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Periculum – The Transfer of the Damage in the Sales Agreement with regard to Turkish Law*

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Abstract

Here in this paper, we will discuss the roots of the regulations of periculum in Turkish Law of Sale in regards of Roman Law. The question is; has the purchase price to be paid although the thing sold has perished (or deteriored) because of the events which neither of the parties can be held liable by the other? Roman law lets the risk pass from the vendor to the buyer upon the completion of the sale. Within this paper, we will look into the resolution of Turkish law concerning this problem as we are pointing out the influence of Roman law. Therefore, it will be helpful to explain this problem at first; then we will examine the situation in the former Turkish Code of Obligations, and finally, we will look closely through the new Turkish Code of Obligations with regards to this matter.

In this study treating one of the most controversial subjects of law, the ownership of the damage in the sales agreement, one will mention the manner in which the subject is treated in Turkish law with the principle adopted in Roman law. Therefore, it will be helpful to explain this problem at first, despite the risk of repeating some issues already known by everyone.

The concept of «periculum» has the meanings of damage, risk. Those are the results of the fact that the execution becomes impossible due to unexpected situations. For instance, the good for which one becomes indebted may be destroyed or deteriorated for an unexpected reason; and the concept of damage has several meanings according to these probabilities. The subject of damage is as

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follows in sales and in general fully mutual contracts:

The problem of damage is the matter of knowing who will undertake the damages happened to the "good constituting an obligation per piece"[1)] within the elapsed time between the establishment of the purchase-sale agreement and the execution of this agreement without the fault of the seller. When the execution becomes impossible; in other words, if the good is entirely or partially destroyed or deteriorated in such a way that the seller can't be held responsible (without the fault of the seller, for unexpected situations) and consequently the seller gets rid of the execution obligation (performance obligation) will the buyer pay the entire agreed amount?

For instance, if an individual sells his horse and that horse gets sick and dies before it is delivered, does this individual get rid of his obligation if he is totally faultless? Or a precious carpet is sold for 1000 gold and is destroyed due to a fire before the delivery without the fault of the seller. Does the buyer have to pay 1000 gold despite the fact that he can't no longer demand anything? If the buyer (client) has to pay the purchasing price as well in case of the destruction of the good for an unexpected situation, it is said that the damage belongs to him, meaning to the buyer (client). If the opposite case is in question and the buyer gets rid of the obligation to pay the purchasing price and therefore the seller does not obtain anything, it is said that the seller undertakes the risk of being deprived of the purchasing price, that is to say that the damage belongs to the seller. Briefly, the damage belongs to the individual to whom no one will pay an indemnity if the sold good is destroyed without the fault of anyone.

At this point, the law resolves the issue of a material loss happened in a non-imputable way to the parties and the question as to which party has to put up with this loss regarding the general mentality and trend and adopting one party or another. The famous response given to the question by the Roman Law is "the damage belongs to the buyer"[2)]. As soon as a sales agreement comes about concerning a certain thing, the damage is transferred to the buyer upon the agreement of the buyer and the seller.

The point that deserves attention here is the fact that the seller will be held responsible if he is faulty in this respect, if the damage resulted from his own fault or negligence (from his carelessness, his imprudence, from the violation of the

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1) Genus non perit. The obligation per species is not wasted, it is only wasted if it is transformed into obligation per piece having been designated one by one.
2) Periculum ad emptorem pertinet. Periculum emptoris est.

rules by himself or from his professional inexperience). In Justinianus' law the seller used to be held responsible for all of his faults (omnis culpa). In fact, in classical period the seller used to be held responsible for the unexpected situations as well and therefore his responsibility had the characteristics of custodial responsibility (custodia). The situation of impossibility of the act appears if the seller is "not responsible" for the damages happened to the good he sold, for instance if these damages resulted from an unexpected event. Romans stated this fact as "no one can be held responsible for an unexpected event" (casu a nullo praestantur). Besides the obligation has to be an obligation per piece. The principle as to the belonging of the damage to the buyer is applied only to the purchase and sale of pieces and not to the purchase and sale of species since a performance impossibility in the purchase and sale of species can't be in question with regard to seller as long as things of that kind exist in the world. And if the obligation is an "obligation per piece" (if this is not an obligation per species) the seller will get rid of his obligation. The fact that the seller will get rid of his obligation means that the buyer will pay for the purchasing price although he does not buy the horse or the carpet.

As we just explained above and as it is stated in Institutiones[3)] the damage used to be transferred to the buyer upon the purchase and sale. "When the purchase and sale agreement is constituted (if the legal act is not a written act, this constitution takes place upon agreement on the purchasing price) the damage is immediately transferred to the buyer although the sold good is not delivered. If the sold slave is dead or some of his body parts are injured, if the sold building is totally or partially burned in fire, if the sold terrain is entirely or partially swept away by river water, if it is reduced or it lost in value due to the toppling of the trees after tempest (if it reduced in value or in ground) the damage belongs to buyer even though he did not take the sold good." In other words, all of this is the loss of the buyer who is obliged to pay the purchasing price although he has not obtained yet aforesaid good since the seller is sheltered from everything that occurs without his deliberation and negligence (sine dolo et culpa).[4)] Nevertheless, if the sold terrain is enlarged with the alluvions after the purchase and sale process, this

3) I.3.23.3

4) Umur, Ziya; Roma Hukuku Tarihi Giriş - Tarihi Giriş, Kaynaklar, Umumi Mefhumlar, Hakların Himayesi, Fakülteler Matbaası, İstanbul, 1982; Umur, Ziya; Roma Hukuku Ders Notları, İstanbul, Beta Yayınları, 1999; Koschaker, Paul; Ayiter, Kudret; Modern Özel Hukuka Giriş Olarak Roma Özel Hukukunun Ana Hatları, Ankara Üniversitesi Hukuk Fakültesi Yayınları, Ankara, 1977.

enlargement belongs again to the buyer since the damage as well as the benefit (interests) must belong to the same person. As it can be also seen here, one tried to make this principle more equitable saying that the damage as well as the interests belong to the same person (cuius periculum eius est commodum).

Once again, the custodial responsibility is used as a situation narrowing the principle of damage. In fact, even though one cannot ask the seller to protect the good with arms, he can be asked to take all the care of the good and first of all to protect the good from theft. Thus; the custodial responsibility of the seller (supervision of the good) balances the situation.

The question as to why the Roman Law defends the transfer of the damage to the buyer with sale is controversial and cannot be answered precisely. With a great probability this principle takes its roots from the times when the sales used to be done with cash money and thus the property was immediately seized. The act of purchase and sale generates only obligation, it is separate from the act of disposal. It binds the seller with the obligation of transferring the sold good, but it does not transfer the property. Therefore, in Roman Law the act of purchase and sale engendering only obligation and the procedure of transfer of the property must be separated. Hence consensual act of purchase and sale does not have any consequence with regard to real rights in Roman Law that accepts the agreements only as a source of obligation. However, the act of purchase and sale passed through a real phase in Roman Law just like in all the ancient laws. In ancient Greek Law, in ancient Oriental Laws and in ancient Germanic Law the transfer of the property and the act of cash purchase and sale were taking place simultaneously. However, in time these two procedures had been separated upon the emergence of minted coin. Thus, the separation between the act of obligatory purchase and sale and the act of transfer of the property took its complete and absolute shape and this principle (the principle that the purchase and sale engenders only obligation) has survived until our actual law as one of the essential principles of Roman purchase and sale law. The source of the principle of damage is explained also based on the act of cash purchase and sale of the first ages. And Roman jurists made similar comments.[5)] While in classical law the emphasis is put on the transfer of the possession of the good, in Justinianus' law it is linked to the

5) Classic lawyers linked the transfer of the damage with the delivery of the good, however a previous time could be accepted as well for the transfer of the damage taking into consideration the contracts such as rental contract, precarium concluded during the sale and giving the buyer a dominating situation on the good.

Also, it could be backdated in cases where the buyer did not take along a mortal↗

completion of the contract.

Indeed, there was nothing unnatural concerning the application of the principle that the damage belongs to the buyer since the property of the good was immediately transferred to the buyer in cash purchase and sale where the good and the purchasing price were immediately exchanged. However, when the moment of the constitution of the agreement and the moment of its execution were separated in time, the transfer of the damage might have been linked to the moment of the constitution of the agreement, that moment having been considered more important. On the other hand, since the obligation of the delivery of the good by the seller did not charge with the obligation of the transfer of the property, it was impossible to link the transfer of the damage with the transfer of the property since sometimes one would wait the realization of the acquisition (usucapio) with prescription although the goods were delivered (in mancipi goods), which could engender several unjust consequences.[6] Nevertheless, many romanists accept that

↘individual or a perishable good after having seen and tested the slave or the good. One can see that the delivery of the good (tradition rei) was demanded at least as principle for the transfer of the damage. And a sort of solution diverged from this principle was justified with a legal assumption. Accordingly, after the conclusion of purchase and sale agreement, different solutions were adopted about the beds left on the street or destroyed by magistra, according to the delivery of the goods to the buyer or his default or according to the non - realization of the delivery or the default. In case of the waste of the goods before delivery the seller losing the right to demand the purchasing price will take in charge the damage. In case of the waste of the goods after delivery the buyer who will pay the purchasing price will be put up with the damage. The default on the reception of the good is deemed equal to the delivery in this respect. If we attach this method to Justianus' law the periculum will be explained by custodial responsibility that has become a natural constituent of the act of purchase and sale in this law. Another example is as follows: The act of purchase and sale of the slave was accomplished in a place where the slave was present as well in order to determine his health condition and in order to enable the buyer to take him along: this was a market tradition. However, if the buyer left the slave temporarily by the seller for taking him afterwards, the damage that would be caused by a natural death existing in the nature of a mortal being was transferred to the buyer upon the constitution of the agreement (Julianus.D. 18.5.5.2). The jurists considered necessary to justify this backdated transfer of damage diverging from the principle of the delivery of the good with an assumption: "One must suppose the slave as delivered if he died after the sale; so that in this case the seller would be rid of his obligation and the slave would be considered as dead in the eyes of the buyer." In essence, the fact that one deemed necessary to attach a situation diverging from the rule in force to the same rule that applied to the assumption that the good was delivered, in order to confirm the accuracy of this situation, is very characteristic. Betti , Emilio; Istituzioni di diritto romano, CEDAM, 1989.

the sphere of influence of this principle was limited on behalf of the buyer even though the explanation and the compilation of existing texts at this subject are difficult(with regard to the fact that the seller keeps the sold good under custodial responsibility until the moment of delivery)[7]. In this case, we cannot but accept that the Roman Law came to the most reasonable conclusion it could come with its integrity and made such an arrangement. We can think that the agreement of purchase and sale from the Justinianus' era is situated in an average place in the transition from the Roman act of purchase and sale that was only promissory to the act of purchase and sale of the modern laws of which the Roman Law is the basis, transferring the property with consent.[8] Thus, we would have a rational explanation in terms of historical evolution.[9] And what is the approach adopted by Turkish Code of Obligations? This subject must be treated as well.

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The principle that the damage belongs to the buyer existing in Roman Law was in force either in Turkish law. The Code of Obligations that has been in force since 1926 regulates the benefit and the damage as follows:

> "ARTICLE 183 Apart from the exceptions resulting from the requirement of the situation or particular conditions, the benefit and the damage of the sold good are transferred to the buyer from the moment of conclusion of the agreement.
>
> However, the sold good that is determined only in terms of species must be distinguished as well and the seller has to lay his hands off the sold good to that end if the sold good will be sent somewhere else.
>
> In the agreements concluded with condition precedent, the damage and the benefit of the transferred good are transferred to the acquiring person only

6) Arangio-Ruiz, Vincenzo; Storia del Diritto Romano, Napoli, 1998

7) According to the classic law the custodial responsibility could be determined only if the seller assumed this responsibility on his own accord. Having interpreted the custodial responsibility as diligentia in custodiendo responsibility, the jurists of Justinianus accepted it as a legal consequence of the agreement as if the sold good belonged from that time on to the buyer but at the same time as if it was left temporarily to the seller. Betti, Emilio; Istituzioni di diritto romano, CEDAM, 1989, p. 11, Betti, Emilio; La Creazione del Diritto Nella "Iurisdictio" del Pretore Romano, CEDAM, Padova, 1927, p. 67

8) Garcia Garrido, Manuel Jesus; Derecho Privado Romano: Casos, Acciones, Instituciones, Madrid, Ediciones Academicas S. A., 2010; Antonio Guarino, Antonio; Diritto Privato Romano, Editore Jovene, Napoli, 2001

9) "Casum sentit dominus", "res perit domino"

from the moment of the realization of the condition."

The fact that the Swiss-Turkish Code of Obligations[10] follows entirely the Roman Law[11] with the 183rd article is considered as a very strange case by Andreas Schwarz[12] as well as by many jurists since in Turkish Law the property of movable goods is transferred to the buyer with delivery, more precisely with the transfer of the possession and the damage is transferred to the buyer with the conclusion of the sales agreement. In Roman Law either the property is transferred to the buyer upon the delivery (in all situations according to the Corpus iuris law) and the damage upon the conclusion of the sales agreement.[13] In this respect, the unexpected situation and the damage risk are assumed not by the owner or seller but buy the buyer who has not been owner yet. And in the modern legalizations in general the transfer of the property and the damage presents always parallelism either with delivery or the constitution of the agreement[14] while the Turkish Law links the transfer of the property with the delivery and the transfer of the damage with the constitution of the agreement.[15] However the literal application of this principle in daily life and amongst the public is suspicious as well. If we come back to the previous examples, we observe that the person does even not need to explain that he would not pay a price for the horse that dies or the carpet that burns before the delivery in horse or carpet sales and that the seller does not think about demanding the price if he is not previously informed about this subject by a lawyer. Because this is a logic that is contrary to the flow of daily life and the habits of the society. In the article the fact that the damage belongs to buyer is

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10) The Turkish Code of Obligations was adapted from Swiss Code of Obligations.

11) Meili, Alfred; Die Enstehung des schweizerischen Kaufrechts, Ein Beitrag zur quellenkritischen Untersuchung des Obligationenrechts, Zürich 1976, p. 37 etc; Erisgin Söğütlü, Özlem; Tarihsel ve Dogmatik Açıdan, Periculum Est Emptoris (Hasar alıcıya aittir), Ankara 2010, p 120 etc.

12) Schwarz, Andreas B.; Satış Aktinde Hasarın İntikali, Ankara 1948, Ankara Üniversitesi Hukuk Fakültesi Yayınları, p.1

13) Altay, Sabah; Satım Sözleşmesinde Hasarın Geçişi, Istanbul 2008, p. 5; Atamer, Yeşim; Satım Sözleşmesinde Hasarın İntikali Anı; Prof. Dr. M. Kemal Oğuzman'a Armağan, Istanbul 2000 (1313-167), p. 132; Honsell, Heinrich; Schweizerisches Obligationenrecht, Besonderer Teil, 5. Auflg. Bern 1999, p. 46; Hager, Günter; Die Gefahrtragung beim Kauf, Frankfurt am Main, 1982, p. 38; Schwarz, R. Andreas (Translated by. Kudret Ayiter); Satış Aktinde Hasarın İntikali, p. 161.

14) German Legal Environment (Austria, Germany, Greece, Poland, Brasil) accepts the transfer of the property and the damage with delivery while Latin Legal Environment (France, Italy, likewise England with regard to movable properties) accepts the transfer of the property and the damage with the constitution of the agreement.

15) Akıntürk, Turgut;Satım Aktinde Hasarın İntikali, Ankara 1966, p. 22 etc.

regulated so as to be valid only for particular situations or for situations where an agreement does not justify an exception. This expression of "particular situations" in the article enables the judge to apply the principle of transfer of the damage to the buyer restricting it since it is not stated expressly and separately what these situations are. Besides, in the article no 216 of the code it is stated that if a term is set with an agreement in order to take possession of the real estate in the sale of real estates, the damage and the benefit are transferred to the buyer only upon termination of that term. Thus, apart from the attenuation of the principle of damage, one must either add that the principle of damage is an auxiliary legal principle and it is possible to come to a contrary agreement.[16)]

And according to the regulation provided for in our new Code of Obligations No. 6098 the benefit and the damage are regulated as follows;

"ARTICLE 208- Except for the exceptional situations resulting from the law, the force of circumstances or from the particular circumstances provided for in the agreement, the benefit and the damage of the sold good belong to the seller until the moment of transfer of the possession for the sales of the movable properties and until the moment of registration for the sales of real estates.

In the sales of movable properties, the damage and the benefit of the sold good are transferred to the buyer as if the transfer of the possession took place in case of the default of the buyer concerning the acquisition of the sold good.

If the seller sends the sold good to other place than the place of execution upon the request of the buyer, the benefit and the damage are transferred to the buyer at the time of the delivery of the sold good to the transporter."

> (Here the explanation of the preamble of the relevant article of the law will be clarifying. PREAMBLE: In the first paragraph of the 183rd article of the Code of Obligations no. 818, it is accepted that the damage and the benefit concerning the obligations per piece are transferred to the buyer at the moment of the constitution of the agreement as a rule. The fact that the buyer is compelled to put up with the damage of a good of which he has not been owner yet and to pay for the price for this good although the property of the sold good is transferred to the buyer not at the time of the constitution of the

16) Tekinay , Selahattin Sulhi; Akman, Sermet; Burcuoğlu, Haluk; Altop, Atilla; Tekinay Borçlar Hukuku Genel Hükümler, Yeniden Gözden Geçirilmiş ve Genişletilmiş Yedinci Baskı, Filiz Kitapevi, İstanbul, 1988; Kocayusufpaşaoğlu, Necip; Hatemi , Hüseyin; Serozan, Rona; Arpacı, Abdülkadir; Borçlar Hukuku Genel Bölüm, Borçlar Hukukuna Giriş, Hukuki İşlem, Sözleşme, Yenilenmiş, Genişletilmiş, Tamamlanmış 2010 Tarihli 5. Bası'dan 6. Tıpkı Bası, Filiz Kitapevi, İstanbul, 2014

sales agreement having the characteristics of a promissory act but at the time of the realization of the transfer of the possession or the realization of the act of registration having the characteristics of an act of disposal in Turkish-Swiss Code of Obligations, is considered contrary to the equity and rightfully criticized in the doctrine. The transfer of the damage to the buyer at the time of the delivery is accepted as well in the rules that will be applied to the agreements concerning the sale of the international movable properties.

Therefore, in the draft and in the new code, the fact that the damage belongs to the seller until the moment of transfer of the possession for movable properties and the moment of registration for real estates has been made into a rule without exception in sales agreements, in contrast to the regulation figuring in the Code of Obligations no. 818. Consequently, the second clause of the Code of Obligations no. 818 concerning the conditions of transfer of the damage to the buyer in obligations per species and the provisions of the last clause concerning the moment of the transfer of the damage to the buyer in sales agreement depending on the retarding condition are not included in the 207th article of the draft and 208th article of the new code.

While in the Code of Obligations no. 818 the moment of transfer of the benefit and the damage of the sold good is regulated, in the draft and in the new code the question as to know until when the damage and the benefit will belong to the seller.)

As it is explained also in the preamble, the fact that the damage is transferred upon the constitution of the agreement without the transfer of the property is contrary to the logic of the society. Besides one could make an agreement contrary to this rule also at the time of the former code. Therefore, we can say that a principle that the damage is transferred along with the property is adopted. The "transfer of the possession in the sales of movable properties" and the "registration in the sales of real states" signify actually the moment of transfer of the property. Thus, the damage will belong to seller until he transfers the property.

The second clause of the 208th article includes the default situation. Accordingly, "the damage and the benefice of the sold good are transferred to the buyer as if the transfer of the possession were realized in case of default of the buyer if he does not take over the possession of the sold good." This provision is a new one that was not included in the Code of Obligations no. 818 et it can be accepted as an exception to the first clause. And in the third clause of the article, it is said that "If the seller sends the sold good to other place than the place of

execution upon the request of the buyer, the benefit and the damage are transferred to the buyer at the time of the delivery of the sold good to the transporter." This can be accepted as an exception to the first clause as well. Accordingly, in case of sending the thing being subject to sale to other place than the legal place of execution, the damage and the benefit are transferred to the buyer from the moment of delivery of the thing subject to sale. This request has to be made by the buyer. However, there are some exceptions to that situation as well. If the transporter is as well bond with the seller with the sales agreement, in this case, the damage and the benefit are transferred to the buyer not at the time of delivery of the thing subject to sale but at the time when the thing subject to sale reaches the buyer.

The transfer of the damage and the benefit in the real estates is regulated under the 245th article of the Turkish Code of Obligations. Accordingly, "If a term is set for the reception of the sold good by the buyer at a time after the registration with an agreement, the benefit and the damage of the sold good are transferred to the buyer with delivery. This provision is applied also in case of default of the buyer concerning the reception of the sold good."

The Turkish Code of Obligations no. 6098 includes a similar regulation with the one figuring in the Code of Obligations no. 818. For instance, if an individual selling an apartment is supposed to leave the apartment and register the apartment in behalf of the buyer in 2 months after the registration, in this case the damage and the benefit of the apartment will be transferred to the buyer in 2 months upon the registration in the land registry. Thus, the buyer is protected. The condition of this rule is stated in the second clause. Pursuant to second clause "The validity of this agreement depends on the condition that it is done in written form." In other words, the law seeks for written form requirement in case of conclusion of an agreement. The written form requirement has hereby the characteristics of constituent element.

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In conclusion, after first adopting Swiss Code of Obligations, 85 years later, we see the change on the expression of the regulation on the transfer of the damage and the benefit with the new Turkish Code of Obligations no.6098.[17)] So, with this new expression of the rule; we see that now the German BGB art.446 is being

17) Ozdemir, Hayrunnisa; Satış Sözleşmesinde Yarar ve Hasarın İntikali, Prof. Dr. Cevdet Yavuz'a Armağan, Istanbul, 2012.

preferred and that is also in compliance with the Vienna Convention's (CISG) art. 67[18].

We see two main requirements listed in the new form of the Turkish Code of Obligations;

— The establishment of the sales agreement[19]
— Transfer of the goods/property by delivery or registration in the land registry ((Here, in the German code, we see "die Übergabe der Besitz")[20]. We see that when the buyer becomes owner, he bears the damage and has the benefits, So the periculum follows the owner.

The exception of the general rule is also regulated on the second clause of the 208th article mentioning the default situation ("the damage and the benefice of the sold good are transferred to the buyer as if the transfer of the possession were realized in case of default of the buyer if he does not take over the possession of the sold good."). This provision is a new one that was not included in the previous Code of Obligations no. 818.

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18) Vienna Convention on 1980 International Sale of Goods which has been prepared to fill several gaps and accepted by Turkey in 2010. For further readings see. Yenice, A. Özge; Türk Borçlar Kanunu ve Viyana Satım Konvansiyonu (CISG) Hükümleri Işığında Gönderme Satımı, XII Levha Publishing, Istanbul, 2015.

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20) Ansay, Sabri, Ş.; —Menkul Mallarda, Mülkiyetin ve Hasarın İntikali Hakkında Muhtelif Sistemler Arasında bir Mukayese, AÜHFD, C. 10, 1953, p. 456.

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