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Injury due to pressing need relating to third parties: a systematic study of the defects of the legal transaction*

Lesão por premente necessidade relativa a terceiros: um estudo sistemático dos defeitos do negócio jurídico

Daño por necesidad apremiante relativa a terceros: un estudio sistemático de los vicios del negocio jurídico

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Abstract

The legal discipline of injury, as set out in art. 157 of the Civil Code of 2002 does not clarify whether the pressing need, required as a subjective requirement for the configuration of this defect in the legal transaction, is motivated by pending danger to the interests of third parties. These third parties may include family members, friends, or even people with no ties to the injured party but for whose benefit the injured party saw no alternative but to enter into the unbalanced transaction. The possibility is expressly provided within the scope of the legal regime provided for coercion and the state of danger, which raises doubts about the legislator's silence regarding the intentionality of the injury. Thus, this study proposes an interpretative path to solving the issue, starting with a systematic look at the defects of the legal transaction and paying attention to the functional profile of business invalidities.

Keywords: defects in legal transactions; injury; state of danger; coercion; third parties.

Resumo

A disciplina jurídica da lesão, conforme prevista pelo art. 157 do Código Civil de 2002, não esclarece se seria possível que a premente necessidade, exigida como requisito subjetivo para a configuração desse defeito do negócio jurídico, seja motivada por perigo pendente sobre os interesses de terceiros. Esses terceiros podem incluir familiares, amigos ou até pessoas sem vínculo anterior com o lesado, mas em prol das quais este não viu alternativa senão celebrar o negócio desequilibrado. A possibilidade encontra previsão expressa no âmbito do regime jurídico previsto para a coação e para o estado de perigo, o que suscita a dúvida quanto a ter ou não o silêncio do legislador sido intencional no que tange à lesão. Desse modo, este estudo propõe um caminho interpretativo para a solução da questão, partindo de um olhar sistemático sobre os defeitos do negócio jurídico e atentando ao perfil funcional das invalidades negociais.

***Palavras-chave**: defeitos do negócio jurídico; lesão; estado de perigo; coação; terceiros.*

Resumen

La disciplina jurídica del daño, según lo previsto por el art. 157 del Código Civil de 2002, no aclara si sería posible que la necesidad apremiante, exigida como requisito subjetivo para la configuración de este vicio del negocio jurídico, sea motivada por un peligro que afecte los intereses de terceros. Estos terceros pueden incluir familiares, amigos incluso personas sin vínculo previo con el afectado, pero en favor de quienes este no encontró otra alternativa que celebrar el negocio desequilibrado. Esta posibilidad cuenta con previsión expresa en el régimen jurídico relativo a la coacción y al estado de peligro, lo que genera la duda sobre si el silencio del legislador respecto al daño fue intencional. Por lo tanto, este estudio propone un enfoque interpretativo para resolver esta cuestión, partiendo de una mirada sistemática sobre los vicios del negocio jurídico y considerando el perfil funcional de las invalideces negociales.

***Palabras clave:** vicios del negocio jurídico; daño; estado de peligro; coacción; terceros.*

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1 Introduction: injury in the face of other business defects

One of the most famous innovations of the Civil Code of 2002 in relation to the codification of 1916 was, without a doubt, the legislative option of reintroducing, in Brazilian positive civil law, the reference to injury as a business defect. The codifier followed, strictly speaking, the reference already proposed in the Preliminary Draft of the Code of Obligations of 1964, authored by Caio Mário da Silva Pereira, whose article 62 proposed: "The declaration of will is defective when one of the parties, abusing the inexperience or pressing need of the other, obtains for himself or for a third party a patrimonial advantage manifestly disproportionate to the benefit resulting from the opposite performance, or excessively exorbitant of normality". As is known, in a famous previous work, in which he supported the reinsertion of the institute in Brazilian law, the author recognized that, disciplined at the time only as a criminal type, the injury should give rise to the nullity of the contract; but it suggested, *de lege ferenda*, its positivity as a cause for annulment[1] (without considering the so-called rescindability, as in Italian law)[2], in order to allow the interested party to reestablish the economic balance if it so wished.

Following this doctrinal orientation, the 2002 codifier chose to adopt criteria for assessing the injury that were purely objective in relation to the party to whom the injury benefits: it does not matter, for the configuration of the defect, whether the benefited celebrant adopted the minimum diligence to identify it, and not even whether or not he was aware of the injured party's need or inexperience[3]. The purpose of the rule, here, appears to be declaredly more drastic than in the other business defects, sheltering not only the individual interest of the victim of the injury, but also the social interest in promoting material equality in business relations, an expression of the incidence of the principle of solidarity[4]. For this very reason, the

[1] PEREIRA, Caio Mário da Silva. **The injury to contracts**. Rio de Janeiro: Forense, 1959, p. 224.

[2] In response to the criticism of Clóvis do Couto e Silva, who argued for the adoption of the term "rescindable" instead of "voidable" in matters of injury and state of danger, the writer of the General Part of the Draft of the current Civil Code, Moreira Alves, expressly stated: "the simple replacement of one term by another would not be enough, and it would be necessary to include the discipline of the action for rescission, as, for example, it is found in the Civil Codes of Italy of 1865 and 1942, and in the Draft Code of Obligations of Prof. Caio Mário da Silva Pereira. I am one of those who understand that there is no fundamental reason to accept, in our law, the distinction between voidability and rescindability as to the state of danger and injury" (ALVES, José Carlos Moreira**. The General Part of the Brazilian Civil Code Project**. São Paulo: Saraiva, 1986, p. 59). The author concludes: "On the other hand, establishing the current Brazilian Civil Code – a principle that was maintained in the Draft Bill – that fraud against creditors is a defect that leads to voidability, it would be incoherent to consider the injury and the state of danger – defects in the manifestation of will that are close to intent and coercion – causes of rescindability. I preferred, therefore, not to introduce into our law that distinction that arose in France for historical reasons and in terms different from those of today, which disappeared after the French Revolution when these reasons withered, and which reappeared in the Code Napoleon, passing from there to other codes" (p. 61).

[3] In summary, "the use is required, but not the intent to take advantage. Hence the objective nature of the injury is affirmed, and it is sufficient to characterize it the disproportionate performance and the factual circumstance of the exploitation, dispensing with the investigation into the intention to take advantage" (TEPEDINO, Gustavo; BARBOZA, Heloisa Helena; MORAES, Maria Celina Bodin de (Org.). **Civil Code interpreted in accordance with the Constitution of the Republic**,v. I. Rio de Janeiro: Renovar, 2004, p. 299). This is also the orientation of Statement No. 150 of the III Conference on Civil Law, promoted by the Federal Justice Council, in 2004, according to which "The injury referred to in article 157 of the Civil Code does not require intent to take advantage".

[4] As previously considered in SOUZA, Eduardo Nunes de. **General theory of legal transaction invalidities**: nullity

defect of injury seems to be poorly placed in the list of defects of the legal transaction; Its *rationale* is, in general terms, that of the protection of supra-individual interests together with the interest of the vulnerable party in the transaction, justifying that it had been included among the causes of nullity of the legal transaction[5].

Inserted, despite this, among the business defects, such findings do not prevent the search in the normative discipline provided for the institute of injury a certain consistency in relation to the legal regime of the other defects present in the same chapter. In fact, there are countless inconsistencies between the rules provided for each of the defects of the legal transaction, apparently motivated more by legislative lapse than by conscious political choice. Illustratively, in the case of a legal transaction voidable due to the occurrence of an essential error, the hypothesis in which the party that contracted in error and intends the annulment of the transaction may have its claim barred if the other party offers to comply with the agreement in the exact terms that the first party had actually conceived. The provision is found in article 144 of the Civil Code, which considers the act fully valid in such circumstances, conferring on the party that did not have its will vitiated in the business the power to remedy the defect[6]. Likewise, the act tainted with injury will not be invalidated "if a sufficient supplement is offered, or if the favored party agrees with the reduction of the benefit" (art. 157, §2 of the Civil Code). However, the legislator failed to expressly provide for such a solution in the face of other defects, such as the state of danger.

Notwithstanding this omission, it seems reasonable to extend this possibility of validation also to the state of danger, always with respect to the protection of the interest of the party that was harmed[7]. Would it be possible, then, in the same sense, another analogical

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and voidability in contemporary civil law. São Paulo: Almedina, 2017, p. 331.

[5] According to Marcos Bernardes de Mello, the injury would have been included in the list of causes of voidability because the legislator would have been concerned with giving it subjective elements, consisting of the pressing need or inexperience on the part of the injured party, while the objectivist current, which maintains that only the obligation to provide a manifestly disproportionate performance is relevant to the injury, would be linked to nullity (MELLO, Marcos Bernardes de.**Theory of legal fact:** plane of validity. São Paulo: Saraiva, 2009, p. 200). Even if such requirements would approximate the injury to the defects of consent, this does not seem to be a determining factor for the nature of invalidity, particularly in view of the history of the institute of injury in the country, intrinsically linked to the fight against crimes against the popular economy**.** In this regard, Humberto Theodoro Júnior comments that "it is not detected in the injury or in the state of danger a defect in the constitution of the legal transaction with an act of will, but in its economic organization. More attention is paid to the protection of the criteria of justice and equity, in business practice, than to freedom of will" (THEODORO JÚNIOR, Humberto. On the defects of the legal transaction in the new Civil Code: fraud, state of danger and injury. **EMERJ Journal**, v. 5, n. 20. Rio de Janeiro: 2002, p. 70).

[6] The example is considered a reflection of the principle of conservation of the legal transaction, based on a corresponding provision in the Italian Civil Code, by TRABUCCHI, Alberto. **Istituzioni di diritto civile**. Padova: CEDAM, 2015, p. 158. In Brazilian law, it is also stated that it is a manifestation of the principle of *please negotii* – or conservation of the legal business (SILVESTRE, Gilberto Fachetti. New problems, old solutions: the broad meaning of the rebus sic stantibus clause and the renegotiation, suspension and conservation of civil and commercial contracts. **Civilistic. with**, Rio de Janeiro, v. 9, n. 2, p. 1-26, 2020).

[7] This is proposed in the Italian doctrine, considering that the *Codice civile* it is also omitted in cases of intent and moral violence. Cf., in this regard, LUCARELLI, Francesco. **Lesione di interesse e annullamento del contratto**. Milano: Giuffrè, 1964, pp. 143 et seq. and, more recently, POLIDORI, Stefano. Lesione d'interesse e annullamento del contratto: attualità e prospettive. **Rassegna di diritto civile**. Anno 33, n. 1. Napoli: ESI, 2012, which states: "if the condition for the annulment of the contract is that the defect has determined a loss, where it has been timely removed, there is no longer any reason to accept the claim of the contracting party to be released from the bond.

interpretation, this time with a view to attracting, for the injury regime, a provision expressly provided for only for other defects, such as the state of danger? Here we consider the rule stipulated by *the caput* and the sole paragraph of article 156, according to which the state of danger can be characterized not only by the need of the person who is obliged to save himself, but also by the urgency of saving a "person of his family" or even a "person not belonging to the family of the declarant" – the latter hypothesis in which "the judge will decide according to the circumstances". The same provision is provided for in matters of coercion by *the caput* and sole paragraph of article 151. The literality of article 157 does not offer any similar provision, not considering a pressing need of the injured party motivated by danger to his family members or third parties. Would this, however, be a deliberate omission by the legislator? This is what is now being discussed.

2 A systematic look at the discipline of business defects in the Civil Code

That the "pressing need" alluded to in the *caput* of article 157 of the Civil Code, as a subjective requirement of the defect of injury, may correspond to a factual situation very similar to the danger dealt with in article 156, seems to be little controversial in the current doctrine[8]8. Injury, in fact, reveals itself in almost all aspects as a vice of simpler configuration than the state of danger[9], including the fact that the pressing need is a broader concept than the need to save someone "from serious damage" required for the characterization of the latter institute[10]. Undoubtedly, the historical association of injury with usurious transactions[11] usually

Framed among these premises, Lucarelli's thesis seems coherent according to which the institute of rectification, although provided textually only in the discipline of error, also applies to cases of contract voidable by intent or violence. [...] the legal system does not consider worthy of protection the claim for annulment of the contract sought by the party who, although having incurred a defect, has not suffered an actual loss or will not suffer it, having intervened the offer of rectification" (p. 255-259. Free translation). In Brazilian law, cf. NEVARES, Ana Luiza Maia. The error, the willful misconduct, the injury and the state of danger in the Civil Code. *In fashion*: TEPEDINO, Gustavo (coord.). The Civil Code in the civil-constitutional perspective. Rio de Janeiro: Renovar, 2013, p. 296; and SOUZA, Eduardo Nunes de. **General theory of legal transaction invalidities**, op. cit., p. 298. And also, Statement No. 148 of the III Conference on Civil Law, promoted by the Federal Justice Council in 2004: "Paragraph 2 of article 157 applies to the 'state of danger' (article 156)".

[8] On the occasion of the legislative processing of the Civil Code of 2002, the intention seems to have been different. In this sense, the Revision Committee of the Project even recorded that "injury occurs when there is no state of danger, due to the need to save oneself; the 'pressing need' is, for example, to obtain resources", as reproduced, ALVES, José Carlos Moreira. **The General Part of the Brazilian Civil Code Project**, op. cit., p. 144.

[9] Some authors, such as Paulo Lôbo, even consider that "the state of danger is a species of the genus injury" (LÔBO, Paulo. **Civil law:** General Part. São Paulo: Saraiva, 2009, p. 290).

[10] In this sense, for example, Humberto Thedoro Júnior states that the state of danger differs from injury "mainly" by the requirement of intent to take advantage of it for the configuration of the former (THEODORO JÚNIOR, Humberto; TEIXEIRA, Sálvio de Figueiredo (coord.). **Comments on the new Civil Code**, v. III, t. 1. Rio de Janeiro: Forense, 2006, p. 212). Ana Luiza Maia Nevares also states that the subjective element of the injury "can take on different features, such as contracting in a state of necessity" (NEVARES, Ana Luiza Maia. The error, the willful misconduct, the injury and the state of danger in the Civil Code, cit., p. 294).

[11] It is enough to remember that, in Brazilian law, after injury was excluded by the Civil Code of 1916, "after an interval of more than 20 years, the Law for the Protection of the Popular Economy (Decree-Law No. 869, of 11-18-1938, replaced by Law No. 1,521, of 12-26-1951) brought a rule that once again opened the doors of the national legal system to the institute of injury" (RODRIGUES, Silvio. **Civil law**. São Paulo: Saraiva, 2007. v. I, p. 226).

refers to contracts involving pecuniary payments, particularly loans, while the most common examples of a state of danger are usually related to benefits of another[nature][12]. No structural characteristic of the injury, however, limits the institute to the borrowing relationship or, in general terms, to contraction of a pecuniary obligation[13] – and, in any case, it is not difficult to imagine concrete cases in which someone may contract, for example, a loan of money pressed by the need to use the resources thus obtained to save himself or others from imminent danger.

It is also frequent in the doctrine to warn that the "necessity" that the legislator considers for the configuration of the injury is not limited to complete miserability, but may also cover unfavorable patrimonial situations that entail an urgency in contracting to obtain resources[14] – as if to suggest that the term "necessity" always implies a financial need. The observation, curiously, is also found in the Italian doctrine[15], in reference to the term "*stato di bisogno*", used in article 1.448 of the *Codex* to define *the lesion*[16]. In neither of the two languages, however, do the terms used have such a semantic limitation, and it is also true that neither of the two coders chose to declare the injured party's need as exclusively financial[17]. In any case, even if this were the case, the problem of protecting third parties would not be removed: it is not difficult to imagine a hypothesis in which the party alleging the injury contracted with a view to obtaining resources to pay off debts or provide financial assistance to others.

If such considerations are true, as they seem, it is perfectly possible that the same concrete situation may configure, indistinctly, injury or state of danger (assuming, of course, that the requirement of intent to take advantage is present for the characterization of the latter)[18]. Undoubtedly, if it is the declarant himself who is in danger, seeing his life, his health,

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[12] The Revision Committee of the 2002 Civil Code Project, in this sense, even recorded in an opinion that the autonomy of the state of danger in relation to the injury would be justifiable because "in the state of danger, someone is obliged to give or do (performance) for a consideration always to do; hence it is not possible to supplement the consideration to validate the business", as reproduced by ALVES, José Carlos Moreira. **The General Part of the Brazilian Civil Code Project**, op. cit., p. 144. This distinction, however, is not reflected in the wording of article 156 – and so much so that, as seen above, the doctrine supports the possibility of extending the rule of paragraph 2 of article 157 to the state of danger.

[13] On the contrary, according to Caio Mário da Silva Pereira, in most Western Codes, the injury "suffered a certain restriction, which reduced its field of action to the purchase and sale contract and to sharing" (PEREIRA, Caio Mário da Silva. **Civil law institutions.** Rio de Janeiro: GEN, 2024. v.I, p. 384).

[14] Cf., for example, TEPEDINO, Gustavo; OLIVA, Milena Donato. **Fundamentals of civil law**. Rio de Janeiro: GEN, 2020. v.1, p. 328.

[15] Cf., illustratively, TRABUCCHI, Alberto. **Istituzioni di diritto civile**, op. cit., p. 171, citing an understanding of the Italian Court of Cassation, according to which necessity ("*stato di bisogno*") "does not necessarily coincide with indigence, and may also consist of a contingent situation of economic difficulty" (free translation).

[16] "Art. 1.448: *Se vi è sproporzione tra la prestazione di una parte e quella dell'altra, e la sproporzione è dipesa dallo stato di bisogno di una parte, del quale l'altra ha approfittato per trarne vantaggio, la parte danneggiata può domandare la rescissione del contratto*. […]". In free translation: "If there is a disproportion between the actions of one party and the other, and the disproportion depends on the state of need of one party, which the other took advantage of to obtain an advantage, the injured party may request the termination of the contract [...]".

[17] Thus, the doctrine also clarifies that "the contractual necessity does not arise from the economic or financial capacity of the injured party, but from the circumstance that he cannot fail to do the business" (PEREIRA, Caio Mário da Silva. **Injury in contracts**, op. cit., p. 196).

[18] In the same direction: THEODORO JÚNIOR, Humberto; TEIXEIRA, Sálvio de Figueiredo (coord.). **Comments**

other existential interests or even his patrimonial subsistence at risk of serious damage, it may be that he will assume, for this reason, an extremely costly obligation, which would not only require excessive sacrifice (to configure the objective requirement of the state of danger) but, In addition, it is completely disproportionate to the benefit obtained with the same contract (which would allow the objective requirement of the injury to be configured). Just think of the example, omnipresent in the manuals, of the person who, drowning on the high seas, agrees to buy, from a sailor who passes by him in a boat, a lifebuoy for an exorbitant price.

This peculiarity of the defects of the legal transaction, which makes them factually interchangeable in numerous concrete situations subsumable to more than one of them, far from representing a failure of the legislator, evidences the quality of the normative system for protecting the integrity of the negotiating will[19]. In this sense, although conceptually none of the business defects are confused, all of them having singular configuration requirements, it is fully possible that a particular factual hypothesis meets all the requirements for the identification of more than one different defect[20]. Precisely for this reason, however, the question arises as to the extent of the applicability of a figure such as injury when the legislator fails to provide, in its legal regime, an expansive rule such as the one that contemplates family members of the declarant and other people in the state of danger – especially because these are two defects so closely related.

In other words, what are the limits of the "pressing need" referred to in article 157? More specifically: whose need should it be – or, even: to what extent is it legitimate for the declarant who claims to have been harmed to characterize as his need the urgency of protecting the interests of third parties? The wording of the normative provision does not allow us to state in advance that the 2002 codifier deliberately intended to exclude This possibility; neither do the conceptual limits conferred on the injury by the doctrine[21]. A comparison with the legal regime of the state of danger, however, could lead to the conclusion that, where the legislature intended to cover the interests of third parties, it did so expressly. In this last direction, it cannot be forgotten that the legal consequence of the configuration of any of the business defects is the voidability of the

on the new Civil Code, v. III, t. 1, cit., p. 215.

[19] Illustratively, when identifying the procedural difficulties for proving the injury, Silvio Rodrigues also pondered in the light of the Civil Code of 1916: "Now, instead of trying to produce such difficult evidence, it will be more convenient for the injured party to resort to the action for annulment of the agreement, based on intent or coercion of the other contracting party" (RODRIGUES, Silvio. **On the defects of consent**. São Paulo: Saraiva, 1989, p. 220).

[20] It is stated, in this sense, that "it is enough to prove one of the defects for the legal transaction to be subject to invalidity. If there is more than one species, the result is the same, that is, the annulment depends on the initiative of the injured party" (LÔBO, Paulo. **Direito civil**, op. cit., p. 276).

[21] See, for example, the example of injury formulated by Caio Mário da Silva Pereira: "An individual in an inland town, deprived of resources, has a son at death's door, to whom the doctor has prescribed a certain medication, which only exists in a pharmacy. The pharmacist sells it to him for an extortionate, very high price. Even if the buyer is a businessman, known as the very rich, he will have carried out the deal under pressing necessity, faced with the alternative of seeing his son die or submitting to the seller's demand" (PEREIRA, Caio Mário da Silva. **Injury in contracts**, op. cit., p. 196).

business, to the detriment of the interests of the contractor to whom the business benefits. In the state of danger, the latter is required to have an additional requirement in order to be able to suffer the request for annulment (the aforementioned intent to take advantage), but not in the case of injury – which could justify why, in the latter, the law has chosen to be more restrictive as to the type of need authorizing the invalidation.

The situation becomes even more complex when the legal regimes of injury and state of danger are compared with the normative discipline of another negotiating defect: coercion. As is well known, in the more traditional doctrine, especially under the aegis of the Civil Code of 1916 – which provided only for coercion, and not the other two defects – it was discussed whether the declaration of will resulting from serious necessity, even when it had not been caused with the deliberate intention of extracting such manifestation from the declarant, could constitute the vice of coercion[22]. Although today there is no longer room for confusing the figures – it is certain that, both in the injury and in the state of danger, the reason that leads the injured party to declare will cannot have been deliberately caused for this purpose[23] –, the proximity between them is undeniable, which seems to justify, in a preliminary analysis, that their legal regimes are very close to a large extent.

And, in fact, also in coercion, the legislator provided, in *the caput* of article 151 of the Civil Code – reproducing, in this aspect, the regime already present in the previous codification – that the "well-founded fear of imminent and considerable damage" that afflicts the coercion may be directed at his own person, his property or the person of his family. The 2002 codificator went even further, providing for an innovative rule in the sole paragraph of the same article 151, according to which, if the threat of harm "concerns a person not belonging to the patient's family, the judge, based on the circumstances, will decide whether there was coercion"[24]. In other words, he chose to equate the requirements that configure coercion, in this aspect, strictly to the same requirements that characterize the figure of the state of danger, also inaugurated by him. When dealing with the injury, however, he remained silent about the dangers that could hang over the injured party's family members or third parties.

What can be extracted from the systematic analysis of the legal discipline of these three figures? Now, when applying the positive norm, it is up to the interpreter to do so in a

[22] Silvio Rodrigues, for example, when dealing with the state of danger, noted that "most jurists understand that it is a figure that fits within the coercion, and all the writers who dealt with the matter have dealt with it, although offering different solutions" (RODRIGUES**,** Silvio. **Direito civil**, v. I, op. cit., p. 218).

[23] PEREIRA, Caio Mário da Silva. **Instituições de direito civil**, v. I, p. 377; THEODORO JÚNIOR, Humberto; TEIXEIRA, Sálvio de Figueiredo (coord.). **Comments on the new Civil Code**, v. III, t. 1, cit., p. 213-214; NEVARES, Ana Luiza Maia. The error, the willful misconduct, the injury and the state of danger in the Civil Code, cit., p. 293.

[24] The doctrine that commented on the Civil Code of 1916, however, already defended the possibility that the threat to non-family third parties could constitute coercion, and it was up to the coato, in these cases, "to prove the intensity of the bond that binds him to such people, so that the fear of harm to be inflicted on them was enough to extract from them an unwanted consent. [...] the judge must be given considerable freedom to examine the concrete case and to decide whether or not there was an element capable of vitiating the consensus" (RODRIGUES, Silvio. **On the Defects of Consent**, op. cit., p. 298).

coherent way, that is, in order to reconstruct, at the moment of application, the unity of the system, both from the logical-conceptual point of view and (and above all) from the evaluative point of view[25]. In other words, the application of the negotiation defect of the injury cannot produce, in the concrete case, results that contradict the same axiological framework that guides the legal discipline of coercion and the state of danger. This basic guideline, so often reiterated by the civil-constitutional doctrine, is in fact very little innovative: it only highlights the finding, which seems to be in general domain, that the law cannot be interpreted, assuming that the legislator intended to discipline identical situations in different ways[26]. In order to affirm that in the injury the interests of the declarant's family members or third parties are not sufficient to configure the pressing need, therefore, it is necessary, first, to identify the *ratio* that would have justified such discrimination in relation to coercion and the state of danger. The investigation may be facilitated by following the opposite argumentative path, that is, asking why, in these last two figures, the interests of third parties were covered.

3 Evaluative profile of business invalidity and the protection of third parties in the configuration of the injury

At this point in the argument, it seems appropriate to momentarily suspend the particular analysis of the institute of injury and recall the broader problem that this figure deals with – namely, that of the invalidity of the legal transaction. In particular, it should be noted that the normative discipline of the validity of legal transactions translates, in reality, into an axiological judgment on these acts, based on the assessment of the fulfillment or not of certain requirements by their structure[27] – requirements that, for the legislator, would be necessary and sufficient to denote the legitimacy of the legal effects that the act is intended to produce[28]. Such requirements

[25] "There are no norms that do not presuppose the system and that at the same time do not contribute to forming it; There are no norms that are not intelligible in their effective scope if they are not inserted, as integral parts, in a formal (legislative system) and substantial (social system) totality. This result postulates the overcoming of exegesis considered exclusively as a search and individualization of the literal meaning of the text" (PERLINGIERI, Pietro. **Civil law in constitutional legality**. Trad. Maria Cristina De Cicco. Rio de Janeiro: Renovar, 2008, p. 628). In Brazilian law, allow us to refer to: SOUZA, Eduardo Nunes de. Indices of the interpreter's adherence to the methodology of civil-constitutional law. **Journal of the Faculty of Law of UERJ,** v. 41. Rio de Janeiro: UERJ, 2022, p. 15 et seq.

[26] BOBBIO, Norberto. The good legislator. Trad. Eduardo Nunes de Souza. **Civilistica.com**, v. 10, n. 3, p. 4,2021.

[27] Antônio Menezes Cordeiro considers nullity "a structural failure of the business" (CORDEIRO, Antônio Menezes **Tratado de direito civil**, v. II. Coimbra: Almedina, 2012, p. 924), emphasizing its link to the static profile of the business act. In this sense, Caio Mário da Silva Pereira states about the invalidity of the legal transaction "that its configuration will be linked to its structure" (PEREIRA, Caio Mário da Silva**. Instituições de direito civil**, v. I, cit., p. 447).

[28] In Italian law, for example, Guido Alpa states: "In legal language, this term [validity] and its opposite [invalidity] have a precise technical meaning: the contract and, more generally, the transaction [...] it is not valid when it does not meet the requirements indicated by law" (ALPA, Guido. **Corso di diritto contrattuale**. Padova: CEDAM, 2006, p. 120. Free translation). In the French doctrine, the definition is already found in the work of Aubry and Rau: "nullity is the invalidity or ineffectiveness of an act that is affected as contravening a command or a prohibition of the law" (AUBRY, Charles; RAU, Charles Frédéric**. Cours de droit civil français**, t. 1er. Paris: ILGJ, 1869, p. 118. Free translation). In Brazilian law, see Orlando Gomes: "Null business is that which is practiced with violation of a legal

can be understood, at the same time, as minimum assumptions, the observance of which allows the legislator to presume that, in the normal case, the effects to be produced by a certain legal transaction may be recognized by the legal system, that is, they may be clothed with legality and enforceability[29].

The role played by invalidities, in this sense, is not merely to investigate the presence or absence of certain defects in the original structure of an act, but rather to signal to the interpreter a presumption of legitimacy or illegitimacy of legal situations, which usually result from acts that have or do not have such defects. It is the system's approval of the effects that will potentially result from each legal act that the legislator deals with when providing for its validity[30]. In the same line of reasoning, the effects arising from acts that do not meet all the requirements for validity are presumed to be contrary to the system. As can be seen, although it is an analysis triggered by defects originating in the act, that is, verified in the abstract only on its structure, we are still faced with an evaluative analysis – even if restricted, at first, to the limits inherent to the general and abstract nature of the legislated norm. According to the assessment of legal situations normally arising from acts with such or such defects, the legislator provides for the rules of nullity and voidability, with specific and sufficient consequences, in most cases[31], to regulate these effects[32].

In the most varied areas of civil law, on the other hand, the insufficiency of the exclusively structural analysis and, *a priori*, of the law for an effective evaluative control of private autonomy in the light of constitutional legality is progressively verified[33]. In terms of the invalidity of legal acts, the need for a functional and dynamic analysis implies that the assessment of the effects, specifically produced by certain (in principle) invalid acts, may justify a different legal treatment in relation to the abstract regime provided for nullity or nullability in negotiations[34], in the light of a judgment of the merit of the protection of values and interests

precept of public order" (GOMES, Orlando. **Introduction to civil law**. Rio de Janeiro: Forense, 2008, p. 423).

[29] Pietro Perlingieri teaches: "Juridicality translates into the power to carry out or to require others to carry out (or to refrain from carrying out) certain acts and finds confirmation in principles and legal norms" (PERLINGIERI, Pietro. **O direito civil na legalidade constitucional**, op. cit., p. 672).

[30] Cf. SOUZA, Eduardo Nunes de. **Teoria geral das invalidities do negócio jurídico**, cit., *passim*.

[31] But not always, since the positive regime of invalidities itself, if observed in an exclusively structuralist and fragmented way, can prove to be frankly inadequate – to the point of leading some authors to question its operativeness (cf., for example, RIBEIRO, Raphael Rego Borges. The failure of the constitutionalization of inheritance law in the Civil Code of 2002 and the need for a critical theory of succession law. **Civilistica.com**, v. 10, n. 1, p. 33, 2021).

[32] Caio Mário da Silva Pereira recognized the value of the classical theory of nullities, but recommended "common sense" in its application: "what must be borne in mind is that traditional concepts are still and should be considered constitutive of a convenient system" (PEREIRA, Caio Mário da Silva **Instituições de direito civil**, v. I, cit., p. 541-542).

[33] Perlingieri argues: "A vast and suggestive research program is opened up for the civilist, which proposes the achievement of qualified objectives: to identify a system of civil law more harmonized with the fundamental principles and, in particular, with the existential needs of the person; redefine the foundation and extension of legal institutes, especially civil institutes, highlighting their functional profiles, in an attempt to revitalize each norm in the light of a renewed value judgment [...]" (PERLINGIERI, Pietro. **Civil law in constitutional** legality, op. cit., p. 591).

[34] In fact, René Japiot, one of the exponents of the critical theory of nullities in France, denounced the artificiality of the classical system – which, according to the author, "[...] it only presents the regime of nullities in this elegant and

concretely involved[35]. Once the legal causes of invalidity are understood, as an abstract judgment made by the legislator on the probable effects to be produced by certain acts, it seems logical to conclude that this judgment can and should be completed in concrete terms by the interpreter, who is authorized to dismiss, in part or in whole, the ordinary consequences of nullity or voidability if he or she identifies an interest deserving of protection[36] that, justifiably justifies it[37].

Returning to the problem of the defects of the legal transaction, it is necessary to note that the legislative provision that coercion and the state of danger can be characterized, even when the risk feared by the declarant is run by someone else, does not result from an arbitrary choice by the legislator, but reflects an authentic value judgment. These are provisions that have been celebrated by the doctrine, insofar as they reflect the prevalence, in the legislative balance, of interests of a primarily existential order, aimed at the protection of human persons. Particularly, with regard to the protection of non-family third parties in coercion and in the state of danger, it has already been stated that the legislator has given prestige to "the bonds of affection, not restricting their protection to the bonds proper to family organizations. What matters is to verify whether the reason for the hiring was to save someone with whom the contractor has a deep emotional bond [...] in order to compromise the formation of the will"[38]. It is even understood that a third party without any prior link with the declarant can be protected, since "human solidarity is sufficient to justify the coercion's succumbing to the coercion's demands"[39].

In this sense, in fact, although the legislator, both in coercion and in the state of danger, has only referred the protection of third parties not familiar with the declarant to the judge's analysis,

clear form, taking as its starting point certain conceptions born of the imagination of theoreticians, and violating objective realities to attribute to them a purely artificial simplicity" (JAPIOT, René. **Des nullités en matière d'actes juridiques**: éssai d'une théorie nouvelle**.** Paris: LGDJ, 1909, p. 156. Free translation).

[35] As summarized by Pietro Perlingieri, "the individuated interests, deduced in the contract or connected to them, are diverse, so that contractual pathologies are obliged to conform to such interests. The 'remedies' must be adequate to the interests" (PERLINGIERI, Pietro**. Civil law in constitutional** legality, op. cit., p. 374). In Brazilian law, cf. BDINE JÚNIOR, Hamid Charaf. **Effects of the null legal transaction**. São Paulo: Saraiva, 2010, p. 211; SOUZA, Eduardo Nunes de. Invalidity of the legal transaction from a functional perspective. *In*: TEPEDINO, Gustavo (coord.). **The Civil Code in the civil-constitutional perspective:** General Part. Rio de Janeiro: Renovar, 2013, p. 375 et seq.

[36] This is a concrete weighting that must accompany the assessment previously carried out by the legislator. Regarding these two instances of weighting, cf. BARCELLOS, Ana Paula de. **Weighting, rationality and jurisdictional activity.** Rio de Janeiro: Renovar, 2005, p. 154-155.

[37] In this sense, Hamid Charaf Bdine Júnior proposes that "what is in view in the field of invalidities are the values to be protected. Those who are most worthy of protection are given prestige [...]. If such values are honored by the maintenance of the contract that the legal system lists among those subject to nullity, the invalidity will not be declared, which, as a sanction, must be justified by the violation of the same purposes indicated" (BDINE JÚNIOR, Hamid Charaf**. Effects of null legal transaction**, op. cit., p. 131).

[38] TEPEDINO, Gustavo; OLIVA, Milena Donato. **Fundamentos do direito civil**, v. I, cit., p. 321 and 323. In the same sense: NEVARES, Ana Luiza Maia. The error, the willful misconduct, the injury and the state of danger in the Civil Code, op. cit., p. 294.

[39] THEODORO JÚNIOR, Humberto; TEIXEIRA, Sálvio de Figueiredo (coord.). **Comments on the new Civil Code**, v. III, t. 1, cit., p. 179.

strictly speaking, this analysis is indispensable in all cases[40]. After all, the rules on the invalidity of the legal transaction (including those that focus on the characterization of *the fattispecie* authorizing the voidability, such as the defects of the legal transaction) indicate only the result of a prior consideration by the legislator, but do not exhaust the entire evaluative judgment (to be completed by the interpreter in each concrete case) to determine whether or not a specific transaction may or may not produce effects. That is to say: the fact that the protection is directed to a family member only allows us to presume[41] that the declarant's interest in postulating the subsequent annulment of the act will be deserving of protection; but also in this case it is up to the judge to analyze the concrete peculiarities[42]. In fact, even in the case where the danger is run by the declarant himself, this is true: see, for example, how in coercion it is required that the threat instills "well-founded fear" in the coercion (art. 151), considering his personal circumstances (art. 152) – issues that the interpreter can only assess in concrete[43].

Such considerations are based on an apparent contradiction: it is necessary to have recourse, at the same time, to both the structural analysis in terms of functional analysis, to identify a disability[44]. In fact, although the problem of validity is only faced with a legal cause (express or virtual)[45] of invalidity to be observed in the structure of the legal act, the final conclusion as to validity depends on the assessment of the effects that the act may (and usually) have concretely produced, in the absence of the initial presumption of non-conformity of these effects with the legal system. Only in concrete terms can the judge confirm the

[40] According to José Roberto de Castro Neves, the possibility of the coercion referring to a threat to third parties who are not family members of the declarant "is in line with the subjective criterion, mentioned above, accepted by the Brazilian legal system in order to configure coercion, since, strictly speaking, the degree of friendship and affection between the person threatened and the coerced person can be much greater than the affection between members of the same family" (Coercion and fraud against creditors in the Civil Code of 2002. *In*: TEPEDINO, Gustavo (coord.). **The Civil Code in the civil-constitutional perspective**. Rio de Janeiro: Renovar, 2013, p. 307).

[41] Regarding the regime of coercion under the Civil Code of 1916, Silvio Rodrigues taught that "if the threat is aimed at the family of the contracting party, including the spouse, parents, grandparents, descendants in general and siblings [...] there is a presumption *iuris tantum* that the threat of harm to one of these people vitiates consent" (RODRIGUES, Silvio. **On the defects of consent**, op. cit., p. 297-298).

[42] According to Humberto Theodoro Júnior, "On the person of the coercion himself or on a person in his family, it is easy to presume the force of coercion that the threat produces in the formative process of the will. [...] The guidance of the Code, however, does not require any bond as a prerequisite for coercion on a person not related to the coercion. What has to be verified *in concreto* is the suitability, at the moment of the threat of harm to another, of the fact having an intense impact on the spirit of the person from whom the deformed declaration of will will be required" (THEODORO JÚNIOR, Humberto; TEIXEIRA, Sálvio de Figueiredo (coord.). **Comments on the new Civil Code**, v. III, t. 1, cit., p. 178).

[43] "The Brazilian Civil Code freed itself from Roman influence to adopt the concrete criterion, that is, the criterion for examining the individual case; In effect, it orders that it be verified whether or not the patient had his will injured and adulterated by coercion. [...] As individuals react differently to violence, so the judge must examine, in each individual case, the greater or lesser repercussion of the threat on the patient, disregarding it when excessively futile, but admitting it when in such a way as to impress the victim of coercion" (RODRIGUES, Silvio. **Direito civil**, v. I, cit., p. 204).

[44] Cf. SOUZA, Eduardo Nunes de. **General theory of the invalidities of the legal transaction**, cit., item 2.4.

[45] Francesco Galgano teaches: "it is not required, for a contract to be null, that nullity be provided for by law as a consequence of the violation of an imperative rule; it is sufficient that a mandatory rule has been violated. [...] It is the so-called virtual nullity, which overcomes the ancient principle of textual nullity" (Il negozio giuridico**.** *In*: CICÙ, Antonio; MESSINEO, Francesco; MENGONI, Luigi; SCHLESINGER, Piero (coord.). **Trattato di diritto civile e commerciale**. Milano: Giuffrè, 2002, p. 267. Free translation).

adequacy of the discipline provided for by law for the purposes of the act in accordance with the defects verified (characterizing nullity or voidability, with the peculiarities of each regime) or, on the contrary, modulate the legal discipline, justifying the feasibility of maintaining some or all of the effects of the act or, also, the need for its total or partial undoing[46]. This argumentative itinerary seems to authorize the redimensioning of the real relevance of the omission, by art.

157 of the Civil Code, with regard to the "pressing need" being characterized by a danger arising from persons other than the injured party himself. The drafting choice of the provision does not exhaust, and could not, the value judgment necessary for the configuration or removal of a cause of business invalidity. Apparently, here the legislator simply preferred not to enunciate, in the abstract, any preliminary conclusion as to the merit of protection of the interests of a declarant who sees, in the threats to others, a pressing need of his, capable of annulling his declaration of will[47]. With this, it delegated to the interpreter the relevant task of inquiring, in the concrete case[48], whether the interest in protecting third parties should be sheltered through the configuration of "necessity" – this itself, it should be emphasized, an indeterminate expression and inexorably open to the interpretative fulfillment of its content[49]. To this end, it will be up to the hermeneutic, without a doubt, to consider the interests of the party to whom the contract benefits (especially considering that, in the event of injury, the latter's intent is dispensed with). But it cannot fail to pay attention to the preference of the Brazilian legal system for the protection of the existential interests of the person, particularly social and family solidarity. This preference derives from the general clause for the protection of the human person (article 1, III of the Constitution) and is implemented, by indirect incidence of this principle, in rules such as those of the sole paragraphs of arts. 151 and 156 of the Civil Code, which may be invoked, by analogy, if it is concluded that the declarant's interest is legitimate. In fact, every interpretation,

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[46] From this perspective, allow us to refer to Eduardo Nunes de Souza. A functional rereading of the invalidities of the legal transaction: a proposal for modulation of the effects of null and voidable acts. **Civilistica.com**, Rio de Janeiro, v. 6, n. 1, p.1-48, 2017.

[47] Similarly, under the Civil Code of 1916, in which the letter of the law restricted the configuration of the vice of coercion to cases in which there was a threat to the patient or his family (as a rule apparently exclusive to non-family third parties), Silvio Rodrigues defended: "although the Civil Code, when using the word *family*, gives the impression of rejecting an exegesis that encompasses third parties, not relatives of the contracting party, the very breadth of that term reveals, as already noted, the legislator's intention to leave the door open to a more liberal interpretation. It is not repugnant, therefore, to grant the judge the competence to, examining the concrete case, annul the transaction because it recognizes that the will that generated it is coerced, even when the coercion is represented by a threat addressed not to the contracting party or his relatives, but to a friend, fiancée or other person so connected to him that the fear of seeing her suffer has been enough to extort his consent" (RODRIGUES, Silvio. **On the Defects of Consent**, op. cit., p. 294).

[48] On this interaction between legislative activity and the role of the interpreter, from a civil-constitutional perspective, it is possible to refer to the considerations
developed in Eduardo Nunes de Souza. Indices of adherence of the interpreter to the methodology of civil-constitutional law, op. cit., p. 24 et seq.

[49] On the role of the interpreter in filling in the content of indeterminate expressions, cf. RODOTÀ, Stefano.
Ideologies and techniques of reform of civil law. Trad. Eduardo Nunes de Souza. **Civilistica.com**, Rio de Janeiro, v. 13, n. 1, p.1-28, 2024.

the civil-constitutional doctrine clarifies, is, to a certain extent, analogical[50]: after all, no legislated rule is capable of exhausting the infinite diversity of peculiarities revealed by concrete cases – many certainly similar, but never totally identical.

4 Concluding summary

The present work intended to demonstrate that a systematic view of the discipline of the defects of the legal transaction in the Brazilian Civil Code reduces the relevance of the legislator's omission, when dealing with the institute of injury, as to the possibility that the pressing need that characterizes the subjective situation of the injured party arises from danger incident on a third person and not on the declarant himself harmed by the disproportion between installments. In fact, this possibility, which is expressly provided for in cases of a state of danger and coercion, seems perfectly extendable to the hypotheses of injury, provided that its true meaning is understood: even in the latter cases, in which it is literally mentioned by law, the interpreter is required to analyze, in each specific case, the impact that the intention to protect third parties effectively had on the declarant's will, ultimately making a judgment of merit of protection over the interests at stake.

The annulability resulting from the configuration of the injury or other defects, therefore, must be, also in these cases, the reflection of a value judgment initiated by the legislator and completed by the judge in the face of the factual circumstances. Only after this process, if it is concluded that the interests of the party that is alleged to have been injured are preferential, will the claim for invalidation be legitimate. In no case, therefore, the express legal authorization that the defect covers the intention to protect third parties (or the omission of the law on this point) can, *per se*, lead to an automatic and necessary configuration (or refutation) of the cause of voidability.

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[50] As Pietro Perlingieri considers, "interpretation is always analogical, since, strictly speaking, one does not proceed by identity between norm and fact, but by similarity between the *abstract fattispecie* provided for in the norms and the concrete fact" (PERLINGIERI, Pietro. **Manuale di diritto civile**. Napoli: ESI, 2014. p. 114. Free translation).

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