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# IMMORAL CONTRACTS IN EUROPE

## The First Common Core

Aurelia COLOMBI CIACCHI

### 1. INTRODUCTION

The present chapter starts from the assumption that the Roman law rules on the invalidity of contractual agreements *contra bonos mores* constitute a first, historical, common core of the current legal formants<sup>1</sup> concerning immoral contracts in a number of European countries. The central question it aims to answer is to what extent this first common core has influenced the current legal formants of the national laws specifically considered in this volume.

The first section briefly outlines the development of these Roman law rules from the 2nd century until Justinian's codification. It then acknowledges the substantive influence of the latter on the continental European civil codes on the one hand, and Scottish law on the other.

The second section, starting from the impact of Roman law on what Zweigert and Kötz call the "Romanist" and "German" legal families, takes position in the general comparative law debate on legal families. On this basis, the third section proposes a tailor-made taxonomy. It identifies five models of legal formants concerning the (in)validity of immoral contracts in Europe, corresponding to three groups of countries plus two individual mixed legal systems. For each model, the extent of the Roman law influence on the current legal formants is summarised. The models are discussed in a logical order, starting with the one

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<sup>1</sup> On the concept of "legal formant" see R. SACCO, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 *American Journal of Comparative Law* 1-34; 343-402. The methodology of the project "The Common Core of European Private Law", in the framework of which this book has been written, is inspired by both Sacco's and Schlesinger's approaches to comparative law. See M. BUSSANI and U. MATTEI, 'The Common Core Approach to European Private Law' (1997/1998) 3 *Columbia Journal of European Law* 339-356; V. GROSSWALD CURRAN, 'On the shoulders of Schlesinger: The Trento Common Core of European Private Law Project' (2003) 11 *European Review of Private Law* 66-80.

most strongly influenced by Roman law, and ending with the one where such an influence can hardly be seen.

The last section concludes that Roman law can be considered a historical common core of almost all legal formants discussed in the national responses to the hypothetical cases in this volume, with one important exception: the Nordic countries.

## 2. IMMORAL AGREEMENTS AND CONDITIONS UNDER ROMAN LAW

The legal concept of immorality of a contractual agreement, which can be found in all continental European civil codes, stems from Roman law.<sup>2</sup> The most ancient known sources mentioning this concept go back to the 2nd century Roman jurists Gaius and Julianus.<sup>3</sup> These jurists formulate specific examples of agreements that do not create obligations because their object or purpose is contrary to good morals (*contra bonos mores*):<sup>4</sup>

- a mandate to steal something or insult somebody;<sup>5</sup>
- a stipulation to commit a murder or steal an object used for divine service;<sup>6</sup> or
- a stipulation of a penalty for failing to institute a certain person as heir.<sup>7</sup>

The latter example is particularly interesting. It arguably evidences that already in its classical period, Roman contract law linked the concept of good morals with the respect for what contemporary scholars would call the private autonomy, personal autonomy and/or self-determination of the obligee, in its specific manifestation as freedom of will. From this background, one might even argue that already in the 2nd century the notion of immorality was used to tackle abuses of private autonomy that resulted in excessive

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<sup>2</sup> The content of this section is mainly based on Zimmermann's excellent discussion of immorality in Roman law: R. ZIMMERMANN, *The Law of Obligations*, Clarendon Press, Oxford 1996, pp. 706–715. For a comprehensive analysis of the relevant Roman sources see T. MAYER-MALY, 'Contra bonos mores' in *Iuris Professio, Festgabe für Max Kaser zum 80. Geburtstag*, Böhlau, Vienna 1986, pp. 151–167; id., 'The boni mores in historical perspective' (1987) 50 *Tydskrif vir hedendaagse Romeins-Hollandse Reg. (THRHR)* 60 et seq.

<sup>3</sup> Both jurists were active during the reigns of the emperors Hadrian, Antoninus Pius and Marcus Aurelius. For a recent overview of the life and work of both jurists see L. WÆLKENS, *Amne adverso: Roman Legal Heritage in European Culture*, Leuven University Press 2015, p. 59.

<sup>4</sup> R. ZIMMERMANN, above n. 2, p. 707.

<sup>5</sup> Gai. III, 157.

<sup>6</sup> D. 45, 1, 26 and 27.

<sup>7</sup> D. 45, 1, 60.

restrictions of what contemporary scholars would call fundamental rights and freedoms.<sup>8</sup>

More frequent than the cases of immoral contracts were the cases of testamentary conditions *contra bonos mores*. In the late classical period, the jurist Paulus, active in the first half of the 3rd century, reports several examples, including:<sup>9</sup>

- a condition not to redeem one's father from captivity;<sup>10</sup>
- a condition not to provide maintenance for patrons or parents;<sup>11</sup>
- a condition not to marry;<sup>12</sup>
- a condition not to have children;<sup>13</sup> and
- a condition to “walk in ghost clothes”, i.e. to appear in public while wearing a ghost costume.<sup>14</sup>

The first four types of conditions relate to interferences in family relations, and touch upon what contemporary legal thinking would now subsume under the human right to private and family life laid down in Article 8 of the European Convention of Human Rights (ECHR).<sup>15</sup> Roman jurists obviously did not speak of human rights. They spoke of *pietas* (the sense of duty and the natural affection towards gods, parents or near relatives), *existimatio* (the respect or esteem enjoyed by a person in society), and *verecundia* (the innate sense of shame).<sup>16</sup> Papinian, one of the major jurists of the late classic period, defined an immoral act as an act that offends “*pietatem existimationem verecundiam nostram*”,<sup>17</sup> which means our duties and affection towards gods or near relatives, our esteem, or our sense of shame. The first four above-mentioned types of conditions were deemed immoral since they offended the *pietas*, while the

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<sup>8</sup> On the distinction between formal and substantive party autonomy, and the fundamental right dimension of the latter, see A. COLOMBI CIACCHI, ‘Party Autonomy as a Fundamental Right in the European Union’ (2010) 6 *European Review of Contract Law* 303–318.

<sup>9</sup> R. ZIMMERMANN, above n. 2, p. 709.

<sup>10</sup> Paul. D. 28, 7, 9.

<sup>11</sup> Paul. D. 28, 7, 9.

<sup>12</sup> Paul. Sent. III, 4 b, 2.

<sup>13</sup> Paul. Sent. III, 4 b, 2.

<sup>14</sup> “Si larvali habitu processeris”: Paul. Sent. III, 4 b, 2. On this see T. MAYER-MALY, above n. 2, p. 165; P. VON RUMMEL, *Habitus barbarus. Kleidung und Rapresentation spatantiker Eliten im 4. und 5. Jahrhundert*, de Gruyter, Berlin 2007, p. 158.

<sup>15</sup> For a discussion of the human rights dimensions of (past and present) Dutch and English cases of contracts declared immoral because they interfered with family relations, the freedom to marry, the freedom to have children etc., see Z. MANSOOR, ‘Contracts Contrary to Public Policy under English Law and Dutch Law: The Case of Agreements Affecting Matrimony’ (2014) 22 *European Review of Private Law* 703–727.

<sup>16</sup> The translation of these three Latin terms is borrowed from R. ZIMMERMANN, above n. 2, p. 711.

<sup>17</sup> Pap. D. 28, 7, 15.

fifth one – the condition to “walk in ghost clothes” – offended the *existimatio* and the *verecundia*.

The scholars who analysed the available Roman sources have identified further groups of cases in which the invalidity of contractual agreements or testamentary clauses on grounds of immorality was invoked:

- agreements pressurising somebody (albeit indirectly) to enter into, not to enter into, to dissolve or not to dissolve a marriage;
- agreements on the future succession of one of the contract parties;
- agreements in anticipation of the death of a third person; and
- agreements excluding the liability of one of the parties even in case of intentional violations.<sup>18</sup>

From the 3rd century on, Roman texts discussed agreements contrary to good morals together with agreements contrary to law, emperor’s statutes or decrees.<sup>19</sup> The contrariety to good morals produced the same legal consequence as the contrariety to formal law: the nullity of the agreement. A statement contained in a scholarly work of the 5th century perfectly summarises this principle: “Agreements or conditions contrary to laws, emperor’s decrees, or good morals, are null.”<sup>20</sup>

This 5th century Roman law principle is arguably still alive and kicking. As the majority of national responses to the hypothetical cases in this volume evidence, in 21st century Europe, the civil courts of many countries still rely on very similar formulations in their judgments – apart from the “emperor’s decrees”, of course, which have been replaced with the more modern concept of *ordre public* or public policy.

The longevity of this and other Roman law principles is easily explained by the long-lasting impact of Justinian’s codification: a 6th century comprehensive collection of legal materials called the *Pandectae* (Pandects) or *Digestum* (Digest). This codification, since the Middle Ages also called the *corpus juris civilis*, has been used for many centuries by legal scholars and courts in large parts of Europe. It then inspired the content of the civil codes enacted in the 18th, 19th and early 20th century, from which the civil codes actually in force in Europe took shape.<sup>21</sup>

Also outside of continental Europe, in a country where there is no civil code, the Roman law principles on the immorality of agreements have had

<sup>18</sup> R. ZIMMERMANN, above n. 2, p. 711.

<sup>19</sup> R. ZIMMERMANN, above n. 2, pp. 709–710.

<sup>20</sup> Consultatio veteris cuiusdam iurisconsulti, IV, 8: “*Pacta vel conditiones contra leges vel decreta principum vel bonos mores nullius sunt momenti*”.

<sup>21</sup> See K. ZWEIFERT and H. KÖTZ, *Introduction to Comparative Law*, 3rd ed., Oxford University Press, 1998, p. 63 et seq.

great influence. As Laura Macgregor demonstrates, the Scottish case law on immoral contracts is notable for its references to Roman law, particularly the Digest.<sup>22</sup>

### 3. LEGAL FAMILIES AND LEGAL FORMANTS ON IMMORAL CONTRACTS

There is evidently a continuity between the rules on the immorality of contracts included in the continental European civil codes, or followed by Scottish courts, and their historical common core derived from Roman law.<sup>23</sup> However, some European legal systems (such as the Scandinavian ones) *prima facie* do not seem to have been influenced by this common core. Therefore, Roman law can probably not be seen as a common root of *all* current European legal formants that make immoral contracts invalid or unenforceable. Roman law can certainly be seen as a historical common core both for Scottish law and for the European continental legal systems that Zweigert and Kötz bring together in the “Romanist” and “German” legal families.<sup>24</sup>

In the following sections, this chapter will attempt to answer the question of whether Roman law could be seen as a historical common core also of *other* national legal formants concerning immoral contracts in Europe – other than the ones of Scotland and the countries undoubtedly corresponding to the “Romanist” and “German” legal families.

A “Romanistic-German family” was already acknowledged by René David.<sup>25</sup> However, while David includes the Scandinavian countries in the Romanistic-German family, Malmström<sup>26</sup> and Zweigert and Kötz<sup>27</sup> acknowledge a separate Scandinavian or Nordic family.<sup>28</sup> This approach is followed in the present chapter. It makes sense to separate the Scandinavian legal family from the Romanist and German ones, both in general and for the purposes of comparative private law in particular, because the Nordic countries never

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<sup>22</sup> See L. MACGREGOR’s responses for Scotland in this volume (Case 1), with further references.

<sup>23</sup> R. ZIMMERMANN, above n. 2, pp. 706–715.

<sup>24</sup> K. ZWIEGERT and H. KÖTZ, above n. 21, p. 63 et seq.

<sup>25</sup> R. DAVID, *Les grands systèmes du droit contemporains*, Dalloz, Paris 1964.

<sup>26</sup> Å. MALMSTRÖM, ‘Rättsordningarnas system. Några synpunkter på ett klassifikationsproblem inom den jämförande rättsvetenskapen’ in *Festskrift till Håkan Nial*, Norstedts, Stockholm 1966, p. 368 et seq. For an English version of this study see Å. MALMSTRÖM, ‘The System of Legal Systems. Notes on a Problem of Classification in Comparative Law’ (1969) 13 *Scandinavian Studies in Law* 127–149.

<sup>27</sup> K. ZWIEGERT and H. KÖTZ, above n. 21, p. 65 et seq.

<sup>28</sup> See U. BERNITZ, ‘What is Scandinavian Law? Concepts, Characteristics, Future’ (2007) 50 *Scandinavian Studies in Law* 13–29, at 18–19.

adopted civil codes, which are a characteristic feature of the continental European private laws influenced by Romanist-German models.<sup>29</sup>

Obviously, the validity of every taxonomy in comparative law is limited by both the perspective from which the taxonomy was created, and the criteria on which the taxonomy is based.<sup>30</sup> Zweigert and Kötz's taxonomy certainly fits the purpose of a history of legal formants in classic private law,<sup>31</sup> which in continental European countries gravitate around the civil codes.

The validity of such taxonomies in fields other than classic private law is questionable. For example, if one compares the different modes of impact of fundamental rights on the adjudication of private relationships in Europe, completely different groups of countries emerge. In previous publications, the present author has argued that states that had become totalitarian at some point in the 20th century (such as Germany, Italy, Spain and Poland) belong – with regard to the horizontal effect of fundamental rights – to the same group or legal family, whereas countries such as France, Belgium, The Netherlands and Luxembourg, whose parliamentary democracies in the 20th century did not slip into totalitarianism, follow a remarkably different approach and belong therefore to a different group or family.<sup>32</sup>

Even within classic private law, legal families classifications such as Zweigert and Kötz's one become questionable once the law-in-the-books perspective is abandoned in favour of a law-in-action approach. This is evidenced by the comparative remarks following the national responses to the hypothetical cases both in this volume, and in the other Common Core volumes published so far.<sup>33</sup> After the completion of the national reports of a Common Core book project, when the editors write their comparative remarks for each fictitious case of the questionnaire, the object of comparison are no longer the legal formants but the “operative rules”,<sup>34</sup> i.e. the remedy-based outcomes of the fictitious cases. The comparative remarks normally divide the countries into two or more groups according to the likelihood that in a certain country the remedy

<sup>29</sup> Ibid., pp. 20–21.

<sup>30</sup> See M. SIEMS, *Comparative Law*, Cambridge University Press 2004, p. 84 et seq.

<sup>31</sup> By “classic private law” the author intends either legislation-based private law, or established common law doctrines in contract law, tort law, property law, family law, restitution law, or other fields traditionally included in the notion of private law. See, among others, G. EÖRSI, *Comparative Civil (Private) Law: Law Types, Law Groups, the Roads of Legal Development*, Akadémiai Kiadó, Budapest 1979; M. MÜLLER-CHEN, C. MÜLLER, and C. WIDMER LÜCHINGER, *Comparative Private Law*, Dike, Zürich 2015; and P. BIRKS, *English Private Law*, Oxford University Press 2004.

<sup>32</sup> A. COLOMBI CIACCHI, ‘European Fundamental Rights and Private Law: The Dutch System in the Context of Different Legal Families’ in B. HEIDERHOFF, S. LOHSSE and R. SCHULZE (eds.), *EU-Grundrechte und Privatrecht*, Nomos, Baden-Baden 2016, pp. 203–226.

<sup>33</sup> See for example G. BRÜGGEMEIER, A. COLOMBI CIACCHI and P. O'CALLAGHAN (eds.), *Personality Rights in European Tort Law*, Cambridge University Press, 2010.

<sup>34</sup> M. BUSSANI and U. MATTEI, above n. 1, pp. 339–356.

asked for by the party of a fictitious case would be awarded by the courts. This comparison often leads to completely unexpected groups of countries, which clearly do not match the legal families taxonomies of classic comparative law literature.<sup>35</sup>

For the purposes of this chapter, however, which focuses on the Roman law roots of the legal formants on the (in)validity of immoral contracts, classic comparative law accounts do seem useful. This is because, as stated before, Roman law can certainly be seen as a historical common core both for Scottish law and for the European continental legal systems that Zweigert and Kötz's classic comparative law taxonomy brings together in the "Romanist" and "German" legal families.<sup>36</sup>

Accordingly, the following section will attempt to group the legal systems considered in this volume under a number of (more or less classic) models.

#### 4. LEGAL FORMANTS CONCERNING IMMORAL CONTRACTS IN EUROPE: FIVE MODELS

One may identify five models of legal formants on the (in)validity of immoral contracts in Europe. In the following paragraphs, these models will be put in a logical order, starting with the one most strongly influenced by Roman law, and ending with the one where such an influence can hardly be seen.

##### 4.1. THE CIVIL CODE MODEL

Drawing inspiration from Zweigert and Kötz's taxonomy,<sup>37</sup> one may speak of a "Romanist-German" model, or – more neutrally – of a "civil code model", taking into account the fact that the continental European civil codes (historically developed from Romanist and/or German models) include a general clause of "good morals" as a standard for the assessment of the validity of contracts.<sup>38</sup> In this regard, nowadays there is arguably no difference between Western and Eastern continental Europe: the general contract law rules currently in force

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<sup>35</sup> A. COLOMBI CIACCHI, 'Comparative Law and Governance: Towards a New Research Method' in A. COLOMBI CIACCHI, M. HELDEWEG, B. VAN DER MEULEN and R. NEERHO (eds.), *Law and Governance: Beyond the public-private law divide*, Eleven International Publishing, The Hague 2013, pp. 223–241 at 230, with further references.

<sup>36</sup> K. ZWIEGERT and H. KÖTZ, above n. 21, p. 63 et seq.

<sup>37</sup> *Ibid.*

<sup>38</sup> See the national responses for Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and The Netherlands in this volume, with further references.



in the new EU Member States of Central and Eastern Europe are enshrined in civil codes following Romanist-German models,<sup>39</sup> and contain a good morals clause.<sup>40</sup> The same applies to the Maltese Civil Code. The Maltese legal system is a mixed jurisdiction,<sup>41</sup> but as far as the legislative formants on the invalidity of contracts on grounds of conflict with good morals or public policy are concerned,<sup>42</sup> there is no difference between the Maltese and Italian civil code rules. The formulations of the rules on the illegality and immorality of contractual agreement in most (if not all) European civil codes correspond to late Roman law principles, which can be easily explained since in the Romanist and German legal systems, Roman law was applied as a (residual) source of law at least until the end of the 18th century.

#### 4.2. THE SCOTTISH MODEL

Scottish law is considered a mixed jurisdiction based on a combination of (inter alia) civilian and common law traditions.<sup>43</sup> There is no civil code in Scotland:<sup>44</sup> the civil law element mainly consists in the influence of Roman law (and the commentaries thereto written by civilian jurists)<sup>45</sup> on the works of Scottish legal scholars over the centuries. In particular, the works of Scottish

<sup>39</sup> On the civil codes of the new Central and Eastern European Member States see P. CSERNE, 'The recodification of Private Law in Central and Eastern Europe' in P. LAROCHE and P. CSERNE (eds.), *National Legal Systems and Globalization*, Asser Press, The Hague; Springer, Berlin/Heidelberg 2013, pp. 45–88.

<sup>40</sup> In contrast to most Eastern European civil codes, which still speak of "good morals", the new Polish Civil Code uses the more modern terminology "principles of social coexistence". However, the latter concept is clearly a functional equivalent of the classic good morals clause. See K. SIKORSKA's responses for Poland in this volume.

<sup>41</sup> See B. ANDÒ, 'The Role of Judges in the Development of Mixed Legal Systems: The Case of Malta' (2011) 4 *Journal of Civil Law Studies* 237–260 with further references.

<sup>42</sup> On these see D. ZAMMIT's responses for Malta in this volume.

<sup>43</sup> S. THOMPSON, 'Mixed Jurisdiction and the Scottish Legal Tradition: Reconsidering the Concept of Mixture' (2014) *Journal of Civil Law Studies* 51–91, rightfully notes that the Scottish mixture comprises of more traditions than just civil law and common law: it includes Celtic and udal law, feudal and canon law, EU and ECHR law.

<sup>44</sup> For the discussion on the possible future introduction of a civil code in Scotland see E. CLIVE, 'A Scottish civil code' in H.L. MACQUEEN (ed.), *Scots Law into the 21st Century. Essays in Honour of W A Wilson*, W. Green/Sweet and Maxwell, Edinburgh 1996, p. 82; E. CLIVE, 'Current codification projects in Scotland' (2000) 4 *Edinburgh Law Review* 341; A. RAHMATIAN, 'Codification of Private Law in Scotland: Observations by a Civil Lawyer' (2004) 8 *Edinburgh Law Review* 28–56.

<sup>45</sup> Scottish institutional writers such as Erskine extensively used commentaries to Roman law authored by civilian jurists, although they only rarely quoted them. See K.G.C. REID, 'John Erskine and the Institute of the Law of Scotland', *Old Studies in Scots Law* vol. 5 (Edinburgh: Edinburgh Legal Trust, 2014); Edinburgh School of Law Research Paper No. 2015/26. Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2644284](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644284), at p. 17.

institutional writers such as Erskine and Bell, who commented on Scottish law by making extensive use of Roman law sources, still today constitute an actual source of law applied by Scottish courts. Roman law itself was not applied as an actual source of law in the Scottish courts, but could be used in order to understand or explain the binding Scots principles.<sup>46</sup> Bell's tripartite classification of illegal contracts (firstly, contracts immoral or *contra bonos mores*; secondly, contracts against public policy; and thirdly, contracts usurious)<sup>47</sup> looks quite similar to the classifications of illegal contracts used by jurists within Romanist-German legal systems in the early 19th century, which inspired the formulation of the rules on good morals and public policy laid down in the 19th century civil codes.

### 4.3. THE ENGLISH MODEL

Roman law, and the commentaries thereto written by civilian jurists, also exerted considerable influence on medieval English scholars such as Bracton,<sup>48</sup> whose works then inspired English legal literature and case law across the centuries. Although this influence has been more limited than the impact Roman law has had in Scotland, the Latin concept of a contractual agreement *contra bonos mores* was used by English courts, too. In the 18th century, common law judges refused to enforce contracts which were “a general mischief to the public”,<sup>49</sup> “against the public good”<sup>50</sup> or “*contra bonos mores*”.<sup>51</sup> However, immorality as a ground of unenforceability of contracts has played a rather limited role in England. It constitutes just one of the many headings of the common law doctrine of public policy, and has only been applied in cases concerning sexual immorality.<sup>52</sup> The English common law rules on immoral contracts also apply to Wales and Northern Ireland, and are followed in Ireland as well.<sup>53</sup>

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<sup>46</sup> See L. MACGREGOR's responses for Scotland in this volume (Case 1), with further references.

<sup>47</sup> Ibid., with further references.

<sup>48</sup> H. DE BRACON, *De legibus et consuetudinibus Angliae*, 1235. Bracton incorporated many passages from Roman law without any reference to their origin and altered them where appropriate to reflect variations in the English law – a technique described by Scrutton as “intelligent copying”: T.E. SCRUTTON, *The Influence of the Roman Law on the Law of England*, Cambridge University Press, 1885.

<sup>49</sup> *Mitchel v. Reynolds* [1711] 24 ER 347 at 349, per Lord Macclesfield.

<sup>50</sup> *Collins v. Blantern* [1767] 2 Wils 341 at 350, per Wilmot LCJ.

<sup>51</sup> *Girardy v. Richardson* [1793] 1 Esp 13 at 16, per Lord Kenyon.

<sup>52</sup> On this see Z. MANSOOR's responses for England in this volume, with further references.

<sup>53</sup> The relevant authority in Ireland is the English case *Pearce v. Brooks* [1866] LR 1 EX 213. See A. MCCANN's responses for Ireland in this volume (Case 1).

#### 4.4. THE CYPRIOT MODEL

The Cypriot legal system is a mixed jurisdiction, which never adopted a civil code. Its contract law is based on the English common law of contract, but it is codified in a statute: the Cyprus Contract Law. This statute contains a provision (Article 23) according to which agreements whose consideration or object is unlawful are void. This includes cases where the purpose or consideration is “forbidden by law” or “of such a nature that, if permitted, it would defeat the provisions of any law” or which “the Court regards ... as immoral, or opposed to public policy”.<sup>54</sup> On the one hand, this legislative provision strongly resembles the rules on the unlawfulness of the cause or object of a contract, contained in the civil codes of Romanist origin, whereby the unlawfulness is statutorily defined as contrariety to law, public policy or good morals.<sup>55</sup> On the other hand, however, Cypriot jurists identify the origin of the rule laid down in Article 23 Cyprus Contract Law in the common law principle declared in *Holman v. Johnson*.<sup>56</sup> English case law is highly authoritative in Cyprus, as regards both contract law in general, and the rules on illegal and immoral contracts in particular.<sup>57</sup>

#### 4.5. THE SCANDINAVIAN MODEL

The Scandinavian model is characterised by the absence of civil codes and the presence of a Contracts Act, the content of which has been harmonised for all Nordic countries.<sup>58</sup> This Act includes general clauses that empower the courts to set aside or adjust unreasonable contractual agreements. These clauses, however, are arguably different – both in their legislative formulation and in their practical application by the courts – from the general clauses included in continental European civil codes and stemming from Romanist and German models. A “good faith” clause can be found in the Nordic Contracts Act, but no “good morals” clause.<sup>59</sup> However, the Danish and Norwegian laws do include a general clause on good morals, taken presumably from Roman law.<sup>60</sup> Independent

<sup>54</sup> See N. HATZIMIHAİL’s responses for Cyprus in this volume (Case 1).

<sup>55</sup> See for example the responses for Italy and Romania in this volume.

<sup>56</sup> [1775] 1 Cowp. 341. See N. HATZIMIHAİL’s responses for Cyprus in this volume (Case 1), with further references.

<sup>57</sup> See N. HATZIMIHAİL, ‘Reconstructing Mixity: Sources of Law and Legal Method in Cyprus’ in V. PALMER et al. (eds.), *Mixed Legal Systems, East and West*, Ashgate, Farnham 2015, pp. 75–100, and N. HATZIMIHAİL’s responses for Cyprus in this volume (Case 1).

<sup>58</sup> On the Nordic Contracts Act see T. HLÄSTAD (ed.), *The Nordic Contracts Act: essays in celebration of its one hundredth anniversary*, DJØF Publishing, Copenhagen 2015, with further references.

<sup>59</sup> See the responses for Denmark, Finland and Sweden in this volume, with further references.

<sup>60</sup> See the responses for Denmark in this volume, with further references.

of the types of legal formants applied, the case law and scholarly opinions on unreasonable contractual agreements in the Nordic countries seem to converge to a certain extent. On the one hand, for example, Lando et al. maintain that the law in Sweden and in Finland has developed practically the same approach to immoral contracts as that in Denmark and in Norway.<sup>61</sup> On the other hand, the authors of the responses for Sweden in this volume noted that “[s]ince the beginning of the 20th century, Swedish and other Nordic jurisdictions have been heavily influenced by the idea that law is not a part of morals. This way of thinking has been called Nordic realism and it has had an immense impact on the Swedish legal system.”<sup>62</sup>

The Nordic legal realism, which is a relatively recent philosophical approach,<sup>63</sup> is probably not the only reason for the difference between the Scandinavian model and all other models mentioned in the previous section of this chapter. A more ancient historical phenomenon should have played a major role: the more limited reception of Roman law in Scandinavia.<sup>64</sup>

## 5. CONCLUSION

One may attempt to conclude that the Roman law principles on the invalidity of contractual agreements contrary to good morals constitute a historical common core of the current legal formants concerning immoral contracts in Europe in all countries corresponding to the first four of the above-mentioned five models.

As regards England, Wales and Ireland, the Roman law common core could arguably be seen as a “cryptotype” in the sense of Rodolfo Sacco’s comparative law theory.<sup>65</sup> The crypto-element consists in the hidden, non-referenced, but actually extensive use of Roman law made by early English legal scholars such as Bracton in laying down what they called the law of England.<sup>66</sup> These English law sources, containing Roman law cryptotypes, in turn considerably

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<sup>61</sup> O. LANDO et al. (eds.), *Restatement of Nordic Contract Law*, DJØF Publishing, Copenhagen 2016, §4–12, p. 161: “According to traditional Nordic doctrine, the courts should refuse to try cases concerning immoral contracts. This principle was early stated in Danish (Danish Code 5.1.2) and Norwegian statutory law, and a non-codified principle to the same effect is generally upheld in Swedish, Icelandic and Finnish law”.

<sup>62</sup> A. PERSSON’s and T. INGVARSSON’s responses for Sweden, in this volume (Case 1).

<sup>63</sup> See J. BJARUP, ‘The Philosophy of Scandinavian Legal Realism’ (2005) 18 *Ratio Juris* 1–15 with further references.

<sup>64</sup> On this see D. TAMM, ‘The Nordic Legal Tradition in European Context’ in P. LETTO-VANAMO (ed.), *Nordisk identitet – Nordisk rätt i europeisk gemenskap*, KATTI, Helsinki 1998, p. 15 et seq. See U. BERNITZ, ‘What is Scandinavian Law? Concepts, Characteristics, Future’ (2007) 50 *Scandinavian Studies in Law* 13–29.

<sup>65</sup> R. SACCO, above n. 1, pp. 384 et seq.

<sup>66</sup> H. DE BRACON, *De legibus et consuetudinibus Angliae*, 1235.

influenced the content of several current common law doctrines, including the part of the public policy doctrine consisting in the unenforceability of immoral contracts.

This may also explain the convergence, within Cypriot law, between an English common law principle and a legislative formulation that strongly resembles the rules on the illegality and immorality of contractual agreements contained in the civil codes of Romanist origin.

This Roman law common core is absent in most of the current Scandinavian rules applicable to the cases discussed in this book. Interestingly, the reporters for Sweden noted that many questions of the questionnaire in this Common Core volume were drafted with the assumption that contracts with a root in immoral behaviour should be invalid, an assumption that does not fit to Sweden or other Nordic countries.<sup>67</sup> These country reporters are perfectly right. Both the questionnaire on which this book is based, and the title of the book, mirror the terminological common core of the first four aforementioned models, which does not really suit the fifth.

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<sup>67</sup> See A. PERSSON's and T. INGVARSSON's responses for Sweden, in this volume (Case 1).