

**Łukasz Romański\***

## **The principle and limits of freedom of contract from the perspective of the Roman law tradition.**

### **Streszczenie**

Praca omawia elementy konstrukcyjne zasady swobody umów oraz jej ograniczeń na podstawie polskiego kodeksu zobowiązań z 1933 roku, oraz art. 353<sup>1</sup> kodeksu cywilnego z 1964 r. w oparciu o recepcję prawa rzymskiego i powstałą na tym polu badań tradycję romanistyczną. Głównym motywem jest pokazanie związków pomiędzy pojęciami i konstrukcjami wytworzonymi w praktyce stosowania prawa rzymskiego a współczesnymi regulacjami prawnymi.

**Słowa kluczowe:** Prawo cywilne, prawo rzymskie, Kodeks Zobowiązań, historia prawa, europejska tradycja prawna.

### ***Introduction***

The principle of freedom of contract is currently of great importance in all law. It fulfils an important function in the broadest sense of the freedom of determining mutual rights and obligations between parties involved in business transactions as the “competence” to shape the subjects of legal relations binding them(...). Sometimes freedom of contract qualifies as a

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\* Ph.D. Candidate at Faculty of Law and Administration, Warsaw University

“right” or a “subjective right”. However, the general view adopted in the science of civil law combines these concepts with the existing legal relationship resulting from the legal event<sup>1</sup>.

Already during the Second Republic of Poland, the eminent Polish civil lawyer Roman Longchamps de Bériér wrote that this principle “pervades the entire obligation law”<sup>2</sup>. It was not without reason that this author stressed the importance of this institution. Also today, perhaps especially now it has become a key issue for all of contract law. Just as in relation to other structures of contemporary private law, it was shaped as a result of reflection on the different institutions of Roman law and its subsequent reception.

According to the archaic Roman law, individual legal action, despite its formalistic framework, posed for the parties some leeway in terms of the alignment of mutual rights and obligations. It would be unreasonable to say that during this period this rule was fully formulated, in the form that is known today. The very notion of rules that not only refer to a system of legal norms is the abstract recognition of repetitive behavior<sup>3</sup>. This principle is formulated in general terms because it meets the universal function, contributing positively to the specific normative order which is characterized by a certain element of discretion. In the case of that, principle of freedom of contract was a result of the application more flexibility forms, give parties more freedom in legal transactions.

The Roman jurists involved in the development of practical legal problems did not create theoretical concept of the principle of freedom of contract. C. Kunderewicz wrote on this topic that: “Roman lawyers have not developed any general theory of contracts, the most important and most frequently occurring in practice source of obligations. On the basis of their decisions, only anecdotal mediaeval glossators and modern Roman law commentators created an adequate system of general concepts”<sup>4</sup>. A similar view is expressed by P. J. Thomas: “It is a widely shared view that the Roman jurist was practically orientated and had no penchant for theoretical or philosophical explanations”<sup>5</sup>. This does not mean, however, that there was no

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<sup>1</sup> Z. Radwański, A. Olejniczak, *Zobowiązania- część ogólna*, Warszawa 2006, p. 126.

<sup>2</sup> R. Longchamps de Bériér, *Prawo zobowiązań*, Poznań 1948, p. 154.

<sup>3</sup> More about the principle, comp. R. Dworkin, *The Model of Rules in Law, Reason and Justice*, New York-London 1969.

<sup>4</sup> C. Kunderewicz, *Rzymskie prawo prywatne*, Łódź 1995, p. 130.

<sup>5</sup> P. J. Thomas, *The Eternal Values of Roman Law* [in:] J. Sondel, J. Reszczyński, P. Ściślicki (red.), *Roman Law as Formative of Modern Legal System, Studies in Honour of Wiesław Litewski*, Kraków 2003, p. 174.

specific legal action which would offer the possibility of laying mutual rights and obligations with more or less freedom.

On the basis of Justinian's codification of Roman law<sup>6</sup>, which was reborn in the university centers of Italian cities, the theoretical development of the concept of freedom of contract came early. This took place in a context of strong growth in the political position of these cities and in the development of mercantile practice .

Additionally, a large influence on the modern concept of contracts was consideration formulated by the doctrine of canon law, for which the foundation was the Roman contracts elaborated by the law glossator's schools. This was reflected primarily in the rejection of the already known Decree of Gratian, the Roman division of the contract which bore a ratio of obligations and those that did not cause such effects. A consequence of this was the thought expressed in the Decretals of Gregory IX that the whole "bare agreement" in principle should be protected by law, or *pacta quantumcunque nuda servanda sunt*; thus also the principle known today as *pacta sunt servanda*. In the following period there was introduced a modification of the rule of restricting agreements which arose from a commitment only to those that were included in a serious intention (*serio animo*) and with consideration (*deliberatione*). Both of these reasons have become the starting point for the development of the theory of the so-called cause of obligation (*causa*). The achievements of mediaeval canon law were used subsequently by the modern school of natural law, which stated that a contract validly depend on *causa* of the obligation, which is connected to the nature of the obligation<sup>7</sup>.

These changes resulted in placement, for the first time, in the Napoleonic Civil Code<sup>8</sup> provision which immediately established the principle of freedom of contract. Later, indirectly expressed also provisions of the German Civil Code BGB<sup>9</sup>, which „soon was recognized as

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<sup>6</sup> M. Sczaniecki, *Powszechna historia państwa i prawa* , Warszawa 2003, p. 43.

<sup>7</sup> W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2009, p. 432.

<sup>8</sup> K. Sójka-Zielińska, *Wielkie Kodyfikacje XIX wieku*, Warszawa 1970, p.90.

<sup>9</sup> K. Sójka-Zielińska, *Historia Prawa*, Warszawa 2003, p. 244.

the incorporation of the theory of pandects”<sup>10</sup>. German Pandects were also reception of Roman law, based on a concept developed by the school of glossators and commentators<sup>11</sup>.

### ***The principle and limits of freedom of contract in the code of obligations of 1933 and in the civil code of 1964***

It's found place also in the Polish Code of Obligations of 1933 (further k.z.), whose article 55 k.z. stated: “On the other hand, as long as the content and purpose of the contract is not opposed to public policy, law or good morals”. This provision marked the relatively wide range of free contracting and named, alongside the laws and good morals, the limitation of the purpose and content of the agreement with the public order clause, which R. Longchamps de Bérrier stated as: “Here are, contrary to the agreement with the tax regime, the courts, the family, the principle of individual liberty, freedom of earning a living, equality of all before the law, with the duties of civil”<sup>12</sup>. Regulation of art. 55 k.z. was in force until the entry of the new Civil Code of 1964 (further k.c.), which was abandoned with the inclusion of a provision establishing the principle of the freedom of contract.

To Polish private law principle of freedom of contract amendment to the Civil Code of 28 July 1990<sup>13</sup>. This was possible due to the economic system transformation in 1989. Previously, for ideological reasons, but also with its profound justification in business practice, the principle of freedom of contract had no reason to exist. It follows that, reported for the principles of regularity, it applies only in a market economy. It can even be stated that it is one of the legal pillars of a liberal economic system.

The principle of freedom of contract is the basic structure of all of law, and in particular of contract law. Each agreement<sup>14</sup> is a legal action, which consists of a subjective, material and content. The obligation (*obligatio*) is therefore a legal relationship<sup>15</sup> which is formed between

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<sup>10</sup> M. Kuryłowicz, *Prawo rzymskie, Historia, Tradycja, Współczesność*, Lublin 2003, p. 104.

<sup>11</sup> M. Kuryłowicz, A. Wiliński, *Rzymskie prawo prywatne, Zarys wykładu*, Warszawa 2008, p. 53.

<sup>12</sup> R. Longchamps de Bérrier, *Prawo...*, p. 154.

<sup>13</sup> M. Safjan, *Zasada swobody umów (Uwagi wstępne na tle wykładni art. 353')*, PiP nr 4 (1993), p. 12.

<sup>14</sup> Z. Radwański, A. Olejniczak, *Zobowiązania*, p. 116.

<sup>15</sup> L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2006, p. 185.

two parties, where one party debtor (*debitor*) is obliged to provide the other side of the creditor (*creditor*). Therefore, the creditor is the authorized entity and the debtor is the entity obliged. The relationship that creates an obligation to have legal effect only between the parties to that relationship. We say, that it is the right relative, effective *inter partes* as opposed to absolute rights, effective *erga omnes*, to all legal entities.

In Roman law there was no uniform definition of the term *obligatio*. The term comes from the Latin verb *ligare*, and the meaning of this concept is the word “bind”. Originally, it meant certainly bound by a physical person who had failed to fulfil his/her obligation with respect to another entity, often carried out by self-help. Only in a later period of development of business transactions was there a new understanding of the concept as legally binding. Justinian’s codification of Roman law includes the following definition: *obligation est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura* – “obligation is a legal node which forces us to provide something in accordance with the laws of our state”<sup>16</sup>. However, as noted by K. Kolańczyk: “this definition does not reflect the diversity of the obligations of the Roman. Fuller definition passed the Digest of Justinian<sup>17</sup>: *Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum* – “the essence of the obligation is not to make us a thing or an ease but in order to force someone else to give us something, to do or to provide something”<sup>18</sup>. Therefore, the duty of the debtor was *dare, facere, praestare*.

Roman law distinguishes between four main types of contracts. *Et prius videmus de his, quae ex contractu nascuntur. Harum autem quattuor genera sunt: aut enim re contrahitur obligatio, aut verbis, aut litteris, aut consensu* – “first take care of those obligations that arise from the contract. These are the four types: the fact incurs the obligations either through the thing, either by word or by letter, or by agreement”<sup>19</sup>. K. Kolańczyk stated that: “consensual

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<sup>16</sup> I. 3,13; Translation for W. Rozwadowski, *Prawo rzymskie. Zarys wykładu wraz z wyborem źródeł*, Warszawa 1991, p. 277.

<sup>17</sup> K. Kolańczyk, *Prawo rzymskie*, Warszawa 1999, p. 335.

<sup>18</sup> D. 44,7,3 (*Paulus libro secundo institutionem*). Translation for W. Rozwadowski, *Prawo...*, Warszawa 1991, p. 277.

<sup>19</sup> G 3,89; The work has been used in the translation published in Gaius, *Institutions*, translated from Latin by C. Kunderewicz, elaborated by J. Rezler, Warszawa 1982.

contracts are historically the youngest against the background of the previous rigor and formalism in incurring liabilities which represented a real breakthrough for the ease and freedom of movement<sup>20</sup>.

The Polish Civil Code of 1964 was based on the design principle of contractual freedom in article 353<sup>1</sup>. According to this provision, “the contracting parties may lay the legal relationship at its own discretion, as long as its content or purpose is not opposed to the properties (nature) ratio, the law or principles of social coexistence”<sup>21</sup>.

The scope of freedom of contracts as designated by article 353<sup>1</sup> k.c. is similar to article 55 k.z. despite the fact that the condition in the form of public order has not been terminated in the current regulation. There is a long-established view in the doctrine<sup>22</sup> and in case law<sup>23</sup> that it applies indirectly since it is impossible to interpret other general clauses contained in the Civil Code and in particular with the principles of social coexistence. It is therefore necessary to consider the content of the principle of freedom of contract as expressed in article 353<sup>1</sup> k.c.

According to article 353<sup>1</sup> k.c., the parties are not tied to the choice of the form of legal action. They have the obligation to comply with a predetermined order for actions necessary to conclude the contract. They can also form mutual rights and obligations according to their own will, by forging a new relationship bond or changing an existing one. This regulation also does not specify the characteristics of the entities which can benefit from the opportunities of free contracting. It uses the term ‘party’, which only indicates a greater number of players than one. This is understandable given that it concerns agreements<sup>24</sup>.

As can be observed, the positive definition of freedom of contract would give unlimited opportunity to shape mutual rights and obligations which could lead to abuse. That is why later in the provision the legislature introduced restrictions in the form of a compliance order

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<sup>20</sup> K. Kolańczyk, *Prawo...*, p. 360.

<sup>21</sup> The Act of 23 April 1964 of the Polish Civil Code (Dz. U. 1964, Nr 16 poz. 93, as amended).

<sup>22</sup> More about this topic in: M. Olechowski, *Porządek publiczny jako ograniczenie swobody umów*, PiP nr 4 (1999), p.60.

<sup>23</sup> Polish Supreme Court judgment of 12.5.2000, V CKN 1029/00, OSN 2001, Nr 6 pos. 83.

<sup>24</sup> W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska- Bocian (red), *Zobowiązania*, Warszawa 2008, p. 145.

and content of the agreement with the nature of the relation, law and principles of social co-existence. It should be emphasized that despite the difference in the order in which they are cited in article 353<sup>1</sup>, these restrictions are just as important and are exceptions to the rule, therefore, they cannot be broadly interpreted in accordance with rule *exceptiones non sunt extendende*<sup>25</sup>.

First, the Code lists the property that is the nature of the legal obligations. The question is how this phrase should be understood. M. Safjan states: “the notion of the nature of the legal obligation may be in the context of the relationship understood in two ways: in wider or narrower terms (...).In a broader sense, as an obligation to respect the basic characteristics of the legal relationship so those of its elements the failure of which could undermine the sense of (being) referring to legal relations (...).In a narrower sense, the term ‘nature of the obligation’ should be understood as an obligation to respect the part of those specific elements against the bond whose omission or modification would have to lead to a distortion of the assumed model of legal relations connected with the type of relation”<sup>26</sup>.

Undoubtedly, another major limitation is the accuracy of the content and purpose of the contract with the legal norms of *iuris cogentis* which are contained in the legislation at the level of the act. These are therefore generally applicable legal acts<sup>27</sup>with unlimited material scope which are constituted in the appropriate procedure<sup>28</sup>.It follows that the agreement should also be in accordance with acts of standing higher in the hierarchy of sources of law than the statutory regulation.

Of course, all of this refers to the Constitution, which contains a number of general clauses and international agreements that were ratified with prior consent granted by statute. It also appears that the provisions of the contract can be assessed for compliance with the legal standards set out in the implemented regulation issued under the Act. This view is expressed

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<sup>25</sup> J. Wróblewski, *Sądowe stosowanie prawa*, Warszawa 1998, p.140.

<sup>26</sup> M. Safjan, *Komentarz do art. 353<sup>1</sup>* [in:] K. Pietrzykowski (red.), *Komentarz do kodeksu cywilnego. T. 1*, Warszawa 2008, p. 837 and n.

<sup>27</sup> *A contrario* acts of internal law as regulations, orders cannot be a basis for conformity assessment content and purpose of the contract with its provisions. They apply only those organizational units subordinate to the licensing of this type of legal norms.

<sup>28</sup> L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2005, p. 135.

by P. Machnikowski, who stated that the “law-commented provision means all the sources of universally binding law in Poland”<sup>29</sup>.

The last-mentioned restriction *explicite* in article 353<sup>1</sup> k.c. is a general clause in the form of rules of social coexistence. It refers to rules of good manners as mentioned in the text of article 55 k.z. There is no shortage in the doctrine of criticism in relation to the term “social intercourse”; just to cite one of them: “the Civil Code still speaks in this regard, inherited from the socialist legislator terminology (...), which should be regarded as anachronistic and ill-contractual relations in trade”<sup>30</sup>. Apart from the considerations about the adopted terminology, a more prominent issue is the attempt to clarify the content of this principle. At this point there appears the problem of blurring<sup>31</sup>, with expressions such as ‘good manners’ or ‘social intercourse’. Surely, the principle of social coexistence represents a matter of law contracts recognized in the community’s moral rules relating to concepts such as integrity, an honest merchant, or to generally perceived reasons of fairness. Despite these attempts to translate the principles of social coexistence the concept is still vague semantically and their use may be useful only in relation to a particular situation and individually marked entities. Hence the important in this regard of the role of judicial decisions<sup>32</sup>.

### ***The principle and limits of freedom of contract in Roman law***

As was previously indicated, in ancient Roman law the principle of freedom of contract did not apply to the extent as it does now. The question is whether or not there were *de facto* activities which served in the practice of its functions. It seems that it would be difficult to answer this question in the affirmative given the size of the business and the need to lay the legal relationship. Already in the archaic period legal action can be observed which left the parties a certain margin of discretion in laying down their rights and obligations. This include

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<sup>29</sup> P. Machnikowski, *Komentarz do art. 353<sup>1</sup>* [w:] E. Gniewek (red.), *Komentarz do kodeksu cywilnego*, Warszawa 2008, p. 534.

<sup>30</sup> J. Rąjski, W. Kocot, K. Zaradkiewicz, *Prawo umów w obrocie gospodarczym*, Warszawa 2002, p. 60.

<sup>31</sup> M. Pyziak-Szafnicka, [in:] M. Pyziak-Szafnicka (red.), *Komentarz do Kodeksu Cywilnego. Część ogólna*, Warszawa 2014, p. 82.

<sup>32</sup> See the judgments of 8.01.2003, CKN 1097/00 OSP nr 4/2004; 20. 05. 2004 II CK 354/03, Biul. SN 2004, Nr 12, pos. 7; and the Polish Supreme Court judgment of 6.03.1992 OSN 1992, pos. 90; 20.07.1993 OSN 1993 pos. 208.

institutions such as the stipulation (*stipulatio*), or act with bronze and weight (*actus per aes et libram*), „which also gave the possibility of a maneuver added to the act reservations (so-called *lex privata* and *pactum fiduciae*)<sup>33</sup>”.

*Lex privata* was developed by consensus agreement, added as a clause that allowed to lay the legal relationship according to the needs of the parties and which eased the rigid form *actus per aes et libram*. The doctrine also stresses that *lex privata* could fulfil the role of the subjective right or rules of *iuris dispositivi*<sup>34</sup> terms of *ius civile*, which in this case would be a rule of *ius cogens*. While *pactum fiduciae*, an action which is based on *fides*<sup>35</sup>, it gave the opportunity to add a stipulation that one party behave in a clearly defined manner after the contents of the original liability resulting from *negotium per eas et libram*.

However, of particular importance in this regard was the stipulation, e.g. “*verbis obligatio fit ex interrogatione et responsione, velut: Dari Spondens? Spondeo, Dabis? Dabo, Promittis? Promitto, Fidepromittis? Fidepromittio, Fideiubes? Fideiubeo, Facies? Faciam*” –“Through the words of an obligation arise the following questions and answers, such as: Do you promise solemnly that it be given? I promise solemnly; Can you?; Do you promise? I promise; Do you promise reliably? I promise reliably; Do you provide reliably? I assure fairness; Did you do it? I will do it”<sup>36</sup>. According to the Gaius Institution, the liability of stipulation notice for words in a particular order, but it was only the form in which the parties could lay down the mutual rights and obligations. This did not happen because nothing determine the subject matter of what to be given to what be promised and it is from the same stakeholders. Of course, all of this was in a raised, formalized character. Only activities praetor make more flexibility of that act, by ensuring an informal promise can become a source of Roman contracts, and later approved by *ius civile*. Naturally, this could be done initially only in strictly defined cases. This situation changed quite late, during the end of the Roman state, after the year 472 A.D. The Constitution of Emperor Leo, which provided validity contained a stipulation even if it did not maintain

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<sup>33</sup> W. Wołodkiewicz, *Rzymskie korzenie współczesnego prawa cywilnego*, Warszawa 1981, p. 82.

<sup>34</sup> W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo...*, p. 34.

<sup>35</sup> J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 2006, p. 382, s.v. *I Fides -ei*.

<sup>36</sup> G 3,93.

the formal requirements: “This form of liberalization stipulation is indicated as the most far-reaching rapprochement in the ancient Roman law principle of freedom of contract”<sup>37</sup>.

The stipulation was one of the main forms of actions performed throughout the period of formation of *ius contractus* and, as W. Wołodkiewicz wrote: “Despite its formalism it gained more and more applications and could be used to achieve all sorts of purposes. It has become, in its various forms of a multi-functional instrument, that *grosso modo* was the modern principle of freedom of contract”<sup>38</sup>. One of the sources *obligationes* have been recognised by the *ius civile*, and which the law confers protection in the form of the possibility of complaint (*actio in personam*)<sup>39</sup>. K. Kolańczyk noted in this topic that: “The same three words, further specifying the obligation of the debtor to the creditor (*dare, facere, praestare*) also occur in the definition of Gaius *actio in persona*”<sup>40</sup>. Gaius says: ‘*in personam actio est, qua agimus cum aliquo, qui nobis vel contractu vel ex delicto obligatus est, id est cum intendimus dare facere praestare oportere* – *Actio in personam* is when we file a lawsuit against someone who is against us and is obliged to either contract or tort, that is, when we say that he/she should give us something (*dare*), make (*facere*), or provide something (*praestare*)”<sup>41</sup>.

With the development of trade and related, new economic activities, some not recognized by the *ius civile* contract gained legal protection granted by praetor. One procedure undoubtedly contributed to the emergence and development of the formula. As a result, in addition to the existing *obligations civiles* there developed a new category *obligations honorariae*, as indicated by Gaius who wrote that *ius praetorium est, quod praetores introduxerunt adiuvandi, vel supplendi, vel corrigendi iuris civilis gratia propter utilitatem publicam*. – “praetor law is that because for public benefit were introduced magistrates to assist, supplement or correct the civil law”<sup>42</sup>. Praetor activity involving the above-mentioned activities soothed the formalism

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<sup>37</sup> W. Dajczak, T. Giaro, F. Longchamps de Brier, *Prawo...*, p. 431.

<sup>38</sup> W. Wołodkiewicz, *Rzymskie...*, p.82.

<sup>39</sup> A. Dziadzio, *Powszechna historia prawa*, Warszawa 2008, p. 346.

<sup>40</sup> K. Kolańczyk, *Prawo...*, p. 336.

<sup>41</sup> G. 4,2.

<sup>42</sup> D. 1,1,7,1 (*Papinianus libro secundo definitionum*). Translation for B. Szolc-Nartowski, *Digesta Justyniańskie. Księga pierwsza*, Warszawa 2007, p.16.

of *ius civile*, giving the parties the possibility of more flexibility and to freely determine their relationship as legal and economic. We cannot forget that *ius honorarium* protects only certain types of agreements in their specific content and form of conclusion.

Directory contracts that were actionable, whether due to the protection granted in the edict of the praetor or through recognition by their *iuscivile*, were already mentioned in the stipulation as well as in the loan agreement (*mutuum*), lending (*commodatum*), storage (*depositum*), trust (*fiducia*), order (*mandatum*), society (*societas*), sale (*emptio venditio*) and contract *loactio conductio*. This was the “core of the Roman obligations *ex contractu*”<sup>43</sup>, but still functioned informal agreement, which not given the complaint, hence they were known as *pacta nuda*, i.e. literally called a “bare contract”. They were not the statute of the contract according to Roman law. Parties could conclude a “bare contract”, but there was a reasonable risk on behalf of the creditor that the rightful provision would not be met and he/she would not have the legal possibility to pursue his/her claims because *ex nudo enim pacto inter cives Romanos actio non nascitur*—“with bare agreement between Roman citizens no obligation arises”<sup>44</sup>. In order to protect the creditor, in the classical period a rule was adopted that in a situation when one of the parties fulfilled its benefit to the agreement the other side also had a duty to fulfil its duties. This was quite a relaxation of the restrictive limit in pursuing claims *ex nudo pacto*.

In case only certain types of agreements have been challenged and recognized under *ius civile* as the appropriate source of obligations. For this process the jurisprudence of Roman law create new term as a “nominalism contract”<sup>45</sup>. The catalogue of contracts protected by the award of a complaint *actio in personam* expanded gradually, which took place mainly as a result of praetor activities. A praetor did not give protection informal agreements: *quae neque dolo malo, neque adversus leges, plebis scita, senatus consulta, decreta directa, principium, neque quo fraus cui eorum fiat facta erunt, servabo*<sup>46</sup>. Of particular interest seems to be the last of the conditions relating to circumvention of the law, which is defined by Paulus as

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<sup>43</sup> W. Dajczak, T. Giaro, F. Longchamps de Brier, *Prawo...*, p. 430.

<sup>44</sup> PS. 2,14,1. Translation for A. Dębiński, *Rzymskie prawo prywatne*, Warszawa 2007, p. 307.

<sup>45</sup> W. Wołodkiewicz, *Czy prawo rzymskie przestało istnieć?*, Kraków 2003, p. 72-73.

<sup>46</sup> D 2,1,4.7 (*Ulpianus libro quarto ad edictum*).

*contra legem facit, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit*<sup>47</sup>.

In conclusion, the freedom of contract was never absolute and there were always factors that limited it. These were present in nature and associated with the content of activities as well as with the subjective aspect, which was associated with the position of the individual in the community of Roman society and the situation which was dependent on status: *libertatis, civitatis i familiae*.

At the beginning of these considerations it would be worth considering the following sentence: *impossibile nulla obligatio est*<sup>48</sup> – “what is impossible not create obligations”. This rule expresses the fundamental principle of limiting the freedom of contract, and it cannot agree on the benefits of which at least one party is unable to meet the objective reasons. Implied also conclude agreements provided (*condicio*), which is known, that cannot be met. Any such agreement will not give rise to a liability relation because *item si quis sub ea conditione stipuletur, quae existere non potest, veluti “si digito caelum tetigerit”, inutilis est stipulatio* – “also, if someone receives a formal pledge under conditions, which is not possible- for example if it touches a finger to the sky, that is ineffective promise and doesn’t create obligation”<sup>49</sup>.

Another element which constitutes a fairly serious limitation was extended formalism, especially during the archaic and before the classic period. It manifested itself in the binding force of rigid rules that governed the order to make certain gestures or speak the right words in the right order. Undoubtedly, this was a major inconvenience, and every mistake resulted in the annulment of these activities. These limits were important, but using current terminology they were of a procedural nature. This does not mean, however, that the parties were bound only by requirements of a formal nature. Just as today, in ancient Roman law there were limitations in the form of the compatibility of the agreement with the acts of law and the constraints of an axiological nature. *Pacta quae contra leges constitutionesque vel contra bonos mores fiunt,*

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<sup>47</sup> D. 1.3.29 (*Paulus libro V ad legem Iuliam et Papianam*) Translation for B. Szolc-Nartowski, *Digesta Justyniańskie, Księga pierwsza* Warsaw 2007, p.45.

<sup>48</sup> This rule is still under private law. See Z. Radwański (red.) *System Prawa prywatnego, Prawo cywilne- część ogólna*, Warszawa 2004, p. 223.

<sup>49</sup> G. 3,98.

*nullam vim habere indubitati iuris es.* –“Contracts which are contrary to the law, the imperial constitution or morality, without a doubt, they have no legal force”<sup>50</sup>.

The first conclusion to be drawn in connection with the reading portion of the Constitution of the Emperor Caracalla is a statement that if the agreement is contrary to the acts of law or the laws and constitutions of this emperor have no legal effect which are provided for in its content, as *ius publicum privatorum pactis mutari non potest*–“public law cannot be changed by agreements among individuals”<sup>51</sup>. In addition, the agreement could not be concluded for a wicked purpose as *pacta, quae turpem causam continent, non sunt observanda*. But there is a problem of interpretation in relation to restrictions which are good manners or a wicked purpose. This is associated with the their “axiological load”.

The premise of good manners limiting the freedom of contracting can also be found in a speech of Paulus, in that it relates to a contract of mandate which had the character of Roman contracts: *illud constant, si quis de ea re mandet, quae contra bonos mores est, non contra obligationem* –“it is certain that if someone gives order, which is against good morals, does not create obligations”<sup>52</sup>. Paulus’ opinion can derive a general rule that other agreements recognized by the *ius civile* for contracts are subject to this restriction. Unfortunately, the jurist does not explain how one should understand the concept of good morals or the criteria of wicked purpose of the activity and what the conditions are for assessment of the contract as wicked or incompatible with morality. Unfortunately, Roman jurists do not explain these concepts.

### ***Concluding remarks***

The problem of limits of freedom of contract remains, moreover, in modern times. Just recall the general clause of rules of social coexistence and reflect on its meaning, depending on the different context. This forces the use of discretionary methods for resolving contractual provisions which are within good manners or principles of social coexistence. This may be controversial, and different interpretations depending on worldview and values appear. But

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<sup>50</sup> C. 2,3,6.

<sup>51</sup> D. 2,14,38 (*Papinianus libro secundo quaestionum*). Translation for W. Rozwadowski, *Prawo rzymskie. Zarys wykładu wraz z wyborem źródeł*, Warszawa 1991, p. 230.

<sup>52</sup> G. 3,157.

this is not the only contiguous point in which *ius Romanum* mingles with contemporary regulations. This kind of influence of ancient Roman law, and its past or even nowadays reflection is much more. It was impossible to present them all, even with regard to the issue of freedom of contract. This indicates the wide range of Roman law influence to current positive and judicial law. It is worth to notice what H. Kupiszewski wrote: “Studies of Roman institutions are simply an irreplaceable value in teaching. *Cupida legum iuventus* brings comprehensive and at the same time precise legal terminology. They teach the concepts of construction of modern civil law”<sup>53</sup>.

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### **The principle and limits of freedom of contract from the perspective of the Roman law tradition.**

**Summary:** The work discusses the structural elements of the principle of freedom of contract and its limitations under the Polish Code of Obligations of 1933 and the current regulation of art. 353<sup>1</sup> of the Civil Code of 1964 from the point of view of the Roman law tradition. The main aim is to show the relationships between concepts and structures as developed in the practice of Roman law and in contemporary legal regulations.

**Key words:** Civil law, Roman law, Code of Obligations, Civil Code, history of law, European legal tradition.

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<sup>53</sup> H. Kupiszewski, *Prawo rzymskie a współczesność*, Warszawa 1988, p. 218.