**Sapienza Università di Roma**

**Comparative Contract Law**

# Historical Development of Freedom of Contract

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**Abstract**

The principle of freedom of contract, as in the European Law of Contracts, is a fundamental principle that has been adopted and applied since the 19th century in all contemporary legal systems. In this study, the changes and innovations that the subject has undergone from its foundations in Roman Law until today are examined.

Key Words: Contract law, Roman Law, Freedom of contract.

**Introduction**

The contract, which is a legal and socio-economic tool in the regulation of social relations, is the agreement formed as a result of the mutual agreement of the free will of the parties and is also legally legitimate. However, throughout history, social relations have undergone rapid changes in social and economic terms. The principle of freedom of contract is needed in order for the contract, which is the most necessary tool to help regulate social relations, to fully fulfill its legal function. For this reason, the indispensable principle of contract law must be in accordance with equity and be used on a legitimate basis. Therefore, today's contemporary legal systems and the European Law of Contracts have found the remedy for the maximum extension to contract law by limiting this principle to a certain extent.

**The Concept of "Contract" in Roman Law**

Since the principle of limited number (numerus clausus) was adopted in Roman Law, the concept of "contractus", which does not fully meet the concept of "contract" in today's modern legal systems in Roman Law of Obligations, refers only to contracts that are bound to certain terms and results. All the remaining contracts, which are not included in this scope, called ius civile, are created by the Emperor's Law. Unlike the concept of contract in the Emperor's Law, contractus is a contract sanctioned by an intermediary recognized by the ius civile[1].

**Roman Law System of Contracts and Control of Freedom of Contract**

The biggest system difference between the modern legal systems applied today and Roman Law is that there is no freedom of contract in Roman Law. The main reason for this situation is that the ius civile does not consider only the consent of the parties sufficient for

[1] Koschaker/ Ayiter, s.205; Meyer, R./Spasche, A.: Roman Law, The Recovery of Benefits Conferred under illegal or Immoral Transactions, Uni. of Aberdeen 2002, p.5.

the birth of the debt. However, this situation has changed in the following periods due to the inability to meet the requirements of commercial life. In Roman Law, it was thought that it was not necessary to balance the obligations in the contract. Therefore, even if there was a disproportion between the value of the thing sold and the price of the goods in the contract, the contract was considered valid. The first restriction of the freedom of contract at that time took place during the Corpus Juris Civilis period. If less than half of the value of the land purchased in the contract is paid, the seller is authorized to terminate the contract. According to this understanding, if the acquisition of one of the contracting parties is half or less than the other, the other party is given the opportunity to terminate the contract[2].

**Contract Types in Roman Law**

It is possible to examine contracts in Roman Law by dividing them into four groups. These; are objective, oral, written and consensual contracts.

For the establishment of an objective contract, the parties must agree to each other and the debtor must receive something "res" from the creditor[3].

In order to establish oral contracts, the consent of the parties must be made verbally and in certain ways. This contract is formed by the question of one party and the answer of the other party[4].

Written contracts are also considered valid if they are recorded in writing. However, written contracts in Roman Law had different characteristics from written contracts like today. Written contracts, called "nomen transeriptium" in Rome, were formed by recording a number of entries in the daily account book of the head of the family[5].

Consent contracts, on the other hand, were contracts that could only be established with the consent of the parties. There is no obligation to give something or follow a certain form. In Roman Law, as an example of a consent contract, it is considered sufficient to declare consent in contracts such as rent, service and company[6].

**Evolution of Freedom of Contract**

Due to the feudal social order prevailing in the Middle Ages, land ownership, which formed the basis of the system, determined fixed statuses especially for individuals.

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[2] Kötz, H.: Europaisches Vertragsrecht, Band I, Abschluss, Gültigkeit und Inhalt des Vertrages, dic Beteiligung Dritter am Vertrag, Tübingen 1996, p.206

[3] Rado.T. Roman Law – Law of obligations, İstanbul 1997, p.62.

[4] Ibid.

[5] Meyer, R./Spasche, A.: Roman Law, The Recovery of Benefits Conferred under illegal or Immoral Transactions, Uni. of Aberdeen 2002, p.63.

[6] Ibid.

Therefore, due to their status, individuals could not be expected to freely enter into contracts in any field they wished, and these contracts could not have legal consequences.

With the collapse of the feudal order, thought and political movements that emerged especially in the 17th and 18th centuries and prioritized the freedom of the individual showed their effects. This movement, which started with the French Revolution of 1789 and continued with the Industrial Revolution, allowed the spread of contracts.

In the 19th century, Adam Smith, who laid the foundation of classical liberal economic theory, stated in his determination as "laissez faire laissez passer" that trying to achieve contract equality by interfering with the price formation in the market by legal means would disrupt the market balance[7]. In this case, the only situation in which the state will step in is to provide the necessary social and political framework conditions for the market to form around the market price. In the capitalist economy, it is accepted that "contract" is the legal form of the relationship that provides the market intermediation that people need[8].

The 19th century was accepted as the "years of contract" and it was accepted that the principle of freedom of contract gave the parties the opportunity to freely shape their relations within the legal framework. As the foundations of contemporary legal systems began to take shape in the 19th century, legal systems adopted the principle of freedom of contract, leaving a space for the contracting parties to decide the terms of the contract with their free will in general. This principle, which has dominated the contract law since those years, has been well worked as long as the contracts remain in the individual field.

**Effects of Freedom of Contract on Codification Movements**

Especially in the 20th century, codification movements came to the fore in European countries. States have started to work to have a uniform application within their borders and to ensure the unity of law. The aim of ensuring the unity of law is the need for individuals to freely establish their legal relations with the demarcation of the border between the state and society and to create legal orders that will respond to the developments in the economic field.

One of the best examples of codification movements is the French Civil Code adopted in 1804, the most beautiful representative of the pursuit of natural law and freedom, and the Austrian Civil Code of 1811. The ideas of "freedom of contract" and "loyalty to contract" are determined in the French Civil Code. The jurists of that time thought that what was agreed upon by contract was always fair. For this reason, the principle of freedom of contract manifested itself in the French Civil Code. For this reason, in the field of limitation of the

[7] Smith, A.: An Inquıry into the Nature and the Causes of the Wealth of Nations, London 1776.
[8] Zöllner, W.: Die Privatrechtsgesellschaft im Gesetzes und Richterstaat, Köln 1996, p.24.

freedom of contract, apart from a few special norms, it envisaged the control of contracts through public order and immorality. The principle of loyalty to the contract has been accepted as a complement to the principle of freedom of contract.

The German Civil Code was created with the adoption of the same principles and the principle of freedom of contract was adopted in article 305 of the Bürgerliches Gesetzbuch[9]. In German law, in line with the theories of Immanuel Kant, the sovereignty of individuals in a legal field far from state intervention and the declaration of will created by this sovereignty and the reflection of this declaration of will are considered as "contracts".

**Control of Freedom of Contract in Today's Legal System**

Roman-Church law, which formed the basis of the legal system in central and western Europe until the end of the 18th century, today constitutes the common origin of the European legal system. It was understood as a general law source applied in the determination and interpretation of legal concepts from the understanding of Ius Commune, which was derived from Roman law[10].

This understanding continued to be valid in German law in the 19th century and the common civil law origin of Europe was preserved by making the principles of Ius Commune a rule in the codification movements in Europe. As it can be understood, Ius Commune is the reason for the countries that have adopted today's European legal system to have certain common elements, principles, aims and similarities.

The history of contract law consists of the search for freedom and the efforts to limit the freedom found. In the human sense, freedom is a concept that ethically, like a legal concept, naturally and historically corresponds to human self-limitation. Freedom of contract has been accepted as a positive legal institution and has become an important structural element of civil law.

**Control of Freedom of Contract in Various Countries in the European Legal System**

In German law, the law on the regulation of General Transaction Conditions Law deals with all contracts made using general transaction conditions, with the exception of contracts made in the fields of employment, family, inheritance and company law[11]. The law seeks mutual and appropriate declarations of will of the parties and the validity of the

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[9] Bürgerliches Gesetzbuch (BGB)§ 305 Einbeziehung Allgemeiner Geschäftsbedingungen in den Vertrag, Retrieved from: https://www.gesetze-im-internet.de/bgb/__305.html.

[10] Basedovv, J.: European Private Law: Sources, 2000, C.52, p.2.

[11] Kötz, H.: Europaisches Vertragsrecht, Band I, Abschluss, Gültigkeit und Inhalt des Vertrages, dic Beteiligung Dritter am Vertrag, Tübingen 1996, p.218.

relevant contract is not accepted in cases where there is no compliance. In addition, it is stipulated that the provisions referred to as unexpected and extraordinary conditions cannot be accepted as a part of the contract. Again, contract terms that are contrary to goodwill, do not comply with the principle of equity, or create unemployment to a degree that cannot be accepted by the parties of the contract are not considered effective.

In Austrian law, the legislator generally aimed to prevent unfair provisions in consumer contracts. The Law on the Protection of the Consumer, which entered into force in 1979, regulates the contractual provisions that will be deemed invalid in the contracts made with the consumer[12]. According to the contract law in Austria, if one of the contracting parties is excessively aggrieved, the contract may be deemed invalid.

Swiss contract law maintains the principle of freedom of contract, which was developed in the 17th and 18th centuries, by preserving its characteristics to a large extent[13]. Accordingly, the principle of freedom of contract has three basic elements. The first of these is to approve or disapprove of a contract by choosing the other party to the contract. The second is the determination of the provisions that will constitute the content of the contract by the parties. Finally, it is the freedom of withdrawal from the contract types included in the special provisions determined in the laws.

**Conclusion**

The contract, which has the function of regulating social relations in the European Law of Contracts and in all contemporary legal systems, found its legal and historical foundations in Roman Law. Roman Law forms the basis of the contemporary legal system applied today. There is a real need for the principle of accuracy and trust, which is one of the general principles of law, of the rights and obligations arising from the contract, which is extremely important legally.

Since the Roman Period, the imbalance in the contracts made in violation of the principle of fairness and to the detriment of one of the contracting parties has been accepted as an abuse of this right and these contracts have been deemed invalid.

With the codification movements that started in the 19th century, the principle of freedom of contract could find a place for itself in contemporary legal systems. Due to the fact that the commercial life, which started to be monopolized by the enterprises that became stronger with the effect of social and economic developments, in time, inexperienced and

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[12] Federal Act of 8 March 1979 Establishing Provisions for the Protection of Consumers, Retrieved from:https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1979_140/ERV_1979_140.pdf.

[13] Dessemontet, F. Ansay, T.: Introduction to Swiss Law, Boston and London, p.5

uninformed people operate, the need to limit the principle of freedom of contract in contract law has also emerged. Limitation of the freedom of contract has been accepted in both national and regional legal systems and has become an important issue. This situation is very open to reshaping in the future in line with social, economic and technological developments.

**References**

Basedovv, J.: European Private Law: Sources, 2000, C.52.

Bürgerliches Gesetzbuch (BGB)§ 305 Einbeziehung Allgemeiner Geschäftsbedingungen in den Vertrag, Retrieved from: https://www.gesetze-im-internet.de/bgb/__305.html.

Dessemontet, F. Ansay, T.: Introduction to Swiss Law, Boston and London.

Federal Act of 8 March 1979 Establishing Provisions for the Protection of Consumers, Retrieved from:https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1979_140/ERV_1979_140.pdf.

Koschaker/ Ayiter, s.205; Meyer, R./Spasche, A.: Roman Law, The Recovery of Benefits Conferred under illegal or Immoral Transactions, Uni. of Aberdeen 2002.

Kötz, H.: Europaisches Vertragsrecht, Band I, Abschluss, Gültigkeit und Inhalt des Vertrages, dic Beteiligung Dritter am Vertrag, Tübingen 1996.

Meyer, R./Spasche, A.: Roman Law, The Recovery of Benefits Conferred under illegal or Immoral Transactions, Uni. of Aberdeen 2002.

Rado.T. Roman Law – Law of obligations, İstanbul 1997.

Smith, A.: An Inquıry into the Nature and the Causes of the Wealth of Nations, London 1776.

Zöllner, W.: Die Privatrechtsgesellschaft im Gesetzes und Richterstaat, Köln 1996.