

## CANONICAL REFLECTION ON THE IMPACT OF *DOLUS* ON JURIDICAL ACTS IN THE PIO-BENEDICTINE CODE OF CANON LAW

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**ABSTRACT:** It is well known that in many respects the 1917 Code of Canon Law, also known as the Pio-Benedictin Code of Canon Law, is an important source for understanding canonical legislation of the 1983 Code of Canon Law. This is also true when it comes to canonical legislation concerning juridical acts as well as that concerning the impact of *dolus* on juridical acts. It is for this very reason that the aim of the present paper is to provide a reflection on the impact of *dolus* on legal acts in the light of the legislation of the 1917 Code of Canon Law. The starting point for the reflection is the general norm on the impact of *dolus* on legal acts, which is laid down in canon 103, § 2 of the 1917 Code of Canon Law. As is well known, canon law in general does not contain definitions of the terms used. This is also true when it comes to *dolus*. The 1917 Code of Canon Law does not provide a definition of *dolus*, but entrusts this task to canonical commentators. Canonical literature has developed several definitions of *dolus*, which are included in this paper. The work also contains an analysis of the essential elements of *dolus*, then continues with a presentation of the division of *dolus* and the legal effects of *dolus* on juridical acts. All this contributes to a good understanding of *dolus* and its impact on legal acts in the Code.

**Keywords:** juridical act, valid, invalid, code, canon law, *dolus*, defects, law, rescindable, canonical commentators.

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## Introduction

As it is known the 1917 Code of Canon Law<sup>2</sup> constitutes a basis for the understanding of the legislation from the 1983 Code of Canon Law. This is also true when talking about the impact of *dolus* on juridical acts. Given that, the goal of this paper is to provide a canonical reflection of the notion of *dolus* and its impact on juridical acts as from the perspective of the 1917 Code.

The reflection will begin with canon 103, § 2 of the 1917 Code, which stated the general norm with regard to the acts placed out of *dolus*, without, however, offering a definition of that term.

Given the lack of a specific definition of *dolus* in the 1917 Code, the following analysis will present some important issues integral to an understating of *dolus*. The paper will begin with the presentation of the very notion of *dolus*. This notion will include the semantic evolution of the term itself; the meaning given to *dolus* in the 1917 Code; and the descriptions provided for *dolus* by the commentators on the 1917 Code. Following upon this exposition, the paper will focus on the essential elements of *dolus* from which the analysis will turn to the division of *dolus* and its legal effects. The paper will end with a summary of the issues treated throughout it.

## The Notion of *Dolus*

Canon 103, § 2 of the 1917 Code stated: “Acts placed under grave and unjustly incurred fear or by *dolus* are valid unless the law states otherwise; but they can, according to canons 1684-1689, be rescinded by judicial sentence, sought either by the injured party or by office”<sup>3</sup>.

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<sup>2</sup> Henceforth cited as the 1917 Code.

<sup>3</sup> 1917 Code, c. 103, § 2: *Actus positi ex metu gravi et iniuste incusso vel ex dolo, valent, nisi aliud iure caveatur; sed possunt ad normam can. 1684-1689 per iudicis sententiam rescindi, sive ad petitionem partis laesae sive ex officio. Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, Rome 1917. English translation from *The Pio-Benedictine Code of Canon Law, in English Translation with Extensive Scholarly Apparatus*, San Francisco 2001. All subsequent English translation of canons from this code will be taken from this source unless otherwise indicated.

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This canon stated the general norm with regard to juridical acts placed out of *dolus*, yet it did not describe the nature of *dolus* nor its elements, its divisions and its effects. Given that lack, in order to understand the norm stated in canon 103, § 2 it is necessary to achieve a certain description of *dolus*.

### **The Semantic Evolution of the Term *Dolus***

Gérard Fransen has demonstrated that the term *dolus* — *δολος* in Greek—from an etymological point of view and in its primitive sense, designated any artifice employed to hide something; a ruse<sup>4</sup>. Also, *dolus* was divided into *dolus bonus* and *dolus malus* in order to determine the moral character of *dolus*.<sup>5</sup> Thus, *dolus bonus* was understood as being “a trick employed for a good purpose, such as the deception of a thief or of one’s enemy in war”<sup>6</sup>, or “a type of exaggeration in a transaction such as a sale”<sup>7</sup>, while *dolus malus* was understood as being any “deceitful action employed to derive some unfair advantage of another”<sup>8</sup>. However, “through common usage the latter signification became so identified with this term itself as to become the exclusive sense in which it was used, and the former connotation has almost completely passed into desuetude”<sup>9</sup>.

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<sup>4</sup> G. Fransen, *Le dol dans la conclusion des actes juridiques: évolution des doctrines et système du code canonique*, Gembloux, J. Duculot 1946, 12. Cf. also Cesare Badii, *Il dolo nel Codice di Diritto Canonico*, *Il Diritto Ecclesiastico* 40, 1929, 308.

<sup>5</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 12.

<sup>6</sup> J.s V. Brown, *The Invalidating Effects of Force, Fear, and Fraud Upon the Canonical Novitiate: A Historical Conspectus and a Commentary*, Canon Law Studies 311, Washington D.C., 1951, 104.

<sup>7</sup> K. W. Vann, *Canon 1098 of the Revised Code of Canon Law: History, Development, and Implications*, Rome 1985, 6.

<sup>8</sup> Brown, *The Invalidating Effects of Force* 104.

<sup>9</sup> Brown, *The Invalidating Effects of Force* 104. See also Fransen, *Le dol dans la conclusion des actes juridiques* 12; Vann, *Canon 1098 of the Revised Code of Canon Law* 6.

The first legal reference to *dolus* in Roman law is found in the law of the *Twelve Tables*, attributed to Numa. In this law *dolus* appears together with *sciens* and refers to the means employed to injure another person, to cause damage to another person. This was the first juridical meaning of *dolus*<sup>10</sup>.

Eventually, this juridical meaning became split in two distinct directions. The first dropped the term *sciens* and retained only *dolus*, indicating the intention of committing delicts, i.e., the will to violate the law. The second insisted on the etymologic meaning of *dolus*, i.e., the intention to deceive. The second is seen in the descriptions given to *dolus* by the classic jurists<sup>11</sup>.

Of these, by far the most important is the one elaborated by Labeo<sup>12</sup>. His description, found in the *Digest* of Justinian, is universally accepted both in civil and canon law up to present day<sup>13</sup>. The pertinent text of the *Digest* states:

Ulpien, in the Book XI, on the Edict. — By this Edict, the Praetor renders juridical aid, against untrustworthy and deceitful men, who have injured others by certain cunning, lest either for the former, their malice is profitable, or for the latter, injurious honesty. § 1. The words, however, of the Edict are such: Those things which will be said to have been done by *dolus malus*, if from these things there will not be another action, and it will be seen that there is a just cause, I will give a judgment. § 2. Indeed, Servius thus defines *dolus malus*, as a certain machination for the sake of deceiving another person, when one thing is prevented, and another thing is done. Labeo, however, says that it is able to be done without simulation, so that someone may be deceived, and one thing is able to be done, and another thing to be pretended without *dolus malus*, just as the ones do, who through the concealing of such kind, zealously serve and protect their things or

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<sup>10</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 12.

<sup>11</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 12-13.

<sup>12</sup> L. Örsy, in one of his articles on *dolus* in marriage law, insists that *dolus* was never defined by Roman jurists but was only described by Labeo. Given that perspective, the dissertation will use the word description and not definition in reference to *dolus*. Ladislav Örsy, Matrimonial Consent in the New Code: Glossae on Canons 1057, 1095- 1103, 1107, *The Jurist* 43, 1983, 50.

<sup>13</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 12.

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the things of others. And, therefore, he himself thus has defined that *dolus malus* is every craft, trick, deceit, or machination having been employed for cheating, tricking, deceiving another person. The definition of Labeo is true<sup>14</sup>.

From this description by Labeo, it can be easily noticed that simulation is not essential for *dolus* but rather the intention to deceive another person is important<sup>15</sup>. Also, this description is very helpful in identifying the constitutive elements of *dolus* which will be analyzed later in this paper.

### The Meaning of *Dolus* in the 1917 Code

In the 1917 Code, the term *dolus* primarily referred to either one of two distinct meanings, dependent upon the context. *Dolus* in reference to juridical acts differed from its usage in penal law.

In the context of juridical acts, *dolus* was understood to indicate “the use of apt means, fraudulently and deliberately set into motion, to create or to sustain an error in the mind of another, whereby he is enticed to perform or not to perform a certain juridic act”<sup>16</sup>. The immediate effect of *dolus* is normally an error, yet this is not always true<sup>17</sup>.

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<sup>14</sup> Digest, Book IV, Title III, N. 1: I. *Ulpianus libro XI. ad Edictum. — Hoc Edicto Praetor adversus varios et dolosos, qui aliis abfuerunt calliditate quadam, subvenit, ne vel illis malitia sua sit lucrosa, vel istis simplicitas damnosa. Verba autem Edicti talia sunt: ‘Quae dolo malo facta esse’ dicentur, si de rebus alia actio non erit, et iusta ‘causa esse videbitur, iudicium dabo.’ Dolum malum Servius quidem ita definiit, machinationem quandam alterius decipiendi causa, cum aliud simulator, et aliud agitur. Labeo autem, posse et sine simulatione id agi, ut quis circumveniat: posse et sine dolo malo aliud agi, aliud simulari, sicuti faciunt, qui per eiusmodi dissimulationem deserviant et tuentur vel sua vel aliena: itaque ipsi sic definiit, dolum malum esse omnem calliditatem fallaciam machinationem ad circumveniendum fallendum decipiendum alterum adhibitam. Labeonis definitio vera est.* Translation taken from Vann, *Canon 1098 of the Revised Code of Canon Law. History* 5.

<sup>15</sup> For a broader discussion on this text from the *Digest* see Vann, *Canon 1098 of the Revised Code of Canon Law. History* 5-15.

<sup>16</sup> Brown, *The Invalidating Effects of Force* 104.

<sup>17</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 370.

Certain examples of canons using *dolus* with this meaning include: canon 103, § 2, which expressed the general norm with regard to juridical acts placed out of *dolus*; canon 169, § 1, 1,° on a vote in a canonical election; canon 185, resignation from an office; canon 542, 1,° on entrance into novitiate; canon 572, § 1, 4,° on religious profession; canon 677, on admission into societies of men and women living in community without vows; canon 1317, § 3, on oath, etc.<sup>18</sup>

In the penal field, *dolus* possessed a different meaning given in canon 2200, § 1 of the 1917 Code: “Here, *dolus* is the deliberate will to violate a law and is countered on the part of the intellect by a lack of knowledge and on the part of the will by a lack of freedom”<sup>19</sup>. Some examples in this regard would be canon 2199, on imputability of a delict; canon 2203, on causes that increase or diminish imputability; and canon 2200, § 2, on the presumption of *dolus* in the external forum<sup>20</sup>.

Moreover, *dolus* had also the meaning of fraud. *Dolus* was in certain canons understood as being the deliberate use of unfaithful means in order to cause damage to others. But in these instances, *dolus* was not intended to influence the consent of the other party. Some examples include canon 48, § 2 on rescripts; canon 1321 on an oath; canon 1625, § 1 on judges; 1833, 10 on the oath of the parties; canon 1857, § 2 on attempts while litigation is pending; and canon 2406, § 2 on the abuse of ecclesiastical power and office<sup>21</sup>.

Finally, *dolus* was also used with the meaning of defrauding the law. In this case *dolus* indicated the use of fraudulent means in order to procure some illicit advantage for oneself or for others. Again, in these instances *dolus* was not intended to influence the will of another person. Some examples include canon 52 on

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<sup>18</sup> For more examples, see Fransen, *Le dol dans la conclusion des actes juridiques* 370.

<sup>19</sup> 1917 Code, c. 2200, § 1: *Dolus heic est deliberata voluntas violandi legem, eique opponitur ex parte intellectus defectus cognitionis et ex parte voluntatis defectus libertatis.*

<sup>20</sup> For a broader discussion on the meaning of *dolus* in the 1917 Code see Fransen, *Le dol dans la conclusion des actes juridiques* 369-374.

<sup>21</sup> M. Lemosse, *Dolus* (Évolution historique de la théorie du), in : *Dictionnaire de droit canonique contenant tous les termes du droit canonique avec un sommaire de l'histoire et des institutions et l'état actuel de la discipline*, ed. R. Naz, 1357-1372. vol. 4, Paris, 1949, 1352-1353. See also Badii, *Il dolo nel Codice di Diritto Canonico* 314-315.

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rescripts; canon 637 on departure from a religious institute; canon 647, § 2, 2O on the dismissal of religious who have pronounced temporary vows; canon 2049 on the informative process; and canon 2387 on delicts against the obligations proper to the clerical state<sup>22</sup>.

**Descriptions Provided for Dolus  
by the Commentators on the 1917 Code**

L. Bender, in his commentary, pointed out that *dolus* cannot be exactly defined, but only described. He also observed that most canonists relied upon the description provided for *dolus* by Labeo in their commentaries<sup>23</sup>.

Labeo described *dolus* as follows: “every craft, trick, deceit, or machination having been employed for cheating, tricking, deceiving another person<sup>24</sup>.”

In addition to the description provided for *dolus* by Labeo, Michiels provided another description. He described *dolus* as “the deception of another, deliberately and fraudulently committed, by which he is induced to place a determined juridical act<sup>25</sup>.”

However, this description was criticized by some commentators; for example by Bender. He stated that it is not correct to restrict *dolus* to deception. While deception does indeed cause an error in the mind of the one being deceived,

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<sup>22</sup> Lemosse, *Dolus* (Évolution historique de la théorie du) 1353-1354. See also Badii, *Il dolo nel Codice di Diritto Canonico* 315-317.

<sup>23</sup> L. Bender, *Normae generales de personis. Commentarius in canones 87-106*, Rome 1957, 177.

<sup>24</sup> Digest, Book IV, Title III, N. 1: *omnem calliditatem fallaciam machinationem ad circumveniendum fallendum decipiendum alterum adhibitam*. Translation taken from Vann, *Canon 1098 of the Revised Code of Canon Law: History* 5. This description can be found in commentators on *dolus* such as: Bender, *Normae generales de personis* 177; Fransen, *Le dol dans la conclusion des actes juridiques*, 13; Brown, *The Invalidating Effects of Force*, 105-106; Lemosse, *Dolus* (Évolution historique de la théorie du) 1347; Badii, *Il dolo nel Codice di Diritto Canonico* 308; R. Bidagor, *De dolo et eius effectibus in admissione ad novitiatum et professione religiosa*, *Periodica* 20, 1931, 61.

<sup>25</sup> G. Michiels, *Principia generalia de personis in Ecclesia. commentarius libri II Codicis iuris canonici, canones preliminaries 87-106*, Paris 1955, 660.

there are cases when *dolus* does not cause an error in the mind of the one against whom *dolus* is employed. This is the reason why Labeo used the word *calliditas* (cunning) *ad circumveniendum* (to cheat, defraud)<sup>26</sup>.

Furthermore, it is important to note that other attempts to describe *dolus* existed under the 1917 Code. Thus, J. Abbo and J. Hannan described *dolus* as “any act of cunning, fraud, or trickery, intended to impose a false opinion on another”<sup>27</sup>. M. Ramstein described *dolus* as “the deliberate misrepresentation of some fact in virtue of which another acts through error”<sup>28</sup>. L. Bouscaren limited the description to “any artifice to deceive”<sup>29</sup>. H. Ayrinhac stated in his commentary that the meaning of *dolus* in canon 103, § 2 is of “inducing others into error, ordinarily for the purpose of injuring them”<sup>30</sup>. Charles Augustine described *dolus* as “a connivance to cheat or deceive another, who thereby suffers injury”<sup>31</sup>. Also, Magnin stated in his commentary that *dolus* “occurs when someone induces another by means of fraud or trickery to consent to some act or contract”<sup>32</sup>. Bidagor described it as “any cheating committed in the concluding of juridical transactions”<sup>33</sup>.

### The Essential Elements of *Dolus*

Given this analysis of the notion of *dolus*, the next step is to determine the constitutive elements of *dolus*, that is, that which establishes *dolus* as *dolus*. Related to this, it must be noted that canon 103, § 2 punishes *dolus* itself and not merely

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<sup>26</sup> Bender, *Normae generales de personis* 177.

<sup>27</sup> Abbo and Hannan, *The Sacred Canons. A Concise Presentation of the Current Disciplinary Norms of the Church*, Vol. I, St. Louis 1957, 150.

<sup>28</sup> M. Ramstein, *A Manual of Canon Law*, N.J. 1947, 134.

<sup>29</sup> L. Bouscaren et al., *Canon Law: A Text and Commentary*, 4<sup>th</sup> revised ed., Milwaukee 1939, 92.

<sup>30</sup> H. A. Ayrinhac, *General Legislation in the New Code of Canon Law*, New York 1923, 223.

<sup>31</sup> Ch. A. Augustine, *A Commentary on the New Code of Canon Law*, vol. 2, St. Louis 1943, 32.

<sup>32</sup> E. Magnin, *Pastors and People; a Summary of Canon Law Affecting Parish Priests, Curates and the Laity*, St. Louis, London 1930, 40.

<sup>33</sup> *Omnis circumventio commissa in conclusione negotiorum juridicorum*. In Bidagor, *De dolo et eius effectibus in admissione ad novitiatum et professione religiosa*, *Periodica* 20, 1931, 61.



the act of deception<sup>34</sup>. Nonetheless and in general, commentators on canon 103, § 2 agreed that *dolus* consists of four constitutive elements.

The first element of *dolus* consists of apt means, i.e. the means employed to deceive must by their very nature be able to lead to error the person upon whom they are employed<sup>35</sup>. The means employed to deceive must “possess objective aptitude to procure the end towards which they are directed”<sup>36</sup>. The means must be grave, that is, able to produce an error in the mind of person placing the juridical act. In other words, it is essential that *dolus* is that which determines the person to place the juridical act and not his or her negligence<sup>37</sup>. Lemosse pointed out a general norm in this regard, which states “*Dolus* is not done to one who knows it”<sup>38</sup>.

However, the gravity cannot be absolutely determined because there are some circumstances that must be taken into account, such as the sex, the age, and the culture of the person induced into error<sup>39</sup>. Brown added to this list “educational background, natural ability, and in general, all those mental and moral qualities which either greatly increase or lessen his ability to perceive insincerity in the speech or conduct of another”<sup>40</sup>.

Additionally, the means can be either positive in character, i.e., saying or doing something that induces another person into error, or negative in character, i.e., dissimulating or keeping silence with regard to certain facts in order to entertain an error which existed already in the mind of the person placing a juridical act<sup>41</sup>. Yet, it is necessary to point out that “mere silence cannot be counted

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<sup>34</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 376.

<sup>35</sup> Brown, *The Invalidating Effects of Force* 106. See also, Lemosse, *Dolus (Évolution historique de la théorie du)* 1348.

<sup>36</sup> Brown, *The Invalidating Effects of Force* 106.

<sup>37</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 376-377.

<sup>38</sup> *Scienti dolus non fit*. In Lemosse, *Dolus (Évolution historique de la théorie du)* 1348.

<sup>39</sup> Michiels, *Principia* 660-661; Fransen, *Le dol dans la conclusion des actes juridiques* 377; Badii, *Il dolo nel Codice di Diritto Canonico* 310; Brown, *The Invalidating Effects of Force* 107.

<sup>40</sup> Brown, *The Invalidating Effects of Force* 107.

<sup>41</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 376. See also Michiels, *Principia* 660; Brown, *The Invalidating Effects of Force* 107; Bidagor, *De dolo et eius effectibus in admissione ad novitatum et professione religiosa* 63.

as a true source of fraud unless there exists a moral obligation to speak out concerning those things about which another is known to be in error when assuming obligations or placing a juridical act<sup>42</sup>. The obligation to inform the person in error may arise either from the law itself or from the very nature of the position that one has over another<sup>43</sup>.

Moreover, there are some authors who used Labeo's description of *dolus* in order to present the ways in which *dolus* can be employed to cause a person to place a juridical act. Thus, it is said that a person is deceived by craft or cunning (*calliditas*) when the deceiving takes place through silence, dissimulation or omission, which are negative in character as mentioned above. It is said that a person is deceived by deceit or trick (*fiallacia*) when the deceiving takes place by telling lies, i.e., under good counsel, the deceiver misrepresents the facts in order to convince the other party to place a juridical act. It is said that a person is deceived by machination (*machinatio*) when the deceiving takes place through facts or insincere action<sup>44</sup>.

Nevertheless, in his commentary Brown stated, in general, "whenever fraud is employed for the purpose of influencing a juridical act, it assumes the guise of good counsel whereby the individual is induced to perform the act or not to perform it<sup>45</sup>.

The second constitutive element of *dolus* consists of the fraudulent use of the means in question. The means employed to deceive must be contrary to the fundamental good faith which explicitly or implicitly regulates juridical acts<sup>46</sup>. Michiels also stated: "*Dolus*, in fact, is not juridically reprehensible, unless, in as much

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<sup>42</sup> Brown, *The Invalidating Effects of Force* 107. See also Bidagor, *De dolo et eius effectibus in admissione ad novitium et professione religiosa* 63.

<sup>43</sup> Brown, *The Invalidating Effects of Force* 107-108.

<sup>44</sup> Wernz and Vidal, *Ius Canonicum*, vol. 6, Rome 1927, 266-267; Michiels, *Principia* 660; Bidagor, *De dolo et eius effectibus in admissione ad novitium et professione religiosa* 62; Brown, *The Invalidating Effects of Force* 108; Lemosse, *Dolus (Évolution historique de la théorie du)* 1348.

<sup>45</sup> Brown, *The Invalidating Effects of Force* 108.

<sup>46</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 377. See also Brown, *The Invalidating Effects of Force* 108; Michiels, *Principia* 661.

as it is indeed bad, culpable, anti-juridical, that is, in as much as it violates faith, which is the necessary foundation of all human relationship<sup>47</sup>. Thus, for instance,

when a merchant merely exaggerates the good qualities of his wares to attract more buyers, he is not ordinarily judged guilty of fraud; his action does not in itself violate basic good faith, since all know and admit of the legitimacy of such action. On the contrary, whenever one presents false documents, such as false certificates of birth or forged passports, or if one designedly employs ambiguous phraseology to trick another in commercial contract, or if one were to keep silent in a case wherein the law demands that one reveal certain hidden facts, it is quite evident that such means, by their very nature, tend to violate the good faith of all<sup>48</sup>.

The third element of *dolus* derives from the intention of the deceiver; i.e., the deceiver must have the precise intention of using the fraudulent means in order to deceive another<sup>49</sup>. *Dolus* in this case requires the precise intention to harm another and, moreover, the intention to mislead another<sup>50</sup>. “It is precisely this ill will which changes a material act of deception into a formal act of fraud. The specific malice proper to fraud is none other than the very will to deceive, whereby the subject of such deception suffers some harm”<sup>51</sup>. However, it is not necessary that the deceived party suffer some harm; the mere fact of willing to extort the consent of another is sufficient to constitute *dolus*<sup>52</sup>. There is no question that it is

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<sup>47</sup> *Dolus enim non est juridice reprehensibilis, nisi in quantum est revera malus, culpabilis, anti-juridicus, idest in quantum violat fidem, quae est totius humani commercii necessarium fundamentum.* In Michiels, *Principia* 661. A similar idea can be also found in Fransen, *Le dol dans la conclusion des actes juridiques* 377.

<sup>48</sup> Brown, *The Invalidating Effects of Force* 108-109. See also Michiels, *Principia* 661; Fransen, *Le dol dans la conclusion des actes juridiques* 377.

<sup>49</sup> Michiels, *Principia* 661; Brown, *The Invalidating Effects of Force* 109; Badii, *Il dolo nel Codice di Diritto Canonico* 310; Lemosse, *Dolus (Évolution historique de la théorie du)* 1348.

<sup>50</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 377.

<sup>51</sup> Brown, *The Invalidating Effects of Force* 109.

<sup>52</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 377. See also Michiels, *Principia* 661; Brown, *The Invalidating Effects of Force* 109.

an injustice to deprive somebody of his or her liberty, which is a natural right, in giving consent. Herein resides, in a particular way, the malice of *dolus*<sup>53</sup>.

Furthermore, Brown stated also: “Since malice is an essential requisite for the true notion of juridical fraud, it follows that whenever one deceives another without any malicious intent his action cannot be described as juridical fraud”<sup>54</sup>. An example in this regard would be as follows: John counseling Mick leads Mick into error because John himself is in error regarding the matter he is counseling Mick. In such a case John cannot be suspected of *dolus* since he was in error with regard to the matter he was counseling Mick<sup>55</sup>. In such a case, Brown stated that the juridical effects of the act “must be judged, not by the principles governing the effects of fraud, but rather by the principles regulating the effects of simple error”<sup>56</sup>.

Additionally, Michiels stated in his commentary that the intention to deceive can be direct or indirect, determined or non-determined. Yet, unfortunately, he offered no further explanation in this regard<sup>57</sup>.

Finally, the fourth element of *dolus* is constituted by the fact that the fraudulent means employed to deceive must succeed in leading into error the person against whom they are directed<sup>58</sup>. They must influence the consent of the person against whom they are employed in order to be called a defect of consent<sup>59</sup>. It must be so because “the objective and intentional use of fraudulent maneuvers, even though illicit in itself, does not constitute an act of juridical fraud, such as will either preclude or minimize juridical consent, unless it succeeds in inducing into error the one against whom it is directed”<sup>60</sup>. Since the error is the way by which *dolus* achieves its effect, it is essential that the fraudulent means employed to

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<sup>53</sup> Wernz and Vidal, *Ius Canonicum*, vol. 2, 51. See also Fransen, *Le dol dans la conclusion des actes juridiques* 377; Badii, *Il dolo nel Codice di Diritto Canonico* 310.

<sup>54</sup> Brown, *The Invalidating Effects of Force* 109.

<sup>55</sup> Brown, *The Invalidating Effects of Force* 109.

<sup>56</sup> Brown, *The Invalidating Effects of Force* 109. See also Wernz and Vidal, *Ius Canonicum*, vol. 2, 51.

<sup>57</sup> Michiels, *Principia* 661.

<sup>58</sup> Michiels, *Principia* 661. See also, Brown, *The Invalidating Effects of Force* 109; Lemosse, *Dolus (Évolution historique de la théorie du)* 1348.

<sup>59</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 377-378.

<sup>60</sup> Brown, *The Invalidating Effects of Force* 109-110.

deceive succeed in creating an error in the mind of the deceived person in order to have an act of *dolus*<sup>61</sup>. Thus, seen in itself, “fraudulent error does not differ from any other error which may arise from some natural cause”<sup>62</sup>. Nevertheless, it is distinct by reason of efficient cause because it is the outcome of the illicit action of another and, consequently, it is unjust by its very nature. For that reason, fraudulent error is “none other than illicit induced error”<sup>63</sup>. In other words, the error stems from a cause that is outside the subject placing the juridical act. This distinction makes *dolus* different from error as treated in canon 104<sup>64</sup>. Moreover, Brown stated in his commentary:

Since it is through the medium of the error which it induces that the element of fraud works its vitiating effect upon consent, the terms fraud and fraudulent error may be used interchangeable in practice as representing the same concept, since in reality they stand as cause to effect<sup>65</sup>.

In short, there must be a causal relationship between the act of the deceiver, the error it induces in the mind of the deceived person, and the placing of the juridical act.

### **The Division of *Dolus***

According to canonical tradition, *dolus* can be distinguished either by reason of the error it induces or with regard to the influence it exerts upon the will in placing a juridical act<sup>66</sup>.

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<sup>61</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 378. See also Brown, *The Invalidating Effects of Force* 110.

<sup>62</sup> Brown, *The Invalidating Effects of Force* 110.

<sup>63</sup> Brown, *The Invalidating Effects of Force* 110.

<sup>64</sup> Wernz and Vidal, *Ius Canonicum*, vol. 6, 267. See also Eduardo Molano, Chapter II: Juridical Person, in: *Code of Canon Law Annotated*, Second Edition Revised and Updated, ed. Ernest Caparros et al., Montreal and Chicago 2004, 108-109.

<sup>65</sup> Brown, *The Invalidating Effects of Force* 110.

<sup>66</sup> Brown, *The Invalidating Effects of Force* 110.

By reason of the error it induces in the mind of the deceived person, *dolus* is divided into substantial and accidental<sup>67</sup>.

*Dolus* is substantial if it “succeeds in so misrepresenting an object or the nature of an act as to conceal its essential nature or substantial qualities, thus creating a false notion concerning its very essence”<sup>68</sup>. Wernz-Vidal and Michiels point out in their commentaries that if a juridical act is placed out of substantial *dolus*, then the juridical act is invalid by reason of the natural law and also by reason of the positive law stated in canon 104<sup>69</sup>. The reason why a juridical act placed out of substantial *dolus* is invalid is that:

the will is rendered incapable of placing a true act of consent towards the object to which it is externally directed. The will accepts an object only as that object is represented to it by the intellect. But when the intellect is led to judge the object to be substantially different from that which it is in objective reality, the will internally consents to something totally different from that to which its external consent is apparently directed<sup>70</sup>.

Moreover, the commentators on *dolus* state that in case of substantial *dolus*, the deceived party can ask for the declaration of the nullity of the juridical act according to canon 1679 of the 1917 Code. Additionally, Fransen<sup>71</sup> points out that in case of substantial *dolus*, the deceived party can ask for reparation of damages according to canon 1681 of the 1917 Code, which states: “Whoever posited an act infected with the vice of nullity is bound [to make good] the damages and expenses to those wounded thereby”.

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<sup>67</sup> Wernz and Vidal, *Ius Canonicum*, vol. 2, 51. See also Brown, *The Invalidating Effects of Force* 110; Lemosse, *Dolus (Évolution historique de la théorie du)* 1348; F. Roberti, *De processibus opus ad Codicis schemata exactum, Ss. Congregationum instructionibus normisque S.R. Rotae conlatis, iurisprudentia tribunalium apostolicorum inspecta et cum iure canonico orientali comparatum*, Vatican City 1956, 636.

<sup>68</sup> Brown, *The Invalidating Effects of Force* 110. See also Michiels, *Principia* 661.

<sup>69</sup> Wernz and Vidal, *Ius Canonicum*, vol. 2, 51. See also Michiels, *Principia* 664.

<sup>70</sup> Brown, *The Invalidating Effects of Force* 114.

<sup>71</sup> Cf. Fransen, *Le dol dans la conclusion des actes juridiques* 391.

In distinction to substantial *dolus*, *dolus* is accidental if “it succeeds in obscuring only some of the accidental qualities of the object or act while the knowledge of the substantial or essential element remains unaffected by it”<sup>72</sup>. Accidental *dolus* forms the focus of this dissertation in as much as substantial *dolus* is regulated according to canon 104.

With regard to the influence it exerts upon the will in placing a juridical act, *dolus* is divided into antecedent (*causa dans*) and concomitant (insiders)<sup>73</sup>. Hence, *dolus* is antecedent if “the object obscured or misrepresented by it constitutes the impulsive cause for which a juridical act is placed. This means that if the person had known the truth, he or she would not have placed the juridical act”<sup>74</sup>. On the other hand, *dolus* is concomitant if it exerts no substantial influence on the determination of consent. This means that “the one acting under its influence is so disposed that, even had the fraud not been present, he would nevertheless have desired the object or placed the act, even though perhaps not quite so promptly or quite easily”<sup>75</sup>.

### The Legal Effects of Dolus

Regarding the legal effects of *dolus*, it is worthy of note that *dolus* does not remove the consent of the person placing a juridical act, but infringes the liberty of the person in such a case<sup>76</sup>.

Additionally and importantly, Fransen and Michiels are the two authors who treated at length the legal effects of *dolus* on juridical acts. Yet, they seem not to completely agree in this regard. Thus, on the one hand, Fransen stated in his

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<sup>72</sup> Brown, *The Invalidating Effects of Force* 110.

<sup>73</sup> Wernz and Vidal, *Ius Canonicum*, vol. 2, 51. See also Brown, *The Invalidating Effects of Force* 110-111; Lemosse, *Dolus (Évolution historique de la théorie du)* 1348; Roberti, *De processibus* 636.

<sup>74</sup> Brown, *The Invalidating Effects of Force* 111.

<sup>75</sup> Brown, *The Invalidating Effects of Force* 111. See also Chelodi, Ioannes, *Ius canonicum de personis praemissis notionibus de iure publico ecclesiastico de principiis et fontibus iuris canonici*, 3<sup>rd</sup> ed., Vicenza 1957, 169; Lemosse, *Dolus (Évolution historique de la théorie du)* 1348.

<sup>76</sup> Lemosse, *Dolus (Évolution historique de la théorie du)* 1348.

commentary that *dolus* produces a double effect: namely, one that is indispensable and characteristic and the other which is present in most of the cases in which *dolus* is involved, but which is not essential for *dolus*<sup>77</sup>.

The first effect of *dolus* is to cause or to entertain an error in the mind of the person placing a juridical act and, consequently, infringing the liberty of the person placing the juridical act.

The second effect of *dolus* is the damage caused by the juridical act which it unjustly provokes. While a common consequence of *dolus*, it is not present in all cases, further its effect is not produced immediately by *dolus* itself, but by the means used by the deceiver to provoke *dolus*. Also, Fransen highlighted that this effect is not regulated by canon 103, § 2, because this canon regulates only the validity of the acts placed out of *dolus*. Fransen stated in his commentary that there is *lacuna legis* with regard to the second effect of *dolus*, i.e., the law did not treat this effect. More about this will be said later in his commentary<sup>78</sup>.

On the other hand, Michiels maintained in his commentary that the first and direct effect of *dolus* is the causing of an error in the mind of the person placing a juridical act (called *dolus positivus* by Michiels) or to entertain culpably an error that already exists in the mind of the person placing a juridical act (called *dolus negativus* by Michiels).

The second effect of *dolus* is the injury caused to the deceived person by the fraudulent error which, in fact, violates unjustly the liberty of the person placing a juridical act<sup>79</sup>. Here, Fransen does not agree with Michiels arguing that it is a mistake to make a distinction between the error and the injury that it causes. This would ignore the character that is proper to *dolus*. The deceiver does not want firstly to cause an error in the mind of the deceived person and then to cause the injury to the same person. He indicates that it is futile to attribute a particular effect to the error caused by *dolus* without taking into account the injustice that is inherent in the error. Moreover, Fransen points out that the malice of *dolus* rests

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<sup>77</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 378.

<sup>78</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 378.

<sup>79</sup> Michiels, *Principia* 662.



on the injury that the error unjustly produces in the mind of the deceived person<sup>80</sup>. Fransen argues more convincingly in as much as the error caused by *dolus* cannot be separated from the injury that is unjustly caused.

The third effect of *dolus* according to Michiels is the damage caused by the juridical act placed as a result of *dolus*. The action for reparation of damage is to be brought against the author of *dolus* according to canon 2210, § 2. This action can be brought against the author of *dolus* independently of the rescissory action<sup>81</sup>.

Having examined these distinct positions of Fransen and Michiels, we will analyze two effects of *dolus* common to them; namely, the error and the damage.

*A.* The first effect of *dolus* is the error unjustly inflicted in the mind of the deceived person.

As already mentioned, canon 103, § 2 of the 1917 Code stated that juridical acts placed out of *dolus* are valid, unless the law states otherwise, but they can be rescinded according to canons 1684-1689.

The law recognizes that juridical acts placed out of *dolus* are as a general norm valid because *dolus* does not necessarily demolish the will of the deceived party but may only diminish it<sup>82</sup>.

Nevertheless, even though juridical acts placed out of *dolus* are valid, the injustice caused by it requires an appropriate sanction. This appropriate sanction derives from natural law and is imposed by positive law<sup>83</sup>. The sanction is stated in canon 103, § 2 of the 1917 Code, i.e., acts placed out of *dolus* can be rescinded.

Now, in order to have a juridical act placed out of *dolus* rescinded, a few requirements must be verified; namely, that there is a juridical act, it is proven that this act was placed out of *dolus* and that *dolus* is antecedent and not merely concomitant.

Also, the foundation for a rescissory action needs further elaboration.

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<sup>80</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 378.

<sup>81</sup> Michiels, *Principia* 662-670.

<sup>82</sup> Michiels, *Principia* 665.

<sup>83</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 379-380.

a. Firstly, it is necessary that the juridical act be placed as a result of *dolus* alone as required by canon 103, § 2. This means that all the constitutive elements of *dolus* as outlined above must be verified. Also, it must be said that it is not enough that the deceived party be led into error through simple fault or negligence, but the juridical act must be the effect of fraudulent means, intentionally used to deceive<sup>84</sup>. Once these fraudulent means “succeed in procuring an act of consent, however, it is wholly irrelevant, as far as rescissory action is concerned, whether or not some material injury results from its use”<sup>85</sup>. What matters very much in this case is that a defective consent results from the use of the fraudulent means and this defective consent requires the rescissory action.

b. Secondly, it is necessary that the juridical act be placed due to antecedent *dolus* and not merely concomitant *dolus*<sup>86</sup>.

Here, the problem becomes a bit more complicated because there is a division among the commentators on the 1917 Code with regard to effects of *dolus* on juridical acts. On the one hand, a first school of thought which, following the doctrine that preceded the promulgation of the 1917 Code<sup>87</sup>, claimed that only a juridical act placed out of antecedent *dolus* could be rescinded<sup>88</sup>. On the other hand,

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<sup>84</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 380. See also Brown, *The Invalidating Effects of Force* 116.

<sup>85</sup> Brown, *The Invalidating Effects of Force* 116. See also Fransen, *Le dol dans la conclusion des actes juridiques* 380.

<sup>86</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 380. See also Brown, *The Invalidating Effects of Force* 116.

<sup>87</sup> See for example A. Reiffenstuell, *Jus canonicum universum. complectens tractatum de regulis juris*, vol. 2, Paris 1865, tit. 14, n. 9; E. Pirhing, “Jus canonicum in V. libros Decretalium distributum, nova methodo explicatum: omnibus capitulis titulorum (qui in antiquis & novis libris Decretalium continentur) promiscue & confuse positus, in ordinem doctrinae digestis ...,” vol. 2, Dilingae, 1722, tit. 14, n.10.

<sup>88</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 382-385; Vermeersch and Creusen, *Epitome Iuris Canonici*. 8<sup>th</sup> ed., vol. 1, 227; Badii, *Il dolo nel Codice di Diritto Canonico* 310; F. Roberti, *De actione rescissoria ob dolum, Apollinaris* 3, 1930, 143-145; D. M. Prtimer, *Manuale iuris canonici in usum clericorum praesertim illorum qui ad instituta religiosa pertinent*, Friburgi Brisgoviae 1927, 74; Bidagor, *De dolo et eius effectibus in admissione ad novitiatum et professione religiosa*, 70-71; Lemosse, *Dolus (Évolution historique de la théorie du)* 1348.

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a second school of thought which held that a juridical act placed out of concomitant *dolus* could be rescinded because this was expressed by canon 103, § 2<sup>89</sup>. The arguments of both of these schools will be presented below. The presentation will start with the second school of thought which considers that concomitant *dolus* is sufficient to rescind a juridical act.

This school relies on three arguments in its demonstration with regard to concomitant *dolus*.

The first argument is that canon 103, § 2 does not make a distinction between antecedent and concomitant *dolus*. The law simply refers to an act placed “by *dolus*”<sup>90</sup>; and, consequently, if the law does not make a distinction between antecedent and concomitant *dolus*, then the concomitant *dolus* fell within the terminology of the canon as well<sup>91</sup>. Also, Chelodi insists that the distinction made by canonists between antecedent and concomitant *dolus* has no basis in Roman law from where, in fact, the notion of *dolus* comes<sup>92</sup>.

Basically, in arguing this, the authors of this school of thought rely on the well-known principle: “Where the law does not distinguish, neither ought we to distinguish”<sup>93</sup>.

The second argument of this school is that the primary aim of the law is to repair the injury caused to the liberty of the deceived party by the deceiver. The injury caused by *dolus* must be punished because it is against the common good<sup>94</sup>. Moreover, the deceiver must be punished because neither the injury can be entirely repaired nor can the common good be well served if the author of *dolus* is not

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<sup>89</sup> Michiels, *Principia* 666-668; Beste, *Introductio in Codicem* 159; Wernz and Petri Vidal, *Ius Canonicum*, vol. 2, 43; Coronata, *Institutiones Iuris Canonici*, vol. 1, 183; Cocchi, *Commentarium in Codicem iuris canonici*, vol. 7, 164.

<sup>90</sup> 1917 Code, c. 103: *Ex dolo*.

<sup>91</sup> Michiels, *Principia* 666-667; Wernz and Petri Vidal, *Ius Canonicum*, vol. 6, 279-280; Coronata, *Institutiones Iuris Canonici*, vol. 1, 183; Brown, *The Invalidating Effects of Force* 117-118.

<sup>92</sup> Chelodi, *Ius canonicum de personis* 169.

<sup>93</sup> *Ubi lex non distinguit, nec nos distinguere debemus*. In Fransen, *Le dol dans la conclusion des actes juridiques* 381. See Chelodi, *Ius canonicum de personis* 169; Michiels, *Principia* 666.

<sup>94</sup> Michiels, *Principia* 667; Wernz and Petri Vidal, *Ius Canonicum*, vol. 6, 268; Fransen, *Le dol dans la conclusion des actes juridiques* 381; Brown, *The Invalidating Effects of Force* 118.

punished<sup>95</sup>. Thus, it does not matter if it is antecedent or concomitant *dolus*, for in order to repair the injury arising from it, to punish the delict, and to protect the common good, the act has to be made liable to rescission<sup>96</sup>.

The third and final argument of this school of thought is that the very nature of the positive juridical and social order requires that a juridical act placed as a result of *dolus* must be made liable to rescission based on an objective demonstrable fact<sup>97</sup>; namely, “on the existence of the objective fraud itself, and not upon the subjective foundation of the degree to which fraud actually affects internal consent in placing an act”<sup>98</sup>. Thus, the authors of this school insist that it is difficult to indicate the exact role of *dolus* in soliciting consent. As a result, “the present law makes it immaterial whether the fraud is or was actually the impulsive cause of an act or merely incidental in its performance, as long as it can be demonstrated as having been present”<sup>99</sup>.

Nonetheless, as mentioned above, the first school of thought argued that concomitant *dolus* has no effect on juridical acts. The authors of this school build their arguments by attacking the arguments of the second school just presented above. This school comes with three counterarguments.

The first counterargument says that since the 1917 Code does not provide a definition for *dolus* the code intends to follow the traditional teaching on *dolus*<sup>100</sup>. However, the traditional teaching is that only antecedent *dolus* renders a juridical act rescindable. Also, even though the code does not make an explicit distinction between antecedent and concomitant *dolus*, nevertheless by treating *dolus* in the same canon with fear it clearly indicates that *dolus* can have an impact on a juridical act only in so far as it really influences the consent<sup>101</sup>.

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<sup>95</sup> Michiels, *Principia* 667; Fransen, *Le dol dans la conclusion des actes juridiques* 381.

<sup>96</sup> Brown, *The Invalidating Effects of Force* 118; Wernz and Petri Vidal, *lms Canonikum*, vol. 6, 280.

<sup>97</sup> Michiels, *Principia* 667; Fransen, *Le dol dans la conclusion des actes juridiques* 381.

<sup>98</sup> Brown, *The Invalidating Effects of Force* 118. See also Michiels, *Principia* 667; Fransen, *Le dol dans la conclusion des actes juridiques* 381.

<sup>99</sup> Brown, *The Invalidating Effects of Force* 118.

<sup>100</sup> Roberti, *De actione rescissoria ob dolum* 143.

<sup>101</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 382.

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But no one is to be found, even among the adversaries of this view, who is willing to admit that fear is sufficient for annulling or making an act liable to rescission, unless it is established as the impulsive cause for which the act was performed. Hence, it seems that one is bound by logical necessity to hold that, unless fraud exerts a noticeable influence upon an act, it cannot be counted as of any relevance as to the rescission of that act. And since incidental fraud by its very nature is understood to have exerted no appreciable influence upon consent in the placing of an act which it merely accompanies, it cannot be construed in any way as constituting an obstacle to volitional liberty. Hence, it seems, it must be excluded from any consideration in canon 103, § 2<sup>102</sup>.

In addition, canon 103, § 2 underscores that juridical acts placed “*ex dolo*” can be rescinded which means that *dolus* has to be the cause of a juridical act in order to have it rescinded. Yet, only antecedent *dolus* can be the cause of a juridical act and not concomitant *dolus*<sup>103</sup>.

Also, the canons on rescissory action indicated that only juridical acts placed out of antecedent *dolus* can be liable to a rescissory action. Thus, canon 1684, § 1 refers to one “confused by *dolus*”<sup>104</sup> and canon 1685, 2° refers to goods that are “extorted by *dolus*”<sup>105</sup>. Given the way these two canons refer to *dolus*, it is “hardly compatible with the notion of incidental fraud. One can scarcely describe an object as extorted through fraud when it would have been given had the fraud been present or absent”<sup>106</sup>. Consequently, “the wording of these canons seems to exclude the relevancy of anything less than antecedent fraud”<sup>107</sup>.

The second counterargument points out that it is true that the intention of canon 103, § 2 is to repair the injury caused to the liberty of the author of the juridical act, but this intention is precisely limited to the effects of juridical acts

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<sup>102</sup> Brown, *The Invalidating Effects of Force* 119. See also Fransen, *Le dol dans la conclusion des actes juridiques* 382.

<sup>103</sup> Roberti, *De actione rescissoria ob dolum* 143-144. See also Fransen, *Le dol dans la conclusion des actes juridiques* 382; Brown, *The Invalidating Effects of Force* 119-120.

<sup>104</sup> 1917 Code, c. 1684, § 1: *dolo circumventus*.

<sup>105</sup> 1917 Code, c. 1685, 2°: *dolo extortas*.

<sup>106</sup> Brown, *The Invalidating Effects of Force* 120.

<sup>107</sup> Brown, *The Invalidating Effects of Force* 120.

placed out of antecedent *dolus*. This is true because the injury caused by *dolus* constitutes an effective interference with the liberty of the author of the juridical act. Yet, as was already noted above, concomitant *dolus* is understood to exert no relevant influence on the placing of a juridical act. As a result, it is difficult to talk about injury in so far as concomitant *dolus* has no determining role in placing a juridical act<sup>108</sup>; “in so far as it does not affect consent, cannot be considered as present in it”<sup>109</sup>. Also, Fransen points out that a juridical act placed out of *dolus* constitutes a defect of consent and can be rescinded only in so far as it exerts a significant influence upon the consent of the author of the juridical act. In other words, since concomitant *dolus* exerts no significant influence upon the consent of the author of a juridical act, it cannot be said that concomitant *dolus* constitutes a defect of consent and that a juridical act placed out of it needs to be rescinded<sup>110</sup>.

Furthermore, Fransen insists that it is important to take into account that the effects of juridical acts placed out of *dolus* are treated in the same canon with those which regard fear. Yet, all commentators agree that only those juridical acts can be rescinded which are placed under grave and unjustly inflicted fear because such fear has to be punished as non-juridical. This kind of fear constitutes a defect of consent. In the same way, only antecedent *dolus* constitutes a defect of consent because it exerts a significant influence on the consent of the author of a juridical act<sup>111</sup>.

The third counterargument points out that *dolus* “always contains an internal element, *dolus consistit in animo*, the demonstration of which can be established only by having recourse to conjectures”<sup>112</sup>. Given that fact, while it is true that it is very difficult to prove whether concomitant or antecedent *dolus* influenced the juridical act, but also the presence of *dolus* itself as a defect of consent in the placing of the juridical act. Due to this difficulty, the canonists of this school maintain that

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<sup>108</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 382-383. See also Brown, *The Invalidating Effects of Force* 120.

<sup>109</sup> Brown, *The Invalidating Effects of Force* 120.

<sup>110</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 383.

<sup>111</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 383-384.

<sup>112</sup> Brown, *The Invalidating Effects of Force* 120. See also Fransen, *Le dol dans la conclusion des actes juridiques* 384-385.

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the traditional doctrine on *dolus* “must be considered as a controlling factor even today”<sup>113</sup>. Yet, the traditional teaching on *dolus* points out that only antecedent *dolus* renders a juridical act rescindable. In other words, the canonical legislation that preceded the promulgation of the 1917 Code admitted that to prove *dolus* was very difficult, yet, nonetheless, it insisted that only antecedent *dolus* rendered a juridical act rescindable.

Additionally, canon 6, 4° of the 1917 Code states: “In case of doubt as to whether a canonical prescription differs from the old law, it is not considered as differing from the old law”<sup>114</sup>. Taking into account this canon and the arguments presented above, it clearly means that only antecedent *dolus* renders a juridical act rescindable.

After summing up the arguments of the two schools of thought with regard to the effects of antecedent and concomitant *dolus* on juridical acts, we now present our position in this regard.

Analyzing the two schools of thought, we would agree with the arguments of the first school holding that only antecedent *dolus* renders a juridical act placed out of it liable to rescission. In addition to the cogency of their arguments, a second argument exerts an important influence and supports the other arguments.

Canon 18 of the 1917 Code states: “Ecclesiastical laws are to be understood according to the meaning of their words considered in text and context ...”<sup>115</sup>.

From this principle and in order to understand the general norm with regard to *dolus* stated in canon 103, § 2, it is important to look first at the text and the context of the law. The text refers precisely to juridical acts placed “by *dolus*”, i.e. *dolus* has to be the cause of the juridical act in order to hold that it was placed by *dolus*. Yet, only antecedent *dolus* can be the cause of a juridical act and not merely concomitant *dolus*. Secondly, it is also important to take into account the canonical doctrine on juridical acts placed out of *dolus* which preceded the promulgation of the

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<sup>113</sup> Brown, *The Invalidating Effects of Force* 120.

<sup>114</sup> 1917 Code, c. 6, 4°: *In dubio num aliquod canonum praescriptum cum veteri iure discrepet, a veteri iure non est recedendum.*

<sup>115</sup> 1917 Code, c. 18: *Leges ecclesiasticae intelligendae sunt secundum propriam verborum significantionem in textu et contextu consideratam ...*

1917 Code. The canonical doctrine in this regard indicates that only juridical acts placed out of antecedent *dolus* are liable to rescission. Thus, the weight of the canonical tradition would argue for recognizing antecedent *dolus* only.

c. Thirdly, knowing that antecedent *dolus* renders an act liable to rescission, it is important to state that its effects must be proved in order to have a juridical act rescinded. The commentators on this issue rely on a traditional norm which says: “no one is evil unless it is proved”<sup>116</sup>. Or, as Michiels points out: “no one is to be presumed evil, unless it is proved”<sup>117</sup>. However, the direct proof of *dolus* is impossible because *dolus* is internal, i.e., “is based upon the internal intention on the one part, and the internal effect on the other part”<sup>118</sup>. Unless the deceiver confesses the perpetration of *dolus*, it is impossible to demonstrate its presence through direct proof. Given that, the only way by which a person can prove *dolus* is “through a careful analysis of the antecedent, concomitant, and consequent circumstances surrounding an individual case and arrive at a morally certain judgment that the act placed under those circumstances was in fact the result of fraud”<sup>119</sup>. Or, as Michiels and Fransen held, *dolus* is to be proved in such a case through legitimate conjectures.

Nonetheless, it is worthy of note that there is a divergence of opinion between Fransen and Michiels with regard to the proving of *dolus*.

Fransen, in his commentary on *dolus*, indicates that it is not sufficient to prove the existence of *dolus*, but it must also be proven that *dolus* is a defect of consent since canon 103, § 2 requires this. This means that it must be proven that the juridical act was placed out of antecedent *dolus* and not merely out of concomitant *dolus*. In other words, it must be proved that the act was placed out of *dolus* and the error was caused by *dolus*<sup>120</sup>.

On the other hand, Michiels points out that the proof of concomitant *dolus* is sufficient for a juridical act to be rescinded; consequently, the proof of an error caused by *dolus* is not necessary for him. It is sufficient to prove that fraudulent means

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<sup>116</sup> *Nemo malus nisi probetur*. In Fransen, *Le dol dans la conclusion des actes juridiques* 385.

<sup>117</sup> *Nemo praesumatur malus, nisi probetur*. In Michiels, *Principia* 668.

<sup>118</sup> Brown, *The Invalidating Effects of Force* 121.

<sup>119</sup> Brown, *The Invalidating Effects of Force* 121.

<sup>120</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 385-386.



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were used to convince the other party to place a juridical act, and that the fraudulent means, by their very nature, were apt to cause an error. Also, Michiels points out that the reason canon 103, § 2 states that a juridical act placed out of *dolus* can be rescinded is simply to repair the injury. Accordingly, it is not necessary to prove the error caused by *dolus*<sup>121</sup>.

In short, in order to rescind a juridical act placed out of *dolus* “one must conclusively demonstrate through moral arguments based upon conjectures and presumptions that the act was in fact the result of an erroneous intellectual judgment which was fundamentally created by the intentional maneuvers of another”<sup>122</sup>.

*d.* Fourthly, the foundation of the rescissory action is that *dolus* constitutes a defect of consent. It causes an unjust injury to the juridical liberty of the author of the juridical act. Also, in order to safeguard the juridical order and the common good it is necessary to penalize *dolus*<sup>123</sup>.

*B.* The second effect of *dolus* is the damage which occurs accidentally through the placing of the juridical act.

Michiels states when a person places a juridical act out of antecedent or concomitant *dolus* some damage may result. Given that, in addition to the rescissory action, it is necessary to take action against the author of *dolus* to repair the damage in accord with the norm stated in canon 2210, § 2<sup>124</sup>, which asks for civil action in order to repair the damage.

However, Fransen does not agree with Michiels that canon 2210 is applicable in the case of juridical acts placed out of *dolus*. Moreover, he points out that this interpretation is a violation of the text of the canon because *dolus* is not a

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<sup>121</sup> Michiels, *Principia* 668-669.

<sup>122</sup> Brown, *The Invalidating Effects of Force* 123.

<sup>123</sup> Michiels, *Principia* 669. See also, Fransen, *Le dol dans la conclusion des actes juridiques* 386.

<sup>124</sup> Canon 2210, § 2 of the 1917 Code stated: *In either case the action is addressed according to the norm of Canons 1552-1959; and the same judge in the criminal trial can, at the request of the injured party, convoke and decide the treatment of the civil action.* In order to understand this canon, it is necessary to refer to canon 2210, § 1, 2° which stated: *From a delict there arises: A civil action for the repair of damages, if someone was damaged by the delict.*

delict in the sense foreseen in canon 2210. The sense of delict used in canon 2210 is to be understood in accord with the definition provided for it in canon 2195, §1<sup>125</sup>. Yet, *dolus* as used in canon 103, § 2 does not fit this definition. Fransen admits that *dolus* as used in canon 103, § 2 constitutes a civil delict but not a penal one. Consequently, Fransen concludes that canon 2210 cannot be used to repair the damage caused to the deceived party by the deceiver. In his opinion, there is a *lacuna legis* in this regard, and due to this, canon 2210, § 1, 2° can be used, but only by analogy<sup>126</sup>.

### Conclusion

The aim of this paper was to make a general presentation on *dolus*, which is necessary for an understanding of the general rule on *dolus* stated in canon 103, § 2 of the 1917 Code, but also for the understanding of exceptions to the general rule on *dolus*, which could be treated in a future paper. In fact, the presentation included, first of all, a description of *dolus*, then, an analysis of the constitutive elements of *dolus*, a short exposition of the division of *dolus*, and, finally, an analysis on the legal effects of the juridical acts placed out of *dolus*. Also, it is important to point out that the presentation was made in the light of the commentaries of the 1917 Code on *dolus*.

Among the weighty authorities who wrote commentaries on *dolus* and were used in this chapter there can be indicated: Michiels, Fransen, Badii, Wernz-Vidal, Bender, Bidagor, Roberti etc.

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<sup>125</sup> Canon 2195, § 1 of the 1917 Code states: *By the term delict in ecclesiastical law is understood an external and morally imputable violation of a law to which a canonical sanction, at least an indeterminate one, is attached.*

<sup>126</sup> Fransen, *Le dol dans la conclusion des actes juridiques* 388-389.