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THE UNDERLYING PHILOSOPHICAL AND LEGAL THEORETICAL PROBLEMS OF GENERAL CLAUSES IN ROMAN LAW

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I. Introduction

Both constituents of the expression "general clause" open the door to the observation of interesting philosophical and dogmatic phenomena. On the one hand, the term *clausula* evokes a whole-part relationship; while on the other hand, *generalis* implies a *genus-species* taxonomic category pair. Within the expression of "general clause", these two different systems of reference appear at the same time in a specific relationship with each other, which deserves special attention.

Through the analysis of the relationship of these categories, the main purpose of this paper is to establish a new framework for the better understanding of general clauses with the prospect of providing new, alternative interpretations, which could lay down a firm theoretical basis for the comparative analysis of a specific general clause to be conducted further on.

The examples for this purpose have been selected from Roman law. The social and temporal characteristics of these demonstrative examples do not influence the general validity of the conclusions drawn since they are formulated at a moderately abstract level. The means of legal argumentation could well be derived from any modern legal systems as well; in certain cases reference will be made also to effective legal provisions.

First, the meaning of the two constituents of the expression: "clause" and its attribute, "general" ought to be defined.

At the beginning of Classical Antiquity, the noun *clausula* had no fixed, technical, legal meaning, only as a grammatical, rhetoric expression did it have a certain usage: it referred to an isolated, self-contained part of the text. Also the legal texts preserved this original, grammatical meaning of the term: under *clausula* the decisive phrases of an *edictum*[1], *senatus consultum*[2] or *lex*[3] were understood. This

[1] Ulp. D. 4, 6, 26, 9: *haec clausula edicto inserta est*

[2] Ulp. D. 5, 3, 23 pr.: *clausulam senatus consulti.*

usage of the expression lives on palpably in the European legal terminologies until now.

The other component of the expression, *generalis*[4], an adjective derived from *genus*, was not used frequently in ancient legal texts. When applied, it was mainly used as meaning "generally".[5] It refers to a common source, to the entirety of a taxonomic category.[6] Its noun, *genus*, appeared to be an inevitable concept for constructing systems and definitions already in the ancient times.

Legal argumentations based on the common, everyday usage of "whole", "part", *species*, or *genus* often lead astray since the legal connotations of these words do not fully match their logical or denotative meaning. For instance "part" in legal usage does not always refer to a smaller unit than the "whole" and also, the *species* do not occupy in all cases a lower systemic level than the *genus*.

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[3] *Ait lex: quanti is homo in eo anno plurimi fuisset quae clausula aestimationem habet damni, quod datum est.* (Ulp. D. 9, 2, 21 pr.)

[4] For further informations about *generalis* see Priscianus. Priscianus, *Institutio de nomine et pronomine de verbo*, III, 478, 5.

[5] Gai. D. 1, 7, 2 pr.

[6] *Oxford Latin Dictionary*, 757; Lucretius, 1, 590: *ostendant maculas generalis corpore inesse; valamint D. 34, 2, 19, 10: nam vasorum appellatio generalis est, dicimus vasa vinaria et navalia;* and D.1, 18, 1: *Praesidis nomen generale est eoque et proconsules et legati caesaris et omnes provincias regentes, licet senatores sint, praesides appellantur: proconsulis appellatio specialis est.*

Since general clauses are legal phenomena, before discussing the philosophical and legal theoretical problems inherent in the concept, it is necessary to define what is meant in this paper by "law".

The concept of law applied in this paper is two-faced[7]: on the one hand, it refers to a major system of rules; on the other hand, it signifies the totality of the related human acts.[8] It is therefore equally connected to values bearing only an ideal presence as well as to the empirical reality of everyday life. This duality appears with respect to general clauses in a much stressful way since these norms – similarly to all legal norms but more pronouncedly – function as a bridge between the ever-changing values of everyday life and the relatively stable legal system. In case of these norms, to this external substantive duality an internal substantive duality is attached as well. General clauses also serve as limits of interpretation concerning the norms of a specific norm-aggregation; in other words: the meaning of general clauses unfolds from the mutual collision with other norms. This duplicity leads to the double systemic dependence of general clauses, which question will be addressed in more detail later on.

In this paper I attempt to examine the first question, the position of general clauses in the legal system from a theoretical perspective. As opposed to this approach, investigating their materialization in the real life, on the one hand, would

[7] See SOMLÓ, FELIX, *Juristische Grundlehre*, (1917), Leipzig, p. 123. For Hungarian aspects see KOVÁCS FERENC, *A magyar jogi terminológia kialakulása*, [The development of the Hungarian Legal Terminology], (1964), Budapest, p. 60. A logically based definition is given by SOLT KORNÉL, *Jogi logika. A jog, a nyelv és a valóság*, [Legal logic. The law, the Language and the Reality], I, (1996) Budapest, p. 16.

[8] MOÓR GYULA, *A logikum a jogban*, [The Logic in the Law] (1928) Budapest, p. 2.

require a large-scale processing of data belonging to the field of legal sociology and on the other hand, it would necessarily lead to the metaphysical problem of the relationship between value and positivity.[9]

Within the legal system three different areas can be delineated, which, by their specific characteristics, contribute to the image of general clauses differently. These areas are: the legal order, jurisprudence and the application of law. The fourth branch naturally following from this categorization would be legislation, which, however, in the approach of this analysis is more interesting from the perspective of its product, the legal order. Thus, in this perspective, the realized legal order is meant to presume, quasi immanently incorporate the field of legislation.

Among the above-mentioned, the most important area is the field of the practical application of law. It can be justified theoretically as well that the legal order and legal scholarship are – after all – aimed at serving the fulfilment of the aims of the application of law to the greatest possible extent. Accordingly, the literature on the application of general clauses is greatly extensive and usually concentrates on the following main question: is the general clause the queen of the legal order or rather a most compliant maid?[10] With respect to the application of law, however, it is always a specific, discrete norm (for example the principle of *bona fides* or the principle of *contra bonos mores*) in relation to which it is rewarding to talk about it; in general – due to its specific nature – it is considerably difficult to draw sound conclusions.

[9] MOÓR, *cit.* p. 3.

[10] AMHREIN, URSULA, *Die Vereinbarkeit der gerichtlichen Generalklausel mit der Gewalteinteilung*, (1958) München, p. 88.

Therefore, this subfield will be addressed only to the extent necessary for the purposes of this paper.

Nevertheless, the literature examining the problems brought up by the concept of general clause is much scantier from the viewpoints of the legal order and legal scholarship. The legal order is typically a human product, the ultimate source of which can be found in the wistful, purposeful individual mind striving to fulfil its needs. In this sense, the legal order is an order of thoughts. It necessarily encompasses the basic categories of human thinking, but not with that incontestable consistence and to such a sophisticated extent as the systematization is accomplished by legal scholarship serving the pragmatic aims of the application of law. Thus, the one-sided application of formal logical schemes to the legal order does not bring about the desired outcome many times.[11]

In the case of general clauses, however, the approach from the perspective of the legal order cannot be dispensed with since the concept of general clause places itself through the "clause" into a greater system consisting of the same *genus*. However, to determine the nature, the scope and the systemic level of the *genus* and the nature of the *species* belonging to that specific *genus,* falls within the tasks of jurisprudence. Thus, the examination shall be carried out with keeping the requirements as well as the specific characteristics of the two systems in view.

[11] According to GUTTERIDGE the formal logic plays only a modest role in the legal reasoning. See GUTTERIDGE, HAROLD, *An Introduction to the Comparative Method of Legal Study and Research*, (1949) Cambridge, pp. 108-109.

In the next section the dialectic approach or in other words, the means of categorization will be briefly addressed, since both the whole-part and the *genus-species* conceptual pairs are produced by this operation.

II. The means of categorization

Disintegration into parts belongs to the traditional methods of jurisprudence, which – among other factors – largely contributed to the arising of the occupation with legal rules to the standard of *ars*.[12]

The dialectical method aiming at the scientific production of different categorizations appeared in Roman legal scholarship after the 3rd century AD, mostly conveyed by stoic philosophy. [13] The origins of stoic dialectics can be traced back to

[12] Cicero, *Brutus* 152: *rem universam tribuere in partes*. Further see PÓLAY (1988), p. 96; FÖLDI, ANDRÁS, *Az institutiones-hagyomány a jogi oktatás történetében*, [The Tradition of the Institutiones-System in the Teaching of the Legal Sciences) in: *Festgabe für János Zlinszky*, (1998) Miskolc, pp. 547-.

[13] The mark of the *stoa* is sensible in the following fragment: *res quae sine interitu dividi non possunt.* See SCHNORR, V. CAROLSFELD, *Geschichte der juristischen Person*, (1993) München, pp. 177-; SOKOLOWSKI, PAUL, *Die Philosophie im Privatrecht*, I, (1902) Halle, pp. 111-; HÄGERSTRÖM, AXEL, *Der römische Obligationsbegriff*, I, (1927) Uppsala—Leipzig, pp. 259-; EHRHARDT, ARNOLD, *Das Corpus Christi und die Korporationen im spät-römischen Recht,* SZ 70 (1953) pp. 308-.

the works of Plato and Aristotle.[14] In Plato's dialogue titled *Sophist*, the essence of dialectics is formulated as follows: [15]

Stranger: Should we not say that the division according to classes, which neither makes the same other, nor makes other the same, is the business of the dialectical science?[16]

The aim of the dialectical method is to formulate general propositions *(regulae, principia)*[17] or respectively, to draw up definitions *(definitiones)*.[18] This purpose was sought to be achieved by the division of concepts and legal phenomena to *genus* and *species* and the definition of species and specimens. The novelty of the method stood basically in hierarchical systematization.[19]

[14] See Aristotelés, *Topica* VII; eo., *Analytica posteriora* II.

[15] SCHULZ, FRITZ, *Geschichte der römischen Rechtswissenschaft*, (1961) Weimar, p. 73, and PÓLAY, ELEMÉR, *A római jogászok gondolkodásmódja, Kazuisztika és absztrakció*, [The Thinking of the Roman Lawyers, Casuistic and Abstraction] (1988) Budapest, p. 96.

[16] Platon, *Sophistés* 253 D-E.

[17] The deductive method is emphasized by LEIBNIZ in his work *Nova methodus discendae docendaeque iurisprudentiae*. See STEIN, PETER, *Roman Law in European History*, (1999) Cambridge, p. 140. Further NÖRR, *cit.* p. 58.

[18] PÓLAY, *cit.* p. 44. KRÜGER, SCHULZ, STEIN, HAUSMANINGER take the terms '*regula'* and '*definitio'* as equivalent. See PÓLAY, *cit.* p. 73.

[19] See BÜRGE, ALFONS, *Römisches Privatrecht. Rechtsdenken und gesellschaftliche Verankerung. Eine Einführung*, (1999) Darmstadt, pp. 104-106.

By means of the dialectical epistemology, genera might be identified in two ways: either by differentiation: *διαίρεις* (*diairesis*, *differentia in Latin*) or by the synthesis of the diversity: *συναγόγή (synagógé)*.[20]

For the latter, *diairesis*, an example can be found at a passage of the praetorian *edictum* addressing the possibilities of restoration to original condition in case of persons above the age of twenty-five.[21] The source of law issued by the magistrate states that the praetor shall help all those who were away on behalf of the public interest and due to this reason, were unable to enforce or protect their rights. After pronouncing the basic proposition, the text continues with the examination of individual cases as to whether they fall within the general category of absence on behalf of the public interest.

The other possibility of determining genera is the method of differentiation or distinction[22], which was used to be applied in many disciplines such as linguistics, rhetoric[23], or literary theory.[24]

The method of distinction appears in many of the works of legal scholars as well.[25] The derivation of general rules by distinction is well illustrated in a

[20] Platon, *Sophistes* 253 D

[21] D. 4, 6

[22] The term *'distinctio'* was in use by the glossators. See STEIN, *cit.* p. 65.

[23] Cicero, *Ad Herennium* 1, 4, 6; 1, 8, 12; 1, 2, 2.

[24] Diogenes Laërtius 3, 45-66.

Papinianus-fragment which connects a *responsum (operarum actio […] apud heredem manebit)* given to an individual case *(si patroni filius extrario restituerit ex trebelliano hereditatem)*[26] with a more general principle *(non summoveri heredem […] ex his causis, quae non pertinent ad restitutionem)*[27] by the stressful usage of the attribute *geratim.*

The concept of distinction understood in a wider sense can be further divided into two subcategories: *partition* and *divisio*[28], meaning also *διαίρεσις* in a narrower sense[29].The technical approach towards these two subcategories, *divisio* and *partitio*[30], can be traced back to a rhetorical writing: Cicero's *Topica*.[31]

Divisio refers to the division of genus into species. In this case the division is complete, the totality of the parts equal to the whole since under all genera only a

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[25] G. 1, 188 and Paul. D. 41, 2, 3, 23. Further BREMER 1, 263. In a fragment of Messala *„Patriciorum auspicia in duas sunt divisa potestates."* For the triads see GOUDY, HENRY, *Trichotomy in Roman Law*, (1910) Oxford

[26] Pap. D. 36, 1, 57 pr.

[27] For further examples see SCHULZ, *cit.* pp. 78-79.

[28] According to PÓLAY there was a third definition, the so called *quid est definition*. See PÓLAY, *cit.* p.112.

[29] Cicero, *Topica*, 5, 28, and NÖRR, *cit.* p. 20.

[30] The term *partitio* is used here as a possible form of creation of definitions and not as a type of legates. For the second see KASER, MAX, *Das römische Privatrecht*, I, *Das altrömische, das vorklassische und das klassische Recht*, 2nd ed. (1971) München, pp. 742-743.

[31] The lawyers borrowed very likely their terminology from rhetors and philosophers. For an example see BRÓSZ, RÓBERT, *Die Rolle der Gewohnheit (des Gewohnheitsrechts) im Laufe der Entfaltung und Entwickelung der longi temporis praescriptio(nes)*, (1985) Szeged, p. 142; and GUARINO, ANTONIO, *L'esegesi delle fonti del diritto romano*, I, (1982) Napoli, p. 540.

specific number of species can be drawn. With respect to *partitio*, the whole is being divided into its members (*membra*) where the distinction is complete if the object to be divided is a finite one, a *res finita*. The main difference between the two is that in the case of *divisio* the number of the parts cannot be increased whereas with respect to *partitio,* it is possible to insert new components (such as in the modern Pandecta-system). In addition, it is much more *partitio* than *divisio* that corresponds to the criteria of contemporary theory of science since only *partitio* can secure the self-contained character of the system, the absence of legal loopholes.[32] Nevertheless, *divisio* is still greatly prevalent in the particular streams of legal scholarship, which is a fact reflecting well the eternal weaknesses of jurisprudence which can never be overcome in comparison to more exact disciplines.[33]

The concepts of *divisio* and *partitio* and the schemes of categorization based upon them were not used consistently even in the terminology of Roman law.[34] This can be proved by the fact that in the text used for the establishment of a type of legacy, namely, *partitio legata*, the words *partitor* and *dividito* appear as synonyms.[35]

[32] From the problematic of the whole-parts systematisation other, more actual questions can be drawn. The European integration process is based on the building a whole from parts, turning back the classical *partitio*. See NÖRR, DIETER, *Divisio et partitio: Bemerkungen zur römischen Rechtsquellenlehre und zur antiken Wissenschaftstheorie*, (1972) Berlin, p. 58-.

[33] NÖRR, *cit.* p. 58.

[34] The development of certain terms was deeply influenced by politics, as well. For the example of *patrocinium* see DIÓSDI, GYÖRGY, *A patrocinium egyes kérdései az egyiptomi papiruszok alapján*, (1963) Budapest, p. 186.

[35] UE 24, 25: *„Heres meus cum Titio hereditatem meam pertitor"*. See also KASER, *cit.* p. 745[36].

Sicut singulae res legari possunt, ita universarum quoque summa legari potest, ut puta hoc modo: „heres meus cum titio hereditatem meam partito, dividito"; quo casu dimidia pars bonorum legata videtur: potest autem et alia pars, velut tertia vel quarta, legari. Quae species „partitio"....[36]

Nevertheless, the concepts of *divisio* and *partitio* do not nearly exhaust the possibilities of grouping and definition-constitution. Besides the procedures mentioned above, according to the ancient sources but also with general dogmatic applicability it can be assumed that the division of the appellation *(όνομα)* into its meanings *(σημαινόμενα)* and the *genus* into its singular components were used as well.[37] To the latter a plausible and legally relevant example is given by the names of persons. Names in Roman law were much more direct reflections of the fact that a specific person belongs to a certain *gens*. The *gens* determined the person's *nomen genticulum* while the *praenomen* and the *cognomen* ensured the further concretization of his or her identity.[38]

From the above-stated it appears that the subject-matter of general clauses can be delineated by means of *divisio* since they contain discrete norms specified by their

[36] The end of the fragment is dubious. For a parallel source see Gai. 2, 254: *„quae species 'partitio' legati vocatur*. See FIRA III Nr. 70; Iav. D. 28, 6, 39 pr.; Lab. D. 32, 29, 1; Cicero, *De legibus* 2, 50; id., *Pro Cluentio* 7, 21; id., *Pro Caecia* 4, 12.

[37] TALAMANCA, MARIO, *Lo schema 'genus—species' nelle sistematiche dei giuristi romani*, in: *Problemi attuali di scienza e di cultura. Accademia nazionale dei Lincei, Quaderno 221,* II, (1977) Roma, p. 97.

[38] VISKY, KÁROLY, *Személynevek a római jog világában*, [Personal Names in the World of Roman Law] (1981) Budapest, pp. 192-193.

genus the number of which can be freely increased and decreased as a result of legislative activity.

III. The relationship between the whole and the part

The relationship between the whole and the part appears to be unambiguous; nevertheless, it suffered a great crisis during the '30s of the last century. That was the era of the subsequent emergence of revolutionary discoveries in quantum mechanics, which fundamentally changed the ideas of the modern man about the nature of the part and the whole.

The relativity of the relationship of the whole and the part – although without much consciousness about it - had been present in the field of law for a long time[39], albeit Paulus formulated the following, at first sight logically not objectionable rule as a *regula*: *in eo, quod plus sit semper inest et minus*.[40]

[39] The servitutes can be also seen from the aspect of the whole-parts problematic. Are they separated from the *proprietas* or can be regarded as immanent rights? See DONELLUS, HUGO, *Donelli iurisconsulti commentaria de iure civili*, I, (1589) Francofurti, pp. 426-, and VANGEROW, KARL ADOLF VON, *Lehrbuch der Pandekten*, 7th ed., I, (1863) Marburg—Leipzig, pp. 687-688. For more concise literature see DIÓSDI, GYÖRGY, *A telki szolgalmak és a zálogjog keletkezéséről a római jogban*, [On the Origin of Mortgage and Rural Servitutes in the Roman Law] (1966) Budapest, pp. 91-93; FÖLDI ANDRÁS: *Adalékok a „tulajdonjogi triász" kérdéséhez*, [Contribution to the Question of the Triad in the property Law] Acta Fac. Pol.-iur. Univ. Budapest 42 (2005), pp. 30-. There is also an interesting addition in the Holy Script, see Cor. 1, 13, 10.

[40] Paul. D. 50, 17, 110 pr.

Contrary to this rule of general applicability, Roman legal scholars already in the Late Antiquity would answer positively the following, at first perhaps surprising questions:

- Can the part be greater than the whole?
- Can the part be more expensive than the whole?

And to the following questions, the answer would be definitely negative:

- Does the sum of the parts always equal to the whole? Or vice versa: is the whole always the totality of the parts?
- Does the part have to resemble the whole?

From the posterior answers it is obvious that the legal concept of the part is a greatly confuse, *sui generis* phenomenon, which may contradict the requirements of formal logic and our everyday concepts.

In order to clarify the paradox stated above, I seek to isolate three different meanings of the concept of the part in the legal order, and respectively, in legal

scholarship. The first is the strict part, which refers to a concept of the part which is based on arithmetic proportions. The second is the fictive part, which cannot be encountered in the empirical reality; its separate existence is constituted and regulated by legal norms. The third is the extensive part, which, breaking out from the given frameworks, formatively affects the whole to which it belongs.

The different conceptions of the part entail different problems to which different solutions can be given; in the last end, different parts may trigger different legal consequences.

III. 1. The strict part

Lawyers may address the concept of the part in a strict or arithmetic, in other words in a normative sense. This is the case when the lawyer determines the compulsory portion of a person who cannot be ignored in material terms to be the quarter of his or her legal portion of inheritance. This is also the case when the lawyer calculates the parts of divisible goods[41] or in case of an instalment payment counts out the current portion of the amount to be paid. Also, it falls within this category to count out the interest to be paid after the capital (for instance, Romans used the one-twelfth of the capital as a point of reference[42])[43] but also the same applies to the case

[41] There was no categorisation for divisible and indivisible things. See BRÓSZ, RÓBERT, *Az „osztható" és „oszthatatlan" dolgok fogalma a római jogban*, [The Term of the Divisible and Indivisible Things in the Roman Law] Acta Fac. Pol.-iur. Univ. Budapest 8 (1966), p. 9.

[42] *„XII tabulis sanctum, ne quis unciario fenore amplius exerceret."* See Tacitus, *Annales*, 6, 16. The *uncia* was the one twelweth of the *as*. The Romans gave .an own name for each proportion. See

when the finder's award is determined after the value of the treasure[44]. In addition, also the scholarly categorization of the legal order, a branch of law or other phenomena (for example that of natural persons) pertains to this issue-area.

To the arithmetic utilization of the strict part or the whole-part relationship and the correction of the result achieved by this method, an interesting example is provided by the *lex Fufia Caminia* enacted in 2 BC, which regulated the liberation of slaves and hereby restricted testamentary freedom. According to its provisions, only a specific proportion of slaves could be freed testamentarily. These proportions were determined contrary to the fact that the achieved results were contradictory. Pursuant to Gaius, the *lex* did not affect *domini* possessing only one or two slaves *(ad hanc legem non pertinet)*[45]. Ulpianus did not even refer to those slave-holders.[46] As a result, both of them started the discussion with reference to *domini* possessing at least three slaves. In Ulpianus's account, the marginal numbers are specified inconsistently since they are added up to both volumes. This could be carried out without significant consequences since these marginal numbers in many cases could not be divided by the new proportion by which it was made clear that the volumes were not closed.[47]

MARTON, GÉZA, *A római magánjog elemeinek tankönyve. Institúciók*, [A Study-Book of the Institutions of Roman Private Law] 4th ed., (1937) Debrecen, pp. 199-200[1].

[43] The *partitio legata* was a special kind of division. See Pomp. D. 30, 26, 2; Gai. 2, 257; UE 25, 15; Theoph. 2, 23, 5.

[44] A deeper analysis is given by VISKY, KÁROLY, *Kincs és kincstalálás*, [Treasure and Treasure-trove] JK 37 (1982), pp. 25-29. For the antic regulations see I. 2, 1, 39 and C. 10, 15, 1.

[45] Gai. 1, 43

[46] UE 1, 24

[47] This *lex* was reconstructed on a different way by BESSENYŐ, ANDRÁS, *Római magánjog I. A római magánjog az európai jogi gondolkodás tükrében*, [Roman Private Law] 2nd ed., (2000) Dialóg Campus Kiadó, Budapest—Pécs, p. 224.

The content of the *lex* can be reproduced as follows: the *testator* having three slaves could free only two of them whereas in case of four to ten slaves maximum the half of them could be liberated. With respect to slaves the number of varying from ten to thirty, the regulation allowed for the liberation only of the one-third; in case of thirty to one-hundred slaves, the one-fourth could be freed. Between a hundred and five-hundred slaves the permissible proportion that could be liberated in the testament was one-fifth, although the number of slaves freed testamentarily could not exceed one-hundred. The regulation held to these marginal numbers and the steadily increasing proportions despite the fact that they lead to mathematical contradictions. For instance, in arithmetic terms the slave-holder who possessed twelve slaves could have freed four of them in opposition to the slave-holder in the possession of ten slaves in which case even five of them could be liberated. Due to these contradictions, Gaius and Ulpianus were compelled to give an explanation: if the number of slaves calculated upon the proportion prescribed by the law do not reach the maximum of the number of slaves that can be liberated in the prior volume, then this maximum will be authoritative as long as it is not exceeded by the new proportion of the new volume.[48]

To illustrate the interpretational differences, moreover, difficulties created by this arithmetical obscurity in course of time, it is sufficient to review the sources conveying the *lex Fufia Caminia*, which exhibit remarkable differences if compared to each other:

[48] See PS 4, 14, 4

The volume of slaves according to Gai. 42-46:[49]	*1-2*	3-10	11-30	31-100	101-500	501=<
The volume of slaves according to PS 4, 14:		2-10	10-30	30-100	100-500	501=<
The volume of slaves according to UE 1, 24:	3	4-10	10-30	30-100	100-500	500<
The proportion which can be liberated:	-	$^1/_2$	⅓	¼	$^1/_5$	-
The number of slaves which can be liberated according to the proportion:	1-2	2-5	3-10	7-25	20-100	-
The number of slaves which can be liberated de facto:	1-2	2-5	5-10	10-25	25-100	<100

It is very likely that that the *ratio legis* had been the stabilization of the rapidly decreasing number of slaves. The *princeps* who was standing behind the legislative organ, by virtue of the respect towards property, decided to regulate only the *mortis causa* liberations and left the other kinds of manumissions intact. Probably the

[49] Gai. 1, 42-46. The 12th page of the *Codex Veronensis* can not be read. The interpretation of the act was completed by HUSCHKE on the basis of Gai. Epitome 2 pr. See HUSCHKE, PHILIPP EDUARD, *Gaii institutionum iuris civilis commentarii quattuor*, in: *Iurisprudentiae Anteiustinianae quae supersunt*, 5th ed., (1885) Leipzig.

princeps's reason to intervention was based on the already existing practice of regulation in different proportions with respect to the field of *mortis causa* legal transactions.[50] (For this matter, it is sufficient to think of the proportions introduced by the *lex Falcidia* in 40 BC.) Thus, the *princeps* kept to the different proportions in this case as well for the sake of the legitimacy of the act, despite the fact that the sequence produced in this way was contradictory in terms of mathematics and owning to this, it had to be corrected in each step. That strict parts were, indeed, arbitrary from the perspective of law is well supported by the fact that Justinianus had repealed the act[51] in question. Although the justification of the repeal argues on behalf of humanity, nevertheless, Justinianus's decision may have been influenced by the unreasonableness of the provisions as contained by the *lex Fufia Caminia* as well.

III.2 The fictive part

The direct opposite of the division into strict parts is the second case, where the part does not even exist tangibly. In this case lawyers mean a fictive, ostensible part under the concept of the part, for example this is the case with respect to *condominium* or collective ownership when the proportions of the co-owners are referred to as *pro parte – pro indiviso* proportions.[52] Even though the proportions of the co-owners physically extend to the whole of the object, still, arithmetically, it can be defined only in terms of one specific proportion.[53]

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[50] This analogy is emphasized by GUARINO as well. See GUARINO, ANTONIO, *Diritto privato romano*, 9th ed., (1992) Napoli, p. 686.

[51] I. 1, 7

[52] Q. Muc.-Paul. D. 50, 16, 25, 1; Cels.-Ulp. D. 13, 6, 5, 15; Ulp. D. 45, 3, 5; Seneca, *De beneficiis* 7, 12.

[53] See KASER, *cit.* p. 411.

In the second case when fictive parts are applied, it is not the fact of using specific, mathematic proportions but rather the absence of such proportions, which leads or had lead to difficulties. For example, the reasonable legal judgement[54] of the public weal, which can be viewed as the property of the whole community and not of single citizens, had been a difficult issue already in the ancient times. Concerning the use of certain, jointly used objects, such as baths, halls or squares, the individual responsibility for damages was *in solidum*, which means that it extended to the total amount of the damage.[55]

There is another case which can be explained specifically by referring to the antique social relations. It concerned the initiation of a noxal action against one of the owners of the slave which was the object of collective ownership. In this situation arose the question that whether the owner, who has only a *pro parte* and, naturally, *pro indiviso* proportion with respect to the slave, shall pay compensation to the co-owners in case of giving up the slave in *noxa* or not.[56]

The judicial *adjudicatio* determining the case of disputed plot-borders might well be for the benefit of more co-owners (where the ostensible controversy is solved by Paulus by means of attaching the borders more to the plots than to the persons) but when the plot is owned by the co-owners *pro indiviso*, the adjudicated part of the plot

[54] Marc. D. 1, 8, 6, 1

[55] Ulp. D. 13, 6, 5, 15

[56] Gai. D. 2, 9, 4

cannot be divided among them[57]. Thus, their fictive part of the collective property cannot materialize physically, not even with respect to increment.

The distinctive characteristics of the fictive part are made absolutely clear in the case when two carts are rented or loaned for use by two persons. How can the responsibility be divided between these two persons in this case? It is obvious that both of them cannot use both carts at the same time and it cannot be stated as well that one of them would be responsible only for one of the carts and so the other. In this case both objects are in the proportionate, but indivisible detention of the entitled.[58]

III.3. The "extensive" part

Third, the legal order also includes the concept of the part in an extensive sense, for example in the case of more valuable accessory things.

According to an Ulpianus-fragment, the pictures painted to the panels of the ceiling and the marble carvings constitute a part of the house, that is, of the real estate:

[57] Paul. D. 10, 1, 4, 5-6

[58] Ulp. D. 13, 6, 5, 15

Quae tabulae pictae pro tectorio includuntur itemque crustae marmoreae aedium sunt.[59]

An interesting problem arises when the costumer intends to buy the real estate only because of these ornaments. In this case the accessory - the painting or the marble carving - is of greater significance from the perspective of the customer's intention than the main object, the house. The part outgrows the whole in its importance; however, since the house being the main object incorporates the accessories as well, it is the house which will significantly determine the accessories' legal position.[60] Therefore, a contract of sale made with respect to the house will be valid independently of the fact that the value of the accessory ornaments may remarkably exceed the value of the house:

nec refert, quanti sit accessio, sive plus in ea sit quam in ipsa re cui accedat an minus: plerasque enim res aliquando propter accessiones emimus, sicuti cum domus propter marmora et statuas et tabulas pictas ematur.[61]

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[59] Ulp. D. 19, 1, 17, 3

[60] Ulp. D. 19, 1, 17, 3 és Cels. D. 6, 1, 38. See PÓLAY, ELEMÉR, *A személyhez kapcsolódó egyes eszmei javak magánjogi védelmének nyomai a római jogban*, [The Marks of the Protection of Certain Personal Rights in the Roman Civil Law] JK XLII (1987)/3, 151, and VISKY, KÁROLY: *Festők, szobrászok és alkotásaik a római jog tükrében*, [Painters, Sculptors and Their Products in the Mirror of Roman Law] AT 1968 XV 2, 195[26]. See also BONFANTE, PIETRO, *Corso di diritto romano. La proprietà*, II, (1996) Milano, p. 84, and CALABI LIMENTANI, IDA, *Studi sulla società romana: il lavoro artistico*, (1957) Milano, p. 119. Cited by VISKY, *cit.* 195[26].

[61] Paul. D. 18, 1, 34 pr. PÓLAY, ELEMÉR, A *személyiség polgári jogi védelmének történetéhez. Iniuria-tényállások a római jogban*, [To the History of the Protection of Personality in Civil Law] AUSz 30 (1983)

The condition included in a legal transaction can be seen as an extensive part as well. Although the *condicio* constitutes a specific, isolated part of the whole of the legal transaction, still, it influences the effectiveness of the whole transaction. The examination from the perspective of the whole-part relationship leads to new observations in this field as well. If the original legal transaction is complemented by a condition, despite the identity of the parties, a *novatio* occurs provided that the condition eventuates. If the specified condition does not come about, the original transaction remains "valid".[62] Thus, the legal situation is contingent on the materialization of the condition: in this situation it is uncertain whether the original transaction will perish or not as a result of the *novatio*. The *condicio* therefore functions as a gate between the original and the new transaction. According to contemporary dogmatic findings, the condition is considered to be such a circumstance which influences the effectiveness of the legal transaction.[63] In the case in question, however, it appears that it is rather the validity or the invalidity of the legal transaction which is determined by the condition. This statement, of course, does not touch upon the soundness of modern validity theories; it only seeks to point

[62] Gai. 3, 179

[63] See FÖLDI, ANDRÁS—HAMZA, GÁBOR, *A római jog története és institúciói*, [The History and Institutions of Roman Law] 13th ed., (2008) Budapest, p. 397, further BENEDEK, FERENC, *Római magánjog, Dologi és kötelmi jog*, 2nd ed., (1995) Pécs, p. 151. More carefully KASER, MAX—KNÜTEL, ROLF, *Römisches Privatrecht*, 15th ed., (2005) München, p. 65, and HAUSMANINGER, HERBERT—SELB, WALTER, *Römisches Privatrecht*, 9th ed., (2001) Wien—Köln—Weimar, pp. 201-202. For diverse view see FLUME, WERNER, *Rechtsakt und Rechtsverhältnis, Römische Jurisprudenz und modernrechtliches Denken*, (1990) Paderborn, pp. 120-. Cited by KNÜTEL—KASER, *cit.* p. 65.

to the conceptual and, in part due to this, theoretical confusion concerning the field of validity which was prevalent in Roman law.[64]

III.4. Summary

After having reviewed the different approached in relation to the concept of the part, the question rightly arises: under which category do general clauses as parts of a legal norm fall?

Essentially, general clauses can be conceptualized as such parts (clause) of a source of law, which, with certain restrictions as expressed by the "general" attribute, may have a determinative influence with respect of the whole of the given source of law.[65] For example, a contract may become invalid because of the clause on fraudulent practices or the bona fide clause may, in certain cases, refine the interpretation of many of the norms deriving from the given legal source. Therefore a

[64] On the theoretical uncertainty see SIKLÓSI IVÁN: *A jogügyleti hatályosság elméleti problematikája, különös tekintettel a végrendelet visszavonásának dogmatikai megítélésére*, [The Theoretical Problem of the Effectiveness of Legal Transactions, with Special Focus on the Theoretical Estimation of the Renouncement of Testaments) Acta Fac. Pol-iur. Univ. Budapest 41 (2004), p. 74. Roman and modern problems of the *condiciones* are touched by ZIMMERMANN. See ZIMMERMANN, REINHARD, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, (1996) Oxford, pp. 716-741. And TRABUCCHI, ALBERTO, *Istitituzioni di diritto civile*, 43th ed., (2005) Milano, p. 143. At least LARENZ, KARL—WOLF, MANFRED, *Allgemeiner Teil des Bürgerlichen Rechts*, 9th ed., (2004) München, pp. 913-.

[65] The expression *ex generali clausula* is written by Ulpianus (D. 4, 6, 26, 1) and by his pupil, Modestinus (D. 4, 6, 33 pr.).

legal proposition can be classified as a general clause if, as elaborated above, it stands in an extensive relationship with the whole.

The most important consequence of this result is that a specific general clause can only be interpreted in each case by considering the whole of the given source of law.[66] If at first sight substantially identical general clauses of different legal orders are subjected to a comparative analysis, it may lead to a false conclusion if we ignore the context in which they are embedded. Thus, general clauses are system-dependent.

III. The relationship of *genus-species*

The other component of the expression "general clause", the "general" attribute directs attention to the *genus-species* relationship. In the next sections I will seek to review the general philosophic and legal problems raised by these categories, and then, I will attempt to discuss the relationship of the *genus-species* and the whole-part conceptual pairs with respect to their potential points of connection.

III.1 Philosophical problems raised by the *genus-species* relationship

In course of the legal analysis of the essentially philosophical categories of genus and species, it is worth mentioning the philosophical findings related to them.

[66] See SCHMIDT, RICHARD, *Allgemeine Staatslehre*, I, (1901) Leipzig, pp.170-171. Cited by MOÓR, *cit.* p. 9.

Although the invocation of philosophy in the process of the application of law is a controversial issue[67], nevertheless, in certain cases already Roman legal scholars referred to philosophers in their decisions[68]. In addition, the two disciplines intersect at several points with respect to their subject-matters[69] and also, it is beyond doubt that philosophy as a discipline has impacted in many aspects on Roman jurisprudence and by its transmission, on universal legal scholarship as well.[70]

The genus is a more general concept occupying a higher systemic level, which clasps the subordinate concepts but may become a building block of a higher genus as well.[71] This taxonomic relativity is also expressed within the field of jurisprudence. Roman lawyers who occupied themselves with pragmatic issues had not dealt with the definition of the ultimate starting point so their categorizations with

[67] WINKEL, LAURENS: *Le droit romain et la philosophie grecque. Quelques problèmes de méthode*, TR 1977 (65) 377.

[68] Alf. D. 5, 1, 76; Marc. D. 1, 3, 2; D. 21, 1, 18 pr

[69] Gellius, *Noctes Atticae* X, 22, 1-2.

[70] The dispute on the relationship between philosophy and law has its origin by Ulpianus in D. 1, 1, 1, 1. On this question see MAYER-MALY: *„Jurisprudenz ist mehr als Rechtsanwendung; praktische und wirkliche Philosophie"*. See MAYER-MALY, THEO, *Recht und Philosophie*, in: EBERT, KURT (Hrsg.), *Festschrift Hermann Baltl zum 60. Geburtstag dargebracht von Fachkollegen und Freunden* (Forschungen zur Rechts- und Kulturgeschichte 11), (1978) Innsbruck, pp. 327-348. Cited by WINKEL,*cit.* p. 379. According to WALDSTEIN: *„Ulpianus deutet darauf hin, dass seit Plato und Aristoteles Sophistik (Scheinweisheit) und Philosophie einander gegenüberstehen."* See WALDSTEIN, WOLFGANG: *Römische Rechtswissenschaft und wahre Philosophie*, Index 22 (1994) pp. 31-45.

[71] PRECHTL, PETER—BURKARD, FRANZ-PETER, *Metzler Philosophie Lexikon, Begriffe und Definitionen*, (1999) Stuttgart—Weimar, s. v. *Gattung*.

respect to genus are valid only within the given context.[72] Owning to this, the *genus* and *species* expressions appear in the available sources as such synonyms which are mutually interchangeable. An illustrative example is given to this phenomenon by Gaius's classification[73] of obligations where *species* appears as a superior category in comparison to *genus*. This relativity is a characteristic of contemporary legal scholarship as well.[74]

Abstraction reaching to increasingly higher levels leads finally to the highest genus (*genus summum*)[75], to the supreme existent[76]. The genus is therefore inherent in the specific species, which partake in its general essence and thus, represent more general common features[77]. At this very point of partaking can be grasped the intersection of the *genus-species* and the whole-part problems. Theoretically it can be justified when comparing specimens that the *tertium comparationis* will be system-

[72] This method is not scientific. The *„ (...)Importance of formulating precise questions and of choosing one's standing point"* emphasized by RAZ, JOSEPH, *The Problem about the Nature of Law*, in: FLØISTAD, GUTTORM, *Contemporary Philosophy, A New Survey*, III, (1982) London, p. 107.

[73] Gai. 3, 88-89

[74] The classification is always occasional: *bloss willkürlich; jeweils nur relativ zu einem bestimmten Gesichtspunkt*. See HÜGLI, ANTON—LÜBCKE, POUL, *Philosophielexikon*, (1997) Hamburg, s. v. *Gattung*. *„Merely conventional; essential to thought"* – stated by MACGREGOR. See MACGREGOR, GEDDES: *Dictionary of Religion and Philosophy*, (1989) New York, s. v. *genus*.

[75] *„Itself not serving as a species."* See BLACKBURN, SIMON: *The Oxford Dictionary of Philosophy*, (1994) Oxford, s. v. *genus*.

[76] EISLER, RUDOLF, *cit.* s. v. *Gattung*

[77] *„Class of things that share a common nature"*. See BUNNIN, NICHOLAS—YU, JIYUAN, *The Blackwell Dictionary of Western Philosophy*, (2004) Malden—Oxford—Carlton, s. v. *genus*. Ont he philosophical background of modern legal reasoning see MAUTHER, THOMAS, *A Dictionary of Philosophy*, (1996) Oxford—Cambridge, s. v. *genus*. *„Class of things that share a common nature"* .

dependent, which means that it will depend on the genus, on the superior category which is placed above the specimen to be compared within specific systems.[78] Specimen may exhibit their specific characteristics only in their relation to the given genus. The comparison is made somewhat more difficult by the fact that specimen may differ in secondary, not genus-specific characteristics.[79]

The question arises whether it is possible to assume a superior genus above general clauses or general clauses occupy the top-level of the taxonomic pyramid as a kind of *universalia* of law? It appears that the answer to the latter question is negative: for example for Roman legal scholars, equity (*aequitas*) served as a superior category.[80] The praetor gave assistance to the absent person by invoking a

[78] IANNONE, PABLO A., *Dictionary of World Philosophy*, (2001) London—New York, p. 143, valamint KLAUS, GEORG—BUHR, MANFRED (Hrsg.), *Philosphisches Wörterbuch*, (1975) Leipzig, s. v. *Gattung*. The same thesis can be found by HEGEL, as WINDELBAND stated it: *„[Der Begriff] erst im Zusammenhange mit den übrigen und durch die Art seiner Einfügung in das Ganze seinen wahren Wert erhält."* See WINDELBAND, WILHELM, *Lehrbuch der Geschichte der Philosophie*, 14th ed., (1948) Tübingen, p. 517. And VORLÄNDER, KARL: *Geschichte der Philosophie*, (1932) Berlin—Charlottenburg, p. 399: *„Jede Erscheinung deutet vermöge ihrer Eingegrenztheit notwendigerweise über sich selbst hinaus"*. Important difference, however, that HEGEL regards history as a continual process, which realises itself in time. In contradiction, the time does not play here an important role. Acording to HEGEL there is no such a thing as time, it is only a delusive phenomenon of the restricted perception of us. See RUSSEL, BERTRAND, *History of Western Philosophy*, (2002) London, p. 705.

[79] SCHMIDT, HEINRICH, *Philosophisches Wörterbuch*, (1982) Stuttgart, s. v. *Gattung*. And RUSSEL, *cit.* p. 447.

[80] The hidden set of values in the constitution are regarded by SÓLYOM as being prior to the general clauses. See SÓLYOM, LÁSZLÓ, *Alkotmányértelmezés az új alkotmánybíróságok gyakorlatában*, [Interpretation of the Constitution in the Praxis of the Constitutional Courts] in: VIZI E. SZILVESZTER (szerk.): *Székfoglalók 2001, Társadalomtudományok*, [Inaugural Lectures 2001,

general clause (which in the present case refers to the first known general clause in universal legal history) because his *aequissimum erat subveniri*[81] intervention was considered to be equitable. Thus, the general clause was applied only for the sake of the superior principle of equity.

Genera cannot be thought of as concrete existents, they can be observed only with respect to single individuals.[82] Within the concept of the general clause, however, the Aristotelian categories of substantial *(to ti en einai)* and collective concepts *(katholon)* merge. Although general clauses substantially qualify as genera (as indicated by their denomination as well), formally, they are endowed with an autonomous presence as sources of law. In addition, their legal content unfolds fully in specific cases in the course of the application of law.

The deduction[83] inherent in the philosophical approach as elaborated above is in direct opposition with the essentially inductive method applied by Roman legal scholars. It comes by no surprise, however, that the case-based Roman legal

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Social Sciences] (2005) Budapest, p. 467. And NOWAK, CARSTEN, *Die praktische Bedeutung der Generalklauseln und unbestimmten Rechtsbegriffen in den grossen Kodifikationen der Deutschen Demokratischen Republik*, (1993) Köln, p. 5.

[81] Ulp. D. 4, 6, 21, 2

[82] *„Sie* [scil. die Gattungen] *begreifen all dies Besondere unter sich, sie gelten dafür."* See WINDELBAND, WILHELM, *Enzyklopädie der philosophischen Wissenschaften*, I, p. 59. Cited by EISLER, RUDOLF, *cit.* p. 456. And HONDERICH, TED (ed.), *The Oxford Companion to Philosophy*, (1995) Oxford—New York, s. v. *species.* This thesis was heavily attacked by the realists, see HÜGLI, ANTON—LÜBCKE, POUL, *cit.* p. 232.

[83] According to STOCKHAMMER we can establish the *genus* only in deductive way. See STOCKHAMMER, MORRIS, *Philosophisches Wörterbuch*, (1980) Essen, s. v. *Gattung*.

scholarship reached its peak of evolution when the discrete decisions were delivered with moderate consideration of the basic propositions of Greek philosophy as well.[84] This observation is valid despite the fact that the classic era of Roman jurisprudence coincided with a rather obscure period of Greek philosophy.[85] Later on, the *regulas* summarized in the last title[86] of the *Digesta* signified the beginning of a new, deductive approach[87], which reached one of its zeniths by the established application of general clauses in the 19th-20th century.

III.2. The *genus-species* relationship as a problem in jurisprudence

Among the numerous[88] methods of scientific definition-building, the method of *genus proximum* aims at locating the proximate superior genus.[89] Characteristically, those Roman legal scholars (such as Pomponius or Gaius) dealt with the genus-

[84] See KUNKEL, WOLFGANG—SCHERMEIER, MARTIN, *Römische Rechtsgeschichte*, 13th ed., (2001) Köln—Weimar—Wien, p. 140, and WINKEL: *cit.* pp. 373-384.

[85] See WINKEL, *cit.* pp. 373-384.

[86] D. 50, 17

[87] STEIN, PETER, *Regulae iuris*, (1966) Edinburgh; SCHMIDLIN, BRUNO, *Die römische Rechtsregeln*, (1970) Köln—Graz, 1970; id., *Horoi, pithana und regulae*, *Zum Einfluß der Rhetorik und Dialektik auf die juristische Regelbildung,* ANRW II. 15, (1976) Berlin—New York, pp. 101-129; id., *Regulae iuris, Standard, Norm oder Spruchregel*, in: *Festschrift Max Kaser*, (1976) München, pp. 91-119. NÖRR, DIETER, *Spruchregel und Generalisierung*, SZ 90 (1972), pp. 18-93.

[88] There are sixteen different methods of definition according to IANNONE. See IANNONE, PABLO A., *cit.* p. 143. In the Middle Ages the *genus—species* was one among the *praedicabilia*, ie. *quinque voces (genus, species, differentia, proprium, accident).* Aristotel, *Topica* IV, 101 b 17-25: *horos, genos, diaphora, idion, sumbebekos*. Porphyrius and later BOËTHIUS changed the *horos* for *species*.

[89] AUDI, ROBERT, *The Cambridge Dictionary of Philosophy*, (1995) Cambridge, s. v. *genus*.

species problem more extensively, who attempted to systematize the casuistically worked-out legal material and to define the related concepts. These scholars had to apply this philosophical-theoretical conceptual pair to empirical, lifelike materials.

The word *genus* and its declinations appear as definite instruments for system-building in the school-book of Gaius[90], which, compared to other available sources, exhibits such didactic values as a perspicuous structure and clear definitions.[91] Each thematic part of Gaius's book starts with introductory sections and contains a great number of clearly presented concluding references. One of these multi-tiered structures can be found in the part dealing with the legal position of persons. In the fragment[92] in question Gaius introduces systemic shifts with the polysemantic word *rursus* and establishes a deeply-articulated, four-tiered scheme: persons are either free or slaves. If they are free, they have either born free or are liberated. Within the latter category they may be Roman citizens, persons with Latin Rights or *dediticii*. The word genus is only used in case of the third category referring to liberated persons: *libertinorum tria sunt genera*[93]. This may be so because of the need to divide the upper category into more than two parts for the first time, however, it can be well demonstrated as well that the employment of the noun *genus* for definition had not been attached strictly to a specific systemic level: it functioned only as an occasional means for more sophisticated language-usage.

[90] LARENZ, KARL—CANARIS, CLAUS-WILHELM, *Methodenlehre der Rechtswissenschaft*, 3rd ed., (1995) Berlin—Heidelberg, p. 263.

[91] MANTHE, ULRICH (Hrsg.), *Gaius Institutiones. Die Institutionen des Gaius,* (2004) Darmstadt, p. 21.

[92] Gai. 1, 9.

[93] Gai. 1, 9

The systemic relativity of general clauses as illustrated above can be of great significance in the comparison of general clauses of different legal orders.

IV. The interconnectedness of the *genus-species* and the whole-part relationships

Since the whole-part and the *genus-species* relationships appear together in the expression of "general clause", it requires further examination to define their relationship more precisely. The primary task in this case shall be to clarify whether there is a substantial difference between *genus* and *totus* on the one hand and *pars* and *species* on the other in order to examine if it is possible at all to talk about their interconnectedness or rather they should be handled as synonyms.

Already Cicero had pointed out that the part and the species shall not be replaced by one another.[94] The most convincing theoretical argument was actually presented by BOETHIUS by pointing to the following correspondence: if the *genus* perishes, so do the *species*; however, if only the *species* perish, the *genus* may subsist. With respect to the whole and the part, the situation is reversed. If the whole perishes, the parts can still maintain their existence whereas with the ruination of the parts, the whole vanishes as well. The whole and the *genus* are clearly marked off in the works of SPINOZA as well, who concludes in the course of his investigations of the divine nature that to a specific genus only separate parts of the same species may

[94] Cicero, *Topica* 7, 31. Cicero itself confused the two categories. See Cicero, *Orator* 33, 117).

belong in opposition to the whole, which consists of parts belonging to different species and is constituted by their fusion. [95]

The following three cases are the most relevant with respect to the possible interconnections of the two category-pairs:[96]

1. from same specied parts emerges a whole which belongs to the same species as well
2. from different specied parts emerges a whole which belongs to either of the species of the constituent parts
3. from different specied parts a whole comes into existence which belongs to a new, distinct species

Two from the above-mentioned three variants are mentioned by Pomponius as well:

tria autem genera sunt corporum, unum, quod continetur uno spiritu et Graece ἡνωμένον vocatur, ut homo tignum lapis et similia: alterum, quod ex contingentibus, hoc est pluribus inter se cohaerentibus constat, quod συνημμένον vocatur, ut

[95] The creations can not belong to the very substance of God, though they unify into one in Him. See SPINOZA, BARUCH, *Korte Verhandeling van God, de Mensch und deszelfs Welstand,* (1677), 1, 2.

[96] See TALAMANCA, *cit.* p. 97.

aedificium navis armarium: tertium, quod ex distantibus constat, ut corpora plura non soluta, sed uni nomini subiecta, veluti populus legio grex. [97]

IV. 1. When same specied parts constitute a whole which belongs to the same species

The first category consists of cases where the corpus is homogeneous (or in other words it has one soul only - *unus spiritus*) such as a man[98], a timber or a stone. Logically, certain agglomerations of things such as *corpores ex distantibus* fall within this category as well. In the case of a *corpus ex distantibus* the parts are united under a common name, such as in the example of a herd or a library.

IV. 2. When different specied parts constitute a whole which belongs to either of the species

To the second category falls the *corpus ex contingentibus*. In this case the different specied parts of the whole constitute a whole belonging to one of the different species, such as in the example of a ship or a cupboard. The whole therefore mean more than the mere totality of its parts.[99]

[97] Pomp. D. 41, 3, 30 pr.

[98] According to Alfenus Varus the human being is not homogeneous. See D. 5, 1, 76.

[99] See KASER, p. 383. In the case of Saufeius there were diverse categories and answers. See D. 19, 2, 36. On this problem see BESSENYŐ, ANDRÁS, *Das Rätsel der actio oneris aversi: Eine Exegese*

In terms of the legal consequences it falls within this category as well the case when the contracting parties enter into a contract with respect to a golden bracelet but later it turns out that it is made of copper which is only coated with gold. In this context one (the gold) part of the constituent parts (gold and copper) determines the whole of the legal transaction including the fate of its object (namely that which party will the bracelet's owner be). Although Ulpianus, a legal scholar who investigated this matter acknowledged that the parties had been mistaken at the conclusion of the contract, he considered the contract to be valid. According to his view, the mistake of the parties was not substantial since the material of the bracelet contained some gold indeed, therefore their *error* does not qualify as an *essentialis et tolerabilis error*. Thus, the mistake had several adverse effects: the contract came into existence contrary to the obvious interests of the buyer.[100]

IV. 3. When different specied parts constitute a whole which belongs to a new, distinct species

To the third category in which two different specied parts constitute a new specied whole, the most plausible example is provided by the confusion of coequal things and the oft closely related aspect of processing (*specificatio*). The species of the things which merge together are decisive in this case as well with respect to the

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von D. 19, 2, 31, in: *Iura antiqua - iura moderna : Festschrift für Ferenc Benedek zum 75. Geburtstag*, (2001) Pécs, pp. 23-55, and FÖLDI, ANDRÁS: *Kereskedelmi jogintézmények a római jogban*, [Commercial Legal Institutions in Roman Law] (1977) Budapest, pp. 64-67.

[100] Ulp. D. 18, 1, 14

legal position of the so-constituted thing. If someone mixes wine with honey, the so achieved honey-wine will belong to the mixer's property. If, however, somebody alloys gold with silver, since the alloy of these metals can be dissolved into its components again, the owner of any of the parts may rightly claim his or her property from the processor.[101]

IV. 4. The effect of temporal changes

The legal position of those same specied parts which formerly belonged to a certain whole which then fell apart is not without legal significance even after the disaggregation. If we entrust somebody with the buying of a collectively owned real estate in which the person entrusted is a co-owner, the following question arises: how shall the price after the proportion of the real estate be determined which is owned by the entrusted person? According to the inventive *responsum* given to the matter, in these cases, for his or her proportion the entrusted is entitled to the average value of the prices to be paid after the other parts of the real estate.[102]

The alteration of the parts does not affect the whole or its legal position if the altered parts belong to the same species.[103] A legion remains the same legion even if new soldiers are recruited to fill the ranks of the deceased; the state remains the same state as well despite the fact that not the same persons make it up as a hundred years

[101] I. 2, 1, 25. For an older view see G. 2, 79.

[102] Ner. D. 17, 1, 35 és Iav. D. 17, 1, 36 pr. The parts are belonging together. See the case of *derelictio*. Mod. D. 41, 7, 3.

[103] In contradiction with KASER, *cit.* p. 383. Alf. D. 5, 1, 76.

ago. The same can be stated about the ship which had been renewed several times during the long years of usage, even if none of its planks resemble the original vehicle. According to the ancient perception, the human body is constituted by atomic particles which are shifting about every day. In this view, human beings as biological entities are in a permanent change; still, it cannot be asserted that their personality or hence, their legal status would change as well from a legal point of view.

IV. 5. Summary

The clause is a legal norm functioning as a part which accommodates into the context of legal regulation, appearing as the whole. In this sense, the clause is one of the same kind of parts of this broader regulative environment, which is – as it was illustrated above – extensive in nature. With respect to its dogmatic structure, it therefore falls within the firstly discussed part of this paper, with one significant exception, however. The content of the general clause is in intensive interaction with the alteration of the constituent parts of the whole, namely, that of legal norms. For instance while the renewed ship as a whole remains identical with its original identity, in the case of a codex the paragraphs of which have been abolished or modified, the codex itself and, as a result of its natural function, the content of the general clauses included in it change as well.[104] Nevertheless, certain limitations are present: it depends on the logical coherence of the legal system which volitional acts of the legislator may become law and this logical coherence can be best captured with

[104] See REBMANN, KURT—SÄCHER, FRANZ JÜRGEN (Hrsg.), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, I, 2nd ed., (1993) München, p. 1140.

respect to general clauses by which a certain control is exercised as well.[105] In a different approach, the real content of the general clause is specified in the process of the application of law by the abstraction of more specific legal norms which belong to the same regulatory species.

This necessarily complex relationship exhibiting two-sided interactions is quite favourable from the viewpoint of the effectiveness of law, which is one of the ultimate aims of law itself.[106] One of the sources of the external stability of the legal order is provided by the fact that it can flexibly adapt to the social-legal environment.[107] General clauses are effective means of this flexibility because they secure that legal norms belong to the same species, even in the case of their

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[105] MOÓR, *cit.* p. 7.

[106] *„ […]Politische Wünsche pozitiv-rechtlich zu untermauern, und damit die bestehende Rechtsordnung nicht auf sie selbst zurückzuführenden Belastungen auszusetzen."* See TUREGG, KURT EGON VON, *Gefährliche und gefährdete Generalklausel. Über die materiell-rechtlichen Grenzen der Verwaltunsklagen*, (1956) Berlin—Köln, p. 102. HEDEMANN, JUSTUS WILHELM, *Die Flucht in die Generalklauseln, Eine Gefahr für Recht und Staat*, (1933) Tübingen. The general clauses make the critique of the judges easier. See PREUSCHE, REINHARD, *Juristische Generalklausel und Argumentationspraxis. Die italienische Rechtssprechung zur Anwendbarkeit ausländischen Rechts (Ordre Public)*, (1978) Regensburg, p. 105. FÖLDI, ANDRÁS, *A jóhiszeműség és tisztesség elve*, [The good faith] (2001) Budapest, pp. 43- and 100-; For both the negative and positive aspects of the general clauses see ZWEIGERT, KONRAD—KÖTZ, HEIN, *Einführung in die Rechtsvergleichung*, (1996) Tübingen, p. 141.

[107] SAMU MIHÁLY—SZILÁGYI PÉTER, *Jogbölcselet*, [Theory of Law] (1988) Budapest, p. 247. For the example *„Mark gleich Mark"* see HEDEMANN, *cit.* p. 12, and ZWEIGERT, KONRAD—KÖTZ, HEIN, *Introduction to Comparative Law*, (1994) Oxford, p. For further literature on 242.§ BGB see BÖRNER, FRITJÖF, *Die Bedeutung der Generalklauseln für die Umgestaltung der Rechtsordnung in der nationalsozialistischen Zeit*, (1989) Frankfurt, pp. 4-6.

alteration.[108] Thus, with the assistance of general clauses, law will be able to solve such problems which had not even emerged at the time of its genesis.[109] In accordance with the above-stated, general clauses may best secure the long-term stability of law by their flexibility[110], and also, they necessarily contribute its logical coherence.[111]

It is an important fact that the system-dependence of general clauses as described above is at least twofold. On the one hand, general clauses depend on the inner characteristics of the legal order or a branch of law but at the same time, on the other hand, they are immanent accessories of a bigger whole, of the social order as well.[112] By treating the legal order as a point of reference, the society functions as an external factor: not only legal but also moral norms govern the social order impacting upon the content of general clauses from an external perspective.[113]

Behind this duality, the duality of law is also present. Within the world view of modernity based predominantly on Kantian and Hegelian ideas, law is situated in the cross-section of natural world and the world of pure values, in other words, in the

[108] See BÖRNER, *cit.* p. 9.

[109] VARGA, *cit.* p. 472.

[110] HEDEMANN, *cit.* p. 209.

[111] MOÓR, *cit.* p. 12

[112] VARGA, *cit.* p. 348.

[113] On the immanent morality of law see VARGA, *cit.* p. 347. The normativ content of the general clauses is always in harmony with the social values. See NOWAK, *cit.* p. 3.

field of value-laden reality.[114] In accordance with the above-stated, with respect to general clauses as legal norms this duality is even more apparent.

Accordingly, when conducting a comparative analysis of general clauses it is very important to reckon with their dual system-dependence, otherwise the investigation may easily lead to invalid conclusions since the identification of the real content of the clauses could not be carried out.[115]

V. Final Conclusions

By virtue of the above schematization it has become more plausible to understand the nature of general clauses. The classification would be even more reasonable if different legal consequences would be attached to the different types within a greatly consistent framework; in other words, depending on to which possible expression of the *genus-species* or the whole-part conceptual pairs can be related the issue in question, a different result would be triggered. Such a high level of abstraction, however, is impossible by the very nature of law.[116] Legal problems, as they are, often refer to extralegal circumstances. Systematization within the legal order is only of secondary importance in comparison with the non-logical factors: "*Within the field of law [...] logic is only a secondary instrument as compared to the primary, alogical, will-driven components*."[117] Furthermore, it is not only the will-driven components but also the objective laws of physics and the state of

[114] MOÓR, GYULA, *A jogbölcselet problémái*, [Problems of the Jurisprudence] (1945) Budapest, pp. 60-61. Cited by SOLT, *cit.* p. 10.

[115] VARGA, CSABA, *Politikum és logikum a jogban. A jog társadalomelmélete felé*, [Politics and Logics in the Law, Towards the Social Approach of Law] (1987) Budapest, pp. 230-231.

[116] In harmony with KASER, *cit.* p. 383.

[117] MOÓR, *cit.* p. 41.

development of disciplines which determine what law is. For example, the questions of what fiction to establish with respect to the date of conception or what legal consequences to be triggered by the mixing up of two liquids are, after all, matters of the actual developments of medical and chemical sciences, not that of the legal regime.

Legal concepts which are inevitable building blocks of all legal systems are, as a matter of fact, fictions, which mean that all legal systems must be necessarily fictions as well. However, the non-existence of these concepts may be excused if they have a specific function in the legal order.[118] In case of the inner systems of law, nevertheless, not only the real abstractions and the real things standing behind the system are missing, but in most cases even the functionality is absent. As a result, the scientific nature of legal concepts can be barely acknowledged (with the concurrent statement of their limited validity), but the inner systems of law are even more difficult to approve of scientifically. These inner systems may serve didactic purposes and only indirectly may they contribute to the better understanding of legal problems or the application of law.[119] "*Jurisprudence is only bound by the requirement-content of law (Forderungsgehalt) at all times, however, in its discretion it may apply new words or may constitute new concepts for the better expression of this content if it considers it to be necessary; it may also split the given legal propositions and concepts into its parts in order to create new concepts from them with the help of which the requirement-content can be rephrased in terms of new propositions and these, again, may be incorporated into an optional system*."[120]

[118] The law can affect the reality through these terms, and it can fulfil its social function, the regulation of future actions. See SOLT, *cit.* pp. 4-5.

[119] VARGA, *cit.* p. 123.

[120] SOMLÓ, *cit.* p. 17.

The multi-perspective approach made it possible to define the concept of general clauses as a prospective basis for further investigations complemented by linguistic and dogmatic observations as discussed above. As it has been illustrated, general clauses always function as extensive parts of a source of law, their species are relative, and also, they constitute a whole, which is greater than the sum of its same specied parts and enjoys an autonomous existence.

General clauses are such general legal propositions which constitute an extensive but also isolated and autonomous structural part (clausula) within a given, same specied collective of norms. Their subject-matter is quite extensive and contrary to specific legal norms, they incorporate a relatively large number of states of affaires which are – as a result of some of their dominant characteristics – considered to be of the same genus (generalis). From these aspects emerges an interpretational practice according to which the alteration of the specific legal norms impact upon the interpretation of general clauses and vice versa: through general clauses the alteration of a superior category may be conveyed to the more specific norms.[121]

To sum up the above-stated, it can be concluded that the dogmatic difficulties related to general clauses derive predominantly from the fact that the concept and the content of this term unites two antagonistic approaches. Formally, assuming an external and formal system, general clauses suggest through the genus-species and the whole-part relationships that law can be cognitively approached whereas substantially, they seek to come over the flaws of the self-contained theoretical

[121] The term 'general clause' was used in a wider sense by PÓLAY. See PÓLAY, ELEMÉR, *Historische Interpretationen der Generalklauseln im römischen Recht*, Klio 67 (1985) p. 528.

system by pointing to the internal characteristics of law. The legal order cannot reach complete self-containment, the realm of effectively operative norms is always open and fragmental[122] or at least it should remain so if it attempts to adapt efficiently to the rapidly changing conditions of living.[123] Jurisprudence is a cognitive discipline (verstehende Wissenschaft) which ought to align itself with its subject and not with exact rules.[124]

[122] On the gaps in the law see MOÓR, *cit.* p. 13. For different standing-point see RENÉ, DAVID—BRIERLY, JOHN E, *Major Legal Systems in the World Today*, (1985) London, p. 151.

[123] VORLÄNDER, *cit.* pp. 403-404, and WINDELBAND, *cit.* p. 517.

[124] *"Sollte den System allgemeiner Rechtsprinzipien ein korrespondierendes System von Rechtsbegriffen zugeordnet werden."* See LARENZ—CANARIS, *cit.* pp. 264-265.