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Ordre Public, Abuse of Rights and Other General Clauses and the New Czech Civil Code

I Introduction

This paper deals with several basic categories which are often called principles or basic rules of civil or private law. The aforementioned qualification of these terms is not the subject of our research, however.

We consider good faith, good morals, *ordre public* and other categories mentioned in the civil code to be general clauses and will analyse them in this respect. For the Czech Civil Code (hereinafter NCC), it is characteristic that, in contrast to some of its predecessors and in comparison to some foreign codifications, it is literally overflowing with such general clauses; this holds especially true for the basic principles of the general part.[1]

The subject of this contribution is foremost a sort of introduction into another text which will deal with the significance and functioning of these general principles (II). The paper will also deal with a phenomenon which is new to Czech private law and, it should be pointed out, has been quite surprising. This is the concept of (internal) *ordre public.* The Czech judiciary may have traditionally encountered this institution in the area of international private law and possibly also in the area of EU law. Now this term is being introduced into the Civil Code,[2] obviously inspired by the Swiss ZGB. This paper will thus aim to clarify the standing of *(ordre public interne)* within *ordre public* in general, and to set out its relationship to other general clauses, such as good faith and good morals. Finally, it will compare different approaches and applications of this institution in continental Europe as well as in common law. Special emphasis will be paid to the understanding of *'ordre public interne'* in France. Within part three of this paper, we also will attempt to set the content, significance and the function of this institution within the Civil Code. This will take place within a description of its relationship to the concept of good morals, which traditionally fulfilled the function which is now, to a large part, provided by the institution of public order.

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1 See typically sections 1–8 of NCC.

2 *Ordre public* in section 1 para 2 and section 588 of NCC serves as barriers of party´s autonomy.

Finally, in part four, we will deal with a phenomenon of the abuse of rights, which had endment already been anchored in the socialist civil code after its in 1992 but nevertheless deserves a more in-depth treatment. We will analyse this phenomenon in its relationship to other types of unauthorised exercises of law, i.e. good morals and good faith. The measure of abuse is relevant because the absence of legal protection is only a consequence of excessive abuse.[3] This part of the paper (IV) will deal with the consequences of the application of the abuse of law.

II General Clauses in the Civil Code

1 Notion

Regardless of whether we consider them legal principles or believe them to have another normative function, general causes are a characteristic phenomenon for the codification of private law. They have a characteristic flexibility which gives a certain vagueness to their use. If we consider that the BGB is typical in terms of the occurrence of such general clauses and that, put differently, it is characteristic of the provisions contained in Section 138 (good morals) and Section 242 (good faith), then, in the case of the NCC, we can talk about a plethora of these terms, which becomes especially apparent from Sections 1–8.[4] From another viewpoint, one can consider this an overburdening by extra-legal notions[5] potentially or explicitly contained in the general clauses. The NCC thus contrasts with other codifications like, for example, the new Hungarian approach, and especially with the previous socialist civil codes in the Czech Republic which were completely devoid of any extra-legal traits.

2 Problems

With general clauses such as good faith or good morals, the main problem lies in their vagueness which does not allow direct application. On the other hand, many consider legal norms to be fully fledged[6] and, despite their vagueness, are formally equal, precise legal rules that are part of a positive legal order.

Together with the industrial revolution in Germany, Sections 138, 157 and 242 of the BGB gained great popularity (for example, Section 242 was celebrated as 'the paragraph of kings'). All attempts to mark these sections as meaningless provisions[7] failed. Under the influence of law

[3] See s 8 NCC.

[4] See the categories of *ordre public,* good morals as well as other terms in s 1–8, such as expectation, decency etc.

[5] Apparently, this is a reaction to previous codes, which did not refer to values and extralegal notions.

[6] See Ernst A. Kramer, *Juristische Methodenlehre* (4th edn, CH Beck 2013, München, Manz Wien, Stämpfli Bern) 70 et seq.

[7] Cf. Peter Jung, 'Die Generalklausel im deutschen und französischen Vertragsrecht' in Baldus, Müller-Graff (eds), *Die Generalklausel im europäischen Privatrecht* (Sellier 2006, München) 37 et seq.

and interessen jurisprudence[8] this provision experienced its heyday. Even such sharp criticism as voiced by Hedemann,[9] who warned of a fragmentation of law and the lack of principles in its application, did not change this. General clauses had their crisis in Germany only with their being discredited under the National Socialist regime,[10] but they were again rehabilitated as a result of the works of Karl Engisch[11] and Josef Esser.[12]

3 Use of General Clauses

General clauses are often used in legislation because it is impossible to include the infinite number of case studies needing regulation. This calls for a general and abstract case description with the use of general indefinite terms *(effet utile),* which leave wider room for application.

The more casuistic the actual legal system, the greater the need for such general clauses. This can be seen in a comparison of the BGB and the ABGB. The latter has been constructed with very 'open' legal norms, which deal with changes in the environment to which they are applied rather well. As such, the need for flexible clauses is significantly lower than in the case of the casuistically devised BGB.

At the same time, general clauses should be viewed as gaps in the law.[13] Flexible, indefinite legal norms and general clauses (for example principles of faith,[14] good morals and due cause), should be viewed as a certain sub-chapter of gaps in the law planned by the legislator. The same holds true for the DCFR,[15], which is full of such generally held terms. They are empty formulations which only at first sight appear to be expressed precisely. On closer reading they become indefinite and open to multiple interpretations. Hedemann[16] called these clauses a piece of open law-making and intended gaps in the law. Heck[17] classifies them as delegating norms.

4 The Function of the Court

The completion of general clauses is considered to be their 'interpretation.' The normative and also legislative function of the court is, in this case, quite often denied or even forced out. These are, however, basically the result and the expression of the spirit of the times *(Zeitgeist).*[18] Any

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[8] See Philipp H. Heck, *Begriffsbildung und Interessenjurisprudenz* (1932, Berlin).

[9] See J. W. Hedemann, *Flucht in die Generalklauseln* (1933) 58 et seq.

[10] Bernd Rüthers, *die Unbegrenzte Auslegung* (7th edn, CH Beck 2012, München).

[11] See Karl Engisch, *Die Idee der Konkretisierung in Recht und Wissenschaft unserer* Zeit (1953).

[12] Cf. Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956).

[13] See Kramer (n 6) 75 et seq.

[14] See NCC, s 2958, 2959.

[15] Cf. e.g. Criticism in Bénedicte Fauvarque-Cosson, Denis Mazeaud (eds), *European Contract Law* (Sellier 2008, Munich) 101ff., 150 et seq.

[16] See Hedemann (n 9) 58.

[17] Heck (n 8) 4.

[18] Christian Baldus, *Historische und vergleichende Auslegung im Gemeinschaftsrecht – zur Konkretisierung der „geringfügigen Vertragswidrigkeit"* (n 7) 22 et seq.

talk about some sort of common knowledge is only an illusion. Legally-politically, this does not involve knowledge but sentience. Against the argument that these are gaps in the law, it is held that it instead is a planned loosening of legislation or the diffusion of the boundaries of the law. The history of judicature shows an unheard-of imagination by the legislative courts, which find these phenomena appealing. A significant number of new legal institutions are indebted to these very clauses. In Germany, for example, the best example is the abuse of law, which the law does not deal with expressly.[19] The same goes for preclusion and doctrine of *Wegfall der Geschäftsgrundlage.* General clauses are marked as the cuckoo's eggs[20] of the liberal legal system.

5 Classification and the Mutual Relationship of Selected General Clauses

It is useful to explore certain characteristic traits of the individual general clauses, on the basis of which they can be classified and compared. This certainly leads to a better understanding of their significance and function.

With regard to the expression of these phenomena in statutory law, one can distinguish between cases where general clauses have been explicitly set in the legal rules on one hand and those legal norms (rules) where general clauses have not been expressed explicitly but they may nevertheless be deduced and applied since the law contains certain very vagne uncertain terms which require their application. Thus, for example in Section 2958 and 2599 NCC respectively, compensation for inflicted harm or wrongful death can be set based on the principles of decency. One can therefore deduce a principle of decency (called 'objective good faith'),[21] not only in connection with the amount of compensation, but also as a general function for the entire scope of the Civil Code.

Similarly, the law holds (e.g. in Section 2061, para.1, lit. a) that a buyer expects certain characteristics. This terminology is the basis for legitimate expectations for a generally known category, e.g. from EU law.[22] One could continue like this on the basis of similar concrete provisions. It can also be claimed that these 'implicit' general clauses have the same or similar meaning as those which are explicitly presented in the NCC.

Looking at the function of the clauses, one can distinguish between those general clauses which have a materially limited functionality and are mainly focused on the relationships

[19] Cf. e.g. Arndt Teichmann, 'Venire contra factum proprium – ein Teilaspekt rechtmissbräuchlichen Handelns' [1985] Juristische Arbeitsblätter 497 et seq.

[20] Pfeiffer called it a 'foreign thing' in continental Europe: Thomas Pfeiffer, 'Die Generalklausel auf der Agenda der europäischen Privatsangleichung' (n 7) 29.

[21] Decency is interpreted as objective good faith by Czech authors [see Filip Melzer, Petr Tégl, in Melzer, Tégl (eds) *Občanský zákonik* § 1.117 (Civil Code) Leges 2013, Prague 152 ff.]. This should be the opposite of subjective good faith in property and succession law.

[22] Cf. e.g. Hans W. Micklitz, 'Legitime Erwartungen als Gerechtigkeitsprinzip des Europäischen Privatrechts' in Krämer and others (eds), *Law and Diffuse Interests in the European Legal Order, Liber Amicorum Norbert Reich* (Nomos 1997, Baden-Baden) 245 et seq.

within the law of obligation or possibly material law and those which are valid on a general level. Here we can find good faith, good morals or *ordre public.* A similar standard to the standing of principles of a general nature and functionality can also be attributed to the categories of decency, the good faith of contractual parties, justness and legitimate expectations.

The terms *abuse of law, circumvention of the law,* and *harassment* have a different function and significance. These are legal institutions of the general part of civil law or are of a general character which goes beyond civil law itself.

How can the mutual relationship between these terms be defined? As will also become apparent from part four of this paper, these terms are in specific types of relationships, e.g. cause and effect. As in German law, the abuse of law is an effect of the violation of good faith.[23] In contrast, Austrian law considers the cause of an abuse of law to be a conflict with good morals.[24] According to what seems to be the majority opinion in the Czech Republic, the abuse of law is a result of the violation of a number of these general clauses, which function as certain legal or moral principles.[25]

III Ordre public. Its Variety

1 Types

Ordre public as a defensive tool, as well as a tool with a certain positive charge, has several different aspects. It traditionally appears in the Czech legal order and is anchored as international public order in the Act on international private law.[26] It also has a conflict-of-law form as well as an international procedural form. The common aim of both of these forms is to prevent the influence of the application of a foreign legal order that is in conflict with the fundamental values of the domestic social order. According to this, there exists a union *ordre public* in the primary law of the EU (TFEU).[27] Finally, the institution of *ordre public interne* has been introduced into the new civil code;[28] this has a somewhat different aim than the above-mentioned types of public order, but nevertheless has the same trait of defending basic principles and values.

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[23] See Manfred Wolf, Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (10th edn, CH Beck 2012, München) 230 et eq.

[24] Cf. Georg Graf in his comments on Sec. 879 ABGB in Kletečka, Schauer, *ABGB – ON* (Manz 2010, Wien) paras 60–224 and Heinz Krejci, 'Comments on Sec. 879 ABGB' in Rummel (ed) *Kommentar zum ABGB* (3rd edn, Manz 2000, Wien) paras 48–55.

[25] See III.5 of this paper.

[26] Cf. s 4 of the Act. No. 91/2012 Coll. Interestingly enough this law does not define *ordre public,* as opposed to the previous Act No. 97/1963 Coll. which understood *ordre public* as principles of social and legal order on which one has to insist (see s 36).

[27] See Art. 36, 45 para 3 and 52 para 1 TFEU.

[28] See III.4 of this paper.

2 Ordre Public in International Private and Procedural Law (Ordre Public International)

This institution belongs to the general section of international private and procedural law and serves to defend legally relevant influences which are in conflict with fundamental values or with the ideas of a certain community, especially states and the European Union. According to the classic concept of international private law, public order is a sort of safety valve, i.e. an essential tool against harmful foreign norms, decisions and their influences. It is thus a defence mechanism against legal actions on the basis of the choice of law, a borderline indicator which is in conflict with the mentioned values or against the results of foreign legal decisions. It is an uncertain term which needs to be defined more precisely.

In international private law, there are a number of problems which often have very ambivalent developments. On a European level, this term is filled with European values,[29] especially the human rights included in the European Charter of human rights of the EU. In this form, *ordre public* is understood to be, in the negative sense of the term, a defence mechanism.[30] It nevertheless also has a positive function in the enforcement of certain values, which takes place through the so-called directly applicable legal norms.

3 Ordre Public in Primary Union Law

Ordre public includes states' interests of essential importance.[31] It is defined by the ECJ as a violation of law in a situation where a sufficiently serious threat exists which concerns the basic interests of the community.[32]

The concept of *ordre public* in Article 36 TEEC cannot be interchanged or confused with understanding the concept in the area of national police law. It denotes the set of basic rules determined by the highest power, which must be taken into account and which are issued protection of to the political and social society structure of the member state. The application of the *ordre public* by the national authorities of the member state has to be contingent on the fact that, except for *ordre public* violations on the basis of a violation of the law, there exists a real, sufficiently serious threat, which affects the fundamental interests of society. [33]

Ordre public Européen, as a vague legal concept, primarily causes the *ordre public* a problem of competence, since who is to decide who has the authority to determine the content of the concept in the end. In this respect, it clearly shows the independence and autonomy of EU law. Even in this respect, supranational control is typical for EU law. Also, here the member states

[29] See para 2 of the Preamble of TEU.

[30] See. e.g. Werner Schroeder in Rudolf Streinz (ed), *EUV/AEUV* (2nd edn, CH Beck 2012, München) 536 para 9.

[31] Jörg Becker in Jürgen Schwarze, *Kommentar zu EUV und EAUV* (3rd edn, Nomos 2009, Baden–Baden) Comments on Art. 36, para 11.

[32] See *Case 30/77 Regina v. Bouchereau* (1977) ECR–1999, paras 7–8.

[33] See Walter Frenz, *Handbuch Europarecht* (Bd 1 Europäische Grundfreiheiten, Springer-Verlag 2004, Berlin and others) 358–359, paras 943 et seq.

have some room for discretion at the first stage/level, which they fulfil by their internal perceptions. However, at the second stage/level, this reasoning is subject to Union control, so the core of the concept is in hands of the ECJ at the end. *Ordre public* can therefore be classified as a union framework concept. Schematically, these three different techniques can be defined. The first category includes defining this concept. This is (respectively was) evidenced in the Directive 244/221. A different definition is made through the ECJ case law. In this framework, it turns out, the ECJ refers to certain categories as parts of *ordre public*.[34] The ECJ is focused on the development of certain directives of the interpretation, which are used to fill the window of this flexible concept.[35] The basic ideas of case law/jurisprudence are to secure basic freedoms from restrictions by the member states, as well as the interpretation of the reservations included in the system of EU law. Besides, the ECJ examines whether the national law reacts to national subject matters in the same way as to EU subject matters.

4 Ordre Public (Ordre Public Interne) in Private Law in France, Switzerland, Italy, Germany, the UK and the USA

a) France

The French Civil Code (hereinafter CC) has a special significance for the concept of *ordre public,* primarily in Article 6, which says that it is not possible to deviate by a contract from laws relating to *ordre public* and good morals[36]. It is followed by conclusions in Article 1133, which states that the cause is unlawful if prohibited by law or contrary to morality or *ordre public.*[37]

Article 6 (besides others) divides the laws into two categories: those which cannot be deviated from and those that apply regardless of the different intentions of the parties. It thus distinguishes mandatory and dispositive laws. The purpose is to safeguard the *ordre public* and good morals, which limits the autonomy of the parties. That is why in the French legal system the mandatory laws indicate mandatory regulations as laws of *ordre public* respectively laws of *ordre public* (national). It is the public interest that defines the mandatory private law so designated by Roman jurists (D.2, 14, 38: *ius publicum privatorum pactis mutari non potest* – Papinian, or D.50, 17,45: *privatorum conventio iuri publico non derogat* – Ulpian). Contracts in conflict with Article 6 are invalid. Some French authors try[38] to make a wider definition of *ordre public* so they interpret this Article as meaning that 'legal action is invalid if it is

[34] Wolfgang Wurmnest, 'Ordre public' in Leible, Unberath (eds), *Brauchen wir eine Rom O Verordnung* (JWV 2003, Jena) 446 et seq.

[35] Ibid.

[36] See Art. 6 Code Civil: *On ne peut déroger, par des conventions particulières, aux lois qui interessent l´ordre public et les bonnes moeurs.*

[37] Art. 1133 Code Civil: *La cause est illicite, quand elle est prohibiée par la loi, quand elle est contraire aux bonnes moeurs on à l´ordre public.*

[38] Marcel Planiol, *Traité élementaire de droit civil* (11th edn, 1998, Paris), art. No. 293, and Felix Wiget, *Der zivilrechtliche Begriff der öffentlichen Ordnung* (Graphische Werkstätten 1939, Aarau).

inconsistent with either the laws of public order or good morals.' But that makes Article 1133 unnecessary. In reality, therefore, there are three cornerstones of the law: the law, good morals and public order. Law are not all legal regulations within the meaning of 1133 CC, but only those legal standards that limit autonomy and which are mandatory in nature in that they were issued because of *ordre public* or good morals. In practice, not all contracts violate the mandatory statutory law, but only those that are in conflict with express statutory prohibition.

According to Marmion,[39] *ordre public* is an institution of society, which determined the status of individuals, legal entities and the holders of state power within society,[40] Actions contrary to *ordre public* are, according to Simitis,[41] acting against the law, which prohibits any deviation, serves public or political goals, protects third parties or law.

Mandatory legal norms are expressed by the terms in Article 6 CC *(Lois d´ordre public).*[42] That is also the case for Articles 686, 791, 900, 1130, 1133, 1172, 1387, 1388, 1443 and 1451 CC. According to the prevailing opinion, all mandatory norms are to be considered to be norms of *ordre public.*[43] The case law very often designates regulations as *ordre public* if their mandatory nature is not to be deduced from the text itself.[44] A special category of laws of *ordre public* is redundant. The term *loi impérative* is fully sufficient.[45] In the new draft of the Code Civil, the expression *disposition légale impérative* is therefore included. Article 6 CC is hence used in all cases in contradiction with the mandatory rules. According to the prevailing opinion back in the 19th century, a contract was in contradiction with Article 1133 only when the contract was in conflict with a mandatory rule. Despite this, the courts hesitated to state/proclaim/declare nullity, because of the stated contradiction to *ordre public.* They invoked good morals or even natural law instead. There was an assumption that the conflict is better justified in this way. This attitude was a result of the prevailing liberal concept, according to which anything that was not explicitly forbidden was allowed.[46] The restrictive interpretation of Article 1133 is not used anymore. This provision has to be applied regardless of the statutory prohibitions. The crucial argument lies in the theory that contractual autonomy is rendered by the legislator. The individual is therefore bound by the legal order.[47] The prevailing opinion in the 19th century resulted in the identification of Article 1133 with Article 6. The problems with *ordre public* seemed to be

[39] Jean Marmion, *Étude sur les lois d´ordre public* (1924, Paris).

[40] See Marcel Courtier, *De la notion de l´ordre public dans le code* (1904, Paris).

[41] Konstantin Simitis, *Gute Sitten und ordre public* (N. G. Elwert 1960, Hamburg) 81.

[42] Marcel Planiol, Georges Ripert, *Traice de droit civil francais* (1930, Paris) para 226.

[43] Henri Malaurie, *L´ordre public* (1955, Paris) 7., Bertrand Fages, *Droit des obligations* (4th edn, 2006, Paris) para 169.

[44] See the judgment of the Supreme Court of France Cass. Rep from 18. 3. 1867, D. 1867 – according Simitis (n 41, 83) and Cass. 1re civ 7 dec. 2004 No 0111.823, JCP G 2005, I 141.

[45] Philippe Malaurie, Laurent Aynnes, Philippe Stoffel-Munck, *Les obligations* (6th edn, LGDJ 2013, Paris) para 648.

[46] According to Boulanger (Jules Boulanger in Etudes Ripert, vol. I, 62) the content of *ordre public* can be made more concrete on the basis of the principles of current law. This opinion has been criticised since not all principles have to be applied [Malaurie, (n 43) 118]. *Ordre public* has to be assessed in compliance with the legal institutions which it serves [Malaurie, (n 43) 69].

[47] According to Simitis (n 41) 84.

a problem of the status of *ordre public*[48] and in this way problems related to the mandatory provisions were also dragged into the area of *ordre public.*[49]

b) Switzerland

Ordre public is a term used mainly in the state and police law, and also in private international law. First of all, it relates to governmental public order. Article 2 of the Constitution holds that one of the federal aims is to keep peace and order. Article 16 holds that disturbance/violation of the internal order is the pre-condition to federal intervention.[50]

Here, *ordre public* imposes regulations on individuals in order to maintain public safety and public order.

The Swiss concept has its basis in Articles 6 and 1133 of the French CC and also in Articles 31 and 1343 of the Italian Codice Civile. In Switzerland, *ordre public* was enacted, in addition to good morals, in Article 2 ZGB. In Switzerland, *ordre public* is attributed to numerous functions. It is believed that public order has only an interpretative role with regard to mandatory legal rules. If it is not clear whether the particular rule has a mandatory nature, it is necessary to ascertain whether it serves the public order or not.[51]

Wiget and Egger[52] considered *ordre public* to be a subcategory of good morals. Gauch and Schleup[53] understand *ordre public* as a complex of mandatory banishing rules of public law. According to Broggini,[54] as a general clause *ordre public* performs an individual control function for the preservation of public policy with regard to the basic values. If the contract is evidently in conflict with the basic ideas immanent in the legal order, public order is applied without this particular contract being in conflict with the particular mandatory rule. Zufferey-Werro[55] a credits *ordre public,* alongside illegality, with an independent meaning.

The concept of *ordre public* as a set of mandatory rules concludes that these rules are issued in the public interest as a concretization of *ordre public.* According to Kramer,[56] *ordre public* is a separately applicable general clause, filled by values and which should primarily fill the gaps in the law.

However, examples from the practice of Swiss courts are not convincing. *Bundesgericht*[57] considered a clause in the by-laws of a company to be in conflict with *ordre public* because it

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48 According to Art. 16 of the Federal Constitution of Switzerland a violated *ordre public* establishes grounds for the intervention of the Federal State.

49 On *ordre public* of the police, See Wiget (n 38) 136.

50 See Wiget (n 38) 121, 141.

51 Cf. Wiget (n 38) 142.

52 August Egger, *Schweizerisches Obligationenrecht* (4th edn, Stämpfli 1987, Bern) para No. 507.

53 Peter Gauch, Werner R. Schluep, *Schweizerisches Obligationenrecht* (4th edn, Stämpfli 1987, Bern) para 507.

54 Francesco Broggini, *Ordine pubblico e norme imperative quali limiti alla liberta contracttuale in diritto svizzero* (Festgabe Schönberger 1968, Zürich) 93 et seq.

55 Jules Zufferey-Werro, *Le contract contraire aux bonnes moers* (These Fribourg, 1988).

56 Ernst A. Kramer, Berner *Kommentar, Das Obligationenrecht* (Bd. VI, 1. Abteilung, Stämpfli 1991, Bern) Kommentar zu Art.19–22 OR, 72.

57 See case BGE 74 II 158 (163).

allowed third parties to enforce resistance against any resolution of the General Meeting, and such a clause is contrary to the basic principle of private law. The court's decision in Basel[58] considered that an agreement that rights against one's spouse cannot be drawn from marriage to be a violation, because such an agreement is against the legal institute of marriage. Also, the consent of a female athlete regarding a doping procedure was invalid because it denied all her procedural rights. *Ordre public* was considered to be the criterion governing general business terms.

Ordre public may also serve to control the contractual content to be performed on the basis of a constitutional legal evaluation, including the indirect effect of fundamental rights. For example, it was referred to regarding the entitlement to equal pay for both women and men.

c) Italy

Ordine pubblico[59] carries out the task of *ordre public* and public policy. According to Art.1343 CC, causa of a contract is unlawful if it violates the mandatory provisions of a statute, *ordre public* interne or corrupts good morals. The same applies to the subject of the contract and to the motives of contracting parties.

d) Germany

Influenced by the French CC, the *ordre public* was incorporated in the bills of BGB of Hessen (1844)[60] and of Bavaria (1840).[61] During the preparatory work *(traveaux preparatoires),* it became part of the first proposal of the German BGB (§ 106), but then it was excluded.

In the German literature,[62] there are three views on *ordre public.* The first group sees in good morals, as well as in *ordre public,* the criteria of unwritten law and within them can be seen three variants[63]: *ordre public* and good morals are different terms, overlapping terms, or a senior term and a subordinated term. The second group understands good morals as a factual and *ordre public* as a regulatory criterion. The third group distinguishes both terms according to the technical aspect: *ordre public* points at the written law, good morals emphasise unwritten law.[64]

Flume considers legal action to be invalid if it "negates the values, which the legal order must implement according to valid legal conviction, so the legal recognition of legal action negating these values is incompatible with the purpose and task of the law.

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[58] See case BGE 109 II 123 (125).

[59] The meaning of the Italian *ordine pubblico* is similar as the *ordre public interne* in French law. Pursuant Art. 1343 Codice civile the causa of a contract is illegal if it contradicts mandatory laws, *ordre public* or good morals.

[60] See Art. No. 84: *Verträge, welche auf einem unerlaubten Verpflichtungsgrunde beruhen, sind ungültig. Der Verpflichtungsgrund ist ein unerlaubter, wenn er von Gesetze verboten oder wenn er der guten Sitten oder der öffentlichen Ordnung zuwider ist.*

[61] Art. 80: *Nichtig sind diejenigen Geschäfte, welche gegen ein gesetzliches Verbot, gegen die Sittlichkeit oder die öffentliche Ordnung abgeschlossen sind.*

[62] Simitis (n 41) 172 et seq.

[63] Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts* (zweiter Band, 3 rd edn, Springer 1979, Berlin) 366.

[64] Werner Flume (n 63) 266.

e) United Kingdom

The term *ordre public* corresponds to the term of public policy in the Anglo-American legal family. Public policy in the broad sense means an expression of moral, political and social principles that determine the development of law at any time. Agreements which are contrary thereto are illegal and invalid.[65] In the case of Michel v. Reynolds (1711),[66] the ban on competition was regarded as invalid because it was inconsistent with the public interest and therefore with public policy. In the Egerton case (1853),[67] the court considered the agreement to be contrary to public order because, according to this agreement, the inheritor was supposed to provide a peerage to the deceased. The condition was valid because it was not prohibited. Nevertheless, the contract was contrary to public policy because it pressured the King[68] to grant the peerage to someone according to a private contract.

According to prevailing opinion[69] of the doctrine of public policy, the judge is not necessarily bound by precedents and must take into consideration the content of the public policy as being variable. The principle that contracts in contravention of public policy are invalid shall continue to apply. Its use is governed by ideas which are determined at the particular time of relevant the public opinion.

Public policy could be cited in cases relating to:

– contracts related to the Common Wealth[70]
– contracts related to public service[71]
– tax matters
– cases of obtaining the benefits of criminal conduct, protection of religious freedom and tolerance, contracts resulting in the ignorance of generally accepted obligations,[72] contracts threatening personal freedom, agreements contrary to good morals, contracts inconsistent with the protection of family life, restriction of trade, restriction of economic(respectively business) activity, restricting economic competition.

When evaluating conflict with public policy, it is necessary to evaluate the ultimate purpose of the transaction, in particular the intention of the parties.[73] Illegality is found when the parties concluded a contract with the knowledge and realisation that the outcome of the contract would be contrary to public order. This must be determined in each particular case. If only one party to the contract had unfair intentions, the whole contract is invalid.

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65 See *Alexander v. Rayson* (1936) 1 K.B.182.
66 Cf. Simitis (n 41) 113.
67 See *Egerton v. Earl of Brownlow,* 23 (1854), L.J.Ch.348, according to Simitis (n 41) 113.
68 Cf. Simitis (n 41) 113.
69 Cf. e.g. case *Lord Macnaghten in Nordenfelt v. Maxim Nordenfeld* Co (1893) A.C.565.
70 See Cheshire-Fifoot, *Law of contract,* 247.
71 Cf. Polock, Winfield, *Principles,* 298 ff.
72 See case *Regazzoni v. Secia* (1958), A.C.301.
73 Polock-Wifield (n 71) 370 ff.

f) USA

The English influence has been decisive for a long time.[74] However, it has become less decisive. While defining public policy, it is necessary to take into consideration the Constitution, statutes and precedent. The provisions of the Constitution have absolute preference.[75]

The meaning of the term public policy is a principle in which one cannot act legally if they act against the public or public welfare.[76]

5 Ordre public in the New Czech Civil Code

Melzer and Tégl[77] differentiate between *ordre public interne* in the broad and narrow senses. In the first case, it is an aggregate of rules, the observance of which is, according to prevailing socio-ethical beliefs, a necessary, unreserved condition for proper human coexistence in a certain society. In this conception, the rules are not distinguished according to origin and rules of good morals are also included. The narrower concept tries to specify the term *ordre public* alongside the category of good morals. *Ordre public* represents just those above-stated rules which have their basis in the legal order as such *ordre public* interne relates to the term 'public interest', though these two terms are different. *Ordre public* is violated if the public interest is breached to such a degree that common living is fundamentally endangered, which results in the need of the public authority's intervention without stating individual initiatives.

I. Pelikánová and R. Pelikán[78] emphasise the difference between *ordre public* and *ordre public* in international private law, which is considerably narrower and covers order in public affairs. In *ordre public* the term is extraordinarily broad and essentially corresponds with the term of public interest. It is a set of rules or principles governing how to behave in public, certain maxims on which society insists. It is also used in a narrower sense, which concerns only behavioural rules regarding publicly accessible places. Nevertheless, in the broader sense it is comprised of principles, on which society insists.[79]

Both of these opinions show a wide variety of weak spots, which have their common denominator in not considering the newly established term *ordre public* in its full context. Inner *ordre public* is one of the forms of public order, which has a specific function in private law, particularly in the scope of the Civil Code. For that reason it is necessary to define inner public order and specify its content with regard to its specific function, not only towards the other forms of public order, but also towards other categories, which have the same independent position as public order, even though they are fulfilling similar functions. This includes good morals.

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74 See Simitis (n 41) 142 et seq.

75 *Gandoufor v. Hartmann* (1892, 49 F.181, Twin City Pipe Line Co.v. Harding Glass Co.1931, 83 L.A.R.1168).

76 Worksmen´s Comp.Bd.v. Abbot. (1925) 47 L.A.R. 789.

77 See n 21, 60, 61.

78 Irena Pelikánová, Robert Pelikán, 'Comments on Sec.1 para 2 NCC' in Švestka, Dvořák, Fiala (eds), *Komentář k občanskému zákoníku (Commentary' on the Civil Code),* (Vol. 1 Wolters Kluwer 2014, Praha) 16.

79 See n 78, 17.

Ordre public as an institution embodied in the Civil Code (Sections 1 par. 2 and § 588) is not a summary of mandatory provisions; legal regulations and rules of police law are not its content and it does not contain moral rules. It is the expression of the public, social interest, which contains constitutional principles and constitutional order, including fundamental human rights.

Its function is to sanction Juridical Section acts, which are contrary to it.

According to section 1 par. 2. agreements violating public order are forbidden and according to section 588 legal acts obviously violating public order are absolutely invalid.

At first sight there is an obvious contradiction between the effects of *ordre public* in the first and the second case. From the point of view of the result, this contradiction would mean that particular actions, even though they are forbidden, are not necessarily sanctioned with nullity. This contradiction is necessary to be resolved by considering the first provision (section 1 par. 2) to be a proclamation of a particular principle, which is then specified in a special provision section 588.[80]

This provision sanctions legal acts, which are in qualified contradiction to public order. It is the only way to interpret quite an unhappy dictum that an act 'obviously violates ordre public'. The literal interpretation of this rule would lead to the opinion that *ordre public* means a complex of specific public order and police regulations, which handle maintaining peace or a particular order of things in a common, factual and not legal contact.

The qualified breach (see 'obvious') is necessary to be understood as a flagrant contradiction between the legal act and the content of the *ordre public* as its result.

The application of *ordre public* is represented by the sanction of nullity of the legal act from its very beginning, which the court takes into account as its official duty.

6 Comparison

a) Essence

The institution of *ordre public* is a category which serves to defend a certain community or the legal order and legal relationships which have been built based upon it from influences coming from foreign legal systems which may disturb a certain equilibrium emanating from the domestic legal order.

The institute of public order is thus a tool, albeit used only exceptionally, against such 'harmful' influences. As we will see, the scope of this instrument is rather wide.

It can thus be said that this is a tool intended to limit freedom (party autonomy), legal actions and their results, the scope of action and applicability of foreign legal decisions, and finally the inhibition of the movement of the basic factors of the domestic market, the foundation of which is the defence of a certain community (state, EU etc.) in the interest of certain values or common values.

[80] Cf. Luboš Tichý, *Obecná část občanského práva (General part of Civil law)* (CH Beck 2014, Praha) 309.

The particular concepts differ from abuse of right in the content of this institution. In some cases all mandatory regulations are considered to be that content, another time some mandatory regulations of a specific kind, such as police regulations, are considered to be it, at some other cases these are values or rules shared in a particular society.

Autonomy of parties is original and *ordre public* interferes with its sphere as an exception. The reason for that is public interest. Included is the case that the contract concerns a state's legal institute or something which is considered by the nation's majority as a condition of peaceful common living.

b) Function and development

The main function of the *ordre public* is to restrict the free will (autonomy of parties) with its content. Nevertheless, the contradiction with this content has its result in the sanction of nullity, because the violation of the public order is forbidden.

Contractual freedom in its liberalistic formulation could have been restricted only by the freedom of others. Mandatory provisions and *ordre public* served this purpose. Freedom and *ordre public* are expressions of two sides of the same idea.[81] *Ordre public* was an exceptional phenomenon. Regarding Arts. 6 and 1133 CC, it must have been used with extraordinary moderation.[82] In the (judicial) decisions, *ordre public* has been referred to in the sense of protection of the French nation and fundamental values. The theory held the view that *ordre public* serves to secure the order of existing society as well as to carry out the decisive political opinions in society.[83] According to this, *ordre public* is a political term. *Ordre public* is then warranted by law as a consistent set of rules. At the same time, it is necessary to see *ordre public* in the historical perspective as the protection of the achievements of the French revolution against the feudal system. The legislator could not foresee all situations which were contrary to these objectives and so there is the general tool of public order as a clause for protecting of the existing social order.[84] It ensures that the minimum legal rules, which guarantee that social affairs will run according to the legislator's notions, will be respected. Since the legislator's value system is his political idea, *ordre public* enforces the implementation of political aims with legislative power.

The content and function of *ordre public* also changes. Contracts for employment, which during the war assigned work orders in Germany, were lawful; these became contradictory to *ordre public* after the end of the war. For example, before the principle of *ordre public,* it was policy that an extramarital child was not eligible to demand either acknowledgement of paternity or alimony. This policy was superseded in 1933, when the duty of an extramarital child's father to pay alimony was recognised. If *ordre public* turns out to be stronger than mandatory provisions, it is obvious that, for example, a causal contract may become void with this legal development.

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[81] Julliot de la Morandiére, *Cours élémentaire* (vol.I. 1932, Paris) 388 et seq.

[82] *Ordre public* interne should be considered adequate functioning of the private law institutions [Malaurie, (n 43) 70].

[83] See 45, para 648.

[84] See (n 63) 367.

Ordre public can have an interpretative function, while the concept of *ordre public* as a subcategory of good morals can have some importance in those legal orders where this category is not known (e.g. BGB, ABGB). In these jurisdictions, good morals are objectified in the direction of the *ordre public.* From this perspective, it is irrelevant whether the terms *ordre public* and good morals have a separate function or whether they have similar meaning.

c) Ordre public and good morals

The applicability of these two concepts, i.e. order public and good morals, essentially should not overlap with regard to their meaning, content and ultimate objective. If somebody acts contrary to good morals, the consequences should only result from the meaning and function of good morals, unless *ordre public* would (in certain cases, possibly) also cover certain aspects of such actions. Each of these institutions has a different objective and therefore a different scope of application.

The position of *ordre public* is relevant to good morals. Simitis[85] held the opinion that good morals are part of *ordre public* (opposite Flume[86]), exclusively the moral imperatives to be applied in the field of sexual and family life.

Ordre public cannot be separated or distinguished from good morals. If someone tries to do so, it is an artificial differentiation. What is immoral is, in many cases, contrary to public order. On the other hand, there are cases in conflict with *ordre public,* which are also immoral. If the conflict with *ordre public* is not immoral, it is usually a neutral action from the ethical point of view. On the other hand, an action could be considered to be one which is contrary to good morals but does not violate *ordre public.* The fact that, in many cases, there is no contradiction between good morals and *ordre public* could be explained so that the reasons contained in Art. 20/para 1 OR invalidity of the contract are not enough without mentioning *ordre public* and they expressly mention only impossibility, illegality and conflict with good morals.

d) General and assessment of ordre public in compared legal orders

Comparing *ordre public* in individual legal orders results in a relatively unorganised picture, at least at first sight. This picture is frequently characterised by internal discrepancies, particularly in relation to good morals, as well as sanctions for contracts and other juridical acts which are affected by *ordre public.* Often the relation to good morals is unclear. After all, this apparently results from the idea, according to which the term *ordre public* should also include good morals.

e) Ordre public in the New Czech Civil Code

For the NCC, the following rules should apply:

– Unlike good morals (see its content above), the content of *ordre public* should not include all mandatory regulations of a given legal order, including public law rules.

– *Ordre public* also shouldn't contain moral values, which are included in good morals.

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[85] Cf. Sinitis (n 41) 197.

[86] Cf. Flume (n 63) 365.

Ordre public should have its specific content and scope of application, as well as specific effects. The basis and content of *ordre public* is the legal order's basis, thus that of constitutional law and fundamental human rights.

IV Abuse of Rights

1 The Term and Relation to other Kinds of Unlawful Exercise of Rights

a) Introduction

The term 'abuse of rights' is very equivocal, which is illustrated by its different conceptions in jurisprudence, even in the same jurisdictions, as well as by a very different understanding of this institute's content, its conception and applicability. For instance, Pulkrábek[87] believes that abuse of rights contravenes not only good morals and good faith, but also other fundamental values. According to this author, this term also includes types of unlawful exercise of rights, which very often, and even in principle, are excluded from the category of abuse of rights.

b) History. Development. Overview

This legal institution of *ordre public* appears in Civil law legal reasoning in the second half of the 19th century in French case law. The principle excluding liability in delict when invoking one's own right had been upheld for a long time when Art. 1382 CC was applied. However, exemptions have appeared since the 1850s. Liability could be invoked provided that the claimant was not abusing their own right. A number of papers dealing with this issue had been published in French and Italian academia throughout the 20th century, though none of any great significance. Most of them namely refer to the Roman law institution of *aemulatio vicini*. Other authors addressed the issue as a conflict between law and morals. Abuse de droit can be established if the invocation of one's own right does not serve its initial economic or social purpose. As such, there was no explicit rejection of this concept. Addressing abuse of rights was perceived as a clear logical flaw as law and its absence could not coexist. Later, the doctrine of E. L. Josserand,[88] distinguishing between the subjective and objective elements of abuse, prevailed in French doctrine. From a subjective point of view, abuse can be established if a claimant uses their own legal position in pursuit of condemnable aims. In contrast to this, the objective abuse of rights does not depend on any mental element and can be established if the entitled person invokes their rights to pursue aims conflicting with the initial purpose of the rights invoked. Simultaneously, legal standing equals legal institution. This is still an unknown concept in common law that still

[87] Zdeněk Pulkrábek, in Melzer, Tégl (ed), *Občanský zákoník § 1–117 (Civil Code)* (Leges 2013, Praha), Comments on Sec. 8 para 1, 149 et seq.

[88] Josserand, *L´abuse des droits* (1904, Paris) according to Filippo Ranieri in Basedow, Hopt, Zimmermann, *Handwörterbuch des europäischen Privatrechts* (Bd. II, Mohr Siebeck 2009, Tübingen) 1259.

upholds Lord Halsbury's famous quote from *The Mayor of Bradford v Pickles:*[89] 'If it was a lawful act, however ill the motive might be, he had a right to do it.'

In Germany, W. Siebert[90] adopted Josserand's concept; however, German and French theories differ. French theory classed abuse of rights as the law of torts. In German theory, however, impermissible execution of a right fell within the scope of good faith *(Treu und Glauben).* Unlike the French doctrine, Siebert[91] also developed a theoretical justification for the judicial mechanism modifying the content of rights through the impermissible execution of rights, which may significantly relativise legal and contractual norms.

The concept of abuse of rights has been added to a number of codifications in Europe, with the exception of Germany. The German BGB only recognises the prohibition of bullying in § 226 BGB. The Swiss Civil Code explicitly recognises the prohibition of the abuse of rights[92] with regard to the principles of good faith and stipulates that a manifest abuse of rights cannot enjoy legal protection. This provision served as a model for a number of other European civil codes. Nonetheless, Italian legislators chose not to explicitly codify the abuse of rights as the Codice Civile[93] already provides for the prohibition of the exercise of rights with the aim to bully others in the section governing property rights. The prohibition of the abuse of rights has been adopted by Sec. 281 of the Greek Civil Code. Article 5 of the Polish Civil Code provides for the prohibition of the abuse of rights. The idea has also been adopted by the Civil Code of Portugal from 1966, as well by Art. 7 of the Spanish Civil Code in its version from 1964 prior to any amendments.

The *venire contra factum proprium maxime* covers a wide range of cases, where considerations regarding the protection of good faith may cause changes in the substantive basis of the case. The exceptional nature of interference in the subject matter is thus very important. Conventional reference merely passes the very core of the issue. It is not the unlawfulness of a legal entity's whole conduct that is decisive. Evaluating the conduct as a legally ethical value is not convincing enough to justify changes in the legal qualification of the substantive basis of the case. Silence *(non licet)* does not result from diverging and conflicting behaviour, but stems from a specific faith worth protecting which, under certain circumstances, may lead to the adaptation of the subject-matter to that respective faith.[94]

The basis of the claim, that the subject-matter should correspond to the faith of the parties, rests to a certain extent on the principles protecting the faith of the respective parties as developed by Canaris[95] and modified by Bydlinski[96] in Austrian law. Under this concept, the

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89 See The Mayor, Alderman and Burgesses of the Borough of Bradford v. Pickles (1895) AC 587 – cit. according to Ranieri (n 88) 1259.

90 See Art. 833 Codice civil.

91 See Siebert (n 90) 128–137.

92 See Heinrich Honsell, Comments on Art. 2 para 2 of the Swiss Zivilgesetzbuch (Lichtenhahn 2009, Basel) paras 1, 4.

93 See Art. 833 Codice civil.

94 Cf. e.g. Günter A. Roth in *MünchKomm BGB* (5th edn, CH Beck 2007, München). Comments on Sec. 242 BGB, paras 176–422.

95 Claus Wilhelm Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (CH Beck 1971, München).

96 Franz Bydlinski,' Willens- und Wissenserklärungen im Arbeitsrecht' (1976) 83 ZAS, 133.

substantive basis of a case is a flexible system. The decisive factors are not explicitly enumerated as they are specified on a case-by-case basis. The basic model, the subject-matter of which is sufficiently determined, is in any case flexible enough to accommodate flatly different conduct by the parties. The conduct, however, may be scrutinised in a perspective different from Canaris' abuse of rights.

Recognising the application of the *venire maxime*, namely that differing legal consequences may be exceptionally justified on the basis of protection of good faith, brings about significant legal consequences.[97] Firstly, the 'clear' prohibition of ambiguous actions, (with no connection to the theory of faith whatsoever) must be refused. This leads to a major impact for the passive extinction of rights. This legal category cannot be justified solely by this elementary concept.[98]

2 Chicanery and Assessment of Abuse

a) Introduction

The abuse of rights persists in the unfair assertion of a right, especially if such assertion conflicts with the protection of good faith or good morals. Such prohibition relates to all rights. Not only the assertion of a claim, but also the exercise of a constitutive right based on a notice, a defence or a controlling interest in corporate law may be deemed impermissible. Moreover, the prohibition of abuse of rights is a recognised principle of EU law.[99] Deceitful or abusive claim is impermissible under the well-established case law of the ECJ.[100]

b) Chicanery

The exercise of rights is impermissible when done with the intent to harm others. This provision (§ 226 BGB) defines abuse very narrowly. It is thus insufficient if the harmful objective is only one out of many objectives pursued by the entitled person and the rest of them remain lawful.

Exercise of a right to information in a situation when this right is still enforced even though the entitled person is aware that its basis has ended, may serve as an example of chicanery.[101]

c) Role of good faith

Prior and current conduct

Conflict with good faith occurs if a person invokes a right they did not previously acquire in good faith. Enforcing rights from a contract with their awareness that the representative of the other party misused its representation may serve as an example. A similar situation arises when a creditor claims contractual penalty even though they incited the debtor to act contrarily to the contract.

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[97] Peter Mader, *Rechtsunmißbrauch und unzulässige Rechtsausübung* (Orac 1994, Wien) 121 et seq.
[98] Cf. Mader (n 97) 124 et seq.
[99] See Case C-265/02 *Halifax*.
[100] See Case 104/79 *Foglia v. Novello* [1980] ECR 745.
[101] Roth (n 94) 292 et seq.

An instance when the legal standing of one party has been modified in an unfair manner would be treated similarly. Such cases typically occur when the addressee prevents completion of expression of the other party's will by removing the mailbox.

The same can be said of the situation when a creditor asserts their right while using it as a pretence to achieve unfair aims.

It is against the principle of good will to act contrarily to one's own prior conduct.[102]

d) Role of good morals

It is very difficult to qualify an abusive exercise of right only by interpretation of the particular norm because the act is incompatible with a certain higher standard represented by good morals. Its application may make an impression that such a right is not protected sufficiently. However this right is just restricted by the prohibition of abuse, as the actual realized law is unjust.[103] This is not about each attempt of abuse, but about clear legal abuse, which must not be in doubt.

3 Relevant Aspects

a) Basic types of abuse

An exercise of a right is abusive if its connected interest, or purpose is condemnable. Primarily, it involves bullying or similar cases. There is no performance interest or steep inequality of interests taking part in favour of the one who is invoking this law or, because of that, gaining the consequences that are not recognised by the law. Otherwise, the actor is characterized as being full of contradictory behaviour. It does not mean anything else than the exercise of right is not covered by the law invoked. The law is evidently narrower as it appears to be at first sight.[104]

– Classic wall case: erection of a wall in order to prevent a neighbour's view.
– Flagrant imbalance of interests: lessor evicts an ill lessee on the day of the end of the lease, although he doesn´t need the flat.
– Inconsistent behaviour. Not every act like this is a abuse and only those that initially inspired confidence deserves protection, if damage is caused.
– To invoke technical deficiency can be, in certain circumstances, abuse, if it is incompatible with the purpose of the law or the deficiency was caused by a trick.
– Abuse of prescriptions. If one party claims prescription despite a reasonable reliance of other party on its silent waiver of such a claim.

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[102] Roth (n 94) 173 et seq.
[103] See (n 86) 366.
[104] According to Hans Merz comments on Art. 2 ZGB in Peter Liver and others (eds), *Berner Kommentar,* Einleitung (Stämpfli 1966, Bern) 303 et seq.

b) Extralegal values[105]

Section 8 of the New Civil Code determines a content limit for the exercise of all subjective rights and also creates a possibility to take non-legal aspects into consideration by the application of the law. The prohibition of abuse of rights serves as a corrective in all cases, as the appeal to the formal rule of law in force is contradictory to what appears to be legal in the interest of material justice. It leads to the relativisation of subjective rights.[106]

c) Degree of abuse

The relevance of the legal role in the meaning of the prohibition of abuse of rights cannot be overlooked. It is relevant where there is no law based on legal transaction; however, in cases when there is a norm of law, that norm holds for everyone in its effect. In that case, it is the misuse of the norm and the misuse of the law that constitutes abuse.[107] An example is a judgment of the Supreme Court of Switzerland from the area of corporate law, Art. 2 ZGB is a crucial norm that acts as the enforcement of public order and morality and its validity is applicable in the whole legal system. As long as the judge's enforcement of the law seems to appear to be a legal abuse, this principle has a narrow connection with the application of the law. The court of justice should not make a decision that would lead to a certain result of the formal legal order which is in obvious contradiction with the ethical requirement element.

The collocation[108] 'obvious misuse' expresses that it is necessary to prevent the legal protection of the law only where the intention, and thus the aim, of the law opposing the use of apparent law was not intended to do so by the legislator, or where the law needs to be marked as defective, because certain cases are in noticeable contrast with the social-ethical basis of the legal order.

d) Subjective or objective abuse

An action tending towards a misuse of the law should be considered as misuse and judged regardless of its subjective aspect. The only exception is liability for damage caused by wilful misuse of the law. Here, the subjective aspect is required in the most important form, namely wilful misuse (section 2909 of the NCC).

e) Consequences of the prohibition of legal abuse

At first sight, it seems that, in the event of legal conflicts, or rather issues of good manners, abuse should lead to invalidity (e.g. according to § 580 NOZ, or rather Art. 20 OR). Absolute nullity would not in many cases be an adequate solution. It would be inappropriate. What is the

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[105] Hector L. Mac Queen, 'Illegality and Immorality in Contracts: Towards European Principles' in Hartkamp and others (eds), *Towards European civil code* (4th edn, Wolters Kluwer 2011, Alphen am den Rign) 555, 559.

[106] Stefan Vogenauer The Prohibition of Abuse of Law: An Emerging Principle of EU Law in de la Feria (Hart 2011, Oxford, Portland) 521, 556.

[107] See BGE 128 III 201.

[108] Cf. Art 2 para 2 of the Swiss ZGB and Sec. 8 of th Czech New Civil Code (NCC).

purpose of modifying subjective or lawful rights in the sense of balancing interests, eventually tending towards compensation for damages?

This aspect is very debatable, primarily in Czech literature.

From my point of view, it is about the criterion of the importance, or rather the criterion of obvious legal abuse. It is, after all, also the aim of the legislator. The goal is to distinguish trivial cases from obvious legal abuse representing obvious unacceptable interference. In such cases, the court should judge the question ex officio.

4 Abuse of Rights according to the New Civil Code

The legislator sets a general limit for the exercise of the right by setting down that its abuse does not enjoy legal protection. It means that a legal claim is restricted in its application towards third parties according to the standard of legitimate use. The outlawry of the abuse of law is based on that.

The abuse of law presumes the existence of applicable law, which uses the proper exercise of legal protection. This right, however, is exercised contrary to its purpose. This is how the term 'abuse' can be understood. There are two forms of the contradiction between formally existing and substantive rights, which deserves legal protection as justice-oriented law:

a) The right is exercised in a way contrary to the idea of law. This exercise is contrary to the substantive right itself, which presumes a balance of the interest of the possessor of this right and the other party, which imposes a corresponding obligation to this right.

b) Quite rarely there are some cases when, as a result of a change of circumstances based on a lack of justice, the material right itself, not the way of its exercise, does not fit the principle of the balance of interests usually acquired at the past.

The section 8 sets a content limit for the exercise of all rights and in this way creates a possibility to take some out-of-law standards into consideration while exercising the right. The prohibition of the abuse of right is a legal remedy in all cases, where achieving a formally rightful legal rule is contrary to what is considered as desirable in the interest of material justice. In this regard a certain kind of emphasis on the relativity of the right itself appears.

The scope of applications of the section 8 only exceeds the effect of the right based on the legal act. It actually concerns all legal entities which gain their rights from the law itself. The abuse then means deducing rights from so-called false gaps in law. In this case we can speak about the abuse of legal rules, i.e. abuse of law. In these cases, it occurs that the legal protection of the law is denied, where laying claims is contrary to the legislator's intention, because such exercise or authorisation was not quite clearly meant by the legislator or where the law can be described as dubious in content in a broad sense, because it is in sharp contrast to the socio-ethical bases of the legal order in a particular case.

The abuse of law leads to the loss of legal protection, which is otherwise inherent in every right in the case that the aggrieved person wants to apply to the court. However, the juridical act, which is based on the abuse of right, is not void. The aggrieved person has a right to legal protection.