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Analysis of Moral Values by Case-Law

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Whether values embedded in social and legal institutions originated in religious or secular beliefs, development of their implications is a continuing process. Indeed, social and legal institutions are constantly changing in response to new conditions. Professor Coing, former Director of the Max Planck Institute for European Legal History, Frankfurt/Main, West Germany, suggests that in this critical evolution, the judge may function as the moral conscience of a given community. Thus, because all the facts about human relationships that the evolving moral standard will regulate are before the judge, he may teach the moral philosopher.

ANALYSIS OF MORAL VALUES BY CASE-LAW*

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Different aspects of judicial thinking have retained the interest of philosophers in the last few years. I would mostly like to recognize the works of my colleague, Mr. Prelman, without forgetting those works of Stephan Toulmin (The Use of Argument), or Patzig (Ethik ohne Metaphysik).

These writers were mainly concerned with the manner in which judges justify decisions. In particular, they studied how judges use rational arguments to justify value judgments. Although I share their interest in this aspect of judicial practice, I would like to discuss another consideration.

This contribution seeks to demonstrate that judges are often drawn to interpret immediately moral values, to explore their meaning in precise social situations, and to determine their field of application in social life. The observation of this spiritual activity, it seems to me, can illuminate the structure of moral values, and the way man's conscience evolves in changing circumstances as man sees himself in the activities of social life.

I will develop my observations in three parts. First, I will demonstrate, on a general level, how a judge can be called to interpret values themselves instead of relying on rules that legislators set (I).

Second, I will give examples, drawn from ancient Roman Law (II),

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from British Common Law (III) and from modern German Law (IV). These different examples will demonstrate the universality of the phenomenon. Finally, I will try to develop a few conclusions (V).

I

Rules for human behavior shape systems of substantive law. The holders of power define, or at least sanction, these rules. Usually, ethics and moral values, not practical concerns, determine the content of these rules. Thus in a modern code, rules about specific performance of contracts turn on the value of good faith, the moral idea that one must keep his word. Of course, the practical goals of the social and economic functions related to a specific type of contract also play a role.

Despite this relation between judicial rules and moral values, the judge called to interpret the law is likely to refer to the substantive rules he finds in the law. Obviously, a good jurist will not forget that substantive rules work for a moral value and have a social function. Nevertheless, the same substantive rules, formulated by statutory law or by precedents, are basic to his activity, and are the subject of his thought and analysis. His primary task is to apply these rules to concrete cases, and to make them valuable in social life. The analysis of values, fundamental to substantive rules, is not his concern. The legislature has done that for him; by creating rules, the legislator has kept the jurist from analyzing values.

However, in an advanced society, despite the normal procedure described above, exceptions and anomalies occur. Very often, even in evolved civilizations, legislators have decided not to set specific rules in certain cases. On the contrary they refer directly to a moral value. An example appears in the well-known rule in which a debtor is called to execute his obligation in good faith or — to use the German Code formula— "nach Treu und Glauben". In this case, the judge does not confront a set of defined rules; instead, he encounters a reference to a moral concept. He must articulate more specific rules himself. The legislator, in these instances, trusts the moral conscience of judges.

In such cases, the judge must analyze the questioned values. He must try to develop the attitude, the social behavior inherent in the values quoted or according to the dialectical nature of the values, the behavior that contradicts them in specific real situations. In deciding specific cases, he must draw from his knowledge new values and consequences according to the nature of the different social situations that he encounters. The following developments illustrate this activity.

II EXAMPLES FROM ANCIENT ROMAN LAW

I turn first to Roman law. The Practor Edict refers to values. This edict was drafted during the Republic and developed in the third century B.C.. It was never "the Law" in the proper meaning of the term. The Roman Praestor had the power to grant legal action on demand. The edict set the necessary conditions for this grant and explained the process of jury trials, if a jury was allowed.

A. "Ex Bona Fide" (Good Faith)

In these texts, we find among others, the formula that in some contracts (i.e. sales), parties are bound to do necessary actions "ex bona fide" (in good faith).

This formula has a double significance. In a first phase, it only stipulated that the bill of sale had created a legal obligation. The ancient Roman law recognized only formal contracts; informal promises merely implied a moral obligation. Later, the praestor himself recognized judicial effects, but he withheld the formula expressing good faith as the foundation of the obligation. Once reference to "fides" was recognized, the judicial effect of informal conventions took another meaning. At this point good faith started to determine the measure, the "standard" by which the parties' behavior in the execution of the contract was judged. It completely determined what their obligations were. Roman jurists developed many detailed observations in this context. If someone becomes obliged to administrate the affairs of another person he is forced to act with diligence, and moreover, not to care less about another's affairs than he would his own (Gaius Institutiones I. 100; D 47.2.54.3). If someone leases a building and mentions that the lessee will pay the full rent before the lessor surrenders the property, the lessor must treat the lessee diligently (D 18.1.68 pr.). When a tutor undertakes the administration of his ward's estate; he violates the fides and acts deceitfully (dolus malus) if he does not draw up the inventory of his ward's estate (D 26.7.7 pr.).

B. "Dolus Malus" (Deceit)

For the Romans, the opposite of good faith is deceit, "dolus malus". Admittedly, in a narrow sense the word only designates fraud. But in a wider context, it applies to all actions, to all social behavior that contradicts good faith, or that good faith would condemn.

During Cicero's lifetime, however, the Roman Praestor created an ac-

tion by which one could ask for damages for losses resulting from another's bad faith, that is due to the behavior of one whose general social relations had violated good faith's demands. Again we have a text referring directly to a moral value, and again jurists derived many detailed rules.

One example:

Someone sells a piece of land with trees by stipulation. Before he transfers the property, the seller has the trees cut. The trees were not mentioned in the contract. Formerly, no remedy existed, the interpretation of formal contracts being very strict in the ancient Roman law. But the buyer enjoys an action in doli mali because the seller acts in bad faith (D 4.3.3.34).

Another example:

The owner of a tenement allows another to exploit a sandpit. He grants permission in a form that does not bind him legally. The grantee makes expenditures to benefit from the permission. The owner, availing himself of his formal right, denies the entrepreneur the right to transport the sand. The owner must pay for the latter's expenditures because he acts in bad faith (D 4.3.3.34). Thus it is possible to struggle against the abusive use of strict rules and the formalism of the ancient law, in the name of good faith (*Cf.*, General formula in D 44.4.1).

In the same spirit, the *preteur* allows one to defend against an action of good faith where although the plaintiff has violated good faith in a strictly judicial point of view, the action appears justifiable. (So-called Exceptio doli mali praesentis). For example, someone has lent capital. The term of the loan has expired and repayment is due. The obligator does not return the capital, but he pays for the stipulated interests for the next year. The creditor accepts the interest, but soon after he asks for the capital, before the year for which he accepted the interests has expired. Legally, his action would be well-founded, but his case is dismissable because he has acted in bad faith.

These examples show how Roman law developed the idea of good faith, (which at the beginning meant keeping one's word) a series of rules for honest behavior in social relations, beyond contractual bounds.

III EXAMPLES FROM ENGLISH COMMON LAW — EQUITY

A. Historical Remarks

English law was formed outside the influence of Roman law. Its foundation is the feudal law of the middle ages after the Norman Conquest, 1066, in the form of medieval legislation (the "statutes"), and decisions by the royal courts in Westminster (Court of the Common Pleas, King's Bench and Exchequer). This root of the ancient Common Law referred mostly to the property laws. In the fourteenth century it started to gain a certain rigidity.

Although the courts of justice were organized very early, and in a very efficient manner in Great Britain, the idea that the king was the real source of law and justice remained alive in the country. For this reason at the end of the fourteenth century people who could not hope to protect their interests through the existing courts (either for legal reasons, or because of factors such as an adversary's power) began to call on the king's judgement, namely on his Chancellor. More and more, the Chancellor received petitions to redress the manifest injustices arising either from insufficiency of traditional rules of the Common Law, or from social situations. Thus a new court of justice was born: the "Chancery".

In the case-law of this court, a new system of rules developed under the name of "Equity", which supplemented the Common Law as the other courts applied it. These rules are not a question of equity in general, but of certain precedents and maxims that the judges of the Chancery had formulated, mostly in the sixteenth and seventeenth century, and that were maintained in the modern English and American laws.

The central ideas of British Equity are the concepts of "good conscience", "reason" and equity. "The King willed and commanded," said an introduction of the Year Books of 1442, "that all manner of matters to be examined and discussed in the Court of Chancery should be directed and determined according to equity and conscience". "Equity" asks that the parties behave socially in a manner that is in harmony with a "good conscience", determined by considerations of what is equitable and reasonable. The decisive question is always if the party could act as he did, "in good conscience". It is obvious that we are again confronted with a reference to moral values.

B. References to Specific Maxims

Let's have a look at one of these maxims.

First, we must look briefly into the principle of "Equity acts in personam." Common Law only sanctioned contracts that gave the injured party the right to ask for damages. It didn't recognize the possibility of forcing someone to perform an act such as transferring property. In Equity, however, one cannot violate the contract and then merely pay damages; one must keep one's word. That is to say, one must execute the contract as promised. This is why in "equity" the judge can condemn a defendant to perform the terms of the contract ("specific performance"), and such a judgement is sanctioned by measures taken against the defendant.

I quote other maxims:

"He who seeks equity must do equity."

This can be illustrated by the following case. A makes a donation to B. The donation is performed by a deed. In the legal instrument, A includes a clause in which B is asked to make a gift to C. B cannot ask for the execution of the donation to him if he does not want to make the donation to C.[1]

"He who comes into equity must come with clean hands."

An individual contracts to rent a house. He cannot ask the other party to perform the contract if he has himself violated one of the specifications of the contract.[2]

"Equity looks on that as done which ought to be done."

A client entrusts a notary with a certain sum. The notary deposits the sum in his own bank account; in this bank account are other amounts belonging personally to the notary. Later, the notary withdraws a certain sum from the account. There remains an equivalent amount, or a slightly greater amount than the sum entrusted to him. To whom does the remaining money belong? Equity begins with the assumption that the notary has acted as he should have, that is, that the notary did not want to touch the money entrusted. Hence, the money belongs to the client. Thus from maxims, the British judges develop "leit bilder," models for behavior in certain social situations.

Moreover, equity has also developed such models out of maxims. For instance one equity principle states that no individual should abuse others by assuming a position contrary to previous behavior when the

1. SNELL, PRINCIPLES OF EQUITY at 35 (n.d.).
2. *Id.* at 36 (*referring to* Coatsworth v. Johnson, 54 L.T. 520 (1886)).

other referred to and trusted such behavior. Such a "venire contra factum propium" can bring among other things, the loss of rights that have not been used.

Finally, I call attention to the fact that it is the case-law of the Chancery that gave judicial protection to the famous British "Trust". Under the ancient common law, the person in whose favor a trust had been set, did not enjoy legal protection. The duties of the person administering the assets of the trust, a trustee, were considered purely *moral*. The Chancery derived legal obligations from these moral duties, granting an action against the trustee. As with the aforementioned contracts in Roman Law, the relation between the trustee and the beneficiary, was changed into a judicial relation; once again it was a moral value (good conscience) that was basic to this development.

IV Examples From Modern German Law

A. The Bona Fide Principle in German Law

The German Code of Civil Law Article 242, (the provision regulating contracts) provides: "the debtor (of an obligation) is held to perform in a manner that corresponds to the exigencies of good faith and to usage of trade." From that text it is clear that the legislature intended to maintain the old principle of the Roman law that the debtor must execute his obligations, especially those resulting from a contract, in good faith. Other legislation, for instance the French Civil Code, include similar concepts.

But the case-law of German courts gave it another interpretation. They found a superior and general principle, that applied to the entire spectrum of private law. As early as 1914 the German Supreme Court (the Reichsgercht) had declared: "The System of the Civil Code is permeated by the bona fide principle (Treu und Glauben) ... and the principle that all fraudulent behavior must be repressed." (RGZ 85.11). From a rule of the contract law a general rule governing human behavior in social life was derived. To a certain extent, modern German law repeated what had happened in the Roman law. The fides, first recognized in the matter of contracts, were spread to the private law, defending individuals and suppressing all fraudulent acts or any other act contradicting bona fides.

B. Application of the German Principle

The following cases illustrate the importance of this extensive interpretation.

The two first decisions were rendered in the context of the great German inflation that the Germans suffered during the six years after World War I. Before that war, an American dollar was worth 4.2 marks. In 1923 its value rose to 4.2 billion marks. It is easy to imagine the effects of such a monetary turmoil on the economic and social life of the country.

Tremendous injustice resulted mainly from the nominalist principle, sanctioned by the substantive law principle that a sum of money owed can always be returned by payment of the same nominal amount. Imagine that someone agreed to pay 200.000 marks in 1910 (in solid gold money) and that this loan was guaranteed by mortgage. In 1923 at the peak of the inflation, the obligator repaid his creditor for the face value, 200.000 marks, and asked that this be entered as satisfaction of mortgage in the land register. The creditor then lost his mortgage for a few pennies.

Often, creditors refused to accept such a refund, but they were wrong according to the texts of law. Then the Reichsgericht resorted to changing the principle. It declared that considering the present situation, in which an application of the nominalist principle would be manifestly contrary to the principle of good faith, the technical principle of nominalism should surrender to the maxim of superior rank—good faith. A debtor availing himself of the first principle was contradicting good faith. (RGZ 107.88). In so doing, the court repressed the abuse of monetary principles in an abnormal situation, a "dolus" in the Roman sense of the word.

With this decision an evolution commenced, referred to in German as the "Aufwertung", or reevaluation of ancient obligations. It was enforced partly by laws, partly by courts. In these last concrete cases a problem soon emerged. When might the creditor call on reevaluation due to delays? Again, the case-law turned to the idea of good faith.

Case-law declared that a creditor who had not attempted to have his claim reevaluated for a long period (thus leading the debtor to believe that no reevaluation would be demanded) could not exercise his right to reevaluation. By calling for reevaluation despite the intervening situation, he would be acting inconsistently with his former behavior, and would be violating good faith. (RGZ 132.225).

A more general example:

An individual leases a bakery. The written contract includes two special provisions. First, the farmer will be entitled to buy the house containing the bakery under certain conditions. Second, after the lease ends, the farmer must not open his own bakery in the same street.

The lease ends after several years. The farmer immediately begins a new bakery on the same street, claiming that the contract was void. He argues that because of the purchase of the house, the deed should have been notarized. The new baker's argument may have been totally valid according to the texts of the Code. Once again the courts declared that the defendant could not avail himself of legal texts. He was obviously contradicting good faith, because he had first enjoyed all the advantages of the contract, only to deny it for faulty drafting when the contract operated against him (RGZ 153.58).

These are a few examples of modern judicial life, in times of crisis and in normal times.

V CONCLUSIONS

After considering examples from very different systems, let us draw a few conclusions.

A. The analysis of these decisions shows that moral values, when they refer to social life or to interpersonal relations, manifest themselves in human conscience through actions, attitudes, or well-defined behavior in particular situations. Moreover, we can observe that a basic idea exists for each individual value, that is a defined action basic to all ulterior forms. For instance, if we take the value of the fides from the Roman Law, it is merely the representation of a man who keeps his given word and nothing else.

B. This basic idea, however, broadens in the evolution of the moral conscience, in two directions:

1. The moral sensibility becomes more accurate. We remark that keeping one's word means more than to literally execute what has been stipulated. The concern is to reach the meaning of enactment, the aim of the parties to the case, so that a party's confidence will not be deceived. In light of these newly acquired notions, the idea of the action required by the value (here the fides) starts to change. The action urged by the situation (here the privity in deed) takes new features, changes its characters, surpasses the preexisting notion.
2. On the other hand, one becomes conscious of the fact that a value,

> originally based upon a certain defined social situation, also takes importance in a different situation. The "fides" — as we were able to see in the Roman law and in the German contemporary law — depart from the narrow frame of the contractual situation. We understand that this value has a meaning for each interpersonal judicial relationship. Thus, from the image of the man who executes his bona fide contract, grows the image of a man trusted in all social situations. This man behaves in all his social activity in a manner that corresponds to the expectation of respect and confidence. The fides start as a contractual value and become a general principle. What occurs is the transposition of the value "fides" to other social situations. It broadens in that direction.

These two evolutions display a common trait, as far as we can observe them in the development of law. They are founded on the fact that the judge is always facing specific cases. The new situation he confronts makes him reevaluate what is accurate. He must find new "Wertantworten", coping with the challenge of these new social situations. His moral sensibility and his capacity to define different situations grows because his moral conscience continually encounters new situations.

C. Besides this evolution of the positive image of the value, we can observe in the case-law the phenomenon of "counter values." To positive values correspond the image of contradictory actions. This opposition to the fides gives rise to the dol, the dolus malus, terms that designate a set of actions — well-defined — that the substantive value of the fides condemns. Here too appears the notion of, for instance, fraud. However, the number of condemned actions changes as well, as we noted in the evolution of the fraudulent action in the Roman law. Of course this phenomenon has been stated for a long time, for instance, in the observations made by H. Hartman. But again, we can see that the history of law gives us a wide field of experiences, a unique possibility for observation.

D. Moreover, it seems that our observations of judicial life are relevant to the discussion of whether value judgments can be rationally justified. In most cases (Roman law excepted to a certain degree) —the judge must justify his decisions. He is in the position described by Prelman, of a man asked to justify his actions before a "universal" audience. How does he proceed? Here the maxims of Equity represent, if not a determination of characters that interpret a particular moral behavior, conscientious (the British term), or alternatively, immoral, contradicting substantive values. "He who comes into equity must come with clean hands" proposes that one must be treated like others, and that one who

acts inconsistently with this maxim cannot act in good conscience. The same is true of the defense of the "venire contra factum proprium." It states that a behavior contradicting a former one creates suspicion about the conscience and equity. These maxims — we can find analogous phenomena outside the common law — offer the rational justification of value judgments that the judge has given in the decisions discussed herein. The maxims clearly indicate what made the judge approve or condemn an action by referring to the fides, or on the contrary, to the "dolus malus".

E. Finally, we can see the fact that the judicial phenomena herein described are a major source for the history of morality. We badly need such a history. We have writing about the history of precepts of philosophical or religious morality. We do not have a history of morality accepted and enacted in real societies, Roman, Medieval and so forth. This is true at least in the case of German literature. Some beautiful beginnings were made. I recall the excellent book by Snell, "Die Entstehung des Geistes," which discussed the evolution of the moral ideas in ancient Greece. But these attempts are limited exclusively to literary sources, poetry and philosophy. Nothing stands against the importance of such sources, but it is certain that the value analysis that judges perform can provide a wealth of supplementary material. It seems that a history of the moral ideas of man, of his knowledge of moral values, is now of great importance. We are in a world where social data and circumstances change constantly. If we wish to keep a moral orientation, we must know the original situation from which our traditional ideas emerged. This is why the analysis of values as well as the analysis of their history is among the duties incumbent upon the philosophers of our time.

I humbly hope that I contribute to this task.
