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Author(s)	Ishida, Kikuo
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ON ARTICLE 90 OF THE CIVIL CODE OF JAPAN

By Kikuo Ishida

Lecturer, Osaka University

I

In Article 90 of the Civil Code,[1] is regulated that

> A juristic act which has for its object such matters as are contrary to public order or good morals is null and void.

Before entering into the examination of this article let me compare it with a few of European prototypes.[2] Their interpretations must be referred, too.

In Roman law (*corpus juris civilis*), was given in principle the following regulation, though not applied to all juristic acts.[3]

> ... omnia, quae contra bonos mores vel in stipulatione deducuntur, nullius momenti sunt. (c. 4. Cod. 8. 3.)

According to the theory of continental common law (*gemeines Recht*),

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1) The Civil Code with capital letters denotes that of Japan unless otherwise stated.

2) Comparative and historical study must play an important part in the interpretation of the law especially in case of Japanese one.

3) It is chiefly because ***corpus juris civilis*** is the action system and was not yet formed into a systematic construction of the abstruct regulation as the presentday law.* Of this problem Boehmer says justly in his ***Grundlagen der Bürgerlichen Rechtsordnung*** (Tübingen, 1951); "Die römischen Juristen verschmähen es meist bewußt, die juristichen Figuren, mit dennen sie arbeiten, durch analystische Zerlegung in ihre Komponenten (Elemente, Bestandteile) diagnostisch zu definieren. Ebensowenig haben sie das Bedürfnis, ihre Fallösungen durch Reduktion auf generellere Formeln aus logischen Oberbegriffen abzuleiten (deduktive Methode) und mit gemeineren Erwägungen zu begründen, als der konkrete Fall es gerade verlangt...; es [Prinzip] abstraut scharf auszusprechen, im Grunde darzulegen, halten sie einerseits nicht für nötig, sind aber andererseits auch nicht fähig dazu.„ (SS. 60–61) Referring to the above, you will see that Aemilius Pomponius' following opinion on ***bonus mos*** is sufficiently convincing: "quae facta laedunt pietaem existimationem verecundiam nostram et, ut generaliter dilerim, contra bonos mores fiunt, nec facere nos posse credendum est." (l. 15. Dig. 28. 7.)

* It is not until Pandects-jurisprudence brought forth the systematic treatment of the law that the civil law took the present form as systematized with every provision. (Cf. Eugen Ehrlich, ***Grundlegung der Soziologie des Rechts***, München und Leipzig, 1913, SS. 257 ff.)

Nichtig sind die Willenserklärungen, die sich durch ihren Inhalt in Widerspruch setzen mit den Vorschriften des Sittengesetzes.

Nichtig sind im Zweifel Rechtsgeshäfte die durch ihrem Inhalt gegen ein gesetzliches Verbot verstoβen.

Nichtig sind Rechtsgeschäfte, die ein Rechstsverhastniss schaffen wollen, welches die Rechtsordnung nicht anerkennt.[4]

(The legall order (*Rechtsordnung*) here meant is no other than the order given by the common law, that is, the private law.) This principle, primarily adopted to the chapter on the juristic act in the general provision, became to be applied to every juristic act without exception. Prussian national law (A. L. R.)[5] and *code civil*[6] were on this principle.

The first draft of the German civil code, in Article 106, taking the example of the aforesaid French *code civil*, primarily regulated that juristic act whose content is against good morals (*gute Sitte*) or the public order (*öffentlich Ordnung*) was invalid.[7] The First Committee supported this plan considering the fact that the content of a juristic act can be contrary not only to the moral interest but also to the general interest of the commonwealth, but the breach of the latter is not always regarded in the same light as that of the former. In this way both the idea of public order and that of good morals were acknowledged in the first draft. Against this the Second Committee maintained that the idea of *öffentliche Ordnung* is to be excluded from the civil code, because the limit of its meaning is not definite. It was for this reason that the idea of public order was excluded from the present Article 138, which regulates only about good

4) Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, Bd. I, Berlin, 1900, SS. 358–60.

5) According to Heinrich Dernburg's opinion, "Daß der Staat unsittlichen und dem Gemeinwohl schädlichen Geschäften die Rechtshülfe weigert, ist eine unbedingte Anforderung an eine vernünftige Rechtsordnung. Was jedoch im Einzelnen als schädlich und unsittich gilt bestimmt sich versehe, den nach den jeweiligen wirtschaftlichen Bedürfnissen der Völker und Zeiten. Der Znstand des heutigen preussischen Rechtes weicht in dieser Hinsicht von dem landrechtlichen in vielen Beziehungen ab, wie dieser wiederum keineswegs mit den römischen Auffassung übereinstimmt." (*Lehrbuch des preussischen Privatrechts*, Bd. 1, 4 Aufl., 1884, S. 171.)

6) Art. 6: On ne peut déroger, par des conventiones particulières, aux loi qui interêssent l'ordre public et bonnes moeures.

Art. 1133: La cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes moeures ou à l'ordre public.

7) Cf. *J, V. Staudinger's Kommentar zum Bürgerlichen Gesetzbuch und dem Einführungsgesetze*, Bd. I, Allgemeiner Teil, erläutert von Dr. Theodor Lowenfeld u. Dr. Erwin Riezler. 7/8 Aufl., München u. Berlin 1912, SS. 530.

morals, as "Ein Rechtsgeschäft das gegen die gute Sitten verstoβt, ist nichtig." (§ 138, BGB.)

Setting aside the case of German civil code, let me pay attention to what is meant by *l'ordre public*[8] in *code civil*, because the object of the present thesis is partly to give a clue to this problem. As for the interpretation of Article 6, it is commonly accepted[9] that *l'ordre public* denotes the order necessary for the commonwealth, that is, a definite system indispensable for the administrative activity. Even the laws other than the private one are taken as connected with *l'ordre public*,—— such laws as the criminal law and its procedure and the public law by which are regulated the personal duty to the State, the authority of the public official, and the judical system. The *loi* in Article 1133, if *l'ordre public* in the same article is to be interpreted in the same light as that in Article 6, would be defined as the statute, which disapprove expressedly the validity of the juristic act from the standpoint of the private law.

II

Of the 'public order or good morals' provided in Article 90 of the Civil Code, it has been taken for granted that the one denotes the general benefit to the commonwealth, and the other, the common moral sense of the general public, and the social appropriateness of act is to be brought forth from the conbination of both of them. Of this problem let me refer to the opinions of Dr. Suekawa and Mr. Wagatsuma, the two greatest living authorities in that line of Japan. In his *Civil Law*,[1] vol. 1, Dr. Suekawa explicitly says;

> The 'public order' denotes the public order systematized for the commonwealth, and 'good morals' signify the morals commonly accepted by the people's public. However, no definite border line is to be drawn between these two. Here suffice it to say that either of them forms the fundamental idea of the law. (p. 69)

Mr. Wagatsuma, in his *Lectures on the Civil Law*[2] (revised edition), interprets these two ideas saying,

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8) Of the provision of Article 6 and 1133 of *code civil*, confer on the foot-note 6 in the present section.
9) As an exampls, confer on Colin et Capitant, *Cours élémentaire de Droit Civil Français*, tome I, 4ed., Paris, 1923, pp. 62–4.
1) *Minpô* (The Civil Law), Vol. I, Tokyo, 1947.
2) *Minpô Kôgi* I. (Lectures on the Civil Law), Vol. I, Tokyo, 1951.

> The 'public order' denotes the general benefit to the commonwealth, and 'good morals,' the common moral sense in the public in general. You will see however that to keep 'good morals' holds good at once to the general benefit, and to be responsible for the general benefit is desirable for maintaining the moral sense of the age. In this sense these two ideas have many things in common and it is not easy to distinguish each other. As stated above, the only difference between these two is that the one aims to the order of the commonwealth, while the other, the general moral sense. You need not however to make any distinct difference between these two when you have to examine the breach of them, because the Civil Code can invalidate whatever is against any of the two ideas. Therefore, to be properly understood, let me introduce the idea of social proprieteness which covers these two ideas. (pp. 230-1)

It seems that almost all theories on this problem are based on the above ones.

But towards these theories Professor Yunoki asssumes a critical attitude and says;

> With the fact that the general benefit to the commonwealth or the social approprieteness of act is creditted by the disciplinary regulation [*lex perfecta*], it is unfair that the act against the disciplinary regulation should not be regarded as invalid, while the act against the general benefit or the social approprieteness, without this regulation, should be taken for invalid. A man whose juristic act, without the breach of the compulsory regulation [*lex minus perfecta*], is taken for invalid, should be invalidated not only because he violates the general benefit to the commonwealth or the social approprieteness, but also because he acts contrary to the public moral sense, a practical principle of people's living. Otherwise, the theory would be self-contradictory.[3]

He makes a further remark on this problem with much originality, saying,

> The phrase 'public order or good morals' is nothing but an literary translation of 'bonnes moeurs ou ... l'ordre public' in Article 1133 of *code civil*, and these two ideas [i. e. 'public order' and 'good morals'] are to be combined into one denotation, that is, an ethical idea commonly

3) Kaoru Yunoki, ***Hanrei Minpô Sôron*** (An Outliine of the Case Civil Law), Vol. II, Tokyo, 1950, p.49.

accepted. Their purpose is to check any breach of them in the limit of the private law by introducing an ethical rule into the legal idea.[4]

Professor Ari-izumi gives another unique theory.

> ... in Article 90, two things are mentioned all at once; the one is about what is forbidden both by the ethical rule (which is to do with personality) and the law proper, —— that is, about the breach of 'good morals', and the other is about what is to be prevented politically by the commonwealth or the lawgiver (which is, in this case, has nothing to do with personality,) —— that is, about the breach of the 'public ooder,' and these two are subject to a legal idea, 'invalidity.' I have thus understood the genuine meaning of Article 90, which regulates the case of the non-fulfilment of contract. I think nothing contradictory may be found in such a treatment of these two ideas under a single idea 'invalidity', because to disapprove the right of action on the side of the transgressor of 'good morals' holds good at once to the 'public order,' and therefore to declare it invalid with reference to the juristic act is little inconsistent with the meaning of this article. Hence it becomes possible to apply such an effect concerning 'good morals' to the invalidity theory. In this sense, the disapproval of the right of act may be uniformly understood under a single idea of 'invalidity.' The conclusion is that these two ideas co-exist in Article 90.[5]

Not a few questions still remain about Professor Ari-izumi's theory. Setting aside whether or not the ethical rule has something to do with personality, I do not think that Article 90 contains in itself something to do with personality. Nor do I agree with such an opinion as acknowledges that 'good morals' form a part or another aspect of the 'public order.' It is therefore too much to say that "to disapprove the right of action on the side of the transgressor of 'good morals' holds good at once to the 'public order.'"

Not only to the theory of Professor Ari-izumi but also to that of Professor Yunoki I do not readily give a consent, but here I will leave my criticism untouched until the latter part of this thesis and only suffice it to examine the relation of the compulsory and disciplinary regulation to the civil law, as

4) Yunoki, *op. cit.*, pp. 49–50.

5) Tôru Ari-izumi, "*Fuhô-gen-in kyûfu* (The payment by Illicit Cause)" in *Hôgaku Kyôkai Zattshi* (Magazine for the Jurisprudence Society), Vol. LIII, No. 4.

suggested by Professor Yunoki.

Article 91 of the Civil Code:

> If the parties to a juristic act have declared an intention which differs from any provisions of laws or ordinances which are not concerned with public order, such intention shall prevail.

The 'provisions of law or ordinances which are not concerned with public order' are no other than the voluntary regulation. It may be justly said that the Civil Code, in Article 91, affords us with the special effect of the intention declared differently from such a voluntary regulation. The commonly accepted theory concludes from the counter-interpretation of Article 91, that the 'provisions of law or ordinances' are the compulsory ones and to intent against them is to be invalidated. (There is not without such exception as Professor Taniguchi's theory, the only one that I know.[6] As for my own opinion, I will leave it untouched for the time being, because the remaining part of this thesis will give an opportunity to state it.) According to the accepted opinion,

> ...the compulsory regulation should be distinguished from the disciplinary one. The disciplinary regulation, being meant to forbid or to control a fixed act, has nothing to do with the compulsory one when it treats the merely factual act. But when it has to control transactions, there comes the controversy as to whether, in case of the act against the regulation, the actual offender is to be punished or the effect of the act concerning the private law be disapproved.[7]

Of this problem my opinion must be given here. I interprete the 'public order' as the compulsory regulation of the private law, and 'good morals,' as the moral of the public in general. These two ideas given in equal terms by a co-ordinate conjunction 'or' are, in this case, not to be regarded as the same thing. Of course I do not mean that it is errornous to take the 'public order' for the general benefit to the commonwealth, but only do I mean that each law is to be exercised differently according to the difference of its field and its object. Let me say more concretely. The law, in a field different from its own, should not regulate the object other than its own, and in this

6) Cf. Tomohei Taniguchi, *Fuhô-gen-in Kyûfu no Kenkyu* (A Study of Illicit Paymenta) Tokyo, 1950, p. 190.

7) Wagatsuma, *op cit.*, p. 224.

sense, the general benefit to the commonwealth must be interpreted differently according to the difference of the limit of each law, and here must be dealt as the compulsory regulation of the Civil Code within the limit of the Civil Code permit. Therefore theoretically speaking, to set an limitation to the compulsory regulation with such a phrase as 'of the private law' will prove of no use, but we can still grant such a limitation referring to the fact that a juristic custom is to invalidate, as a matter of course, the act against the administrative and criminal law in terms of the private one. Anyway, according to my opinion, the Civil Code, Article 91 affords us with an all-inclusive principle to invalidate both the act against the compulsory regulation (of the private law) and that against the so called moral of the public in general.[8)]

Proceeding in this way with this problem, we have to compare the act which is 'contrary to public order' in Article 90 not with the act against both *l'ordre public* in *code civile* and the *öffentliche Ordnung*[9)] in the former German Law, but more properly, with the *gesetzliche Verbot* in Article 134 of German Civil Code and the act 'prohibée par la loi' in the first half of Article 1131 of *code civile*. Of course these European Laws do not restrict the function of the *Gesetz* or the *loi* within the limit of the civil code or its extra case, and cannot by themselves control any validity of the private law whatever punishment or prohibition they may regulate. In short questions are resolved only according to whether or not a separate regulation can disapprove the validity of the private law. Here it is suffice to see that the problem of the compulsory regulation of the private law was the matter of controversy either in German or in France as well as in Japan.

Let me add a few more to make sure of my opinion. There is no plausi-

8) There was a scholar who had held the opinion that "to invalidate the act which is contrary to the ethics is to ignore the difference between the law and ethics, that is, to deviate from the proper limit of the law. (Kenjiro Ume, *Minpô Yôgi* (Interpretation of the Civil Code), 1901 p. 90) But that the law does not protect the anti-ethical act is another thing from that the law compels the ethical goodness. It was he that ignored the difference. The problem has nothing to do with the difference between the law and ethics. Nowadays such a theory has been completely disapproved.

9) At present this phrase is not acknowledged as a judical term of the Civil Code but to be against the 'öffentliche Ordnung' is taken for independent of the validity of the private law. Cf. Enneccerus-Nipperdey, *Lehrbuch des Bürgerlichen Rechts*. Bd., 1. 2Abt., Tübingen, 1955. SS. 812 ff.; Colin-Capitan, *op cit.*; Lehmann, *Allgemeiner Teil des Bürgerlichen Gesetzbuches*, 7 Aufl., Berlin 1952. SS. 174 ff.

ble connection between the theory which says that "to keep 'good morals' holds good at once to the general benefit, and to be responsible for the general benefit is desirable for maintaing the moral sense of the age [and] in this sense these two ideas ['the public order' and 'good morals'] have many things in common . . ," and the theory which says that to distinguish theoretically the one from the other is impossible. Consequently it must not be concluded so hastily as that we "need not . . . make any distinct difference between these two,"[10] because it is not always right to conclude that any interpretation adoptable to the realities is correct, though whether or not an interpretation is theoretically correct may be examined according to whether or not it is to be adopted to the social realities. As for the theory of Professor Yunoki who completely ignores the 'public order' as far as Article 90 is concerned, he is too haste in his conclusion ignoring the fact that both Article 91 and 92 hold the idea of the 'public order'. As I presume, Professor Yunoki, in his commentary on Article 91, might have ignored the meaning of the 'public order'[11] only to make his theory consistent. Article 91 should be understood more poperly only in terms of the voluntary regulation. It ought to be interpreted more straightforwards as I have done without a help of counter-interpretation.[12]

My next concern is about such an expression as 'has for its object such matter as are contrary to . . . .' Here, 'its object' is the content (*Inhalt*) of the juristic act, in other words, the juristic change resulted from that act. It is not correct to say that it represents only the payment (*Leistung*), which must be done as the result of the juristic act by the parties. Consequently, whether or not the juristic act is against the 'public order' or 'good morals' should be decided according to the general content of the act itself.

The question still remains as to the case in which the motive for the act is against 'good morals'.[13] When the motive is not declared expressedly or

10) Of these quotations from Mr. Wagatsuma's, see page 18 of this thesis.

11) As far as Article 91 is concerned, Professor Yunoki holds the commonly accepted opinion, which was given by Dr. Kawana and Dr. Hatoyama a decade ahead. In this sense the opinion is of long standing.

12) "The importance of Article 91," according to Professor Yunoki, "exists rather in its invalidating a juristic act, when the content of the act is against the compulsory regulation." (*Op. cit.*, pp. 25–6)

impliedly there remains no room to make a further controversy, but when declared opinions is divided.

The earlier opinions completely ignored this question saying,

> Even when the juristic act is against the public order or good morals, the act is not invalidated.[14]

or

> Only the content or the matter of the juristic act should be the standard of judgement. I am convinced that to be controlled easily by the motive sentiment of the parties is against the purpose of this article.[15]

Recent opinions however, have taken seriously this question and says,

> Immorality of the motive, when both parties are conscious of it, should be invalidated.[16]

or

> The motive declared as the content of the juristic act, is to be taken for the standard of judgment of the anti-sociality of the act.[17]

or

> Motive is to be a matter of account only when declared by the juristic act itself....[18]

Be the opinions as they are, I still think it too hasty to conclude that the declared thing is the content.[19] Whether or not the motive, in broader sense, is the content must be cautiously concluded once it is declared.

Another opinion says that

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13) The problem of the act against the 'public order' is beyond question, because it is too evident to be the matter of controversy.

14) Kenshiro Kawana, *Nippon-Minpô Sôron* (General Outline of the Civil Code of Japan), Tokyo, 1903, p. 205.

15) Hideo Hatoyama, *Chûshaku Minpô Zensho* (Commentary on the Civil Law), Vol. 2, 1912, p. 68.

Here it must be apologized that even what is called motive in the ordinary case should cease to be called motive when changed into the condition or the content by the intention declared by the parties.

16) Suekawa, *op cit.*, p. 110.

17) Wagatsuma, *op. cit.*, p. 238.

18) Yunoki, *op. cit.*, p. 51.

19) According to this standpoint of view, every motive declared is to be taken easily for the content, and every motive, undeclared, not for the content. It is difficult to make a decisive distinction between the limit of content and that of motive. The limit of content and motive are actually seen overlapping one another in a separate case.

If it is desirable to regulate the validity of the juristic act with the purpose of keeping good morals of general public, the question of motive is justly to be taken seriously as a juristic problem.[20]

Though it may be justifiable to consider that Article 90 contains the moral sense in itself so long as it invalidates the anti-ethical act, yet to grant the motive theory to this Article is theoretically incorrect even when the motive is declared, considering the fact that the law expressly provides the verbal phrase, 'has for its object.'[21] Practically speaking, to do so will lead to evils threatening the safety of transaction.

We have more questions about Article 90, and not a few problems still remain as to what sort of act is to be judged as practically against the 'public order' or 'good morals.' It would be a good job to go furthermore into these problems referring to numerous precedent cases, which will give us clues to solve them, but I will reserve it for another occasion because of the limit of paper.

III

My purpose in this section is to state what opinion I hold of the law proper and make it my conclusion. I expect myself to be the target of adverse criticism of what I had said concerning Article 90 in the preceeding sections. According to such a criticism, I shall be condemned as too particular about wording such as 'or', 'public order' and 'has for its object.'[1] Against the criticism I will answer as follows. The text of the law must be supported by the social reality and each word in it forms separately an idea with a definite content, and it is necessary that a researcher who has to interpret the law scientifically should construct the whole system of the civil law after clearifying the content of the idea. Every scholarly research must be done with logical consistensy and systematic order. Jurisprudence is not an exception.

20) Wagatsuma, *op. cit.*, 238.

21) Confer on the fact that more theories and precedent cases about Article 138 of German Civil Code do not consent to invalidate the act only for the immorality of its motive, even when the act itself suggests the motive.

1) For the Anglo-American lawyer, to be particular about phraseology and theory would seem of no use so long as their practical effect is passable. But on this problem I shall have another chance to discuss.

So long as a theory is confirmable according to the factual happening of life, the proof of it may naturally be dependent on the factuality, but to interpret the law so as to make the factuality correspond easily to the law is imprudent. He who interprets the law scientifically has to keep the purely objective attitude towards the law and realize himself that he is not ordained as to construct the law as he pleases. Such an attitude as I hold is commonly called *Rechtspositivismus*. Against this is expected the following criticism.

Rechtspositivismus is built on an ethical premise —— i. e. the general will (*Gemeineswille*) of the legislator is always the will for justice and its legality (*Legalität*) always leads to legitimacy (*Legitimität*). Such an ethical premise however will betray our trust when legislation is done by many for a wrong purpose. *Rechtspositivismus* therefore involves in itself some risk to tie up with the political power of the legislator, who bears no ethical responsibility for his duty. And, all the worse, this positivism is powerless before the risk.[2)]

I must confess that the criticism is all right, but I would, for the time being, rely on the good sense of the people, who can distinguish justice from injustice, and I hope as an interpretor of the law that people's good sense would not betray me. In this sense I think I am nearest to Dr. Hatoyama[3)] who was, and is regarded as an authority of *Rechtspositivismus* or *Begriffs-Jurisprundenz*, and whose opinion is to emphasise the logical consistensy and the systematic order for the study of the law. Indeed we stand in serious need of renewing 'our investigation into a separate idea and making its systematic arrangement after German manner with more references to our native law and the reality of our society' and finally 'initiating reform of our study of the law by introducing the jurisprudence of America or France, with reference to the achievement of other sciences such as economics and sociology.'[4)] How these opposite manners, that is, the German manner and American and French one, may be arranged by the lawyer is another problem, but the limit of paper does not allow me to go furthermore into it. Anyway I want to point out in this thesis that there is an observable tendency among the lawyers to ignores

2) Cf. Franz Wieacker, *Privatrechtsgeschichte der Neuzeit*, Berlin, 1952, S. 272. Of this problem Mr. Mitsukuni Yazaki, in his "Legality and The Right of Resistance." (*Osaka University Law Review*, No. 4,1957,) gives us an outstanding study.

3) Hideo Hatayama (†1940) played the most important part among our civil law circle from 1910s to 1920s.

the logical consistensy with too much attention to the factual phase of society and be hasty to make a formal conclusion. I fear lest the interpreter of Article 90 should be the victim of such a tendency.

(This thesis is the revision of the paper read in October, 1957 at the bi-annual meeting of Osaka University Law Society.)

4) Cf. Wagatsuma's speech at the symposium on 'The Jurisprudence of Japan' held by Shin Nippon Hyôronsha Co. The record of the symposium was published by the same company in 1950 titled *The Jurisprudence of Japan, its prospect and retrospect.* Wagatsuma's speech on this problem is in page 51.