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COMPARATIVE ANALYSIS OF RISK PASSING IN ROMAN LAW, SERBIAN DOCTRINE AND 19TH CENTURY LEGISLATION*

There are several different theories that attempt to explain the exact moment of risk passing in Roman law. The most accepted explanation claims that the Roman rule periculum est emptoris (risk lies on the buyer) was present not only in the post-classical period of Roman history, but in the classical one as well. A minority of Romanists find this explanation too simplistic, arguing that the opposite rule, periculum est venditoris, (risk lies on the seller) was applied during the classical period of Roman legal history. In this paper the author examines these two approaches and make some comparisons between Roman law of risk passing and the Serbian 19th century legislation and legal doctrine. He concludes that theories claiming that periculum est emptoris was the only way to resolve periculum rei venditae are not convincing.

Key words: *Risk Passing. – Periculum Rei Venditae. – Periculum Est Emptoris. – Periculum Est Venditoris. – Serbian Civil Code of 1844. – Roman Law. – Comparative Legal History.*

Rules about risk passing, *periculum rei venditae*, have been studied and applied since the Roman period and today they are found in almost every civil code. A developed system of trade and market economy is the requirement for such a subtle institute as *periculum rei venditae* is. Therefore it was not present in most medieval laws when direct exchange of goods (*permutatio*) prevailed, due to feudal organization of economy, poverty and the generally low standard of living. With the renaissance and revival of commercial markets, risk passing has once again applica-

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ble. Latter on, it can be found in all 19th-century civil codifications. As one of the first modern civil codifications in Europe appeared the Serbian Civil Code of 1844. The Serbian Civil Code, as the cornerstone of the Serbian legal system in the 19th century, will be examined and compared with the Roman law as well as with the other Serbian 19th century laws pertaining to *periculum rei venditae*. It is necessary to briefly examine initially the nature of this institution in the Roman law itself in order to conduct comparisons of other solutions with the Roman one. There are several diverse theories that attempt to explain Roman concept of *periculum rei venditae*, due to the general lack of Roman legal sources and the many interpolations made by Tribonian's commission.

Periculum rei venditae comes out when one of the contractors, either the buyer or seller, has to bear the consequences if the object of *emptio-venditio* (*merx*) is damaged or destroyed by accident (*vis maior* or *casus*). Normally, the owner is to bear the consequences when his thing is destroyed or partially damaged (*casus sentit dominus*). However, if this occurs while the obligation has not been completed between the contracting parties, the problem is how to determine the exact moment of ownership and risk transfer between the seller and buyer, and, consequentlly, who of the two undertakes the consequences. Ownership, as a rule, passed to the buyer only when the thing was actually delivered.[1] If the object (*merx*) is *genera*, the answer is easy. According to the famous Roman rule "*genera non pereunt*", the seller has to take the risk and eventually provide the same amount and quality of goods to the buyer when the *merx* was destroyed. According to the Roman legal sources if the object was *species* the buyer had to take the risk – *periculum est emptoris*.

The majority of Romanists and legal historians have accepted *periculum est emptoris* as a Roman rule despite of it's general dissonance with the spirit of Roman contract law.[2] Firstly, it is obvious that this rule is completely contrary to the Roman maxim *casus sentit dominus*. It would make sense and this could be justified if the *consensus* would led to immediate transfer of ownership on the *merx* without *traditio*. This was obviously not the case. Sale was a consensual contract, which requires no formalities but depends for its validity solely upon the agreement of the parties (which is purely Roman invention).[3] The buyer had only the right to claim *traditio* from the seller (*obligatio*). He did not have any rights on the object itself. On the other hand, the *rule periculum est*

[1] D. 41, 1, 9, 3.

[2] Alan Watson, *The Spirit of Roman Law*, The University of Georgia Press: Athens & London 1995, p. 27; Alan Watson, *The Law of Obligations in Later Roman Republic*, Oxford: Oxford University Press 1965, p. 69; Alan Watson, *Legal Transplants – An Approach to Comparative Law*, The University of Georgia Press: Athens & London 1993, p. 82.

[3] See, Alan Watson (1993), p. 82.

emptoris in practice could lead to some clearly unjust outcomes. For example, if the seller sells the thing to the buyer and prior to the *traditio* object is being destroyed by *vis maior*, the buyer will have to pay the price although he did not get anything out of it, and did not have any liability for the destruction of the *merx*. This situation can be much more unfair if the seller has sold the same object successively. He would have the right to claim the price from each buyer![4] On the other hand, if the object was not destroyed he could claim the price from only one buyer. Furthermore, he would have to compensate other buyers for not fulfilling the contract.

Nevertheless, in the Justinian's Codification we find many acknowledgements on *periculum est emptoris* at many places.[5] This is why most scholars accept this rule as a common place in the Roman law.[6] Among the legal historians who support different explanations of risk passing in ancient Rome are those who try to prove that the rule *periculum est emptoris* was actually combined with the rule *periculum est venditoris* – by which sellers bear the risk until *traditio* is accomplished. There are some authors who claim that *periculum est emtoris* was not used at all in classical Roman law, but only *periculum est venditoris*. These assertions are perhaps not so well-known and widely accepted in Serbian legal theory and among scholars in general, so we shall focus on them.

According to these viewpoints, there is no doubt that *periculum est emtoris* was practiced in the time of Justinian. "*Cum autem et vendito contracta sit, periculum rei venditae statim ad emptorem pertinet, tametsi adhuc ea res emtori tradita non sit*"[7]– As soon as an agreement to sell is concluded, the risk of a sold thing transfers to the buyer also in the case if the *traditio* has not been performed yet. Justinian justifies this solution with the fact that from the moment of the *consensus* the buyer has the right to the fruits and accessions of the object (*merx*).[8]

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[4] Mihajlo Konstantinović, "Prilog teoriji rizika u rimskom klasičnom pravu" [Contribution to the risk theory in classical Roman Law], *Arhiv za pravne i društvene nauke* 3/1924, p. 162; the same article was reprinted later, Mihajlo Konstantinović, "Prilog teoriji rizika u rimskom klasičnom pravu" [Contribution to the risk theory in classical Roman Law], *Anali Pravnog fakulteta u Beogradu* 3–4/1982, 247–258.

[5] For example, Inst. III 23.3.

[6] Dragomir Stojčević, *Rimsko privatno pravo* [*Roman Private Law*], Beograd: Savremena administracija 1988, p. 264; Bertold Eisner, Marijan Horvat, *Rimsko pravo* [*Roman Law*], Zagreb: Nakladni zavod Hrvatske, 1948, p. 422; Watson, Alan (1965), 69; Jelena Danilović, "Srpski građanski zakon i rimsko pravo" [*Serbian Civil Code and Roman Law*], *Sto pedeset godina od donošenja Srpskog građanskog zakonika*, Beograd: Srpska akademija nauka i umetnosti, 1996, p. 58.

[7] Inst. III 23.3.

[8] Eisner and Horvat (1948) state that this explanation is not satisfactory, due to large disproportion between risk that has to be taken and the benefits from *commodum rei*, p. 422.

This rule was undoubtedly present in the time of Emperor Justinian, but was that so in the classical Roman law as well? One of the most famous ex-Yugoslavian legal scholars, late Professor Mihajlo Konstantinović, believed that this was not the case. Konstantinović was one of the foremost Serbian specialists in civil law, teaching at the University of Belgrade Faculty of Law. He got his legal education in Lyon, France and taught law at first at the University in Subotica, and subsequently Belgrade. He is the author of the so-called Draft of the Law of Obligations and Contracts (1969), which served as an inspiration for the Yugoslav Law of Obligations. It has never been enacted, but has always been quoted as a supreme authority. It has become the main model for the Law of Obligations of 1978, which is still in force in Serbia. It has effected most legislations on law of obligation in the ex-Yugoslav countries.

Following the idea of Arno, as far as risks are considered, Konstantinović wrote a couple of works where he tried to prove that *emptio est venditoris* had been the only rule on risk during the Roman classical period. He emphasizes that the contractual obligation of one contractor is *causa* for the obligation of the other. If one's obligation becomes impossible (e.g. if the *merx* is destroyed) the obligation of the other contractor terminates. *Periculum est emptoris* therefore differs from the general logic of Roman contractual law and can cause unjust situations. On the other hand, the classical Roman law has been, in Konstantinović's opinion, much more just, because it used the rule *periculum est venditoris*. Subsequently, Justinian's commissioners took (transplanted), under the instructions of the Emperor, the rule *periculum est emtoris* from the East provinces, from the Greek law, and applied it as a general rule. Only thanks to the rush of the Tribonian's commission, some non-interpolated fragments have survived, so that we can see the traces of *periculum est venditoris* in classical Roman law.

In his article *Contribution to the Roman theory of risk*, Konstantinović challenges the arguments of Rabel, who admits that *periculum est emptoris* has not always been applied.[9] Rules in the *Digest* indicate its application was obviously interpolated, which doesn't mean that *periculum est venditori*s was a general rule. In Rabel's opinion, none of these rules were general – each one of them had its own field of application. The distinctive line between the two is, in Rabel's opinion impossible to find, so he gives enumeration of the cases with *periculum est emptori*s. Konstantinović challenges Rabel's examples in favor of *periculum est emptoris* and comes out, using *argumentum a contrario*, with the conclusion that *periculum est venditoris* was the way to resolve the risk passing in Roman classical period.[10]

[9] Mihajlo Konstantinović (1924), *passim.*

[10] *Ibid.*

For example: Rabel claims that when the slave or an animal is the object of an agreement to sell, the risk is assumed by the buyer from the moment of *consensus*. This opinion is based upon the *Digest*, but Konstantinović argues that these fragments have been severely interpolated in order to modify the nature of the institution into *periculum est emptoris.*[11] It is easy to find legal, linguistic and logical obscurities and discrepancies in fragments about slave trading. Some explanations that Konstantinović gives are quite complicated and sophisticated, especially in linguistic matters, but on the other hand, there are some very simple and obvious examples, like Ulpianus's fragment, stating: *hoc amplius Labeo ait, et si quid in funus mortui servi impensum si, ex vendito consequi oporter, si modo sine culpa venditoris mortem obierit*. This whole fragment is, in Konstantinović's opinion, the work of Justinian's commission. He accepts and elaborates the opinion of Arno that it was impossible for the buyer to be obliged to pay the costs for the burial of a slave who died in a period between *consensus* and *traditio*. The reason is simple: in the time of Labeo the slave master was not obliged to bury the slave at all. Corpses were thrown into *Campus Esquilinus*, where wolves and vultures scattered their remains, in words of Horatio.[12]

Of course, there were some masters who buried their slaves – the place where slave was buried was even *res religiosa* for Romans, but that was a matter of *fas*. According to *ius*, Rome of that time did not oblige slave masters to bury their slaves. Plenty of linguistic characteristics of this fragment also show that this was actually a creation of Justinian's commission. Studying this one and many other interpolated fragments in Digest, Konstantinović comes to the conclusion that *periculum est venditoris* was the general rule in classical Roman law considering risk transfer, with only a few understandable exceptions. One of these exceptions is famous fragment from Gaius' *Res cottidianae*, concerning the selling of wine. Eva Jakab examined this fragment in detail in her works. She states that the seller took the risk for the wine if he had guaranteed wine's quality to the buyer, and *traditio* has been made before the buyer tried the wine. If there is no guarantee from the seller, and the buyer doesn't try the wine (or tries it without noticing its dissatisfying quality), he takes the risk if the wine gets sodden or spoiled. But, Jakab emphases, if the seller knows that quality is about to drop before *traditio*, and does not warn the buyer, seller was to take the risk again.[13] Konstantinović has had the same

[11] Eisner and Horvat (1948), pp. 422. support theories that see *periculum est emptoris* as the only way to resolve the problem of risk transfer in Roman law. However, they admit that this question is highly contraversial and that the presence of Justinian's interpolations is obvious.

[12] Mihajlo Konstantinović (1924), p. 171.

[13] Eva Jakab, "Gaius kommentiert die Papyri*"*, *Symposion 1995, Vortrage zur griechischen und hellenistischen Rechtsgeschichte,* Koeln – Weimar – Wien 2003, pp. 313; Eva Jakab, "'Wo gärt der verkaufte Wein?' Zur Deutung der Weinleiferungskäufe in

opinion about the *periculum rei venditae* in these wine sales as Jakab. This same fragment is, on the other hand, interpreted by Haymann as an example of *periculum est emptoris*, which is further evidence of how this Roman legal matter, *periculum rei venditae*, can be considered in different ways with good argumentation. However, Konstantinović's conclusions and arguments on that topic still sound very convincing.[14]

In comparing Roman understanding of *periculum rei venditae* with the Serbian 19th century legal system, one has to take into account the general situation in the country at that time. At the beginning of 19th century a part of the Serbian people was living under the supreme power of the Ottoman Empire, and the other under Austro– Hungarian Empire. This period of Serbian legal history can be clearly divided into two asub periods – the one before adoption of the Serbian Civil Code of 1844 and the one afterwards. Before the codification was enacted, any comprehension of *periculum rei venditae* did not exist at all. It was a period without written civil laws; courts were judging arbitrarily, mainly according to the customary law and equity, and there are no traces of *periculum rei venditae* mentioned in the preserved court decissions. Situation was different in the now Serbian Northern Province of Vojvodina, inhabited with a huge Serbian population. The area was part of the Austrian Empire, and when the Austrian Civil Code was enacted in 1811, it was applied to all the citizens, including Serbs. Although many Serbian intellectuals from Vojvodina maintained close contacts with the Serbs "from the other side of the Danube", and strongly influenced political, cultural, educational and all elements of life in Serbia during and after the First Serbian Uprising against the Turkish rule in 1804, even then there are no traces of import of rules about risk passing. Even more, legal terminology was weak among Serbs in Vojvodina also: it was common expression in Vojvodina of that time *zavrsio sam posao* [a rough translation would be "I finished (completed) contract"] for situations in which someone has actually only achieved *consensus*, without *traditio*.[15] In the southern part of today's Serbia, being deeper and longer within the Turkish rule, problems that occur dealing with *periculum rei venditae* were resolved without involving the court, according to local customs. This situation changed considerably after enacting of Serbian Civil Code of 1844 and the Serbian Commercial Code of 1860. Highly influenced by Austrian Civil Code of 1811,[16] Serbian Civil Code of 1844 brings *periculum rei venditae* into Serbian legal life.

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den graeco-ägyptischen Papyri", *Symposion 1997, Vortrage zur griechischen und hellenistischen Rechtsgeschichte,* Koeln – Weimar – Wien 2003, pp. 295.

[14] Mihajlo Konstantinović (1924), 173.

[15] Jelena Danilović (1996), pp. 58.

[16] For more details, see Miroslav Đorđević,"Pravni transplanti i Srbijanski građanski zakonik iz 1844. godine" [*Legal Transplants and the Serbian Civil Code of 1844*], *Strani pravni život* 1/2008, 62–84.

If one accepts, as most authors do, *periculum est emptoris* as a general Roman rule, the solutions found in the Serbian Civil Code differ from it almost completely. According to the Code, the buyer does not become the owner of the object with an agreement to sell contract itself (moment of *consensus*), but with the moment of *traditio.*[17] Therefore, the seller had to bear the risk of accidental object destruction fully according to the Roman rule of *res perit domino*. The seller was not capable of transfering the ownership to the buyer due to accidental destruction of the object; he was not allowed to ask for the price, neither to keep it if it was given before, as it would be considered to be in his possession *sine causa*. This solution is very similar to the one found in Austrian Civil Code, as the Serbian Civil Code transplanted it in many aspects. Article 658 of the Serbian Civil Code says: *Što se koristi i opasnosti pri prodatim, no nepredatim stvarima tiče, važi popis zakona pri promeni naznačenog* – "concerning things sold, but undelivered, applicable is the rule written under exchange", which is the article 636 of Serbian Code that says: *Ako je vreme za prodaju određeno, pa bi međutim stvar zabranom zakonom prestala među ljudima prolaziti, i vrednost imati, ili bi slučajno propala, onda prestaje ugovor, i smatra se kao da nije ni učinjen*– "if the object stipulated for excange becomes *res extra commercium,* or accidentally gets destroyed before the delivery (*traditio*), contract is abolished, like it has never been made".

Professor of Roman law from Banja Luka in the BiH Federation, Nikola Mojović, offers in his thesis interesting conclusions about *periculum rei venditae* in Serbian 19th century law. He claims that this is clear application of rule *periculum est venditoris.*[18] Exclusion of objects from legal circulation (due to expropriation, for example), in the Serbian Civil Code is treated equaly as the physical destruction of it. If the contract is abolished, the seller, still being the owner, will be given the compensation for the expropriated good. This may sometimes be worse for the seller, because maybe he could have got the better price from the buyer. In that case, Mojović states, the will of the state in case of expropriation is considered as *vis maior.*[19] When the object of *emtio-venditio* is not completely destroyed, but only damaged, the rule *periculum est venditoris* is also in place, with an exception for situtations in which the object is the whole stock (*djuture*). In this case, risk lies on the buyer's side from the moment of *consensus*. Although the main model for Serbian Civil Code was the Austrian Civil Code, nevertheless we come here to certain difference between the two. In the Austrian Code, if the object is damaged so it has

[17] Serbian Civil Code, Art. 658, 636, 642, etc.

[18] Nikola Mojović, *"Periculum rei venditae" od rimskog do savremenog prava*, Beograd, Pravni fakultet Univerziteta u Beogradu, 1985, 308.

[19] *Ibid.*

lost half of its value, consequences are the same as it was destroyed completely.[20] Serbian Code, on the other hand, in this situation leaves with the buyer the right to decide whether the contract will remain valid or will be eradicated.[21]

In this context it is also important to paz attention to the Serbian Commercial Code of 1860. It had a few additional rules about risk passing, applied along with those from the Serbian Civil Code. Serbian Commercial Code regulates situations when something accidentally happens to goods during their transport. By that law, the owner of the goods takes the risk – *casus sentit dominus*, but has the right to ask for compensation of damage from the carrier or shipping clerk. It is also significant to mention a unique Montenegrenian civil codification of 1888 – *Opšti imovinski zakonik za Crnu Goru* (*General Civil Code for Montenegro*), written by Valtazar Bogišić, a scholar who was greatly influenced by the historical school, stressing importance of national legal customs. This Code had a tremendous influence on Serbian legal tradition, and it definitely should not be left out of any examination in the context of Serbian 19th century law. Written by this brilliant and erudite Viennese scholar, the Code strictly proclaims the rule *res perit domino*. Mojović emphasizes that out of all the civil law regulations of that time, only the English law of sales from 1893 has proclaimed the rule of *res perit domino* as explicitly as Valtazar Bogišić did in his Code.[22] Due to similar solutions on *periculum rei venditae* in the General Civil Code for Montenegro and the ones in the Serbian Civil Code, one should point out two interesting fragments.

Although it seems just and fair in most instances, the rule *res perit domino* can occasionally lead to some unjust solutions, as stipulated in the Art. 231 of the Montenegrenian Code.[23] In this article it appears that the Code leaves the court the option of spliting the cost for damages equally between the buyer and the seller. The court can even arrange the matter in a different way, in cases when it is obviously unjust that only buyer should take the risk or the exact moment of object destruction or damaged cannot be clearly established. It is also important to stress that Roman rule *genera non pereunt* has been literary translated (*vrsta ne gine*), and included in the Code.

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[20] Austrian Civil Code, Art. 1048.

[21] Serbian Civil Code, Art. 637.

[22] Nikola Mojović (1985), p. 310.

[23] "*Ako se nikako ne da tačno odrediti vrijeme kad se slučajni kvar ili gubitak dogodio, tj. da li je to bilo prije ili poslije neg sto je vlaština prešla na kupca; ili bi inace, radi osobitih kakvih prilika i uzroka, bilo očevidno nepravo da sam kupac ili sam prodavac sve štetuje, tad sud moze obojici podijeliti štetu po pola ili onako, kako vec nađe da je priličnije i pravednije*", General Civil Code for Montenegro, Art. 231.

All this brief analysis of the doctrine and legislation significiant for Serbian civil legal history makes particular sense if one puts it into the contemporary context, trying to understand how the legal tradition survives. Serbia's current *Law of Obligations* arranges the matter of *periculum rei venditae* very clearly and simply in Article 456 stipulating that before *traditio* risk of the accidental destruction or damage is on seller, and after *traditio* it is transfered to the buyer.[24] It is evident that the rule *periculum est venditoris* is fully accepted in actual Serbian positive law, like in most other countries, as the remnant of reconciliation of Serbia's 19th century legal solutions and the doctrinal perceptions of the problems in the 20th century.

Was it accepted in the Roman classical period? Theories that tend to approach the problem from a different angle, such as the theory of professor Konstantinović, present a great advance and inspiration for further research in this field. We still find the arguments in favor of *periculum est venditoris* as a dominant rule during the Roman classical period to be very convincing.

[24] Zakon o Obligacionim odnosima, Službeni list SFRJ 29/1978, article 456: *"Do predaje stvari kupcu, rizik slučajne propasti ili oštećenja stvari snosi prodavac, a sa predajom stvari rizik prelazi na kupca*". In the French *Code civil* risk and ownership pass together to the buyer as soon as the contract is perfect; in the German 1900 Codification (BGB) risk and ownership pass together to the buyer, but only on delivery of the thing, while the Swiss solution follows Roman law, and risk passes to the buyer when the contract is perfect, but ownership is transferred only with delivery, see more: Alan Watson (1993), pp. 82.