# Error As A Vice Of Consent In Contracts

## A COMPARATIVE STUDY

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For the notion of obligation it is very useful to refer to Roman Law, where the subject was reasonably well developed. French, Italian and Maltese Law on the subject are very similar to Roman Law as modified by French Customary Law. Pothier and Domat, who were commentators of Roman Law were followed by the draftmen of the French Code and through it we have got the concept of vices and defects of consent into our Law.

The main vices or defects of consent are three: Error, Fraud and Violence. French Law also includes lesion, but this is more an element of 'causa' than of consent. These vices of consent, strictly speaking and with particular reference to our law make the contract not void but voidable, depending on the will of the person who has been in error or defrauded.

Generally speaking error means the false notion of a thing or contradiction between an idea and its object. "Where a man consents, believing that he is consenting to something entirely different, he can hardly be said to have consented at all to the actual transaction". (1) In this case there is apparent and not real agreement.

It is very useful to look at the Roman Law of contracts before trying to determine what the French, Italian and our laws say on the subject. The rules of Roman Law relating to the concept of vice of consent are a compromise between the difficult question as to whether the law is concerned with a man's real intention or with the intention as he has expressed it.

There was in Roman Law a distinction between 'stricti juris' contracts as, for example, the 'stipulatio', and other contracts. In the first the mistaken identity of the party would invalidate: likewise the identity of the subject matter, but mistakes as to the qualities of the subject matter were immaterial. In the other contracts the rule was that a fundamental mistake voided the contract but there was no exact definition of which mistake was to be considered fundamental. Many cases were dealt with, and commentators distinguished four kinds of error — In persona, In negotio, In Corpore, and In substantia.

Error as to the person always invalidated. This is not exactly so in modern law. The French Code says "mistake as to the person with whom one intends to contract does not cause the contract to be void unless the consideration of this person was the principal cause of the agreement." This principle is reproduced by our law in Sec. 1019 sub-sec 2. In the second place, error as to the nature of the transaction as, for example, when one of the parties intended loan, the other sale, invalidated.

Error as the identity of what was sold invalidated, while error as to the qualities of a thing was not ignored as in the 'stricti juris' contracts, but it only nullified the contract if it was very important; that is 'error in substantia' as opposed to 'error concomitans'. A lot of writers think that the distinction was first introduced by Justinian

"quotes in substantia erratur nullus est consensus". This distinction is not found in the sources but in the texts of the Corpus Juris and it was applied mostly to sale, as for example, a table of bronze which both parties think is of gold. However, it could even be that only one party was in error. In this case if his error was reasonable in the circumstances 'justas et probabilis error' the concept also applied. Furthermore, there is no reason why this should apply only to the buyer, it can also apply to the seller who should, however, usually know what he is selling. In Roman Law the doctrine of 'error in substantia' was probably applied only to two cases; When a thing was not of the stipulated material and also When there was a mistake as to the sex of a slave. In modern laws this has been extended to all cases where the quality is essential. It is not necessary that there should have been any misrepresentation by the seller. This would be the vice of fraud and not of error. The mistake must not be extended to the contract it is not what I think I am buying (this is my responsibility), but what the thing was sold as, that is the material factor.

In modern law we must distinguish between proper and improper error. The latter occurs where the parties are in error with regard to one of the essential requisites of a contract e.g.: the object or causa. In this case error is only of secondary consideration. Proper error is error when it acts on the consent of the parties and not on the other requisites of a contract and produces directly the voidness of the contract. A further distinction is necessary between 1. errore ostantivo 2. error in substantia and 3. error concomitans. The first two are essential errors, the last is accidental. The first one makes a contract void, the second only voidable whilst the third does not invalidate a contract but allows only for different judicial remedies according to the type of contract.

Neither the French, nor the Italian nor our Code make any mention of the errore ostantivo. The latter is in fact derived from natural equity, from Roman Law and from doctrine. This type of error excludes and not only vitiates consent and it produces the absolute voidness of the contract. This is because the exterior manifestations which produce consent are not in correspondence with the interior sentiments. Here the consent is void and, although for different reasons, is comparable to the consent given by a minor or an interdicted person. It is one thing when two people or one of them have agreed as to the nature or the object of a contract, but are in error as to one of its qualities, but quite a different thing when the parties are in error as to the nature of the contract or of the object itself. In the former case the error does not nullify the consent, although the contract may be annuled at the instance of one party. In the latter case the consent is non-existent and the contract is void and not voidable. Errore ostantivo, as can be seen, is merely the Roman Law concept of 'error in negotio' and 'error in ipso corpore' and also includes, according to early writers, mistake with regard to the price of a thing.

Again in modern laws, in which error is the principal vice of consent, there is no distinction between the error of one party or of both, but only a distinction between 'errore essenziale' and 'non essenziale'. While admitting the fact that error can have the effect of invalidating a contract we must keep in mind two considerations. Firstly in order that we might hold that error could reasonably invalidate we must consider whether the party in error would have entered into the contract or not had he not been in error. Secondly the rights

acquired by the other party and by third parties must be protected and, therefore, it is also necessary that the error must be excusable and determining. This was held to be so in the case of Frendo vs. Chetcuti decided by the 1st Hall in 1952 and confirmed in Appeal: "hemm bżonn illi l-iżball ikun invinċibili u li jkun ukoll skużabili. L-imprudenza u l-leġġerezza tal-kontraenti mhix raġuni ta' annullament ta' kuntratt".

As we have already said our Code only deals with certain types of error. In fact according to sec. 1018 "An error of law shall not void the contract, unless it was the sole or principal inducement thereof". Also Sec. 1019 provides 1. "an error of fact shall not void the contract unless it effects the substance itself of the thing which is the subject matter of the agreement" and 2. "the agreement shall not be void if the error relates solely to the person with whom the agreement has been made unless the consideration of the person has been the principal inducement thereof.

As can be seen our Law only deals with substantial error, error of law and to a certain extent with error as regards the person. This classification is very similar to that of Italian Law and therefore what is said about the different kinds of error in Italian doctrine can be applied to our law. I propose first to deal with error of law since this was in theory not admitted by Roman Law nor by the early commentators, although in practice many exceptions were made in order to preserve equity. Nowadays the question is merely a matter of degree. An error of fact is more easily excusable but this does not make an error of law completely inexcusable. To hold otherwise would be unjust especially since certain provisions of the law are by no means clear. Besides, the philosophy behind the maxim 'ignorance of the law is no defence', a maxim which applies especially in criminal law, is to prevent the law from becoming ineffectual. This can hardly be said to occur when one pleads, and proves error of the law in contracting. Here one does not want to avoid the law but merely to annul a contract which, in good faith was not done according to law. Despite this, this type of error was not included in the Code Napoleon, which only allowed error as to the substance and that as to the person. Two different interpretations were given to this clause. The first applied the rigour of Roman Law and denied the possibility of error of law, the other interpeted a reference to an error of substance as applying both to a substance of law and of fact. This latter view is the view followed by the Italian Code in Sec. 1109, by our Code in Sec. 1018 and also by our case law as, for example, in the case of Mifsud vs Polidano in 1944, where the Court held "l-iżball ta' dritt jikkostitwixxi vizzju tal-kunsens u jġib innullita tal-konvenzjoni, meta jkun ilkawża unika jew prinċipali ta' dik ilkonvenzjoni". This however produces the anomaly that while an error of law, if it is 'causa unica o determinante', always produces a vice of consent, an error of fact does not unless it refers to the substance or the person.

An error of fact is any error which does not relate to a provision of the law. The Romans, as we have seen, distinguished between 'error in substania' and 'error concomitans'. For them, however, and unlike us 'error in substantia' produced absolute nullity and not annulability. This seems to be equivalent to the doctrine of 'errore ostantivo' which, as we have mentioned, is not included in our Code. When we come to deal with substantial error, that is, error as to the quality of the object, we are faced with a variance of opinions both in doctrine and in French and Italian judgements as to what the mean-

ing of "sostanza" really is. It is certain that this is the opposite of accidental, and means that the object which I think I am buying is so different in one of its essential qualities from the object which I actually get as to make it practically a different object. Giorgi takes the view that because of the fact that the criterion we adopt is that whether the party would have still contracted had he known of the mistake, we must follow a subjective test; that is of the person who is in error, in order to see whether 'error in substantia' exists. This is the doctrine which we have also adopted and which is contrary to the objective test followed by Roman Law. It is a just and equitable doctrine and has everything in its favour except the feasibility of proof. That the doctrine of 'error in substantia' has also been accepted by our Courts is shown by various judgements of which we may quote Portanier vs Dalli of 1936, "biex jagħti lok għat-thassir tal-kunratt l-iżball ta' fatt irid ikun żball sostanzjali" — referring to mistake as to the quality of the thing and quoting to its favour an Italian judgement (Palumbo vs Giannone 1928) which applied as its criterion not whether the thing was made more onerous by the mistake, but the mistake constituted a vice only if it was such as to preclude or diminish the use of the thing according to its natural destination or to that intended by the parties.

The concept of error as to the person is found in the French, Italian, Swiss and German Codes besides our own. However, in order to vitiate consent the identity of the person must be material or, to be more precise, the contract must have been conducted in consideration of that given person as would, for example, generaly be the case in matrimony or donation. Where there is this error however, Pothier thinks that an obligation would still lie but based on equity and not on the contract. Doctrine has interpreted all this as including not only error as to the identity of the person but also with regard to his essential qualities. Here again the underlying thought is the fact that I am entering into a contract assuming that person to have such qualities, and, that I would not so enter if I knew that he did not possess them. However, it is important to remember that error with regard to the capacity of person is never excusable.

A difficult question discussed by textwriters is in which contracts can the identity of the person be considered as substantial? Although in the ultimate analysis it is for the judge to decide whether the 'error in persona' has vitiated consent, writers have tried to classify those contracts, where the identity and quality of the person are definitely material. First amongst these, for obvious reasons, are contracts of a gratuitous title and the contracts of partnership, mandate and deposit. According to the said Codes an error when compromising to be material must be an error of fact referring either to the person or to the object: an error of law does not, in such cases, invalidate. Finally, according to Giorgi, 'error in persona' is determining in contracts of an onerous title which have for their object an act, positive or negative, which is 'non fungibile', when we understand the latter as meaning an act for the completion of which certain special qualities of a determinate person are required. On the contrary' error in persona' where the object consists in 'un fatto fungibile', as for example, the raising of a wall, or in contracts of an onerous title which have for their object the delivery of a thing, does not make the contract void. However, even in the latter case, we must make an exception for those qualities considered as belonging to the substance of the

thing as, for example, the buying of a manuscript of a renowned author.

When discussing the question whether an error with regard to the motive can vitiate consent we are walking on very thin ice. Those who hold motive to be a determining element and, therefo e, an error with regard to it as nullifying the contract base themselves on the wording of the Italian Code "che non vi possa essere alcuna obligazione senza causa". But the Romans and authors of the Italian Code did not mean by 'causa' the motive but "i momenti di fatto". Puffendorf thought that mistaken motive would make the contract void and gave the example of a party buying horses having been informed that his have perished. Here, he says, the parties tacitly agree that the truth of the information is a condition for the validity of the contract, and I can withdraw if this is proved false: only I have to compensate for damages. But as Barbeyrac says if this is a condition the contract would be absolutely null and 'defectu conditionis' no damages would lie. We cannot annul a contract, like we cannot a legacy, because the motive of the party when contracting or when giving a legacy does not materialize.

Giorgi says that we must speak with caution when we say that error as to the motive does not vitiate consent. The same occurs when we interpret 'error in substantia' subjectively, that is the prime motive of the contract is the idea that I am obtaining something which has certain qualities. It is for these reasons that Giorgi concludes "che dobbiamo ritener vera la massima, che l'errore sui motivi non vizia il consenso, purche s'intenda restrittivamente a quei soli motivi, che non furono la causa determinante del contratto". With ail due respect to Giorgi, I think that a distinction is necessary between the motive of a person in contracting and error with regard to that motive. If my motive in contracting is a particular person or one who has certain qualities and it results that I was in error as to that person or those qualities, it is one thing, and in the cases allowed by law the contract can be rescinded. However, it is a different situation if my motives for dealing with such and such a person are mistaken, even if such motives are the determining reason for which I contract. It would be highly unjust to make the other party suffer a recission of the contract solely because I was mistaken with regard to my motives for entering into the contract.

To sum up a few points with regard to error generally, we might conclude that error has obviously to be proved and it also has to be excusable. Furthermore as we have already said, and although some writers of renown such as Toullier do not agree, error can be unilateral as well as bilateral. The latter condition has never, not even in Roman Law, been enumerated as a necessary condition for the vitiation of consent in any law. On the contrary the Swiss and German Codes expressly mention that it can be unilateral. In this case, however, the injured party has on action according to Giorgi 'ex delicto' but more probably 'ex quasi delicto' on the grounds of unjustified enrichment.

Finally it is important to determine to what prescription the action of rescission for a vice of consent is subject. According to our law as exemplified in the Connatasi vs Tabone Case of 1945 "L-azzjoni għall-rexissjoni ta' Kuntratt minħabba vjolenza, żball, qerq, stat ta' mara miżżewġa, interdizzjoni jew minorità, hija suġġetta għall-preskrizzjoni ta' sentejn, meta l-liġi għal xi raġuni partikulari, ma tistabbilix preskrizzjoni aqsar."

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(1) Buckland.