# THE EVOLUTION OF CONTRACTS IN ROMAN LAW

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## Abstract

*One cannot understand an institution today without researching its entire historical thread, how it evolved until it became what it is through the vicissitudes of the past. On this, our law has very deep and distant roots, partly directly in the custom of the land and in the written laws we had, partly through the influence of the laws of the Occident, and especially the French ones, with Roman law. We cannot easily realize how much we live without knowing by tradition based on the past; the scientist's job is to dig up these past influences and bring them to light in order to understand today's institutions".*

*Following the path shown by Professor Mircea Djuvara, in this study I propose to "dig" in order to highlight the boundless influence of Roman law in the field of contracts. Because it is this influence that explains a unique phenomenon in history, namely the fact that this legal system did not die with the people who created it, but survived for millennia, imposing itself on foreign peoples and vigorously shaping their legal spirit.*

*Therefore, if we want to understand the physiognomy of today's contract, we must dig for its origins, and they will be found in Roman law, where the contract was originally a convention that produced legal effects only if he wore the heavy coat of formalities required at the moment of its conclusion. The essential element of the contract was therefore not the agreement of will, but the formal elements required for its preparation.*

**Keywords:** *contract, Roman law, formalism, influence, the essential elements of the contract.*

## 1. Introduction

Roman law is, to a large extent, the classic legal expression of life relationships, of the relationships within a society where private property assumes its enduring form, as none of the following legislations has succeeded in making substantial improvements in this area. The historical interest of Roman law consists in the fact that it shows us the way in which legal institutions are created and how they change in relation to the economic basis and the other forms of social life.

Roman law has created the legal language and Rome has created the alphabet of law. Thanks to this alphabet, we can formulate any legal ideas. Most of the current legal notions have largely appeared in Roman law. When Rome went down in history, the ancient world knew several legislative codes.

This legal system is not only of historical importance, but it represents a great advance in the field of legal technique. The precision and clarity of the definitions, the severe reasoning and consistency of the legal thought, combined with the vitality of the conclusions, highlight the great art of the Roman legal advisers, who played a great role in the development of the law. As Professor Emil Molcuț points out, the legal

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advisers of the Modern era[1] have borrowed many constructions and legal categories from the arsenal of the Roman law, as well as a series of categories and general principles that they have laid the basis for the entire regulation[2].

The subject matter of obligations and contracts has known a great development in Roman law, by taking hold of a particularly important position. This position is imposed by the exceptional vitality of the institutions related to the subject matter of obligations and contracts, which represent the first universal system of rules of a society. The institutions of the obligations exceeded the order that created them and were applied, with certain adjustments, in the social formations that followed.

## 2. Content

Many of the current legal concepts find their origins in Roman law, which has managed to confer them a precise wording[3]. The Romans achieved such performances, especially in the field of contracts, as they remained, to a large extent, unchanged in terms of the formation of elements and effects.

For a long time, the contract in Rome was just a convention under a certain form. The word "contractus" was used to mean contract, as follows: originally, contract meant reunion. Due to the fact that, in ancient times, the sale was performed by means of two separate documents, a document of purchase and a document of sale, the word appeared later[4]. The word was generalized and also used for other legal operations. Thus, if not any convention is a contract, any contract "contractus" implies a convention, therefore an agreement. In ancient times, this agreement was formal because only the parties were on an equal footing. The owner of the means of production imposes his will on the one who lacks the means of production, who could do nothing but follow the conditions of the owner.

In what concerns the evolution of Roman law, we can start the study in the ancient times, when the contract was a convention the obligation of which resulted from the formalities and solemnities performed on the occasion of its conclusion. The essential element of the contract was not the agreement of will, but the formal elements required on the occasion of its draw up[5].

According to Professor Molcuț, in ancient Roman law, in order for a document to produce effects, it had to be veiled under certain forms; the mere manifestation of will was devoid of legal value[6].

The first forms of contracts that we know were distinguished by a rigorous formalism. *Sponsio*, verbal contract, was concluded by the utterance of certain solemn words, and the so-called literal contract (*litteris*), by certain entries made in the

[1] This is applicable even for modern organisations such as European Union. For a perspective on contractual obligations in EU law: Conea Alina Mihaela, *Politicile Uniunii Europene. Curs universitar*, Editura Universul Juridic, Bucharest, 2019, pp. 130-142.

[2] Emil Molcuț, *Drept roman*, Edit Press Mihaela S.R.L. Publishing House, Bucharest, 2002, page 10.

[3] For a detailed analysis of the juridical concepts, see Nicolae Popa, Elena Anghel, Cornelia Beatrice Gabriela Ene-Dinu, Laura-Cristiana Spătaru-Negură, *Teoria generală a dreptului. Caiet de seminar*, Edition 2, C.H. Beck Publishing House, Bucharest, 2014.

[4] Cornelia Ene-Dinu, *Istoria statului şi dreptului românesc. Curs universitar,* Universul Juridic Publishing House, Bucharest, 2020, page 26.

[5] Vladimir Hanga, Mircea Dan Bocșan, *Curs de drept privat roman*, Universul Juridic Publishing House, Bucharest, 2006, page 241.

[6] Emil Molcuț, *op. cit.*, page 235.

register (codex) of the creditor, under the consent of the debtor.

As production and trade increased, the old forms were abolished by new social needs which were brought to life. However, their removal was gradual, only insofar as contractual forms corresponding to the new social relations were created. Along with the old formal contracts, new informal ones have appeared. This is how we explain the occurrence of the real contracts which are concluded by means of the simple transfer (re) of the object and of the consensual contracts which are concluded by means of the simple consent (*solo consensu*). Their validity is subject to substantive conditions resulting from their economic destination and use. In fact, they are actual pacts, namely agreements which are not veiled under solemn forms, raised to the rank of contracts due to their special economic importance.

Throughout the Imperial Era, the general theory of contracts is progressively developed. The contract (*contractus*), the essential element of which is now the agreement of the parties, is released from the primitive formalism. The contractual system will develop progressively throughout the Roman Imperial Era. The economic and social needs will reveal other conventions generating legal effects that will join the old contractual categories. The pacts, for example, will round the contractual system off, the viability of which consisted in a flexible adjustment to the needs of the social development in continuous transformation.

The subject of obligations has a great importance, both from a practical point of view and from a theoretical point of view. The practical interest results from the multitude and endless variety of legal relations that people create, due to permanent demands of life. In order to satisfy their most basic requirements of life, people conclude various obligation generating contracts every day. Along with the legal relationships created by will, there are others that are born independently of it, such as the obligations involved in the principle of the legal liability. Therefore, the most common act of daily life are resources of legal relations that are the object of obligations.

In a broad sense, obligations mean the legal relations which entail both the active side, which is the right of claim belonging to the creditor, and the correlative of this right, namely the passive side of the relation, which is the encumbrance of the debtor; in the narrow sense, the obligation designates only the passive side, the encumbrance of the debtor.

Therefore, in terms of the active side, the obligation is that legal relation which contains the right of the active subject, called creditor, to ask something to the passive subject, called debtor, whose obligation is to give, to do or not to do something.

If the focus is on the passive side, the active side of the obligation being present by default, the obligation can be defined as the legal relation by virtue of which a person called debtor is hold liable to another person called creditor, either to a positive benefit or to an abstention. The term of obligation sometimes refers to the title itself which establishes the existence of a debt.

If the legal relationship is considered in terms of the creditor, it is called right of claim, and if it is considered in terms of the debtor, it is called obligation.

During the classical antiquity, the obligations take on a particularly large extent due to the development of production and exchange of goods. In this world of business of all kinds, the interest-bearing loan has emerged. Such business operations required new legal instruments.

By being regulated at a higher level, the Roman obligation had a special importance for the economic circuit of Rome. At the same time, the concentration

of private property has enabled the process of crystallization of the institution of obligation, by imposing a detailed regulation of contractual rights and obligations.

The obligation, as an institution of law, appears at the same time with private property and social classes, by firstly representing a means of enslaving those who lack the means of production. According to the primitive Roman conception, the obligation (*ius in personam*) is created after the image and likeness of the property right (*ius in re*), ie of the real rights. The Romans made the same confusion between family rights and real rights. The etymology of the word "obligatio" (ob-ligatio) indicates, in a plastic way, the initial meaning of the term: to bind, to chain.

The development of the production of goods and trade led to the replacement of the formalism of old law, by bringing radical changes in the legal mentality. In this case, the notion of obligation begins to change its primitive structure. The idea of bounding (*ob-ligatio*) ceases to be understood in a strictly material sense. It becomes a purely legal relationship under which the debtor was oblige to perform a service, and in the event of a non-performance, the creditor could pursue the debtor's assets and not his natural person.

It is interesting to study the components of the obligations[7]. If we consider the creditor, he can force the debtor to pay something he owes.

The debtor is always forced to pay something to the creditor.

The scope of the obligation is the payment that the debtor has to make to the creditor. It is important to mention the fact that, by payment, the Romans did not only understand the remittance of amounts of money, but the scope of the obligation could also be established by giving, making, rendering. From the word "prestare", the legal expression prestațiune (provision) was formed in order to designate any scope of the obligation. Therefore, moving from Latin to modern legal terminology, the meaning of this word was amplified.

The conditions of the scope of the obligation meant, in Roman law, the fulfillment of requirements without which it could not be fulfilled. Therefore, the scope must be lawful, be possible, be of interest to the creditor and be determined.

Another essential element of the obligation is the coercion, ie the legal sanction that is applied to debtor in case of non-execution.

The original features of the obligation have never been lost in full, but they have known some deviations over the century. Due to the fact it is a relationship between debtor and creditor, the Romans found it very difficult to accept debt and claim to be passed to another person. The creation of a real right cannot be contemplated by an obligation. The scope and the persons are definitively established and the Romans belatedly admitted that novation could take place, so that the scope of the new obligation was distinct from that of the old obligation.

The sources of the obligation are the legal acts and facts that give rise to it. In the ancient times of Roman law, they consisted of contracts and crimes, the contracts being rare because the production of family members covered all their material needs. The crimes gave rise to the obligation of the defaulter to pay compensation to the victim.

Any obligation has the effect of the voluntary execution of the service the debtor was bound to provide. This is why, the obligation occurs, unlike property, as a transition right, due to the fact it is extinguished by means of its execution. If the debtor fails to perform the service, the

[7] Emil Molcuț, *op. cit.*, page 160.

creditor can sue him, as the creditor's claim is protected by the positive law. There are also obligations not sanctioned by any action, as is the case of the so-called natural obligations.

There are cases when the debtor is exempt from performing the service if the execution became impossible. Natural obligations are imperfect, not protected by actions. Being devoid of action, these obligations are not enforceable, meaning that their execution cannot be required before the courts. The term of natural obligation, unknown in ancient Roman law, is found only in the classical antiquity, being gradually developed in the Post-Classical Era. Natural obligations are a creation of the legal advisers of the Imperial Era, determined by the activity of the slaves.

The slave had no legal personality and could not be bound by his contracts.

Positive law allowed slaves, within certain limits, a certain freedom to contract. Although they are not sanctioned by actions, natural obligations still have a legal existence. Their execution represents a payment identical to that of the civil ones, so that the payment made by the debtor cannot be claimed.

Natural obligations can be changed into civil obligations by means of a novation.

They may be opposed in compensation to other civil obligations and even encumbered with a personal or real guarantee. All these are evidence of the legal nature of these obligations, the execution of which represents a payment, not a donation.

The damages are established before the court, by forcing the debtor to compensate the creditor for the damage caused, the damage being the result of the fact that the debtor fails to fulfill his obligation or fulfills it improperly or with delay. In this case, the court will order the debtor to pay damages, namely an amount of money in order to repair the damage caused. The damages will be assessed by the court before which the debtor was sued. They can also be evaluated, in advance, by the parties.

In order to establish such damages, the ancient Roman law used an objective criterion, the damages representing only the material value of the non-executed services. As production and movement of goods were low, such criterion was sufficient.

During the classical antiquity, once with the development of the production, credit and trade, this criterion proved insufficient, being replaced by a subjective one, which puts the spotlight on the creditor. This criterion seeks to satisfy any interest of the creditor[8].

The cases not chargeable to the creditor are: force majeure and unforeseeable circumstances.

Force majeure (*vis maior*) shall mean the events that the debtor cannot oppose due to the fact they are caused by forces beyond his powers, such as: floods, earthquakes, etc.

Unforeseeable circumstances (fortuitus casus) shall mean those events that could be avoided by exceptional measures. If the debtor fails to fulfill his obligations due to such events, he may be held harmless. Notwithstanding, if he fails to fulfill his obligation, due to his fault, although it would perish later by unforeseeable circumstance or force majeure, the debtor would still be obliged to pay damages. The debtor continues to be liable for the loss even if it occurred by unforeseeable circumstance or force majeure, if he failed to provide the service within the deadline, due to his fault.

The cases of culpable failure are: the notice of default and negligence.

Mora is the culpable delay of the debtor who fails to perform his obligation.

[8] See also Vladimir Hanga and Mircea Dan Bocșa, *op. cit.*, page 286 and the following.

In order to be deemed in default, certain conditions are required, the summon being one of them. The creditor must demand payment from the debtor at the appropriate time and place. The existence of a deadline removes the obligation of a summon.

The claim must be enforceable, the enforceability being possible from the moment the claim arises, except the cases where the parties have not set a deadline.

Another condition is that the debtor's refusal to pay the debt is unfair due to the fact any refusal of the debtor to perform his obligation is culpable, unless the debtor proves that he had doubts on the existence of the claim.

The debtor in default shall bear the risks of the work, in other words, if the work is lost by unforeseeable circumstance or by force majeure, the debtor shall pay damages.

The creditor can also be deemed in default (mora creditoris) if he unreasonably refuses or delays to accept the payment which is due to him. The effects of the default of the creditor are the same, the risks pass on to him, the debtor being liable only for his will. The debtor's notice of default can cease if the debtor or a third party provides the creditor with the due benefit accompanied by the amount of the damages. Furthermore, the creditor's notice of default ceases if he accepts the payment and compensates the debtor for the damages suffered.

Another fact chargeable to the debtor is the negligence, which consists of an inadvertence, an inexcusable mistake in the execution of the obligation. Contrary to dilligence, contractual negligence that occurs in the performance of a contract must be distinguished from the tort[9].

It has been admitted in the classical antiquity that negligence can consist not only of a positive, commissive act, but also of an abstention, omission. Negligence is different from dolus due to the fact it entails an intentional fault, either commissive or omissive, of the debtor who was knowingly outside the rules of law regarding the execution of the contract.

The theory of negligence was gradually shaped in the Roman law, being definitively formulated in the Post-Classical and Byzantine Era. During the Era of Justinian, the negligence was of two kinds: slight negligence (levis) and gross negligence (lata).

In the ancient times, the discharge of obligations was governed by the correspondence principle. According to this principle, the obligation is extinguished by using a solemn act identical to the one that gave rise to it, but used in the opposite direction.

The physiognomy of personal rights is different from that of real rights in terms of capitalization. Therefore, real rights are capitalized by the exercise of certain attributes by the right holder, while personal rights are capitalized by the execution of the obligation by the debtor. Thus, real rights are, in principle, perpetual, while personal rights are temporary. Appeared in the field of patrimonial relationships between two determined persons, the rights of claim are extinguished by capitalizing the interests contemplated by the respective relationships.

There are voluntary and involuntary means of extinguishing obligations. Voluntary means entail a manifestation of will of the creditor and the debtor. In addition to the payment, which was currently used, the Romans also knew other voluntary means of extinguishing obligations: transfer in lieu of payment,

[9] For a detailed analysis of the theory of negligence, see Grigore Dimitrescu, *Drept roman. Volumul II – Obligațiuni și Succesiiuni*, Imprimeria Independența Publishing House, Bucharest, page 259.

remission submission, compensation, novation.

Involuntary means do not entail the will of the parties, which is why there are sometimes designated by the terms: forced means or necessary means. Obligations are involuntarily extinguished by: impossibility, non-execution, confusion, death, capitis de minutio and extinctive prescription.

### 3. Conclusions

As we have already shown, many of the current legal concept originate in Roman law, which succeeded in giving them a practical formulation. I find it very interesting that the Romans have achieved such performances, especially in the field of contracts. What I mean by saying this is that contracts have remained, for the most part, unchanged in terms of formation, elements and effects. As we have seen, current changes are formal and there are not changes in principle.

Therefore, this study proves the great importance of Roman law for education and life, due to the fact that, as Romanist say, there has been no other system of private law so thorough and capable of reaching the same high level of legal form of technique, throughout the entire history of society.

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