

INVALIDITY RULES IN THE GERMAN CIVIL CODE

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Abstract: German Law is an example of a Civil law system. A feature of this – probably in Germany in the most abstract system – is the conviction that all possible legal constellations are abstract, sufficient, and regulated by just one law. One would have merely to look into the Official Law Gazette to find for each case the prior regulated rule.

Invalidity is mentioned in different sections of the German Civil Code (GCC). The general part of the GCC contains Section 138 which as a general provision applies to all parts of the GCC. S. 138 subs. 1 reads: ‘Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.’ or in English: ‘A legal transaction which is contrary to public policy is void.’ Other translations for the term ‘gute Sitten’ could be ‘good morals’, ‘public decency’, or ‘common decency’. Thereby the German legal system refuses to recognise immoral transactions via Section 138 GCC and thus the possibility of deriving enforceable legal consequences from an immoral legal transaction. The term ‘gute Sitten’ is a general clause. General clauses in the language of the law are usually understood as specific legal provisions containing various types of terms with flexible/undefined meanings. It means that the text recipient is referred to general assessment criteria of non-legal character – that is to say moral values, political values, or economic values.

In older German Courts decisions Section 138 GCC was interpreted in the way that a transaction is contrary to morality if it is ‘contrary to the sense of decency of all fair and just thinkers’. The formulation used by case law in recent times reads: ‘[a] legal transaction is to be judged immoral within the meaning of this provision if it is incompatible with the fundamental values of the legal and moral order according to its overall character, which can be inferred from the summary of its content, motive, and purpose.’ German courts have developed case groups that can be used as a guide in the evaluation of a legal transaction as valid or invalid according to Section 138 GCC. The presentation focuses on the term ‘gute Sitten’ or ‘common decency’ as a gate to bring constitutional values into the sphere of private law. It will also refer to the history of this norm and the legal space it opens for judge-made-law.

Keywords: *common decency, indirect third-party effect of fundamental rights in private law, judge-made-law, general clauses*

1. INTRODUCTION

German Law is an example of a Civil law system. A Civil law system may be defined as a legal tradition that has its origin in Roman law, as codified in the *Corpus Juris Civilis* of Justinian, and as subsequently developed mainly in Continental Europe.

The civil law legal tradition itself can be divided further into the Romanic laws, influenced by French law, and the Germanic family of laws, dominated by German jurisprudence (Lengeling, 2008).

A civil law system indicates for the contracting practice that the need for discussion and documentation has been limited by the existence of a large body of statute law, regulating relationships and limiting the room for debate (Cummins, 2010, p. 134).

A civil law system is a system in which regulation (by statutes and administrative acts) rather than litigation plays a stronger role in law-making and this influences also contracting.

As *Posner* puts it:

Regulation and litigation tend to differ along four key dimensions:

(1) regulation tends to use ex-ante (preventive) means of control, litigation ex-post (deterrent) means;

(2) regulation tends to use rules, and litigation standards;

(3) regulation tends to use experts (or at least supposed experts) to design and implement rules, whereas litigation is dominated by generalists (judges, juries, trial lawyers), though experts provide input as witnesses; and

(4) regulation tends to use public enforcement mechanisms, whereas litigation more commonly uses private ones — private civil lawsuits, handled by private lawyers although the decision resolving the litigation is made by a judge (with or without a jury), who is a public official (the jurors are ad hoc, public officials). (Posner, 2011, pp. 11–26)

A feature of this – probably in Germany in the purest prevailing system – is the conviction that all possible legal constellations are abstract, sufficient and regulated by just one law. One would have merely to look into the Official Law Gazette to find for each case the prior regulated rule (Döser, 2000, p. 1541). From this is deduced the principle that individual arrangements between the parties need to contain only the statutory basics for the *essentialia* of the case, but beyond this regulation, even if the wording of the contract leads to a different assumption, the contract can be completed by the statutory regulations which can be found for instance in Article 133 of the German Civil Code, Article 157 German Civil Code and Article 9 of the law on general terms and conditions (AGBG) (Döser, 2000, p. 1541).

Contracts concluded under German law (as an example for a civil law system) are ‘the better the shorter they are’, they are structured in a way that leads from general to specific and they are divided into sections with weighted logical subgroups (Döser, 2000, p. 1541). The detailed provisions this way will be located closest to the highest relevant superordinate topic/preamble and are formulated as abstractly as possible, to encompass all conceivable variations of the later following system levels (Döser, 2000, p. 1541). An example of this, though not taken from a contract but the Civil Code of Germany, would be the division, i.e. of the first book of the civil code, which contains the general part of the code. The first division is about persons, a more general description, followed by the first title about natural persons which are consumers and entrepreneurs, and then in the sections of this title,

there are regulated special questions concerning the beginning of legal capacity, residence, lack of full capacity, etc.

2. THE REGULATION

Invalidity is mentioned in different sections of the GCC. A search through the GCC looking for the words: “invalid” or “invalidity” led to 25 results. Most of them were in the general part, i. e., in the context of legal transactions of minors or persons of mental disturbances (Article 105), mental reservations (Article 116) invalidity due to a lack of form of a legal transaction (Article 125) and invalidity due to requirements which are regulated in the special parts or chapters of the GCC such as in the family law section or the heritage law section.

In my presentation, I will focus on Article 138 GCC which as a general provision applies to all parts of the GCC. In German Article 138 reads:

‘(1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig.

(2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen.’

The translation given on the side of German Ministry for Justice and Consumer Protection reads:

‘Section 138 Legal transaction contrary to public policy; usury

(1) A legal transaction which is contrary to public policy is void.

(2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgment, or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.’

Other translations for the term ‘*gute Sitten*’ could be ‘*good morals*’, ‘*public decency*’, or, ‘*common decency*’.

The German legal system refuses to recognise immoral transactions via Article 138 GCC and thus the possibility of deriving enforceable legal consequences from an immoral legal transaction.

The term ‘*gute Sitten*’ is a general clause.

General clauses in the language of the law are usually understood as specific legal provisions containing various types of terms with flexible/undefined meanings out of which the content of legal provisions is composed.

As far as the application of general clauses is concerned scholars favour the institution of ‘reference’. It means that the text recipient is referred to general assessment criteria of non-legal character – that is to say moral values, political values or economic values. This stance finds confirmation in the following definition: ‘a general clause is a flexible expression included in a legal provision

referring to certain assessments typical of a given social group, to which such a legal provision refers by obliging persons to abide by them when determining a factual state of affairs regulated by a given norm.’ (Grzybek et al., 2015, p. 146).

Whoever concludes a contract may not act outside of all social value standards, even if these standards are not recorded as a special legal prohibition.

In all Western societies, it is now agreed that ‘freedom of contract’ is limited by something that, in reference to the Roman *boni mores* as ‘*bonnes moeurs*’ or ‘*good morals*’. What is to be understood by this? (Haferkamp, 2003, p. 709)

Historical reviews of ‘good morals’ often refer to a passage in the motifs of the first commission. (Haferkamp, 2003, p. 711) The motives commented:

“The provision presents itself as a significant legislative step, which may not be without concerns. Judicial discretion is granted a leeway as is hitherto unknown in large areas of law. Mistakes cannot be ruled out. However, given the conscientiousness of the German judiciary, there can be no doubt that the provision will only be applied in the sense in which it is given.”¹

Thus Article 138 appears to have granted the judge a position of power hitherto unknown ‘in large areas of law’. (Haferkamp, 2003, p. 711)

The older definition of Article 138 by German courts since 1901 concluded that a transaction is contrary to morality in the sense of Article 138 if it is ‘contrary to the sense of decency of all fair and just thinkers’; so-called ‘*Anstandsformel*’ or ‘decency formula.’ (For more references see Haferkamp, 2003, p. 710)

Critics of this formula believe that clear material values are missing and that the pseudo-empirical ‘decency formula’ ends up in nothing but a judicial realism test at the desk (Haferkamp, 2003, p. 710).

3. CASE GROUPS

3.1. The example of usury

3.1.1. First period – circa 1900

Already in the first years of the GCC judges developed case groups dealing with Article 138 and thus acting contrary to the prevailing opinion that judges during this period were still acting along with legal positivism or even jurisprudence of concepts (*Begriffsjurisprudenz*).

Yet, to the vast changing of social circumstances after 1900 (the year of the coming into force of the GCC) judges were more open to sociological concepts with an influence on judicial decisions, i.e., the methods of *Eugen Ehrlich* one of the first legal sociologists or the upcoming economic sciences, i.e., by *Max Weber*. So

¹ *Motive zu dem Entwurfe eines BGB für das Deutsche Reich, Vol. V, Erbrecht*. Amtliche Ausgabe, 1888. Available at: <https://archive.org/details/motivzudemtw03germgoog/page/n4/mode/2up> (Accessed: 18 January 2022) = Mugdan, vol I, 469, pdf. Available at: https://collections.thulb.uni-jena.de/servlets/MCRFileNodeServlet/HisBest_derivate00010708/Band%201.pdf (Accessed: 18 January 2022).

already before WWI the judgments regarding Article 138 were referring to so-called case groups (Haferkamp, 2003, p. 711) and developed judge-made law.

It has been brought forward the theses of the change of function of Article 138 GCC: ‘The function of Article 138 had shifted from the reception of self-imposed moral norms of bourgeois society, especially after 1914, to judicial and at the same time state intervention, even judicial economic policy.’ (Haferkamp, 2003, p. 714) The theory of a change in function thus suggests double: a shift in competence (from the legislator to the judge as social engineer) and a change in content (from the liberal to the social contract model). (Haferkamp, 2003, p. 714)

This theory is challenged. However, the antithetical scheme of the ethical and economic concept of ‘good morals’ misses the contemporary standpoints from circa 1900. *Gottfried Planck* clarified this underlying position of the GCC in 1903:

‘A legal transaction that violates the great principles of modern law, in particular the principles of personal freedom, freedom of conscience, freedom of association, freedom of trade, freedom in the exercise of the right to vote, etc., is always also to be regarded as a legal transaction that violates morality.’ (Planck, 1903; cited in Haferkamp, 2003, p. 722)

The Reichstag Commission, which prepared the new usury law of 24 May 1880 in 1879, stated: ‘*It has been argued that usury was first created by the usury laws and will disappear with their elimination.*’ (Haferkamp, 2003, pp. 724–725; with further reference to *Luig*, 1982, p. 186).

But this view has not been borne out; usury had not disappeared, money had not become cheaper, but the rate of interest had risen.

The idea that the free play of natural forces would bring about normal conditions of its own accord was already considered a failure in the 1870s, barely 10 years after the start of the legislative interest-free policy. According to *Luig*, even during the period of interest-free rates between 1867 and 1880, jurisdiction had accepted excessively high interest rates ‘only for lack of legal authorisation’ and not ‘out of overreaching.’ (*Luig*, 1982; cited in Haferkamp, 2003, pp. 724–725). This was corrected by the jurisdiction under the new usury statute. *De facto*, shifts in the burden of proof allowed for largely free control of equivalence already under this regulation. In this environment, the judicature adopted a relatively strict interest rate control. As early as 1890, the ‘Reichsgericht’ formulated:²

‘Rather, it must be regarded as an immoral exploitation of the embarrassment and need of others if interest and commissions are calculated and accepted to such an exorbitant extent and under such oppressive conditions that they completely lose the character of remuneration for the enjoyment of the capital or the efforts and risk of the lender.’ (Haferkamp, 2003, p. 726)

² *Ibidem*, with reference to RGZ (14.2.1890-III 26/90) 25, 177, 179. Available at: <https://research.wolterskluwer-online.de/document/9a0be60a-52d1-4ea8-a414-20e9a10681cc> (Accessed 18 January 2022).

With the new GCC, usury was regulated in Article 138(2) and the jurisdiction continued its line of judgments already formulated before (Haferkamp, 2003, p. 726).

3.1.2. *Second period – 1914–1933*

Against the backdrop of extensive state price fixing and tightened criminal usury legislation, so-called *war usury* also came into view in civil law. The demands for combating ‘price gouging’, supported by war-related rhetoric about the common good, aimed to expand the offence of usury, especially about *usury in kind*. In the literature, there were more and more calls for a general judicial equivalence control under the rule of Article 138(1) GCC and not Article 138(2). (Haferkamp, 2003, p. 727)

3.1.3. *Third period – 1933–1945*

During this time one could say, that the perspective shifted from the protection of the unjustly disadvantaged contracting party to macroeconomic considerations in the service of Nazi- economic policy (Haferkamp, 2003, pp. 728–730).

In the year 1936 RGZ 150/1³ stated the following:

A legal transaction in which performance and consideration are conspicuously disproportionate to each other, but the other characteristics of usury [Article 138(2) GCC] are not present, is void pursuant to section 138 (1) GCC if, in addition to the disproportion, such an attitude on the part claiming the excessive benefits can be ascertained that the legal transaction, according to its content, motive, and purpose, offends against the popular opinion (*gesundes Volksempfinden*). Under certain circumstances, this attitude can be inferred from the disproportion. If one party maliciously or grossly negligently closes its mind to the fact that the other party is agreeing to the difficult conditions out of an awkward situation, this, in conjunction with the disproportion, can render the legal transaction null and void.

By referring to the motion of the popular opinion (*gesundes Volksempfinden*) the court referred to national-socialist law-principles. (Haferkamp, 2003, pp. 729–730) There occurred a shift in the perspective away from a breach of morals, toward the self-interest of the national comrade (*Volksgenosse*) that inflicts the national interest. The ‘good customs (morals)’ that were characterised by the jurisprudence up to 1933, above all in their openness to value, were to be given a clear thrust as a tool of National Socialist exclusionary policy and as an expression of general state supremacy (Haferkamp, 2003, pp. 736–737).

3.1.4. *Contemporary interpretation of Article 138 GCC after 1945*

The definition of ‘gute Sitten/good morals’ by the German Courts since the 1950th formulated by German case law in recent times reads:

³ Pdf available at: <https://opiniojuris.de/sites/default/files/RG,%2013.03.1936%20-%20V%2018435%20-%20RGZ%20150,%201.pdf> (Accessed 18 January 2022).

‘A legal transaction is to be judged immoral within the meaning of this provision if it is incompatible with the fundamental values of the legal and moral order according to its overall character, which can be inferred from the summary of its content, motive, and purpose.’ (Creifelds et al., 2011, p. 1085)

The notion of incompatibility with the fundamental values of the legal and moral order according to its overall character refers to the theory of effect on the third party of the human rights set out in the Constitution. Traditionally human or civil rights are only protecting the people or citizens from interference with their rights by public authority.

The theory of effect on the third party leads to indirect binding also between private persons by the fact that human rights influence also the sphere of private law through their application via general clauses⁴ (Jarass/Piero, 1995, pp. 48–49) such as ‘good morals’ in Article 138 GCC.

The legal content of fundamental rights acts through the medium of the provisions directly dominating the individual field of law, in particular, the general clauses and other terms that are open to interpretation and need to be filled in (BVerfGE 73, 261 [269]).

3.2. Another Case group – Surety agreements

Surety agreements with banks with relatives of borrowers to secure their loan when the relative has no income- or other assets and thus assumes high liability risks as guarantors.

The Constitutional Court decided that civil courts must – especially when concretising and applying general clauses such as Article 138 and Article 242 GCC (principle of good faith) – observe the fundamental right guarantee of private autonomy in Art. 2(1) Basic Law. This results in their duty to review the content of contracts that place an unusually heavy burden on one of the two contracting parties and are the result of structurally unequal bargaining power (BVerfGE 89, 214 [214]).

The Constitutional Court argued in the reasons of the decision that the constitutional complaint is directed against civil court rulings on payment. The normative foundations on which the decisions are based are not challenged; the relevant provisions of the Civil Code remain unchallenged. Rather, the complainants’ complaints concern the interpretation and application of those general clauses which require the civil courts to review the content of contracts under the law of obligations, above all Article 138 and Article 242 GCC. When concretising these clauses, the constitutional guarantee of private autonomy and the general right of personality had to be taken into account, which the civil courts had failed to recognise in the original proceedings. This reasoning accurately captures the significance of fundamental rights for the concretisation of general clauses under civil law (BVerfGE 89, 214 [214]).

⁴ Another notion instead of “indirect influence” is: *Ausstrahlungswirkung der Grundrechte*, “broadcast effect”.

In its fundamental rights section, the Basic Law contains basic constitutional decisions for all areas of law.

These fundamental decisions unfold through the medium of those provisions which directly govern the respective area of law and are above all also significant in the interpretation of general clauses of civil law (BVerfGE 7, 198 [205, 206]; 42, 143 [148]). In that Article 138 and Article 242 GCC refer in general to good morals, custom, and good faith, they require the courts to concretise them according to the standard of values which are primarily determined by the fundamental decisions of the constitution. Therefore, the civil courts are constitutionally obliged to observe the fundamental rights as “guidelines” when interpreting and applying the general clauses. If they fail to do so and therefore decide to the disadvantage of a party to the proceedings, they violate that party’s fundamental rights (See BVerfGE 7, 198 [206, 207], established case law).

The case group of Surety agreements is not new. Already in 1910, the OLG Dresden agreed to the violation of Article 138 GCC in a case in which a young woman of low income who lived still in the household of her parents agreed to a surety for a due loan of her parents that was then extended for 8 more days (Haferkamp, 2003, p. 715).

4. SUMMARY

The invalidity of legal transactions in Article 138 on the ground of being against good morals has been a way to influence the private law sphere with the prevailing social or political system in the way that the text recipient is referred to general assessment criteria of non-legal character – that is to say moral values, political values or economic values.

As the norm put under regard here came into force 121 years ago in 1900 it has a long history during which the interpretation was influenced by world wars, the Weimar Republic, and the Nazi Regime. In the German Democratic Republic, it was obliging in parts until 1976, and after the reunification of Germany, it came into force in the whole of Germany.

While it was at first concluded from the omission of the phrase ‘public policy’ (*öffentliche Ordnung*) in Article 138 GCC which was contained in the first draft of the GCC that the definition of an act against good morals was to be understood from a more personal angle in the way that the partners of the contract should be in such a position that the weaker partner was protected by the good morals from the exploitation of his weaker position by the other partner. It soon turned out though that the common interest which was rather understood as relating to the term ‘public interest’ that was omitted in the final formulation of Article 138 GCC, was re-interpreted into the notion of ‘good morals’.

Since early 1900 until now there is a dispute about what good morals are: Are they rather changing due to developments in the sphere of society, economy, and other relevant social spheres, or are good morals unchangeable and eternally the same? At least for the *de facto* change in the meaning throughout the time they *de*

facto were not always understood the same although there are many parallels in the cases that were decided by the Courts throughout the 121 years.

From the perspective of the Basic Law which states in Article 79(3) a so-called eternal guarantee by excluding any amendment of the principles laid down in Article 1 and Article 20 Basic Law (human dignity and constitutional basic principles).

Already according to Roman law the *bona mores* were gathered around case groups. Also based on Article 138 GCC case law and case groups were developed. By controlling good morals along the basic rights also the Constitutional Court (CC) plays a role in the creation of judgments. Still, the CC is not a ‘supreme court of appeal’ as it is controlling the decisions of the courts of the instances not in a narrow way. The intensity of Constitutional Court review is decisively determined by the intensity of the impairment of the fundamental right. Furthermore, it is significant how far the fundamental right can be waived. The possibility under private law to bind oneself is often an exercise of fundamental rights. The more the burden can be attributed to the persons concerned as their own decision, the weaker the fundamental right obligation (private autonomy).

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