論　　説

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Abuse of Rights in Europe: An Outline

(With Some Observations on Modern Japanese Law)

「ヨーロッパにおける権利濫用」の掲載にあたって（紹介と要約）

I

1995年10月12日，南山大学ヨーロッパ研究センター主催，南山大学法学会協賛で講演会が開催された。以下の英文の論文は，著者がその際用意された講演原稿に若干加筆をされたものである。著者自身が第一次的には講演原稿でありintroductory なものと考えておられるにもかかわらず質量ともに本格的論文としての体裁を十分備えたものであること，内容が専門分野を問わず広く関心を抱くことのできるテーマを素材としており，また日本法をも素材としているため英文ではあっても比較的容易に読み進めること，講演当日は法体系の違いを超えて共通する問題として参加者との間で活発な質疑が行われ好評な講演会であったことなどから，今回著者の御了解をいただいたうえ法学会の御厚意により，全文をそのまま掲載させていただくこととした。

著者であるウンベルト-イゴールA. ストラミニョーニ（Umberto-Igor A. Stramignoni）氏は，1963年生まれのイタリア国籍で，ローマ国際自由大学（L.U.I.S.S. (Rome)）を卒業後弁護士となり，その後コーネル大学大学院，オックスフォード大学大学院を経て，オックスフォード大学で博士号を取得し，現在，ロンドン大学LSE（London School of Economics and Political Science）の法学部（Law Department）

でヨーロッパ私法担当講師をされている新進気鋭の比較法学者である。私がオックスフォード大学へ留学中にお互いの学問的関心から親交を結び，その縁で1995年秋に共同研究の打ち合わせのために来日された。その機会に前述の講演会が開催されたわけである。

氏の関心は，比較法学者らしく，幅広い知識と問題意識に支えられてきわめて多岐にわたるが，一貫して追求されているのは，深い歴史観を前提として，基礎理論の形成，発展，現代的変容を的確に捉え，現代における基礎理論の再構築をいかにしてはかるかという点である。とりわけ，法学における永遠の課題である，法的正当化問題における Formality と Substantiality ないし Formal Reasoning と Substantial Reasoning の相互関係の理論的解明に関心を抱かれており，今回の講演テーマであったヨーロッパにおける権利濫用法理の展開も，ヨーロッパの事情の簡単な紹介という制約の中でではあるが，両者の調整理論としての役割の見直しという観点で捉えられている。

II

論文は，「ヨーロッパにおける権利濫用（日本法の若干の検討をふまえて）」と題するものであり，5章構成から成っている。以下では，その内容を要約して紹介しておくこととする。

第1章：一般的な三段論法

1．世界の国の法体系は，その国の正義観念，歴史，法解釈のスタイル・方法，外国法の影響，実質的な意味での法，生産手段の公的・私的性質，人種などに応じて，いわゆる「法家族」という概念で分類されている。このような分類方法には種々の批判があるが，本稿の観点からは一定の意味がある。

2．法家族には，いわゆる「大陸法」と「コモン・ロー」がある。それにはそれぞれの歴史があるが，本稿では次の二点だけを指摘しておく。(a) この分類は，ヨーロッパ以外にも及ぶ。たとえば日本法は，大陸法家族に属し，オーストラリアはコモン・ロー家族に属している。(b) 両家族は，「法体系」であるという点で共通しており，その特徴は，高度の形式性 (formality) である。形式性は，確実性を提供し，状況の違いにもかかわらず同様の取り扱いがなされるということ，すなわち正義を保障する。

3．以上のことから，次のような三段論法が成り立つ。すなわち，形式性は確実性を導く。確実性は正義を導く。それゆえ，形式性は正義を導く，と。しかし，この論法は常に正しいとはいえない。形式性は，ニュートラルな存在であ

り，正しいとか正しくないとかいうものではない。すなわち，どのような法理も形式的であるがゆえに正しい，ということはできない。どのような法理でも，状況によっては，それが目指したのとは正反対の「不当な結果」を生じうる。これが「形式性の問題」であり，法理がこのように潜在的に不当な結果を導く可能性がある以上，これに対応できるような理論を備えておかなければならない。以下では，このような問題に対するヨーロッパの法体系におけるひとつの解答例を述べる。

第2章：法の限界領域で（権利濫用）

4．大判昭和 10.10.5 民集 14 巻 1965 頁（宇奈月温泉事件），安濃津地判大正 15.8.10 法律新聞 2648 号 11 頁（富田浜病院事件），大判昭和 11.7.17 民集 15 巻 1481 頁（発電用トンネル事件），大判昭和 13.10.26 民集 17 巻 2057 頁（高知鉄道敷設事件），最判昭和 38.5.24 民集 17 巻 5 号 639 頁（対抗力のない土地賃借人に対する明渡請求事件）を紹介。

5．以上の判例は，既存の法理が場合によっては不当な結果を導くことを示している。ここで問題となる法理は，所有権絶対の概念である。たしかに，所有者は自己の財産を自由に使用処分できるが，所有権の行使によって他人に損害を与えることまで許されるべきではない。他人の福祉に対する「攻撃」は，所有権の行使として許されず，排除される。これが伝統的な権利濫用の理論である。権利濫用は，今日，種々の場面で問題となる。権利濫用概念の主旨は，当該行為は「違法ではないが，あまりにも合法的すぎる」という点にある。(a) 主観的要件としては，「損害を与える意図」をあげるのが伝統的な理解である。(b) 客観的要件は，当該行為によって他人に経済的損害を与えるということである。このような権利濫用は，他人を害する意図でのみなされた訴訟提起のような場面でも認められる。ヨーロッパ連合では，立法や判例で権利濫用に対する言及が見られるが，どのような場合に権利濫用になるかは各国の立法の問題である。

6．権利濫用について，日本民法典は模範的な例である。民法1条3項に規定されている権利濫用の禁止は，一見するといかなる場合にも適用されるように見えるが，実際にはいくつかの点で限定がある。すなわち，我妻博士によれば，権利濫用は，信義則と区別され，権利濫用をする者とされる者との間に特定の法律関係がない場合にのみ適用される。また，内在的には，主観的要件と客観的要件とによって限定されている。他方で，実際に権利濫用が利用されている事例は数多い。第二次大戦後の裁判例を見ると，全体で三千件近くの事件が権利濫用に関係し，そのうち千件近くが権利濫用と信義則違反の両者に，また三百件余りが権利濫用と公序良俗違反の両者にまたがって関係している。

第3章：大陸法の果て

7．ローマ法が所有権の行使には制限があるということを認めていたかについては，議論がある。ディゲスタ（Digesta）にはこれを認めるような個所もあるが，今日ではそれがローマ法の権利濫用とは見られていない。権利濫用は，その後の注釈学派と後期注釈学派の所産であると考えられており，フランス，ドイツ，イタリアでは継受の程度は異なれ，いずれも権利濫用理論を持っている。フランスでは，ナポレオン法典制定当時には，所有権の絶対性を強調するイデオロギーの影響で権利濫用の規定がなかったが，その後の判例や1930年代にジョスラン（Louis Josserand）の著作によって今日では権利濫用理論を認めるに至っている。

8．ジョスランの理論は，ヨーロッパに大きな影響を及ぼした。ドイツでは，ドイツ民法226条にシカーネの禁止が規定されているが，これに限らず，826条では良俗違反が，242条では信義則が規定されており，広い意味で権利濫用に該当する場合をカヴァーしている。

9．イタリアでは，1942年民法833条が，所有者に対して他人に損害を与えること以外の目的を持たない行為を禁じており，民事訴訟法96条が，不当な訴訟提起に対して損害賠償が認められることを規定している。さらに，民法2043条，1175条，1337条，1366条，1375条，1460条の2，2598条3項などによって，ドイツにおけるのと同様に，広い意味での権利濫用を規制している。すなわち，(a) 所有権の濫用はひんぱんに発生する，(b) 当事者間に一定の契約関係ないしそれに準じる関係があるときは，信義則に関する規定が権利の濫用を阻止する，(c) 濫用により損害が生じたときは，損害賠償が認められうる，(d) 以上以外の場合であっても，損害を与えることだけを目的とする所有権の行使は，権利濫用ないし，より一般的に非道徳的であるとされるのである。

第4章：コモン・ローの実証主義

10．イングランド法は権利の濫用を阻止する一般的な原則を認めていないと解されている。しかし，権利濫用という言葉を使わないだけで，実際には権利濫用の場合を扱う理論を持っていたと考えられる。

11．1989年にイングランドでは土地売買契約に関して改革があった。この改革のひとつのポイントは，衡平法上の「一部履行の理論」(the doctrine of part-performance) を排除することにあった。この理論は，1681年のある判決で認められて以来，数世紀を経て，修正されつつ1989年までは生き延びていたものであり，権利の濫用に関する重要な一場合であったと考えられる。

12．1677年の詐欺及び偽証法（the Statute of Frauds and Perjuries）の4条では，

一定の契約は文書で締結されなければならず，当事者により署名されなければならないと規定されていた。これは，実在しない契約を存在すると主張する詐欺的な者を排除するために設けられたものである。しかし，制定後は逆に，契約の一部がすでに履行されているような場合でありながら，当該契約が必要な形式を備えていないことを主張して，実際には存在する契約から逃れようとするケースが出てきた。そこで，このような詐欺的な主張を排除するために一部履行の理論が案出されたのである。私の考えでは，これはイングランドにおいて権利濫用を規定していた一事例といってよい。しかし，1989 年に英国議会はその廃止を決定してしまったのである。

13．イングランドには，フランス，ドイツ，イタリアのような権利濫用に関する一般原則はない。しかし，一部履行の理論がその一場合を扱っていた。権利濫用は通常考えているよりも頻繁に生じる。前述した日本の裁判例はそのことを示している。それゆえ，一部履行の理論の機能は，このような観点から再検討される必要があろう。

第5章：む す び

14．コモン・ローと大陸法は，法系の違いにもかかわらず，形式性という共通性を有している。形式性に関しては，形式性が正義を保障するという意見と，形式性は正義を貫徹するための障害であるという意見とがある。前者は，法理を形式的に適用することが裁判所の任務であるとして，個々の事件が提起する新たな問題の解決を政治的な機関に委ねる。これに対して，後者は，形式性を排除して，裁判所は当該問題を解決するために実質的な探求をすべきであるという。しかし，いずれかの立場のみを強調しまた批判することは妥当ではない。形式性それ自体はニュートラルな実在であり，出発点にすぎない。また，裁判官に完全に自由な裁量権を与えるべきでもない。権利濫用は，これらの調整のための適切な手段なのである。大陸法もコモン・ローも古い権利濫用概念を排除しているように見えるが，それに代わる適切な権利濫用論を確立しているとはいえない。新たな権利濫用論のためのひとつの可能性としては，権利行使により「どのような危害が加えられるか」という基準に代わって，権利行使により「どのような利益が損なわれるか」という基準をたてることが考えられる。このような基準によれば，「損害を与える意図」を立証する必要もない。他方，損なわれる利益は，経済的に見て十分保護に値するものでなければならないことになろう。そして，権利行使が経済的に評価できる利益を生み出さず，または損なわれる利益と比較にならないほど小さいものであるときは，権利の濫用であるとされることになろう。

15．以上述べてきたことは，最終的な提案ではなく，今後の議論を喚起するためのものである。この問題を通じて，より効果的な法制度を確立するために努力する価値はあるように思われる。

III

権利濫用法理の独り歩きに対する危惧と明確な適用基準確立の必要性については，わが国でも従来からかなり研究されていることろである。とりわけ客観的事情の利益衡量に過度に依存することに対しては，むしろ「権利濫用の濫用」の危険が指摘され，主観的事情との総合判断の必要性や，よりきめ細かな類型化の必要性が唱えられており，氏の問題提起はそれ自体目新しいものというわけではない。また，法的正当化の過程で Formality と Substantiality の合理的な調整が重要であるということについても，わが国ではこの調整が法規解釈という作業の中で延々と行われているわけであり，それ自体当然のことである。このような意味では，この論文は，内容的には権利濫用に関するヨーロッパ法の歴史と現状についてのまさに introductory なものにすぎない。

しかし，他方では，わが国でもこれまでイングランドに特有の理論と捉えられてきた一部履行の理論について新たな視点を提供し，法体系の違いやある法理，法制度の違いないしそれらの発展の違いを超えて，ある国に特有の法理，法制度，法現象と考えられているものについても Formality と Substantiality の調整という観点からする相関的なメルクマールを新たに見出せば効果的な研究が可能であることを示すなど，比較法研究をするに際して示唆的な点もまた多いように思われる。それは，制度や理論の表面的な類似性の有無にとらわれない問題状況の把握の仕方と，比較をする際にいかに柔軟で相対的な視点を持てるかという基準の設定の仕方とにかかっていると主張されているのではなかろうか。

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Abuse of Rights in Europe: An Outline

(With Some Observations on Modern Japanese Law)

By

Umberto-Igor A. Stramignoni [1]

(i) A Commonly Accepted Syllogism

1. Western students of comparative private law often place the various countries of this world within so called "legal families". "Legal families" are the result of conventional classifications that comparatists made to convey the fundamental features of the various responses that the different countries give to matters that, from a Western point of view, fall within the domain of "the law". The notion of several such "families" is said to be justified, for example, by the prevailing

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conception of justice specific to the countries considered,[2] or by their common historical background,[3] or by reference to style,[4] methods of legal interpretation,[5] influences exerted by outward legal ideas,[6] substantive rather than formal aspects of the law,[7] public or private nature of their means of production,[8] and even race.[9]

One drawback of such classifications is that, generally, they mirror the specific environment of those who make them—so that they may hardly have an independent value. Another drawback is that they are one-dimensional.[10] A third drawback is that they are hardly exhaustive. So, for example, South-Africa shows distinctive crossways features that make it difficult to place it anywhere among the commonly accepted families. A fourth drawback is that, at times, the classifications proposed are simply inadequate. So, for example, Sauser-Hall in 1913 purported the existence—among others—of a family of "peuples barbares" (barbarian people).[11]

Nevertheless, some of the classifications proposed make sense (within ever increasing limits), and can be used for present purposes.

[2] R. David, *Les grands systèmes de droit contemporains* (11th ed, Dalloz, 1988), at 23.

[3] G. Gorla, *Diritto comparato e Diritto Comune Europeo* (1981), at 10 ff.

[4] K. Zweigert - H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts,* Tübingen, at 72 ff.

[5] T. Ascarelli, *Studi di diritto comparato e in tema di interpretazione* (Milano, 1952), at XXXIX–XLII.

[6] E. Martinez-Paz, *Introducciòn al estudio del derecho civil comparado* (Cordoba, 1934), at 149 ff.

[7] P. Arminjon - B. Nolde - M. Wolff, *Traité de droit comparé* (Paris, 1950), at 42–53.

[8] G. Eörsi, *Comparative Civil (Private) Law—Law Types, Law Groups, the Roads of Legal Development* (Budapest, 1979), at 62–99.

[9] G. Sauser-Hall, for example, pointed to a 'race aryenne ou indo-européenne', a group of 'races sémitiques', and a group of 'races mongoles' *(Fonction et méthode du droit comparé,* Geneve, 1913, at 102–103). On juridical ethnology, see Mazzarella, 'I caratteri morfologici' etc.

[10] Zweigert and Kötz, *Einführung* etc, at 68.

[11] So, according to Sauser-Hall, 'alors que dans ces trois premiers groupements rentreront tout les droits des peuples civilisés, le quatrième ne comprendra que les droits des peuples barbares, droits essentiellement coutumiers, dont les points de contact sont nombreux et proviennent simplement d'un fond humanitaire commun; tels sont les usages négritiens, mélanésiens, indonésiens, australiens, polynésiens, ainsi que ceux des indigènes de l'Amérique et des Hyperboréens' (*Fonction et méthode* etc, at 103–104).

2. Since the formation in Europe of the modern nation states on the ruins of the Empire, pre-reformation Christianity, and its common legal culture *(jus commune)*, the intellectual debate initiated by lawyers in occasion of the 1804 French codification, and revived with the German codification at the turn of the century, has somewhat dominated the Universities. The English and U.S. legal systems (with the exception of Louisiana) had remained outside what Savigny called the 'cancer' of codification,[12] and this is probably one reason why many comparatists have since long focused their attention on the so called "Civil Law" (the French and the Romano-Germanic codified sub-traditions), and the so called "Common Law" (the Anglo-American uncodified tradition). There is no need here to expand on what are commonly regarded to be the specific features of the two families in argument, nor on the differences and similarities between them. Suffice to make only the two following points. (a) The Civil Law family and the Common Law family do not include only European countries, but reach out to embrace other important communities of this world. So, for example, in many ways Japan can be regarded as a full-member of the Civil Law family—just as the Australian Federation is commonly said to belong to the Common Law family. (b) Both the Civil Law and the Common Law family include countries which have generated "legal systems"—that is, a succession of rules which especially form the law. It is in the nature of such systems to be characterised by a high degree of formality. Legal rules are formally identified, formally applied, and formally abolished. The interesting and complex works of scholars like, for example, Professors Neil MacCormick, Ronald Dworkin, Morton Horwitz, Joseph Raz, Robert Summers, and Patrick Atiyah, provide a fresh look on certain aspects of this long-standing theme. If formality seems thus to be unavoidable, also there appears to be hardly any doubt that the degree and marks that formality can attain in any given legal system are substantially determined by cultural and historical incidents. One seemingly obvious reason for insisting on

[12] F. von Savigny, 'Of the Vocation of Our Age for Legislation and Jurisprudence', trans by A. Hayward, London, 1831, at 19.

keeping a certain minimum degree of formality is that *(inter alia)* formality fosters *certainty*—and some degree of certainty, today, is thus regarded as a fundamental common feature of countries in the Civil Law and in the Common Law tradition. By and large, certainty means the predictability of the outcome from the viewpoint of the law—in other words, the promise to equals of an equal treatment in identical, similar, or comparable circumstances. Such is the promise of justice.

3. The terms of what could be therefore described as an often accepted syllogism, go as follows: formality leads to certainty; certainty leads to justice; therefore, formality leads to justice. But is this syllogism always true? Can one really say that formality leads to justice?

This is of course a very complex matter. I think, however, that one can safely say that—*per se*—formality has a merely neutral structure. Formality, as such, is not good or bad, just or unjust, desirable or undesirable. That is, justness (or unjustness) is hardly an intrinsic quality of formality—rather, formality is an instrinsic quality of the (good or bad, just or unjust, desirable or undesirable) rule, or system of rules, which form, or inform, each particular legal system. In other words, while all good (and bad) rules are formal, no formal rule is good (or bad) *because formal.*[13]

A bad rule leads to injustice, and everyone of course understands that such rules should be eliminated. Good rules, by contrast, are meant to be kept. But how do we define a good rule? Is a *substantially good* rule (say, a rule which works in nine cases out of ten) a good rule? A number of people would say yes. Others would say no. The point here is that the operative consequences of the two positions can be quite different. The first group of people will offer their sympathy to the minority aggrieved by the occasional hardship of the "substantially good" rule—but nothing more. The second group of people (the one that rejects quantitative arguments legitimising

[13] This is so *a fortiori* if one takes the view that legal rules are themselves neither good nor bad—they *just* rules.

substantially good rules) will not be content until a solution for the minority cases is found.

In general, one can say then that justice is achieved by redressing perceived anomalies in a particular society through the creation of a certain rule, or system of rules, apt to do the job. To the extent that such a rule, or system of rules, is formally identified, formally applied, and (when the case) formally abolished, formality can be said to lead to (better, foster) justice. But, the critical point here is that, even when justice is so achieved, it is sometimes the very presence of that particular rule, or system of rules, that might (on occasion) determine an *unjust result.* By "unjust result" I mean an outcome irreconcilable with the reasons for which the rule or the system under scrutiny was initially devised.

The possibility of an unjust result visualises the "problem" of formality. The presence (rather than the absence) of a certain rule, or system of rules, is now at stake. That rule, or system of rules, is now found to generate occasional injustice—and a substantial degree of formality in the identification and in the application of that rule, or system of rules, may thus reaffirm or even enhance the potentiality of injustice discovered in such rule, or system of rules (only, that is, as far as that particular case is concerned). Precisely because the substance of formality is neutral, this can be coloured of justness or unjustness as the case may be.[14] Then, again, one could adopt the view that legal systems do not have to provide justice all the time—but only in a majority of cases. In other words, legal systems are only concerned with the application of the existing rules in the best possible way—and their relative justness in particular cases is a necessary evil to avert which one's formal approach to law cannot be sacrificed. Or one could take the rather different view that legal systems should (at least, attempt to) provide justice in each and every case—that is, it is not sufficient that the existing rules

[14] Thus, the negative connotation traditionally associated with the term 'formality' (and its offshoot) could be somewhat more convincingly explained with the diaphanous fabric of that word—rather than in terms of the traditional antithesis between substance and form.

are applied in the best possible way, but it is indispensable that new rules are continually devised to deal with in-built hard cases left unaddressed by the legal system as it is. Only if one adopts the first view, the "problem" of formality arises. If one adopts the second view, by contrast, the problem of formality ceases altogether to exist.

The following introductory observations are concerned with one specific example whereby the problem of formality arises, and with the response given by some Western legal systems. Obvious constrains require that I do not discuss, for example, the otherwise very interesting experience of the law of the Scandinavian countries,[15] or the experience formerly or presently said to belong to the Socialist family.[16] Instead, I shall concentrate on the Civil Law and Common Law families—and, within them, on select members of those two families only.

(ii) At The Frontiers of the Law: Abuse of Rights

4.[17] In one famous Japanese case, plaintiff bought a piece of land knowing that defendant had laid a pipeline on that land without the authorisation of the original owner. Then, plaintiff sought to sell the land to the defendant for an irreasonable price. Upon the defendant's refusal to buy the land at that price, plaintiff went on, and asked a court the removal of the pipe. The court found that the plaintiff's claim was abusive—as, in fact, he was simply attempting to force the defendant to buy the land at an excessive price.[18]

In another case, a landowner asked the owner of a near-by sanatorium to buy his land at an unacceptable price. Upon the latter's

[15] S. Jørgensen, 'Abuse of rights according to Nordic law', in *L'abus de droit* (Padova, 1979), at 195–209.

[16] For example, G. Eörsi, 'The Abuse of right in doctrine and court practice in Hungary', in *L'abus* etc, at 87–113.

[17] In this parapraph, a number of text-book Japanese cases on abuse of rights are briefly mentioned. All of them are discussed to a somewhat deeper extent (but in the French language) by Y. Noda and T. Nomura's 'L'abus du droit en droit privé japonais', in *L'abus* etc, at 283–301.

[18] Daishin'in, October 5, 1935 (MS XIV-1965).

refusal to buy, the land-owner erected a building that considerably affected the lights and aeration of the sanatorium. It was held that the erection of the building constituted abuse of rights, for the land-owner's only task was to damage the owner of the sanatorium.[19]

An altogether different case occurred when a state-owned electric company laid down a water-pipe in a piece of land belonging to someone who, then, asked the removal of the work. The request was rejected on grounds that, if the pipeline were removed, the resulting detriment for the company, as well as the public at large served by that pipeline, would be unjustifiably excessive.[20] Similarly, in a case whereby the defendant railway company without authorisation had loaded with soil and sand a certain site belonging to the plaintiff so as to reinforce the grounds on which the railway was being built, the judge found the plaintiff's land to be both of no use and of no value, and considered that the removal of the work in argument (at the time of the lawsuit, the work had been completed) would severely impair the functioning of the railway, as well as the interest of the population reached by that service. Accordingly, the judge rejected the plaintiff's claim as fundamentally abusive.[21]

Finally, in another important decision, the buyer of a piece of land asked the lessee of the land (who was also the owner of a house built on that land) to leave the premises on grounds that the lessee had failed to comply with the formalities required by law when the house had been built on the site. Because of the want of the required formalities, the lessee was unable to protect his position as against the buyer. Nevertheless, the Japanese Daishin'in found for the defendant-lessee, in consideration of the fact that the buyer had known of the existence of the lease, and actively impeded the lessee from complying with the formalities in argument.[22]

[19] Chihô-Saibansho, Anotsu, August 10, 1926 (HS no. 2648-11).
[20] Daishin'in, July 17, 1936 (MS XV-1481).
[21] Daishin'in, October 26, 1938 (MS XVII-2057).
[22] Saikô-Saibansho, May 24, 1963 (SSH civ., XVII-5-639).

5. Each one of the cases mentioned in the previous paragraph points to one instance whereby an existing rule may on occasion generate what looks like an unjust result.[23] The rule in question is the norm conferring certain individuals proprietary rights over certain things. According to such rule, the individuals concerned are entitled to transfer, use or dispose of their property as they best like. Furthermore, they are entitled to protect their property both immediately, and through the intervention of a public official (or other relevant constitutional authority). This is, in essence, the Western notion of "absolute ownership".

The degree of formality reached by so many European countries, however, is such that when the defendant has title over the thing, this is regarded to provide the judiciary with an exclusionary reason *not* to look at any underlying issue which might affect unduly the defendant's position as the owner of the thing.[24] But, should those who are entitled to exercise proprietary rights over things, be allowed—in so doing—to affect negatively the interests of another person? That is, is absolute ownership a right *'erga omnes'*, or is it also a right *'contra omnes'* ? Was the buyer of the land where the pipeline had been laid down (first case) not *entitled* to do with his property what he pleased—including removing the work (even considering that the only reason for doing this was to force the other to buy the land at an unacceptable price)? The dilemma could be cast in the following terms: while it is clear that the exercise of one's own proprietary rights may well on occasion entail "offence" to another person's welfare, it would also seem that one should not be allowed to exercise her proprietary rights over the thing with the only or prevailing objective to commit such "offence". This is the traditional concern of the doctrine known as "abuse of rights". Again, one's formal approach to the rule of law expressing

[23] But the holders of the first view discussed above, § 3, would probably consider it a necessary result.

[24] This proposition would require a number of qualifications that cannot be made here—where I am only concerned with one particular aspect of the relationship existing between a certain rule ("ownership is absolute"), and its bounderies.

the idea that ownership is absolute, could—by contrast—preclude whatever consideration for the actual result of the owner's exercise of her proprietary rights over the thing. Indeed, this alternative approach would go as far as denying that there can be such a notion as the "abusive" exercise of an absolute "right". Either there is "right", or there is nothing.[25]

The fundamental concern of the doctrine of abuse of rights appears to arise virtually everywhere in the law—though it is hardly ever acknowledged in so many words. So, for example, while I have the right to drive my car, it is clear that I have no right to drive it as I like, and even less to run down my nosey neighbour. But the doctrine of abuse of rights is present elsewhere too—for example, within the domain of competition law, labour law, family law, etc. In other words, abuse simply defines whatever right (or *prérogatives juridiques définies*[26]) by placing a firm limit to its exercise. Indeed, the doctrine nowadays appears to be still questioned only within select areas of the already limited realm of the private law (property and contracts). Hence, the cases mentioned above.

The central point about what can be regarded as a Western notion of abuse of rights is that the offensive act in argument is not 'illegal, but . . . too legal'.[27] Important questions related to a rule of law signifying the (possible) rejection of a certain exercise of one's own proprietary rights as abusive (that is, assuming such rejection on the basis of the employment of the word "abuse" stronger in character than, for example, "misuse") are the following: (a) what would be the subjective, and (b) what would be the objective requirements, of the "offensive" act.[28] The answer to the first question appears to be deceptively simple. One traditional way to put it is that abuse of

[25] Below, note 28.

[26] J. Ghestin et G. Goubeaux, *Traité de Droit Civil—Introduction Général,* Paris (3me ed., 1990), at 687.

[27] Allen, *Law in the Making* etc, at 379.

[28] A third question is whether rights can be abused (Planiol, *Traité élémentaire de droit civil,* II, no. 871). A fourth question concerns the difference between abuse of rights and the misuse of a liberty, and between abuse of rights and breach of a duty or an obligation.

rights obtains when one party exercises her right with a malicious motivation. Malice is often understood to be the 'intention to cause harm'[29]—though one could wonder to what kind of "harm" the intention should be directed. However paradoxical this might seem, some people act with malice (i.e., intention to cause harm) *ultimately* to amuse, surprise, educate, deliver a certain message, or stimulate a response. Is that harm? If the answer is no, then one should probably say that abuse obtains only when the intended harm is gratuitous. If the answer is yes, one should probably say that abuse obtains when one party intends to harm the other whatever the reason for this conduct might be claimed to be.[30]

The next question arises, however, when is it that malice can be said to be serious enough to trigger the reaction of the legal system. The general answer seems to be that malice is conclusively unlawful when it is clear that the exercise of the right in question would negatively affect someone else's (use of the) property in a way *which can be measured in economic terms* (objective requirement). So, abuse of rights obtains not every time one acts maliciously, but only when a damage measurable in economic terms can be shown.[31]

Can abuse of rights obtain within the legal process? At least in theory, the answer is yes.[32] In particular, the exercise of a legal action is the exercise of a power (qualified differently in different jurisdictions) deriving from, or associated with, one or more rights—and so is the exercise of the defence. The malice necessary to speak in terms of abuse in such circumstances is not always difficult to identify. However, if, for example, Mr Potts starts an action with no other purpose than to be a nuisance to his neighbour Mr Turvin, whom he hates, one can say that Potts is abusing his rights by exercising the correspondent legal action. Similarly, if Potts resists an action

[29] Napier, 'Abuse of Right' etc, at 271.

[30] This view was first reaffirmed at the beginning of this century by Louis Josserand in *De l'esprit des droits et de leur relativité*, below, § 7. Some commentators, however, prefer to speak in (the equally teleological) terms of *"détournement des droits de leur fonction sociale"* (for example, Ghestin et Goubeaux, *Traité de droit civil* etc, at 698–704).

[31] See also Betti, *Istituzioni di diritto romano*, I, Padova, 1967, § 79.

[32] Winfield, *The History of Conspiracy* etc, and The Present Law of Abuse etc.

with no other purpose than to be a nuisance to the plaintiff, he is abusing his rights by defending himself in that way.[33]

In the still blossoming law of the European Union reference to a 'general principle of abuse of rights' can be found both in the legislation,[34] and in the reported cases.[35] It is, however, largely a matter of national regulation the extent to which the possibility of abuse of rights is recognised, and condemned.

Before I turn to such regulation, the brief observations which follow, are in order.

6. In the matter of abuse of rights, the Civil Code of Japan is exemplary. The substantial amendments introduced by law no. 222 of December 22, 1947,[36] as a consequence of the enactment of the 1946 Constitution, made sure that the matter of abuse of rights was addressed, and regulated: 'No abusing of rights is permissible'—Article 1(3). Although the provision in argument might *prima facie* appear to be far too broad to be of any use, several qualifications are still possible. One such qualification was suggested in 1965 by Mr Wagatsuma, according to whom Article 1(3) should be taken to refer only to instances whereby the "abusor" and the "abusee" are *other than* in a specific juridical relationship with one another—for Article 1(2) on good faith would control such remaining cases.[37] This is, really, an outer limit to the Japanese notion of abuse of rights, that logically precedes and thus adds up to the subjective and objective requirements outlined above. Another qualification lies in

[33] But see *A.G. v Sudeley* (1896): 'A "right of action" is not the power of bringing an action. Anybody can bring an action, though he has no right at all. The meaning of the phrase is that the person has a right or claim before the action, which is determined by the action to be a valid right or claim' (*per* Esher MR).

[34] O.J.L. 391, 31-12-1992, at 36. O.J.L. 225, 20-8-1990, at 10, refers back to the relevant French statute book.

[35] Reports of cases for the years 1990 (2367, at 2376 par 7), 1988 (6039, at 6058 c and d), 1985 (363, at 386 par 35).

[36] The Civil Code of Japan was enacted by law no. 89, April 27, 1896. Law no. 222, December 22, 1947, reformed Book IV ("Relatives") and Book V ("Succession"), and added Article 1 and Article 1–2 to Book I ("General Provisions").

[37] S. Wagatsuma, *Civil Law* (in Japanese), I, Tokyo, 1965, at 38 ff.

that the exercise of any given right can only be abusive when the values protected by it are much more limited than the values protected by a countervailing right that the exercise of the first right is meant to affect (for example, public order).

It seems to be established that the abusive exercise of one's own rights will normally prevent it from being effective.[38] In some cases, it appears that damages may be awarded to the abusee in consequence of the abusor's behaviour stigmatised as a civil wrong.[39] Messieurs Noda and Nomura extend the notion of abuse of rights to include the Civil Code provision of Article 834 on forfeiture of parental power, and maintain that, on occasion, abuse can be dealt with by removing the right abused by the original holder.[40]

Table 1 below indicates the presence of robust litigation in Japan in post-war years between 1945 and 1995 on issues concerning the relationship between public order, good faith, and abuse of rights. In particular, the total number of reported cases which in one way or another deal with abuse of rights is 2.831.[41] Of those cases, 2.789 cases were decided after the end of World War II, and 2.788 cases were decided after the enactment of the amendments to the Japanese Civil Code operated by law no. 222, December 22, 1947.

It is noticeable that of a total of 2.831 cases—Table 1 (i)—963 concerned abuse of rights and good faith. Of such smaller group of cases, 956 were decided after the end of World War II (and 955 were decided after the enactment of the 1947 amendments to the Civil Code). By contrast, of the mentioned 2.831 cases, 347 cases concerned abuse of rights and public order (a notion that, in Japan, includes *boni mores*), 338 cases of which were in fact decided between the end of World War II, and today (no case on abuse of rights and public

[38] Chihô-Saibansho, Osaka, October 28, 1967 (HJ 512-63). Daishin'in, October 5, 1935. (MS XIV-1965).

[39] Daishin'in, March 3, 1919 (MR XXV-356).

[40] Noda and Nomura, 'L'abus' etc, at 296.

[41] This figure on the Japanese case law, as well as the figures which follow, are based on information provided by the Hanrei-Taikei Data Base System (update: October 13, 1995). However, the numbers provided in each case include decisions which mention only in passing the matter to which such numbers refer.

Table 1

Japan [42]

Note: Total reported civil law cases decided in Japan after World War II 46.626
Total reported civil law cases after Law no. 222 46.595

(i) *General Figures on public order, good faith, & abuse of rights*

	public order	good faith	abuse of rights
total reported cases	2.311	3.356	2.831
total reported cases (decided after World War II)	1.922	3.286	2.798
total reported cases (decided after Law no. 222)	1.922	3.285	2.788

(ii) *Analytical Figures on public order, good faith, & abuse of rights*
(cases decided after the end of World War II)

Note: Each of the following numbers refers to periods of 5 years. Each period of 5 years runs from the 1st of January of the first year given for each period, and the 31st of December of the year preceding the second year given for that period. So, for example, 1945–1950 reads Jan. 1st, 1945 to Dec. 31, 1949.

years	public order	good faith	abuse of rights	total
1945–1950	5	9	10	24
1950–1955	141	183	188	512
1955–1960	178	293	322	793
1960–1965	243	332	339	914
1965–1970	224	329	302	855
1970–1975	221	353	321	895
1975–1980	202	379	340	921
1980–1985	255	480	345	1080
1985–1990	266	557	354	1177
1990–1995	187	371	278	836

(iii) *Analytical Figures on abuse of rights*
(cases decided after the end of World War II)

Note: Each of the following numbers refers to periods of 5 years. Each period of 5 years runs from the 1st of January of the first year given for each period, and the 31st of December of the year preceding the second year given for that period. So, for example, 1945–1950 reads Jan. 1st, 1945 to Dec. 31st, 1949.

Years under consideration	abuse of rights (total)	abuse of rights & good faith	abuse of rights & public policy	total of cases on abuse of rights only
1945–1950	10 (9 [43])	2	1	7
1950–1955	188	67	19	102
1955–1960	322	103	27	192
1960–1965	339	127	52	160
1965–1970	302	89	48	137
1970–1975	321	94	35	129
1975–1980	340	121	46	173
1980–1985	345	139	39	167
1985–1990	354	123	42	189
1990–1995	278	91	29	158

[42] The author acknowledges with thanks the help offered by Professor Yugen Kudo (Nanzan University) in identifying the information contained in the Table.

[43] The number in brakets refers to the cases on abuse of rights decided between the enactment of Law no. 222 and Dec. 31, 1949.

order was decided between the end of the War and the enactment of Law no. 222). So, cases discussing the relationship between abuse of rights situations and good faith situations were about three times more frequent than those concerned with the relationship existing between abuse of rights situations and public order issues.

Of the total number of reported cases dealing one way or another with abuse of rights, 197 concerned the issue of the abusive exercise of rights in the context of a sale of immovables (including sales which, in fact, are mortgages), whereas 109 cases concerned the lease of such immovables.[44] Finally, and significantly, 151 cases dealt with abuse of rights within the context of labour relationships.[45]

(iii) The *Impasse* of the Civil Law

7. It is arguable whether the Romans developed (at least, in post-classical law) the notion that the exercise of proprietary rights over things should have its limits. Some places in the Digest seem to suggest so.[46] For example, in D. 20 1 27 the following situation is depicted (italics are mine).

> MARCELLUS. Seruum, quem quis pignori dederat, ex leuissima offensa uinxit, mox soluit, et quia debito non satisfaciebat, creditor minoris seruum uendidit: an aliqua actio creditori in debitorem constitutenda sit, quia crediti ipsius actio non sufficit ad id quod deest presequendum? quid si eum interfecisset aut eluscasset? ubi quidem interfecisset, ad exhibendum tenetur: ubi autem eluscasset, quasi damni inuriae dabimus actionem ad quantum interest, quod debilitando aut uinciendo persecutionem pignoris exinanierit. fingamus nullam crediti nomine actionem esse, quia forte causa ceciderat: *non existimo indignam*

[44] The most recent, Supreme Court case was decided by Saikô-Saibansho (SS), 1994, 20 December (which decided that, in the circumstances, no abuse of rights could be claimed to have taken place).

[45] For example, SS 1993, 11 June, which reversed both the District Court, and the Court of Appeal, decisions, and rejected the employee's defence on abuse of rights.

[46] D. 6, 1, 38; 9, 2, 29, 1; 9, 2, 39, 1; 39, 1, 12. Buckland and McNair, *Roman Law & Common Law* etc, at 96 ff.

rem animaduersione et auxilio preaetoris. ULPIANUS notat: *si, ut creditori noceret, uinxit, tenebitur,* si merentem, non tenebitur.

So (according to the Pennsylvania edition),

> MARCELLUS. The mortgagor of a slave chained him for a trivial offense, then unchained him. The debt was not paid and the creditor sold the slave for less. Should the creditor be given an action against the debtor, as the action on the loan does not suffice to enable him to recover the residue? Suppose the debtor to have killed him or put out his eye? If he killed him, he is liable in the action for production. If he put his eye out, we shall allow an action as if for wrongful damage to the extent that the weakening or chaining reduced the value of the action on mortgage. Imagine that because of a procedural error the action on the loan fails. *I think the preator might well take note and give a remedy.* ULPIAN: *He is liable if he chained the slave to harm the creditor,* not if the slave deserved it.

The notion that examples such as the above one might amount to a Roman doctrine of abuse of rights, was opposed by the Italian Scjaloia—according to whom the doctrine was rather a product of the labour and interpretation of Glossators and Bartolists.[47] Interesting though this question might be from the historical point of view, the French, the Germans, and the Italians of today have their own doctrines on abuse[48]—although the import of such doctrines

[47] V. Scialoja, *'Aemulatio',* in *Studi giuridici,* III: *Diritto privato,* Roma, 1932, at 216 ff.

[48] Scholarly contribution to the matter of abuse of rights is massive if, however, somewhat scattered. For general as well as particular aspects of the matter (including the historical development of it), see Gutteridge, 'Abuse of Rights' etc, at 22 ff; Ghestin et Goubeaux, *Traité de droit civil* etc, at 674–725 (with an excellent French bibliography at 675); Jacubezky, 'Zur Frage des allgemeinen Schikanenverbots', in *Gruchot's Beiträge,* 40, 1896, at 591 ff; Endemann, *Lehrbuch des bürgerlichen Rechts*[9], Berlin, 1903, § 84, at 424, no. 18; Cosak und Mitteis, *Lehrbuch des deutschen bürgerlichen Rechts*[8], Jena, 1927, § 324, at 318–320; Wieacker, *Zur rechtstheorischen Präzisierung des § 242 BGB,* Tübingen, 1956; Merz, 'Vom Schikaneverbot zum Rechtsmißbrauch', in *Zeitschrift für Rechtsvergleichung,* 1977, at 162 ff; Palandt, *Bürgerliches Gesetzbuch Beck'sche Kurz-Kommentare,* 54th edition, München, 1995; Betti, *Istituzioni di diritto romano,* Padova, 1967, § 79; Natoli, *Note preliminari* etc; Rotondi, 'L'abuso di diritto' etc; Cattaneo, 'Buona fede obbiettiva e abuso del diritto', in

in relation to other parts of the law varies considerably. It should be noticed, in particular, that XVIIIth and (above all) XIXth century ideologies—keen as they were to reaffirm the absolute centrality of property in the life of individuals—managed to circumscribe drastically the traditional, broader notion of abuse of proprietary rights over things. In that sense, one is not surprised that the 1804 *Code Napoleon* had no express provision on abuse of rights (whereas later Codes often would). Nevertheless, a famous 1855 decision by the French court of Colmar (concerning a chimney built with the sole purpose of being a nuisance to the neighborhood) is generally accepted to be the main precedent for today's commonly accepted notion that 'the exercise of a right which can be attributed only to a malicious motive is actionable'.[49]

The French doctrine of abuse of rights received a decisive contribution from the treatment given to it during the thirties by Louis Josserand in his celebrated book *De L'esprit des droits et de leur relativité*. In it, Josserand divided all problematic juridical acts in illegal *(actes illégaux)*, negligent *(actes fautifs)*, and excessive *(actes excessifs)*. In the first case, *'le plaideur ou le saisissant a dépassé les limites objectives de son droit'* (plaintiff or defendant have defied the objective boundaries of their rights). In the second case (in which Josserand includes the abusive exercise of rights), the acts *'ont été accomplis dans les termes de la loi, conformément à la règle du jeu, mais dans un esprit qui n'est point celui de l'istitution'* (conduct is lawful, and respectful of the rules of the game, but not consistent with the spirit of the institution). Finally, in the case of excessive rights, the acts are those *'qui, accomplis dans les limites objectives tracées par la loi et pour des raisons valables, causent cependant à un tiers un préjudices qu'il serait injuste de lui faire supporter définitivement'* (conduct is lawful, and dictated by valid reasons, though it causes to third parties a prejudice that it would be unfair for them to suffer), and so may give rise to strict

Riv.trim.dir.proc.civ., 1971, 614 ff; Dias and Markesinis, *The English Law of Torts* etc, at 110.

[49] F. H. Lawson, *Negligence in the Civil Law*, Oxford, Clarendon, at 16–17.

liability for their author *("responsabilité objective")*.[50] Moving from such tripartition, Josserand explained how any other act which does not fall within it, can be regarded as "normal". In that sense, Josserand said, proprietary rights should be described as egoistical, and abuse should be inferred whenever the egoistical spirit of such rights cannot be demonstrated.

Today in France Josserand's theory seems to be kept somewhat on hold (at least, in its original terms). In order to solve abuse-of-rights-situations, French courts appear often to rely on (the generic) notions of equity and *'politique juridique'*, but also on Article 1382 of the *Code Civil*—and thus treat abuse-of-rights-situations as a particular instance of the (equally generic) notion of *faute*. This of course generates distress among legal scholars—though, in turn, such distress is itself at times expressed in a somewhat circular way.[51] This uncharacteristic lack of direction on the part of the French judiciary and scholarship constitutes (I think) some evidence towards the proposition that even the highly developed European legal systems generate voids which are alarming, and cannot be ignored. The *impasse* in the matter of abuse of rights, however, does not detract from the fact that—nowadays—it would appear that there exists a large consensus as to the proposition that all rights (even proprietary rights) must have their limits—and this, of course, is the central proposition of Josserand's still valid legacy.

8. Josserand's theory had a certain influence in Europe, and its tenets were widely discussed throughout.

[50] L. Josserand, *De l'esprit des droits e de leur relativité*, Paris, 1927, at 84–85.

[51] H. L. Mazeaud et Tunc, *Traité de la responsabilité civile*, I, no. 564 ff; Colin et Capitant, *Traité de droit civile*, II (8me éd), no. 195. According with Ghestin and Goubeaux, *Traité de droit civil* etc, at 692–694, '[l]a faute dans l'exercise des droits comme critère des abus est une théorie soit inexacte soit presque totalement inutile' though '[s]i . . . on admet que le terme "abus de droit" désigne une limitation particulière du droit, il est clair que celui qui "abuse" ainsi de son droit agit en réalité sans droit et engage sa responsabilité. La sanction de l'acte abusif trouve bien un fondement dans l'article 1382 du Code Civil. Mais il fallu *préalablement* faire tomber la présomption de licéité de l'acte en démontrant l'abus, ce qui permet de faire apparaître la faute'.

One interesting objection to such theory soon developed that 'it is seldom that a man injures another out of pure spite, in circumstances where he himself stands to obtain no tangible benefit from his act'.[52] This objection is, I think, open to doubt. The somewhat disturbing case concerning someone who in Germany prevented his children from entering a property where their mother was buried,[53] or an equally famous case where the same claim had been put before 74 different courts,[54] show that abuse of rights for other than traditional economic reasons is only too real.[55] True, § 226 of the *Bürgerliches Gesetzbuch* (BGB) according to which '[t]he exercise of a right is unlawful, if its purpose can only be to cause damage to another person' (so called *Schikaneverbot*), was never employed by the German courts with enthusiasm. However, it does not follow that this was due to the fact that the events contemplated by § 226 do not occur, or are infrequent.

One explanation for the German antipathy for § 226 is that it may be difficult to prove that the abusive behaviour did *not* have a purpose other than to cause damage to someone else. Another explanation is that the particular event under scrutiny is best seen to fall within the domain of a different provision. So, again, the German Code contains two paragraphs that can be usefully resorted to in a number of relevant circumstances. According to BGB § 826 *(Sittenwidrigkeit)*, '[a] person who wilfully causes damage to another in a manner contrary to morality is bound to compensate the other for damage'. That is, anyone exercising her rights *contra bonos mores* shall be liable. Some qualifications would still need to obtain. So, for example, the standard of morality required should be identified by reference to the standard held by a fair and reasonable person; the exercise of the right in question should be directed towards a specific person; and the damage must be intentional, or at least

[52] Lawson, *Negligence* etc, at 17.
[53] Reichsgerichtsentscheidung in Zivilsachen (RGZ) 72, 351.
[54] Arbeitsgericht Hamm 66, 272.
[55] In such situations, it would seem that there is no 'tangible benefit' accruing to the abusor—or, if there is one, than there would be probably a "benefit" *not* recognised (nor recognisable) by the legal system.

tolerated by the abusor. Yet, having such provision, there might be no need to resort to § 226.

Likewise, and more importantly, BGB § 242 *(Treu und Glauben)* provides that '[t]he debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage'. Accordingly, it was held that the exercise of a right against the requirements of good faith gives rise to an instance of "excess of right" and, as such, is unlawful.[56] This, in turn, was extended to include virtually any instance of abuse of rights—like, for example, the case where a person who takes part in a dangerous sport (including football) is injured and then claims damages despite the fact that he was injured by someone who was playing according to the rules.[57] Again, certain qualifications must obtain for § 242 to apply. One is that the abused interest should be protected by statute and by the Constitution. So, general principles of equity *(allgemeine Billigkeitserwägungen)* would not do—for to protect them against another person's right would impair constitutional principles.[58] A further qualification for § 242 to apply is that there must be a specific legal relationship between the abusor and the abusee (on-going business, contractual negotiations, contract, etc).[59] However, the point is that whenever such circumstances obtain, the directions contained in BGB § 242 somewhat pre-empt those contained in BGB § 226, and thus regulate events which otherwise would easily fall within the common description of abuse of rights. This is, however, not always so, nor does it mean that abuse of rights is rare, or that its existence is of no concern for the German.

9. Under the Italian law, regulated instances of abuse of rights are *'atti di emulazione'* and *'lite temeraria'*.[60] The first case is contemplated

[56] Bundesgerichtsentscheidung in Zivilsachen (BGHZ) 12, 157.
[57] BGHZ 63, 145.
[58] Article 20 III and 97 I.
[59] Interestingly enough, a void contract would do (BGHZ 85, 48).
[60] On abuse of rights under the Italian law, see 'L'abuso di diritto e il fenomeno dell'adeguamento della norma alla coscienza collettiva', in *Nuovi studi di vario diritto',*

by Article 833 of the 1942 *Codice Civile,* according to which the owner *(proprietario)* is asked to abstain from acting in a way that is intended to have no other purpose than to damage or irritate another person. But the Italian notion of damage is a fairly broad one. The second case is contemplated by Article 96 of the *Codice di procedura civile,* according to which damages (in addition to costs) can be awarded upon request of the winning party, or by the judge *ex-officio,* whenever it turns out that the losing party brought or opposed a legal action in bad faith. Beyond that, the Italian Civil Code does not include a general provision prohibiting abuse of rights in so many words.[61] However, Article 2043 of the Code contains a general provision making any person causing problems to another person liable for damages. Furthermore, Article 1175 instructs that debtor and creditor must act *'secondo correttezza',* and Articles 1337, 1358, 1366, 1375, 1460(2), and 2598 n. 3, require good faith behaviour *(buona fede)* in a number of crucial circumstances (negotiations, contract interpretation, etc). Accordingly, the contemporary doctrinal debate seems to be focused (like in Germany) on the notion of good faith *(buona fede),* and on its boundaries with the notion of abuse of rights.[62] In particular, it is objected that one thing is that the exercise of rights must have limits suggested by social issues (this would be the domain of a doctrine of abuse of rights), and a different thing is the matter of the relationship among different rights (which would be instead the concern of the various provisions on good faith).[63] Also, the positivistic observation that the expression "abuse of rights" is intrinsically a *non-sequitur,* is challenged by some authors with the remark that the events in argument are normally such that it *appears* to

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Padova, 1978, at 377–383; U. Natoli, 'Note preliminari ad una teoria dell'abuso del diritto nell'ordinamento giuridico italiano', in *Riv.trim. e dir. e proc.civ.,* Milano, 1958, at 18–37.

[61] But Natoli, 'Note preliminari' etc, at 19, note (5), mentions other instances in the Civil Code that various Italian authors believe to amount to abuse of rights.

[62] G. Cattaneo, 'Buona fede obbiettiva e abuso del diritto', in *Riv.trim.dir. e proc.civ.,* 1971, at 613–658.

[63] Cattaneo, 'Buona fede' etc, at 636.

the external world that the agent is, in fact, doing nothing else than exercising her right in the lawful way. Therefore—it is concluded—the expression "abuse of rights" can be well justified by the ambiguity of the circumstances regulated under such label.[64]

Such being the Italian background to the matter that is here of concern, it is clear that the conclusions are not dissimilar from those discussed with reference to the German experience. So, equally, the problems remain. They can be summarised as follows: (a) the abusive exercise of proprietary rights occurs, and it occurs more frequently than it is claimed by certain literature; (b) when the two parties are in some kind of contractual, pre-contractual, or quasi-contractual relationship, a general provision requiring good faith should normally deter either of them from exercising their rights in an abusive way (whether this happens or not is an entirely different matter); (c) if, on the other hand, the abusive behaviour causes actual damage, a further provision (Article 2043 of the Civil Code) may see that damages are awarded (but all sorts of conditions would need to obtain for this provision to operate); (d) other than that, the exercise of proprietary rights which is only intended to damage, is expressly acknowledged (and rejected) either specifically as abusive, or generally as immoral.

(iv) The Positivism of the Common Law

10. When it comes to the Common Law (and, in particular, the English law), the traditional treatment of the matter of abuse of rights turns out to be rather simple. In fact, it seems to be generally accepted that the English do not recognise a general principle rejecting the abusive exercise of one's own rights.[65] The decision in *The Mayor, Aldermen and Burgesses of the Borough of Bradford v Edward Pickles* (1895) has been continuously referred to in any and each

[64] Natoli, 'Note preliminari' etc, at 37.

[65] Napier, 'Abuse of rights' etc; Dias and Markesinis, *The English Law of Torts* etc, at 110. But this seems to be true of abuse of *proprietary* rights only—Buckland and McNair, *Roman Law & Common Law* etc, at 99.

subsequent case on abuse of proprietary rights decided in England ever since,[66] as well as in cases concerning abuse of rights outside the law of property.[67]

Because the position held by the English appears to be so firmly established, I shall not expand upon it. The only point I wish to make here is that, despite the apparent positivism of the Common Law, a series of reputedly independent judicial doctrines and legal mechanisms have indeed dealt in the English law with abuse of rights situations—forming a *corpus* that of a general principle of abuse of rights lacks only the name. Accordingly, I should take this occasion to formulate a suggestion resulting from recent research I have been doing at the University of Oxford—which, I hope, proves the point.

11. In 1989 a difficult Reform was made in England concerning land contracts.[68] One aspect of this Reform was the perceived "abolition" of the equitable doctrine of part-performance.[69] Elsewhere I have demonstrated that the doctrine of part-performance was first devised by the Lord Nottingham in 1681 in the decision now known as *Potts v Turvin*.[70] The doctrine has travelled throughout the centuries, then come to this century, and survived—in a somewhat modernised form—until 1989. My suggestion is that the doctrine was actually a very important instance whereby the English legal system acknowledged, and rejected, the abusive exercise of proprietary rights by the defendant.

[66] For example, *Chapman v Honig* (1963), regarding the lawful termination of a tenancy by the landlord.

[67] *Allen v Flood* (1898), regarding the lawful termination of the employment contract of several workers.

[68] Law of Property (Miscellaneous Provisions) Act 1989.

[69] So, G. H. Treitel, *The Law of Contract* (9th ed, 1995), at 171, repeats with the Law Commission (Law Comm 164, at 16) that 'there can be no part-performance of a non-existent contract'. Elsewhere, I have argued that (despite opinions to the contrary) the doctrine of part-performance was never formally abolished, and could well be resorted to by the courts if need come (see my doctoral thesis entitled *Form in Contract Law: A Silent Revolution,* Oxford 1995).

[70] See U-I A Stramignoni, 'At the Dawn of Part-Performance: A Hypothesis', in *Journal of Legal History,* forthcoming (August 1996).

12. It all began in 1677 when the Statute of Frauds and Perjuries was enacted.[71] According with section 4, certain contracts (among which *land* contracts) should now be made in writing, and signed by the party to be charged.[72] It is important to notice that section 4 had been devised to protect meritorious defendants against fraudulent plaintiffs claiming that a contract (or certain terms thereof) had been made—when, in fact, no contract (or different terms) had been made. Those were very difficult times in England, and such fraudulent claims were all but infrequent. The uncertain state of the law of procedure did not help.

Almost immediately after section 4 was enacted, a different problem arose. Now defendants could (and would) claim that no contract had been made whenever the required formalities had not been met. If no contract had actually been made, that was fine. The pleading of the Statute of Fraud would simply have the effect to signify the defendant's intention to paralyse the plaintiff's request that a (non-existent) contract should be enforced. If, by contrast, a contract had been made, fraudulent defendants could now get away with it simply by pleading the Statute of Frauds, and therefore *voiding* the (existing) transaction. This, of course, could not be tolerated by the legal system—not, at least, if (in the meantime) the plaintiff had been acting detrimentally in performance of, or reliance on, the (now voided) contract.

In its original version, the doctrine of part performance allowed the meritorious plaintiff to obtain from the Chancellor an order for the specific performance of certain contracts despite the fact that the required formalities had not been complied with by the parties. This result could be reached only if certain conditions were specifically met. Here I shall only mention that the main condition

[71] An extensive treatment of this can be found in Stramignoni, *Form in Contract Law* etc, ch 1.

[72] Such were contracts by executor or administrator to answer damages out of his own estate; contracts to answer for the debt, default or miscarriages of another person; contracts made upon consideration of marriage; contracts for the sale of land or any interest in land; contracts not to be performed within one year from stipulation.

was that, in the circumstances, defendant should be found to be acting fraudulently.

So far, little has been said by the concerned legal scholarship as to what the defendant's fraud would amount to. My suggestion is that the defendant's fraud was in the nature of the unlawful exercise of his right (the English perhaps would rather call it "power") to "defend" himself by pleading the Statute of Frauds. In circumstances where plaintiff had acted detrimentally in performance of, or reliance on, the contract in question, the Chancellor would regard as unlawful to permit the defendant to exercise his right to plead the Statute of Frauds, and thus get away with that. There was a case of abuse of rights whose characteristics were perhaps in part different from the official doctrine of abuse as it developed during the XVIIIth and XIXth centuries. Still, *in nuce* that was it—a regulated instance of unlawful exercise of one's own proprietary rights which, however, in 1989 the U.K. Parliament decided to "abolish".[73]

13. Was it wise to "abolish" the doctrine of part performance?

A proper answer to this question would require much discussion that I am not allowed to undertake here. However, as a conclusive remark in the present introduction to the matter of abuse of rights in England, I shall observe the following.

The English are said to have no recognised general principle of good faith. Nor are said to have a recognised general principle like Article 1382 of the *Code Civil,* § 226 or § 826 of the BGB, or Article 2043 of the Italian *Codice Civile.* They have, however, judicial doctrines and other legal mechanisms such as the doctrine of part performance. Such doctrine, in my view, dealt with a particular instance of abuse of rights—despite the fact that it was not *in itself* a general statement about abuse of rights. Also, after *Steadman v Steadman,*[74] the doctrine of part performance was finally given a modern shape, and thus the limitations placed by XVIIIth and XIXth centuries *laissez-faire* ideologies were, in the event, substantially reduced. The

[73] Above, note 69.
[74] CA [1973] 3 All ER 977, [1974] QB 161; HL [1974] 2 All ER 977.

Japanese data offered above confirm that even in reputedly advanced societies abuse of rights occurs more often than it is usually believed. It might be therefore worth reconsidering the function of the doctrine of part-performance under this light.

(v) Conclusions

14. European countries rely on certain propositions that form what they then call the "legal system". Such propositions are formally identified, formally applied, and formally disposed of. The common, liberal belief is that a certain degree of formality in the identification, application, and disposal of such propositions insures a degree of certainty that, in turn, insures a degree of equality that, in turn, insures a degree of justice—that is found to be all in all satisfactory. Critics attack formality as intrinsically evil as—they say—it bars the path to justice. It seems to me that neither position is acceptable. The former thesis accepts that formal rules provide an exclusionary reason for the judiciary not to look at occasional issues clashing with the rule they apply, and delegates the responsibility of devising new rules to the political authority if and when such authority is willing and ready to intervene in each particular case. The latter thesis rejects formality altogether, and directs the judiciary to search for the substantive issues at stake as they present themselves—without any further delay nor, for that matter, any fear (or almost any fear) of "discretionary disasters".

It seems to me that formality is an essential feature of the European philosophical and legal heritage. If, however, formality is thus in my view largely inescapable, that is not to say that formality is either good or bad—indeed, formality seems to be a fundamentally *neutral* entity. Formality simply means that legal analysis must start at an earlier stage, and that—in theory—it would be for the legislator to consider whether each of the rules in question may on occasion produce hardship. While, I think, it could be reasonably expected that all rules will cause hardship whenever the reasons for which they were initially devised do not obtain, this of course *de*

facto could only be verified at the (later) time of litigation (legislators are statesmen—hardly oracles). On the other hand, it might be felt that it should not be left simply to the mere discretion of each court to devise in each particular case an answer to that case. Accordingly, a modern version of the traditional doctrine of abuse of rights could perhaps provide an appropriate, pre-determined instrument to measure in each of the actual circumstances whether, or not, the right in question was exercised for the reasons for which such right was initially conferred to the relevant body.

Both the Civil law and the Common law seem to have rejected the traditional notion of *abus de droit.* But so far neither the Civil law nor the Common law seem to have been able to point to a convincing alternative. Abuse of rights situations do occur, and need to be dealt with in a cogent and consistent way. To this problem, however, there appears to be no easy answer. One possibility to overcome the traditional criticism against the doctrine of *abus de droit* (whereby typically abuse comes up as a defence in an action by the "abusor") is perhaps to analyse abuse of rights situations in terms of "benefit removed from" rather than "harm inflicted to" the defendant.[75] In other words, one could think of abuse of rights situations as instances concerning some *lawful behaviour (by the plaintiff) leading to the unjustifiable (or unjustified) removal of a well defined benefit from the defendant.* So, the plaintiff's conduct must be intentional, lawful, and such that a certain benefit for the defendant would be removed. In such view, there would be no need to show the *actual reasons* for the plaintiff's (intentional) conduct—least of all 'the intention to cause harm'. The benefit for the defendant (which would be removed), by contrast, would have to be substantial enough to be measurable in economic terms. Finally, there would be "abuse" (but perhaps a more felicitous name for such doctrine would have to be found) whenever the conduct by the plaintiff would not generate an advantage (found by the court to be) substantial enough

[75] While perhaps one could say that every time some kind of harm is inflicted on someone some kind of benefit is removed from the victim, not every time that a benefit is removed from someone this can be said to have been harmed.

to be measured in economic terms, or (if so measurable) then one that could be (by the court) hardly compared in consequence with the benefit removed. In the specific case of property rights, this would be justified by the fact that still to this day such rights seem to be perceived as (mainly) patrimonial rights. The moment such rights are exercised in a way that cannot be convincingly showed to have an explanation measurable in economic terms, it would seem that the body to whom such rights were initially conferred can be asked to restrain from further exercise of those rights in that particular way.

15. This, again, is by no means a final proposal. Rather, there is an initial attempt to invite fresh debate on an undeniably difficult matter. The prize, of course, would be a more convincing and (because of the consequent abatement of unjustified or unjustifiable claims) a more effective legal system—something that, I think, would be no doubt worth the effort.