

PRAWO / LAW

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BRIEF REFLECTIONS ABOUT VOLUNTARY FORMALISM IN THE ITALIAN LAW SYSTEM

1. Premise

The reflections that follow intend to investigate the problems underlying the voluntary formalism¹, moving first from the identification of its source and, subsequently, highlighting the possible differences with the forms so called *ex lege* having regard to the role and function.

The civil code, as known, expressly regulates the voluntary formalism in two provisions and, specifically, in the art. 1326, paragraph 4² and in the art. 1352 c.c.³

The different topographical location of the two norms clearly reveals the possible theoretical alternative that is offered to the interpreter who intends to approach the study of conventional formalism⁴.

The possible paths would seem to revolve around the following alternative: the voluntary formalism remains attracted to the «requisites» of contract,

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¹ Although aware of not being able to provide an exhaustive account of the doctrine which, over time and with differing opinions, has dealt with the study of voluntary formalism, we refer here to the following authors: Ant. Genovese, *Le forme volontarie nella teoria dei contratti*, Padova 1949, passim; U. La Porta, *Accordi sulla forma, preliminare e tecniche di formazione del contatto. A proposito di un recente libro*, „Rass. dir. civ.” 1993, p. 529 ff.; V. Verdicchio, *Forme volontarie ed accordo contrattuale*, Napoli 2002, passim; G. Cerdonio Chiaramonte, *Questioni irrisolte intorno ai patti sulla forma di futuri contratti*, „Riv. dir. civ.” 2004, no 1, p. 241 ff.; R. Favale, *Forme convenzionali*, Torino 2013, p. 276 ff.; E. Palmerini, *Forme convenzionali*, in: *Comm. Gabrielli, Dei contratti in generale*, II, ed Navarretta e A. Orestano, Torino 2011, art. 1352, p. 185 ff.; A. Renda, *Forme convenzionali*, in *Comm. Schlesinger*, Milano 2016, passim.

² The text of the art. 1326, paragraph 4, of the Italian Civil Code reads: «If the proposer requests a specific form for acceptance, the acceptance has no effect if it is given in a different form».

³ The article 1352 c.c., under the heading «Conventional forms», states that: «If the parties have agreed in writing to adopt a specific form for the future conclusion of a contract, it is assumed that *the form was intended for the validity of this*». (italics by the author)

⁴ The observation has been highlighted by V. Verdicchio, *Forme volontarie*, p. 34.

as would seem to suggest the location of the art. 1352 c.c.⁵ immediately after the articles 1350 and 1351 which enumerate the different hypotheses of solemn contracts. Or differently it is something that is absolutely far from the negotiating structure, to the point of affecting the formation of the contractual agreement, as would appear from the analysis of the art. 1326 paragraph 4 c.c.⁶

The solution to the proposed alternative is not insignificant but, on the contrary, influences with an overwhelming incidence the choice of the discipline to apply to the forms *ex-voluntate*, thus differentiating them from those *ex lege*.

Starting from the first possible reconstruction – which considers the voluntary form as a requisite of the contract – this suggests to the interpreter to reflect on a series of problems that can be summarized as follows: the assimilation of the conventional forms to the legal ones is admissible, above all having regard to the legitimation of private individuals to identify the validity requirements of the contract? Is it possible to discuss of an *ad substantiam* form established by private parties in the same sense in which it is mentioned for the *ad substantiam* form established by the law, that's to say as a «requisite» of contract? Is it possible to believe that the non-observance of the conventionally chosen form induces to the same consequences as the non-observance of the legal form, and so to the nullity of the agreement?⁷

2. The private autonomy of the parties as the source of the conventional formalism

In order to answer the questions referred to, it becomes preliminary to detect the source of the voluntary formalism to understand if it finds its place in the negotiating autonomy of private individuals or in something else.

⁵ It should be noted that the studies on the subject of voluntary formalism have almost exclusively centered on the exegesis of the norm of art. 1352 c.c. which would seem to extend to conventional forms the same alternative between the *ad substantiam* form and the *ad probationem* one. On this point, comp. F. Di Giovanni, *Accordi sulla forma e accordi sulla "documentazione" del futuro negozio*, in *La forma degli atti nel diritto privato. Studi in onore di Michele Giorgianni*, Napoli 1988, p. 94: «The text of the art. 1352 cod. civ. proposes to the interpreter the question of voluntary forms suggesting their inclusion in the alternative between form as a structural datum (*ad substantiam*) and form as a constrained means of proof (*ad probationem*). The presumptive formulation of the provision seems to imply a clear allusion to a problem of choice between the two mentioned possible alternatives». On the warned need to resort to a systematic interpretation of the art. 1352 c.c., comp. P. Perlingieri, *Forma dei negozi e formalismo degli interpreti*, Napoli 1987, p. 137: «One thing seems certain. The article 1352, in its apparent clearness, must be connected and inserted into the system and cannot be read and interpreted all by itself».

⁶ In the approach to the study of voluntary formalism, the art. 1326, paragraph 4, differently from the rule of the art. 1352 c.c., had no particular consideration by the doctrine. In this regard and to better understand the reasons that led to the less attention paid to the rule in art. 1326, paragraph 4, c.c.comp. R. Sacco, *Il contratto*, „Tratt. dir. civ. Sacco” 1993, n. 1, p. 585.

⁷ The setting of the problem in the terms mentioned above was acutely investigated by V. Verdicchio, *Forme volontarie*, p. 43 ff.

On this point the doctrine, and not only the Italian one⁸, has always believed that the voluntary formalism has its roots in the broader notion of the parties' private autonomy.

However, the authoritative thought that rejected the construction of voluntary formalism as an expression of private autonomy, pushing towards a complete equation of conventional and legal forms, cannot be ignored⁹. The thesis just mentioned is based on the conviction that «private individuals do not have the power to design the type of negotiation, but only to determine the content»¹⁰, coming to believe that the articles 1326, paragraph 4 and 1352 c.c. «delegate, to a party or parties, the power to construct the case, and thus to make a weak case strong by adding the requisite of form»¹¹.

To fully understand the argumentative path of this authoritative doctrine, it becomes necessary to focus the attention on the concept of «delegation» which constitutes the central nucleus of this theory. Basically, we need to ask ourselves about the configuration of the agreements on the form that the parties – by virtue of the «delegation» entrusted to them by the legislator – put in place once said that they can't constitute manifestations of private autonomy.

On closer inspection, the aforementioned doctrine does not expressly rule on the point merely by adding that «The legislator delegates to the parties the power of composition of the case, as he himself holds and exercises»¹².

With this last assumption, it would seem to be hinted that the power that private individuals exert in the hypotheses referred to in articles 1326, paragraph 4 and 1325 c.c. would not be qualified in terms of autonomy, but rather as the same power that the legislator «holds and exercises»¹³.

The orientation just mentioned has been strongly criticized for two reasons: firstly to validly claim that the forms chosen by private individuals have the same nature and strength as those prescribed by law, it should be assumed that the legislator has delegated to private individuals the same legislative power that it is entitled to, thus allowing the parties to set up an activity that can

⁸ The reconciliation of the pact on the form in the context of the parties' negotiating autonomy, finds expressed and almost unanimous recognition not only in the legal systems of Civil Law, but also in those of Common Law. On this subject see, among the others, comp. C. Gomez Salvago Sanchez, *La forma voluntaria del contratto*, Valencia 1999, passim; R.B. Schlesinger, *Formation of Contracts. A Study of the Common Core of Legal Systems*, London 1968, passim.

⁹ This thought, as known, belongs to N. Irti, *Idola Libertatis. Tre esercizi sul formalismo giuridico*, Milano 1985, passim.

¹⁰ N. Irti, *Idola Libertatis*, p. 22.

¹¹ N. Irti, *Idola Libertatis*, p. 23.

¹² N. Irti, *Idola Libertatis*, p. 89.

¹³ This approach, according to Irti, would remain confirmed by the assumption that «It would be singular that the form, desired by the legislator, was of a different rank than that of the form established by the parties in the exercise of delegated power». According to the A. this last assumption demonstrates that legal forms and conventional ones are placed exactly on the same level. Consequently there would no longer be any conceptual restraint to reconcile the consequence of nullity to the non-observance of the voluntary forms, thus extending to the hypothesis of their absence the same discipline that applies to the contract missing the legal form.

be qualified as «legislation»¹⁴. Otherwise, even if one does not want to believe that the legislator has stripped himself of his typical power with the delegation, then the rules referred to in articles 1326, paragraph 4 and 1352 c.c. should be qualified in the same way as «blank» rules which need the determination of private individuals to reach the identification of their preceptive content.

Both the alternatives referred to, as anticipated, lend themselves to significant objections. As has been effectively pointed out¹⁵, if one accepts the solution according to which the legislator wanted to delegate to the private parties a power that would be identify in that of legiferation, there would be a serious problem of harmonization with the system of the sources of law¹⁶ that hardly could be solved.

But even wishing to follow up the suggestion that the rules on the conventional form would be considered as «blank» ones, it should in any case come to the conclusion that voluntary and legal forms would have the same nature and that, therefore, they should operate in the same way, that's to say that they impose themselves on the private once chosen without possibility for them to be able subsequently to remove them¹⁷.

This conclusion, however, strongly clashes with the opinion, almost unanimous in the doctrine¹⁸ that recognizes the possibility for private individuals, after the choice of a conventional form, to decide not to respect it, thus revoking the agreement on the form at any time and because of the real interests they want to fulfill.

But if the parties can modify the form they had previously requested even disregarding it, the same could in no case be equated with the legal form since the latter inevitably imposes itself on private individuals. At this point, one should rightly consider in line with the dominant orientation, that if private individuals are granted to want and disregard the rules through which they regulate their relations, such a possibility remains limited exclusively inside

¹⁴ On the point, and in line with the thought of Irti, comp. F. Venosta, *La forma dei negozi preparatori e revocatori*, Milano 1997, p. 308: «As well as, in fact, the legislator can insert in the contractual case the requirement of the written form, in the same way he can delegate others to do so; it is the same power, which the legislator can exercise directly or by delegation, without giving rise to a breach of the principles».

¹⁵ V. Verdicchio, *Forme volontarie...*, p. 49.

¹⁶ On the need of a careful harmonization of the sources of law, we refer to the enlightening considerations of P. Perlingieri, *L'ordinamento vigenti e i suoi valori. Problemi del diritto civile*, Napoli 2006, p. 46 ff. where extensive bibliographical references can be found.

¹⁷ V. Verdicchio, *Forme volontarie*, p. 52: «In other words, if the election of the form by private individuals would be an example of the law making technique *per relationem* envisaged by the "blank" rules referred to in articles 1326 paragraph 4 and 1352 of the civil code, it should be considered that, once the form has been chosen, the preceptive content of these rules is definitively established. And since it would be a matter of legal forms at this point, private individuals could not further dispose of them and would remain irretrievably subject to them».

¹⁸ The pact on the form is generally classified as a bilateral contract that can certainly be revoked at the request of the parties. On this topic comp. F. Gazzoni, *Manuale di diritto privato*, VII^a ed., Napoli 2007, p. 868; G. Mirabelli, *Dei contratti in generale*, Padova 1980, p. 218ff.

the perimeter of the exercise of private autonomy, leaving no space for a legislative «power of delegation». Hence the consideration of the impossibility of explaining voluntary formalism as a phenomenon unrelated to private autonomy¹⁹.

3. Legal forms and conventional forms: the problem of the negotiating pathology of informal contracts

Having acknowledged that traditional opinion identifies the source of voluntary formalism in negotiating autonomy, we should now ask ourselves whether the form agreed by private individuals may or may not occupy the same place and fulfill the same function as the legal form²⁰ and, specifically, of the form *ad substantiam*²¹. It is necessary, in essence, to ask oneself about the possibility to attribute to the forms *ex-voluntate* the same role performed by those *ex lege*, arriving to configure them as a «requisite» of the contract whose absence would lead to the nullity of it.

¹⁹ The impossibility of explaining conventional forms in a different way, is emphasized by P. Perlingieri, *Forma dei negozi*, p. 39, when he asks himself: «As indeed explain the voluntary form without resorting to autonomy [...]»; and when he states: «what is right is to consider this norm (art. 1352 c.c.) as an expression of autonomy».

²⁰ The attention to the functional profile of the prescriptions on the form suggests to the interpreter to identify the real interests that justify their prevision and, at the same time, to verify their merit in the light of the values characterizing the entire order. On the topic comp. P. Perlingieri, *Manuale di diritto civile*, 8^a ed., Napoli 2018, p. 503: «Primary importance is assumed by the identification of the single “sufficient reason” of the norm on the form [...]. This functional perspective of form, which requires the interpreter to look for the “why” of the prescription, urges a different identification of the regular/exceptional and mandatory/derogable character. The axiological-constitutional interest, which is the basis of the legislation on form, represents the compass with which the jurist moves in the interpretation and qualification of the single rule».

²¹ It should be noted that the traditional doctrine has generally affirmed the exceptional nature of the forms *ad substantiam* based on the existence of a general principle of freedom of forms. This principle, as known, has undergone vigorous criticism by N. Irti, *Idola libertatis*, p. 79 ff. The A. believes that from the letter of the norm in art. 1325 c.c. «Two standards can be removed. One describes a weak case, resulting from the combination of three requirements (agreement, cause, object); the other, a strong case, resulting from the combination of four requirements (agreement, cause, object, form)». The descriptive norm of the «weak» case is not configurable as a rule on the form but it is exclusively referable to the agreement. Consequently, the only and exclusive norm on the form is that referred to in paragraph 4 of the art. 1325 c.c. and precisely because of its singularity it cannot be configured as an exceptional rule. In the opinion of another authoritative doctrine «the evocative approach under consideration which has even aroused criticism even within the logic of legal formalism and the structural conception of form, of which it is an elegant testimony, has, more than any other, the merit of having given a jolt to the affirmed indiscriminate exceptional nature of the statutory norms for negotiating legal forms». We refer to P. Perlingieri, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile*, Napoli 2003, p. 97 ff. If, however, the Author continues, «the exceptional rule is defined in the relationship with the general rules and with other laws, this means that this qualification cannot be limited to the exclusive comparison with a single principle or rule, but a comparison between the single provision and the entire order is needed».

Indeed, if one looks at the formal requirement as an element of the structure of the contract in spite of any evaluation of the function it is required to perform, one would have the impression that the two *species* of form occupy the same place in the structure of the case.

If, on the other hand, the analysis is also oriented towards an evaluation dimension that is careful to grasp the actual interests at stake, the situation changes²². In fact, while the conventional forms constitute, as previously observed, a manifestation of the exercise of the autonomy of negotiations aimed at the protection and realization of private interests that belong to the subjects that have them, the legal formalism aims at protecting general and superior interests²³.

It cannot be overlooked how such an assumption has been criticized by those who have considered that on several occasions, and more and more frequently, the legislator has set hypotheses of nullity directly protecting one of the contracting parties and therefore an interest – at least immediately – «private»²⁴.

On this point, however, the most careful doctrine²⁵ has not failed to point out that the interests protected in these particular hypotheses always transcend the purely particular and private dimension. Just think of the hypotheses of nullity of protection imposed on the protection of consumers²⁶ to realize how such a statement, far from the protection of the private interest of the individual consumer, concerns the generality of the subjects so called weak²⁷. But even if a nullity of protection is not going to offer a generalized protection but only

²² On this point the observations of P. Perlingieri, *Forma dei negozi*, p. 45: «the distinction between structure and function cannot be translated into separation and therefore into exclusion of one of the two, since each “*how*” of law always has a “*why*” juridically relevant» (the italics are of the A.)

²³ More generally, it is observed that the modern function of the legal form is identified in the desire to make the contractual relationship as clear as possible in order to protect the position of the contractors and, in particular, of the weak parties. On this topic comp. F. Camilletti, *Le varie funzioni della forma nel diritto privato*, <http://www.biblio.liuc.it/pagineita.asp?codice=82Castellanza> (VA): LIUC, 2005.

²⁴ The thought goes to a vast range of hypotheses introduced by the special legislation of community derivation, above all in the matter of protection of the so called consumer. On the topic comp. N. Lipari, *Nullità (nella legislazione di derivazione comunitaria)*, „Dig. disc. priv., Sez. civ.” 1996, v. 16, p. 673 ff.; G. Gioia, *Nuove nullità relative a tutela del contraente debole*, „Contr. impr.” 1999, p. 1332 ff.; G. Alpa, *Consumatore (tutela del)*, „Noviss. Dig. it., Appendice” 1981, n. 2, p. 516 ff.; Id., *Il diritto di consumatori*, Roma–Bari 1995, passim; G. Chinè, *Il consumatore*, in *Diritto privato europeo*, 1, ed. N. Lipari, Padova 1997, p. 164 ff.

²⁵ With reference to the interests belonging to the so called weak’s categories, has been observed by A. Gentili, *Le invalidità*, in: *I contratti in generale*, ed. E. Gabrielli, Torino 1999, p. 1347, that «we are talking about interests that it is inappropriate to define as particular interests, both because they are serial, and therefore widely generalized, and because they are intertwined with the general interest of a mass society that requires for its balance the protections of weak contractors and rules of economic action».

²⁶ In terms of consumer protection, literature is very wide. For the only purpose of a general overview, comp. the authors cited in note 22.

²⁷ These are «serial» interests, so that, in these hypotheses, «the general interest absorbs the private serial interest»: A. Gentili, *Le invalidità*, p. 1377.

and exclusively to safeguard a single weak part, it would be misleading to consider such interest as merely private.

This consideration would find a secure foothold in the circumstance that in juridical system such as ours which places the protection of the human person and the promotion of his full and free development at the center of it, any hypothesis of nullity that contributes to its implementation would always be characterized by a valence that transcends the strictly private dimension²⁸. If, therefore, the legal and conventional forms cannot be put on the same level because functionally directed to the protection of different interests, it would then be unreasonable to come to affirm that the defect of these latter produces the same consequence, such as the invalidity *sub specie nullitatis*.

In support of these theses it has been argued, among other things, that on a merely logical level that segment of the nullity discipline represented by the institution of conversion could never be applied to the contract missing of the voluntary form²⁹.

This consideration alone would be sufficient to doubt about the validity of the juxtaposition of conventional and legal forms, apparently descending from the letter of the art. 1352 c.c. Furthermore, the lack of distinction between conventional and legal forms, would bring to extend to the latter the same discipline of the former with the consequence that the nullity of the «informal» contract could be asserted by anyone interested in it, as well as being taken over automatically (article 1421 c.c.); the action to enforce it would be imprescriptible (art. 1422 c.c.) and the contract would be incurable (art. 1423 c.c.)³⁰.

But the application of such normative treatment to the hypothesis of inobservance of the conventionally agreed form would seem inadequate if only one looked at the quality of the interests at stake³¹.

But if the nullity cannot be the right answer to the non-observance of the conventional formalities, it is necessary to ask if it is possible to configure the invalidity expressly referred to by the rule of the art. 1352 c.c. in terms other than nullity.

²⁸ On the topic comp. P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti*, Napoli 2006, p. 305, according to which the constitutional system «overcomes the myth of the superindividual purpose by not conceiving a higher interest than that of the full development of man. The latter constitutes a fundamental principle of public order».

²⁹ Thus G. Mirabelli, *La forma volontaria nell'art. 1352 cod. civ.*, „Vita not.” 1957, p. 597: «to the contract which do not observe the conventional form is not applicable any of the institutions proper to the case of the null act»; Id., *Dei contratti in generale*, Torino 1980, p. 220.

³⁰ It cannot be doubted that the lack of an *ad hoc* legal form determines the radical nullity of the contract, with the consequent joint application of all the aforementioned legislation.

³¹ On this point comp. P. Perlingieri, *Forma dei negozi*, p. 145: «certainly the interests that assume importance in the predetermination of conventional forms are by definition available and the qualification of the invalidity resulting from the failure to comply with such a form cannot but be compatible with the nature of the interests that underlie it. It would be in this respect incongruous to pigeonhole the case in that of nullity so called absolute and mechanically extend that discipline».

4. Annulment as a possible remedy to the non-observance of conventional forms

This is the attempt conducted by a part of the doctrine³² who, recognizing the inadequacy of the sanction of nullity, is not able however to detach the voluntary forms from the context of the invalidity of the negotiation, coming to resort to the sanction of annulment.

This solution would appear to have a double advantage over the use of nullity: on the one hand it would allow us to explain the sanability of the contract which doesn't respect the chosen form thanks to the validation (*convalida*) pursuant to art. 1444 c.c.; on the other it would be better harmonized with the widespread opinion that wants annulment as a tool to protect strictly private interests³³.

But even the recourse to the annulment discipline has raised more than a few doubts. With particular reference to the operation of the institution of validation, there was no lack of those who considered that this instrument is not applicable to the hypothesis under examination³⁴. It has been observed, in fact, that the conventional forms chosen by the parties must necessarily be eliminated by mutual agreement between them, since a unilateral decision such as validation cannot be sufficient³⁵.

It would follow that the inapplicability of such a significant and qualifying segment of the discipline of annulment entails its complete non-application³⁶.

Indeed, the arguments mentioned do not seem fully acceptable. And this because it could well happen that the parties jointly decide to apply a certain form

³² On this point comp. O. Proserpi, *Forme complementari e atto recettizio*, „Riv. dir. comm.” 1976, n., p. 208; P. Trimarchi, *Appunti sull'invalidità del negozio giuridico*, „Temi” 1955, passim; G.B. Ferri, *Il negozio giuridico tra libertà e forma*, Rimini 1992, p. 165; M. Giorgianni, *Forma degli atti (dir. priv.)*, in: *Enc. dir.*, Milano 1968, p. 997, where the author speaks expressly of an invalidity «which, however, does not belong to the type of “nullity” drawn by the legislator, as it can only be asserted by the interested party, which therefore can renounce it, as it can execute the contract».

³³ In hindsight, the idea that annulment is instrumental to the protection of necessarily private interests has found penetrating criticism on the part of those who have highlighted how such an assumption does not always correspond to the truth, since there are recognizable cases in which, instead, «the protected interest is general». Thus A. Gentili, *Le invalidità*, p. 1377.

³⁴ Comp., among the others, F. Messineo, *Il contratto in genere*, in: *Tratt. dir. civ. e comm.*, 1, directed by A. Cicu e F. Messineo, Milano 1972, p. 151: «the agreement on the form binds both parties and, therefore, it cannot be derogated by only one of them».

³⁵ On this point, for further investigation, comp. R. Favale, *Forme “extralegali” e autonomia negoziale*, Napoli 1994, p. 282: «the terms agreed by the parties, even in the case of protection of only one party, cannot be unilaterally eliminated, especially if the violation arises from the behavior of the interested contractor, otherwise the existence of the constraint would be subordinated to the mere whim of the subject. The establishment of a commitment regarding the “appearance” of the definitive contract, indeed, links both parties to the respect of the same, except for the possibility of a different intention of bilateral order». In the same way F. Messineo, *Il contratto in genere*, p. 151 ff.

³⁶ It should be pointed out that some authors have proposed the possibility of having recourse to the discipline of nullity so called relative (*nullità relativa*). Comp. E. Betti, *Teoria generale del negozio giuridico*, 2^a ed., Torino 1955, p. 471; F. Gazzoni, *Manuale di diritto privato*, Napoli 2007, p. 869, according to whom the nullity can be «relied on only by the interested party»; V. Roppo, *Il contratto*, in: *Tratt. di dir. priv.*, Iudica e Zatti, Milano 2001, p. 248.

to the future contract but, then, only one of them wants to waive the formality previously agreed upon thus disregarding it. Well, in such an eventuality the part who, on the other hand, would not have modified the agreement on the form could well decide to «unilaterally» validate the informal contract as it is equally capable of satisfying its concrete interests. And again, since the annulment is only objectionable by the party in whose interest it was arranged, this part could renounce to claim it thus safeguarding the contract materially concluded.

5. The ineffectiveness of the contract as a possible consequence of non-compliance with the agreements on the form

The brief observations made so far could justify a corrective interpretation of the art. 1352 c.c. in the part in which the «validity» of the contract is connected to the respect of the form conventionally agreed upon by the parties. Moreover, the aforementioned article, talking of «validity» does not clarify from which form of pathology the contract concluded in disregard of the formal requirement would be drawn. In this regard it is noted that if the legislator wanted to refer to the nullity rather than to the annulment, he would have explicitly mentioned it in the same way as the other rules in which these sanctions are explicitly indicated³⁷.

It is interesting to note that in another rule, and specifically that referred to in art. 1398 c.c. with regard to the contract concluded by the *falsus procurator*, the legislator used the same term «validity».

It is well known that, according to the dominant opinion³⁸, the art. 1398 c.c. doesn't integrate a hypothesis of invalidity, but one of ineffectiveness *strictu senso*. This consideration could lead to believe that also in the provision of art. 1352 c.c. the legislator, far from referring to a hypothesis of invalidity in a technical sense, has wanted to link the event of the non-observance of the conventional form to the inability of the contract to produce any effect³⁹.

³⁷ V. Verdichio, *Forme volontarie*, p. 152: «It seems logical to think that, if the legislator had really wanted to equate the voluntary forms with the legal ones, he would have used in the art. 1352 c.c. the same concept of nullity specifically used for the latter in the two immediately preceding articles».

³⁸ On this point comp. for all. C.M. Bianca, *Diritto civile*, v. 3: *Il contratto*, Milano 2000, p. 107 ff.

³⁹ It seems interesting to note that the letter of the norm in art. 1352 c.c. uses instead of the negative lemma «invalidity», the positive one «validity». While the former has a very specific dogmatic meaning in the general theory of the contract, the latter is sometimes used in a more neutral sense to designate the general attitude of an act to produce effects.

6. The “constitutive” function of the voluntary formalism: relationship between the rule of art. 1326 paragraph 4 and that referred to in art. 1352 c.c.

From what has been said so far, the article 1352 c.c. expresses clearly the idea that the parties can foresee a voluntary form in «constitutive function», that is for the purposes of the validity of a future contract. Now it remains to wonder what it can consist of.

As mentioned in the introduction, the conventional forms are to be individuated in two precise provisions and specifically in the article 1326 paragraph 4 c.c. and in the article 1352 c.c.

According to the article 1326 paragraph 4 c.c. acceptance «has no effect» if it is given in a form other than that requested by the proposer. There is no doubt that the provision in question intends to express the idea that acceptance formally different from what is required by the proposal is not suitable in order to reach the conclusion of the contract.

The clause of the proposal referred to in paragraph 4 of the article 1326 c.c. would perform the function of introducing, in the contract formation process⁴⁰, a further and distinct interest of the proposer from which the «*an*» of the contract depends.

To identify the type of this interest, the doctrine believes that the term «form» mentioned in article 1326 c.c. has a much wider extension than the concept of form referred to in article 1350 c.c. embracing all the possible methods relating to the *quomodo fiat* of acceptance⁴¹: not only those relating to the form of the negotiation, but also those relating to the subject to whom the acceptance is sent or to the place to send it⁴².

⁴⁰ The procedural technique of the exchange of the proposal and acceptance pursuant to art. 1326 c.c., is only one of the ways in which the agreement can be formed. In fact, it can also be achieved in a less simple and linear way, i.e. passing through the negotiation phase. At this stage, the parties begin to discuss the deal by exchanging the data, information and opinions they deem necessary. It is clear that, during the negotiations, the parties still have no intention of binding themselves, also because most of the time they have not even elaborated a text which fully expresses the regulation of their interests. This is the issue of the so called progressive training of the contract (or agreement and consent), which gives rise to the obvious difficulty of identifying precisely not only when, but before that, whether the agreement has been reached or not. On this topic comp. F. Carnelutti, *Formazione progressiva del contratto*, „Riv. dir. comm.” 2016, n. 2, p. 308 ff.; V. Roppo, *Il contratto*, p. 137 ff.; V. Ricciuto, *La formazione progressiva del contratto*, in: *I contratti in generale*, 1, ed. E. Gabrielli, Torino 2006, p. 151 ff.; P. Gallo, *Conclusione del contratto*, in *Comm. Gabrielli, Dei contratti in generale*, 1, ed. Navaretta e A. Orestano, Torino 2011, p. 252 ff.

⁴¹ On the wideness of the concept of form pursuant to art. 1326 c.c. comp., among the others, A. Ravazzoni, *La formazione del contratto*, Milano 1973, p. 129 ff.; G. Castiglia, *Manifestazione (dir. civ.)*, in: *Enc. giur.*, v. 19, Roma 1990, p. 1 ff.; A.M. Benedetti, *Autonomia privata procedimentale. La formazione del contratto fra legge e volontà delle parti*, Torino 2002, p. 317 ff.

⁴² In this way A. Genovese, *Le formalità dell'accettazione stabilite dal proponente*, „Riv. dir. civ.” 1996, n. 1, p. 364: «The formalities imposed on acceptance are of various types and nature: the proposer can establish that the acceptance is expressed in a specific form (written or public), perhaps with certain requirements; that the acceptance is presented to him personally or to another person whom he indicates; that it is addressed to a predetermined place».

In other words, the rule referred to in paragraph 4 of the article 1326 c.c. offers the possibility to the proposer of including in the formative procedure of the case additional interests with respect to the final ones – such as those connected to «how» and «where» – which directly affect the conclusion of the contract⁴³.

Since the procedural technique referred to in article 1326 c.c., requesting the voluntary contribution of two distinct parts, it is clear that the proposal, considered alone in itself, is not suitable to satisfy any interest expressed by it until it meets an acceptance that expresses the same convenience of the other part to conclude the same contract⁴⁴.

It follows that the clause of the proposal pursuant to paragraph 4 of the article 1326 c.c. would limit itself to delineate the boundaries within which the proposer intends to bind himself to the contractual commitment, with the consequence that the acceptance that is not compliant to what is required by this clause would not achieve the completeness of the consent so that the contractual situation could be completed⁴⁵.

And then, if the request for a particular form – which is an expression of the overall set of interests that the proposer aims to achieve – requires a compliant acceptance for the purposes of concluding the contract, it could reasonably be assumed that the rule on voluntary formalism of article 1326 paragraph 4 c.c. directly affects the formation of the agreement⁴⁶.

If one adheres to such a conclusion, having taken note of the affinity between the aforementioned rule and that referred to in article 1352 c.c, it would not be foolish to imagine that even the agreements on the form affect the coming into existence of the contractual case.

But if this were the case, it remains to explain what is the difference between this hypothesis and the one referred to in paragraph 4 of the article 1326 c.c.

⁴³ V. Verdicchio, *Forme volontarie e procedimento di formazione del contratto*, „Riv. dir. priv.” 2018, n. 2, p. 188: «the contract formation process is, ultimately, not only a tool for selecting and composing the final interests, but also a means of selecting and satisfying the interests connected to the time, the way and the place of sending the acceptance; that is, it is a tool that can affect not only the content of the commitment, but also the time, the way and the place of its making».

⁴⁴ V. Verdicchio, *Forme volontarie*, p. 186: «since the proposal and the acceptance are necessary to prepare the content of the contract *in fieri*, that is the set of clauses that express the negotiating regulation (net of the possible additions and/or corrections made by the heteronomous sources), it seems evident that the conformity of the one to the other is the result – with reference to the final interests that the contract will have to reveal and regulate – of a full content congruency, which occurs, precisely, when they express the same contractual content».

⁴⁵ On the principle of the so called completeness of the agreement comp. L. Mosco, *Diffinità tra proposta contrattuale e accettazione*, „Dir. giur.” 1948, p. 215; A. Gallo, *Trattative precontrattuali e perfezionamento del contratto*, „Giur. completa Cass. civ.” 1954, n. 2, p. 160 ff.; A. Candian, *Questioni in tema di formazione dei contratti*, „Riv. dir. comm.” 1916, p. 859.

⁴⁶ The aforementioned consideration would induce the interpreter to believe that the theme of conventional formalism is a phenomenon to be placed in the context of the formative phase of the contractual case, coming to influence his coming into existence. For more information on this point, comp. V. Verdicchio, *Forme volontarie*, passim.

The difference, as suggested by careful doctrine⁴⁷, would be to identify in the circumstance that in the hypothesis of paragraph 4 of the art. 1326 c.c. there is a «clause that is an integral part of a declaration that expresses a decision that is already potentially definitive and binding»⁴⁸ and therefore supported by the *animus obligandi*. It follows that if the contract is not perfected it is not because the declarations are free of the *animus obligandi*, but because of the lack of full compliance between the proposal and acceptance.

Otherwise, the space in which the agreements on the form referred to in article 1352 c.c. can only be opened with reference to declarations that still lack the *animus obligandi* and therefore, in themselves, not binding. As if to say that, when the parties agree that the future contract will come into being in a certain form – in this the «constitutive» function of the latter consists – they are mutually clarifying that they do not intend to bind themselves without that precise *vestmentum* and that, therefore, all the statements up to that moment already made or to be carried out are not and will not be supported by the *animus obligandi*.

In other words, the difference between the rule of article 1326 paragraph 4 and that referred to in article 1352 c.c. is closely connected to the different circumstance for which, in the dynamics of the formation of the contract, in the first hypothesis we have a part that directs to the other a real contractual proposal, already in itself suitable to reach the completion of the agreement, and in the second one two parts that face each other to start a complex negotiation phase.

Thus, when a subject already decided to conclude a contract intends to formulate a specific proposal to another, and also has an interest in having the contract perfected in a specific way and/or in a specific form, he may include in the proposal the clause referred to in paragraph 4 of article 1326 c.c. When, on the other hand, two subjects simply intend to discuss a deal, without either of them being able or willing to formulate a proposal, they, to avoid remaining bound without the desired form, may agree that the contract will not be concluded until the moment in which the respective wills will be expressed in that form⁴⁹.

Both in one case and another, it should however be assumed that the constitutive function of the voluntary forms always detects only for the purposes of perfecting the contractual case, affecting the formation of the agreement.

⁴⁷ See for all F. Gazzoni, *Manuale di diritto private*, p. 841: «the proposal is a declaration of objectivity, characterized on the objective level, by the completeness of the device content that must prefigure the contractual one, with which it will be identified once the acceptance of the acceptor is identified. On the subjective level, then, the intention to unconditionally bind oneself to that given set of interests must be inferred from the context of the declaration». Again on this point V. Roppo, *Il contratto*, in *Collana di diritto privato*, Milano 2011, p. 101. The A. clarifies that «the proposal must not contain, or be accompanied by, reservations about its currently binding nature».

⁴⁸ F. Gazzoni, *Manuale*, p. 842.

⁴⁹ The relevance of the agreement on the form pursuant to art. 1352 c.c. on the negotiation phase is also highlighted by E. Betti, *Teoria generale del negozio*, p. 289, when he states that the agreement must intervene before the conclusion of a given regulation of interests, that is, ultimately, «both in the course of negotiations and in view of them».

The conclusion reached is not, however, free from objections and needs some further clarification.

And this is because if it is absolutely certain that in the hypothesis referred to in paragraph 4 of the article 1326 c.c. we do not reach the conclusion of the contractual case in absence of an acceptance that fully complies also with the formal prescriptions required, a different consideration should be pointed out for the agreements on the form pursuant to article 1352 c.c.

The problem is in all its evidence when the parties decide to conclude the future contract by observing a specific form and, subsequently, enter into the conclusion of the contract but informally. In such an eventuality, if one wanted to adhere to the thesis that sees the voluntary formalism connected to the formation of the agreement, it should be considered that the contract actually concluded is completely new and different from the original regulation of interests which, in practice, has never arose. This conclusion does not indeed appear fully acceptable.

7. The revocation of the agreement on the form

In the hypothesis just mentioned, we face a further operational problem that the voluntary forms raise: *quid iuris* of the contract that the parties, without observing the form previously agreed for it, effectively and intentionally conclude *verbis* or by *facta concludentia*?

It could well happen that a party contests the concluded contract without observing the chosen form denouncing the invalidity, and the other objects that they have renounced the agreed form by the very fact of having intended to conclude the contract without abiding by it.

The doctrine, on the assumption that the pact on the form is a bilateral contract⁵⁰, usually faces the problem in terms of silent withdrawal or by *facta concludentia* of the convention on the form. If, in fact, it cannot be revoked in doubt that the parties can, in the free exercise of their autonomy, reconsider their interests and deem the previously agreed *vestmentum* no longer necessary, it is discussed whether a silent withdrawal of the agreement is admissible as a consequence of having concluded the contract informally.

The problem that has been advanced concerns the possibility that the revocation must necessarily cover the written form if the agreement on the form has been, in turn, concluded in writing⁵¹.

⁵⁰ On this topic comp. F. Gazzoni, *Manuale*, p. 868; G. Mirabelli, *Dei contratti in generale*, 3^a ed., Torino 1980, p. 218.

⁵¹ Regarding the problem of the form of revocatory agreements, there are conflicting positions in the doctrine. See, even if in the diversity of opinions and suggested solutions, G. Deiana, *Contrarius consensus*, „Riv. dir. priv.” 1939, p. 89 ff.; A. La Torre, *La forma dei negozi solutori*, „Giust. civ.” 1(1962), p. 155 ff.; A. Luminoso, *Il mutuo dissenso*, Milano 1980, *passim*; G. Capozzi, *Il mutuo dissenso nella pratica notarile*, „Vita not.” 1993, p. 637 ff.

It is well known, in fact, that according to a certain doctrinal direction⁵², the matter of the form of the revocatory agreements would be governed by a principle of symmetry in the mind of which the revocation should take the same form as the contract that it is going to remove. In such a perspective a revocation by *facta concludentia* of a pact on the form concluded in writing would not be valid.

Indeed, such an orientation is not that of the majority doctrine⁵³. The agreement on the revocation is to be considered functionally autonomous by the contract it goes to resolve, and so for it could never be required the same form as the main contract. The problem relating to the form of the revocatory agreements would be right to place themselves exclusively for the *contrarii actus* of the contracts where a specific form *ad substantiam* is required by the law and not also for the contracts that, independently of any legal prescription, the parties have in any case and freely stipulated in writing.

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⁵² On this topic comp. R. Scognamiglio, *Osservazione sulla forma dei negozi revocatori*, „Temi nap.” 1961, *passim*.

⁵³ For a strong criticism of the related thesis of formal symmetry, comp. G. Gabrielli, *Vincolo contrattuale e recesso unilaterale*, Milan 1985, *passim*. And again on the point A. Luminoso, *Il mutuo dissenso*, p. 313 ff. Here the A. rejects any principle of symmetry and believes that the solution to this problem must vary from case to case, according to which the same *ratio* that justifies the prescription of form for the contract that it intends to eliminate is used or not for the revocatory agreement.

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BRIEF REFLECTIONS ABOUT VOLUNTARY FORMALISM IN THE ITALIAN LAW SYSTEM

SUMMARY

The essay deals with the complex issue of voluntary formalism, regulated in the articles 1326 paragraph 4 and 1352 of the Italian Civil Code, and the exegetical problems connected to it. The study aims to verify whether the voluntary formalism occupies the same role or not and fulfills the same functions as the legal formalism. Then the relationship between the voluntary forms and the classic pathologies related to contracts has been investigated in order to verify the possibility of tracing the whole theme of the forms chosen by the parties within the different problem of the formation of the contractual agreement.

KEY WORDS: conventional formalism; nullity; annulment; legal forms; constitutive function

