OBJECTIVE FACTOR OF *FURTUM: CONTRECTATIO*[*]

Furtum'un Objektif Unsuru: Contrectatio

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ABSTRACT

The first element of furtum was contrectatio; the handling of an object against the will of the owner (invito domino) or the person who had a lawful interest in such object. Examples of contrectatio included the removal of a thing, embezzlement, receiving stolen goods, disposing of a pledged thing without being authorized to do so, accepting an object that the owner had handed over by mistake, and hiding an escaped slave. Furthermore, a pledgee or depositee who made use of the pledged or deposited object committed furtum as did the borrower who misused the thing lent and even the owner who fraudulently removed a thing from who had a real thing in it or from a hirer with a right of retention for expenses. It is difficult to apply the notion of handling (contrectatio) to land thought of as such, and it is never is in fact so applied in juristic texts, thought soil or stones, as opposed to praedium, could be "contrected" and stolen.

Keywords: contrectatio, furtum, handling, subripere, manus

ÖZET

Furtum'un ilk unsuru contrectatio; eşyanın, malikinin (invito domino) veya eşya üzerinde meşru menfaati olanın rızası hilafına ele alınmasıdır. Contrectatio örneklerine, eşyanın alınıp götürülmesi, zimmete geçirme, çalınmış malların alınması, rehinli malın yetkisiz şekilde elde çıkartılması, malikinin hataen teslim ettiği malı kabul etmek, ve kaçak köleyi saklamak dahildir. Bundan başka, rehinli alacaklı ya da vedia alan, ödünç alanın malı sözleşme hükümlerine aykırı kullanmasında olduğu gibi ve malik dahi üzerinde ayni hakkı olan bir kimseden veya masraflar için alıkoyma hakkı olan kiracıdan hileli şekilde malı aldığında furtum işleyebilirdi. Contrectatio kavramının, hukuki metinlerde de geçerli olmadığı gibi, alınıp götürülemediği için araziler bakımından mümkün olmadığı, toprak ve taşların ise, praedium'un (arsa) aksine, ele alınabileceği, çalınabileceği düşünülmekteydi.

Anahtar Kelimeler: contrectatio, hırsızlık, taşıma, elle dokunma, gizlice alıp götürme

Introduction

Contrectatio[1] is wider in meaning and can be used to signify "meddling"

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[1] *Contrectatio* is the noun of *contracto*, to touch, feel, fondle; this verb being in itself a combination of *con* and *tracto*, the latter being the frequentative of traho and meaning to touch, feel, treat, but also: to use. *Con* may mean 'with', but also 'together' in the sense of bringing two together. Hence, *contrectatio* may mean the act of touching, feeling as an act or as the result of this. Sirks, Adriaan Johan Boudewijn:'*Furtum and manus/potestas*', Tijdschrift voor Rechtsgeschiedenis, Vol. 81, 2013, p. 497.

whether or not there is actual touching or handling[2]. *Contrectatio* involves some sort of physical meddling with the thing, such as shows the beginning of the theft.

In Roman law, the distinction between the two levels remained, for while physical act required ground liability for *furtum* was a simple *contrectatio*; the mental state of wrongdoer could be specified as an *animus furandi*, an intention to steal, that clearly involved more than an intention to handle[3].

The *contrectatio* is spoken of as the *initium furti* in Digest[4]:

Dig. 47.2.6 (Paulus libro nono ad Sabinum):

'Quamvis enim saepe furtum contrectando fiat, tamen initio, id est faciendi furti tempore, constituere visum est, manifestus nec ne fur esset.'

'Although there may be theft where there are frequent interferences, nevertheless, it is to the begining, that is, the time of the first such interference, that we must look to decide whether the theft be manifest or not'.

On the other hand, *contrectatio* usually has a more restricted sense and means a handling or touching which is improper in some way, whether illicit, immoral, illegal or merely disgusting[5]:

Cicero, De Deorum Natura, (1.27):

'…*cur non gestiret taurus equae contrectatione,..*'

'… should not a bull take pleasure in union with a mare,..'

Donatus Terence, Eunuchus, (194):

'..*hoc totum nimis blande et cum contrectatione...*'

'… he's handled the affair smartly…'

Contrectatio also requires an objective genetive and this is provided in the present text by *rei*. The *res*, for example, must be *mobilis* and children, wives in *manu*, etc. who are not *res*, may be stolen[6]. The thing (*res*) which was stolen

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2 But those who adopt this point of view, produce no evidence for it and it would appear from texts that the word is not so used. Watson, Alan: '*The Definition of Furtum and The Trichotomy*', (Trichotomy), Tijdschrift voor Rechtsgeschiedenis, Vol. 28, 1960, p. 198.

3 Ibbetson, David: '*The danger of definition: contrectatio and appropriation*', in The Roman Law Tradition (ed. Lewis, Andrew/ Ibbetson, David), Cambridge 1994, p. 55-56.

4 This might well be accompanied by a certain looseness of conception of the meaning of the word, a looseness which would make 'meddling with" a beter translation than 'handling'. Buckland, William Warwick: '*Contrectatio*', The Law Quarterly Review, Vol. 57, p. 468.

5 Watson, Trichotomy, p. 198.

6 The popular opinion that there could not be *furtum* of land came to prevail in classical law: Dig. 47.2.25. pr. (Ulpianus libro 41 ad Sabinum): '*Verum est, quod plerique probant,*

should have been any *res mobiles* in *commercio* which someone had the right to it. In addition, theft was possible only on movables, which were considered as *res aliena*[7].

Furtum means the appropriation to another person's property or its possession or use fraudulently (*contrectatio*).

Gaius tells us that actual '*amovere*' (remove) is not necessary; *contrectatio* suffices[8].

Gai. I. (3.195):

'*Furtum aulem fit non solum, cum quis inlereipıendi causa rem altenam arntivit. sed generaliter cum quis rem aiienam invitu domino contrectat*'.

'Again, theft is committed not only when a person removes the property of another with the intention of appropriating it, but, generally speaking, when anyone handles the property of another without the consent of the owner'.

Gai. I. (3. 196):

'*Itaque si quis re, quae apud eum deposita sit, utatur, furtum committit; et si quis utendam rem acceperit eamque in alium usum transtulerit, furti obligatur, ueluti si quis argentum utendum acceperit, quasi amicos ad cenam inuitaturus, et id peregre secum tulerit, aut si quis equum gestandi gratia*

fundi furti agi non posse'. 'The rule adopted by most authorities, that the theft of a tract of land cannot be committed, is true'. Buckland, p. 469. Gai. I. (2.51): '*Fundi quoque alieni potest aliquis sine ui possessionem nancisci, quae uel ex neglegentia domini uacet, uel quia dominus sine successore decesserit uel longo tempore afuerit: quam si ad alium bona fide accipientem transtulerit, poterit usucapere possessor; et quamuis ipse, qui uacantem possessionem nactus est, intellegat alienum esse fundum, tamen nihil hoc bonae fidei possessori ad usucapionem nocet, cum inprobata sit eorum sententia, qui putauerint furtiuum fundum fieri posse*'**.** 'Anyone can obtain possession of land belonging to another without the exertion of violence, if it either becomes vacant through the neglect of the owner, or because he died without leaving any heir, or was absent for a long time; and if he should transfer the said land to another who received it in good faith, the possessor can acquire it by usucaption. And although the party who obtained the land when vacant may be aware that it belongs to another, still, this does not in any way prejudice the right of usucaption of the possessor in good faith, as the opinion of those who held that land could be the subject of theft is no longer accepted'. Gai. I. (3.199): '*Interdum autem etiam liberorum hominum furtum fit, uelut si quis liberorum nostrorum, qui in potestate nostra sint, siue etiam uxor, quae in manu nostra sit, siue etiam iudicatus uel auctoratus meus subreptus fuerit*'. 'Sometimes, however, a theft of persons who are free is committed, for example where anyone of my children who is under my control, or a wife in my hand, or a judgment debtor, or a gladiator whom I have hired is secretly taken away'.

7 Peschke, Seldağ Güneş: '*Furtum as a Delict under Ius Civile*', in Roma Hukuku ve Güncellik, (ed.Ünver,Yener), Ankara, 2017, p. 97.

8 Buckland, p. 467.

commodatum longius aliquo duxerit, quod ueteres scripserunt de eo, qui in aciem perduxisset'.

'Therefore, if anyone makes use of property deposited with him for safe keeping, he commits theft, and if having received an article for the purpose of using it, he employs it for some other purpose, he becomes liable for theft; for example, if anyone being about to invite friends to supper borrows silver plate and takes it away with him to a distance; or if anyone borrows a horse to carry him to a certain place, and takes it much further away, or, as the ancient lawyers stated by way of example, if he takes the horse into battle'.

Gaius relates that the *veteres*, considered the case of taking borrowed horse into battle to be *furtum*, evidently because the horse had not been lent out to that purpose. This is called *furtum usus*, but Gaius ranges it under *contrectatio*, like the use of a thing given in deposit[9].

In general, this is every handling of a thing against the will of the owner. In his examples the thing is already with the future *fur,* and the *contrectatio* is handling of the thing[10].

The well-known definition of *furtum* given in Digest of Paulus and referred to in Institutiones of Iustinianus that reflects the standpoint of the classical law is particularly superb. Paulus in the famous definition repeated with a difference in the Institutes (4.1.1) makes *contrectatio* a primary characteristic of *furtum*[11]:

Dig. 47.2.1.3 [Paulus, libro trigensimo nono ad edietum (Iust. Inst. 4, 1, 1)]:

'*Furtum esi contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve quod lege naturali prohibitum est admittere*'.

'Theft is a fraudulent interference [*contrectatio*] with a thing with a view of to gain, whether by the thing itself or by the use or possession of it. This

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9 Sirks, p. 496; Burdick, William L.: *The Principles of Roman Law and Their Relation to Modern Law*, New Jersey, 2012, p. 254.

10 *Contrectatio* fits perfectly the criterion of *furtum* as developed in *decemviral* times. It is always a handling against the will of the owner and such it challenges his control over the object. Sirks, p. 497. On the other hand, Birks argued that the *furtum manifestum* would have driven the moment of liability early; the need to name the stolen *res* would have prevented its being lost in mere intent; the act required would have been capable of only the loosest description as the beginning of an *amovere,* a description whose factual content would vary according to the evidential weight of the surrounding circumstances and, because different things began to be taken in different ways, according to the nature of the coveted *res.* Birks, Peter: '*A Note on the Development of furtum*', The Irish Jurist, Vol. 8, (1973), p. 351.

11 Buckland, p. 467.

natural law proscribes'[12].

In this definition of Paulus is included the intention of gain or interest '*lucri faciendi*' compared to that of Gaius[13].

We have another definition of *furtum* by Paulus and this is much closer to those of Sabinus and Gaius than to that ascribed to him in the Digest.

Paulus, Sententiae, (2.31.1) :

'*Fur est qui dolo malo rem alienam contrectat*'.

'A thief is one who handles the property of another with evil intent'.

There is internal evidence to show that his Commentaries ad edictum, from which the Digest definition is taken, are earlier than the *Sententiae* and after producing such a good definition, he revert to the traditional, inferior one[14]. If the *Sententiae* are a postclassical compilation from the works of him, it is difficult to understand why the author chose the inferior definition even if it was the earlier.

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12 According to Schulz and Watson, expression of '*vel ipsius rei vel etiam usus eius possessionisve*' are undoubtedly an interpolation. They must depend on either *contrectatio* or *lucri faciendi gratia*. If the former, they are logically absurd since one cannot handle the use or possession of anything. If the latter, they would be ungrammatical. In reference to Watson, the important point is deciding whether the compilers regarded them as depending on *contrectatio* or on *lucri faciendi gratia*. According to him, the evidence strongly points to the latter and lastly, expression of '*lucri faciendi faciendi gratia vel ipsius rei vel etiam usus eius possessionisve*' makes perfect sense both logically and legally. But words '*lucri faciendi gratia*' are not in the Institutes (4.1.1). On the other hand, Buckland relying on the Institutiones, but he omits the first *rei* which occurs between *contrectatio* and fraudulosa. Baldus' comment on Iustinianus Institutiones (4.1.1) is as follows: '*Furtum est contrectatio proprietatis vel usus resi alienae fraudulosa invito domino animo lucrandi*', 'Theft is a fraudulent dealing with property, either in itself, or in its use, or in its possession: an offence which is prohibited by natural law'. Baldus, links the *vel ipsius* etc. with *contrectatio*. Watson, Trichotomy, p. 204-205. According to Watson, the Digest definition should be translated as follows : 'Theft is the dishonest handling of a thing with intention of profiting either from the thing itself or from its use or possession. From such conduct natural law commands us to abstain'. Watson, Trichotomy, p. 202.

13 The classical Roman lawyers, adopted a definition of *furtum* as a *contrectatio rei fraudulosa*, adding an additional mental element that it must have been *lucri faciendi gratia*. Ibbetson, p. 57. On the other hand, Biondi (Biondi, Biondo: *Istituzioni di Diritto Romano*, Milan, 1946, p. 397) implies that the element *lucrum* should not depend on the intention to steal (*animus furandi*), the subjective element of theft because *furtum* may exist without *lucrum* by giving the example of a man who steals a female slave just to satisfy his sexual desires (*libidinis causa*). Rado, Türkan: '*Gaius'a göre Klasik Roma Hukukunda Furtum Suçu*', İstanbul Üniversitesi Hukuk Fakültesi Mecmuası, Vol. 1-2, 1952, p. 501.

14 Paulus intended the *Sententiae* for the education of his son, it is just possible that he would prefer to give the old definition because it is simpler. Watson, Trichotomy, p. 197.

These definitions underline two elements of *furtum*: one is objective and the other subjective. The objective element *contrectatio* refers to handling of a property fraudulently. This term also means, seizure or theft of a property with the intention of acquiring that property and refers to loosening up the limits of the right of use or acquiring the possession of another person's property unjustly. The subjective element, on the other hand, refers to do the same, intentionally without the consent of the owner[15].

Contrectatio covers not only appropriation of a movable property, but also the offenses of fraud and abuse of confidence mentioned in the contemporary criminal law. A person who takes money, not belonging to him, commits *furtum*:

Dig. 13.1.18 (Scaevola libro quarto quaestionum):

'*…furtum fit, cum quis indebitos nummos sciens acceperit*…'

'…it is theft knowingly to receive coins which are not owed…'

Using less weights or falsifying another person's handwriting, was also considered as *furtum* in Roman law. A man who paid up his debt by using the money he received on behalf of a false creditor or to pay the debt of a third person was also considered as an example of *furtum*[16]:

Dig. 47.2.43.pr. (Ulpianus libro 41 ad Sabinum):

'*Falsus creditor (hoc est is, qui se simulat creditorem) si quid acceperit, furtum facit nec nummi eius fient*'.

'A false creditor, that is, one who pretends to be a creditor, commits theft if he accepts payment; and the money does not become his'[17].

The acts of a person claiming a lost property and of the slave are both considered within the context of *contrectatio*[18]:

Dig. 47.2.43.4 (Ulpianus libro 41 ad Sabinum):

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15 The term *contrectatio* is connoted with the term *manipulation* (to handle, to touch) in French. Rado, p. 501.

16 Tahiroğlu, Bülent: *Roma Hukukunda Furtum*, İstanbul, 1975, p. 109.

17 The general effect of the the texts just cited is that there was no theft, whatever else there was, if ownership passed. It would seem that property would pass, but even if it did not, it could hardly pass any the more because the fraudulent originator was not on the spot. According to Buckland, that is the reason why there is no *furtum* here, if he is away must be the absence of *contrectatio*. Theft is committed not only when a person removes the property of another with the intention of appropriating it, but everyone handles the property of another without the consent of owner. This of itself can hardly amount to the necessary *contrectatio*. Buckland, p. 474; Peschke, p. 97, fn. 12.

18 Tahiroğlu, p. 110.

'*Qui alienum quid iacens lucri faciendi causa sustulit, furti obstringitur…*'.

'A man who, for personal gain, takes away a thing belonging to another is guilty of theft…'

Dig. 47.2.61 (60) (Africanus libro septimo quaestionum):

'*Ancilla fugitiva quemadmodum sui furtum facere intellegitur, …*'

'Just as a runaway slave-woman is regarded as stealing herself…'[19].

Therefore, the scope of the concept *contrectatio* is larger than theft. It also contains *furtum usus* and *furtum possessionis* other than the simple theft mentioned in the contemporary law.

I. The Early Law Period

In the Lex duodecim tabularum, *furtum* is primarily trickery and *subreptio* is distinct from *furtum*. The armed robber and the night prowler were treated as thieves (Lex duodecim tabularum, 8.12.13) though they had as yet taken nothing. And it is certain that the typical thief is the *subreptor*, the man who privily takes the thing, not the fraudulent person, the trickster, who commits the *furtum* improprium[20].

In the early law, *contrectatio* was not necessarily considered as an objective element of *furtum*. The main texts which are believed to show that touching was not needed in Dig. 47.2.67.2 and also in Dig. 47.2.37[21].

Dig. 47.2.67.2 (Paulus libro septimo ad Plautium):

'*Eum, qui mulionem dolo malo in ius vocasset, si interea mulae perissent, furti teneri veteres responderunt*'.

'The older jurists held that a man who, with wrongful intent, summoned a muleteer before the magistrate was guilty of theft, if the mules dissappeared'.

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19 In some texts, *contrectare* is used not because the thief has possession prior to the act of theft but because, there is another reason making inappropriate the use of words signifying removal. Africanus states it in Dig. 47.2.61. This is a case not where the ancilla takes her child away with her, but one in which she gives birth after she has fled. MacCormack, Gerard D.: '*Definitions: Furtum and Contrectatio*', Acta Juridica, Vol. 129, 1977, p. 138.

20 Buckland, p. 467.

21 Unfortunately, *contrectatio* never received a clear definition. Perhaps, the jurists felt it best to avoid precision. *Contrectatio* could equally well mean handling, meddling, or interfering; but did it require actual physical contact, touching the property? Although theft normally involved physical contact between the thief and the stolen property, there could be exceptional situations in which theft was committed despite the absence of physical contact, just as Dig.47.2.37. Du Plesis, Paul: *Borkowski's Textbook on Roman Law*, Oxford, 2010, p. 330.

In this Digest text, the man who summoned a muleteer to court of no reason had abused a specific right, because filing a suit *(actio iniuriarum)* to punish such abusers was not possible then. In this concrete case, the *Aquilia* law was not applicable as no direct damage had existed. If the mules had died or disappeared when the muleteer was going to court, the ancient legists (*veteres*) had granted *actio furti* despite the fact that the summoner was not mentioned as the co-partner of the thief [22]. He has not been enriched nor has he handled them in a way which would fall under *contrectatio*[23].

The term *furtum,* here, is a vast and ambiguous concept with no objective element (*contrectatio*)[24].

For example, in the case of the tame peacock; somebody chases a tame peacock away that gets lost. He is guilty of *furtum*, if somebody else catches it. The text says that, if somebody else starts to get hold of the animal, *furtum* is present and the former owner can sue the chaser[25].

Dig. 47.2.37 (Pomponius libro 19 ad Sabinum):

'*Si pavonem meum mansuetum, cum de domo mea effugisset, persecutus sis, quoad is perit, agere tecum furti ita potero, si aliquis eum habere coeperit*'[26].

'If, when my tame peacock escaped from my house, you chased it so that it dissappeared, I could have the action for theft against you, if someone else should take it'.

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22 Zimmermann, Reinhard: *The Law of Obligations*, Cape Town, 1990, p. 924-925.

23 Watson suggests that, the animals have been stolen and that he is liable on account of accomplicity and also he has argued that this would mean that the wrongdoer was liable without *animus furandi*, which he would regard as an untenable belief. Watson, Alan: '*Contrectatio as an essential of furtum*', (Essential), Law Quarterly Review, Vol. 77, 1961, p. 529. On the other hand; Ibbetson argued that, it did not seem too far-fetched to see this as indicating a broadening of the mental element and the causal connexion between the acts of the wrongdoer and the loss of the goods, analogous to the extension of the physical element visible in the move from subtraction to *contrectatio* and the only difference was that the latter had became established law while the former had not done. Ibbetson, p.59, fn.37.
There has been no handling, one is inclined to say there has been no 'meddling with'. But there has been a displacement due to intermeddling. The text decides that, if someone meddles with the thing wilfully so as to deprive you of an economic interest in the thing, that is *contrectatio fraudulosa*. Buckland, p. 470-471.

24 Tahiroğlu, p. 109. To assume that this criterion was introduced by them would require more assumptions. That is indeed done; expansion of furtum to cases of wrongful damage and destruction, which was halted when lex Aquilia offered a solution. Sirks, p. 496.

25 Sirks, p. 497. For some discussion between Thomas and Watson on this text see, Watson, Alan: '*Contrectatio Again*', (Again), Studies in Roman Private Law, London, 1991, p. 293.

26 This is *furtum* '*si aliquis eum habere coeperit*'. On the principle of the text just considered the proviso ought not to be necessary. Buckland, p. 471.

Sabinus's definition reported by Aulus Gellius shows that, in his time handling, not asportation was the requirement for theft.

Aulus Gellius, Noctes Atticae, (XI.18.14):

'*Atque id etiam, quod magis inopinabile est, Sabinus dicit furem esse hominis iudicatum, qui, cum fugitivus praeter oculos forte domini iret, obtentu togae tamquam se amiciens, ne videretur a domino, obstitisset*'.

'And Sabinus tells this also, which is stil more suprising, that one person was convicted of having stolen a man, who, when runaway slave chanced to pass within sight of his master, held out his gown as if he were putting it on, and so prevented the slave from being seen by his master"[27].

Likewise the case of the fugitive slave, who is shielded from his master's eyes by somebody holding up his toga, this was *furtum* according to Aulus Gellius. There is no touching at all. Aulus Gellius exemplifies the offense committed by a man, who stood in front of a slave and prevented him from seening as a case of *furtum* with no concrete *contrectatio* element[28].

There has been a discussion on the question, whether the criterion of *contrectatio* was old, or whether it had been developed (out of asportation, that cannot happen without touching the object) at the end of the Republic, in order to restrain a too wide application of the delict of *furtum*[29].

II. The Classical Law Period

By the begining of the first-century B.C., *furtum* was defined by *contrectatio* and this could even comprise of cases without actual touching, like in the cases of the peacock and the fugitive slave[30].

In the classical period, damage to the aggrieved did not suffice for an act to be considered within the scope of *furtum,* unless the elements of *furtum* were substantiated. There could be no *furtum,* unless there was an ***animus furandi,*** or wrongful intention of appropriating property[31]:

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27 Sirks, p. 499, fn. 118.

28 Tahiroğlu, p. 109. But there are alternative ways of looking at this. Sabinus may have been thinking of theft '*ope consilio*' (aiding and abetting) and Gellius, may not have appreciated the distinction. Or we may hold that this distinction was not known to the earlier lawyers and those who aided were assimilated to the actual thief. Buckland, p. 469.

29 Sirks, p. 496.

30 For Sabinus, it was sufficient that there had been an improper interference, adtrectatio, and the later jurists refer commonly to *contrectatio*, that seems to mean the same thing and the shift has probably begun to occur before the time of Sabinus. The moving away from the older conception had already begun by the middle of the first century BC. Ibbetson, p. 56.

31 Tahiroğlu, p. 109.

Dig. 47.2.1.2 (Paulus libro 39 ad edictum):

'*Sic is, qui depositum abnegat, non statim etiam furti tenetur, sed ita, si id intercipiendi causa occultaverit*'.

'Thus, one who denies the existence of a deposit with him does not at once become liable for theft but only if he conceal the thing with a view to appropriating it'.

The case of cupboard being opened and the objects in it being touched, but *furtum* only commited with those objects taken away shows that the *contrectatio* was originally sufficient ground, or else the question would not have risen and asportation would not have been applied to limit its application[32].

Dig. 47.2.21. pr. (Paulus libro 40 ad Sabinum):

'*Volgaris est quaestio, an is, qui ex Acervo frumenti modium sustulit, totius rei furtum faciat an vero eius tantum quod abstulit. Ofilius totius Acervi furem esse putat: nam et qui aurem alicuius tetigit, inquit Trebatius totum eum videri tetigisse: proinde et qui dolium aperuit et inde parvum vini abstulit, non tantum eius quod abstulit, verum totius videtur fur esse. Sed verum est in tantum eos furti actione teneri, quantum abstulerunt. Nam et si quis armarium, quod tollere non poterat, aperuerit et omnes res, quae in eo erant, contrectaverit atque ita discesserit, deinde reversus unam ex his abstulerit et antequam se reciperet, quo destinaverat, deprehensus fuerit, eiusdem rei et manifestus et nec manifestus fur erit. Sed et qui segetem luce secat et contrectat, eius quod secat*[33] *manifestus et nec manifestus fur est*'.

Dig. 47.2.21.pr. introduces the problem, drawing attention to the tension between the idea of *furtum* as *contrectatio* and *furtum* as *subreptio*. The man who takes a measure out of a whole heap of corn or small quantity of wine from a barrel is held to commit *furtum* of the whole, for he has committed a *contrectatio* of the whole. On the other hand, the damages should be assessed solely by reference to the amount that he took[34] . The case of cupboard being opened and the objects in it being touched, but *furtum* only committed with those objects taken away shows that, the *contrectatio* was originally sufficient ground, or else the question would not have risen and asportation would not have been applied to limit its application[35].

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[32] Sirks, p. 497. If mere meddling with the deliberate intention of depriving the owner of his property had been the standard again the theft would have been restricted to what the thief took or intended to take. For these Republican jurists *contrectatio* is the touchstone for theft. Watson, Again, p. 301.

[33] Mommsen suggested that '*eius quod secat*' should be replaced with '*eius quod sequente nocte asportans deprehenditur*', an emendation that has found general acceptance. MacCormack, p. 135.

[34] Ibbetson, p. 63.

[35] Sirks, p. 497.

Labeo (Dig. 47.2.1.3.) put forward as essential element of *furtum* the *lucrandi causa*, the intent to enrich oneself. Sabinus, on the other hand, emphasised the dolose aspect and extened by this application to even *furtum* of land[36]. But he also reintroduced the *contrectatio* to cover cases of conversion and where the object has dissappeared as a result of touching.

Just like Pomponius (Dig. 47.2.36.2) and Gaius (Gai. I.3.198), Ulpianus, the last of the classical legists, also admits that *furtum* cannot exist without *contrectatio*[37]:

Dig. 47.2.52.19 (Ulpianus libro 37 ad edictum):

'*Neque verbo neque scriptura quis furtum facit: hoc enim iure utimur, ut furtum sine contrectatione non fiat. …*'.

'No one commits theft by word or writing; our rule is that there can be no theft without wrongful physical interference;…'[38].

Was Ulpianus in Dig. 47.2.52.19 thinking of cases in which no coins passed from one person to another but some loss was incurred through a representation? For example, a creditor might be induced through a piece of verbal or written trickery to forgo a debt which was due to him. What one has is use by Ulpianus of the notion of *contrectatio* to exclude *furtum* in an undefined area of loss caused through verbal or written statements. He does not say that there is no theft because in this particular type of case there is no *contrectatio*, but more generally and strongly that there is no theft without *contrectatio*. He cannot consistently have held that theft normally or usually involved *contrectatio* but that such a requirement was not necessary in all cases. However, despite the uncompromising nature of his formulation he may have accepted the existence of exceptions to a rule requiring the presence of *contrectatio* in all cases of theft. There is a difference between accepting *contectatio* as a normal but not a necessary requirement of theft

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36 Aulus Gellius, Noctes Atticae, Lib.XI, XVIII, 13: 'In this book there is also written a thing that is not commonly known, that thefts are committed, not only of men and movable objects which can be purloined and carried off secretly, but also of an estate and of houses; also that a farmer was found guilty of theft, because he had sold the farm which he had rented and deprived the owner of its possession'.

37 Buckland, p. 467. Dig. 47.2.22.1 (Paulus, 9 ad Sabinum): 'if he handles the other things in the box with the intent to steal them, even if he does not carry them off, he commits *furtum* of them; if he handles them only to move them out of the way of the object of his theft, it is not *furtum*'. Ulpianus would presumably not disagree even with the first case (Dig. 47.2.52.19): the difference is that for Paulus (Dig. 47.2.21.7) there is a liability if the things were handled *furti faciendi causa*, while for Ulpianus the bundle was unstrapped simply ut contrectat the contents. Ibbetson, p.67, fn.84.

38 The most common word used to describe the act of stealing is subripere, with *contrectare* normally being used to designate the interference with goods that have been stolen already or simply to underline the minimal condition for liability. Ibbetson, p. 57.

and accepting it is a necessary requirement subject to the existence of a number of exceptions[39].

Dig. 47.2.52.22 (Ulpianus libro 37 ad edictum):

'*Maiora quis pondera tibi commodavit, cum emeres ad pondus: furti eum venditori teneri mela scribit: te quoque, si scisti: nam [] non [enim] ex voluntate venditoris accipis, cum erret in pondere*'.

'Someone lent you heavier weights when you were buying by weight; Mela writes that he will be liable to the vendor for theft as also will you if you are aware of the facts; for you do not acquire the goods with the owner's consent when he is in error over the weight'.

In this text (Dig. 47.2.52.22)[40], you are buying goods by weight; I lend you false weights so that you get more than is due. Ulpianus quotes Mela as saying that, I am quilty of theft and you also liable. I am the primary thief, for I am liable whether you are innocent or not. There has been a *contrectatio*, not indeed by the thief himself, but procured him[41].

According to Watson, in this text, first alternative the purchaser is innocent. Nevertheless, the lender of the false weights is guilty of *furtum*. He can be said to have handled fraudulently through the innocent agent. In this situation, the owner is deprived if his property and it can hardly have made difference whether or not the wrongdoer or his accomplice had fortuitously touched it[42]. This is not a wide extension of *contrectatio*.[43]

III. The Post Classical Law Period

In the post classical period, there were no significant changes in the definition of the delict of *furtum* so Iustinianus, in his codification, defines the *delict* of *furtum* as:

Iust. Inst. (4.1.1):

'*Furtum est contrectatio rei fraudulosa vel ipsius rei vel etiam usus eius possessionisve, quod lege naturali prohibitum est admittere*'.

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39 MacCormack, p. 144.

40 The real problem is that, Mela thought that even if the buyer did not know of the heavier weights, the provider was nonetheless guilty of furtum. This is suprising since he does not gain by it, nor touches any of the wares weighted out or takes anything with him. So, according to the criteria usually applied in the doctrine, there is no argument to hold him liable for furtum. Sirks, p. 499.

41 Buckland, p. 472.

42 Ibbetson, p. 61-62.

43 Watson, Alan: '*Contrectatio as an Essential of Furtum*', (Furtum), Studies in Roman Private Law, London, 1991, p. 289.

'Theft is the fraudulent handling of property, whether of the article itself or the use or possession of the same, and to commit it is prohibited by natural law'.

From the definition given in Institutiones of Iustinianus, it can be concluded that the delict of *furtum* contains certain subjective and objective elements. The objective elements include the unlawfulness of the act and the act of appropriating someone else's things, while the subjective ones include *animus*, that is, the offender's desire for material gain by appropriating things[44].The Roman law never had our highly technical rule of asportation: the thing need not have been moved. But it had an almost equally technical requirement, that of *contrectatio*: the thing must actually have been handled, *furandi animo*[45].

All of the aforementioned requirements have to be cumulatively met in order for the delict of *furtum* to exist. If the *contrectatio* has just the aim of endamaging, it would exist *damnum in iure datum*. If a slave is caught for being killed immediately, *furtum* would not be committed in this case. In the absence of the subjective element, that is, the intention to obtain material gain by seizing things, there will be the delict of *damnum iniuria datum*.This perception is a strange to the early times of Roman Law and it gradually admitted in Iustinianus Law[46].

In order to charge the perpetrator of the delict of *furtum* with this act, it must be done out of malice (*dolus*), and not by negligence (*culpa*). Also, a person who can not understand the significance of the committed act or a person who reasonably believes that he is entitled to appropriate certain thing, will not be responsible for the commission of this delict[47].

Although the definitions of the delict of *furtum*, legal protection, forms of expression and other basic characteristics in the Institutes of Gaius and Iustinianus are in many ways similar. The authors in their works give the explanations of this delict that testify to the level of development of the law and the conditions in different periods of development of the Roman State.

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44 Arsic, Aleksandar: '*Furtum in Roman and Contemporary Law*', Ius Romanum, Vol.2, 2016, p. 8.

45 Buckland, William Warwick / Mcnair, Arnold D. / Lawson, Frederick Henry: *Roman Law and Common Law*, Cambridge, 1974, p. 352.

46 Tahiroğlu, p. 114.

47 Arsic, p.8.

Conclusion

As a common view of the Romanist doctrine put forward that, there was a shift in the range and meaning of *furtum* between the Lex duodecim tabularum and the Late Republic, but regarding the nature of these changes pinions differ. Thomas[48] and Zimmermann[49] assume that, *furtum* was in the decemviral period limited to the asportation of moveable objects.

Watson took about the same position, that *contrectatio* was essential for theft. But unlike Buckland[50] and Thomas, he assumed that this was always physical touching, not also a meddling.

Buckland saw *contrectatio* as a rather limited criterion. He assumed that it was introduced as legal element of *furtum* in the Principate from the 2nd A.D., in order to extend the delict to attempted *furtum*. This might even have comprised cases of attempt without actual touching[51].

Mommsen[52] asserts that according to the view prevalent in the classical law but changed in the Iustinianus law, the jurists had rather used *contrectatio* (handling) than taking away the property as attempts of theft (preparatory act) were not punished in the Roman law. In other words, they assumed bringing the moment of actual crime (like the main offence) forward beneficial. Therefore, the *furtum* offense is deemed to have been committed even if the thief leaves the property instead of actually taking it away.

Birks[53], does not suggest what the central element of *furtum,* in his view, was but argues that the commitment to carrying off as the paradigm of theft did not entail the selection of asportation as the necessary and sufficient *actus reus* of the wrong and it was, in fact, almost wholly neutral.

Ibbetson[54] assumes too that by the middle of the 1st century B.C. the jurists started to discuss *contrectatio* as element, presumably to cover cases where there was no taking away as such present. On the other hand, according to MacCormack[55] one should not too easily assume that all jurists of these times considered *contrectatio* a necessary element. Besides, the word has an extraordinary wide range of meanings.

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48 For some remarks on *contrectatio* by Thomas, Joseph Anthony Charles: '*Contrectatio, complicity and furtum*', Iura, Vol. 13,1962, p. 69-88.

49 Zimmermann, p. 924-925.

50 Sirks, p. 503.

51 Buckland, p. 486.

52 Mommsen, Theodor: *Le Droit Pénal Romain*, C.III, Paris, 1907, p.36 ff.

53 Birks, p. 350.

54 Ibbetson, p. 55-56.

55 MacCormack, p. 144.

The question is, is *furtum* by mere touching possible? Some confirm this already Lex duodecim tabularum, others see this only in the Late Republic or Early Principate as possible, due to an extension on the meaning of *contrectatio*, that is: that it was separated from asportation and had become a criterion in itself[56].

As a conclusion; when we look at the development of Roman law through periods of Roman history, we can see the evolution of the legal institute of *furtum*. Thus, even Lex duodecim tabularum defines the delict of *furtum* in detail and the most common forms of its manifestation. Further study of this institute has been followed through the actions of the *praetor*, in the period of the Republic, together with the development of resources of procedural protection. Then Gaius, in the Institutes, gives his definition of this delict, whose fundamental elements remain largely the same as in Institutiones of Iustinianus. The importance of studying the delict of *furtum*, is not limited to the study of crimes against property. Because the delict of *furtum* in Roman law, included many forms of theft, which in contemporary criminal legislation are differentiated as separate crimes. After a comparative study of the development of the delict of *furtum* through periods of the Roman Empire, one can come to the conclusion that, its evolution is just one of the witnesses of a high level of development of Roman law.

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Bibliography

Arsic, Aleksandar, '*Furtum in Roman and Contemporary Law*', Ius Romanum, Vol.2, 2016, p.1-13.

Biondo Biondi, *Istituzioni di Diritto Romano*, Milan, 1946.

Birks, Peter, '*A Note on the Development of furtum*', The Irish Jurist, Vol. 8, 1973, p.349-355.

Buckland, William Warwick, '*Contrectatio*', The Law Quarterly Review 57, 1941, p. 467-474.

Buckland, William Warwick/ Mcnair, Arnold D. / Lawson, Frederick Henry, *Roman Law and Common Law*, Cambridge 1974.

Burdick, William L., *The Principles of Roman Law and Their Relation to Modern Law*, New Jersey 2012.

Du Plesis, Paul, *Borkowski's Textbook on Roman Law*, Oxford 2010.

[56] Sirks, p. 504.

Ibbetson, David, '*The danger of definition: contrectatio and appropriation'*, in The Roman Law Tradition (ed. Lewis, Andrew/ Ibbetson, David), Cambridge 1994, p. 54-72.

MacCormack, Gerard D., '*Definitions: Furtum and Contrectatio*', Acta Juridica 129, 1977, p. 129-147.

Mommsen, Theodor, *Le Droit Pénal Romain*, C.III, Paris, 1907.

Peschke, Seldağ Güneş, '*Furtum as a Delict under Ius Civile*', in Roma Hukuku ve Güncellik, (ed. Ünver,Yener), Ankara, 2017, p. 95-103.

Rado, Türkan,'*Gaius'a göre Klasik Roma Hukukunda Furtum Suçu*', İstanbul Üniversitesi Hukuk Fakültesi Mecmuası 1-2, 1952, p. 479-519.

Sirks, Adriaan Johan Boudewijn, '*Furtum and manus/potestas*', Tijdschrift voor Rechtsgeschiedenis 81, 2013, p. 465-506.

Tahiroğlu, Bülent, *Roma Hukukunda Furtum*, İstanbul 1975.

Thomas, Joseph Anthony Charles, '*Contrectatio, complicity and furtum*', Iura 13,1962, p. 69-88.

Watson, Alan, '*Contrectatio as an essential of furtum*', (Essential), Law Quarterly Review 77, 1961, p. 526-532.

Watson, Alan, '*Contrectatio Again*', (Again), Studies in Roman Private Law, London 1991, p. 291-301.

Watson, Alan, '*Contrectatio as an Essential of Furtum*', (Furtum), Studies in Roman Private Law, London 1991, p. 283-289.

Watson, Alan, '*The Definition of Furtum and The Trichotomy*', (Trichotomy), Tijdschrift voor Rechtsgeschiedenis 28, 1960, p. 197-210.

Zimmermann, Reinhard, *The Law of Obligations*, Cape Town 1990.

http://droitromain.upmf-grenoble.fr/ (18.11. 2017)