



ANALYSIS OF ABUSE OF RIGHTS AND ITS LEGAL CONSEQUENCES IN GERMAN CIVIL LAW

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Abstract

This article analyzes the concept of abuse of rights in German civil law, its theoretical foundations, and its civil law consequences. The study examines various manifestations of abuse of rights based on §§226, 138, 241, 242, 249, 280, 812–822, 823–826, 858–906, 652–654, 656c–656d, 675k–676c, and 771–776 of the German Civil Code (BGB). In particular, the research covers the prohibition of chicanery, the principle of good faith, limitations of contractual freedom, tort liability, unjust enrichment, limits on the exercise of property rights, payment services, intermediary relations, and suretyship, as well as the legal consequences of bad-faith exercise of rights. The article concludes that in German law the abuse of rights is not treated as a separate legal remedy, but rather as a comprehensive civil law mechanism that defines the limits of exercising rights, restores legal balance, protects the weaker party, and ensures good faith in civil circulation.

Keywords: Abuse of rights, chicanery, good faith, fairness, suretyship, intermediary relations, restitution, tort, unjust enrichment.

Introduction

In German civil law, the institution of abuse of rights is regulated by a number of substantive legal norms, and its content as well as its legal consequences are reflected in the provisions of the German Civil Code (Bürgerliches Gesetzbuch – BGB). In particular, §§226, 138, and 826 of the German Civil Code, adopted on



18 August 1896 and entered into force on 1 January 1900, establish general and special legal mechanisms related to the abuse of rights¹.

Section 226 of the German Civil Code (BGB §226) is one of the important general limiting provisions in civil law aimed at preventing the abuse of rights and is recognized as the prohibition of chicanery (Schikaneverbot). According to this provision, if a person exercises their right without pursuing any legitimate legal or economic interest, but solely with the intention of causing harm to another person, such conduct shall not be granted legal protection. In German civil law doctrine, this rule is considered a specific manifestation of the principle of good faith (Treu und Glauben – BGB §242) and is regarded as serving to ensure the social function and purpose-oriented exercise of subjective rights.

In legal scholarship (for example, in the works of K. Larenz², D. Medicus³, and F. Baur⁴), it is emphasized that for chicanery (Schikane) to be established, it must be demonstrated that there is no objective benefit in the exercise of the right and that the intention to cause harm predominates. In other words, the exercise of a right must be aimed not at protecting the legitimate interests of the right holder, but solely at causing harm to another person.

German civil law scholars consider this rule as a legal mechanism aimed at harmonizing public interests and the rights of legal subjects⁵. This position is also reflected in German legal commentaries on the prohibition of chicanery under the German Civil Code. In particular, it is emphasized that it is not the exercise of a right as such that is prohibited, but rather its exercise in a manner intended to cause harm to another person. Indeed, certain rights cannot be exercised without affecting others to some extent. Moreover, it is not sufficient to prove that causing harm was one of the purposes of exercising the right; it must also be established, based on the circumstances of the case, that the person exercising the right had no other purpose, meaning that causing harm was the sole intention⁶. Section 226 of the German Civil Code is based precisely on these criteria and serves to ensure the observance of the principle of good faith in civil transactions (Treu und

¹ [extension://mjdgandcagmikhblbnlkmfnjeamfikk/https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf)

² K. Larenz, *Textbook of the Law of Obligations, Vol. I: General Part* (Munich: C.H. Beck, 1987), p. 154;

³ D. Medicus and J. Petersen, *Civil Law* (Munich: C.H. Beck, 2019), p. 103;

⁴ F. Baur and R. Stürmer, *Property Law* (Munich: C.H. Beck, 2009), p. 96.

⁵ Энкецкерус Л. Курс германского гражданского права. Т. 1, полутом 2. М., 1949. С. 168.

⁶ Цвайгерт К., Кетц Х. Введение в сравнительное правоведение в сфере частного права: В 2 т. Т. 1. Основы: Пер. с нем. М., 2000. С. 231.



Glauben), to prevent the use of rights contrary to their social purpose, and to establish that the freedom to exercise rights is not absolute. At the same time, German legal doctrine recognizes that the prohibition of chicanery applies to all areas of law, including procedural law, and that violations of this prohibition may result not only in material damage but also in non-material (moral) harm.

The specific feature of §§138 and 826 of the German Civil Code (BGB) in relation to the abuse of rights is that they regulate this institution in a comprehensive manner through different legal mechanisms. In particular, §138 of the Civil Code limits the contractual (ex ante) form of abuse of rights by declaring void those legal transactions that are contrary to good morals (gute Sitten) and that are aimed at obtaining an unfair advantage by exploiting the financial situation or economic vulnerability of one of the parties. Through this provision, the legislator establishes that the principle of freedom of contract is not absolute and must be limited by the requirements of good faith and fairness. Section 826 of the Civil Code, in turn, provides for the tort-law (ex post) consequences of abuse of rights by establishing civil liability for damage caused intentionally and in a manner contrary to good morals. In this respect, the peculiarity of these provisions lies in the fact that one serves as a preventive mechanism aimed at preventing abuse of rights (§138), while the other functions as a mechanism establishing financial liability for damage caused as a result of such misconduct (§826).

In German civil law, the institution of abuse of rights is not limited solely to the prohibition of chicanery provided in §226 of the German Civil Code (BGB). This institution is also ensured through other provisions of the Civil Code, such as §241 (the duty of mutual respect and consideration of interests within obligations), §242 (the principle of good faith – Treu und Glauben), §249 (the principle of full compensation for damages), and §280 (liability for breach of obligations). In this regard, the prevention of abuse of rights in German law is characterized not by a single legal provision, but by a system of interrelated legal rules encompassing the general principles of civil law and liability mechanisms. In particular, according to §241(2) of the German Civil Code (BGB), an obligation relationship includes not only the performance of primary obligations but also the duty of the parties to respect each other's rights and legitimate interests. This provision establishes standards of good faith conduct in legal



relations and serves to limit the formally lawful exercise of rights in a manner that substantively harms the interests of another party. At the same time, the principle of good faith (Treu und Glauben) established in §242 of the Civil Code is considered one of the fundamental principles of German civil law and serves in judicial practice as a universal evaluative criterion for identifying abuse of rights. Through this principle, courts assess the purpose of exercising rights and the standards of fairness in civil law relations, thereby ensuring that subjective rights are not treated as absolute. The specific feature of these provisions is that in German law the prevention of abuse of rights is ensured not only through the prohibitive rule of §226, but also through a comprehensive regulatory framework that includes the establishment of standards of good conduct in obligation relationships (§241(2)), the application of the general principle of good faith (§242), and the mechanisms for restoring violated rights and ensuring liability (§§249 and 280). If damage is caused as a result of the abuse of rights, civil law consequences such as restoration of the previous legal position, compensation for material damage, or other forms of compensation may be applied in accordance with §§249 and 280 of the Civil Code.

A comprehensive analysis of the provisions of the German Civil Code demonstrates that in this legal system the abuse of rights is not regulated through a single specific norm, but rather is limited through various institutions of civil law, including the principles of good faith, proportionality, fairness of contractual terms, and the balance of the parties' interests. The peculiarity of this approach lies in the fact that courts assess not merely the existence of a right, but also the purpose, manner, and degree of good faith with which such a right is exercised. In particular, in the area of payment services (§§675k–676c BGB), abuse of rights may manifest itself through the use of contractual rights by a bank or payment service provider in a manner contrary to the interests of the customer. For example, the unjustified blocking of an account (§675k), the refusal to execute a payment order without sufficient legal grounds (§675o), or the unlawful imposition of liability on the consumer for an unauthorized transaction may be considered forms of bad-faith exercise of rights. In such cases, the law provides for restitution (restoration of the legal situation to its state prior to the violation) and compensation mechanisms. This includes the obligation of the bank to immediately refund unauthorized debited funds (§675u), the limitation of the



customer's liability to a fixed amount (§675v), and the allocation of the burden of proof to the professional party (§675w). This demonstrates an important feature of legal protection against the abuse of rights.

An analysis of §§652–654 and §§656c–656d of the German Civil Code (BGB), which regulate intermediary (real estate brokerage) relations, shows that abuse of rights in these contractual relations primarily manifests itself through the use of contractual powers by the intermediary in a manner contrary to the principle of good faith (§242 BGB). Given the legal nature of a brokerage contract, the main obligation of the intermediary is to act in accordance with the interests of the parties and to comply with the principles of trust and fair dealing. From this perspective, if the intermediary simultaneously serves the interests of both parties or gives preference to one of them in pursuit of personal financial gain, such conduct may be regarded as the use of a right contrary to its purpose, that is, as an abuse of rights. Section 654 of the German Civil Code provides for a specific legal consequence in such cases: if the intermediary allows a conflict of interest or breaches contractual trust, they lose the right to claim their brokerage commission. An important aspect here is that the law does not primarily apply classical civil liability (such as damages), but rather a mechanism of deprivation of legal protection in response to the abuse of rights. In other words, even if the intermediary has facilitated the conclusion of a contract, the court may deny their claim for remuneration if the right was exercised in bad faith.

At the same time, in real estate brokerage (§§656c–656d BGB), abuse of rights often manifests itself in situations where the economically stronger party attempts to use its dominant position to unjustifiably impose the obligation to pay the brokerage fee on the consumer. According to these provisions, if the intermediary provides services to both parties, the obligation to pay the commission must be shared equally between them (§656c). If the commission is imposed on only one party, this is permissible only where there are legitimate legal grounds for doing so (§656d).

Thus, based on the analysis of these provisions, it can be concluded that the main forms of abuse of rights in this area include: allowing conflicts of interest by the intermediary; charging unjustifiably high or disproportionate fees; and imposing excessive obligations on the economically weaker party through contractual terms. In such cases, German civil law provides the following legal consequences



as mechanisms to address abuse of rights: deprivation of the right to claim brokerage commission (§654 BGB); declaring unfair contractual terms invalid; proportional distribution of the obligation to pay the commission (§656c BGB); exemption of the consumer from unjustified financial liability; and the application of legal protection in favor of the good-faith party.

In suretyship (Bürgschaft) relations regulated by §§771–776 of the German Civil Code (BGB), abuse of rights in contractual relations may typically arise where a creditor, despite having a legal right of claim, exercises this right in a manner contrary to the principles of good faith and fairness (BGB §242). In such cases, even though the creditor formally possesses the right, its exercise may be considered abusive if it disturbs the balance between the parties or unjustifiably harms the interests of the surety. Given the legal nature of suretyship, the liability of the surety is of an accessory character, meaning that it is dependent on the obligation of the principal debtor. Therefore, when exercising the right of claim, the creditor must first take reasonable steps to satisfy the claim from the assets of the principal debtor. If the creditor directly claims against the surety despite the availability of such possibilities, this may be regarded as an exercise of rights contrary to their purpose, that is, as an abuse of rights. To prevent such situations, §771 of the German Civil Code grants the surety the right to raise the defense of prior recourse against the principal debtor (Einrede der Vorausklage). The legal nature of this mechanism lies in the fact that it does not eliminate the creditor's right of claim, but rather limits the manner of its exercise. In other words, the creditor may exercise their right, but must do so in compliance with the requirements of good faith and fairness. In this context, the legal consequence of abuse of rights is not liability as such, but the temporary restriction of the creditor's ability to enforce the claim.

At the same time, §776 of the German Civil Code (BGB) is aimed at preventing the deterioration of the surety's legal position as a result of the creditor's actions. If the creditor unjustifiably waives collateral, a mortgage, or other security rights, or fails to take the necessary measures to preserve them, the surety is released from liability to the corresponding extent. The purpose of this provision is to ensure that the creditor exercises their rights in good faith. This is because the creditor must not, through their actions, limit the surety's rights of recourse, that



is, the surety's ability to claim reimbursement from the principal debtor after fulfilling the obligation.

The specific feature of §§771–776 of the German Civil Code (BGB), which regulate suretyship relations, is that German law limits the abuse of rights not only through general prohibitions but also through a system of special legal safeguards aimed at protecting the surety from unfair conduct by the creditor. In particular, the law treats the creditor's right of claim not as an absolute power, but as a right that must be exercised within the framework of the principles of good faith and fairness. For this purpose, a number of legal mechanisms have been introduced, such as granting the surety the right to raise objections against the creditor's claim (§771), reducing or eliminating the surety's liability where security rights are lost due to the creditor's fault (§776), and protecting the surety's rights of recourse. The main distinctive feature of this regulation is that it does not aim to restrict contractual freedom by limiting the creditor's formal rights, but rather to ensure legal equality between the parties and to protect the relatively weaker party, such as the surety, through a special preventive legal model. From a theoretical perspective, these provisions demonstrate another important characteristic of the abuse of rights doctrine in German law. Namely, the legal consequence of abuse of rights in this context is not classical tort liability, but rather the readjustment of the scope of the obligation—that is, the rebalancing of the rights and obligations of the parties on the basis of the principle of fairness.

An analysis of §§812–822 of the German Civil Code (BGB), which regulate the civil law institution of unjust enrichment, shows that this institution serves as a universal civil law mechanism aimed at ensuring the balance of proprietary interests in cases of abuse of rights. Its essence lies in the principle that no person may obtain unjustified economic benefit at the expense of another. From this perspective, if a person acquires property or a financial advantage without legal grounds at the expense of another, they are obliged to return it (§812 BGB). Within this framework, abuse of rights primarily manifests itself when a person refuses to return or attempts to retain unjustified economic benefits despite being aware of the absence of a legal basis. If the person who received the benefit knew, or later became aware, that there was no legal ground for such enrichment, the scope of their civil liability increases (§819 BGB). Furthermore, these provisions



also cover another form of abuse of rights, namely situations where unjustly obtained property is transferred to a third party in order to avoid restitution. In such cases, the law allows the restitution claim to be directed against the third party as well (§822 BGB).

An analysis of the content of §§823–826 of the German Civil Code (BGB), which regulate tort obligations, shows that in this area the concept of abuse of rights is not limited merely to the improper exercise of subjective rights, but also includes situations where a person uses their legal or factual opportunities in bad faith, contrary to social purpose or moral standards, thereby causing harm to another person. In this context, abuse of rights is characterized by the fact that even formally lawful actions may conceal an unfair intention. In particular, §823 BGB establishes general tort liability and provides that a person who intentionally or negligently causes damage to another person's life, health, property, or other absolute rights is obliged to compensate such damage. At the same time, §826 BGB establishes a more specific form of abuse of rights—intentional damage caused in a manner contrary to good morals—as an independent ground for liability. According to this provision, if a person, while formally acting within the law, causes harm to another through bad faith conduct, they are obliged to compensate the damage in full. The specific feature of abuse of rights in this context is that liability is determined not by the existence of the right itself, but by the purpose and manner of its exercise, meaning that courts assess not only the formal legality of the conduct but also its fairness and social justification. In such cases, the civil law consequences of abuse of rights are primarily reflected in the obligation to fully compensate the damage. If the damage results in reduced working capacity or increased needs of the injured person, compensation may be awarded in the form of periodic payments (annuities) (§843 BGB), which demonstrates that tort liability performs not only a one-time compensatory function but also a long-term restorative function. Furthermore, §852 BGB provides an additional safeguard against abuse of rights by establishing that even if the limitation period for a tort claim has expired, a person who has obtained a proprietary benefit at the expense of the injured party must still return such benefit under the rules on unjust enrichment.

Based on the analysis of the German Civil Code, it can be concluded that the main feature of abuse of rights in tort law is the use of one's legal or factual



opportunities with the intention of causing harm to another person or in a manner contrary to the requirements of good faith. The civil law consequences of such conduct are primarily expressed through restorative mechanisms aimed at restoring the previous property status, full compensation of damages, restitution of unlawfully obtained financial benefits, and the restoration of the violated rights of the injured party.

An analysis of §§858–906 of the German Civil Code (BGB), which regulate possession and property rights, shows that a key feature of abuse of rights in this area lies in the fact that the powers of the right holder are not absolute, but are limited by the requirement to respect the rights and legitimate interests of others. In other words, even a right holder may not exercise their rights arbitrarily or in a self-willed manner. In particular, according to §858 BGB, which regulates the protection of possession, any unlawful interference with possession (self-help without legal grounds) is prohibited. This rule is aimed at preventing abuse of rights and establishes that even a person who considers themselves the rightful owner may not resolve a dispute through force or factual dominance outside judicial procedures. If possession is unlawfully disturbed, the law grants the possessor the right to claim restoration of possession and to demand the cessation of unlawful interference (§§861–862 BGB).

The same principle applies in the field of property law. According to §903 of the German Civil Code (BGB), an owner may use their property at their own discretion, but this right is limited by the law and the rights of third parties. This demonstrates that property rights are not absolute but rather relative in nature. From this perspective, the provisions on neighbour law (§§908–924 BGB) serve as important limitation mechanisms aimed at ensuring the social function of property rights. In particular, if an owner uses their property in a way that creates a risk of damage to a neighbouring land plot, the neighbour has the right to demand the elimination of such risk (§908 BGB). Likewise, excavations that endanger the structural stability of a neighbouring building are prohibited (§909 BGB). If the actions of one owner significantly interfere with the use of neighbouring property, such interference may be restricted or, in certain cases, compensated through monetary payment (§906 BGB). In cases of boundary encroachment, the law does not always require the demolition of the encroaching



structure; instead, taking into account the balance of interests, it may grant the affected neighbour the right to claim compensation (§912 BGB).

Conclusion

An analysis of the provisions of the German Civil Code regulating possession and property rights shows that, in this area, abuse of rights is mainly manifested through the exercise of property rights in a manner that harms the rights and legitimate interests of others. In such cases, the civil law consequences of abuse of rights are not punitive in nature but rather restorative and restrictive, and are expressed through the following legal mechanisms: claims requiring the offender to cease unlawful conduct (injunctive relief); restoration of violated possession or legal status; recovery of compensation for damages; determination of the limits of the exercise of property rights; and legal protection of the interests of neighbouring property owners.

As a general conclusion, it may be stated that the most important distinguishing features of the institution of abuse of rights in German civil law are the following: first, abuse of rights is not treated as a separate legal remedy but as a universal principle defining the limits of the exercise of rights (§242 BGB); second, the legal consequences are aimed not at punishment but at restoring legal balance; third, legal protection depends not on the formal existence of a right but on its social purpose and its exercise in good faith; and fourth, the main functions of this institution are preventive (prevention), restorative (restoring balance), restrictive (limiting the exercise of rights), and protective (protecting the weaker party). From this perspective, the consequences of abuse of rights in German law do not constitute an independent type of civil liability but rather represent a complex legal mechanism aimed at ensuring the fair exercise of rights.

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