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ABUSE OF RIGHTS IN FRANCE, GERMANY, AND SWITZERLAND: A SURVEY OF A RECENT CHAPTER IN LEGAL DOCTRINE

Vera Bolgár*

FRANCE

In the development and the clarification of the doctrine of the abuse of rights French scholarship occupies the key position. It was through the writings of the most authoritative protagonist of the doctrine, Louis Josserand,1 that the problems attending the consequences of any abusive exercise of rights were given renewed attention and exerted considerable influence on contemporary doctrine as well as on the jurisprudence of the courts.

The basic principle seems simple and irrefutable. It provides that whoever abuses his legal rights should be held liable for the consequences of such abuse. Nevertheless, the reactions to this principle gave rise to a controversy that went beyond the simple causes and effects of the abuse of rights and eventually came to touch upon the then prevalent notions on the nature and the functions of law. Perhaps it was not by chance that the controversy arose and reached its most violent forms in France, in the country where any restriction on individual freedom of action or on the intangibil-

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Abbreviations for French reports are the following: Cass. civ.: Chambre civile de la Cour de Cassation; Cass. comm.: Chambre commerciale de la Cour de Cassation; Cass. req.: Chambre des requêtes de la Cour de Cassation; D.: Dalloz, Recueil périodique et critique de jurisprudence, de législation et de doctrine; D.H.: Dalloz, Recueil hebdomadaire de jurisprudence; D.-P.: Dalloz, Recueil périodique et critique de jurisprudence, de législation et de doctrine; D.-S.: Recueil Dalloz-Sirey, de doctrine, de jurisprudence et de législation; Gaz.-Pal.: Gazette du Palais.
ity of individual rights was considered a violation of the revolutionary mystique of liberty as embodied in the Declaration of the Rights of Man and the Code Napoléon. Or was it altogether by chance that the abusive exercise of rights, as it were their détournement, by private individuals came into the focus of interest through the parallel scrutiny of the French Conseil d'État into the détournement de pouvoir as exercised by the public authorities?

It should also be recalled that the appearance of Josserand's theories at the turn of the nineteenth century marked one of the most radical changes in the ideas on the nature and the functions of law, and the effects of this change were reflected in the ensuing controversies. Briefly, what Josserand voiced was the vindication of the gradual process that shifted the importance of individual rights from their private, autonomous domain into the social field, and transformed the exercise of these very rights into social functions. Hence the controversy on the abuse of rights turned around the old and the new: represented by those who held that there can be no abuse of rights if they were exercised within the limits of the law that granted these rights—le droit cesse où l'abus commence—and by those who held that any exerci-

2. R. Savatier, Du droit civil au droit public 7 (1945).

3. The similarity between the détournement de pouvoir within individual rights and within the functions of public officials is, however, merely one of surface. In checking whether a public authority has exceeded the limits of its power as set down by law the administrative courts merely examine whether such action conformed to the public interest that, in its turn, sets the limits of such power. The examination is altogether objective and has nothing to do with morals or equity, which, on the other hand, are the determining factors in qualifying individual actions as abusive of rights. Cf. 1 R. David, Le droit français: les données fondamentales 179 (1960); English translation in R. David, French Law: Its Structure, Sources and Methodology 201 (M. Kindred transl. 1972) [hereinafter cited as David], 1 R. Savatier, Traité de la responsabilité civile en droit français 53 (2d ed. 1951) [hereinafter cited as Savatier]; Conseil d'État, Judgment of February 27, 1903, S.1905:3.17, note Hauriou. On an exhaustive treatment of the jurisprudence of the Conseil d'État, in particular under the abuse of rights theory, see Louis Dubouis, La théorie de l'abus de droit et la jurisprudence administrative (1962), especially with a view to détournement de pouvoir at 184 ff.

4. Next to Josserand the most famous exponent of this view was Léon Duguit. See L. Duguit, Les transformations générales du droit privé depuis le code napoléon (1st ed. 1912). See also David at 179.

5. "The law stops where abuse begins." This is a famous quotation taken from 2 M. Planiol, Traité élémentaire de droit civil no. 871 (11th ed. 1939). See also his note at D.1902.2.329; cf. 1 H. Mazeaud, L. Mazeaud et A. Tunc, Traité théorique et pratique de la responsabilité civile, dé-
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cise of rights which is contrary to the social functions of these
rights constitutes abuse. The chief protagonist of the first
theory, besides Planiol, was Georges Ripert, who feared that
the emphasis on the social as against the individual orienta-
tion of law will gradually deprive the individual of his subject-
ive rights. For the first school, abuse of rights involved ac-
tions which, even though exercised within the limits of the
law, are contrary to morals; but carrying this thought further
it also held that the judicial scrutiny of the morality of indi-
vidual actions would introduce an arbitrary element into the
jurisprudence of the courts.

In essence, this is the same theory that governed the
highly individualistic system of Roman law. Under its guiding
principles no action exercised within the limits of a legally
stated right could be construed as abuse; nevertheless, this
principle was tempered in time by the exceptio doli generalis
and specialis, under which the defendant could allege plain-
tiff's fraud, on the one hand, and by the possibly first formu-
lation of a theory on the abuse of rights, under which Gaius
enjoined the mistreatment of slaves and upheld the functions
of spendthrift guardians, on the other: male enim nostro iure
uti non debemus—we should not exercise our rights wrong-
fully.

On the other hand, Dean Ripert's statement that the
interest in the doctrine of abuse of rights emerged concur-
rently with the renewed interest in civil liability and, in par-
ticular, with the extension of its field of application, was
justified by later developments. Planiol's views were upheld
with respect to certain rights within which individual au-
tonomy remained either absolute or discretionary; but

LICTUELLE ET CONTRACTUELLE 627 (5th ed. 1957) [hereinafter cited as
MAZEAUD ET TUNC].

6. See text at note 4, supra.

7. G. RIPERT, LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES 195 (3d ed.
1935) [hereinafter cited as RIPERT]; Ripert, Abus ou relativité des droits, 49 REV.
CRIT. LÈG. ET JURISPR. 33, 57 (1929).

8. Digest 50.17.55 (Ulpian): nullus videtur dolo facere qui suo iure utitur;
also D.50.155.1 (Paulus): non videtur vim facere qui iure suo utitur.

9. GAIUS INST. 1.53; cf. G. CORNIL, LE DROIT PRIVE 102; MAZEAUD ET TUNC
at 629.

10. RIPERT at 169; Appleton, Notre enseignment du droit romain: ses en-
nemens et ses défauts, in MÉLANGES DE DROIT ROMAIN DÉDIÉS À GEORGES CORNIL
43, 73 (1926).

11. Rouast, Les droits discrétionnaires et les droits contrôlés, 42 REVUE
TRIMESTRIELLE DE DROIT CIVIL (REV. TRIM. DR. CIV.) 1 (1944). 2 G. RIPERT ET J.
BOULANGER, TRAITÉ DE DROIT CIVIL D'APRÈS LE TRAITÉ DE PLANIOL (1957)
beyond this restricted category, Josserand's theory on the relativity of rights became the widely accepted view, under which the relativity of rights was equated with their socially equitable exercise. It was at this point that contact was made between the theories of abuse of rights and civil liability; the determining factor in both fields became the motive of fault that induced a particular individual action, and as a further step, entailed the reparation of damages which arise through such fault. It made no difference whether the damage was caused through actions involving the abuse of rights or through actions involving negligence or delict.

These ideas were equally reflected in French legislation. It should be mentioned at this point that one of the most representative rights of individual autonomy, the right of ownership, was already given its limitations at the time of its original formulation, since the legislator stated as early as 1804 that the owner's absolute rights are limited by law.

In the following years, provisions were codified which established the requirement of good faith in the dissolution of partnerships, providing also for the restitution of damages arising either through the unilateral rescission of contracts or through the "abusive termination of a labor contract"; in the latter case, the law imposed on the courts the determination of the abuse.

Further provisions impose limitations on the owner's right with respect to leasing his property for private habitation.

[Hereinafter cited as RIPERT ET BOULANGER] at 368 lists the following rights which are not susceptible of abuse, i.e., they are discretionary: the parents' right to consent or to oppose the marriage of their children, the paternal rights over the children, the right of testation, the rights of ownership (for its reservations, however, see note 14 infra) as well as the right not to enter into contracts. On the judicial approval of this last right, see Éperrnay, February 28, 1906, and Lille, November 12, 1906, D.1908.2.73, note Josserand; Aix, December 21, 1910, D.1911.2.385, note Planiol.

12. SAVATIER at 51.
13. MAZEAUD ET TUNC at 624, 633.
14. FRENCH CIV. CODE art. 544: Ownership is the right to enjoy and to dispose of things (chooses) in the most absolute manner, provided they are not used in a manner as prohibited by law or by regulations (translation by author); cf. RIPERT ET BOULANGER at 366.
15. FRENCH CIV. CODE arts. 1869-70.
16. Law of December 17, 1890 amending FRENCH CIV. CODE art. 1780.
19. Art. 21 of Law of September 1, 1948 (D.1949.93) which penalizes the
for commercial use,\textsuperscript{20} or for farming\textsuperscript{21}—in these instances equally imposing on the courts the examination whether this right was exercised abusively, i.e., with the intent to harm.\textsuperscript{22} The Code of Civil Procedure lays down limitations on the right to bring actions by imposing a fine on the dilatory or abusive exercise of this right.\textsuperscript{23}

An instructive illustration of the legislator's acceptance of the theory that law should be considered in its social-functional aspects was given by the 1965 reforms of the laws relating to marriage and marital property. For instance, article 223 of the Code Civil that recognized the husband's right of refusal to the wife's exercise of a profession, unless this right is abused,\textsuperscript{24} was radically changed in its new reformed version.\textsuperscript{25}

However, in the development of the doctrine of the abuse of rights it was not the legislator but the courts who played the decisive part. At first they elaborated the original limitations on ownership, and interpreted as an abusive exercise of ownership rights such exercise as was motivated by the intent to cause harm,\textsuperscript{26} or when the damages which arose from owner who refuses to lease his house to a family with many children; here the abuse of the right not to contract is the reason for the penalty; cf. MAZEAUD ET TUNC at 632.

\textsuperscript{20} Art. 19 of Decree of September 30, 1953 (D.1954.185).

\textsuperscript{21} Code Rural art. 846, modified by Law of September 5, 1947; for present legislation, see MAZEAUD ET TUNC at 632, 637.

\textsuperscript{22} MAZEAUD ET TUNC at 637.

\textsuperscript{23} FRENCH CODE PRO. Civ. arts. 453, 471. Under these articles there is a jurisprudence constante; cf. CASS. CIV., March 9, 1949, Gaz. Pal. 1949.1.245; CASS. CIV., February 22, 1950, S. 1950.1.183; Lyon, January 31, 1951, D.H.1951.258. For further decisions, see RIPERT ET BOULANGER at 366-67; SAVATIER at 83.

\textsuperscript{24} Paris, December 7, 1940. Gaz. Pal. 1941.1.11; cf. MAZEAUD ET TUNC at 632.

\textsuperscript{25} FRENCH CIV. CODE (new) art. 223: "The wife has the right to exercise a profession without the consent of the husband, and she may at all times, for the requirements of this profession, alienate or enter into obligations on her own with respect to her own property" (translation by author).

\textsuperscript{26} The French courts apply different principles to controversies arising from this particular right than do the English courts who would qualify these cases as falling within the law of nuisance. AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 219 (3d ed. F. H. Lawson, A. E. Anton & L. Neville Brown 1967); RIPERT ET BOULANGER at 366. See also cases in notes 38, 39, infra; also Lyon, April 18, 1856, D.1856.2.199 involving an owner who reduced the neighbor's spring waters by diverting them through his own land. For a similar case in the Common Law, see The Mayor of Bradford v. Pickles [1895] A.C.587 (H.L.) discussed by Albert Mayrand, Abuse of Rights in France and Quebec, 34 LA. L. REV. 993, 995.
such exercise were far in excess of the advantages gained by the owner.\textsuperscript{27}

The parallels in the development of the doctrines of the abuse of rights and civil liability are particularly evident in the jurisprudence of the courts; indeed, their implementation is the exclusive work of jurisprudence, strikingly similar to the developments in the Common Law. The French courts have built the standing practice on the abuse of rights—in the absence of a general legislative rule—upon a few scattered provisions and their successive amendments under the guiding principle that the damages caused through the abusive exercise of rights, which they qualified as “fault,” should be repaired by the party who abused his rights. As regards the doctrine of civil liability, the courts had not much more to go on. In Book III, title IV, chapter II of the \textit{Code Civil}, on “delicts and quasi-delicts,” three terse provisions provide for the reparation of damages caused either directly or vicariously by the party at fault, and these three provisions were the foundations of the entire system of modern legal principles that constitute the French law of civil liability.\textsuperscript{28}

In the determination of the presence or the absence of abuse of rights in given fact situations, however, the courts operate in a narrower field than the one governed by civil liability. The central feature of both fields is the restitution of damages caused by the party at fault: under the rules of civil liability, the courts inquire whether it was caused through imprudence, negligence or a quasi-delictual behavior—in other words, whether the action violated not merely the rules of law but also the rules of equity;\textsuperscript{29} whereas under the accepted doctrine of the abuse of rights, the fault which caused the damage may only arise within the limits of those rights which by their nature may allow a certain causation of

\textsuperscript{27} The courts follow the formulation of the Court of Cassation, C\textsc{ass. C\textsc{i}v.}, February 18, 1907, D.1907.1.385, 387, note Ripert: “\textit{attendu qu’un industriel qui, par l’exploitation de son usine, cause aux voisins un préjudice, excédant la mesure des obligations ordinaires du voisinage, est en faute s’il néglige les précautions qu’il y aurait lieu de prendre pour prévenir ces inconvénients}.” For the legislative and jurisprudential elaboration of such \textit{animus nocendi} or fault in the French-inspired law of Quebec, see Mayrand, \textit{Abuse of Rights in France and Quebec}, 34 \textit{La. L. Rev.} 993, 995.

\textsuperscript{28} A glance of the large amount of case-law printed under articles 1382, 1383 in the pocket edition of the \textit{Code Civil} (Daloz, Petits Codes, 1971-72) illustrates this body of law; see also \textsc{Mazeaud et Tunc} at 633, 646.

\textsuperscript{29} \textsc{Savatier} at 50.
harm.\textsuperscript{30} Consequently, abuse of rights may only arise in connection with damages caused through the exercise of these particular rights; in the examination of damages caused by other means the question of the abuse of rights does not concern the courts.\textsuperscript{31} Among the rights within which "there exists a codified permission to do harm,"\textsuperscript{32} are those, for instance, which govern ownership,\textsuperscript{33} contracts,\textsuperscript{34} business competition;\textsuperscript{35} such are also the procedural rights which authorize the initiation of actions or their appeal.\textsuperscript{36} In deciding situations involving these particular rights the courts merely examine whether these were exercised within the legally authorized limits of their purpose or whether they were abused, on the one hand, or whether they were exercised for the exclusive purpose of causing harm, on the other.

It might be of interest to cite a few decisions in detail which illustrate the position of the courts with respect to these principles. One of the earliest decisions was handed down by the Court of Colmar,\textsuperscript{37} in which the court stated that the limits of the right of ownership are set by a serious and legitimate interest, and therefore they do not authorize mischievous actions (in the case, the erection of a chimney) which are not justified by reasons of utility and are destined to damage the interests of third parties.

In the \textit{Affaire Clément-Bayard}\textsuperscript{38} the Court of Cassation had no difficulty in finding abuse of the right of property since the owner of a field adjacent to the hangar for zeppelins used by Messrs. Clément-Bayard erected a wooden structure topped with metal spikes for the purpose of impeding the operations of the zeppelins. Similarly within the field of ownership, the Court of Cassation upheld the liability of the owners and awarded damages which arose through their use of electrical machinery on the grounds that "even the legitimate exercise of the rights of ownership will generate liabil-

\textsuperscript{30.} \textit{Id.} at 51-52.
\textsuperscript{31.} \textit{MAZEAUD ET TUNC} at 626.
\textsuperscript{32.} \textit{SAVATIER} at 51.
\textsuperscript{33.} See notes 26, 27 supra.
\textsuperscript{35.} \textit{RIPERT ET BOULANGER} at 367; \textit{SAVATIER} at 64.
\textsuperscript{36.} See note 23 supra.
\textsuperscript{37.} Colmar, May 2, 1855, D.1856.2.9.
\textsuperscript{38.} \textit{CASS. REQ.}, August 3, 1915, S.1920.1.300, D.P.1917.1.79.
ity if the resulting inconvenience to third parties goes beyond the ordinary obligations towards neighbors. 39

In controversies affecting shareholders' rights, the Court of Cassation adopts a restrictive interpretation to alleged abuses of rights and tends to uphold the validity of decisions voted upon either by the board of directors or by the general assembly. For example, by reversing a decision of the Court of Appeal the Court saw no abuse of rights in a measure voted upon by the board of directors of a company by which transfers of shares were subjected to the agreement of the board. 40 The Court held that this measure did not abuse the provisions of the controlling law since these touch merely on the shareholders' freedom to vote but not on their freedom of acquisition. Similarly, the Court upheld the validity of a decision brought by the general assembly of a limited liability company 41 that settled the remuneration of the managers and denied recourse to the courts for contesting the decision. In the opinion of the Court, unless there is evidence of action that is either violative of procedure or abusive of shareholders' rights, the courts may not substitute their decisions for those of the general assembly.

Finally, a decision of the Court of Appeal of Ghent should be noted since it is an excellent illustration of the judicial implementation of the abuse of rights doctrine. 42 The controversy arose under the rights of eminent domain of the township of Courtrai. The town started construction of public roads which ran through private lands without the preliminary measures of expropriation. The Court rejected the request of appellants, the owners of the land, for the restitution of the fences and for the demolition of the constructions erected by the town, on the grounds that even though Courtrai committed an abuse of its rights of eminent domain, the

41. CASS. COMM., January 11, 1972, D.S.1972.1.559, note Orengo. The decision treats a problem that has not as yet been explicitly decided by the courts. For a similar case see Douai, February 11, 1972, D.S.1972.J.279.
42. Even though this case was decided by a Belgian court, it is mentioned here since the Belgian law is also governed by the Code Napoléon (with subsequent Belgian modifications). In addition, the discussion of the decision is one of the most frequently cited publications on the French principles of abuse of rights; cf. Ghent, November 20, 1950, 7 REVUE CRITIQUE DE JURISPRUDENCE BELGE 270 (1953) with note by A. De Bersaques, "L'abus de droit," at 272.
damages which the town would incur through the imposition of specific performance would exceed by far the harm done through its violation of appellants' rights of ownership.

In the continuing jurisprudence of the French courts, their final achievement in the implementation of the abuse of rights doctrine was the segregation of that particular kind of fault that was committed through the abusive exercise of a right. Even though the bases for awarding the damages which arise through the abuse remain similar to those applied in the field of civil liability for damages which arise through fault, nevertheless, “by baptizing this particular fault as abuse,” the courts have proved that even within the exercise of a right there may exist the motive of fault. If their jurisprudence had not added anything new to the Code in this respect, it has nevertheless revealed the wealth of its substance.43

**Germany**

The developments in Germany with respect to the doctrine of abuse of rights were all in all similar to the developments in France. However, it should be recalled that the German Civil Code was promulgated roughly one century later than the French Code Civil;44 hence the progress of ideas within this span of time, from the strictly individualistic towards the social-functional aspects of law—which affected legal thought in Germany as well—had its definite impact on the principles that lay at the foundations of the German code. In particular, there was less resistance towards embodying in the code a provision that reflects the acceptance of a doctrine under which the unrestricted exercise of individual rights may be limited, if such exercise means the abuse of these very rights. Nevertheless, the then still prevailing ideas of liberalism were evident in the drafting stages of the code, since the Senate expressed criticism towards the inclusion of

43. MAZEAUD ET TUNC at 646.

44. The German BÜRGERLICHES GESETZBUCH (B.G.B.) was promulgated in 1896 and came into force on January 1, 1900—the first product of the law of the XXth century.

Abbreviations for German reports are the following: BGHZ: Entscheidungen des Bundesgerichtshofs in Zivilsachen (reports of decisions of the Federal Supreme Court (civil matters); RG, RGZ: Entscheidungen des Reichsgerichts in Zivilsachen (reports of decisions of the civil divisions of the former German Supreme Court).
a provision that would restrict the exercise of individual rights on grounds of fraud. The reasoning of the Senate was in essence similar to the French reasons put forth against the doctrine of abuse of rights, namely, that the judicial determination of fraud would obscure the limits between the rules of objective positive law and the rules of subjective morals. Nevertheless, contrary to the opinion of the French Commission de Révision du Code Civil, which rejected the inclusion of an article on abuse of rights in the preliminary sections of the Code, the German drafters inserted into the Code an article on the abuse of rights, which provides for the unequivocal refusal to recognize any exercise of rights that was carried out for the only purpose to cause harm.

In addition to this explicit, positive provision, two further articles of the code indirectly affect the doctrine of the abuse of rights: article 242, that lays down the general provision on good faith—Treu und Glauben—in the execution of obligations, and article 826 that provides for the restitution of damages caused by actions that are contra bonos mores.

The legislative history of the right of ownership, considered by liberal philosophy as the practically unrestricted power in the exercise of individual rights, illustrates in the German example the gradual shifting of importance from the private-individual to the social domain. In the first draft, the formulation of the rights of ownership was close to the French idea of fixing these as the rights of disposal in the manière la plus absolue; in the final version, which became the codified provision, the manner of the exercise of these

45. This provision would have incorporated the Roman principle of the exceptio doli, under which defendant could claim that plaintiff acted fraudulently. For German law, see L. ENNECCERUS, T. KIPP AND M. WOLFF, LEHRBUCH DES BÜRGERLICHEN RECHTS, ALLGEMEINER TEIL 1440 (Halbband/II, 5th ed. Nipperdey 1960) [hereinafter cited as ENNECCERUS, KIPP AND WOLFF]; STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, RECHT DER SCHULDVERHÄLTNISSE § 242 at 743 (11th ed. 1961).

46. Cf. RIPERT at 195.

47. Id. at 178.

48. The suggestion for inclusion came from Raymond Saleilles. Cf. RIPERT at 169.

49. BGB art. 226.

50. Cf. ENNECCERUS, KIPP AND WOLFF at 1443; T. SOERGEL & W. SIEBERT, BÜRGERLICHES GESETZBUCH, ALLGEMEINER TEIL § 242, Note III [hereinafter cited as SOERGEL-SIEBERT].

51. The German wording in the first draft was “nach Willkür,” arbitrarily, with full authority; cf. O. PALANDT, BÜRGERLICHES GESETZBUCH 993 (12th ed. 1954) [hereinafter cited as PALANDT].
rights was set down "at discretion."\textsuperscript{52} Moreover, while the French restrictions on ownership are limited by the code to existing laws and regulations, the German code adds to these restrictions the rights of third parties. This idea was already present in the Weimar Constitution, promulgated in 1919, which proclaimed the obligatory nature of ownership as well as its exercise for the public interest.\textsuperscript{53} The post-World War II Constitution, the Bonn Basic Law, repeats this idea, but adds renewed emphasis to the social functions of ownership by declaring that its exercise should serve equally for the benefit of the community.\textsuperscript{54}

These legislative developments, however, were already anticipated by the German courts: as early as 1902, the Supreme Court declared that the strict principles of ownership, which were taken from Roman law, were already alien to contemporary legal ideas;\textsuperscript{55} also in establishing the obligation for the security of transfers of ownership, the court stated that ownership creates not merely rights but also obligations.\textsuperscript{56}

On the other hand, the law sets restrictions equally on the obligations which arise in connection with the rights of ownership. Thus, various articles of the Civil Code regulate the owner's obligations so far as toleration of nuisance is concerned, and list in detail the kinds of such nuisances: emission of gaseous substances, of odors, smoke, soot, heat, noise, shocks, etc. These may be tolerated only to the extent that does not impair the regular use of the property; contrariwise, the owner is entitled to ask for injunction or, in case such nuisance is the consequence of unavoidable economic activities, to ask for damages.\textsuperscript{57}

A further protection for the owner is the presumption of his freedom over the disposal and use of his property; this has the important procedural consequence that the burden of proof is shifted to the party who requests the limitations of the owner's rights.\textsuperscript{58}

\textsuperscript{52} "nach Belieben"; cf. BGB art. 903.
\textsuperscript{53} Article 153.111 of Weimar Constitution.
\textsuperscript{54} Article 14.11 of Bonner Grundgesetz; cf. PALANDT, note to § 903 at 966.
\textsuperscript{55} 52 RG 376 (1902).
\textsuperscript{56} 89 RG 121 (1816); cf. PALANDT at 966.
\textsuperscript{57} BGB art. 906.
\textsuperscript{58} 3 L. ENNECERUS, T. KIPP AND M. WOLFF, LEHRBUCH DES BÜRGERLICHEN RECHTS, SACHENRECHT 174-75; (10th ed. by Martin Wolff-Ludwig Raiser 1957). See also SOERGEL-SIEBERT § 226 at 988 n.26.
With respect to the development of the doctrine of the abuse of rights, eventually two theories gained ground, called the "external" and the "internal" theories. The first shows some similarities to those French views that stress the exercise of rights as against the nature of the right, and maintain that there can be no abuse of rights only an abuse of their exercise if this is contrary to morals. In line with this reasoning, the German "external" abuse of rights theory holds that all restrictions are uniquely directed against the owners of the rights and affect merely the exercise of rights and leave the nature of the right intact; as it were, they affect the right only externally. The "internal" theory, on the other hand, insists that the right itself, its immanent nature, controls its very exercise. It was this latter theory that was taken over by the governing doctrine and was influential in the implementation by the courts of the various features of abuse.

In essence, in the elaboration of the doctrine of abuse of rights, the German courts did not have many more codified provisions available for assistance than were available to the French courts. In addition to article 226 which is fairly restrictive in scope (limiting the purpose to cause harm, i.e., only to malicious action), there are two broad general provisions in the Code which stipulate the requirement of good faith and the conformity with bonos mores in the exercise of rights. Since these provisions offer no more than general guidelines, the courts had to interpret the incidence of abuse

59. W. SIEBERT, VERWIRKUNG UND UNZULÄSSIGKEIT DER RECHTS-AUSÖHRUNG 83 et seq. (1934) [hereinafter cited as SIEBERT].
60. See text at notes 5-7, supra.
61. In the German wording, this process is the äussere Rechtsbeschrankung, which implements the Aussentheorie; SIEBERT at 83; ENNECERUS, KIPP, AND WOLFF at 1442 n.23.
62. In the German wording, Innentheorie; cf. SIEBERT at 85; ENNECERUS, KIPP AND WOLFF at 1442.
63. The fundamental idea that the exercise of each and every right is limited as a matter of course by the content of these rights has already been formulated by Otto v. Gierke, 1 DEUTSCHES PRIVATRECHT 319 (1895). Gierke's admirable elaboration of the social functions of law that sets at the same time the limits of its abuse, whether the abuse occurs through the use, the misuse, or the non-use of a right, is a forerunner of all the later Western theories.
64. See the leading opinion handed down by the German Federal Supreme Court in the judgment of July 12, 1951, 3 BGHZ 94, 103 (1951) in which the court rejected the defense that the incriminated action was carried out under the provisions of a statute on the grounds that any implementation of a statute that is contrary to its nature and original purpose qualifies as abuse of rights. Cf. also Judgment of January 27, 1954, 12 BGHZ 157 (1954).
in the light of the surrounding circumstances of each particular case; this meant that they had to examine whether the contested exercise of a right was truly malicious and as such constituted an abuse of rights or whether, even though not malicious, it was nevertheless violating the general requirements of good faith or morals.

While judicial interpretation had to move within the broad limits of these general rules, nevertheless certain typical situations emerged in the course of time which, in turn, served as the bases for certain typical rules. These rules may be summarized as follows:

(a) all exercise of rights is abusive if grossly inequitable under the circumstances, or is carried out with no regard for the legitimate interests of other parties;\(^{65}\)

(b) no exercise of rights will be given legal recognition if these rights were acquired either through the violation of laws or in bad faith;\(^{66}\)

(c) no exercise of rights will be given legal recognition if it is contrary to former conduct;\(^{67}\) and finally,

\(^{65}\) 150 RGZ 286 (1936) (cancellation of a lease on the last day of its termination); Judgment of February 19, 1951, 1 BGHZ 186 (1951) (use of formal advantages given by law without substantive justifications); Judgment of February 21, 1952, 5 BGHZ 186 (1952) (petition for divorce based on the malicious deception of the wife considered abuse of rights if held forth by petitioner for the only purpose to have the marriage dissolved in order to marry another woman). Cf. ENNECCERUS, KIPP AND WOLFF at 1444, n.32; App. Celle, Judgment of July 7, 1950, 4 NEUE JURISTISCHE WOCHENSCHRIFT 317 (1951).

\(^{66}\) Judgment of October 6, 1953, 10 BGHZ 319 (1953) (abusive exercise of banking rights if bank's defense is the knowledge of client of a reservation for the transfer of funds during exceptional circumstances); Judgment of February 24, 1954, 12 BGHZ 328 (1954) (it violates the rules of good faith if plaintiff requests continued high payments from company which were awarded to him during the National Socialist period); Judgment of March 31, 1954, 13 BGHZ 67 (1954) (the German Federal Railways, which as a legal entity are identical with the former German Reich Railways, may not avail themselves of their rights of redemption against land bought second-hand from a Jewish owner in 1942); Judgment of May 29, 1954, id. at 346 (a decision in which the Court examines under the guidelines of good faith whether the request for a pension of a former corporation executive under the National Socialist regime would be justified had employment contract been signed under normal circumstances). Cf. ENNECCERUS, KIPP AND WOLFF at 1444. n.33.

\(^{67}\) Judgment of January 28, 1938, 67 JURISTISCHE WOCHENSCHRIFT 860 (1938), even though contract for services provided for rescission at will, the circumstances of a given case might prevent the validity of such rescission (elaboration of the \textit{venire contra factum proprium} rule); cf. ENNECCERUS, KIPP AND WOLFF at 1444, n.36.
all exercise of rights is illegal if carried out maliciously for the only purpose to cause harm.  

The last one of these rules is closest to the principle enunciated in article 226, the codified provision on the abuse of rights. It is also the one that affects the exercise of rights which lie outside the scope of the Civil Code, for instance, rights which govern family relations, successions, or even commercial transactions or business competition.

Under the German doctrine of the abuse of rights, similarly to French doctrine, the nature of abuse is conditioned by the nature of those rights in which there is a codified permission to do harm, as for instance, in the rights of business competition or industrial property. However, if the exercise of these rights goes beyond the codified permission, or is exclusively motivated by malice, it will qualify as abuse of rights. However, because of such close interaction between legally permitted abuse and malicious abuse, the judicial determination of abuse of rights is a complicated process in which the court examines the facts and circumstances of the case and, in addition, also the intent of the parties. The burden of proof is on the party who alleges the malicious intent. On the other hand, the courts give relief even in the absence of malicious intent if the exercise of a right violates the good faith and good

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68. This is the principle laid down in BGB art. 226, under the title, the prohibition of chicane, the abuse of rights. It was not included, without any discussion, in the Civil Code; indeed, in the first draft it was destined merely as a protective provision for the rights of ownership until incorporated eventually as one of the general provisions. (Cf. text at notes 48 and 51). The leading decision on chicane was handed down by the Supreme Court in the Judgment of December 3, 1909, 72 RGZ 251 (1910), that qualified as gross abuse of the rights of ownership a father's prohibition to his son against visiting the grave of his mother which was situated on the father's property; ENNECCERUS, KIPP AND WOLFF 1446, n.45 (citing further decisions).

69. On the other hand, contrary to French doctrine and practice, the German doctrine of the abuse of rights excludes the procedural rights (the French voies de recours) from the domain of abuse of rights. Cf. note 23, supra. In the leading opinion of the German Supreme Court, Judgment of February 10, 1940, 162 RGZ 65 (1940) all actions carried out under the rules of civil procedure are governed exclusively by the rules of procedure; hence their validity is to be determined by other principles than those which are laid down in the Civil Code, cf. SOERGEL-SIEBERT at 989 (4).

69a. Thus, the Administrative Court of Appeal of Münster held the State Rheinland-Westfalen liable for abuse of rights for the violation of the Law on the Protection of Mothers when notice of dismissal to an employee was given one month before the birth of her child. The State argued that the Law was not applicable to her case; cf. Judgment of July 11, 1951, 30 DEUTSCHE RICHTERZEITUNG (Heft 1, 1952).
morals provisions; in these cases, however, the judgment is not based on abuse of rights alone but equally on the parties' behavior that violated the moral standards set by articles 242 and 826.\textsuperscript{70}

In the standing jurisprudence of the German courts, article 226 is treated restrictively;\textsuperscript{71} indeed, the general attitude of the courts is to deny relief in situations which involve merely allegations of abuse of rights.\textsuperscript{72} The dominant concern is the equitable compromise of conflicting interests and the consideration of those specific social functions which should be assured by the regular exercise of rights; hence the courts invalidate merely the results of such actions on grounds of abuse which are contrary to the social purposes and goals inherent in these rights.\textsuperscript{73}

With respect to the influence of the principles established by the theory of the "internal" abuse of rights, controversies involving business partnerships offer good illustration. In a case which involved the striking from the commercial register of a limited liability company, on the grounds that its registration as such constituted an abuse of rights under the pertinent sections of the commercial laws because the company was essentially a one-man corporation, the court rejected the request. It held that the purpose of the law was to create a legal entity through commercial registration, and this purpose has been achieved. The court went on to state that the subsequent transfer of the shares to one owner did not destroy the legal entity, and even though such transfers are not altogether justifiable in theory they are harmless to the economy and indeed quite necessary in practice. Since the purpose of the law was not violated through the registration, the legal entity thereby created should be recognized.\textsuperscript{74}

The same principle was followed by the court in holding

\textsuperscript{70} SOERGEL-SIEBERT at 986.

\textsuperscript{71} For an early decision, cf. Judgment of February 3, 1915, 86 RGZ 191 (1915); SOERGEL-SIEBERT at 986.

\textsuperscript{72} Judgment of July 13, 1954, 14 BGHZ 294 (1954) (not considered as abuse of rights if members of an undertakers' trade union were denied access to burial grounds which belong to a Church); DEUTSCHE JURISTENZEITUNG 643 (1936) (invalidation of easements where the owner of the land had other means of entry); cf. also SOERGEL-SIEBERT at 990; further decisions in Comment on refusals to recognize abuse of rights, 8 DER BETRIEBS-BERATER 373 (1953).

\textsuperscript{73} SOERGEL-SIEBERT at 989.

\textsuperscript{74} Judgment of October 9, 1956, 21 BGHZ 378 (1956); similar reasoning in Judgment of July 12, 1956, 21 BGHZ 242 (1956).
the only member of a limited liability company liable for the company's debts. The court upheld the validity of the company since it was registered under the provisions and in accordance with the principles of the law; however, it went beyond the text of the law and held that it would violate the rules of good faith if the purpose of the law—in this case the reliance on the separation of the company's assets from those of its members—is abused. The court referred to a prior decision which stated that no legal entity should be given recognition if used contrary to the purposes of the law.

By similar reasoning, the court refused to permit the transfer of a company's assets from West Germany to East Germany, and held that such measures of uncompensated expropriation would be contrary to the legal nature and the social purposes of a legal entity. Added reasons for refusal were the possible extraterritorial effects that would be involved in the transfer.

In other decisions, the court qualified the following actions as abuses of rights: a father's eviction of his son—under the provisions of the Law on Homesteads—from the farm on which the son had worked for many years; a father's refusal—under the rules on parental rights—to the marriage of his daughter on the ground that the future husband had a different religion; while in another case it was held as a violation of good faith if the defense of an arbitral award is brought up in judicial proceedings.

SWITZERLAND

The treatment of the Swiss developments in the field of abuse of rights was left to the last, not because of the alphabetical sequence of the countries discussed, but because of the excellent synthesis offered by the Swiss jurisdiction of the implementation of this doctrine.

Even though Swiss legal science and practice are much influenced by German and French law—for instance, Swiss

76. 169 RGZ 248 (1943).
80. Judgment of May 20, 1968, 50 BGHZ 191 (1969). In this instance the court discussed the rules on estoppel by conduct if it violates the accepted principles of good faith.
courts frequently cite German decisions in support of their judgments, and Swiss legal scholars consult German and French theories in the elaboration of their views—Swiss law naturally possesses its own unique national characteristics which are equally evident in the implementation of the doctrine of the abuse of rights.

The most outstanding of these is the famous article 1 of the Swiss Civil Code which, as an unprecedented measure, gives quasi-legislative functions to the courts by authorizing the judges to substitute their own interpretation where the text of the law or the accepted custom is silent or inadequate. In addition, article 1 states that in the execution of this function the judge should act as though he were the legislator. The next article contains the rule on abuse of rights. In line with the spirit of article 1, this provision contains equally the authorization of the judge to apply the law in accordance with his own interpretation; this authorization is implicit in the structure as well as in the wording of the text. In structure, the article is built around the provision on good

81. See, e.g., BGE 69.2.102, 103-4 (1943). This influence, of course, is mutual, and frequently the consequence of personal relations between the scholars of the three countries. Examples are found in the EUGEN HUBER ARCHIV with respect to the preliminary drafts of the SWISS CIVIL CODE; for instance, Rudolf Stammler made a few suggestions to Huber on the formulation of the introductory provisions of the Code. Cf. Merz, Annotations to Article 2, Swiss Civil Code, in 1 LIVER, MEYER, HAYOZ, MERZ, JÄGGL, HUBER, FRIEDRICH AND KUMMER, SCHWEIZERISCHES ZIVILGESETZBUCH, Einleitung, Artikel 1-10, 213 et seq., at 229 (1962) [hereinafter cited as SCHWEIZERISCHES ZIVILGESETZBUCH].

Abbreviations for Swiss reports are the following: BGE: ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTES (reports of the decisions of the Swiss Federal Supreme Court).

82. The text of article 1 reads in the official French version: (1) La loi régît toutes les matières auxquelles se rapportent la lettre ou l'esprit de l'une de ses dispositions. (2) A défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur. (3) Il s'inspire des solutions consacrées par la doctrine et la jurisprudence. See the excellent annotated French edition of the CIVIL CODE AND THE CODE OF OBLIGATIONS (Scyboz-Gilliérion, eds. 1972). In the following, the citations from the Civil Code will be made from this edition and not from the equally authentic German text. For details on Article 1, see 1 A. EGGER, KOMMENTAR ZUM SCHWEIZERISCHEN ZIVILGESETZBUCH, Einleitung, Arts. 1-10, 43 (2d ed. 1930) [hereinafter cited as EGGER].

83. The text of the SWISS CIVIL CODE art. 2 reads: (1) Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi. (2) L'abus manifeste d'un droit n'est pas protégé par la loi.
faith to which the prohibition of the abuse of rights is attached; however, with the qualification—which is absent in the French and German laws—that the abuse be manifest. The combined structure and the wording point to the necessity of judicial interpretation; since the constitutive elements of abuse are violations of good faith and the manifest abusive exercise of rights, neither of these elements may be determined otherwise than by judicial interpretation.

Furthermore, the Swiss legislator had no scruples in placing the prohibition of the abuse of rights among the general provisions in the introductory part of the code. Neither does it seem that the doubts voiced by the French and the German legislators on the positive codification of a theory that involves the abuse of a right the very exercise of which would preclude abuse, were shared by the Swiss legislator. True, in the original draft, the abuse provision referred only to the right of ownership if maliciously exercised, but in the following drafts it was extended to every right the exercise of which is motivated by a legal interest. In the final formulation—the achievement of Eugen Huber who was the reporter, the draftsman and the moving spirit behind the code—the prohibition became a succinct statement to the effect that any manifest abuse of rights will be refused legal protection.

Article 2 goes beyond the French and the German laws in two respects. First, it is not merely directed towards the debtor as are the German and French provisions, but places also the exercise of rights by the creditor as well as the performance of the debtor under the requirements of good faith. Second, the implicit necessity of judicial interpretation does not make the determination of abuse contingent upon the allegation of the parties; on the contrary, by raising it into a question of both law and fact, the determination of abuse becomes the duty of the courts.

These principles expressed in article 2 justify the standing practice of the Swiss courts in the interpretation of abuse of

84. The French expression is *manifeste*, the German expression is *offenbar*. See BGE 88.2.18, 24 (1982).


86. Merz, SCHWEIZERISCHES Zivilgesetzbuch at 230; Egger, Arts. 1-10, 72 et seq., with comparative notes to the French and German laws.

87. See the opinion of the Supreme Court in BGE 88.2.23 (1962); also BGE 72.2.39, 44 (1946); P. Tuor, DAS SCHWEIZERISCHE Zivilgesetzbuch 48 (8th ed. by B. Schnyder & P. Jäggi 1968).
rights; indeed, it is merely a codified formulation of a long line of decisions handed down by the Federal Supreme Court long before the civil code came into force.88 With respect to the general application of article 2, it should be recalled that it is set down among the ten introductory articles of the code and as such it is of the nature of a general rule. Hence its application is not restricted to one certain area of the law but cuts through all those areas in which rights may be subject to abuse: for instance, in family law, or in the laws of contracts, civil liability, unfair competition, and even in the area of public law.89 Similarly to French law, but contrary to German law, the laws of procedure fall equally under the abuse of rights prohibition; since these are construed as part of the individual freedom to bring actions, like all freedoms, it may also be abused.

Nevertheless, in spite of the broad field given to the application of article 2, Swiss practice developed certain uniform principles under which the courts may hold the exercise of rights contrary to the purpose of the law, and therefore abusive. These principles are mostly applied in situations which show:

(a) a useless or unprofitable exercise of rights;
(b) a gross disparity of interests;
(c) no consideration for the rights of others in the exercise of rights;90
(d) controversial behavior, or estoppel through conduct (the *venire contra factum proprium* rule) with two most frequently arising situations involving the defense of the limitation of actions and the claim to void transactions on grounds of failure of form (the latter claim is always deemed inadmissible); and finally,
(e) in actions involving unfair competition.91

88. EGGER at 72, citing BGE 32.2.360, 365 (1906), the case involved a situation of unfair competition. See also O. A. GERMAN, GRUNDLAGEN DER RECHTSWISSENSCHAFT 50 (2d ed. 1968).
89. E.g., abuse of rights was alleged against a decree of the Conseil d'Etat of the Canton of Geneva in which the demolition of private apartment houses or smaller dwellings was enjoined for reasons of scarcity of private habitations; cf. BGE 89.1.430 (1963). See also an earlier decision in BGE 47.2.452 (1917).
90. The untranslatable German expression is "*schonende Rechtsausübung,*" and arises mostly in connection with actions of nuisance between neighboring lands or buildings.
91. Compare SCHWEIZERISCHES ZIVILGESETZBUCH at 37 (no. 39), 243 with German text at notes 65-68, supra.
Before listing a few examples of the treatment given by Swiss courts to abuses of rights one of the leading opinions of the Federal Supreme Court might serve as a good illustration:\textsuperscript{92}

For over a long period the Swiss courts recognize in article 2 C.C. the 'positive limits of all exercise of rights.'\textsuperscript{93} The fundamental theory of this article is the recognition that positive legislation is unable to affect in detail all the controversies which may arise in the society of men, and it is equally impossible for it to regulate these controversies in advance. However much the legislator may try to build up a legal structure that shows no gaps in the laws, there will always be special cases in which a rigid application of the statutory principles would lead to injustice, and this the judge is not permitted to tolerate. This happens in particular if individual rights are exercised contrary to good faith. Section 2 of article 2, which denies legal protection to the manifest abuse of a right, forms the necessary amendment to the duty which is set down in section 1 of article 2, namely, to act always in good faith. The purpose of this provision is to either limit or to annul the formal validity of positive laws whenever the judge deems this to be in the interests of substantive justice. Hence the application of article 2 should cover the whole area of the civil code as well as that of the code of obligations. This follows from the article's position in the code and is also in conformity with its usual description as exceptio doli generalis.\textsuperscript{94}

Nevertheless, the courts employ great caution in qualifying actions as abusive exercises of rights, even if it is alleged that they are contrary to the purposes of the law. Thus, for instance, in certain transactions for which either the law or the contracting parties require the strict adherence to certain forms, the courts refer to the interests of legal certainty and security in their refusal to apply article 2, and set aside the parties' arguments to the effect that the exercise of rights based on these very forms is contrary to the purposes of the law.\textsuperscript{95}

\textsuperscript{92} BGE 72.2.39 (1946).
\textsuperscript{93} The court refers here to BGE 47.2.453 (1917).
\textsuperscript{94} BGE 72.2.39 (1946) (translation by author).
\textsuperscript{95} SCHWEIZERISCHES ZIVILGESETZBUCH at 242. The example mentioned is insistence on the legally prescribed written form in contractual transac-
In the following, a few decisions are listed to illustrate the application of article 2 by the Swiss Supreme Court.

With respect to defects of form, the courts refused to invalidate transactions under application of article 2 if plaintiff himself was responsible for the defect (in the instant case, the witnessing of the contract by one of his employees); or if the required official registration of the transaction was either incomplete or inaccurate as to price, or even negligently omitted. On the other hand, it found manifest abuse of rights in the claim for the invalidation of a contract for the sale of land when plaintiff knowingly registered a lower price than actually agreed upon by the parties.

In further decisions involving the application of article 2 on grounds of the running of the limitations of actions (liberative prescription), the court upheld the claim of a village community against the relatives of one of their welfare clients, since they fraudulently made it impossible for the community to bring their action within the required time limit; similarly, the court upheld the claim of a son against his father who was manifestly malicious in giving the son to understand that their contract for the sale of land against the father's annuity was valid after the limitation of registration had run. The court found manifest abuse of rights in both cases and applied article 2.

On the other hand, the court found no manifest abuse and no violations of good faith in cases which involved the rights of heirs to check the records of a family foundation in an endeavor to ascertain their claims to the succession; or the right of a wife to inherit under the stipulations of a marriage contract that did not withhold fraudulently the statutory shares of the heirs; furthermore, there was no abuse of rights in the refusal to alter the provisions of a long-term contract requested in view of changed circumstances, which must be upheld even though the parties—in the instant case, a lawyer and a businessman, respectively—do not require the protection of the written form. Cf. also BGE 53.2.162, 166 (1927).

96. BGE 72.2.39 (1946).
97. BGE 86.2.256 (1960).
98. BGE 92.2.323 (1966).
99. BGE 88.2.19 (1962).
100. BGE 92.2.323 (1966).
101. BGE 76.2.113 (1950).
102. BGE 89.2.256 (1963).
103. BGE 92.2.365 (1964).
104. BGE 82.2.477 (1956).
cumstances;\textsuperscript{105} and there was no manifest abuse of rights (affecting freedom of employment) in the absence of bad faith when an employer hired a foreign worker without requiring the showing of a working permit and thereby violating the police rules.\textsuperscript{106}

With respect to violations of the principles of good faith and hence a manifest abuse of rights, the court held article 2 applicable if a legal institution is used for a purpose that is contrary to its original aims;\textsuperscript{107} if the member of an association is excluded from the association, especially if the exclusion is not motivated by the interests of the association;\textsuperscript{108} but held that the decisions of the general assembly of a business corporation (société anonyme) constitute a manifest abuse of rights only if they are obviously against the interests of the minority, and there is no particular reason to support the interests of the majority.\textsuperscript{109}

It is hoped that the above brief survey of the implementation of the abuse of rights doctrine in three important Western jurisdictions has demonstrated the essential merits of the doctrine: the rejection of a rigid adherence to the letter of the law in the evaluation of individual action in the exercise of rights granted under law, and in particular of such exercise as is carried out within the letter of the law but is contrary to the principles of good faith and to the social purposes and functions of the law.

\textsuperscript{105} BGE 47.2.440 (1921). This decision is a masterful application of all the principles of judicial interpretation. The case involved a request for rescission of a contract on grounds of price increases occasioned through the conditions of World War I. The court went into every circumstance of the case, including the difference in profit margins over the years, before rejecting the request.

\textsuperscript{106} BGE 84.2.424 (1958).


\textsuperscript{108} BGE 85.2.525 (1965), Journal des Tribunaux 538 (1960); BGE 90.2.346, Journal des Tribunaux 268 (1965).

\textsuperscript{109} BGE 95.2.157 (1970), Journal des Tribunaux 344 (1970). The decisions listed in notes 105-107 were taken from the French annotated edition of the Swiss Civil Code which contains a wealth of references to cases decided under each article.