

METUS REVERENTIALIS: COME-BACK OF AN OLD CONCEPT?

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Abstract in original language:

The essay entitled ‚*Metus reverentialis* — Come-back of an Old Concept?’ analyses the reminiscences of an old legal institution in this context. *Metus reverentialis*, fear due to the natural respect owed to persons in authority (such as parents or husbands) was first identified in the Middle Ages when the Accursian Gloss recognized it as a general ground for setting aside a contract. The concept remained highly disputed for a long time, and some authors recently claimed that it would be almost forgotten. Its modern revival has its origin in German jurisprudence, where the problem was absorbed by immoral transactions. It appears that this principle has become accepted into other legal orders as well.

Key words in original language:

Metus reverentialis, economic duress, undue influence, contra bonos mores, immorality, guarantee, mortgage, surety ship, Smith v Bank of Scotland, Mumford v Bank of Scotland.

1. INTRODUCTION

Mortgages have attracted severe attention in light of the recent economic meltdown. We may personally know people who took credits in fever of consumption far above of their financial means. In such cases they were asked to provide some additional guarantees. Frequently somebody from their family, the wife or the husband or even a child undertook a guarantee for the respected relative. Some Australian feminists even call it “sexually transmitted debts.” In these Australian corporation insolvency cases we find small „family” companies where there may only be one active director. This gave rise to a difficult issue of imposing liability for insolvent trading on a spouse who is, factually, merely a dormant director.¹ The fear caused by natural respect to a person in authority (such as parents or husbands) was known in the Antiquity as *metus reverentialis*.

Here is the point I am going to speak about. What is the role and where is the responsibility of the financial institutions and banks? On the other hand: May allow the state its citizens to become overburdened by unreasonably assumed financial risks? Or should the state step in by declaring such contracts on credit void? These questions had been debated for centuries and no final answer could have found to them. Where *metus* meant fear, *reverentialis* is in turn *reverential*, so it is a *reverential* fear.

To understand this phenomenon we first analyze modern legal approaches towards surety ships offered in similar circumstances. Then we pursue a quick survey in the legal history, where we dwell upon both Roman law and Medieval legal literature. At the end we identify three main problems regarding *metus reverentialis*:

¹ See Julie Cassidy, „Sexually Transmitted Debts»: the Scope of Defences to Directors' Liability for Insolvent Trading”, 7/20 (2002) *Company and Securities Law Journal* pp. 372-389.

1. What are the main motivations behind its revival? Is it a sign of paternalism, a result of the current economic approaches?
2. What is its real dogmatic nature?
3. What are the legal consequences of it?

2. MODERN APPROACHES

Originally, in duress there had to be threats to bodily injury, nowadays duress of economic nature suffices and the courts fill the gaps with rules of undue influence.² Those rules allow a party to escape from disadvantageous contract if there was a special relationship of trust between the parties, by invoking the presumption that he abused that position of trust.

In **Barclays Bank plc v O'Brien** the House of Lords held that, if the creditor had actual or constructive notice of any undue influence or misrepresentation by the guarantor's husband, then the guarantee or third party mortgage can be set aside.³ A presumption of constructive notice was granted "*if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand surety.*" This principle has also become accepted into Scottish law.⁴ Later development refined this approach, and English jurisprudence has taken a divers turn. English courts first have struggled to set guidelines as to what steps should be taken by banks in order to protect themselves against the use of this doctrine.⁵ The recent ruling is that the burden of proof rests on the party alleging constructive notice on the side of the mortgagee.⁶ Alongside with their English pendants Irish courts have also cast doubts on this sympathy for wives.⁷

According to some authors the Scottish judges were strongly influenced by German decisions. Here, in Germany these problems emerged in the eighties. The courts first remitted these cases but this attitude should have been rethought on ground of a decision of the Constitutional Court in 1993.⁸ According to this, if an inexperienced and resourceless family member takes on a disproportionate financial burden without personal interest, the transaction could be regarded as immoral in sense of the **§ 138 BGB**. The three conditions are: some kind of pressure, subjectively disproportionate debts, absence of personal financial interest. In such cases the German courts have the right to paternalistically revise financial mechanisms

² Hein Kötz/Axel Flessner/Tony Weir, *European Contract Law*, Oxford: Clarendon Press 1998, pp. 209 and 133.

³ See James O'Donovan, *Lender Liability*, London: Sweet & Maxwell 2005, pp. 266 sqq.

⁴ *Mumford v Bank of Scotland*

⁵ *Royal Bank of Scotland plc v Etridge*

⁶ *Barclays Bank plc v. Boulter*

⁷ *Bank of Nova Scotia v Hogan*

⁸ BVerfG 89, 214

through private law general clauses.⁹ This doctrine has been since extended to children, spouses, fiancés and partners in life.¹⁰ The pressure can be exercised by the bank itself, when the obligation is minified (“*it would be a mere formality*” or “*it is only needed for the papers*”) or the financial risks are concealed. It seems, the modern forms of *metus reverentialis* are handled under § 138 and not § 123 which merely states that the transaction must have been reached “unlawfully” by duress. The reason might be that the German BGB does not know any abstract legal test in order to range of different forms of *metus*, and the aim is more easily fulfilled with help of an elastic general clause.

The solution of the French **Code civil (article 1114)** is very similar to the strict Roman concept. The mere reverential fear (*la seule crainte révérencielle*) is not enough without real aggression (*violence exercée*). For instance, if the mother locked up in a room her daughter who suffered under birth pangs in order to make her sign a contract of cession was a ground for the nullity of that enforced agreement.¹¹ Since the law of 4th April 2006 a marriage enforced by the parents is null and void.¹²

At the European level, on ground of the provision about responsible lending contained in the new **Consumer Credit Directive** which came into force in May 2008, the standard of protection of sureties from unproportionate obligations would probably increase in all Member States. Following the new principle, “*the creditor shall assess the consumer’s creditworthiness on the basis of accurate information provided and on the basis of consultation of the relevant database.*”¹³ Nevertheless, apart from the existence of a specific Directive, surety ship agreements may be conflicting with EC law if they are detrimental to fundamental rights of EU citizens or clash with common European constitutional principles.

3. ROOTS

Originally, the *ius civile* had not recognized fear as a cause of action. Later the praetor helped the party acting under severe evil, and gave him a special action (*actio quod metus causa*) or exception (*exceptio metus*). However, the fear had to abhor with good cause even a steadfast man (*homo constantissimus*). Death, torture, captivity, slavery or rape were such severe fears, *metus maioris malitatis*. On the other hand, a threatening lawsuit or infamy was not acknowledged. To sum up, Roman law generally rejected the idea of declaring agreements null and void on ground of minor causes of fear.

⁹ Knut Wolfgang Nörr/Robert Scheyhing/Wolfgang Pöggeler, *Sukzessionen*, 2nd ed., Tübingen: Mohr Siebeck 1999, pp. 265-267.

¹⁰ Udo Reifner, „Die Mithaftung der Ehefrau im Bankkredit. Bürgschaft und Gesamtschuld im Kreditsicherungsrecht”, *ZIP* 1990, p. 427; Bettina Albers-Frenzel, *Die Mithaftung naher Angehöriger für Kredite des Hauptschuldners*, München: Duncker & Humblot 1996.

¹¹ A decision from Bruxelles, 22th August 1808. See Modeste Biret, *Vocabulaire des cinq codes*, Paris: Tournachon-Molin 1826, p. 438.

¹² Muriel Purquet, *Droit de la famille*, 2nd ed., Paris: Bréal 2007, p. 45.

¹³ Julien Ernoult/Walburga Hemetsberger/Henning Schoppmann/Christoph Wrengler, *European Banking and Financial Services Law*, 3rd ed., Alphen aan den Rijn/London Kluwer p. 157.

Notwithstanding we might find some indicia of the later less strict development. The most remarkable fragment¹⁴ in this regard is where a liberated slave was granted an exception against his patronus' action if the slave had taken unusual burdens for his liberty. It was so even *ex intervallo* (i. e. the obligation was made some time after the manumission) as well, if the slave had acted out of fear (*metu solo*) or he had had excessive respect towards his patron (*nimia patrono reverentia*). The real force of this statement is weakened by the fact that unusual charges were generally unacceptable.

Under Constantin a transaction made on ground of fear (*per impressionem*) towards a higher official was to have been restituted.¹⁵ The same line was followed by Honorius and Theodosius who generally declared infirm all sales, donations and other similar transactions.¹⁶ These texts are either dubious or heavily questioned as a form of *metus reverentialis*.¹⁷

First the **Accursian Gloss** recognized it as a general ground for setting aside a contract. I think this is only an overstatement of **Zimmermann**, for Accursius only offered further casuistry when considering the relation between a freedman and his patron. Even this slight extension of the concept, however, remained disputed. Beside relationship based on respect **Bartolus** required additional elements to pure fear, like previous threat or beating. **Voet**, for instance, did not allow restitution on ground of minor fear. He also recognized an exception, if the husband or the father went beyond the natural respect and exercised a terror exheredationes, namely he threatened with exheredation. His casuistic approach later was abandoned in favor of a more general theory. **Lauterbach** distinguished between *metus iustus* and *metus iniustus*, between just and unjust fear. Cutting across the historical concepts, the main question was whether the fear was inspired *contra bonos mores adeoque injuste*, immoral or not. For combining immorality in a technical sense and fear, as a cause for invalidity he took his argument from a **Digest** fragment.¹⁸ The criterion of injustice was then picked up by **Pothier**.

This subtle form of coercion than first bloomed during the economic individualism of the 19th century is in his best form again. The standard for measuring the degree of pressure has significantly changed with the centuries. The old *vir constantissimus* gave his place to a more *léger* and realistic *homo constans* or *personne raisonnable* in its French form.

4. LEGAL AND DOGMATIC PROBLEMS

Our first question was what are the main motives behind the revival of *metus reverentialis*? It is a clear sign of state paternalism and culminates in the artificial modification or abolishment of existing agreements. I think the most important argument is to be found in the grossly unbalanced bargaining power between a bank and a guarantee. The personal string existing

¹⁴ Ulp. D. 44, 5, 1, 6

¹⁵ C. 2, 19 (20), 11

¹⁶ C. 2, 19 (20), 12

¹⁷ See Jacques Du Plessis/Reinhard Zimmermann, "The Relevance of Reverence; Undue Influence Civilian Style", 10 (2003) *Maastricht Journal* pp. 345 and 351.

¹⁸ Ulp. D. 4, 2, 3, 1 and D. 50, 17, 116

between the main debtor and his dependents is only a marginal element in this aspect. Through more carefully managed financial services the whole edifice of national economy should be defended, as the natural state of family order where the strongest convergent force has to be mutual affection and not financial interest. Sometimes the desperate and deprived state of the guarantee may play a role. It seems that the so called *Sandhaufenteorem* applies, and more elements should be present to declare a *metus reverentialis* for a cause of nullity.

Our second and third questions concerning the legal nature of the modern *metus reverentialis* phenomena and its legal consequences are similarly interesting. The original Roman concept was clear. Fear affected the free will of the threatened party, and depending on its strength it could be a cause of action, i.e. the agreement was not *ipso iure* null and void. Minor fears, as we have seen, were not admitted. However, in the Middle Ages, immorality got into the picture. The reason was that beside the insignificant fear there was an additional element contradicting Christian conceptions on family order and good society. However, immorality is slightly different from fear. It affects the action's incompatibility with legal order, so not an error of will. In addition, immoral transactions are, in turn, null and void. This medieval approach has survived. For instance, in today Germany this kind of cases belong to the competence of **§ 138 BGB**. So we have a surprising dogmatic feature here: some kind of severe fears are only a cause for action but some kind of minor fears render the transactions automatically void. Is it a proper distinction? Going further, in some exceptional cases, where the prestations of the parties are grossly unequal there is a presumption of emotional case of necessity.¹⁹ Thus, the burden of proof is reversed in comparison to the normal case, where the forced person bears this task. The German courts feel the inadequacy of this solution, and to salve what salvable they acknowledge only partial nullity and diminish the affected person's liability to a normal, justifiable level. They do so despite of the principle derived from **§ 139 BGB** according to what if a part of transaction null, the whole transaction is null.

5. SUMMARY

To sum up, I think that in contradiction to some authors²⁰ we can not speak about the extinction of *metus reverentialis*. It does exist and offers us dogmatic problems to deal carefully with. First, we should be aware that some newly introduced financial law rules, such as unenforcibility of sureties and mortgages given by closed family members have a long history and a double dogmatic feature. Their origin can be traced back to Medieval concept of minor fear or fear out of respect. At that time the concept originally affecting only the free will of the party became confused with immorality, which can not be effectively pursued by legal means. Thus, two distinct dogmatic lines conjugated causing acute problems. On the other hand we find the possibility of action, on the other hand there is an automatic nullity. To solve this difficulties, modern courts are obliged to alleviate strict dogmatic boundaries. They mostly operate with partial nullity, and set aside the moral aspects of the transaction replacing them with other, more legal elements, like disturbed equality of obligations or presence of unallowed economic duress.

¹⁹ Nörr/Scheyhing/Pögeler, op. cit., pp. 266-267.

²⁰ For instance Stephan Wagner, „Metus reverentialis – Von der Rezeption zur Kodifikation“, 12 (2008) *Orbis Iuris Romani* 85 sqq.

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