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Analysis of the Mechanisms of the Legal Will – an Argument for an Interdisciplinary Scientific Framework

Alexandrina-Augusta BORA[1]

[1] Associate Lecturer PhD, "Babeş-Bolyai" University Cluj-Napoca, Romania, alexandrina.bora@ubbcluj.ro

Abstract: The legal will agreement producing legal effects means that each party will is real, conscious, free and clear, externalized and expressed the intention to be bound. Through legal concepts of will and consent, a purely psychological approach objectifies producing legal effects. The whole argument is based on the idea that an interdisciplinary approach of the law requires updating the content of the concepts reflecting processes and mental phenomena which can be scientifically investigated with the methods and techniques of modern science. Analysis of classical theories of the will and the modern theories on the decision making process revealed the evolution of decision making research and the importance of including these valuable scientific information within the factors influencing civil act theory as a manifestation of the will and the concept of contractual freedom.

Keywords: *legal will; consent; civil legal act; interdisciplinary approach.*

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1. Introduction - the need to adapt legal concepts to scientific research

The validity of research in any science depends on the accuracy of the definition of the concepts being used. All the more so, law, which often uses concepts borrowed from other social sciences, needs clear standards for defining legal concepts, standards that can incorporate and exploit in the legal concept all the significant content provided by research in other social sciences.

Even if, on the surface, the law keeps in line with the economic and social change, in fact, as an American futurologist observes, additions increase the volume of law without recodifying or restructuring the system as a whole (Toffler & Toffler, 2006). Moreover, law is considered by the same author as "the slowest of the slowly changing institutions". Of course, it is accepted that the law should slowly change, because it provides society and the economy with a necessary degree of predictability, but the same specialist considers that some essential laws that directly affect the advanced economy in spheres such as copyright, patents, privacy, remain outdated. This state of law is characterised not as stability, nor as immobility, but as a true legal *rigor mortis*. It is necessary (a need formulated four decades ago) to outline open and mobile legal structures that do not block the flows of social life and the rhythms of growth, favouring the achievement of goals compatible with resources (demographic, natural, intellectual) (Dumitriu, 1974). These structures are built with difficulty due to the fact that humanity has been taught to think retrospectively, making it very difficult to detach from the reflexes created over more than two millennia by this type of thinking (Toffler & Toffler, 2006).

It has been rightly argued that "one of the most insidious traps set by the science of law for legists is absolutism" (Vasilescu, 2003a), the legist decoding the social fact in a legal key, explaining the whole reality by recourse to legal notions.

On the other hand, the literature has pointed out the danger of "amalgamating legal terminology with economic, political, sociological or philosophical terminology, without reworking the concepts and without a clear understanding of their spheres of origin" (Dănişor, 2011). It is argued that this attitude makes "doctrine and jurisprudence too often flat and stereotypical, if not conceptually chaotic", and legists are perceived "not as men of culture, seeking to explain the nature of things through justice, but as mere technicians, applying concepts taken from the socio-human sciences, creating an eclectic and somewhat sleepwalking theory" (Dănişor, 2011).

How this is addressed depends on the action of those who make the law and on striking a balance between these tendencies.

2. Aspects of the evolution of the vision of legal will; the need for an interdisciplinary approach to legal concepts

Trying to avoid some possible simplifications, we can admit that the interdisciplinary approach to the science of law, the complementarity of scientific approaches to the legal phenomenon stems from "the acutely felt human need for integrative knowledge, itself an essential expression of our existential-anthropological condition" (Huma, 2005). The relevance of psychological elements on the process of constitution of legal institutions and rules is also evident from "the correlation of the different stages of man's physical development, and consequently of his mental faculties, his discernment, his capacity to act with awareness of the possible effects of his actions with the legal regime applicable to the different categories of persons" (Naschitz, 1969). In this sense, it is argued that it is important to go deeper into the analysis of the structure of human actions, towards elements of a subjective nature, related to the psychological motivation of these actions.

Even if the law does not sanction acts of conscience, as long as they have not been externalised in certain actions, one cannot ignore the mental processes that take place at the level of the intellect, emotions and will. As such, legal regulatory action must necessarily take into account the existence of psychological processes as a structural element of the behaviour of individuals and human communities. All the more reason to note the need to update these typologies in the light of contemporary psychological research.

Since law does not have the privilege of using its own exhaustive language, the concept of "will" is taken from other branches of knowledge, from philosophy and psychology. We consider it important to state that we support the interdisciplinary approach, but in the sense of falling within the standards of a legal concept, within the rules of definition of such a concept.

Will is described as the defining element of legal acts (Dogaru, 1986), being considered to be the essential psychological category in the delimitation of legal facts from legal acts, a delimitation with significant legal effects.

Emphasizing the volitional element underlying the legal act should not lead to ignoring the fact that any legal operation is the result of a more complex psychological process, in which the manifestation of will is only the final moment, the volitional factor being doubled by the intellectual factor,

of undeniable legal relevance, as shown, among others, by the study of capacity, of defects of consent or of cause (Cosma, 1969).

3. Psychological aspects of the legal will; evolution and scientific research

In the field of will analysis, there is a lack of methodological and theoretical unity, as the different approaches demonstrate the complexity of the problem of will. Paradigms of modern psychology include the concept of volition in the decision-making process, the selection of an alternative from the multitude of possible choices being an essential component of our daily (and legal, one might say) life, expressing the intentionality of the human being. Moreover, even in the field of civil legal acts, the freedom of the person must be understood as the possibility to choose between the different variants of legal action (Reghini et al., 2008). In the models used to investigate the decision-making process, the elements of legal will - consent and cause - are more clearly found. The field of research called 'decision making' is interdisciplinary, involving economics, politics, sociology, psychology, statistics and philosophy. Philosophical systems have also made a specific contribution to the construction of decision theory: they have gradually led to the identification of utility as the basic factor of decision (Ceauşu, 1972), a theory that has also been used in the legal field in the evolution of the concept of autonomy of will.

From a cognitive perspective, the term decision making denotes an information processing activity that starts with the recognition of a choice situation and ends with the implementation of the choice and the monitoring of its effects. The decision-making process usually starts with the information-seeking phase, continues with the estimation of the probabilities of possible options and the deliberation phase, and ends with the final act of making a choice. Cognitive decision theory seeks to determine the set of possible choices (in this case, alternatives) and to specify the criteria for the choice. Based on mathematical and probabilistic methods, it allows the development of simplified models of the studied situations (Jordan, 2008).

Research has shown that we can also speak of psychological limitations of the legal will, which can be seen as intrinsic elements limiting contractual freedom.

In addition to the analysis of normative and descriptive models in the investigation of the decision-making process, cognitive factors that can influence the calculation of alternatives (Miclea, 1994), and therefore the decision making, can be taken into account, their knowledge being of real use in detecting the legally relevant elements of an act of legal will that can

be the object of a process, and, implicitly, the object of analysis, evaluation and interpretation of the judge.

Normative models assume that the decision-maker behaves rationally, is omniscient (knows all available alternatives and their consequences), has sufficient time resources. The optimal decision is obtained on the basis of algorithms for calculating the value of alternatives or the utility that the subject attributes to them. The utility of an option lies in the subjective perception of its value (Miclea, 1994).

The expected utility model starts from the idea that there is a difference between value and utility: value is an objective given, utility is the subjective perception of a value. Research in the past supported expected utility theory, implying that a person's choices can be seen as favoring the alternative with the highest subjective expected utility (Jordan, 2008).

Transposed to the legal level, this model seems to be at the basis of modern theories on the cause of the civil legal acts which have tried to define and characterize the cause by rediscovering the subjective source of the cause of of the civil legal acts and by combining it with elements of an objective nature, external and detached from the will of the parties (Vasilescu, 2003b).

The new, descriptive models are called models of bounded rationality. This means that the decision-maker, with limited computational and time resources, is forced to resort to various decision heuristics and simplified representations of the alternatives to be decided upon. The result is a simplified mental model of decision situations.

Given the contradictions that may arise between the two perspectives mentioned, the third approach, called the prescriptive approach, focuses on methods to improve the decision, to bring it closer to the normative goal (Iordan, 2008). The limitations of operational research applied to humans can only be overcome with descriptive psychological research (Ceauşu, 1972).

These aspects are relevant in the legal field, as it is often necessary to understand the inner workings that led to an external manifestation of will, and these assessments cannot ignore the psychological elements of decision-making.

Recent research in the field has shown that the choices people make are influenced by different aspects of the decision situation. These include: the conflict or difficulty that characterizes a decision, the anticipated regret in cases where another option would have been better, the role that reason plays in justifying one choice over another, the attachment that is felt to options that are already in the person's possession, the influence exerted by

costs already incurred, the effects of temporal separation on future decisions, and the occasional inability to predict the future or recall past satisfactions (Jordan, 2008).

A number of cognitive factors have been studied that can influence the calculation of alternatives (Miclea, 1994), and therefore the decision making, and their knowledge is of real use in detecting the legally relevant elements of an act of legal will that may be the subject of a lawsuit, and, implicitly, the subject of analysis, evaluation and interpretation of the judge: "immersion of the decision in a cognitive schema", prototypicality of alternatives, accessibility of alternatives, post evaluation of alternatives (distortion of the appreciation of the initial difficulty of the decision after knowing the correct decision).

The extension of the field has eroded the idea of a general theory of decision-making in favour of rather situation- and domain-specific models and empirical research on the conditions under which different modalities and strategies are applied (Jordan, 2008).

An extensive study on rationality demonstrates by reviewing decision research that rationality as a normative model does not reflect the psychological reality of how people make decisions and that analysis of other variables that determine decision making is scientifically justified (Shafir & LeBoeuf, 2002). The authors argue the need for such research to be taken into account by other social sciences.

4. Legal will in the civil code - from science to codification; an interdisciplinary approach.

Understanding the mechanisms of the legal will is also necessary from the perspective of penetrating into the very essence of the civil legal act, in this case, the contract, and the way of regulating these legal categories as well as the frequent changes in this matter that have occurred even after the entry into force of the new Civil Code reveal both the perpetual pendulum between tradition and modernity as regards the concept of legal will, and the difficulty of integrating into the legal norm the result of scientific research (at the level of legality) of modern psychology on the decision-making process.

The Civil Code (Parliament of Romania, 2009) defines contract in Article 1166. The amendments made by the introduction of the phrase "with intent" in this article reveal the importance of the volitional, intentional element in the formation and very existence of the contract. This vision is in line with the current modern trend to look at the contract from the

perspective of its progressive formation, in line with today's socio-economic reality.

The changes that have occurred in the legal texts defining contract reveal the complexity of the doctrinal discussions on this subject and the difficulty of arriving at a unanimously accepted definition that expresses the essence of this legal category and the situation of contract in contemporary law.

For the purposes of semantic and logical delimitation of terms, in the doctrine it is specified that legal will comprises two elements: cause and consent, which correspond to the two legal stages of the psychological process of will formation (Ionaşcu, 1974). The main determining motive and the decision to conclude the corresponding legal act, which this motive entails, followed by its outward manifestation, constitute the legal stages of the psychological process of the formation of the legal will.

Thus, the cause is concerned with the purpose pursued by the act of will, a purpose which will be achieved in the future, but which, through mental representation, constitutes the reason for consent. It should be noted that not all the reasons have legal significance, but only the main ones, which are decisive in the decision to conclude the act of will. All others remain outside the legal will. They are purely psychological reasons, indifferent from a legal point of view (Ionaşcu, 1963).

Consent, the second element of the legal will, is "the decision manifested externally to conclude the legal act through the effects of which the intended purpose is to be achieved, which was the determining reason for the act of will, its cause" (Ionaşcu, 1974). Consent is part of the legal will (Chelaru, 2007). The cause, through the anticipated representation of the achievement of the intended purpose, precedes and explains the element of consent, and the latter, through the conclusion of the legal act, ensures the achievement of the intended purpose (Ionaşcu, 1974). The same approach, by another author, supports the idea that will is not reduced to consent, but "it comprises, in itself, a series of representations concerning the objects to be obtained, the services to be performed, the purposes that prompt the author of the manifestation of will to enter into a contract" (Dogaru, 1986).

In addition to the provisions of art.1179 Civil Code, which refers to a valid cause as an essential condition of the contract, the Civil Code devotes art.1235-1239 to this element. The provisions of the Civil Code in this area bring some novelties compared to the previous regulation, which did not provide separately for the morality of the cause, making it subject to the condition of being lawful. However, it has been argued that one cannot ignore the existence of this condition of validity of the case (Boroi et al.,

2008), the doctrine and jurisprudence in our country being constant in this regard (Court of Appeal Ploiesti, civil section, decision no. 211/1998, Supreme Court of Justice, civil section, decision no. 12/1991). The Civil Code expressly provides for the morality of the case.

With regard to the meaning of cause, the nature of *purpose* or *motive* of the cause in the civil legal act, it has been argued that, if we also take into account the philosophical meaning of the notion of cause *(causa eficiens)*, the terminology used by the Civil Code is relatively inappropriate, arguing that it is preferable to use the word purpose to designate this condition of the civil legal act. These observations have not been incorporated into the Civil Code's regulation of the case. Although apparently, the cause in the legal sense *(causa finalis* or purpose) would follow the effect, in the sense that the achievement of the proposed purpose is subsequent to the moment of the conclusion of the legal act, in reality, the cause precedes the effect since, being the mental prefiguration of the intended purpose, it is achieved before and in view of the conclusion of the legal act (Boroi, 1997).

The definition of the notion of cause in Article 1235 of the Civil Code as "the reason that determines each party to enter into the contract" leads to the end of some doctrinal discussions based on the provisions of the old Civil Code on cause as purpose or cause as reason. So the purpose (realisation) is in the future, but the consideration of the purpose, i.e. the reason for executing the contract, is in the past, before the formation of the act of will. It is clear that it is not only a question of "knowing what the debtor must do *(quid debetur*), but of knowing what exactly has led the debtor to undertake to do it" (Dogaru, 1986).

The cause is characterized by the fact that it is presented both as the psychological representation of the consideration, in the sense of the purpose of the one who is bound, and as an element that survives the moment of the conclusion of the act, prolonging its effects and legal importance in the phase of execution of the legal act (Vasilescu, 2003a). This idea is considered to be particularly valuable, because "it transforms the legal cause of the act from an instantaneous element into one with a value of continuity until the extinction of the legal relations generated by the act, which gives a subjective support to the cause of the obligation" (Vasilescu, 2003b). These modern concepts attempt to strike a fair balance between the subjective and the objective in characterising the cause of the legal act. We believe that this definition eliminates some of the controversy about the nature of the cause of the civil legal act, and also corresponds to the scientific view of psychology, thus bringing scientific research into the work of codification.

As regards the meaning of the term "consent", it can be argued that it always means a manifestation of will in a legal act. Due to the multitude of meanings offered by this term, it has been called in this case a "*polysemy of refinement*" (Cornu, 2005).

It can be said that consent means the legally manifested will, and "its external form measures the distance between the psychologically understood will and the legally expressed will" (Frison-Roche, 1995). Although "law does not deal with psychological phenomena, with the way they are formed, but only with the legal effects of the expressed will" (Reghini et al., 2008), the alteration of the psychological mechanisms of decision making (alteration legally called "vitiation of consent") produces legal effects beyond the expressed will (vitiated at a given moment), requiring the consideration of these internal mechanisms.

As stated in the doctrine, "in order to be valid, consent must meet the following conditions: it must come from a person with discernment, it must be expressed with the intention of producing legal effects, it must be externalized, it must not be altered by any defect of consent" (Turianu, 2009).

The analysis of these conditions reveals the importance of psychological elements and concepts, of the typologies used in this field, in producing legal effects**.** Since the legal act presupposes a fully conscious and free consent, we should admit that any alteration of the psychological process of consent formation leads to the annulment of the act (Cosma, 1969). For the stability of legal relationships, the legislator has required that the annulment of legal acts be admissible only when the alteration of consent is of a certain seriousness and only in the cases and conditions provided for by law. The importance of the effects of altering consent is a further argument for scientifically substantiating and updating these elements in line with new research in psychology, which has evolved rapidly over the last century. Moreover, the legal literature argues that "if the legal act is defined as a manifestation of will made with the intention of producing legal effects, it is obvious that it must be considered, at least at the time of its creation, as a volitional construct" (Reghini et al., 2008).

It is argued that contract law today can no longer be just a general theory of contract, to which some special rules are added, and that from contract law we will have to extract a 'general theory of consent' applicable to contracts, based on the common law and not on a law of contracts, we consider it *necessary to define the term consent*. Just as the Civil Code in force defined the notion of cause, so we consider it necessary to define the notion of consent, as an element of the legal will, all the more so because, due to

the multitude of meanings (subtly broken down) offered by this term, we spoke in this case of a "*polysemy of refinement*", as mentioned above (Cornu, 2005).

Consent defects should be dealt with in a whole other work, since error, malice, violence and especially injury have given rise to lengthy and controversial discussions in the literature, many of which are based on ambiguities in the law or difficulties arising from the complexity of the psychological aspects of decision-making involved in the manifestation of legally effective consent.

In the Civil Code, part of the plastic wording of Article 953 of the previous regulation has been retained. Thus, Article 1206 of the Civil Code provides in para.1: "consent is vitiated when given by mistake, deceitfully or violently obtained". While this wording goes some way to differentiating how consent is vitiated in the three situations, we nevertheless believe that it may create confusion and misinterpretation of the vitiation of consent, despite the clarifications provided by the articles governing mistake, fraud or violence. For example, the wording "deceitfully" creates the impression of an instantaneous action, whereby one party is "surprised" by the fraudulent manoeuvres of the other. In the case of consumer contracts, for example, which are specific to consumer law, we cannot speak of instant malicious manoeuvres. Then, the wording "violently obtained" suggests a physical action, reducing the meaning of violence as a vice of consent to physical violence, we believe. The subjective aspect, of justified fear unduly induced by the other party or a third party, is revealed in the wording of articles 1216-1220 of the Civil Code, in order, we believe, to avoid a simplistic interpretation of this defect of consent. That is why we consider it appropriate to abandon the plastic expression in favour of a more austere formulation.

Thus, we propose, *de lege ferenda:* amending Article 1206(1) of the Civil Code to read "*consent is vitiated when it is given in error, deceitfully or violently obtained*" with the wording "*consent is vitiated by error, deceit or violence*".

The error is a psychological fact that can have legal consequences if it alters the will expressed at the conclusion of the contract (Dogaru, 1986), when the error may occur concerning not only the triggering of the internal will (formation of consent), but also the declaration, transmission or interpretation of the will (Ungureanu, 2007). Controversies in the doctrine on the types of error and their effects on the validity of the civil legal act have often been resolved by the courts, which have clarified the content of certain concepts, for example, that of "substance of the thing" or error on grounds outside the subject matter of the contract.

The regulation of mistake of law in the current Civil Code resolves most of the controversy about the conditions under which this type of mistake vitiates consent. However, in the case of Article 1208 para. 2 of the Civil Code, with regard to the wording "accessible and foreseeable legal provisions", we have an observation to make. While the accessibility of legal provisions can be quantified in various ways, the obvious one being publication in the official gazette, the foreseeability of legal provisions becomes difficult to assess in the light of the current legislative changes, and the assessment of the existence of an error of law becomes, in this case, synonymous with an assessment of the foresight capacity of the subjects who may have been in error of law, which comes close to a real psychological assessment that may go beyond the skills of a legist. The practical application of these provisions will show the difficulties arising from this wording, and it will then be possible to make proposals for amendments.

An important aspect, found in the Civil Code solutions, is the error concerning the simple reasons of the contract, an element of psychological subtlety, with determining effects on the legal level. It is generally accepted that it is for the parties to agree on what is and what is not essential to them in a contract, but it has been argued that mere knowledge of the reason by the other contracting party is not sufficient and must be expressly included in the contract. Thus, the Civil Code expressly states that mere subjective reasons, extraneous to the economics of the contract, are not part of the content of the agreement of will, so that the error on their part is not essential, unless they have been raised to the level of determining reasons.

This is yet another argument that not only justifies and even makes it necessary to study elements of the psychology of perception and decision making, to understand the cognitive mechanisms involved in giving legally valid consent.

Violence as a vice of consent combines extrinsic and intrinsic elements of the process of altering the legal will: an objective element - coercion, and a subjective element - fear. "Rational fear", "reverential fear" or "moral violence" are terms that have been constantly nuanced over time in doctrine, and in order to take into account the evolving nature of these concepts it is necessary to refer to new research tangential to the legal field. The provisions of the Civil Code on violence as a defect of consent are, for the most part, consistent with the findings of psychological research.

However, for the sake of accuracy and correctness of language, for practical reasons relating to the proof of vitiation of consent by violence, but also in order to correlate the provisions of the Code with the scientific

elements of personality psychology, we formulate the following proposal ***de lege ferenda***: amendment of Article 1216(4) of the Civil Code, which reads as follows *: "In all cases, the existence of violence shall be assessed taking into account the age, social status, health and character of the person on whom the violence was exercised, as well as any other circumstances that may have influenced his or her condition at the time of the conclusion of the contract"* , with the wording *"In all cases, the existence of violence shall be assessed taking into account the age, social status, health and personality of the person on whom the violence was exercised, as well as any other circumstances that may have influenced his or her condition at the time of the conclusion of the contract".*

Replacing the term "character" with "personality" is necessary both for theoretical and practical reasons. First of all, the meaning of the two concepts in psychology is different, character being only one component of personality, referring to the whole of the fundamental, moral attributes of a person, which is manifests itself in manner of behaviour, in ideas and in actions, and personality encompasses a broader spectrum of temperament, aptitude and character. Or the existence of violence is assessed taking into account all the personality traits of the person whose consent is vitiated. Second, modern psychological science has developed a number of standardised personality assessment tools that the court could use (through a psychological expert) to properly assess a situation of coerced consent.

Much of the controversy over the lession as a defect of consent is eliminated by the way it is regulated in the Civil Code in Articles 1221-1224, with the amendments provided for in Law no. 71 of 3 June 2011 for the implementation of Law no. 287/2009 on the Civil Code. As arguments, modern regulations are invoked, including projects for the unification or standardisation of private law at European and world level, in which it is proposed to broaden the scope of application of the injury. Indeed, in today's society, the legislator must protect the party who is at a significant economic or informational disadvantage from abuse by the stronger party.

In the context of the new civil law, we can say that the individual will, as the source of the right, benefits from a reconsideration.

Therefore, we consider it justified to approach the legal will from this perspective as well. We were also somewhat motivated by the opinion that the literature reflects "the tendency to legalise any institution to the extreme, by reducing it to the letter of the law and to case-by-case solutions", and challenged us, at the same time, in research, the "reproach" that "today nobody seems willing to make an effective evaluation of the mechanisms of formation and dynamisation of the legal act (or any other private law institution)", that "we are content with the exegesis of the

normative act, with the description of its (not always fine) mechanics, with the contemplation (critical or not) of the solutions of jurisprudence" (Vasilescu, 2003).

In this regard, we would add that the mechanisms of the legal will deciphered through the scientific filter of cognitive and experimental psychology can contribute not only to a just decision in specific cases judged by the courts, but also to the construction of legal institutions appropriate to both the social and psychological realities of the subjects of law.

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