Principle of Freedom of Contract in the Laissez-faire Era

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ABSTRACT
The article discusses the level of development of Western European law and the operation of the principle of freedom of contract in the period of the XVIII–XIX centuries. The evolution and key changes in contractual freedom since the adoption of the Laissez-faire doctrine are displayed. The author connects evolution in positive law with the transformation of the economic and socio-ethical thought of society.
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At present, it is difficult to determine the importance of the economic, social and ethical aspects in securing the freedom of contract idea weight. These factors in aggregate contributed to the absolute priority given to the freedom of contract principle in the XIX century.

The transition to a market economy and the rise of liberal values have contributed to the gradual abandonment of legal doctrines that prevent the subjects of civil turnover from fully carrying out of entrepreneurial activity. According to R. O. Halfina, "the freedom of contract and minimization of state influence on the market were a symbol of the bourgeoisie in its struggle against feudalism and absolutism, that tried to preserve the existing form of the state through paternalistic ideas".[1]

When gradually transiting from feudalism to capitalism, the legislation of European states started getting rid of the significant restrictions to the freedom of contract that existed in the absence of a market economy and liberal values. It has become possible in positive law to observe the elimination of mechanisms ensuring the substantive justice of contractual relations. This process is explained by the fact that the interests of the bourgeoisie came to the fore, as well as by the change in economic and socio-ethical views in society. Since feudal relations locked the economic life of European nations inside self-sufficient social enclaves in the Middle Ages, ethical attitudes of a small group had a great impact on it. In this regard, the participants in the contractual relations were under moral and social pressure if the agreement did not correspond to the public opinion about its proper content. Later, namely since the economy transition to commercial and industrial principles, the market volume has grown rapidly and the above characteristics have lost their significance. It is much easier to create the most favourable conditions for yourself and to take advantage of the counterparty's weakness in cases when an agreement is concluded between the parties located at a great distance from each other, separated by nationality, religion, traditions, rather than when the parties to the agreement live on the same territory.

In contrast to the Middle Ages where justice and morality of the agreement were of the prevailing importance, the principle of freedom of contract took their place under the new conditions.

Since the beginning of the XIX century, Western European countries have turned the vector of the law development in the direction of increasing freedom of contract and reflecting the needs of a market economy in legislation. Thus, according to many scholars, the principle of non-interference burst into the contract law of European states.[2]

Recognition of the legal force of the contract was necessary due to the rapid growth of capitalist relations, the stock market, corporations, and foreign trade. Thus, the basic contract model changed: a one-time exchange is replaced by the contract, which determines the rights and obligations of counterparties for the future and regulates the liability for violation of its terms. Civil turnover participants needed guarantees that the counterparty would comply with the terms of the contract, so the law began to provide them. The British scientist David Ibbetson notes that "a consensual agreement that generates counterparty obligations by virtue only of their will expressed in the agreement was a fundamental tool for private planning, displacing the structure of a unilateral contract to the periphery".[3] According to Patrick Atiyah, "the structure of a consensual agreement distributed the risks, associated with the contract performance, among the counterparties and also provided guarantees through the possibility of

[1] Halfina R. O. Contract in English civil law [Dogovor v angliiskom grazhdanskom prave]. M, 1959. P. 184. (In rus)
[2] Angelo A. H., Ellinger E. P. Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany and the United States // 14 International and Comparative Law Journal. 1991–1992. P. 455.
[3] Ibbetson D. J. A Historical Introduction to the Law of Obligations. 2006. PP. 74, 76, 220 ff.

the enforced fulfillment of obligations through the judicial authorities, thereby ensuring "control over the future".[4]

The application of the consensual agreements structure has contributed to drawing attention to the phenomenon of the occurence of obligations subject to judicial protection due to the mere fact of the will of the parties. In this regard, according to James Gordley, the forms of volitional theory that link the occurrence of legal consequences with the will of the parties to the contract became the main ones in the XVIII century in Western European countries.[5]

However, the popularity of volitional theory cannot be considered a drastic revolution, since its essence was recognized even in Roman law. Various technical problems, such as the recognition of unnamed contracts, were resolved as early as the XVI — XVIII centuries, helping to reinterpret the meaning of the consensual agreement. Thus, the volitional theory of the contract was based on scientific and legal knowledge developed by lawyers of the past. David Ibbetson notes the following changes that occurred in the XIX century: 1) the force with which the jurists preached the factor of free will; 2) the role assigned to the autonomy of the will of counterparties in the scientific literature and judicial practice; 3) the willingness of the legislature to codify the volitional nature of the contract.[6]

As volitional theory became more and more popular, the contract became independent of state intervention, since it was the will of the parties agreed upon by the contract. Thus, the innovation of the contract law of the era in question was in the formation of the element of the counterparties' will expressed in the contract as the fundamental principle that defines the essence of the private rules of contract law.

The idea proclaimed in Corpus Juris Civilis and not used in the Middle Ages on the possibility for the participants in contractual relations to legally smart each other and use their advantages to gain conditions for themselves that the counterparty voluntarily agrees to, became the basic principle of contract law in the XIX century.

On the contrary, the fairness and good faith of the agreement during the Laissez-faire era were not recognized as principles of contract law by most Western European states.

This approach extended the scope of the freedom of contract by eliminating the restrictions prescribed by Roman, christian, and feudal law, which impeded the rapid development of a market economy.

The foundation was laid for the development of scientific questions concerning freedom of contract. In the periods of Antiquity and the Middle Ages, the freedom of contract was studied only partly (issues related to unnamed agreements, admissibility of state interference in the regulation of certain types of contracts), and freedom of contract was not considered as the fundamental principle of private law.

The legislator had to develop contract law rules aimed at ensuring guarantees of the parties determined by the terms of the contract, since active participants in civil turnover need a stable legal environment allowing them to act within the framework of legal expectations for the possibility of building their own economic plans. Patrick Atiyah on this occasion notes that "the priority of long-term interests over short-term ones covered all the contract law of the Laissez-faire period in the XIX century".[7]

Legal formalism began to prevail in contract law. The role of the court was to remove unjustified barriers to the implementation of private agreements and to enforcement of the agreements reached between the parties.[8] Thus, the function of the court was passive and consisted in interpreting the agreements in accordance with their literal meaning. As E. McKendrick notes: "Adjustment of contractual conditions in order to ensure a fair balance of counterparties' interests was not the task of the court".[9] The essence of the changed approach is as follows: "What is based on the contract is fair".[10]

If the courts wanted to restrict and control the content of contracts, in order to hide government interference, they used a variety of artificial maneuvers. References to the doctrines of deception, violence, coercion, the causation of a transaction, the principles of interpretation of a contract, and other institutions of contract law that are not intended to protect a participant in contractual relations from unfairness of the transaction terms were subject to application. It is worth noting that due to the lack of legislative mechanisms for direct control of the fairness of contractual conditions, as well as due to

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[4] Atiyah P. S. The Rise and Fall of Freedom of Contract. 1979. PP. 420, 421.

[5] Gordley J. Contract, Property and the Will — the Civil Law and Common Law Tradition // The State and Freedom of Contract / Ed. by Harry N. Scheiber. 1998. P. 67.

[6] Ibbetson D. J. A Historical Introduction to the Law of Obligations. 2006. P. 232.

[7] Atiyah P. S. The Rise and Fall of Freedom of Contract. 1979. P. 354.

[8] Teeven K. M. A History of the Anglo-American Common Law of Contract. 1990. Ch. 6.

[9] McKendrick E. Contract Law: Text, Cases and Materials. 2nd edn., Oxford, 2005. P. 17.

[10] Beale H., Hartkamp *A., Kotz H., Tallon D.* Cases, Materials and Text on Contract Law. 2002. P. 120.

a change in attitude to state interference with private affairs, the scope of the above-mentioned practice is insignificant compared to the previous era of the Middle Ages.

In most Western European countries, legislative acts regarding the limitation of interest rates on loans have been repealed.

Back in the XVII century, the views on the sinfulness of the demand of remuneration for the provision of loans lost their significance. Later, some countries also refused to exercise control over interest rates. For example, the upper interest rate limit in Germany was cancelled in 1867.[11] In France, in connection with the state establishment of loan interest, the legislation setting the maximum loan interest was heavily criticized at the beginning of the XIX century.[12]

Legislative regulation of prices for goods and services in the XIX century was used in the form of targeted interventions in economic turnover. However, it was thought to be an exceptional measure, was criticized and was applied quite rarely. The current level of economic theory development proved the negative effect of such measures to the healthy development of economic turnover.

In this regard, the applied laesio enormis doctrine began to lose its popularity. J. Dawson notes that during the XVII — XVIII centuries there was a process in France of limiting the laesio enormis doctrine until its return to the framework given in Corpus Juris.[13] Jean Domat pointed out that it did not seem possible to apply the laesio enormis doctrine to all bilateral agreements in the XVII century, and allowed the reference to a disproportionate price to contest a transaction only in exceptional cases, e. g. the sale and purchase of real estate.[14] R. Pothier also pointed out the impossibility of applying the laesio enormis doctrine in the XVIII century in cases of difficulty when establishing a fair price.[15]

These processes are explainable. The development of economic thought raise doubts about the idea that economical goods have an objective internal value that would not depend on subjective assessments of specific parties to the contract. Moreover, the high day of volitive theory restrained government attempts to intervene with economic turnover in order to ensure fairness of the contract contrary to the will of counterparties reflected therein.

It is worth noting that private law have undergone other transformations aimed at expanding the freedom of contract. For instance, the law of Western European countries approved the creditor's right to assign to a third party, which was impossible during the Antiquity and the Middle Ages. As R. Zimmermann notes: "The legislation of countries with a capitalist economy could no longer put up with this obstacle" .[16]

Thus, European private law was modified under the influence of the active development of capitalism and the ethics of individualism.

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[11] Zimmermann R. The Law of Obligations. Roman Foundations of the Civilian Tradition. Oxford, 1996. P. 174 ff.

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[13] Dawson J. P. Economic Duress and the Fair Exchange in French and German Law // 11 Tulane Law Review. 1936–1937. P. 367.

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[16] Zimmermann R. The Law of Obligations. Roman Foundations of the Civilian Tradition. Oxford, 1996. P. 58 ff.