"The study of contract law is a study of the restrictions on the freedom of contract" Does modern contract law interfere too much with contractual freedom?

1 A comprehensive answer to this question would require a substantial treatment of not only contract law, but also of economics, history, politics and sociology. Obviously, this is not really practical in the space available but I will try to make some general points in answer to the question.

2 In order to answer the question I will first give some historical background on the ideas of "freedom of contract" before looking at some of the reasons why this freedom may have been curtailed. Finally, I will look at the current position of contract law and analyse the extent to which contractual freedom can be said to exist today.

3 The ideas encapsulated in the term "freedom of contract" should be put in the context of the ideas of the late 18th century, in particular those of Adam Smith and his seminal economic thesis *The Wealth of Nations* (Beatson 2002). To summarise, this work upheld the beliefs of freedom of trade against protectionism. In this way the ideas of freedom of contract represented the new social ideas of the "libertarian state" (Collins 2003) in which the ideas of equality were seen as crucial. This should probably be put in the historical context in which all men were now seen as free to enter contracts of their own choosing regardless of rank and privilege and this has been described as a "great social levelling" (Collins 2003). Incidentally, this idea of "equality" has little in common with the modern conception of the word and classical theory of contracts had little interest in distributing wealth from the rich in society to the poor, merely in enabling all men to form contracts regardless of birth and title.

4 I hope that this gives some idea of the political ideology which gave birth to the classical era of contract law and some of the beliefs underpinning the concept of freedom of contract. I would now like to discuss some of the specific characteristics of contract law in this period.

5 It has been argued that contract law in this period was "sparse in content and imperialist in its ambitions" (Collins 2003) and the same author has also talked about an "empire of the law of contract" (Collins 2003). A good example of the far reaching nature of contract law in this period can be seen by looking at the famous case of *Carlill V. Carbolic Smoke Ball Co*. It has been argued that in this example the "court was prepared to conceive of social relations in terms of contracts" (Collins 2003). In other words, in the case there is no conception of consumer rights or the moral issues connected with selling suspect medicines. The only issues which concern the court are the technical issues of offer and acceptance. It seems that this case is a good example of an era in which Jessel was able to declare in 1875 that "contracts….shall be held sacred" (Cheshire et al. 2001).

6 Having discussed very briefly the ideology of this "golden age" of freedom of contract, and some of the features of the legal sphere in this period, I would now like to analyse some of the reasons why these ideas came to be challenged. Again, it should be pointed out that this is clearly a very large area of study and that any ideas given here should be seen as tentative suggestions only.

7 A major work dealing with this transition is P.S. Atiyah's *Rise and Fall of the Freedom of Contract*, and I will try and summarise some of his key ideas here. He argues that between 1875 and 1914 the increasing wealth and prosperity of the average person meant that people became more aware "that they had something to protect" (Atiyah 1979). This increasing interest in the welfare of the mass of the population meant that as early as 1881 T.H. Green was able to put "the right of the state to intervene to protect the weak on an equal footing as freedom of contract" (Atiyah 1979). Atiyah argues that in this period it was increasingly being seen as the business of governments to provide against contracts being used as "instruments of disguised oppression" (Atiyah 1979).

8 In *The Rise and Fall* it is argued that by the end of the 1880s we can see the "end of freedom of contract as a political slogan" (Atiyah 1979) with such key figures as Churchill arguing that the ideas of laissez-faire economic doctrine had lost its hold as the lot of the mass had scarcely improved (Atiyah 1979) and Chamberlain in 1885 declaring that freedom of contract represented merely the "convenient cant of selfish wealth" (Atiyah 1979). It should be noted here that this criticism was in many ways far from the ideas first raised by Adam Smith and others where there can be seen a belief in the "maximisation of wealth for the greater good of society" (Poole 2004). However, according to Atiyah faith in this wealth generating ability of freedom of contract was clearly wavering in the late 19th

century until in 1897 Matthew Ridley was able to declare as home secretary that "there is no such thing as freedom of contract" and that the "law lays down certain conditions" (Atiyah 1979) out of which contracts can be formed.

9 Atiyah then goes on to trace these developments of the late 19th century into the 20th century where it is argued that "an immense increase in the role of the government in the economy occurred" (Atiyah 1979). Especially in the two world wars he argues that government increasingly took control of the national economy with large sections of the nation taken under government control. He argues that "the free enterprise economies of the nineteenth century died in world war two and have never come to life again" (Atiyah 1979).

10 There is no space here to expand on the historical developments which may have curtailed freedom of contract in English law. However, I think it is important to have some idea of the political pressures which may have reduced this freedom in the law. I would now like to briefly discuss the current state of contract law, and analyse the extent to which it may or may not interfere excessively with the freedom of contract.

11 It has been argued that the growth of the welfare state following the 2nd world war saw an "establishment of obligations altered to fit the ideals of social justice" (Collins 2003). It has been argued that this shows a change of view point from the classical theory, in which the law was seen as a means to allow contracts to operate, towards a view in which policy and the law dictates "how the market should be permitted to operate" (Collins 2003) and again that the function of modern contract law is "to regulate markets, market practices and the social practice of making contracts" (Collins 2003).

12 It has been argued that the modern law takes more into account the complexity of today's economy in which "not all undertakings are taken completely voluntarily" (Poole 2004) and where there is not a "precise symmetry in the intentions of the parties" (Poole 2004). For example, can it really be argued that buying a train ticket should be forced into the narrow 19th century conception of offer and acceptance? This argument can also be extended into many of the areas affected by contract law such as employment, where contracts are regularly signed but not exactly on equal terms. The nature of the modern economy has led many experts to perceive a "recognition of differences in knowledge and expertise" (Collins 2003) and a dropping of the "presumption of equal terms" (Collins 2003). There has also been an increasing emphasis on such concepts as "reasonableness" and "good faith" which may have appeared alien to the libertarian thinkers who extolled the virtues of contractual freedom.

13 To conclude, I think that there can be little doubt that the study of modern contract law does represent a restriction on freedom when seen from the high point of 19th century libertarian philosophy, in which freedom of contract was seen as an ideal of the new type of free market economy which figures such as Adam Smith were striving to create. However, the extent to which modern contract law interferes with this freedom too much is more difficult to answer objectively as it is very closely linked to one's personal political opinion. In very broad terms, I would argue that companies in Britain are able to operate with a fair degree of freedom in terms of investments, acquisitions and other economic activities. However, I would argue that the law should also protect "ordinary citizens" and recognise that in the modern world most people do not think of contract law when they buy a new cooker or start a new job. There is also a role for contract law to protect these interests as well as allowing businesses to operate in the interests of profit and wealth generation.

Bibliography:

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