

VIOLENCE AS DEFECT OF CONSENT

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(Summary)

Violence is a defect of consent that consists of threat to a person producing her fear and cause to contract, so that it would not be done in other circumstances

By nature of evil, we can distinguish:

Physical violence - *vis* - exists when the threat of harm targets physical integrity or goods of a person.

Moral violence - *metus* - exists when the threat of harm targets the honor, honesty or the person's feelings.

After the nature of the threat it distinguishes between: legitimate threat, justified with an evil, not defect of consent (for example, the creditor threatens the debtor to sue him if he fails to fulfill a duty) and the illegitimate, unfair threat of harm, and in this situation signifies defect of consent, attracting cancellation of act completed under the fear inspired by such a threat.

As the deceit, violence - as defect of consent - is composed of two elements: an objective element, external, that involves a threat of harm; and a subjective element consisting of a fear instilled to a person, which alters the consent, in case of violence, and is precisely this fear inspired to victim of violence.

In order to be defect of consent, violence meets together two conditions: to be determinant for completing the juridical act; to be unjust (illegitimate, illicit).

Keywords: moral violence, physical violence, fear, harm, victim, illegitimate, threat, claim.

Consent, as well as deceit and violence, may be tainted by violence as it is mentioned in article 953, Civil Code.

Violence is a threat that brings a person a fear he could not resist, thus forced to contract. Thus, rigorously discussing, not violence (*vis*) as a threat, as such, is defect of consent, but fear (*metus*) which the threat brings to the victim,

causing her to contract, so that it would not be done in other circumstances¹.

Related to granting a consent we have to mention that in case of spontaneous error, which is error of substance, or caused error (deceit), these vitiate consent within its intellectual and reflexive dimension, because it is not given knowingly, while violence-induced fear vitiate consent within its volitional side or freedom is given through constraint in order to avoid a worse evil².

When consent of one party is missing, her will is completely substituted by the will of another person, as it happens in situation where one party „contracts” in a state of total drunkenness or under hypnosis³, in accordance with classic conception, it can not be a simple defect of consent, but simply a lack of one of validity elements that is sanctioned by absolute nullity⁴.

According the modern theory, which assimilates such cases to insanity, actually it is not lack of consent, but restriction to its freedom, and can be assimilated to the defect of consent⁵.

Elements of Violence

Ambivalence of Violence

As well as in case of deceit, violence has a dual nature, while for its author it's a civil offence, for its victim it's a defect of consent⁶. If deceit means a disloyal criminal act, an objective element, and also misleading of joint contractor as subjective element, violence supposes threat of harm as objective element which has as a result conclusion of contract under the rule of fear inspired by threat as subjective element.

1 B. Petit, J.-Cl. Civ. Art. 1111-1115, 1998, p.3, no.3

2 J. Flour, J.-L. Aubert, E. Savaux, p. 157, no. 216; F. Terre, Ph. Simler, Y. Lequette, p. 246, no. 242, apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 261

3 Both unprovoked by the co-contractor, otherwise being incidents the specific manoeuvres of deception.

4 Mazeaud, Chabas, q.w. p.191, no. 200242 apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, 2008, p. 262

5 Ch. Larroumet, *Le contrat*, p.284-285, no. 320, p.276, no.320, p.319, no. 369; B. Petit, J.-Cl. Civ. Art. 1111-1115, p.2-3, no.2

6 Mazeaud, Chabas, quoted work, p.190. no. 199 apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 263

The Threat of Harm

Content of Threat

From objective point of view, the range of means both physical and moral, a fear for one of the contractor exposed to a considerably „Considerable evil”

the wealth whose consent is the target also close persons as it is shown in Art. 956

Threats may be very serious: of death, harm, seizure and defamation, abandonment of those of financial nature such as company bankruptcy, eviction of household exploited by the contractor

We illustrate with the case of violence, which has been used against a religious sect for fifteen years. The mind was very fragile and she gave away her house to a contractor's members, following moral pressure during the trade sale. The contractor's separation from the contractor

In such cases, we recognize the psychological vulnerability of the contractor and the conditions of violence of actions of threat without

It is recognized that threats are those listed at art.957, Civil Code. B. Petit, J.-Cl. Civ. Art. 1111-1115, p.2-3, no.2. Cass. 3-e civ., 13 January 1999. G. Lousseau, JCP (Chron.-I 143) 1999, p. 263. *Special Contracts, Vol.I Sale and Exchange*

The Threat of Harm

Content of Threat

From objective point of view, violence involves the deployment of a wide range of means both physical and moral pressure which cause inspiration to a fear for one of the contracting parties, namely the fear „that will be (...) exposed to a considerably worse, as it is shown in Art. 956, Civil Code.

„Considerable evil”, of which speaks the law, affects both the person and the wealth whose consent is intended to be plucked. It is likely that this evil to target also close persons such as relatives, spouses, ascendants or descendants as it is shown in Art. 956, paragraph 1, Civil Code⁷.

Threats may be very different, starting from physical ones such as threat of death, harm, seizure and continuing with moral threats, such as dishonor, defamation, abandonment if it's about a sick or old person and ending with those of financial nature such as loss of function or professional position, company bankruptcy, eviction from house, and to determine closure of a leasehold exploited by the victim⁸.

We illustrate with a case that highlights the modern application of violence, which has been noted related a woman who had been a member of a religious sect for fifteen years. Being in a difficult period of time, in which her mind was very fragile, divorced and taking care of two infant children, gave away her house to a company subordinate the sect to accommodate sect members, following moral constrain of the sect members both before and during the trade sale. The contract was canceled at the request of the victim after her separation from sect⁹.

In such cases, we must underline the following fact, namely that psychological vulnerability and influencing the applicant are not sufficient to achieve the conditions of violence, which is present only if it is proved exertion of actions of threat without which there it can be no question of defect of

7 It is recognized that threat may refer to any dear person, under the condition to prove it, not only to those listed at art.957, Civil Code.

8 B. Petit, J.-Cl. Civ. Art. 1111-1115, p. 4, no. 7-9

9 Cass. 3-e civ., 13 January 1999, Ch. William, "Recueil Dalloz" (Jurisp. Comm.) no.4/2000, p.76 and G. Loiseau, JCP (Chron.-I 143) no.23/1999, p.1076-1077. apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 264

consent by compulsion, but possibly by fraud, if the other contracting party taking advantage of applicant state mislead him in any way.

In some cases, within the judicial practice in our country, the defect of consent by violence is broached with an unforgettable negligence.

In support of this idea, we exemplify a case in which a contract of sale signed by applicant's predecessor was canceled for reason of violence, so it was noted that before the end of the contract, the seller, who was an elderly person and was suffering from serious and incurable illness, was hidden the disease diagnosis he was suffering and he was isolated from relatives and friends, without being given on time the appropriate medical treatment. It is noted that the act of sale was concluded when the person entered the final stage of the disease and being under the influence of drugs administration¹⁰.

Analyzing the facts, it appears that none of the factors the court mention contains any physical or moral threat. Concealment of the diagnosis, isolation from relatives and friends, failure to timely appropriate therapy are all components of deceit, in which concealment of diagnosis may be interpreted as a deceiving reluctance, and others may be classified as deceptive machinations. Therefore, the difference between annulment for deceit and cancellation of contracts for violence is not just a theoretical one, but basically there are many differences in terms of legal status. For example, deceit can only come from a joint contractor, while violence may derive also from a third party.

Regarding the period of prescription in action of annulment, it begins in case of deceit from the time it is known the reason of annulment, but not later than 18 months from its conclusion of contract, while in case of violence it begins from the moment it is finished.

Related to signing of contract when the vendor is in final stage of his disease and under the influence of drugs administration, there is no question of defect of consent by violence or deceit whose elements are missing altogether, but eventually the conclusion of contract by an adult person, but devoid of discernment and not placed under ban, signing the contract being made under

¹⁰ C.S.J., Civil Department, decision no.200/1993, in „Journal of Jurisprudence” – database, Ed. C.H.Beck.

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¹² D. Alexandresco, *op.cit.*,

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¹³ J.Flour, J.-L. Aubert, E.S

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¹⁴ Cass. 3-e, civ; 17 January

¹⁵ For example, a person tha

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¹⁶ A.Rieg, quoted work., p.2

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the influence of mind insanity¹¹.

Unfair Nature of Threat

Starting from Roman law, where originally *Metus* was a criminal offense, we believe that the threat cannot constitute violence as defect of consent unless it is considered to be unjust or illegitimate¹². For this reason, documents concluded under the threat of legal action or prosecution commencement in order to recover a legitimate claim cannot be canceled for violence¹³.

To reinforce this idea, we give as example the situation where it was not allowed, for violence, the annulment of a sale that was requested by an employee after he caused injury to his employer, but had admitted guilt, and thereafter in order to extinguish the obligation of compensation he concluded an agreement which he sold a property to the employer, which he belonged, being threatened that otherwise he would be sued for damages. We mention that the negotiated price was equivalent to the damage caused to the employer and it was considered to be sufficient to compensate the mutual claims of two parties: the claim for damages of the employer --buyer with the claim to pay the price of the employee-seller¹⁴.

On the other hand, if there is a legitimate right, such as a certain claim, liquid and due, which is claimed by illegitimate means, without using legal ways, in fact ways outside the law constitute a threat of violence¹⁵, so that if a contract is concluded under the influence of fear inspired by such means, this is cancelled¹⁶. Similarly, it is also about violence, when a legitimate right that

11 Related to spirit insanity and specific for cancellation of onerous documents on this ground, see: D.Noguero, Obs. Lacass 3-e civ. 20 octombrie 2004, "Recueil Dalloz" no.4/2005, p.257 și urm., Ch.Boillot, *Régime des actes conclus sous l'empire d'un trouble mental, dans la période qui précède la mise en place d'un régime protecteur*, in "Rev. L'amie Dr. Civ." no.42/2007, p.57.

12 D. Alexandresco, *op.cit.*, V, p.60; Mazeaud, Chabas, *op.cit.*, p.191, no.202. apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 265

13 J.Flour, J.-L. Aubert, E.Savaux, quoted work, p.160, no.221. apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 265

14 Cass. 3-e, civ; 17 January 1984, quoted by B.Petit, J.Cl.Civ.Art. 1111-1115, p.7, no.23

15 For example, a person that owns an amount of money to a person "agrees" under treat to give the creditor, as debt, the ownership of a car.

16 A.Rieg, quoted work., p.2, no.16. apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 266

is hijacked by pursuing an illegitimate purpose, such as a person who causes injury by crime to another, and the injured party threatens to trigger criminal action in order to induce the offender to obtain a patrimonial advantage greater than the suffered damage¹⁷.

Analyzing art.198, Civil Code, we find a specification that „simple reverential fear, without violence, cannot cancel the agreement.” Through reverential fear we understand that fear arising from a desire not to disappoint a person, against which there are strong feelings of respect and affection, such as parents¹⁸.

This kind of moral authority of the person who inspires such feelings looked within its singularity, without exerting other means of pressure, has nothing reprehensible in itself, so a contract on such considerations cannot be penalized with nullity¹⁹. In the case above, there is no doubt of constraint, but one which is legitimate.

In case the contract ended, not because of reverence, but a threat, annulment for violence is possible even if it comes from a person who is owed respect and obedience²⁰.

The Origin of Threat

If in case of deceit, cancellation of a contract can be achieved only if it comes from a joint contractor, constitutive threat of violence can come, not only from him, but, as shows art.955 Civ. Code, comes from „other person than the one who benefited from convention”²¹.

17 A.Rieg, quoted work., p.2, no.18; Mazeaud Chabas, *op.cit.*, p.192-193, no.202. apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 266

18 C. Hamangiu, I.Rosetti-Bălănescu, Al.Băicoianu, quoted work, p.502, no.1228. apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 266

19 J.Flour, J.-L. Aubert, E.Savaux, quoted work, p.160, no.221. apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 266

20 D.Alexandresco, quoted work., V, pg. 65 apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 266

21 The difference was explained by the fact that violence is the only mechanism that allows sanction for fear inspired by a contracting party, while deceit is added to spontaneous error to punish especially intentional fault of contractual partner (B.Petit, J.-Cl.Civ.Art.1111-1116, p.5, no.12 apud

So, in one case, the annulment was granted on grounds of violence, although threats came from third parties (members of religious sects) and not from the (company linked to a religious sect) who benefited from the conclusion of sale under conditions of moral constraint²².

Existence of possibility or not, to cancel for violence a contract concluded in a situation of constraint arising from outside circumstances that it was done and not from the threat of another determinant has been a problem widely discussed in practice and doctrine. This case is also known under the name of signing the contract in a state of necessity.

The person who contracts under the state of necessity is at availability of his contractual partner, he can take advantage of the situation arose requiring excessive conditions such as, for example, if a ship captain at sea was in a difficult situation and who was forced to accept a reward disproportionate for his savior²³ or the situation of a doctor who takes advantage of the poor condition of his patient and claims an exorbitant fee to save his life²⁴.

The issue raised above is a very controversial one, some authors say that the situation is related, rather to lesion and not to violence, in one argumentation, and another one, based on provisions of the Civil Code, in art.956 and art.957, which would give an indication that violence can only come from a human being, and it rejects annulment for violence²⁵.

Other authors found similarities between the state of necessity and violence, since one of the contracting parties took advantage of it to get from the partner some exaggerate advantages²⁶.

Considering that the legislator himself has provided situations where the

Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 267)

22 Cass. 3-e civ., 13 January 1999, Obs. G.Loiseau, apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 267

23 Cass. Req., 27 April 1887, quoted by J.Ghestin, *Le contrat: formation*, p.495, no.448

24 B.Petit, J.-Cl.Civ.Art. 1111-1115, p.6, no.17

25 Ch.Larroumet, *Le contrat*, p.337-338 no.371; Ph.Malaurie, L.Aynes, Ph.Stoffel-Munck, quoted work, p.256, no.518

26 26 A. Rieg, quoted work, p.2-3, no. 25; J. Ghestin, *Le contrat: formation*, p. 495-496, no.448; J. Flour, J.-L. Aubert, quoted work, p. 154-155, no.232; Mazeaud, Chabas, quoted work., p. 193-194, no. 205; F. Terre, Ph. Simler, Y. Lequette, quoted work, p. 249-250, no. 247 apud Dan Chirică, *Treaty on Civil Law. Special Contracts, Vol.I Sale and Exchange*, Ed. C.H. Beck, București, 2008, p. 267

state of necessity may be a reason of cancellation for violence, we believe that this idea should not be repudiated. For example, Decree-Law no. 645/1945 to cancel acts of disposal completed during the Hungarian occupation provided that the acts of disposal concluded during Hungarian occupation in North-West of Transylvania (August 30, 1940 - October 25, 1944) as effect of national persecution, racial or anti-democratic are annulable, the consent is presumed to be torn by violence, until proven otherwise, if the plaintiff was caused a loss of at least 25% of the good (Article 2).

We should keep in mind that in order to sanction violence in such situations must be a disadvantageous contract for the applicant which contains an imbalance between the obligations to do showing unfair exploitation of the situation by the other side of the contract, coercive state may not be directly deducted from the state of emergency²⁷.

Signing a contract for fear inspired by threat

Firstly, it should be noted that a threat must be a determinant one, without the fear caused through this, the contract wouldn't have been completed or done in other conditions. Thus, to retain the violence and to apply specific sanctions it is not enough to prove the achievement of a threat, but it is required to prove that he inspired a serious enough concern to one of the contracting party, without finding an alternative to get away from constraint than by granting consent.

Article 956 Civil Code states that fear must be „rationale” for the one who contracts, as it is shown in paragraph (1), so that will take into account „the age, sex and condition of persons.”

These issues make us believe that the criteria for assessment will be an individual one (*in concreto*). We believe that inspiration of fear will be noticed easier in case of threats to an elderly person or a person with weakened mental faculties of to a person suffering from nervous problems or inexperienced person, than a person in full physical and mental faculties. External conditions can and may be taken into consideration as factors of instilling fear, such as

²⁷ B. Petit, J.-Cl. Civ. Art. 1111- 1115, p.6, no.18; Cass. 1-re civ., 3 May 2000, in L. Leveneur, *Droit des contrats. 10 ans de jurisprudence commentée 1990- 2000*, , p. 21, no. 23

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²⁸ B. Petit, J.-Cl. Civ. Art.
2004, JCP no. 4/2005, p. 179

isolation of location, time of day (night) or existence of intimidating factors such as some hostile people. If case of international trade sales are more difficult to meet these conditions for violence because the assessment criteria may not be so subjective, but this can not be excluded completely.

Violence involves „pulling out” the consent by inducing a fear, the threatened one concludes the contract without actually wanting it, but it doesn't mean the person is somehow in error. Unlike violence, deceit requires „surprise” the consent by deceptive maneuvers that appear stealthily, without visible aspects. In Article 956, paragraph (1) shows that threat must be a „considerable and present” evil. The „substantial” evil means that threat must be a serious one, able to compel the other, not an easy one, with no power to impress the other one. Regarding the „present” feature of threat, the unanimous opinion is that not evil which threatens has to be present; it may be also a future evil, but the threat, because if the threat comes after the free expression of consent, it is no longer considered as defect of consent.

Proof of Violence

The one who invokes violence as defect of consent must prove the threats which he has been subjected, but also to prove that these threats led him to contract under these circumstances²⁸. With regard to legal facts and not legal acts it is allowed evidence by any mean of proof.

Sanctions of Violence

Cancellation of Contract

According to art.961, Civil Code, violence is sanctioned by relative nullity.

The persons in right to request it are those who have been victims of violence or their universal successors, or having universal title. Action for annulment is prescribed in the general prescription period of three years, which commences from the date of cessation of violence in accordance with Art. 9, paragraph (1), Decree no.167/1958, related to the extinctive prescription.

²⁸ B. Petit, J.-Cl. Civ. Art. 1111-1115, p. 9, no. 31 și 32; C. A. Nimes, 1-re civ., ch. B, 23 March 2004, JCP no. 4/2005, p. 179

The person entitled to request cancellation can confirm the act, directly or tacitly, renouncing the civil action, as it is mentioned in Art. 959, Civil Code.

Depending on whether the violence has tainted his consent to all or only on a specific term, contract cancellation may be total or partial, on either one or other of the clauses²⁹. Reduce excessive commitment torn by violence can be achieved by partial cancellation of the contract³⁰.

Award of Damages

If the victim proves that he suffered harm (Article 998 Civil Code.) the author of threat, either party or third party may be liable for damages; violence is not only a defect of consent, but a criminal act.

Damages may be claimed together with the cancellation or independently of it.

A pertinent question would be that related to the time at which begins prescription period to claim damages. According to article 8, paragraph 1 of Decree no. 167/1958, „The prescription on the right of action to claim compensation for damage caused by unlawful act begins from date the injured knew or had to know both the damage and the one in charge of it.”

If case of action in annulment for violence, the limitation period begins to run from the date violence ends, as requires art. 9, paragraph. (1), Decree no. 167/1958. Examining this hypothesis, we realize that legislature has not considered it. If we analyze logically and interpret texts in the same way, we conclude that the period is calculated necessary from the cessation of violence without requiring the victim to act under the sway of fear, calculating time of its conclusion, when damage occurs and knows its author, the one who forced to contract by threats.

²⁹ B. Petit, J.-Cl. Civ. Art. 1111-1115, p. 9, no. 33

³⁰ The exception to this rule, Article 2 of Decree-Law no. 645/1945 to which we have referred above created a presumption of violence in the special situation mentioned.

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