

## CONTENT OF LEGAL PROCEDURE IN CIVIL LAW

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### ABSTRACT

Transactions that directly affect a right in property, transfer or restrict that right to another person, change or terminate its legal content are called legal transactions. Absolute rights, relative rights and legal relationship in assets are among the rights that may be subject to peculium process. While absolute and relative rights in assets create changes in rights in a narrow sense, in a broad sense, not only a right included in the property, but also a legal relationship to which the person is a party is the also subject of a legal transaction. In our study, theoretically, the concept of legal transaction in a narrow sense has been discussed. Based on this scope; The scope of the legal transaction, the effects created by the legal transaction, and finally, the absolute and relative rights in the assets of the peculium process were examined based on the basis.

**Keywords:** Legal transaction, Peculium process, Civil law.



**Mr. Funda Nezir**

*Faculty of Law,  
International Vision  
University, Gostivar,  
N.Macedonia*

**e-mail:**

nezir.funda@vision.edu.mk

**UDK: 347.132.6.01**

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## 1. THE CONCEPT OF THE LEGAL TRANSACTION

In terms of the concept of legal transaction, it is seen that there is a unification and agreement about the basis of the concept in today's doctrine. According to the idea that is accepted as a whole, it is accepted that a legal act is a concept that arises due to a declaration of will made properly for a legal result and a result is concluded by the legal order in accordance with this declaration of will<sup>1</sup>. In general, legal transactions are defined as declarations of will or declarations of will directed by one or more persons to reach a certain result and which are concluded by the legal order on them or themselves<sup>2</sup>. If we briefly stated, the declaration of will made by the person to have legal consequences is accepted as a legal act. If the validity conditions sought by the legal order are in question, the legal order concludes this declaration of will. Among the elements of the concept of legal transaction, there is both a declaration of will and a legal result linked to this declaration of will. Legal transactions consist of two parts. One of them is "facts" and the other is "legal result"<sup>3</sup>.

Cases are generally divided into two parts as founding cases and supplementary cases. Undoubtedly, "declaration of will" is accepted among the founding facts and has an important place. The means of projecting the will of the transaction to the outside world, especially to the party, is "disclosure" or synonymously "declaration". With the declaration of the person, we understand his will to put the legal action into effect<sup>4</sup>. It is possible that the person's words, writing, hand-arm or head movements, and in some cases a verb of silence, can also be considered as an explanation. As a matter of fact, while the declaration of will is considered the only founding fact of the legal transaction in some cases, it is sometimes accepted as the "most important founding phenomenon". In cases where the declaration of will is accepted as the most important founding fact, the legal order seeks the existence of supplementary facts along with some other founding facts together with the statement of will

<sup>1</sup> Werner Flume, **Allgemeiner Teil**, Zweite Band, Das Rechtsgeschaeft, Berlin 1965.s. 23.

<sup>2</sup> Aydın Zevkliiler, **Medeni Hukuk, Giriş ve Başlangıç Hükümleri, Kişiler Hukuku,Aile Hukuku**, İzmir 1992, s. 111; Ali Naim İnan, **Borçlar Hukuku, Genel Hükümler, Ders Kitabı**, 5. bası, Ankara 1984, s. 61. Fikret Eren, **Borçlar Hukuku, Genel Hükümler**, C.1, 5. bası, İstanbul 1994, s. 168-169.

<sup>3</sup> Eren, **a.g.e.**, s. 167.

<sup>4</sup> Flume, **a.g.e.**, s. 25.

in order for a legal act to be valid. The existence or formation of the legal transaction essentially depends only on the founding facts.

Complementary facts are generally the facts that are necessary for the emergence of the provisions and results expected from this legal action, after the legal action is established. To specify, while the facts that help a legal act to be formed, or to be established, are founding facts, complementary facts help a legal act to be concluded and have its consequences. In order for a legal transaction to take effect, it may be necessary to carry out this transaction in the presence of the official authority, that is, the participation of the official authority in this transaction in order for the legal transaction to take effect. If a transaction has to be made in the presence of or in the presence of the official authority, it is considered as one of the founding elements of this transaction.

In some cases, a material fact must also be added to the declaration of will for the establishment of a legal transaction. An example of such transaction types is the *delivery contract*<sup>5</sup> type. In this type of contract that we encounter in Roman Law, the contract is established when the thing in the contract is delivered to the other party. In such contracts, besides the declaration of will for the contract to be formed, the delivery of something that is a founding element is also included. As we have stated above, in addition to the founding elements, a complementary element is also required in some cases for a legal transaction to occur. As a matter of fact, the constituent element is necessary for the establishment of the legal transaction, while the complementary element is the necessary element for the transaction to become effective.

To give an example of a complementary element, in cases where a legal representative is required to approve a transaction that has been made, this approval process is a complementary element. Legal transactions are classified in different ways according to their characteristics<sup>6</sup>. The classification, which is important in terms of the subject and considering

<sup>5</sup> Selahattin Sulhi Tekinay, Sermet Akman, Haluk Burcuoğlu, Atilla Altop, **Tekinay Borçlar Hukuku Genel Hükümler**, İstanbul 1993, s. 40.

<sup>6</sup> Hukuki işlemlerin Roma Hukuku'nda; tek taraflı-iki taraflı, sağlar arası-ölüme bağlı, ivazlı-ivazsız, sebebe bağlı-soyut, şekle bağlı-şekle bağlı olmayan işlemler şeklinde sınıflandırıldığı görülmektedir. Paul Koschaker, **Modern Hususi Hukuka Giriş Olarak Roma Hususi Hukukunun Ana Hatları**, Çeviren: Kudret Ayiter, Ankara 1950, s. 48-49; Ziya Umur, **Roma Hukuku Dersleri**, İstanbul 2010, s.192.

the effect of the legal transaction on the assets, is based on. Legal action can take two forms in terms of the effect it creates on assets. The first type of legal act is a subtractive transaction and the second type of legal transaction is an earning transaction<sup>7</sup>. Subtractive transaction is a type of transaction that reduces a person's assets. While the subtractive legal transaction does not seem to cause any increase in the assets of the other party, it is seen that the party performing this transaction causes a decrease in the assets. The appearance of the subtractive process is always a one-sided peculium process<sup>8</sup>. A rewarding transaction is a process that occurs when a person gains a new right to a property belonging to someone else, in other words, increases his / her assets by gaining interest or prevents him / her from decreasing<sup>9</sup>.

## 2. EFFECT OF LEGAL TRANSACTIONS

### 2.1. Subtractive transaction

Subtractive transaction is a type of transaction that reduces assets. A subtractive transaction is a unilateral legal transaction that causes a reduction in the assets of the counterparty, without causing any reduction in the assets of the counterparty, in the asset. In the subtractive transaction, while no gain is provided to the other party, a right in the assets of the person performing this transaction is terminated. As an example of subtractive processing, we can show the process of renunciation of ownership with these qualities. In the process of renunciation of ownership, the owner terminates a right in the property of the person with his own unilateral declaration of will and without notice to the other party. Looking at this process, it is seen that a right in the assets has ended. Since it directly affects this right in the assets, it is accepted that this transaction is a peculium process without any doubt. Although abandonment of ownership is considered as a peculium process, this process does not

<sup>7</sup> Hüseyin Hatemi, Emre Gökyayla, **Borçlar Hukuku Genel Bölüm**, İstanbul 2011, s. 11; Hüseyin Hatemi, **Medeni Hukuka Giriş**, İstanbul 2012, S 10, N. 20; Andreas Hans, **Allgemeiner Teil des Schweizerischen Obligationenrechts**, Erster Band, Zürich 1979, S 25, s. 194

<sup>8</sup> Hüseyin Hatemi, **Medeni Hukuka Giriş**, İstanbul 2012, S 10, s. 34; Hüseyin Hatemi, Rona Serozan, Abdülkadir Arpacı, **Eşya Hukuku**, İstanbul 1991, s. 487.

<sup>9</sup> Kemal Oğuzman, Nami Barlas, **Medeni Hukuk Giriş Kaynaklar Temel Kavramlar**, 13 Bası İstanbul, Arıkan 2006s. 140.

constitute a profitable transaction for anyone<sup>10</sup>. In some cases, the waiver process, which occurs as a unilateral subtractive peculium process, does not cover all kinds of rights in the person's assets. The person cannot waive his claim right unilaterally, that is, only by his own declaration of will.

In such transactions, if we want to terminate the right to claim by comparison with the subtractive peculium process, the existence of mutual and appropriate declarations of will indicating that both parties participate in this transaction. So there is a release process that needs to be done. Although we think that the release process is a subtractive peculium process in terms of ensuring the termination of the debt right by the contract, we can mention the existence of a profitable peculium process, since there is no reduction in the assets of the debtor on the other side, while one party loses its credit right in the transaction. The main feature that distinguishes the subtractive process from the earning process is that the subtractive process is a type of transaction that does not provide gains to both parties.

## 2.2. Earning transaction

Earning transactions are included in the broadest concept of earning. Earning is the benefit of another person from one person's property or work power<sup>11</sup>. Earning can generally be achieved in the form of increasing the active assets of a person, or preventing the decrease of the active in his / her assets, decreasing the passive or preventing the increase in the passive. Earning means a wider meaning than legal action alone. As a matter of fact, not every gain is a legal transaction. Earning can be done in various ways, this acquisition can be done by a peculium process, by granting a credit right or by an act<sup>12</sup>. If the acquisition is provided by a legal transaction and if it is an acquisition other than performance or material action, the gain made by such legal transaction is called an earning transaction. If we briefly look at the meaning of the earning transaction, in the earning transaction, the person makes a debt transaction and provides a credit right to the other party with this borrowing

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<sup>10</sup> M.Kemal Oğuzman, Nami Barlas, **Medeni Hukuk, Giriş, Kaynaklar, Temel Kavramlar**, 13 Bası İstanbul 2006,

<sup>11</sup> Fikret Eren, **Borçlar Hukuku, Genel Hükümler**, 8 bası, İstanbul 2003, s. 167; Andreas von Tuhr, **Borçlar Hukukunun Umumi Kısmı**, Cilt I-II (Çeviren: Cevat Edege), 2.bası, Ankara 1983, s. 194.

<sup>12</sup> Eren, **a.g.e.**, s. 168; Necip Kocayusufpaşaoğlu, **Borçlar Hukukuna Giriş, Hukuki İşlem, Sözleşme**, İstanbul 2008, s. 108-109.

transaction. While a debt arises on behalf of the person making the gain in the winning transaction, a credit right arises for the person on the opposite side of this transaction.

If this borrowing transaction imposes debt on both sides, then two borrowing and two earning transactions result. Example: In a sales contract, the seller has an obligation to deliver an electronic item, while the buyer has a debt to pay, which is in the liabilities of both parties and creates debt for both parties. The price to be received by the seller in exchange for electronic equipment and the buyer to receive the electronic equipment are included in the assets of both parties and are a winning transaction for both parties. Based on the example we have given, the buyer paying the seller in return for the delivery and delivery of the electronic goods causes a peculium process, while the seller who receives the price and the buyer who receives the electronic goods is a gain for both.

### 2.3. Debt Transaction

Debt transaction adds a new debt to the liabilities of the assets and causes the person to decrease his / her assets. Debt transaction is a type of legal transaction in which a person on the other party makes a commitment to do something, to deliver something, or to refrain from doing anything. Making this kind of debt transaction increases the liabilities of the person who made this transaction, that is, the assets of the person who went into debt. With the debt transaction, a debt situation has occurred in the assets of the person making this transaction, while a new right is added to the assets of the person on the opposite side of the transaction. The debt transaction cannot directly affect a right in the person's property and transfer this right to another person, cannot limit this right, terminate this right, or cause a change in the content of the right. The borrower makes a commitment to make a peculium process in the form of terminating, limiting, transferring or changing the content of the right, which is actually the subject of the act borrowed.

The creditor on the opposite side with the debt transaction does not have a right over a part of the debtor's assets, his right is only a credit right. With the debt transaction, a debt relationship including principal performance obligation is established between the parties<sup>13</sup>. With the debt

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<sup>13</sup> Karl Larenz, Manfred Wolf, **Allgemeiner Teil des Bürgerlichen Rechts**, München 2004, S 23, N. 31; Fikret Eren, **Borçlar Hukuku Genel Hükümler**, Ankara 2012, s. 171.

transaction between the parties, a debt relationship arises, with this debt relationship, a debt relationship is established between the creditor and the debtor, and the transaction to establish this relationship is called the transaction that causes debt. With this relationship, the debtor is obliged to fulfill his debt, while the creditor has a right to receive a debt at the point of execution of the debt. The performance of the debtor owed by the debtor can be done by execution or peculium process.<sup>14</sup> In the presence of a service contract, the debtor's fulfillment of his debt occurs as a behavior, while in the case of a sales contract, the seller fulfills his performance obligation by executing a debt transaction. The debt transaction occurs between the parties in the form of a bilateral legal transaction, that is, a contract. Some opinions in the doctrine accept that the promise of awarding in the form of an advertisement is in the form of a unilateral debt transaction<sup>15</sup>. With the debt transaction, the person can end, transfer, limit, or change the content of something in his / her assets and the subject matter of the original debt, while the person concerned with this thing can make a new loan and the borrowings and borrowings he made are valid. Some kind of person can make more than one borrowing transaction by using the same right in his / her property or he / she can perform any of these transactions. In the event that the person who has borrowed money over the same issue fulfills one of his debts, this does not mean that the person gets rid of other debts. The borrowing transactions made by the person still exist. In this way, the legislator has given the buyer the right to demand compensation from the debtor if the debtor does not fulfill his debt by protecting the other party. A person who has made more than one borrowing transaction for the same thing cannot make a difference in terms of the first transaction date and the other transaction date in terms of performance. It cannot give priority to one of the creditors over other creditors.

The reason for this is that since the right in the assets of the person in the debt transaction is not directly affected, the buyer only has the right to receive and this credit right does not affect the right of disposal on this right in the assets of the debtor. Borrowing is the legal reason for the peculium process. The fact that the debtor transaction constitutes the legal reason for the peculium process and the effect of the legal reason on the validity of the peculium process have different meanings. The legal reason included in the debt transaction is not included in the peculium process.

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<sup>14</sup> , Nuredin, Abdulmecit. (2016). A Ius Cogens Rules In The International Treaty Law. International Scientific Journal Vision, 1(1), 17-28.

<sup>15</sup> Wilhelm Schönenberger, Peter Jäggi, **Kommentar zum Schweizerischen Zivilgesetzbuch, Obligationenrecht**, Teilband VIa, Allgemeine Einleitung, Art. 1-17, Zürich 1973, Art. 8, N. 3; Reinhard Bork, **Allgemeiner Teil des Bürgerlichen Gesetzbuch**, Tübingen 2006. N. 44

The legal reason is actually the debt transaction that is not included in the content of the peculium process and is made before and outside it.

#### 2.4. Peculium process

Peculium is the process that directly affects a right in the assets of the saver and transfers it to another person, restricts it, terminates it or changes its content<sup>16</sup>. With the peculium process, the right in the assets of the person making this transaction is directly affected, while a decrease in the active part occurs. Peculium means the termination of a right in the assets of the party making the transaction, its content change, transfer or limitation. With the execution of a sales contract, the buyer who has the right to receive with this contract becomes the owner of this property right as a result of the transfer of the right by directly affecting the property right in the seller's assets. An increase occurs in the buyer's assets with this transaction<sup>17</sup>. Transaction can be done in the form of a contract or a unilateral transaction. The profitable peculium process takes place in the form of a contract, while the subtractive peculium process occurs in the form of a unilateral transaction. Peculium process are encountered in the transfer of receivables, in the transfer of movable or immovable property. The saver can transfer a right in his assets, restrict, remove the right or change its content, only once.

### CONCLUSION

In our study, we have been subjected to the distinction between subtractive legal action and profitable legal transaction, taking into account the effect of legal action on assets. As we know, a subtractive transaction is a type of transaction that always occurs in the form of a peculium process, which does not constitute a gain for both parties, while a decrease in the assets of the party making the transaction. A rewarding transaction is a transaction that increases the assets of the person making the transaction, decreases his / her liabilities and creates gain in the care of the counterparty. A profitable transaction occurs as a debt transaction or a peculium process. In our opinion, it is not correct to accept that the peculium process generally occurs as a profitable transaction. Because it is more correct to divide the peculium process into two as a subtractive

<sup>16</sup> Kudret Ayiter, **Medeni Hukukta Tasarruf Muameleleri**, Ankara 1953, s. 13; Safa Reisoğlu, **Borçlar Hukuku, Genel Hükümler**, 17. bası, İstanbul 2005, s. 47.

<sup>17</sup> Carole Van de Sandt, **L'acte de disposition**, Fribourg 2000, N. 808.



transaction, that is, while there is a decrease in the assets of the counterparty, a peculium process that provides a gain for the other party, while there is a decrease in the assets of the counterparty.

Peculium process and debt transaction cannot be explained clearly without a borrowing transaction. After the comparison of both transactions, it is known that the right to borrowing transaction indirectly affects the right and the disposition transaction directly affects the right. While it is certain that the effect cannot be eliminated after the peculium process is made, it is possible for the parties to make changes about the transaction after the transaction. Both transactions take place side by side in the acquisition phase. While the borrowing transaction lays the groundwork for the peculium process, the peculium process is in the nature of the execution of the debt committed by a kind of borrowing transaction. In this respect, it is necessary to clarify the situation that both processes are affected by each other with the principles of loyalty to cause and abstraction.

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