

**The Rise and Fall of Freedom of Contract
by Patrick Selim Atiyah, Professor of
English Law in the University of Oxford**

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Readers of Professor Atiyah's previous works have come to expect a degree of clarity of thought and eloquence of expression rarely matched in writings on the Common Law. His *Introduction to the Law of Contract, Sale of Goods and Accidents, Compensation and the Law* have been enormously successful in influencing legal opinion. The latter book in particular springs to mind for its combination of breadth of coverage with depth of analysis. To this formidable list can now be added his *Rise and Fall of Freedom of Contract*, arguably his *magnum opus*. This book is a study of the history of the idea of freedom of contract from around 1770 to the present day. His examination of the hold of this idea on the law proceeds by an investigation of the parallel history of economics and political and social change.

It has been said that *Rise and Fall* "offers neither new scholarship nor unfamiliar perspectives" on this period of history (Fried 1980: 1859) and it is certainly true that Atiyah, as is common with many legal historians, depends heavily on secondary sources. Yet it is undeniable that this book fills a major gap in our legal history by virtue of its enormous scope and combines in one lucid, albeit long, volume a vast range of material previously only to be found in monographs specializing in discrete disciplines, such as economics. Indeed it is clear that Atiyah has committed himself to transcending such artificial barriers and rekindling the ideal of a true interdisciplinary approach to legal problems and their history.

It is the duty of a book review to communicate the "flavour" of a work. With shorter works involving specialised areas of the law this may not be difficult. Yet despite the fact that *Rise and Fall* does have a pervasive theme, namely that our law of contract is based on an outmoded philosophy, it would not do justice to the work simply to concentrate on that alone. Perhaps the real flavour of Professor Atiyah's work lies in the methodology he has adopted. In keeping with his generalist

approach, Atiyah chronicles the rise and fall of freedom of contract by combining a broad overview of English society at certain dates with biographies of leading judges, politicians and philosophers and summaries of their ideas. *Rise and Fall* is therefore a work that neatly combines macroscopic and microscopic views of society. The result is a book that both informs and entertains. In keeping with this approach, *Rise and Fall* does not contain any exhaustive case analysis. Rather it attempts to chronicle the history of ideas by selective example. Perhaps not surprisingly, in view of the relative sparsity of precedents cited and the contentious view taken of the law's development, one commentator has stated that the book's weakest parts deal with the law itself (Baker 1980). This reviewer does not share this attitude, as the methodology employed precludes a complete examination of relevant cases. Besides, Professor Atiyah has pointed out that *Rise and Fall* does not purport to be a general history of contract law, although in view of the importance of the book's central theme this claim may be too modest.

If the flavour of *Rise and Fall* is generalist in nature, some of its inherent themes are quite specific and repay examination. The early part of *Rise and Fall* is an investigation of England around 1770, ranging from the political structure and the intellectual movements of the time to the state of the law. Atiyah's main conclusion is that the eighteenth century was indeed an age of "contractarianism", where the cohesiveness of the landed aristocracy, the ruling elite, lent credence to philosophies of society and man's relation to the state that stressed contractual ideas. Both Hobbes and Locke saw society as being based ultimately on agreement. Atiyah's thesis is that the non-existence of so much of what we today regard as government was reflected in the elite's views of society. Relationships between men and the state, and with each other, were seen as being contractual. Professor Atiyah sees this contractual view of life as almost all-pervasive, ranging from the phenomenon of land settlements through to the nature of the statutes of the era. However, Atiyah is at pains to establish that, whilst ideas of contract pervaded so much of eighteenth century life, it was a contractualism based more upon notions of benefit conferred that should be paid for or acts of detrimental and reasonable reliance that should be compensated than on abstract notions of the binding effect of promises *per se*. In Atiyah's view the modern law's recognition that promisees are entitled to have mere expectations protected was not an accepted part of eighteenth century law. Viewed through Atiyah's eyes, the presence or absence of a promise was more a question of evidencing the conferral of benefit than the source of liability.

For it is the unifying theme of *Rise and Fall* that the law of contract changed in the nineteenth century to accommodate the then prevailing political philosophies and came to regard the executory contract as the law's paradigm. Indeed, if one asks *why* has Atiyah written this prodigious work at all, the answer appears to be that it is the "first blast of the trumpet" against the nineteenth century model of contractual obligation that Grant Gilmore (1974:17) has so graphically described as a "monstrous machine". Atiyah's aim is clearly to establish, by historical analysis, that the ideas and forces that were operative on the law at the time that freedom of contract and the executory contract became pillars of contract law have ceased to exist, whilst the legal forms and theories that embodied them have survived to rule us from their graves. Atiyah's book paves the way then, for a second volume in which he will expand and expound his thesis that there has been a shift of emphasis

from promise-based liabilities to a more functional notion of liabilities based on action in reasonable reliance on the conduct of another. As a corollary the executory accord would no longer have cardinal significance in our law of civil obligations. Indeed Atiyah points out that liability for breach of a purely executory contract is already contingent rather than absolute; promisees only recovering damages for lost expectations in circumstances where they cannot satisfactorily mitigate such loss.

It might be asked why Professor Atiyah did not simply write his second volume alone. Why did he feel it necessary to indulge in the "masochism of the legal historian" (Parker 1974)? The answer of course is that outmoded contract theories still survive in the legal world of today. One only has to pick up *Cheshire and Fifoot* to see how well the Victorian edifice has survived in legal theory, despite the criticism it has sustained at the hands of academics (Llewellyn 1931).

Atiyah's history is therefore both a prelude to and at the same time an integral part of an appeal for a piece of massive law reform, the complete rethinking of the nature and role of civil obligation in contemporary society. Admittedly Atiyah's central point, that we should concentrate more on the reliance interest has been made before, and he expressly states the galvanic effect of the seminal article by Fuller and Perdue (1936). Professor Gilmore reached a similar conclusion in his *Death of Contract* (1974:87). However, the point has never before been made so forcibly, nor after such an exhaustive examination of the law's history. *Rise and Fall* is therefore anything but a sterile examination of a point of academic interest. It is in fact a brilliantly argued polemic that renders current received dogma about contract law demonstrably bereft of intellectual merit and connection with the realities of English, and presumably, Australian society in the last quarter of the twentieth century.

In a journal of this nature, and in a book review, it is neither possible nor desirable to review the "black-letter" legal developments by which the philosophies underlying the freedom of contract shibboleth entered our law. Of more interest is Atiyah's interpretation of the change itself. In Atiyah's view the emergence of freedom of contract is not attributable to the capitalist bourgeoisie simply altering the law to suit its needs and to deny those of the proletariat. Rather it was the result of the grip of the philosophy of Bentham and the Political Economists. Freedom of contract was the heart of classical economics.

Disciples of Bentham and Ricardo supported individualism and an atomistic theory of society. "Political economy", as Atiyah points out, abjured empiricism in favour of *a priori* principles derived from the model of the free market with its perfect competition. The theory was that market forces, the combination of supply and demand, would allow an individual to best allocate his resources to ensure his happiness. The sum of such individual optimal allocations was to be collective happiness.

At the same time as Atiyah painstakingly demonstrates the increasing hold these theories had on a receptive legal profession and judiciary, he believes that the picture of nineteenth century decision makers as being die-hard supporters of *laissez-faire* is a myth. Atiyah relies on the laws relating to weights and measures, the "marketing" offences and the poor to support his argument that the commonly held belief that "social Darwinism" was rampant in England at the time is likewise a myth. Far from being consummate opponents of government action, Atiyah regards the

middle-class as having put increasing demands on government. Yet it is perhaps significant that these demands were made in areas where the free market model had been proved inadequate, such as health care or the police. In terms of more commercial activities the belief in small government remained dominant for much of the century.

Although *Rise and Fall* recognises that there were terrible social costs to the rapid industrialization that occurred between 1770 and 1870, Atiyah clearly sees this as arising not from class conflict but from the patent inability of government to regulate the process that occurred. Atiyah seeks the lack of corresponding revolution in administration as being largely responsible for failure by government to "humanise" the industrialization.

A simple lack of knowledge, in the form of statistical data, hampered the implementation of desired reforms. It can be deduced from the above that Atiyah has adopted a relatively sympathetic view of nineteenth century England, even to the extent of defending the Enclosure Acts as having been fairly administered. This view does not of course accord with more radical and even traditional perspectives. Professor Atiyah cursorily dismisses Marxist approaches to the era, and this detracts somewhat from the book. Atiyah's interpretation of Marxist analysis of the evolution of law in the nineteenth century is extraordinarily simplistic; "On this view, all the improvements in working-class conditions which occurred were concessions wrung from the industrialists to stave off the inevitable revolution." (p 221). This assessment does not do justice to the diversity and sophistication of Marxist analysis. The debates about the relative autonomy of law as a phenomenon *vis-a-vis* its being solely part of the "superstructure" of the state have something to say about the evolution of law in response to changes in society and deserve consideration (Cotterell 1981). This is particularly so in view of Atiyah's earlier statement that "The law always reflects the interests of a governing class" (p 97). The whole thrust of Marxist analysis is aimed at explaining this very phenomenon.

Of course one does not have to be a Marxist to disagree with Atiyah's view of nineteenth century industrialization. Atiyah refers to the steady rise in real wages after the early decades of the century and compares this favourably to agrarian poverty. The "traditional" historian would answer that purchasing power is not the measure of human happiness. The death rate remained lower in the country than in the towns (Trevelyan 1967: 498, 541). Atiyah's excuse that the appalling housing and sanitary conditions in the new towns were caused in good measure by an absence of engineers and architects is not convincing. Despite Professor Atiyah's detailing of working attempts at social reform, the period still emerges as one of consummate selfishness, greed and exploitation of the weak.

Once Atiyah accepts that "freedom of contract" and its attendant inequalities were philosophic and institutional errors rather than the product of the exercise of power by one class against another, a lot of heat is lost from the debate about why the law changed to embody freedom of contract ideals. Particularly, Atiyah does not have to resolve the sort of argument that currently rages between the rival historical theories of A.W.B. Simpson and Morton Horwitz, both of whom have written at length about this period of change in English law. Horwitz (1974, 1975) has written two articles that are particularly relevant to this period. In these, he has characterized the eighteenth century law of contract as paternalistic, benign and

based on ideas of just prices or fair exchanges. Horwitz's central thesis is that there occurred a dramatic change in the law to facilitate the inequities of the free market economy of the nineteenth century. The reason for this change was the emergence of national commodities markets in the late eighteenth century and the consequent rise of free market capitalism. The law can therefore be seen to have altered rapidly to accommodate the interests of the wealthy, particularly in its shift from a "title theory of exchange" with its attendant notions of fairness, to its recognition of the wholly executory agreement.

Professor Simpson (1979) dissents vigorously from Horwitz's views, and has taken great pains to rebut the evidence presented in Horwitz's *Historical Foundations* which ultimately appears to reflect an *interpretation* of the cases rather than demonstrating a catalogue of errors on Horwitz's part. It has been stated by a reviewer of Simpson's *A History of the Common Law of Contract* that "his principal weakness is a taste for the definite answer" (Barton, 1977: 375) and the phenomenon of legal historians giving widely different interpretations of the scarce cases surely cautions against seeking definitive answers. What is certain is that a central tenet of Professor Simpson's jurisprudence is that the degree of judicial innovation in the nineteenth century is often greatly exaggerated (Simpson 1975). It is Simpson's view therefore, that executory contracts were enforced much earlier than the period under discussion in *Rise and Fall* and that no major shift took place in the nineteenth century.

Exactly where does Atiyah fit into this "just price" to "market price" controversy? Although Atiyah frequently cites Simpson with approval, he does have some sympathy for the Horwitz view. Although Atiyah states that there has never been an "overt principle of fairness" in the common law (p 146), he goes on to discuss the Chancery tradition to that effect. Further on in *Rise and Fall* Professor Atiyah in fact adopts a position very close to that of Horwitz (p 168). An interesting example of common ground between the two lies in their belief that, even if the courts had no overt principle requiring adequacy of consideration, the jury would take a disparity of consideration into account in the award of damages (p 203) (Horwitz 1974: 924). In Professor Simpson's view "Romanticism about juries is not history" (Simpson 1979: 575). *Rise and Fall* has not presented the final word on this most interesting and important historical debate, but it will certainly fuel future discussions of its ramifications.

Another important theme of *Rise and Fall* reflects one of Atiyah's current concerns about English law and its future. Atiyah's attitude to the nineteenth century is that it was an age of "principle", particularly "rule-utilitarianism" and the belief was widely held that legal rules could have a crucial educative or hortatory effect in creating a better society. Atiyah contrasts this with his "Age of Pragmatism" from 1870 to 1970 where "principles" declined in importance compared to the pragmatic or result-orientated approach. The latter stresses the achievement of a just result *inter partes* regardless of the decision's educative role. Pragmatism took the place of principle in contract law because of the evident failure of classical economic theory to match reality, particularly evidenced by the growth of monopolies and large corporations. At the same time Atiyah sees freedom of contract and its stress on the individual as being fundamentally in conflict with what he sees as the majoritarian spirit of the post-1870 era. By 1885 Joseph Chamberlain

could say in the House that ideals of freedom of contract were "the convenient cant of selfish wealth" (p 587). Even art now mocked the once sacred principles of the earlier period. In *The Importance of being Earnest* Miss Prism tells her charge, "Cecily, you will read your Political Economy in my absence. The chapter on the Fall of the Rupee you may omit. It is somewhat too sensational".

An alleged shift from principles to pragmatism is a jurisprudential phenomenon that obviously concerns Professor Atiyah. His inaugural lecture at Oxford was concerned with this subject. It is the part of *Rise and Fall* that deals with this shift that can perhaps be seen as the weakest of the book. Julius Stone (1981) has criticised Atiyah's approach to this topic, and his criticisms are cogent. In Stone's analysis, Atiyah uses the term "principle" to mean "rule", that is to say, a principle is applied to a set of predicated facts to achieve a result that will affect future behaviour of others as against a result that will achieve justice *inter partes*. In reading *Rise and Fall* one could be forgiven for thinking that Atiyah advocates the triumph of "pragmatism" over "principle". In fact Atiyah is simply saying that our contract law currently has the wrong set of principles. This is borne out by Atiyah's conclusion, late in the book, that ultimately more harm than good results from attempts to do justice in every case (pp 679-680). The perceived harm is a breakdown of the rule of law and a subversion of the judicial role.

Stone's criticism centres upon the fact that legal "principles" or "rules" almost invariably involve elements that are "result-orientated" rather than hortatory, such as "good faith" or "reasonableness". These are of course not verifiable empirically (Stone 1981: 228-229). There are also the "received ideals" of legal personnel. These may be desirable or undesirable, but they exist to affect decision making even in the face of principles (Stone 1981: 230). Atiyah's conclusion in *Rise and Fall* is that the very idea of principle in contract is crumbling, to be replaced by *ad hoc* decisions. Yet Stone (1981: 238) perceives this process as a move from principles to different principles, as *values* embodied in the old "rules" are challenged by different sectors in society.

So it could be that, in contract law, pressure from consumers is precipitating a rejection of legal principles created to facilitate the rise of capitalism in favour of principles reflecting the collective nature of the modern state. Certainly Grant Gilmore (1974: 102) saw the change Atiyah observes in terms other than the death of contract *per se*. He saw the rejection of the old contract model and subsequent instability in legal decision making as analogous to cyclical movements in the arts: of organised classicism which atrophies, followed by apparently chaotic romanticism that eventually becomes formalised as the new classicism. Gilmore saw the future of contract as being its reabsorption into tort. Atiyah (1978: 221) has written favourably of such an integration. In his view current analysis of tort ignores the factors of consent, intention and voluntary conduct that underlie both compartments of our law and civil obligations. The unifying sources of liability in both contract and tort are seen by Atiyah (1978) as being the elements of reciprocal benefit and reasonable reliance.

Atiyah's new contract theory is to be expounded in the second volume of his work. It is to rest on three main ideas. These are, first, the idea of recompense for

benefits, secondly, the idea of protecting reasonable reliance, and thirdly, the voluntary creation and extinction of rights and liabilities.

It may be, as has been alleged by Fried (1980: 1862-1863) that Atiyah has gone too far in denigrating the role of the promissory as against reliance-based aspects of civil liability. However, one should await Professor Ayitah's second volume before his new plan can be evaluated. If that volume is as provocative and informative as *Rise and Fall* it will be bound to have a major impact in the debate about the nature of contract law and the path to reform. For although Atiyah has demonstrated convincingly the failure of the classical model, the task now is to learn from that failure and to start conceptualizing a more realistic law of contract.

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