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Coercion and fear in Roman Law[1]

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1. COERCION AND FEAR IN THE SOURCES OF ROMAN LAW

Vis et metus – otherwise – coercion, causing fear, is present in human actions in various situations. It is a factual circumstance that arises from various motivations and it is primarily aimed at the goal, which is to achieve what the actor would not have otherwise achieved without mental coercion (violence). Already Roman law, in order to ensure justice, observe the existence of the phenomenon of compulsive force *(vis compulsiva)* and has defined, although not by means of ius civile, but through the edict of the praetor[2] as a manifestation of his norm-making activity (*adiuvandi vel supplendi vel corrigendi*), coercion (compulsive force) as a wrongful act, which must be restricted.

D. 4,2,1 (Ulpianus libro XI ad edictum):
Ait praetor: „Quod metus causa gestum erit, ratum non habebo". [...]
The praetor says: „I will not hold valid what has been done under duress." [...]

The approach of Roman law to the issue of mental coercion and the fear, that this coercion caused, took shape in a special way around the year 80 BC. In his edict, Praetor Octavius introduced and put into practice a special action with a special

Abstract
The law order assesses acts of people, in principle, according to the external attributes. This approach is based on the fact, that only external signs are objectively perceptible by the senses, and the internal circumstances that contributed to the formation of the will are not relevant. Roman praetors (since the time of the praetor Octavius in 80 BC), with the competence to correct, sustain and supply civil law (corrigendi, suplendi, adiuvandi), give actions to those participants in law relations, which were mentally forced to express their will. Roman jurisprudence further elaborated the condictions of mental coercion and its consequences, so that the application of this institution has been balanced and designed in the interest of justice.

Keywords
Civil law (ius civile), praetorian law, vis et metus (coercion and fear), great coercion, actio quod metus causa, roman law

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[1] This article is an issue of VEGA agency research project no. 1/0548/22: *Kríza dôvery a jej rímsko-kánonické riešenia.*

[2] Ulp. D. 4,2,1: *Ait praetor: „Quod metus causa gestum erit, ratum non habebo".* (The praetor says: „I will not hold valid what has been done under duress."); cf. CICERO. *De officiis* 3,24,92. Emperor Justinian included texts of jurisprudence related to violence and fear in the second title of the fourth book of the Digest, but the texts of the original works of lawyers are significantly interpolated (cf. GLOVER, Graham. Metus in the Roman law of obligations. In *Fundamina*, 2004, vol. 10, p. 31. [online]. [cit. 2023-07-24]. Accessible at: <https://core.ac.uk/download/pdf/145042033.pdf>

formula[3] *(actio quod metus causa[4])* for the case if someone forced another to do something or not to do something[5] within the frame of *stricti iuris* act[6].

According to Ulpianus, the content of this act was the force, expressing coercion, that goes against the will of the coerced person *(necessitatem impositam contrariam voluntati)*, and the fear expresses the anxiety of the mind *(mentis trepidatio)* of coerced person due to imminent or future danger[7]. However, it was necessary to distinguish, if there was only a suspicion, that something might happen in the future without causing fear from a danger, really threatened in future. Pomponius states that fear must be induced by someone and must reach a certain (high) intensity[8].

D. 4,2,9 pr. (Ulpianus libro XI ad edictum)
[...] Denique tractat, si fundum meum dereliquero audito, quod quis cum armis veniret, an huic edicto locus sit? Et refert Labeonem existimare edicto locum non esse et unde vi interdictum cessare, quoniam non videor vi deiectus, qui deici non expectavi sed profugi. Aliter atque si, posteaquam armati ingressi sunt, tunc discessi: huic enim edicto locum facere.
[...] Then he examines the question whether the edict applies in the case of a person who, hearing that some armed man was approaching, abandoned his land. And he reports that Labeo thinks that the edict is not applicable and that neither is the interdict unde vi, since I am not held to have been forcibly ejected as I have run away without waiting to be ejected. The position would be different

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3 Formula of this action got its name after this praetor – formula Octaviana (cf. CICERO. In Verrem 2,3,152: Eduxit vir primarius, C. Gallus senator; postulavit ab L. Metello ut ex edicto suo iudicium daret in Apronium, Qvod per vim aut metum abstulisset, quam formulam Octavianam et Romae Metellus habuerat et habebat in provincia); later praetor allowed to insert to this formula also exceptio quod metus causa. However, we are not able to specify exactly what was the praenomen of the praetor with the family name Octavius, which introducted the formula of violence and fear. Glover stated, that Robert T. Broughton (The Magistrates of the Roman Republic. Oxford, 1951), referring to Gaius Sallustius Crispus - historian and politician from this era - supposes, that this praetor was Lucius Octavius, which was in office in the year 78 BC; John M. Kelly (Roman litigation. Oxford, 1966) supposes, that the name of this praetor was Gnaeus Octavius, which was in the office in the year 79 BC, referring to Cicero and his work De finibus bonorum et malorum (cf.. GLOVER, ref. 2, p. 30 – 31).

4 The possible version of this action was designed by Otto Lenel (Ed. X, § 39): Si paret metus causa Aulum Agerium fundum illum Numerio Negidio mancipio dedisse neque ea res arbitrio tuo restituetur neque plus quam annus est cum experiundi potestas fuit, quanti ea res erit, tantae pecuniae quadruplum iudex Numerium Negidium Aulo Agerio condemnatio: Si non paret absolvito. (LENEL, Otto. Das Edictum perpetuum. Ein Versuch zu dessen Wiederherstellung. Leipzig: Bernard Tauchnitz, 1883, p. 91 – 92).

5 Ulp. D. 4,2,3 pr.; VÁŽNÝ, Jan. *Obligační právo* I. Bratislava: Právnická fakulta Univerzity Komenského v Bratislave, 1924, p. 25 – 26.

6 In bonae fidei contracts, it was not necessary to intervene in favor of the forced person by means of a special action - *actio quod metus causa*. It was sufficient for the coerced party to use the action regarding bonae fidei contract, which the coercion occurred in, e.g. actio empti. (cf. Ulp. D. 19,1,1,1). In this action was This action always contained a clause *ex bona fide* (cf. GLOVER, ref. 2, p. 45 – 46).

7 Ulp. D. 4,2,1: ... vis enim fiebat mentio propter necessitatem impositam contrariam voluntati: metus instantis vel futuri periculi causa mentis trepidatio; cf. APSĪTIS, Allars – JOKSTS, Jānis – ANTANAVIČIENĖ, J. Threats to sustainable development: asset grabbing phenomenon and the legal concept of Force and Fear in Roman Law. In Journal of security and sustainability issues, 2016, vol. 6, no. 2, p. 293.

8 Ulp. D. 4,2,9 pr.; In this fragment, Pomponius gives as an example the situation if someone left the tract of land because he heard that someone would pass over there with a weapon, which cannot be subsumed under the assumptions of the application of an action, since although fear may exist in this situation, there is a lack of violent act, which might not happen. Similarly in the Ulpian`s fragment D. 43,16,3,6 - if anyone, having seen armed men going elsewhere, became so terrified on this account as to take to flight, he is not considered to have been dispossessed; because the men who were armed had no intention of molesting him and therefore absent the reason to fear (it is possible to consider it as a fear of irresolute man, which is mentioned in D. 4,2,6). On the other hand, even if those who came armed did not use their weapons in order to drive away the party in possession, but laid them aside, armed force will be held to have been employed; for the fear of weapons is sufficient to establish the fact of dispossession by armed force. (D. 43,16,3,5).

where, after armed men had entered, I then left. For, [he says], the edict is then applicable. The same jurist also says that if you perchance should collect an armed band and build forcibly on my land, both the interdict against force or stealth and this edict will be applicable, obviously because I allow you to do that through fear.

2. CRITERIA FOR ASSESSING VIOLENCE AND FEAR

Jurisprudence fixed certain general or objective criteria, that assumed the use of a penal *actio quod metus* causa or restoration to the previous condition (*restitutio in integrum*). According to what Glover claims[9], even the *actio quod metus causa*, as an *actio arbitraria*, was primarily intended for restitution and not for a fine[10], ~~let us say~~, the defendant was condemnated to pay fine only if he failed to make *restitutio*, that is (i. e.), if he did not comply with order to *restitutio in integrum*.

According to Ulpianus, ordinary (common) violence, or that, which magistrate commonly used in accordance with his competences when applying the law, was not enough, it had to be *„vis atrox, quae contra bonos mores fiat"* - that is, atrocious (enormous) violence, that was contrary to *bonos mores*[11] and which excluded the freedom of the expression of will of the person, which was subjected to coercion[12].

D. 4,2,3,1 (Ulpianus libro XI ad edictum)
Sed vim accipimus atrocem et eam, quae adversus bonos mores fiat, [...]
But we understand force to be severe and such as is used contrary to sound morals, [...]

It required the act of such a great force, that is impossible to avert it[13], that is (i.e.), the only way to avoid the consequences of coercion was to perform a legal act following the will of the violator[14]. In such a case, the praetor relieves, correcting on behalf of justice the rigidity of *ius civile*[15] and in the conflict *verba vs. voluntas* he takes into account, in particular, the importance of will.

It was true that atrocious violence of great intensity *(vis atrox)* was always accepted as a reason for fear[16], but in other situations it has been shown, whether the violence, which was used, caused such fear, which in the sources is described as great *(maior malitas)*[17]. The threat of violence had to be real and reasonable *(iustus metus)*, so it was not enough for the coerced

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9 GLOVER, ref. 2, p. 45; D. 4,2,14,3-4.

10 Cf. du PLESSIS, Jacques, E. Compulsion in Roman Law. In Compulsion and Restitution – A historical and comparative study of the treatment of compulsion in Scottish private law with particular emphasis on its relevance to the law of restitution or unjustified enrichment, 1997; (unpublished Ph.D. thesis, University of Aberdeen), p. 8. [online]. [cit. 2023-07-26]. Accessible at: <https://aura.abdn.ac.uk/bitstream/handle/2164/91/060410-002.pdf;jsessionid=C028A1A5F0EF0527416B09D49CEE231E?sequence=1>

11 Ulp. D. 4,2,3,1.

12 DOSTALÍK, Petr – KOČNAR, Šimon. Římskoprávní kořeny Kodexu kanonického práva (CIC 1983). In *Právnické listy,* 2020, vol. 4, no. 1, p. 14.

13 Paul. D. 4,2,2: *Vis autem est maioris rei impetus, qui repelli non potest*. (**Force is an attack of superior power which cannot be resisted.**)

14 Paul. D. 4,2,21,5: *Si liberum esset noluissem, tamen coactus volui* (Although if I had been free I would have been unwilling to do so; still, having been subjected to compulsion, I had the will to act). Since the validity of legal acts with regard to ius civile was judged according to their external characteristics, an act performed under fear, arising from coercion, was valid. *(coacta voluntas est voluntas)*.

15 Praetorian *actio quod metus causa*, or *exceptio metus* were necessary just because in civil law, an act performed under fear, arising from coercion, was valid.

16 Ulp. D. 4,2,1 in fine.

17 Ulp. D. 4,2,5.

person to have any apprehension, or worry about trifles, that are not important (essential) and which the law order, with regard to that, does not take into account[18].

A great maleficence was considered to be the one, that the threats must be of dead or bodily hurt, wrongful enslavement or physical integrity of the forced person and also of members of his family[19], but not property damage[20]. If the person, who was subjected to the threat had at his disposal tools, which are possible to thwart (eliminate) the execution of the threat, cannot use *actio quod metus causa* (or *exceptio metus*), since the threat in such a case is avertable and resistible[21].

D. 4,2,2 (Paulus libro primo sententiarum)
Vis autem est maioris rei impetus, qui repelli non potest.
Moreover, force is the attack of a more powerful agent which cannot be repelled.

The conditions of great fear *(metus gravis)* were not met even if someone was afraid of making a decision contrary to the will of respectable citizens - e.g. contrary to the will of the patrons[22], but above all, if *filius familias* has fear to oppose his pater familias when he takes a wife *(metus reverentialis)*, as Celsus states[23]. In such a case, the son seems to adopt the father`s opinion in such a way, that it is *stricto sensu* a decision of these son, who respects his father`s opinion, even if this opinion is expressed coercive figure[24].
In principle, however, father`s constraint towards the son to enter into marriage was inadmissible[25], as it have been not accepted that gives the full consent the one who obeys the command of his father or his master[26]. Later it was accepted, that an act for fear of the influence of a person in some office was the reason for the restitution[27].

D. 50,17,4 (Ulpianus libro sexto ad Sabinum)
Velle non creditur, qui obsequitur imperio patris vel domini.

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18 D. 1,3,3 - D. 1,3,6; D. 1,3,10: these texts indicates the same principle - *de minimis non curat lex* (the law does not govern trifles) or another version of it: *Quod raro fit, non observant legislatores* (the law does not take care of that, which seldom occurs).

19 Paul. D. 4,2,8,3 (fear initiated through children); Ulp. D. 4,2,7,1 (fear of death); D. 4,2,22 (fear from become a prisoner); Ulp. D. 4,2,3,1 (fear from flogging); Paul. D. 4,2,4 (fear from slavery); HEYROVSKÝ, Leopold. *Dějiny a systém soukromého práva římského*. Praha: J. Otto, 1910, p. 199 – 200. If someone has fear from infamy, that tis not the case of *metus*.

20 HEYROVSKÝ, ref. 19, p. 200.

21 Paul. D. 4,2,2; Pauli sent. 1,7,7.

22 But patron cannot marry his freedwoman against her consent, if he emancipated her only in order to marry her. (Marci. D. 23,2,28; Ulp. D. 23,2,29).

23 Cf. D. 23,2,22.

24 Cf. du PLESSIS, ref. 10. Thomas Aquinas has adopted the Roman law concept of the contract of marriage and brought the principle solus consensus facit nuptias into the legal and doctrinal debate. He came from the opinion of Pope Urban II. (1088-1099), according to which the fear due to psychological coercion ab extra makes marriage invalid. Accordingly, the conjugal consent of both parties is the causa efficiens of every marriage, which is expressed in canon 1057 CIC 1983 as the condicio sine qua non of its valid creation. This is a basic element of the contractual conception of marriage, expressed in the canons on marriage in the CIC 1983 as a contract of a special nature, and at the same time the personalistic character of matrimonial consent is emphasized.

25 Cf. Ter. Clem. D. 23,2,21.

26 Ulp. D. 50,17,4: *Velle non creditur, qui obsequitur imperio patris vel domini*. (**He is not considered to give his full consent who obeys the command of his father or his master.**)

27 C. J. 2,19,11 (imperator Constantinus ad Evagrium, 326 AD); cf. DELI, Gergely. *Metus reverentialis: come-back of an old concept?* In DÁVID, Radovan – NECKÁŘ, Jan – SEHNÁLEK, David (eds.). *COFOLA 2009: the Conference Proceedings*. Brno: Masaryk University, 2009. [online]. Accessible at: <https://www.law.muni.cz/sborniky/cofola2009/files/contributions/Gergely%20Deli%20_868_.pdf>

Someone is not regarded as beeing willing if he obeys the command of a father or master.

The fear *ratio* was measured by an objective criterion, which was a man with a solid character *(homo constantissimus)*, i. e. a prudent, stable man, which is in fact the opposite of unstable person (*homo vanus*), who, as a result of the rational criterion chosen in this case, is „not affected by the edict", as Gaius states[28].

D. 4,2,6 (Gaius libro quartum ad edictum provinciale)
Metum autem non vani hominis, sed qui merito et in homine constantissimo cadat, ad hoc edictum pertinere dicemus.
Moreover, we say that the duress relevant to this edict is not that experienced by a weak-minded man but that which reasonably has an effect upon a man of the most resolute character.

The coercion must have been unlawful. If person exerted compulsion on the acting person, which was based on a righteous reason, no injustice is committed and it is not *vis et metus* here[29].

Similarly, one who was forced to pay an existing mature debt, it was not *vis metusve causa gestum*, as there was no unlawful coercion present and the debtor was not harmed[30]. However, if the creditor took possession of the property of his debtor without the judge`s authorization, he was liable under the Julian law relating to private violence *(lex Iulia de vi privata)* to a fine[31].

CONCLUSION

The importance of freedom of the will in the human acting in law relations is unquestionable. However, since a human will is part of his internal mental world, it is not possible to perceive it in such a way that other participants in legal relations always, under all circumstances, acquire objective knowledge of its real content. It is affected by external factors, among which mental coercion is important for our consideration. If the coercion reaches a great scale, it causes fear of varying intensity. Roman law, especially jurisprudence, dealt with several aspects of this phenomenon, which affects human decision-making and has some legal consequences. The reflection of roman lawyers was based on the fact, that the validity and effects of legal acts (expressions of will) must be judged mainly according to their external elements, but in the interest of equity, it is also necessary to take into account what the actor really wanted, but fear due to mental coercion prevented him from expressing it in acting. In this situation the praetor played an important role, for he protected the coerced person with a special action of coercion, or an exception of fear.

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28 Gai. D. 4,2,6; Ulp. D. 43,16,3,5-6.

29 For example, if the creditor demands payment and threatens with execution, or if the pledgee threatens the non-paying debtor with the sale of the pledge.

30 Cf. du PLESSIS, ref. 10; HEYROVSKÝ, ref. 19, p. 200.

31 Modest. D. 48,7,7 and D. 48,7,8 *(decretum divi Marci)*: *Vis est et tunc, quotiens quis id, quod deberi sibi putat, non per iudicem reposcit.* **(Force is also employed when anyone thinks that he can take what is due to him without demanding it a through the judge.)**.