ZESZYTY NAUKOWE UNIWERSYTETU PRZYRODNICZO-HUMANISTYCZNEGO W SIEDLCACH Nr 123
Seria: Administracja i Zarządzanie (50) 2019
pl ISSN 2082-5501

MORALITY AS A CRITERION FOR A CLAUSE OF GOOD PRACTICES IN THE LIGHT OF SELECTED ACTS OF POLISH COMMERCIAL LAW

MORALNOŚĆ JAKO KRYTERIUM KLAUZULI DOBRYCH PRAKTYK W ŚWIETLE WYBRANYCH AKTÓW POLSKIEGO PRAWA HANDLOWEGO

https://doi.org/10.34739/zn.2019.50.09

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Abstract: This article employing historical-legal methods presents the relationship between an extra-legal axiology and the norms of commercial law. The standard of morality is presented among several criteria of the good practices clause. Axiological pluralism demands that the criterion of morality be recognized in the light of constitutional values. Freedom of economic trade is a basic value that can only be restricted by law. At the same time, legal norms require justification through the system of moral norms. Non-legal norms incorporated into the system of commercial law make trade more flexible and allow a judge to resolve conflicts in economic trade.
Keywords: competition, ethics, commercial honesty, commercial freedom, rules of social symbiosis

Streszczenie: Artykuł z wykorzystaniem metody historyczno-prawnej prezentuje związek zachodzący pomiędzy pozaprawną aksjologią a normami prawa gospodarczego. Normy z zakresu moralności przedstawiono jako jedno z kryteriów klauzuli dobrych obyczajów. Pluralizm aksjologiczny postuluje, aby kryterium moralności było rozpatrywane w świetle wartości konstytucyjnych. Swoboda działalności gospodarczej stanowi podstawową wartość, która może zostać ograniczona jedynie na mocy ustaw. Jednocześnie normy prawne wymagają uzasadnienia przez system norm moralnych. Pozaprawne normy inkorporowane do systemu prawa gospodarczego uelastyczniają obrót gospodarczy i pozwalają sędziemu na rozwiązywanie konfliktów w zakresie działalności gospodarczej.
Słowa kluczowe: konkurencja, etyka, uczciwość kupiecka, wolność gospodarcza, zasady współżycia społecznego

Introduction

After political and economic changes were implemented in the early 1990s, the good practices clause was reintroduced into the *Ustawa o zwalczaniu nieuczciwej konkurencji* of 1993: art. 3, § 1; 16, § 1, p. 1; 16, § 3 (Dz.U. of 1993, No. 47, item 211), the *Prawo działalności gospodarczej* of 1999: art. 8, 9, 64 (Dz.U. of 1999, No. 101, item 1178), the *Kodeksu spółek handlowych* of 2000 (Dz.U. of 2019, item 505, 1543, 1655; Szajkowski, 2002, ad art. 249, p. 578) and also appeared in several new or amended provisions of the *Kodeks cywilny* of 1964: art. 705, § 1; 72, § 2; 385^1, § 1 (Dz.U. of 1964, No. 16, item 93 as amended), the *Ustawa o swobodzie działalności gospodarczej* of 2004: art. 17 (Dz.U. of 2004, No. 173, item 1807) and, finally, in the 2018 *Prawo przedsiębiorców* of 2019: art. 9; 10, § 1 (Dz.U. of 2018, item 646).

The legal terms or legal norm will be used according to the meaning generally assigned to them by the doctrine and philosophy of law. In contrast, the term morality will be considered "sensu largo" to be a synonym of ethicality (Przesławski, 2015, p. 38).

Literature review

Among the research results conducted on the good practices clause, Zygmunt Fenichel's publication, *Pojęcie "dobrych obyczajów" w prawie polskiem*, should be mentioned; it appeared in print in Lviv in 1934 in an edition by Artur Golman. That author, referring to the provisions of binding law which contained a clause of good practices, primarily presented the doctrine of scholars in a German-speaking area. Alfred Kraus and Fryderyk Zoll also presented interesting findings in the *Polska ustawa o zwalczaniu nieuczciwej konkurencji: z objaśnie-*

niami, which was published in Poznan by the Wojewódzki Instytut Wydawniczy in 1929 (Żurawik, 2009, p. 35; Dolata, 2009, pp. 268, 274). Then, Adam Szpunar (Szpunar, 1947) and Franciszek Studnicki (Studnicki, 1949) in the socio-political surroundings of the Polish People's Republic carried out a legal analysis of the good practices clause in the light of commercial norms (Żurawik, 2009, p. 35).

More recent research results include, among others, an investigation of general clauses conducted by Leszek Leszczyński and Grzegorz Moroń (Leszczyński, 2001; Leszczyński, Moroń, 2013, pp. 81-91) as well as an exploration by Artur Żurawik, who studied the clause of good practices from a hard-line historical approach (Żurawik, 2009, pp. 35-51).

Methodology and theoretical basis

The concept of a general clause has not yet been defined in legal terminology, and its character has become the subject of numerous disputes on the basis of a native theory of law (Mojski, 2016, pp. 151-160).

Doctrine expresses the view that a general clause signifies an element of a legal article that is an indistinct phrase, i.e., an underspecified phrase, containing an open criterion, one that contains elements of a social axiology outside of the legal (Kalisz, 2013, p. 198).

The general clause can be understood in two ways; first, as a norm arising from a provision authorizing the entity to exercise the right to sentence, ruling or administrative decision support for the indicated non-legal criteria; second, as a vague, non-legal phrase, referred to by the legislator in legal norms (Leszczyński, Moroń, 2013, p. 81).

The general clause reflects an external axiology referring to values, assessments or norms. Simultaneously, regardless of whether or not those values are moral, economic or political, the general clause opens up the legal system to an axiology which the legislator considers of value (Szot, 2016, p. 293).

The legislator uses the general clause to "elasticize" the contents of the legal regulations in context of its social dimension. Its application is primarily intended to make legal, i.e., appropriately lawful, and advisable individual rulings or administrative decisions that are in context of facts. The use of the decency clause allows a judge to resolve conflicts in the course of business transactions whose facts go beyond the norms of commercial law (Machnikowski, 2016, ad art. 5, p. 17).

In doctrine appearing before World War II, it was believed that good practices were violated when an act was committed that violated what the average honest individual considered immoral, and in the *Kodeks handlowy* (Dz.U. 1934, No. 57, item 502) such an act was considered to be invalid due to the legal act being unethical (art. 240, § 2; 414, § 1). A legal act in the commercial sphere could be considered unethical even if it would not necessarily be considered immoral outside of economic circles. On the other hand, it was also thought that commercial activities should not be recognized as being in line with morality if the general public considered them to be immoral (Allerhand, 1935, p. 380, note 9).

In literature on the subject, it was believed that "an offense against good practices in specific cases will be ruled by the judge on the basis of his discretion, guided by a sense of fairness as represented by people who think fairly and rightly" (Kraus, Zoll, 1929, pp. 170-171). Good practices were an objective criterion for behaviour, objectively stemming from a system of an ethical society. The degree of ethical requirements was determined on the basis of the average level of morality represented by participants in the economic sphere. The median was, on the one hand, limited by idealism and altruism, foreign to an economic way of thinking and, on the other hand, by immorality (Kraus, Zoll, 1929, p. 171; Szwaja, 2003, p. 995).

Pre-war doctrine adopted ethical and moral assessments as a criterion for good behaviour and decency. Violation of good commercial practices was a matter of fact subject to court ruling. Literature argued that good practices were violated when an act was carried out that would be against what any honest-thinking person judged to be moral, and such an act became invalid because it could not be assumed that the law would recognize an unethical act. Commercial habits should also be taken into account when assessing good practices. The act was in opposition to good practices if it was considered unethical in the sphere of commerce, even if it would not be considered immoral in other areas; on the other hand, it could not be considered to be in accordance with good practices of commercial habits if it was generally considered immoral (Szwaja, 2003, ad art. 422, p. 995).

Some researchers including Adam Szpunar (Szpunar, 1947, p. 64) and Alfons Kraft (Kraft, 1963, pp. 101 et seq.) and Eugen Ulmer (Gadek, 2003, p. 132) rejected a criterial connection between good practices and morality. In this way, attempts were made to reformulate the clause of good practices in such a way as to "free" it from non-legal norms, and to bind it only to norms of the legal system.

According to these researchers morality, regarding sentences made in the human mind, is subjective, and sometimes good practices, having an objective nature, refer to the sphere of human behaviour. Assessments from a moral point of view are subjective only to a way of thinking, to motives or to the goal of a particular action, but never to a human act, because that act remains morally indifferent. Thus, the application of a general clause cannot be dependent on the entrepreneur's actions. The good practices clause was thus to become an expression of an objectified ethical order resulting from regulating the legal system (Gadek, 2003, p. 132; Żurawik, 2009, p. 41).

Criticism of the moral value of good practices was caused, among other things, by the difficulty in establishing an axiological system in a pluralistic society. This has resulted in the formulation of a new concept, according to which the clause of good practices should be understood as a clause serving the protection of constitutional values. Therefore, observance of constitutional values was to be the basic criterion for assessing whether, in a given case, a violation of good practices would occur. In order to establish a prevailing moral system, it would be necessary to carry out research using the sociological method, which in current conditions could prove to be too complicated and thus difficult to perform. Also, drawing "from moral views and feelings of decency of all correctly and fair-mindedly thinking people" has the disadvantage that it is unknown whose this standard would be. In the case of a democratic state of law characterized by a kind of egalitarianism, this could lead to legal norms written on an empty card (Żurawik, 2009, p. 41).

A position of compromise was also proposed, positing that the criterion of good practices refers to recognized, legal, and primarily constitutional values, although the clause also refers to extra-systemic values. In this concept, attempts were made to take into account the relationship between norms of the legal system and non-legal norms (Laszczyk, Gajdus, 2012, p. 24).

Results and discussion

In literature on the subject following Katarzyna Kopaczyńska-Pieczniak (Kopaczyńska-Pieczniak, 2016, pp. 97-98), the good practices clause is associated with, among other things, such criteria as morality, decency, honesty, fairness (alone or together with morality) (Korzonek, Rosenblüth, 1936, p. 142; Fenichel, 1934, p. 23), social mores, actual practices, social concepts and a societal sense of law (Szpunar, 1947, pp. 64-65), justice (Żurawik, 2009, pp. 35 et seq.), legal ethics inherently associated with the socio-economic system, constitutional values oriented towards ensuring the smooth functioning of economic trading, a Christian system of values (Żurawik, 2007, p. 201; Pilich, 2008, p. 172), as well as a widely understood respect for one's fellow man (Sąd Okręgowy w Warszawie - Sąd Ochrony Konkurencji i Konsumentów, *Wyrok* of February 23, 2006. Sygn. akt XVII Ama 118/04. Dz.U. of UOKiK 2006, No. 2, item 31).

The concept of good practices is best investigated by taking into account additional criteria such as economic-functional or economic-moral factors (Kopaczyńska-Pieczniak, 2016, p. 99).

In art. 9 and 10, § 1 of the *Prawo przedsiębiorców* of March 6, 2018 (Dz.U. of 2018, item 646), the clause of good practices directly refers to a pre-war rule of commercial integrity, hence it seems legitimate to state that a new rule for doing business is being formulated (Biskup, 2007, p. 154).

Moving to the law, it should be noted that legislators of the *Constitution* of the Republic of Poland use the concept of morality in art. 31 section 3, mentioning the protection of public morality as one of the justifications for setting restrictions on the exercise of constitutional freedoms and rights. Morality, without the adjunct "public," is a premise for excluding the public to the procedure of hearings (art. 45 section 2), restriction of the freedom to express religion (art. 53 section 5), as well as a justified dismissal from military service or a call for substitute service on the basis of moral principles professed by a citizen (art. 85 section 3) - (Dz.U. of 1997, No. 78, item 483; Krąpiec, 2006, p. 384; Salachna, Tyniewicki, 2016, p. 11; Podkowik, 2019, p. 21).

It should be noted that in literature on constitutional law, the terms "public morality" and "morality" can be considered synonymous based on the *Constitution* of the Republic of Poland (Mojski, 2014, p. 52).

Private (individual) morality is based on subjective assessments, while public morality is a set of norms, values, ideas or beliefs recognized and accepted by a social group, and not only by individual citizens making moral assessments of specific cases (Podkowik, 2019, p. 32).

Public morality, in contrast to the rule of private (individual) morality, is a component of general morality understood as an un-codified and informal set of norms, values, ideas or beliefs relating to human behaviour towards others and oneself, qualifying that behaviour in the category of good or evil (Buksiński, 2017, pp. 31-34; Podkowik, 2019, p. 32). Public morality is considered to be the cement of society, or more precisely, the "Polish

Nation" in its political sense, that serves to safeguard the identity of its political being. That is, public morality is the minimum set of common values shared and important to the citizens who make the "Polish Nation," sovereign, and having the right to decide on the fate of their homeland, as named in the preamble to the *Constitution* of the Republic of Poland. In this context, the meaning of the term morality should be defined in light of the norms of the constitutional law system. The legislator incorporated ethical norms into the system of economic law by introducing the norms contained in art. 18 on the necessity of conducting business activities in compliance with public morality into the *Ustawa o swobodzie działalności gospodarczej* of July 2, 2004 (Dz.U. of 2004, No. 173, item 1807; Greßler, 2013, p. 203).

In order to establish the relationship between the clause of good practices and morality, reference should be made to the ethical values prevailing in society, i.e. those professed by the general public, or, as the Constitutional Tribunal puts it, those values "functioning in society" (Trybunał Konstytucyjny, *Wyrok* of October 17, 2000. OTK ZU 2000, No. 7, item 254) or, according to the Supreme Court, those that are "setting general moral standards binding in society" (Sąd Najwyższy, *Wyrok* of September 26, 2002. III CKN 213/01, OSNC 2003, No. 12, item 169). The Supreme Court indicated that among moral norms incorporated into the good practices clause was also a ban on the abuse of subjective rights (Sąd Najwyższy, *Uchwała* of November 17, 2011. III CZP 68/11, OSNC 2012, No. 5, item 60; *Wyrok* of October 16, 2008. III CSK 100/08, LEX, No. 1438707).

The issue of interpreting the protection of morality has appeared in quite a number of rulings in the European Court of Human Rights (*Johnson v. Ireland*, Judgment of December 18, 1986, § 52, Complaint No. 8697/82; *Otto Preminger-Institute v. Austria*, Judgment of September 20, 1994, Complaint 13470/87): "based on the internal law of various countries [...] it is impossible [...] to find a uniform European concept of morality. Legal views in this area differ depending on the time and place, especially today, in an era characterized by rapidly changing opinion on morality. National authorities, due to constant contact with these problems on the ground, are better able to assess the requirements for "moral protection" and the need for restrictions or penalties than an international judge" (*Handyside v. the United Kingdom*, Judgment of December 7, 1976, § 48, Complaint No. 5493/72; Greßler, 2014, 103-126).

The concepts of moral foundations and assessments are accompanied by various analyses. Lon L. Fuller based his considerations on the distinction between the external and internal morality of law (Fuller, 1978, p. 207).

The concept of the external morality of law boils down to the use of general clauses which consist of references to socially significant moral values in complex legal situations, not formalized directly in the legal system, but highlighting the general principles of social coexistence. These general clauses create a "climate" and reflect the expectations of the people, indicating what the law should be and what goals it should achieve. On the other hand, the inner morality of the law should be understood as legal norms confluent with moral ones; moral principles are incorporated into the legal system, constituting a field consistent with morality; moral values that the law both protects and implements; rules determining the proper functioning of the law (Michalik, 2005, p. 386).

Axiology of the law manifests itself in its character and purposes, defining the fundamental values of the legal system on which law is built, determining the sense of its existence and the moral assessments that should be taken into account in decisions. In particular, fundamental values (Krąpiec, 2008, pp. 704-708; Żuk, 2016, pp. 17-46) and their associated chief moral principles - basic, indisputable and inalienable - that the rule of law should pursue must be taken into account; that is, human dignity and equality regarding the law and justice (Michalik, 2005, p. 386). After all, the law, as Domitius Annius Ulpianus taught († 228 CE) - (Bunson, 2002, pp. 560-561; *Słownik kultury antycznej*, 2012, p. 501), is the art of applying what is good and right ("ius est are boni et aequi") - (D. 1, 1, 1962, p. 1; Burczak, Dębiński, Jońca, 2013, p. 126).

The law is a kind of transference of moral values into a system and activities undertaken by the institutions of a democratic state ruled by law (Juvenal, 1996, p. 68; Michalik, 2005, pp. 377-388).

Constitutional economic freedom defines the limits of detailed regulations in public economic law. In this way detailed legal regulations concerning entrepreneurship and its entities are shaped in vertical and horizontal relations (Kieres, 2014, p. 191).

The process of determining the differences between positive law and morality is associated with difficulties because the ranges of these areas are extensive and multi-faceted, and their properties are diverse in many respects, and thus they may be described as common, independent or contradictory. It should be emphasized that "law cannot be a full reflection of morality", because "positive law, especially in a pluralistic system, is

always the result of a compromise between various political and social forces playing a role in social life" (Trybunał Konstytucyjny, *Uchwała* of March 17, 1993. W 16/92, OTK 1993, No. 1, item 16; Michalik, 2005, p. 381-382; Kotowska-Lewińska, Kulmaczewski, 2017, p. 317).

That is why "the democratic way of creating law guarantees [...] the implementation of a socially accepted system of values as a source of morally legitimate legal norms" (Działocha, *Zdanie odrębne* of October 7, 1992. U 1/92, OTK 1992, No. 2, item 38).

Opinions in literature have been raised that use of the good practices clause in public economic law may lead to restrictions on the freedom of economic activity. Freedom is identified as one of the basic values currently regulating the functioning of the economy, the scope of which determines the functioning of democratic countries' market economies. Rights of economic freedom, as the next generation of basic human rights, includes subjective rights as personal human freedoms. This is in line with the definition of freedom adopted in modern philosophy, i.e., a state in which a person is not subject to coercion by the arbitrary will of other entities. Freedom understood in this way is only a postulate and cannot be fully realized within social relations (Nyka, 2009, p. 353; Węgrzyn, 2014, 515--517; Magdziarczyk, 2018, 138-149).

The experience of recent years has sufficiently demonstrated that legal norms regulating economic life, insufficiently safeguard the freedom of economic activity. That is why the legislator supplements these legal regulations with extra-systemic norms referring to universally recognized moral norms. The reference to extra-systemic standards makes the functioning of the system of economic more flexible, allowing for the development of additional rules of conduct that are expressed by positive law (Trybunał Konstytucyjny, *Wyrok* of December 7, 1999).

According to the well-established position of the Constitutional Tribunal, "art. 31 section 3 of the *Constitution* of the Republic of Poland [determining the limits of freedoms and rights also on the basis of the criterion of public morality] applies to all constitutional freedoms and rights, regardless of whether specific provisions separately specify the conditions for restricting a given right and freedom" (Trybunał Konstytucyjny, *Wyrok* of April 10, 2002. OTK ZU, No. 2/A/2002, item 18). Arguably, as Małgorzata W. Greßler believes (Greßler, 2015, p. 169), it is about values commonly recognized by citizens of the Republic of Poland, because art. 22 of the *Constitution* of the Republic of Poland (Dz.U. 1997 No. 78 item 483) allows the restriction of economic freedom "only by way of [Polish] law" and only because of an important public interest (Bielecki, 2003, pp. 63-64). It is a set of norms of conduct in the categories of "good" and "evil" which refer to "interpersonal relations in aspects of public behaviour as well as those belonging to the sphere of privacy" (Ciapała, 2009, p. 403). Thus, "morality includes social norms that qualify specific human behaviour according to the criteria of right and wrong, equitable and inequitable" (Sąd Najwyższy, *Wyrok* of September 26, 2002. III CKN 213/01, OSNC 2003, No. 12, item 169). The term "public morality" (Verkhovna Rada Ukrayiny, Proekt Zakonu of December 26, 2014; Greßler, 2015, p. 165, note 14) includes "the trust of citizens in the state, on the one hand, in its officers, and on the other, in its law, which binds all citizens regardless of their functions and the state itself" (Trybunał Konstytucyjny, *Wyrok* of June 6, 1999. OTK 1999, No. 5, item 103).

Conclusion

The concept of good practices is an indefinable category, and discussion can only be subject to the criterion used to determine whether it was or was not preserved in a given case (Żurawik, 2009, p. 44).

The clause of good practices sets the model for proper or fair conduct in interpersonal relations and is considered to be the determinant of the ideal pattern of behaviour in business activities. It is a conglomerate of social norms with various justifications including those that are moral, organizational or economic. Due to axiological pluralism, it should be assumed that the criterion of morality in the clause of good practices is based on the foundation of constitutional values. In this way, a system of non-legal norms accepted by the legislator is introduced into the system of constitutional law, upon which the system of commercial law, both public and private, is based (Kopaczyńska-Pieczniak, 2016, p. 108).

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