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Loredana VLAD¹

Abstract

People are considered bio-psycho-social beings. From the beginning of mankind, violence as part of human nature has manifested itself in relation to the other through the crime committed by Cain against his brother Abel. As time passed, it was found that a form of protection is needed to prolong the life of the individual, and thus by accepting the "social contract", man gave up his natural state in which freedom was absolute, in order to obey the law.

In this paper I will bring to the fore a series of considerations with a focus on violence, emphasizing the idea of the vice of consent.

Keywords:

Individual; violence; social construct; freedom; consent vice.

I. Introduction

Violence is a concept we encounter every day, either at work or in the media, etc. We talk about violence in all its forms: physical violence, mental, economic or language violence. Postmodern man is characterized by minimal morality (Adorno, 1999). Violence as a form of manifestation can be analyzed from several perspectives: sociological, economic, psychological or philosophical when we talk about a phenomenology of violence. Although the phenomenon of violence has been known since the beginning of mankind, man has tried to find valid explanations for the aggressive behavior of individuals, so that different disciplines (and here we are talking about niche disciplines - genetic engineering, etc.) emerged with the development of new technologies (Vlad, 2019), seek to explain the aggressive behavior of man by emphasizing the traumas suffered in childhood, the environment in which a person grows and develops, education, etc.

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In this paper I will address the subject of violence - the vice of consent, but from an interdisciplinary perspective. Violence emerged as a social reaction (Hurbean, 2007), but the need for society to defend its members led to the emergence of several branches of law. In the Civil Code of 1864, but also in the present Civil Code, the specifics of each vice of consent are exposed, with a series of theoretical and practical differences. Regarding the „vice of consent of violence” it is found that there are no major changes regarding the two civil codes brought to the fore (Duță, 2012).

In the literature, violence (as a crime) is at the boundary between private law and public law. What is important to point out is that in Justinian's time fear was configured as a vice of consent (Giffard & Villers, 1976). Nowadays, within the general theory of civil law, vices of consent are found in the „conditions that are required to be met in order to express a valid consent. More precisely, for the valid formulation of any legal act, it is not enough for the manifestation of will to be conscious, externalized and made with the intention to produce legal effects; it is necessary for it to be expressed knowingly, so to speak, it is necessary not to violate the consent” (Hurbean, 2009).

II. About freedom and the choice or free will

Freedom has often been considered synonymous with „free will”, in the sense that „there are no constraints or obstacles to action or influences of any kind that limit us and prevent us from acting, determining or forcing us to act” (Popa, 2014). The issue of freedom to make decisions is often debated, given the fact that man is „handcuffed” by the moral values of the community in which he lives, but also by the legal framework in force. Freedom can be considered the possibility of man to choose between doing good or evil (evil being considered the absence of good). To act according to moral standards or according to an axiological system of values is to assume responsibility (Letourneau, 2004). When we talk about free will, we must bring to the fore the concept of (autonomous) will. The will is a concept that appears in the works of Arthur Schopenhauer (2019), Friedrich Nietzsche (2010), but also in I. Kant, who is emphasizing the „autonomy of the will” (1972).

Free will is a topic of interest when we bring the theological perspective to the forefront. The works of theology and dogmatics emphasize the fact that God instilled in the human individual reason and free will, namely „that ability to lead oneself” (Brașoveanu & Lozovanu, 2015).

Free will is an intensely debated topic in both philosophy, theology and law. The following can be stated about free will: „the issue of free will can be found in almost every important aspect of our lives. Morality, legislation, politics, religion, public policy, intimate relationships, feelings of guilt and

personal fulfillment - which is distinctly human - seem to depend on the fact that we perceive ourselves as autonomous people, capable of choices” (Harris, 2019). Arthur Schopenhauer also speaks about free will, but also Sigmund Freud, Foucault, Benjamin Liber, J.D. Haynes, Wegner, etc. Under the conditions of a paradigm shift (Kuhn, 1996), the postmodern individual must understand that his existence is unique, and his decisions must reflect the freedom to choose, without being subjected to external pressures.

III. Violence as a vice of consent

The validity of the consent involves that the consent is free and not to be altered in any form by what in the specialized literature is called the vice of consent (Duță, 2012). As pointed out in the literature, violence and law belong to two opposite worlds, given that „the existence of law is given by the need for human security and the sanctioning of any form of violence” (Neculăescu, 2017). Of course, in the field of law we can talk about multiple forms of violence, especially when it comes to contracts, given that one of the parties „exploits the state of dependence under which the contract was concluded” (Neculăescu, 2017). In these conditions, as Neculăescu C. states, „consent is not valid when it has been «extorted» by violence, as [...] as provided by art. 953 of our Civil Code, formula taken over by the current Civil Code at art. 1206. The vitiation of the consent is therefore limited to the human will, either of one of the contracting parties or of a third person. It is here that the Roman tradition according to which violence was seen exclusively as a crime, is present” (Neculăescu, 2017).

From G. Boroï's point of view, the „vice of consent” must be free and conscious: „vices of consent are those circumstances that affect the conscious and free character of the will to conclude a legal act. Specific to the vices of consent is the fact that there is a manifestation of will (there is therefore consent), but it is altered either in its intellectual content, conscious, as in the case of error and malice, or in its free character, as in the case of violence and injury” (Boroï & Anghelescu, 2012). On the other hand, in the context of violence, the following are expressed: „violence is that vice of consent which consists in threatening a person with an evil likely to cause him, without right, a fear that leads him to conclude a legal act, which otherwise it would not have ended it” (Boroï & Anghelescu, 2012). Another definition given to the notion of violence is the following: „violence is that vice of consent which consists in threatening a person with an evil likely to provoke a fear, which determines him to conclude a legal act that would not otherwise be concluded” (Răuschi & Ungureanu, 1995). As a vice of consent, violence is regulated by articles 1216-1220 of the Civil Code (Oprina & Rizoïu, 2020). The classification made by Boroï and Anghelescu refers to the nature and character of the threat, so that:

according to the nature of the evil, violence can be moral or physical, and according to the nature of the threat, it can be legitimate and illegitimate (Boroi & Anghelescu, 2012).

In order to be considered a vice of consent, violence is made up of two elements, namely a subjective one and an objective one; on the other hand, in order to be considered a vice of consent, violence must meet several requirements such as: instilled fear, illegitimate threat, and the threat to come to the other contracting party (Boroi & Anghelescu, 2012).

An important element to mention is related to the state of necessity, as it is not related to „concluding legal acts”, but to „committing legal acts” (Ungureanu, 2016). On the other hand, the vitiation of consent is not actually due to the threat, but to the fact that the threatened person does not feel fear in the face of threats. For this reason, when we talk about the vice of consent, we have in mind the subjective element, namely fear (Ungureanu, 2016), which is assessed on a case-by-case basis, but must exist when the legal act is concluded. For example, reverential fear (which springs from respect) cannot be considered a vice of consent (Ungureanu, 2016). As regulated, violence as a vice of consent is a civil crime, the victim can introduce two actions: on the one hand for the annulment of the legal act, and on the other hand an „action for damages”, as evidence of violence can be proven with any means of proof, this task falling to the victim (Ungureanu, 2016).

When we talk about violence we can bring to the fore several perspectives: psychological, legal, sociological, etc. In the literature, the concept of violence is described as: „the brutal or continuous disorganization of a personal, collective or social system and which translates into a loss of integrity, which can be physical, mental or material. This disorganization can operate through aggression, through the use of force, consciously or unconsciously, but there can also be violence only from the point of view of the victim, without the aggressor having the intention to do harm” (Debarbieux, 1996). The literature talks about multiple types of violence, but the term refers to aggressive behavior „manifested in socially undesirable ways” (Căprioară & Căprioară, 2013). From a legal perspective, it is considered that „violence is the general violation of human rights: the right to life, security, dignity and physical and mental integrity” (Căprioară & Căprioară, 2013). Article 1216 of the Civil Code provides as follows:

- „There is violence where the fear instilled is such that the threatened party could believe, under the circumstances, that, without his consent, his life, person, honor or property would be in serious imminent danger”;

- „Violence may also lead to the cancellation of the contract when it is directed against a close person, such as the husband, wife, ascendants or descendants of the party whose consent has been vitiated”;

- „In all cases, the existence of violence shall be assessed taking into account the age, social status, health and character of the person against whom the violence took place, as well as any other circumstances which may have influenced his condition at the time of conclusion of the contract”.

An important aspect that must be brought to the fore is related to the fact that violence affects the freedom of will, but not the will, which „although constrained, remains conscious” (Neculăescu, 2012). As mentioned earlier, vice occurs due to instilled fear, not violence.

We mentioned earlier that violence can take different forms, economic violence being brought to the fore in this context, even if we are talking about legal persons: „a legal person can be a victim of violence - vice of consent, if the representative on the occasion of the conclusion of a legal act, in the name and on behalf of the legal person, a violent action will be exercised on him, on the part of the co-contractor or of a third party in cohabitation with him” (Matefi, 2017). The previous statements are substantiated by the provisions of art. 209 para. (2) and of art. 218 of the Civil Code, „the natural person exercising the quality of administrative body has the right to represent the legal person vis-à-vis third parties concluding legal acts within the limits of the conferred powers, legal acts that are qualified by law as the acts of the legal person itself (para. (1) in art. 218)” (Matefi, 2017). Therefore, it can be stated that the „violent violation of the consent,, of a natural person „legal representative of a legal person” on the occasion of concluding a „legal act as an administrative body”, may also involve „vitiation of the consent of the legal person”, as specified in art. 1216 and of art. 1299 of the Civil Code.

IV. Conclusion

In this paper we analyzed violence as a vice of consent. In this paper we brought to the fore the concept of violence, starting from the legal perspective, but we also addressed the issue of freedom, will and free will. Since we cannot talk about these concepts only from a single perspective, the analysis is interdisciplinary, so we also introduced a philosophical perspective. The conclusions we reached after conducting this study is that the vice of consent occurs when the person is forced to perform an action such as signing a contract, but it also depends on the personality of the person on whom this type of violence is exercised.

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