GERGELY DELI

DOGMATIC, HISTORICAL AND COMPARATIVE ANALYSIS OF GENERAL CLAUSES WITH SPECIAL EMPHASIS ON THE GOOD MORALS CLAUSE

Ph.D Thesis Summary

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I. Research objectives

My thesis analyses the general clauses from dogmatic, historical and comparative aspects. A special emphasis is laid on the good morals clause. The underlying question behind this subject is of comparative-dogmatic nature: how should we compare similar legal institution from different legal orders having different cultural and social background? In such a case a pure legal analysis would be insufficient.

This basic question rapidly leads us to the phenomenon of general clauses. Their function is to implement non-legal and/or extra legal norms into the closed edifice of law. There are too many general clauses and there is already a vast literature which would render an all-in approach of a single scholar impossible. Accordingly, the research should have been restricted in several aspects. Thus, a choice was made for the good morals clause. Except a recent monograph,[25] it is barely discussed in the Hungarian legal literature. In addition, this norm has clearly a normative character despite of its *expressis verbis* allusion to a non-legal sphere, the morality.

We had to face some dangers and difficulties making our endeavours even more exciting. First, it was necessary to distinguish our subject from the already existing similar attempts. This aim was achieved by introducing a newly created methodology. Hopefully, in this way we have avoided being a boring epigon. Second, we should not have surpassed the reasonable limits of philosophical theorizing. We did not want to participate directly in the endless scientific discussion on the relationship between law and morality. The dissertation does not concern too much for a further and fruitless redefinition of law and morality. [26] This job is already done by others. [27] Our aim was to reassess the term 'good moral' in its practical, forensic context.

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[25] Menyhárd Attila. A jóerkölcsbe ütköző szerződések [Contracts Against Good Morals]. Budapest: Gondolat 2004.

[26] Similarily, Graf touches only *per tangentem* the definition of morality and understands it as a subjective moral of a given social class. See Graf, Georg. Das bürgerliche Recht und die Moral der Bürger. Überlegungen zum Verhältnis von Moral und Zivilrecht [Some Thoughts on the Relation Between Morality and Private Law]. In: Beck-Mannagetta, Margarethe, Böhm, Helmut and Graf, Georg: Der Gerechtigkeitsanspruch des Rechts, Festschrift für Theo Mayer-Maly zum 65. Geburtstag. Berlin/Heidelberg/London/Paris/Tokyo: Springer 1996, p. 164.

[27] Horváth Barna. Az erkölcsi norma természete [The Nature of Moral Norm]. Máriabesnyő/Gödöllő: Attraktor 2005.

II. Methods, sources and structure of research

After considering the possible methods, the thesis focuses on the explicit references of 'good morals' clause in the private law sources. Due modern technical devices and databases this method meant a speedy and relatively overall inquiry. Naturally, only the formal appearances could be detected in this way. However, it did not affect our results negatively, because our primary concern is the nature of general clause, and norms become general clauses only if they explicitly contain the term 'good morals'. Even this vacuous, to be filled out term renders them general clauses. This way of developing our arguments ensures that it does not become a *l'art pour l'art* scrutiny. The thesis rather builds on positive legal rules in order of getting an inductive method for concretization of the term 'good morals'. All this is a guarantee for the practical usability of our work.

The spatial and temporal limits of the research should have been carefully determined: do we need focus on one concrete legal order in a given period of time or striving for a wider spectrum would be more adequate? The diachronic approach seemed to be inevitable, the comparative attitude was due to our initial problematic. Thus, the thesis took the risk of being modest and superficial in some point for the sake of the whole picture, i. e. the *grosso modo* demonstration of development of one of the most interesting idea of human intelligence.

This panorama has been realized on ground of sever compromises and fills out the hiatus of the already existing literature as follows. First, we needed a more or less exact definition of the term 'general clause' especially as there was no clear and unambiguous *communio doctorum* in this regard. We followed up the development of the term in diverse countries to have a descriptive basis for our further, more abstract analysis. In the second step we scrutinized the *genus—species* and part—whole relationships contained in the term from a logical, dogmatic and systematic point of view.

Then we continued our research in a more earth-bound way. The scientific results gathered abstractly in 'general part' were proved on the concrete general clause of good morals in the 'special part'. We had to determine when this norm was given its general character. Due our presumptions we looked at the antique Roman law sources for producing evidence. Both 'general clause' and *'boni mores'* are of Roman origin, so it was quite plausible that this important step was taken at that time.

We also thought that the content of the clause diverges as social circumstances change. Thus, we need to have an excurse in the medieval legal literature, where we find an absolute, Christian order of values behind the *boni mores*. We limited our research to the early *ius*

commune and let aside canonical and later pandectistic jurisprudence. This two were already abundantly evaluated.[28] We only touched the latter *per tangentem* when discussing the historical interpretations of the national *codices*.

Our thesis culminated in the comparative part containing a detailed in depth analysis of the French, German and Hungarian regulations concerning 'good morals'. Roman law was not considered because, *stricto sensu*, only valid legal orders could be compared.[29] The other three were chosen on ground of their diverse social characteristic. We developed our argument here as before: we concentrated on the presence of the term 'good morals" in the legal sources and the empirical data were tried to be put in a larger theoretical concept. The object of the comparison was not only how to concretize the term but also its systematic and dogmatic function in the given legal order. For a better result we developed a new method of comparison combining Sacco's *formante*-theory with Savigny's classical canon.[30] According to the genial Italian jurist, the *a priori* presumption that positive norm, the juridical decisions and the living law, the 'law in action' are only different forms of the same and identical law is false. We can only have a more realistic picture if we take into consideration all of this figures separately.[31] As turned out, the triad of legislation, judicature and jurisprudence is to be easily harmonized with the classical canon, namely the grammatical, logical, historical and systematic aspects of interpretations. Undoubtedly, the positive, written norm created by legislation constitutes the starting point for all the others, because both judicature and jurisprudence have to reflect it. Accordingly, our comparative analysis starts with a concise description of the positive norms in question. This part entails a briefing of systematic, grammatical and historic facts. In addition, legal consequences are also comparatively demonstrated. Then we enter the field of jurisprudence as the second *formante*. Within jurisprudence we started with legal philosophical considerations. In this way we tried to disclose the non-verbal but still sensible effects, the so-called *criptotipi.*[32] It is followed by a demonstration of dogmatic peculiarities special to a given national legal order and then we distinguished 'good morals' from similar legal phenomenon. The third *formante*, the

[28] Schmidt, Helmut. Die Lehre von der Sittenwidrigkeit der Rechtsgeschäfte in historischer Sicht [The Doctrine of Immoral Transactions in a Historical View]. Berlin: Schweitzer 1973.
[29] Constantinesco, Léontin-Jean. Rechtsvergleichung. Die rechtsvergleichende Methode [Comparative Law. The Comparative Methodology]. 2. vol. Köln/Berlin/Bonn/München: Carl Heymanns 1972, pp. 302-303.
[30] See Savigny, Friedrich Carl von. System des heutigen römischen Rechts [System of Today's Roman Law]. 1. vol. Berlin: Veit 1840, pp. 206-. For further references see Fikentscher, Wolfgang. Methoden des Rechts in vergleichender Darstellung [The Methods of Law Seen Comparatively]. 3rd vol. Tübingen: Mohr Siebeck 1976, p. 67.
[31] Sacco, Rodolfo. Einführung in die Rechtsvergleichung [Introduction to Comparative Law]. Baden-Baden: Nomos 2001, pp. 59-78.
[32] Sacco: pp. 74-77.

judicature is the most important one. This statement is already confirmed by MARKESINIS[33] and in accordance with him we think the final aim of law is to be found in judicial decisions. The forensic activity can be enriched by the achievements of jurisprudence but it still remains the sovereign of 'real' law. The case groups of good morals were born thanks to a groping from-case-to-case approach of national courts. This approach was dissected in its dynamic, temporal development paying special attention to decisions breaking up with older line of judgments.

At least we shortly considered the role of general clauses and that of good moral in the EU.

[33] Markesinis, Basil. Rechtsvergleichung in Theorie und Praxis. Ein Beitrag zur rechtswissenschaftlichen Methodenlehre [Comparative Law in Theory and Praxis. An Addendum to Methodology of Legal Science]. München: Sellier 2004, p. 153.

III. Scientific results and conclusion

There are more scientific *novum* in the thesis. First, we gave a new definition of general clauses. The emerging difficulties were solved by a synthesis of a linguistic and logico-dogmatic approximation. The first helped us to understand the development of the term from the antique Roman law sources through *ius commune* till the modern codifications. The second unveiled the hidden dogmatic content lying behind general clauses. This theoretic content is twofold, it suggests both the *genus–species* and the whole–part problematic. Due the abstractness of this inquiry we could restrict our arguments to Roman law. As a result we stated that general clauses have a double dependency. Their meaning and concretisation depend on positive legal norms as well on extra legal, social value judgments. As the definition goes:

General clauses are such general legal propositions which constitute an extensive but also isolated and autonomous structural part *(clausula)* within a given, same specied collective of norms. Their subject-matter is quite extensive and contrary to specific legal norms, they incorporate a relatively large number of states of affaires which are – as a result of some of their dominant characteristics – considered to be of the same genus *(generalis)*. From these aspects emerges an interpretational practice according to which the alteration of the specific legal norms impact upon the interpretation of general clauses and vice versa: through general clauses the alteration of a superior category may be conveyed to the more specific norms.[34]

After determining the term ‘general clauses’ we focused on a concrete clause forbidding transactions against good morals. We ascertained that this norm took its general character in the classical period most probably by Papinian and reached its zenith in the postclassical age, especially in the Sentences of Paulus.

The research of Roman law sources enriched our knowledge in more other aspects. For example, we established a new interpretation for the famous Papinian-fragment in D. 28, 7, 15. Our conclusion was that this citation contains a synthesis of illegality and impossibility. Impossibility here means not physical impossibility but used in the sense that a morally good man, a *bonus vir* can not do anything which is contrary to good morals. Thus, the interaction between illegality and impossibility is more complex than thought before. We can find textual evidences in the *Digest* where an action is lawful but dishonest. On the other hand, sometimes

[34] The term ’general clause’ was used in a wider sense by Pólay. See Pólay, Elemér. Historische Interpretationen der Generalklauseln im römischen Recht. [Historical Interpretation of General Clauses in Roman Law] Klio 67 (1985) p. 528.

the two, illegality and impossibility went hand in hand as positive law (e. g. the praetorian edicts) had forbidden immoral behaviour. The phrase *'non posse'* often means illegality in the sources.[35] As in our fragment, where positive legal norms *(quod senatus aut princeps improbant)* were explicitly referred. Consequently, it is not about legally not forbidden *(licet)* but dishonest acts, as KASER suggested,[36] rather about a double social defence, in which legal and moral considerations were strengthening each other. The unlawful act would cause not only the breach of positive legal norms but may equally harm our honesty, sense of duty and decency.

Second, we pointed out that the term '*boni mores'* developed in a strong interaction with *iniuria*. This fact led our attention to new aspects of immorality and illegality which were not scientifically analysed yet. In some regards we might have confirmed and occasionally refined PÓLAY's path-breaking results concerning the development of *iniuria*.[37] We followed up the parallelisms between *boni mores* and *iniuria* till the late preclassical period. Our research disclosed that their relation was not one-sided as thought before.[38] *Actio iniuriarum* was not only a tool for the protection of social order through *boni mores*, but, *vice versa*, sometimes[39] the clause helped to prevent certain acts of *iniuria*.

Finally, our considerations were not without use from a legal philosophical point of view regarding the relation between law and morality. On ground of our sources we depicted the historical development how the *ius* has been enlarged by praetorian activity at the expense of *mos* that is moral precepts, formerly terrain of the head of Roman family *(pater familias)* and the censor.

In the next part we analysed the role of *boni mores* in the early legal literature of *ius commune*. According to our knowledge there was no similar attempt made before. The primarily sources were the works of the glossators and commentators. Methodical curiosity that the results of this empirical study were placed in a broader theoretical framework: the neotomist model was adapted for concrete analyse of a given fragment containing regulations on adulterous relations. In the long run we stated that the contemporary jurists understood *boni mores* as a representative sign of an absolute, Christian order of values.

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[35] Pomp. D. 1, 2, 2, 16: *lege lata factum est, ut ab eis provocatio esset neve possent in caput civis Romani animadvertere iniussu populi.* Or Pap. D. 1, 21, 1, 1: *verius est enim more maiorum iurisdictionem quidem transferri, sed merum imperium quod lege datur non posse transire.*

[36] Kaser, Max. Das römische Privatrecht. Das altrömische, das vorklassische und das klassische Recht. [The Roman Private Law. The Preclassical and Classical Law] 2nd. ed. München: Beck 1971, p. 197.

[37] See Pólay Elemér. Iniuria Types in Roman Law. Budapest: Akadémiai 1986, pp. 201-205.

[38] Pólay: pp. 202 and 205.

[39] Gai. 3, 157

In the largest part of our thesis we realized a comparative study analyzing nine different aspects or *formanti* as called by RODOLFO SACCO. This strict methodology ensured the depth and thoroughness of our research and designed its larger social contrasts. This step was of utmost importance regarding the double system dependency of the general clauses. Beside minor similarities and differences we found out that the differences emerging from 'good morals' are caused by social and cultural specialities rather than legal curiosities. The Germans are trying to concretise good morals on its own subtle dogmatic way, the French are more willingly asking for help from legal philosophy. However, despite of their different approach their solutions are becoming more and more similar. The Hungarians can be characterized as way-seeking German satellite. The German solutions of *Fallgruppen* were introduced in the national jurisprudence by MENYHÁRD's monograph. According to one of his reviewer he succeeded to avoid the Scylla of blending law and moral together and the Charybdis of morally nihilist positivism.[40] He did not deal with the question what causes lie behind the changes of good morals and what we should do if equally strong precepts are conflicting in it. These are substantial questions and we tried to answer them on the basis of a historical and theoretical enquiry. Doing so, we half-consciously constructed a hermeneutical circle highly similar to ROBERT ALEXY's rational discourse theory.

In the next chapter we focused on the European regulations, proposals and drafts. The whole edifice of European private law can be considered as a monstrous general clause. It is fragmentary in character and substance and driven by the final aim of a common financial market. More practically, we cleared questions of competence between the national and the EC court, and lined out the possible trends of future development of European general clauses. We stated that the largest problem means the lack of a standard European order of values. It lies hidden behind positive legal norms but it alone can guarantee their efficacy.

To sum up, a historical cyclicity could be traced from the development of good morals.[41] This periodicity is closed to that which was stated by MÁDL on delictual responsibility, with the difference that the changes of the former seemed occur more rapidly than that of responsibility. In Roman law *boni mores* originally meant the values of a distinct social caste, the moral of patricians, i. e. it was subjectively objective (objective as marked the

[40] As stated by Földi András. Gondolatok a jóerkölcsbe ütköző szerződésekről Menyhárd Attila monográfiája kapcsán. [Thoughts on Contracts Against Good Morals Regarding Menyhárd Attila's Monograph] Acta Fac. Pol.-iur. Univ. Budapest 42 (2005), p. 220.

[41] Mádl Ferenc. A deliktuális felelősség a társadalom és a jog fejlődésének történetében, Budapest: Akadémiai 1964. On this cyclicity see Peschka Vilmos. A kártérítési felelősség morális és etikai kiüresedése. [The Moral and Legal Emptyness of Responsibility] In: Bán Chrysta (and others). Ius privatum — Ius commune europae. Liber Amicorum. Studia Ferenc Mádl Dedicata. Budapest: ELTE 2001, p. 219.

behaviour of a fictive entity, and subjective because this class made up only a part of the total Roman population) and relative. [42] Latter it became a general term, its subjectivity slowly diminished and its content expanded. In the Middle Ages the Christian faith secured its concrete contents, namely *boni mores* were objective and absolute. In the modern France and Germany, they turned back to the origins and the term was to reassure the social position of a privileged class (see for instance the so-called *Anstand*-formula). The dimensions of the absolute felt gradually off. In today's Europe the wish of an objective moral seems illusive the struggle for one an absolute order is in turn highly anachronistic. This dilemma can only be solved by balancing interests in a rational discourse.[43] This discourse should be a general dispute in which each member of the society can take part, where everybody can express his need, every statement can be questioned and where is a need of justification for the speaker. These conditions are theoretically given in a democratic state.[44]

We have seen that there is no final answer for the problematic of concretization of 'good morals'. This term can not be substantially determined. It is thinkable, as historical evidence pointed out that its meaning will take a different turn in the future, and its long forgotten objective or absolute aspects will reach primacy once again. Our answer can only be procedural in nature.[45]

Our second lesson, that we should try harmonize inductive and deductive approaches. Inductively, the case-groups are the Ariadne's line, but they are of no help when it comes to the question whether we should depart from the old moral standpoint. For this a deductive approach is inevitable. To our knowledge both flexibility and legal security are to be achieved by the help of practical argumentation theory. This theory may be a fair tool for a judge deciding a concrete case in the light of the eternal and insolvable question of generalization.[46]

The most important function of general clauses has always been to allow the spirit of time permeate the otherwise closed *terrenum* of law, more precisely law of contract. We do it right today if we seen general clauses as an open gate for the newest achievements of social

[42] This kind of morality is called by Hart positive morality. My objective and absolute category is the same like his critical morality. See Hart, Herbert Lionel Adolphus. Law, Liberty, and Morality. Stanford UP 1963, pp. 17-.
[43] Rationalism and free discurse together can help us to avoid the danger Kant draw attention to: *„Wenn man annimt, dass reine Vernunft einen praktisch, d. i. zur Willensbestimmung hinreichenden Grund in sich enthalten könne, so giebt es praktische Gesetze; wo aber nicht, so werden alle praktische Grundsätze blosse Maximen sein."* See KANT. KpV 5, 19.
[44] Confirmed by Graf: pp. 165-167.
[45] For the same conclusion in other way see Cserne, Péter. Freedom of Choice and Paternalism in Contract Law: Prospects and Limits of an Economic Approach. Diss. University of Hamburg. 2008, p. 161.
[46] Doubts on judicial freedom are soothed by Enderlein, Wolfgang. Abwägung in Recht und Moral. [Balancing in Law and Morality] München/Freiburg: Karl Alber 1992, pp. 351-353.

sciences, that of legal philosophy, especially rational discourse theory and flexible system.[47] Right comprehension so becomes good judicial decision.[48]

[47] From the older Hungarian literature see Somló Bódog. Értékfilozófiai írások. [Essays on Philosophy of Values] Kolozsvár/Szeged: Pro Philosophia, 1999, pp. 165-169, and newly Enderlein: pp. 281-368.
[48] These expressions, *richtiges Verstehen* (right understanding) and *richtiges Handeln* (right action) are from Canaris. see Canaris, Claus-Wilhelm. Systemdenken und Systembegriff in der Jurisprudenz. Entwickelt am Beispiel des deutschen Privatrecht. [System Thinking and the Term of System in Jurisprudence. Developed on the Example of German Private Law.] 2nd ed. Berlin: Duncker & Humblot 1983, p. 147.

IV. List of publications related to the topic of the dissertation

1. Érték és valóság határán — A jóerkölcs további története. [On the Frontier of Value and Reality. The Further History of Good Morals] Jog—Állam—Politika, 2009 (under publication)
2. Metus Reverentialis: Come-back of an Old Concept? In: RADOVAN, DÁVID—NECKÁŘ, JAN—SEHNÁLEK, DAVID (ed.): COFOLA 2009: the Conference Proceedings, Brno: Masaryk University 2009, 131—136.
3. Érték és valóság határán — A jóerkölcs kezdetei. [On the Frontier of Value and Reality. The Beginnings of Good Morals] Jog—Állam—Politika 2 (2009), 55—79.
4. The Underlying Philosophical and Legal Theoretical Problems of General Clauses. RIDROM [on line] 2009, ISSN 1989-1970, pp. 46-89. Download: http://www.ridrom.com.
5. Continuity and Discontinuity in Concept of Legal Responsibility. In: RADOVAN, DÁVID/NECKÁŘ, JAN/ORGONÍK, MARTIN/SEHNÁLEK, DAVID/TAUCHEN, JAROMÍR/VALDHANS, JIŘÍ: Europeanization of the National Law, the Lisbon Treaty and Some Other Legal Issues. Brno: Tribun EU 2008, pp. 998-1008.
6. A generális klauzulák mögöttes filozófiai és jogelméleti problémái. [The Underlying Philosophical and Legal Theoretical Problems of General Clauses] Jogtörténelmi Tanulmányok IX., 2008, pp. 107-136.
7. Észrevételek a jogi felelősség fogalmáról. A censori regimen morum mint a felelősségrevonás intézménye. [Remarks on the Term of Legal Responsibility. The Censorial Regimen Morum as an Institute of Impeachment] Iustum, aequum, salutare (2007) pp. 159-177.
8. Adalékok a generális klauzula kifejezés történetéhez. [Datas to the History of the Term 'General Clauses'] Fiatal Oktatók Tanulmányai 4., 2006, pp. 68-90.