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# CONSIDERATIONS ON THE THEORY OF NONEXISTENT LEGAL ACTS IN ROMAN LAW

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**ABSTRACT**
*WORDING THE NONEXISTENT LEGAL ACTS THEORY BY M.C.S. ZACHARIAE, GAVE RISE TO A CONTROVERSY ABOUT ITS USEFULNESS IN THE LEGAL WORLD. IF AT THE TIME OF ITS APPEARANCE, THE LEGAL ABSENCE WAS BOUND TO BE APPLIED ONLY IN THREE CASES OF MARRIAGE MATTER, THE SUPPORTERS OF THIS THEORY HAVE EXPANDED ITS SCOPE OVER OTHER LEGAL DOCUMENTS AS WELL, SUCH AS SALES. ALTHOUGH OUTLINING THIS THEORY TOOK PLACE IN THE NINETEENTH CENTURY, THE ROMAN SOCIETY WAS NOT FOREIGN TO THIS SANCTION. THIS STUDY AIMS TO PRESENT THE CAUSES DETERMINING THE NONEXISTENCE OF LEGAL ACTS IN ROMAN LAW. ALSO, WHERE POSSIBLE, I TRIED DRAWING COMPARISONS WITH THE CURRENT ROMANIAN CIVIL LAW.*

**KEY WORDS:** THEORY OF NONEXISTENT LEGAL ACTS, NULLITY, ROMAN LAW

## INTRODUCTION

The theory of nonexistent legal acts was drawn up for the first time by Professor M.C.S. Zachariae from the Faculty of Law in Heidelberg in order to complement the classical theory of the legal act invalidity. According to Zachariae's theory, the legal act lacking an essential element in order for it to take form (such as consent, object, cause) is more than null, it is nonexistent[2]. This was aimed to resolve the following cases with respect to marriage: the lack of consent, gender identity and lack of marriage conclusion by the official state authority. From this point, the doctrine extended the nonexistence theory to other legal acts as well, and "*according to most authors' opinion and doctrine, it was admitted also by the legislator, when determining nullities of marriage*"[3]. Although the outlining of the nonexistent legal acts theory took place in the nineteenth century, the Roman society was not foreign to this concept.

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[2] M.C.S. Zachariae, "*Cours de droit civil français"*, (F. Lagier Librairie, Strasbourg, 1839) tome I: 66; tome III: 210-211.
[3] George Plastara, "*Curs de drept civil român pus la curent cu noua legislație"*, vol. IV, (Cartea Românească, București, 1925): 615.

## THE THEORY OF NONEXISTENT LEGAL ACTS IN ROMAN LAW

The Roman law did not draw a clear distinction between the nonexistence of legal acts and their nullity. This was due to the fact that a general theory on invalidity of legal acts was not expressed. In the primitive Roman society the nonexistence was closely linked to its social and legal structure. Thus, "*for the human beings to be able to participate in legal life, it should have had capacity or personality (caput)*" [4]. According to the Roman law, not all beings were born with personality and could have rights and assume obligations, but only free people. However, they were not equal, but their capacity was distinctive according to "*membership of a particular social class, ethnic origin, or attitude adopted towards the Romanian state expansionism*"[5]. The nonexistence of legal acts was aimed primarily at slaves and pilgrims.

The slaves had no personality and could not conclude legal acts because they had no possibility to become holders of rights and assume obligations. "*From a legal perspective, the slave was considered a simple thing (res), and was part of his master's property*"[6]. Therefore, the legal acts concluded by slaves in their own name were "*believed to have no legal existence*"[7]. There was an exception to this rule and the legal acts concluded by slaves were considered valid if they improved their master's condition, that is if the master acquired rights. In this case, the Romans thought the slave borrowed the master's personality, because they could not act as his representative as long as they had no capacity. "*This mechanism could work only as long as the contracts were unilateral*"[8]. With the development of Roman society and hence of the commercial operations, due to the emergence of bilateral contracts, "*it was admitted that in some cases, the slave should undertake in his own name, while binding the master at the same time*"[9], although their personality was still not recognized.

Pilgrims were part of free men, who were not citizens though. They did not enjoy *jus civile*, but could use the law of the city in which they lived as long as it was not contrary to the principles of Roman law. Therefore, pilgrims had no access to civil law provisions, and "*with the exception of those who enjoyed jus comercii, they were believed to have no legal existence*" [10].

The doctrine developed also the idea that in Roman law the lack of fulfilling a substantive condition resulted in the absence of the legal act. Thus, it was asserted that the nonexistence may have as cause the lack of an essential element for its formation "*so that the act cannot be conceived without this element*"[11]. The main causes for nonexistence of substance discussed in the doctrine are the lack of consent, lack of action and lack of capacity because these three are essential elements of the contract, giving it own identity. "*In the absence of any one of those three elements, there is no contract*"[12]. With regard to the cause of the contract, the Romans did not consider it an essential element as they mistook for the reasons of the legal act conclusion.

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[4] Emil Molcuț, "*Drept privat roman"*, (Universul Juridic, București, 2007): 83.
[5] Emil Molcuț, "*Drept privat roman"...*, 83.
[6] Emil Molcuț, "*Drept privat roman"...*, 85.
[7] Pavel Filip, "*Nulitatea actului juridic civil prin prisma interesului ocrotit",* (Hamangiu, București, 2016): 40.
[8] Emil Molcuț, "*Drept privat roman"...*, 86.
[9] Emil Emil Molcuț, "*Drept privat roman"...*, 86.
[10] Pavel Filip, "*Nulitatea actului juridic civil prin prisma interesului ocrotit"...,* 40.
[11] Marcel Planiol, Georges Ripert, "*Traité élémentaire de droit civil~, ed. 12-a,* (Paris, 1935): 354.
[12] Emil Molcuț, "*Drept privat roman"...*, 181.

The definition given by Romans to consent has remained rooted in modern civil law as well. Thus, consent means the "*substantive, essential and general condition of the civil legal act which is the outwardly manifested decision to conclude a civil legal act*"[13]. The term *consensu* derives from the phrase *cum sentire* which meant to have a common view with the other side. The old Roman law was coordinated by the principle of formalism and in order to produce legal effects, the consent had to be externalized in the form required by law. The causes altering the consent were twofold: the first category entailed the absence thereof, and the second category resulted in its vitiation. The first contained frivolity and error, and the second, fear and undue influence/deceit.

Earnest/Reliability assumed that the consent expression should not be done in jest or in circumstances showing beyond doubt that the intention of the parties was to exclude assuming obligation. Such circumstances existed when one party was mental or one of the contractors was an infans, who could not speak coherently.

The error is "*misrepresenting reality on the occasion of the civil legal act conclusion*"[14]. Depending on the aspects toward which it was directed, the Romans made a distinction between *error esentialis* leading to the nonexistence of contract, and *error minus essentialis* which had no effect on the same. The following were considered essential errors whose existence made it impossible for a contract to be concluded: error in negotio, error in persona, error in corpore and error in substantia.

Error in negotio is misrepresenting the nature of the legal act in the sense that a Party considers that they conclude a particular legal act, while the other Party believes it is another legal operation. "*In such a situation, both Parties are in error, with no consensus for any of the contracts*"[15]. In this regard, Ulpian wrote that "*If I gave you money as donation, and thou hast received it as loan, it is neither donation nor loan*".

Error in persona is the error on the identity of the person with whom the contract is entered into, and consists in that a Party believes it has completed the legal act with a certain person, and in fact has concluded it with another. For example, A believes they are granting a loan to B, and in actual fact the borrower is C.

Error in corpore wears on the object identity and it occurs when a Party believes that the legal act object is a certain property, and the other Party is considering another one. For example, A believes they will borrow a car, and B believes that it is a motorcycle.

Error in substantia is the error on the essential qualities of the object, and it occurs when the goods acquired by concluding the legal act is made from another material than that which the Party believes it will have. Traditionally the examples given are acquiring a brass vessel the Party believes of gold, or of a slave woman whom they consider man.

It is noted that these four types of errors that the Romans considered essential for the conclusion of a legal act, have been preserved also in the current Romanian civil law. Unlike Roman law, the penalty applicable today to the legal act concluded by a Party whose consent was vitiated by an essential error is the relative nullity. Also in contemporary civil law is retained as error in persona also the error on a quality of the Party without which the contract would not have been concluded.

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[13] See Ion Dogaru, Sevastian Cercel, "*Drept civil Partea generală*", (C.H. Beck, București, 2007): 115; Gabriel Boroi, Liviu Stănciulescu, "*Instituții de drept civil în reglementarea noului Cod civil*", (Hamangiu, București, 2012): 94.
[14] Ion Dogaru, Sevastian Cercel, "*Drept civil Partea generală"...,* 118.
[15] Ion Dogaru, "*Drept civil român. Idei producătoare de efecte juridice",* (All Beck, București, 2002): 364.

In a legal sense, the fear is the "*violence that is exercised against a person in order to induce them to conclude the contract*"[16]. From this definition one may see that the Roman law fear is the vitiated consent of violence in the current civil law as it is presented both in theory and in Art. 1216 from the Romanian Civil Code. However, there are clear differences between the two.

In the ancient Roman law, as now, there was a distinction made between physical and psychological violence. The first occurred when a person concluded a legal act under the influence of physical constraints. In this case, violence represented a case of absence of consent. The second type of violence, the psychological one, consisted in threatening one Party with something evil to cause them to conclude the contract and did not affect the consent in any way. Therefore, in case of psychological violence the legal act could not be attacked. Considering the constraints of the ancient Roman law formalism, the use of any type of violence against one Party was almost impossible. Amid trade development and completion of further more diversified categories of contracts, formalism so present in Roman law experienced a decline that led to the need to punish also psychological violence. Thus, towards the end of the republic, the victims of violence could defend themselves citing *exceptio metus* or could invoke a procedural means (*actio metus*) through which it was possible to obtain the cancellation of the contract.

Consequently, if physical violence represented a case of absence of consent and hence of the legal act, only toward the end of the old Roman law era psychological violence could lead to cancellation of the contract. Currently, the Romanian civil law sanctions by relative nullity the legal acts concluded by a Party whose consent has been undermined by physical or moral violence.

The deceit/deception consisted in using cunning or deceptive manoeuvres by one Party to cause the other Party to enter into a particular contract. It is noted, as in the case of violence, that this Roman legal reality corresponds to the vitiated consent of deception in the current civil law. Unlike in the Romanian legal present where deceit is sanctioned with the relative nullity of the act, in Roman law it was not punished. As with physical violence, in the first century and following the development of trade acts, the praetor made available for the victim of deception a procedural means by which they could obtain the cancellation of the contract.

The object of the contract in Roman law consisted solely in creating obligations which were later executed by separate acts from the contract they were provided in. In this respect, the object of the contract was confused with its effects and was not transferring ownership, but only generated obligations. Broadly, the object of the contract was confused with the object of the obligation which was represented by the performance of the obligor had to perform to their creditor. In the absence of the object, the contract did not exist.

In the current civil law, the object of the contract is the legal operation upon which the Parties agree as resulting from the contractual rights and obligations. In Art. 1225 par. 1 Civil Code, sale, lease, loan, and the like are given by way of example. The object of the obligation is defined in Art. 1226 par. 2 Civil Code as the "*services the debtor undertakes*" such as the seller's obligation to deliver the object to the buyer. It should be noted that "*the object is a substantive, essential, of validity, and general condition of the civil legal act*"[17] and according to Art. 1225 par. 2 Civil Code, its absence causes absolute nullity of the contract.

[16] Emil Molcuț, "*Drept privat roman*"..., 182.
[17] Gabriel Boroi, Liviu Stănciulescu, "*Instituții de drept civil în reglementarea noului Cod civil*"..., 116.

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Apart from the legal nonexistence based on the lack of capacity to contract or a substantive condition, in the doctrine was presented the view according to which nonexistence also resulted from the conclusion of a legal act in violation of imperfect laws. Thus, during the Republic, laws were the most important source of law and depending also on the nature of the penalty, they were classified as: perfectae, minus quam perfecate and imperfectae. Perfect laws were those which ordered that the legal act concluded in violation of the law was to be cancelled. The less perfect laws provided that the legal act would not be cancelled, but its author had to be sanctioned usually by paying a fine. Imperfect laws did not provide any penalty for drafting a legal act in violation of the law. In the latter case, it may be considered that the act did not exist since the law expressly provided the cases of nullity for the acts drafted in violation of legal requirements.

**CONCLUSION**

Consequently, from the research conducted I can conclude that the Romans knew the nonexistence of legal acts based on the following reasons: the lack of capacity to contract, the existence of a frivolous consent or one affected by one of the errors considered essential or by physical violence, and the absence of the object. Also, after nullity was expressly provided for in the perfect laws, the absence continued to be applied in parallel with the latter for acts concluded in breach of the conditions required by the imperfect laws.

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9. Romanian civil code.