

# COMPARATIVE ANALYSIS OF VICES OF CONSENT

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*Vices of consent represent a distinct juridical institution, because they are placed between the lack of will and a free, conscious consent, which is able to produce exactly that juridical effects perused through the conclusion of the act. Otherwise, the intervention of the vices will affect the internal will and, finally, the consent, but not so powerful that makes it non-existent, but it will harm the consent in its conscious and free dimension.*

*Understanding the manners in which these vices affect the human wills it is realized, also, through comparative analysis. Thus, the common points of the vices of consent are the moment of intervention, their effects and sanction. But in the context of their structure, all these vices are different because each one of these answers different to the question what caused the debasing of the will of the person who invokes the vice.*

In the general theory of the civil law, vices of consent are to be found among the conditions that are required to be accomplished in order to express a valid consent. Further more, to the valid formation of every legal transaction, it is not enough for the display of will to be conscious, externalized and to be made with the intention to produce legal effects; it is necessary for it to be freely expressed and in full knowledge of the facts, in other words, it is imposing the un-invalidation of consent.

What justifies and explains vices of consent is the freedom of will, as an extension of the freedom of one's person. "The judicial free will" designs every person's possibility to choose certain behaviour, fulfilled through the closing of some legal transactions. The freedom of the internal will is a

consequence of the contractual freedom, of course, but, unlike this one, which is a legal status, the freedom of will is an actual position.

More over, the freedom of will excludes the idea of force, no matter what its display aspect should be and no matter where it should come from, and it includes the idea of self-awareness and that of the surrounding world.

In this context, the vices of consent appear as defects of the internal will, and they are, from the juridical point of view, obvious, just because the will was externalised with the intention of producing legal effects.

Without resuming the whole problematic of vices of consent, we try to bring in the first line those elements of vices that, on the one hand, individualize them into a distinct institution of the civil law, and on the other hand it contributes to the creation of a self physiognomy, different for every vice of consent, partly.

Right from the beginning, we must specify that all vices of consent have a common origin – the Roman law. If the misrepresentation was considered a vice of consent even from the Classic Roman law, the undue influence and the duress have represented sources of obligations, respectively civil offences. The wrong, as a disproportion between the undue influence and the duress, appeared later on, once with the development of the commercial transactions, mainly regarding the real estate. What is sure is that, the premises of the understanding of these notions, as ways of alteration the free will to contract, appeared once with the work of coding the Roman law, during Justinian's dynasty, which, moreover, represented the root of reception the Roman law in the Codes of the modern civil law.

Thus, the general theory of formation the civil legal act had imposed the principle of free will to the legal subjects. And, in this context, the sanction of vices of consent fulfils the same reason and function, namely, it insures the freedom of the legal will, in such a way that the concluded act should represent an exhibition capable of reflecting the interest of its author. The invalidation of one part's consent doesn't suppose, in none of the four cases, its lack or the lack of the conscious character of the will, but it supposes an incongruity between the reason and the purpose of the human activity<sup>1</sup>. From this point of view, the structure of the misrepresentation, that of the undue influence, of the duress and that of the wrong, presents a common element – the subjective element that taints the will.

What makes the difference among them, in the context of their structure, is the answer to the question what precisely caused the alteration of the person's free will that invokes the vice of consent. More exactly, all along the

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<sup>1</sup> In this context, the *reason* is seen as the *need* that pushes the person to act in a certain way (that of producing the legal effects), and the *purpose* is represented by the closure of the civil legal act.

line of the transformation of the reason into an aim, due to the intervention of some obstacles over the free will, the legal subject gets to a result that he neither wanted nor pursued. In the case of misrepresentation, the cause of this fact is represented by a lack of conformity between perceptions and the objective reality, appeared during the moment of representation and identification, in the mental plan, of the action.

In the case of undue influence, the other contractor, generally, induces the misrepresentation by the employment of some fraud acts, with a view to determine the victim to contract (or to conclude the act, if we talk about one-sided act) or to contract in certain conditions.

The appearance of duress in the formation process of the legal will has the same result: the closure of an unwanted legal transaction or the closure under some conditions that the part wouldn't have wanted. But, the cause of this consequence is represented by fear, by scare. The legal subject concludes under the force of a physical or mental constraint, exerted by another person, which induces a state of fear. In order to be in the presence of duress, the state of fear doesn't have the capacity to cancel the will, transforming the victim of duress into a simple instrument. This victim has the possibility of choosing from closing the act and to eliminate the producing or the continuity of the bad, or to bear the bad that he was threatened with.

Thus, the undue influence and the duress, in relationship with the error, suppose, on the one side, the existence of an external element that produces the alteration of the legal will of the person that invokes the vice, and on the other side, the bad will of its author.

But, from another point of view, putting together the misrepresentation and the undue influence, we notice that both of them sanction, particularly, the wilful fault of the co-contractor, while the duress is the only mechanism that allows the sanction of the induced fear to a stipulator. Therefore, if the provoked or spontaneous misrepresentation vitiates the consent in its reflexive or intellectual dimension, because it is not given knowingly, then the fear produced by the duress vitiates the consent in its free or wished dimension, because it is given under a state of coercion, in order to escape from a worse bad. Even more, if the undue influence supposes the existence of a misrepresentation that comes from the other party, and, in consequence "the surprise" of consent based on insidious manoeuvres, then the duress supposes "the rip" of consent by inducing a state of fear. And so the victim of the duress chooses to conclude the legal act, without being under misrepresentation.

In this case, the wrong verges on undue influence and duress, even if, accordingly to the statutory provision in the matter, the only element that enters the structure of this vice of consent is the disproportion of value between two mutual acts. To a more profound analysis of the wrong's structure, it is noticed that the legal will of the wrong's victim was vitiated,

simply, by its condition – the emergency in which he was at the moment of the closure of the legal act, and the attitude of the other party who takes advantage of this state.

Going further with the comparative analysis of vices of consent, it emerges the fact that all of them have a decisive character at the closure of the respective legal transaction. In other words, there is an unquestionable relationship of causality between the vitiation of the contractor's consent, and the closure of the legal act, as a display of will that doesn't reflect the interest of its author or it doesn't satisfy the need that represented the premise of his judicial policy.

Nevertheless, the misrepresentation represents a real vice of consent only when it falls over the substantial qualities of the object of the legal act that was concluded, or when it falls over the identity of the other contractor (in the *intuitu personae* contracts). As a difference, the undue influence can be invoked no matter on what element the provoked error falls over.

Another common element to all vices of consent is that of the moment of their appearance. This moment must be prior or, at most, contemporary with the moment of the closure of the civil legal act. These vices cannot supervene after the legal act's closure, because, firstly, all of them influence the process of formation of the legal subject's juridical will, an essential element to the civil legal act, and, secondly, because the sanction that can be inflicted would not be the relative nullity of the act, anymore (under the conditions in which the nullity cannot be involved than in the case of the apparition of a cause that happened prior or simultaneous with the closure of the act).

On the same line, that of the similitude of vices of consent, in the bilateral legal acts, it is enough for the vice to vitiate the consent of just one party. It doesn't have to be common in order for the action of the establishment of facts to be admitted. Further more, except the wrong that has a restraint domain of application, the undue influence and the duress are universal. It means that, in principle, they can affect every juridical transaction, regardless of the number of wills that participates to its appearance, or regardless of its concrete substance.

But, on the other hand, the origin of will's vitiation is another element that differentiates them. So, the misrepresentation doesn't come from the other party or from a third person, but it appears during the moment of formation the legal will of the person who invokes it, spontaneously. The undue influence and the duress derive, always, from another person. While the duress operates *generaliter in rem*, being a cause of invalidation, no matter where it would come from, the undue influence operates *specialiter in personam*, which means that it must come from the other contractor. The reasons of this distinction reside in the fact that the acts of psychological or physical constraint, in the case of duress, have the capacity of producing a bigger social danger, than

the fraud manoeuvres in the case of undue influence, if we analyse this problem from a legal-socio point of view. Accordingly to the civil law, the motivation is represented by the invalidation of will, which in the case of duress it doesn't matter if it comes from the other party or from a third party. Also, if the party misled by a third person were able to demand the act's invalidation, the other innocent party would wrongly suffer the consequences of the undue influence.

Finally, the last aspects that individualize the category of vices of consent from other invalid causes of the civil legal transaction (actually, of the consent on the civil legal transaction), and, in the same time, it differentiates them one from another, are the sanction and the probant evidence practicable to these vices.

The misrepresentation, the undue influence, the duress and the wrong are accompanied by the same sanction – the relative nullity – as they have the same judicial conditions. What differentiate them are the admission terms, because every vice of consent has its own structure. Without going in the description, *in extenso*, of the existence conditions of all four vices of consent, we long to point out that, unlike misrepresentation, the undue influence and the duress represent civil offences. And that because they are always provoked by somebody and they also involve the civil aquilian responsibility, besides the sanction of nullity of their author<sup>2</sup>, which is excluded in the case of misrepresentation, due to its spontaneous character.

From the probation's point of view and starting from the element that approaches them, we remind that the misrepresentation, the undue influence and the duress are fact issues, which must be proved *in concreto*. The only vice of consent that, accordingly to the law, presumes, is the wrong, and that, due to its role of protecting the minor with a reduced capacity of practice.

The misrepresentation will always be more difficult to prove, because of its subjective element, but it is also more rarely found in the case law. In this context, the probation of undue influence and of duress is easier to be done. Thus, in the case of undue influence, the complainant doesn't have the obligation to prove that the induced misrepresentation reflects over a substantial quality of the purpose of the contract, especially because, being a misrepresentation provoked by a wilful illicit act, the sanction will intercede no matter what the misrepresentation's nature would be.

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<sup>2</sup> In the juridical literature, it was shown that both the duress and the undue influence have a dual nature: for their author it is a civil offence, and for their victim it is a vice of consent (H. L. et J. Mazeaud, „*Leçons de droit civil*” tome II. Obligations. Théorie générale, 9-e édition par F. Chabas, Montchrestien, Paris, 1998, p.190, nr. 199, quoted after D. Chirică, „*Violența ca viciu de consimțământ în contracte*”, in *Curierul Judiciar* nr. 3/2005, p. 64).

The same situation is found in the case of duress, too, when the complainant is obliged to prove the closure of the legal act under the impact of fear. And, because the threat or the so-called coercion, the fear's generator, it is an illicit and a fact issue, it is easier to prove the duress, than an internal, psychological act.

So, from this point of view, the undue influence and the duress have a larger sphere of application, pursuing not only the quality of consent, but also the sanction of an illicit act.

The wrong, instead, can be seen as an atypical vice of consent – and that due to its restraint applicability, more precisely because the wrong is a vice of consent by exception. From misrepresentation, undue influence and duress, the misrepresentation has the most restraint domain of application. But the wrong's domain of application is even more restraint than that of misrepresentation, both regarding the persons that can invoke it, and the acts capable of invalidation for wrong. But, the last one approaches the undue influence and the duress, regarding the probation, because the objective element from their structure is easier to probate, than the structural, subjective element of misrepresentation.

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