementation of the contract or the effective period during which legal action may be ineffective for purposes of a condition, time, etc. By many modern legislation but also by our current legislation Civil Code of the 1994, legal action is defined in its narrow notion.

1. Doctrinal Treatments of Understanding of the Juristic Action

In a narrow sense of the notion legal actions will be understood as legitimate manifestation of the will of the individual, physical and juristic persons that are intended to create, change or erase the civil rights and obligations that the parties undertake. While in the wide sense of the notion we will understand the legal actions not only as legitimate show of will and intended by the parties but must also be seen the interpretations, parties behavior, care, trust shown by them and the effects arising during the effective implementation of the contract or the period during which juristic action may be ineffective for purposes of a condition.¹ Professor of civil law Francesco Galgano conceives the legal action as a fact-willing and aware of human, where the legal effect not is recognized by law as a result of occurrence of the fact but as a consequence of the will of man in the happening of this fact. In the end the legal action is identified on the basis of the particular role that develops the will of man. On the other hand the legal effect, that the right recognizes, as any action, is dedicated not to the simple will of the action but the will of effects. That the legal effect to be produced is necessary for this entity to have the desired effect. So the professor admits that the will is the mechanism that allows the parties to establish a certain status to create, change or cancel a relationship that provides the effect of legal fact.² Even in the Albanian legal doctrine, is accepted the doctrine that the right makes himself the instrument of what it aims. On the other hand the theory of the legal action supported in the remarkable german doctrine is a theory that is carried away and completed only within a legal fact. In many legislations like the French, British, American, Italian and others do not conceive straight *the force that has the will of creation, modification and termination in a civil and legal relations* because they are driven by economic methods, objectivity in civil exchanges, facilities in civil circulation in the framework of trading increases. Legal doctrine considers the legal action³ as the mean with more weight on the side of which it is realized what

¹ Francesco Galgano, *Private law*

² Ardian Nuni, *Civil Law*

³ Ardian Nuni, *cited work*

is called autonomy of will. But what if over a will is judged indirectly as this tool can be in the context of equality between the subject and purpose of the law? Therefore the most effective solution should have been to accept the juristic action as the mechanism by which individuals in accordance and pursuant to the autonomy of the will act by turning a factual situation between them in a factual legal situation, as there is not the juristic action that is required by the people but the people require it and not as a tool but as a mechanism that would serve the interest, their purpose and effect.

1.1 The legal doctrine, over the type of legal action

In the legal action type there already is a classic classification, they even were like that in the Roman law with *ius gentium* and *ius civile* and classified in the legal action of:

- Unilateral
- Bilateral
- Multilateral

⁴Sometimes even the the Romans themselves also make and receive a number of other classifications eg legal actions in lucrative and onerose. Another classification was the one that classified according to the criteria of the way of legal protection that is to say legal action *stricti iuris* that are protected by conditions and special charges where the judge does not have it necessary and is not required to care for the principle (*bonae fidei*) and in legal actions (*bonae*) meaning associated with trust between parties where necessarily is shown for a whole complex of rules from the moment of birth and relationship of legal action until its realization and completion. Other classifications, we have the legal action caused by abstract and causal cause, this classification is based on the element of cause, but also in other classifications by type.

1.2 The legal doctrine, over the form of juristic action

Another interesting element of a legal action is also the form. In Roman law the forms were very formal and monotonous since the legislations of modern times recognize as the main instrument of the forms their freedom *and this is not without reason actually as the highest goal is that of the free movement of objects, items, services and goods*. Classical forms that are anticipated by the legislations and also from our legislation (specifically Article 80 of the Civil Code) which are as follows:

- Oral
- Writing
- With any other display of will

2. A Brief Historical Overview on the Nature of Legal Actions

The main source and the largest in the whole world that has its influence even in our legislation is the Roman Right. For parentheses, to explain the genesis of the concept of legal action in our country, (as a country that belongs to the family of the romanistic right) we think it would be useful to explain in advance the Roman concept of legal action which obviously has greatly influenced in the formatting of the Albanian legal theory on this institute of law.

2.1 Roman influence in the formation of the concept of the juristic action

The outstanding roman jurist admits in his work that: ⁵"*Obligaciones aut ex contractu, nascuntur, aut ex maleficio aut propio quodam jure ex variis causarum figuris*", Gai on the other hand knew how to make clear another essential distinction, but he did not understand that in this distinction he had set the creative role of will. He said so: ⁶"*Duorum pluriumve in idem placitum nel consensus*". Therefore the consent to enter into an agreement may be and bring even a simple agreement between the parties. Also in Roman law there was a tendency in the post-classical period that was the *quasi contrata* and *quasi delicate*. But even this classification had a problem because some purely legal actions did not

⁴ Ivo Puhani, *Roman Law*

⁵ Aurea, Gai (the same work re-quotes Ivo Puhani on the Roman law)

⁶ Aurea, Gai, cited work

enter in this category, therefore the Roman jurisprudence was forced to return once again to the Gai classification. But according to the romantic doctrines, all legal actions are legal facts that lead to the consequence. In the case of natural facts is not discussed for something of such because legal action occur regardless of will which parties have, and even in certain cases the obligation IS created by the provisions of the juridical order and derive ex legge. While in the human actions it is easier to connect concepts and to adjust the legal fact. Later the germanic theory supported to the French legal action creates not only a procedural abstraction but also a material abstraction thing that gives to the individual the opportunity to grab his equal position in relation to the right legally and the means that the right offers and on the other hand actually to precede it with his actions that have legitimate purposes, determinable and moral.

2.2 *Juristic action in the Middle Ages*

Our country which has been under the influence of powerful empires like the Roman, Byzantine, Slavic and Ottoman. For the sake of the favorable position that has on the geographical position, it has had a powerful impact also from the regulation that made to the norms the empires of that time. And yet our country has a specific of itself in the field of rates regulation. We can boast for the time of its existence with our customary law. Canons but not only them but also other norms of Canon Law have had their influence in our country. Another recent discovery of 2004 shows about the coastal statutes like those of Shkodra. But let's get back to our customary law. One of the most powerful statutes on which on certain parts of our country is still acted and accepted even though it has no legal value is that of Leke Dukagjin so I decided to treat our customary right under this canon. In themselves all the statutes in our country but not only, have predicted and are described by a large formalism and this precisely because solemn forms and publication of characterize the form of legal action. A separate institution and quite intriguing is that of the given word. Institute that characterizes the legal action of the time utterly connected to the principle of trust in the present time, and even though like that I would add that personally i think that the given word is even above the principle of good faith. The formalism of legal action in the canon of Lek Dukagjin is determined on:

- Lidhja e kontrates
- Menyra e permbushjes se detyrimit
- Thirrja e deshmitarit si forme solemne per efekt per te provuar veprimin juridik.

In the statutes, in respect of legal action it is not included in the general part but is included on the part of the obligations. On the other hand, the general elements of legal action are common as there were in Roman law:

- Binding Contract
- Legal capacity
- Form

An institution that comes from canon but is also handled by our civil right is the right of first purchase which deliberately exercised to protect as many residents of the areas where the canon was applied and maintaining the social base and the values of the area. These were some parts that made the canon in our right special and intriguing for research. As Kadare calls it in his work on Albanians "Another dark night of occupation had fallen and therefore they for the sake of preservation of their values were forced to return to the canon and not because they loved it". This is very true as the Middle Ages canon law raises its main principle "Nudum a Solemnitate" that in albanian means "Legal action must be liberated from the solemn form". Albanians are forced to be isolated within themselves for the effect of the infamous invasion.

3. **The Notion of Juristic Action in Foreign Legislation**

It has been accepted worldwide, developed and handled the legal action theory, but in some jurisdictions it has a closer extension e.g Common Law countries, and a wider spread in Civil Law legislation in France, Italy, Albania etc.

3.1 *The difference in the treatment of legal action between Civil Law and Common Law*

In countries like Germany the theory and concepts of legal action have reached to the development extent that without fear it can be said that civil concept dominates. For the sake of abstraction in France it was blocked by the codification in Germany it was easier to go beyond. Therefore the German jurists continued the abstraction and outside contract being also extended to other institutes. In the German civil code, it is acknowledged a distinction between the binding legal action that has a legal basis and creates an obligation for implementation and on the other hand abstract application that is

dependent on the legal cause, which has its validity. Different lies the notion and understanding of legal action Common Law, where it is accepted that ⁷ "The life of law has not been the logic but the experience". For some internal and external reasons England in contrast with other countries previously had a unified right and on the other hand a more efficient and procedural thinking. In the legal field in England. ⁸ There are only two colors, contract and the promise, no legal action treatment. In America "Common Law" has had its impact, but on the other hand since the colonial time and until nowadays the great power and numerous principles of law given in favor of American courts and in particular to the high, gave the opportunity and the chance to change and modify a specific part of the English Common Law system where the American civil rights emphasizes the objectivity of exchange and welfare of persons in society.

3.2 *Juristic action in the family of French and Italian Civil Code.*

Regarding to France, the Civil Code of 1804 arises as a result of new principles of society and revolution, not only in the field of law. The greatest difficulties in creating its own, this code faced exactly in the clash between natural and positive law or otherwise said between customary and written law. The French civil law as regards the legal action is based on the principle that it is a contractual act that operates automatically as a special way of ownership profit. The Italian Civil Code which has an old Roman tradition of not adopting all concepts, methods, tools, goals, consequences and abstract mechanisms of the German Civil Code. So consequently, we come to the conclusion that the Italian Civil Code does not possess the general part of the German Civil Code. The notion and meaning of legal action is not treated in the Italian Right and not considered necessary to be used in its place, in the article 1321 are considered and treated contracts in general. From it follows that the legal relationship in Italy is based on a general discipline. Just as the professor Galgano admits ⁹ "the contract at least is a real reflection on the act of exchanging and legal regulation of contract is a direct relationship with the reality of economic and social life".

4. The Concept of Juristic Action in the Current Legislation: The Meaning of Juristic Action

Legal action is the legal expression of the will of the physical or legal person that aims to establish, change or deletion of civil rights and obligations – 79 Civil Code. ¹⁰ This specification given by the law itself, in the content of it has legal appearance of the will of the physical and legal person. At first sight the will is a mental and psychological phenomenon. Psychological process of creating the will is relevant to the civil law regarding the issue on the invalidity of legal actions.

4.1 *The private autonomy*

In some countries of the world this autonomy is considered either act of the will or contractual autonomy. Expression of will is considered in all those countries that creative force is part of their legislation, while in other countries that have not something like that is called contractual autonomy, such as Italian and French legislations. The concept of private autonomy of will and the contractor consist of three criteria:

- Stems from the freedom that the subjects of the right have.
- Stems from the moral that the subjects of the right have.
- Stems from necessity and / or needs that the subjects of the right have for material benefit.

In the most typical legal actions that are or that may be considered as declarations will are those legal actions, according to the classification types that fall into the category of unilateral legal actions such as proxy, will, giving up some personal material rights, marriage, the right to exercise the vote, personal promise by a person or persons etc. This declaration will and this closed structure relies also on the fact that these categories of legal actions are based on an activity and a closely personal right that is related only to a concrete person and his will. But the private autonomy of the will and that of contractor will not be extended without limits and go so far as to oppose the parties, to affect the validity, effectiveness, scope and consequences that the parties intend.

⁷ Zweigert and H.Kotz, *cited work*

⁸ Ardian Nuni, *cited work*

⁹ Francesco Galgano, *cited work*

¹⁰ B.H-Fallon & A-M. Simon. *Droit Civil. 6 Edition. Dalloz 2001*

4.2 The will of the parties

From the Roman law we have inherited a very interesting principle, one that requires compliance of internal will with that stated. Will itself can be realized in various ways and kinds eg in expressed manner or silent, to be realized in writing, orally, by silence, as on the other hand, it can be done at the same time and in the same act or legal action eg the case of multilateral legal actions or in a later stage and in a second moment, as often happens when we are in front the cases of acceptance and proposal etc.¹¹ On the other hand a very interesting fact is the one that professor Nuni did in his book, he ejects in front of the will those he calls subjects of the right. Here he puts all those persons who have the legal capacity to act, this applies to minors from 0-18 years old as well as for individuals who are major, as it applies for the physical person, physical person and state because they as well are subject to law.

4.3 The types of declaration of the will

Declarations of will in the civil law can be different and can create various actions. The number of will declarations is large. Characteristic is that these aim at the birth, modification or termination of legal reports. All these will statements are legal facts. So with them created, changed or terminates a large number of legal relations and constitute that important group of legal facts that we have called legal action.

4.4 The moment of the show of the will

The person who performs a legal action wants the arrival of these or those consequences, since this is its purpose. So for some legal actions, manifestation of the will is just the essential part of the comprehensive legal facts which create legal relations, eg to have a legal action may be necessary also a real action (delivery of the item). In many cases to have a legal action is sufficient the emergence of will one man as it is in the will but in most cases is required the emergence of will from two or more persons.

4.5 The cause in the juristic action

In our actual Civil Code 1994 in the article 667 are indicated the cases for legal action when there is an illegal cause and in the Article 674/2 is shown the knowledge of the cause concretely: article 667 says: in a contract, the cause is illegal when it is contrary to the law, public order or when the contract becomes a mean to avoid the application of a norm. On the other hand article 674/2: the party that knew or should have known the cause of the invalidity of the contract and has not let to know that to the other party, is obligated to pay for the damages that this last has suffered because it trusted due to no fault in the validity of the contract. So, as we understand the second condition of a legal action is the cause. If we would search where the cause in legal action is, we would recognize that it rests chiefly with material and human side of a legal action. In the doctrine, there is a classification between the concrete cause and abstract cause that finds extensive expression, more specifically we have this analysis. By concrete cause is understood the fact of expression and involvement of the cause in the legal action itself that the parties have chosen as the most effective means for achieving the wishes, goals, consequences, effects and everything else that they have desired, so the cause is shown by its legal actions. By abstract cause is understood the fact of expression and the involvement of the cause is not found on its legal action that the parties have chosen as the most effective mean for achieving the wishes, consequences goals, effects and everything else that they have desired, so the cause in such a case is not shown by its legal actions as a consequence the obligation or the right arises without showing the cause.

4.6 The motive in the juristic action

Motive in itself is a subjective reason by which a subject of the right connects performing or not performing of a legal action with the other party. Personally I think that when the motive is against the law and in the case of error and these are result of a premeditated motive then we should have not only an invalidity of the legal action but we must also have a civil sanction in the form of indemnification to pass in favor of the state in order to not abuse with the freedom of

¹¹ Cited work, lectures on civil law, Ardian Nuni

movement and legal action.

4.7 Subject in the juristic action

In our actual civil code 1994 under article 678 is stated that: the object of the contract should be possible, lawful, determined or that can be determined. The object on the legal action can be done about the past, present and future. On the other hand it does not matter whether we have a typical or not typical legal action or simply declaration of will the object in the legal action where it is required should always be in. The object can be a:

- An item
- A right
- An obligation

We may have a legal action with a lot of objects and legal actions with a sole object.

5. The Classification of Legal Actions

Most important classifications made by science of law, and by the law itself are divided:

- Legal Actions because of death (mortis causa)
- Unilateral, bilateral legal actions and multilateral legal actions.
- Formal and non formal legal actions.
- Legal actions with reward and without counter (free).
- Consensual and realistic legal actions..
- Causal Legal actions (causative) and abstract legal action.
- Administration legal actions and availability legal action.

6. Conclusions

The goal in this suggestive theme was to bring a perspective on the notion of legal action, being based on and respecting what has been accomplished in the legal doctrine, foreign ones and above all the Albanian ones. By treating the legal action in its entire dimension, it is important to verify that the most important principles in civil law are:

- The creative force of will.
- The effective and legal equalization of parties.
- Non-obstructing of the subjects of law, but only their limitation.
- The speed of movement of the goods and services.
- The effective and uniform justice in its stances.
- Non-limiting of the category of legal action.
- The combination of as many legal action as possible.
- Respecting the goodfaith to the maximum mainly for our right.
- Preserving the legal action as much as possible.
- Rehabilitation of legal action when possible.

Personally, especially in unilateral and multilateral actions I maintain stances because it is easier to search and recognize a non-existent legal action than to accept the concept of its invalidity in certain cases eg cases receiving different proposals in favor of stakeholders in legal action. This in itself is something unexplained as it should because as at the time of creation, the change and extinction of legal action or even during his interpretation of its clauses or to the civil code itself which accepts creative force of will as his base element and relying on this fact there is nothing left to do but to respect the will not only by the objective side but also by the subjective side. The spirit of Civil Code is like that and requires from the parties good faith between them and requires the information of the other party fully and with the most effective means possible. As it requests from the other party a minimum and effective attention based on minimal human knowledge. A relative invalidity as in the case of fraud by omission even when one of the parties or both operate quietly with the sole purpose to evade, hide or deviate from the consequences or effects that produces or creates not only the right but also their will.

References

- The Constitution of the Republic of Albania 1998.
Civil Code of the Republic of Albania 1994.
Civil Code of the Republic of Albania 1991.
Law on the legal actions and obligations 15/11/1956.
Civil Code of the Republic of Albania 1929.
Syrja Pupovci (Civil legal relations according to the Kanun of Lek Dukagjini).
Ardian Nuni, Introduction to the civil law, The work for the protection of scientific degree, A set of lectures on civil law.
Gaius (Aurea) founde on internet.
Ivo Puhan (Roman Law).
Juliana Latifi, Civil Right, Heritage in the civil code.
Francesco Galgano, Diritto Privato.