

# CONTRACTUAL CONSENSUS – THE EVOLUTION OF THE NOTIONS OF FORMALISM AND CONSENSUALISM

*Teaching assistant Ioana Cristina PANȚU\*, Ph.D. student  
Romanian-American University, București, România*

## **Abstract**

The topic approaches the evolution of concepts such as: form – formalism and consensus – consensualism in the contractual consent, from ancient times to the pre-classical and classical. Formalism is that feature of the legal systems of ancient times and ancient organizations, where literacy was the privilege of certain social class or strata, under which legal provisions were effective, subject to be drawn into a given shape. Consensual contracts rooted in the law of nations ("ius gentium") and developed in the imperial era to enhance the effectiveness of trade agreements and to facilitate their adjustment to social needs in full transformation.

**Keywords:** consensus, form, formalism, agreement, consensualism

## **A. The evolution of the notions of form and formalism**

Form represents the correlation between the appearance and the content of an object or process.

Form requires some external structure, relatively stable of a given content, is a way of existence, organization and structuring of the elements making up an object or a process.

Formalism is the care and exaggerated concern given to forms and formalities at the expense of content<sup>1</sup>.

Strictly legally, formalism is that feature of the legal systems of ancient times and ancient organizations, where literacy was the privilege of certain social class or strata, under which legal provisions were effective, subject to be drawn into a given shape (e.g. the parties had to utter certain sacramental formulas, accompanied by gestures or the document was drawn by a state body, etc). Failure to observe pre-stated formalities entailed the absolute nullity of such document<sup>2</sup>.

In the past, the validity and effectiveness of documents was provided by magical rituals, which consisted of the prescription's consistency of a rigid form (through words and gestures) for the fulfillment of the same documents.

The rigidity that characterized this historical age was absolutely essential, meaning that any error or omission triggered the document's invalidity. At the same time, rigidity was enough as the validity of the document did not matter for the actual purpose pursued

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\* e-mail pantuioana@gmail.com

<sup>1</sup> For details see E. Molcuț, *Drept roman*, Edit Pres Mihaela, Bucharest, 2000, p. 268 and the following.

<sup>2</sup> See V. Hanga, *Drept privat roman*, Bucharest, 1978, p. 12; M. Teodor, *Consensualismul în istoria dreptului roman*, Ph.D. thesis I.F.S.D. Chișinău, 2004, p. 16.

by the author and, sometimes, the significance of the gestures and words uttered was irrelevant.

Religion with its rituals prescribed by prayer to change the will of the gods could not promote this type of formalism.

It was not the same when using formal schemes, important secrets guarded or kept by the sacerdotal college of pontiffs.

Form was required both for legal acts and for trials.

For instance, a legal document was the document by means of which the head of a family usually in agreement with another head of the family amended the personal legal situation of their own or of those in their power as regards the family or the properties<sup>3</sup>.

On the other hand, there were part of procedural documents the documents based on which the head of the family protected their own interest against another and accepted the protection of the right.

However, the sphere of influence of formalism was expanded over the entire law of that age.

The transfer from the ancient age to the pre-classical and classical ones was obviously marked, among others, by the limitation or the exceeding of such formalism.

The Roman law in the ancient age provided, from the very beginning, private subjects, most of them heads of family, with the foundations for a large autonomy, as indicated above.

Formalism was characterized in the ancient age, especially in the legal area, by the exigency with which will was expressed or declared through words and, sometimes, through favored or predisposed gestures by means of the absolute rigidity of the law<sup>4</sup>.

When it was powerful, formalism was expressed through a richness of words and was expressed through a richness or prescribed gestures as the effect foreseen and pursued occurred without other interventions, with few exceptions which we will detail below<sup>5</sup>.

Thus, literature indicates the magical or magical-religious component of formalism.

The form of ancient trade required, according to its rules, the presence of two subjects with opposed interests, but the utterance of words or expressing some gestures was not strictly necessary.

Sometimes the presence of the two subjects with two different interests, especially the two parties, was not necessary, but the approval of the curiate assembly was necessary, with the participation of the pontiffs (for instance, in case of adoptions (adrogatio), wills, etc.).

The origin of the document was most times underlain by a religious-legislative decree, without a purely legal trading nature, but it preserved its form when for them the commercial nature prevailed decisively.

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<sup>3</sup> See E. Molcuț, *Drept roman*, Edit Pres Mihaela, Bucharest, 2000, p. 269.

<sup>4</sup> For details on how formalism was expressed during the ancient age, see the French doctrine: G. Berlioz, *Le contrat d'adhésion*, LGDJ, Paris, 1976, p. 122; Moeneclae, *De la renaissance du formalisme dans les contrats en droit civil et commercial français*, Lille, 1914, p. 26 and the following; Rouxel, *L'évolution du formalisme*, Caen, 1935.

<sup>5</sup> See St. Tomulescu, *Drept privat roman*, University of Bucharest, 1978, p. 114 and the following.

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Another feature of formalism was "typicalness". Thus, trade was the only one possible which had pre-established forms as elements. As the norm was rigid, the supplementations made by the parties or other versions were not allowed. Thus, documents were rigid and typical. Legal trading documents which did not meet such restrictions from the beginning were not considered valid.

Each type of document corresponded for a party to a specific purpose and had one or several effects related to such purpose.

This state of affairs must be judged by the low level of development of the forces and relations of production slave, which, in their turn, did not require the conclusion of numerous legal acts or commercial transactions and having a complex character in an era that was dominated by the natural economy.

The old Roman law, represented by "ius civile", had a rigid and formalistic character. Legal documents, proceedings were held orally, certain formalities had to be fulfilled, certain sacred words had to be uttered and these true rituals were accompanied by gestures or signs of essential significance for the society<sup>6</sup>.

The formalism of the old civil Roman law, together with its orality, rigidity and traditional-conservatory spirit, represent the fundamental features of the Roman law.

Moreover, legal documents were quite rare in the field of commercial transactions (and not only), thus they represented true occasions of celebration, but were seen as documents with significant, as well as severe consequences for the contracting parties or their assets.

The excessive formalism, through its visual and audio elements, the presence of witnesses and, of course, of the contracting parties were the underlying conditions for the conclusion of the legal documents.

In the old Roman law, legal relations could exist only within such excessive formalism, which became, in time, the exact nature of such relations.

Through the end of the Republic, together with the development of merchandise production, of trade and significant economic and social transformations for the settlement of the conflicts between Roman citizens or the facilitation of the relations with foreigners, the old formalist and rigid Roman law, which was a significant hindrance in the development of the law, was changed and even replaced as it did not match reality, with legal principles and institutions from the law of the tribes, respectively the Praetorian law.

This important step was fulfilled based on the idea of equity, which represented at the time, the morals and interests of the class of slave owners. At the same time, all the means to fulfill the legal document or the contract were the material proof of the obligation's security.

A mere convention, which was not accompanied by a rigorous formalism, did not create any legal relation and did not cause any legal effects.

The oldest contractual forms in the Roman law root in the ritual of *mancipatio*, which was a way to alienate things "*mancipi*" and was fulfilled through certain words; a

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<sup>6</sup> See V. Hanga, *Tratat de drept roman*, Editura Academiei, Bucharest, 1978, p. 211 and the following.

"libripens" and five witnesses attended and then the loan contract – "nexum" was concluded through the procedure „per aes et libram”<sup>7</sup>.

This class of contracts also includes "sponsio" – a verbal contract concluded through the utterance of solemn words and the literal contract ("litteris"), which was concluded through the registration in a registry ("codex") of the debts towards a creditor, but only with the consent of the debtor.

The essential element of the obligation in „mancipium” and „nexum” contracts is represented by formalism and consisted in the participation of the parties in the conclusion of the contract, of the five witnesses who had to attend and, respectively, of a balance bearer („libripens”).

Formal contracts ("nexum", the verbal contract and the literal contract) are those contracts whose fulfillment requires certain formalities.

The increase of slave production, the development of commercial exchanges at the end of the Roman Republic and the beginning of the Imperial Age, contributed to the discovery of new legal instruments to replace the rigid formalism and triggered its oblivion. New contractual forms were born, highly simplified, as real contracts, concluded through the mere retention of the object ("re") and the consensual ones, concluded through the mere consensus ("solo consensu") of the contracting parties.

Formalism played an important role in the slave-owning Roman society, especially in the beginnings, in a natural economy, with a low level of development of production forces, but together with the profound economic, social transformations, the development of merchandise production, commercial transactions, represented a limitation of contractual relations, which led to its oblivion and to the birth of new contractual forms without the excessive rigors of formalism.

## **B. Evolution of the notions of consensus and consensualism**

Consensus („consensu”) is understood as the consent, approval characterized through the will to undertake, naming the expression of will or decision which can give raise to an obligation.

The act of will is determined by a series of intellectual representations which contribute to the composition of the elements of the legal document, with its economic consequences, with all the changes likely to occur during its execution, with the motivation that the person can agree or refuse<sup>8</sup>.

The occurrence of consensual contracts of good will in the Roman law has an outstanding significance as regards the research on the intention of the parties to establish exactly the true will when the contract is concluded.

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<sup>7</sup> See also the French and Italian doctrines: E. Perrot, *Precis elementaire de droit romain*, Paris, 1937, p. 3; A.E. Giffard, *Droit romain et ancien droit francais*, vol. II, Dalloz, Paris, 1967, p. 3; M. Roberti, *Storia del diritto romano*, Milano, 1969, p. 7.

<sup>8</sup> For details on the notions of consensus and consensualism in the Roman law, see M. Teodor, *Consensualismul în istoria dreptului roman*, Ph.D. thesis I.F.S.D. Chişinău, 2004, p. 16 and the doctrine cited by the author; V. Hanga, *Drept privat roman*, Editura Didactică şi Pedagogică, Bucharest, 1977, p. 284-286; E. Molcut, D. Oancea, *Drept roman*, Bucharest, 1997, p. 249-250.

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Gaius showed that consensual obligations are contracted in the field of sale and purchase, rentals, companies and mandates.

The legal regulation of the contract was possible through focusing private property in favor of privileged owners who consolidated their positions through rapid enrichment, aspect fully confirmed by the history of humankind throughout its development.

Of all the contracts indicated hereby, formalism was mostly changed by consensual contracts (which appeared through the agreement of will of the parties because they lack solemn formulas – verbal or written)<sup>9</sup>.

Consensual contracts originate in the law of the tribes (“*ius gentium*”) and developed in the Imperial Age to improve the efficiency of commercial transactions and to facilitate their adjustment to the social needs in full transformation.

The Roman legal expert Pedius (who lived during the rule of the emperor Hadrian 117 – 138 A.D.) showed that the essential element of the contract was the agreement of will of the contracting parties and consensual contracts had an important place, triggering in the first centuries of the Empire a maximum development due to the increase of merchandise production and commercial transactions.

Consensual contracts, according to some authors, appeared when economic life was developed and they were accessible even to pilgrims (not only to Roman citizens) in the 2<sup>nd</sup> century B.C.

The principles of the Roman consensualism remain the theoretical foundation and the identical essence of the consensual obligations in the field of sale and purchase, rentals, companies and mandates, oriented on the fulfillment of good will and equality of the citizen in a state of law.

The principles concern the fundamental content of the legal norms on consensual contract, irrespective of space, time, opening in perspective, the path of the development of the contractual system according to the overall evolution of society, in the economic, social, cultural or religious field, in particular<sup>10</sup>.

The importance of consensualism in the history of Roman law and the research of the evolution in the modern law is the correlation of the complexity of the economic and social life, of the creation of the institutional framework proper to the society's development.

In the Roman law, consensualism "defeated" the traditional formalism, burdened by the "sacredness" of the "candid" formulas, rigorous ceremonies which represented a barrier in the way of commercial transactions in a booming period of the Roman Republic<sup>11</sup>.

The formless, flexible consensualism adjusted to the needs of the economic and social life matched the requirements of the slave-owning Roman society (tendency

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<sup>9</sup> It was enough for the contracting parties to agree because such agreements could be concluded between absentees, through a letter or proxy. This was very important because a verbal obligation could not be concluded between absentees.

<sup>10</sup> See J. Ghestin, *Traité de droit civil. Les obligations. Le contrat*, LGDJ, Paris, 1980, p. 208.

<sup>11</sup> See M. Teodor, *Consensualismul în istoria dreptului roman*, Ph.D. thesis I.F.S.D. Chişinău, 2004, p. 147.

noticed in the ages up to the modern law), through its simplicity, expressed in the contractual relations based on the agreement of will<sup>12</sup>.

The existence of consensualism was related to the "contractual freedom of parties", closely pursued by the society's interests through legal regulations, which represented an objective way to perceive contractual relations through the "limits" imposed by the "public order" and "good morals".

Through consensualism, the autonomy of will conferred simplicity and vigor to contractual relations and abolished the rigidity of the forms which, throughout history, were a barrier in the way of progress and economic-social development.

In the Middle Age, consensual sale was a way to expand large properties, without other formalities for its validity, while in the modern law, the form of the authentic documents is expressly stipulated by the law, subject to absolute nullity.

Thus, in the medieval law, through laws or individual normative writs, privileges were granted to people in the field of consensual contract to facilitate trade, mining, grazing or fishing and in the modern law, governments, through their economic policy, established facilities, in particular, during the transition period to the market economy<sup>13</sup>.

In the Medieval Age, consensual sale was accompanied by the fulfillment of certain formalities and in the modern law, only in the cases expressed stipulated by the law, thus as exception from the rule of consensualism.

Also, the preemption right in the field of sale-purchase had an oscillating evolution: the institution was known in the Roman law, the documents recorded it in the Middle Age as an essential element for the validity of consensual contract and then it disappeared together with the more frequent limitations included in the system of private property by the purely communist legislation.

The capacity of the contracting parties (as essential element of contracts, consensual contracts included) is differently regulated in the modern legislation. The incapacities established by the Roman law are stipulated by the modern law, especially those related to the person's capacity: guardians, proxies, administrators, public servants, etc.

Consensualism sanctified, through his triumph over formalism, the beginning of an age of profound economic and social transformations, prepared the premises for the inoculation of legal will in the field of the contractual system, where it remained, in time, a determining agent in assessing contractual relations.

The history of law confirmed the supremacy of the principle as "contractual system through the diversity of the enforceability areas, through the rapidity of its fulfillment, through the major efficiency of this system, through the immediate legal effects it produces" (s.n)<sup>14</sup>.

We would like to point out that the evolution of the contractual system, given the historical conditions under analysis, was not possible without the "revolution" of the notion of consensualism and the flexibility of the legal document (in opposition to the

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<sup>12</sup> See E. Molcuț, *Drept roman*, Edit Pres Mihaela, București, 2000, p. 269 and the following.

<sup>13</sup> See J. Ghestin, *Traité de droit civil. Les obligations. Le contrat*, LGDJ, Paris, 1980, p. 208.

<sup>14</sup> Although in the modern age, we witness a "rebirth of the principle of formalism", see J. Ghestin, *Traité de droit civil. Les obligations. Le contrat*, LGDJ, Paris, 1980, p. 206-207.

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rigidity of the excessive formalism, which, in all ages, represented a severe hindrance in the way of progress)<sup>15</sup>.

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<sup>15</sup> See M. Teodor, *Consensualismul în istoria dreptului roman*, Ph.D. thesis I.F.S.D. Chișinău, 2004, p. 149.