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THE ROLE OF THE ABUSE OF RIGHT
DOCTRINE IN JAPAN*

Kazuaki Sono** and Yasuhiro Fujioka***

I. INTRODUCTION

In a recent case, Mitamura v. Suzuki,1 the plaintiff sought compensation for loss of enjoyment of sunshine and obstruction of ventilation resulting from defendant’s addition of a second floor to his one-story house southern to the plaintiff’s in a residential section. Deciding in favor of the plaintiff, the Japanese Supreme Court stated:

In all cases a right must be exercised in such a fashion that the result of the exercise remains within a scope judged reasonable in the light of the prevailing social conscience. When a conduct by one who purports to have a right to do so fails to show social reasonableness and when the consequential damages to others exceed the limit which is generally supposed to be borne in the social life, we must say that the exercise of the right is no longer within its permissible scope. Thus, the person who exercises his right in such a fashion shall be held liable because his conduct constitutes an abuse of right.2

Nuisance was traditionally considered as primarily a matter of tort. The basic provision in the Japanese Civil Code for tort liability, article 709, provides: “A person who violates intentionally or negligently the right of another shall compensate for damages arising therefrom.” Thus, for the existence of tort liability, four elements are required: an infringement of another’s right (objective test), wilful intent or negligence (subjective test), damage, and causation. Since one of the purposes of the law of tort is to protect legitimate interests which emerged in the process of the development of

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* This article has been prepared for the Louisiana Law Review to introduce the peculiar nature of the role of the abuse of right doctrine in Japan. Professor Fujioka’s article, Kenri no ranyo ni kansuru ichi-oboegaki (A memorandum on the abuse of rights) in HOKUDAI HOGAKU RONSHU, vol. 26, no. 2 (1975), forms a basis for this paper. But the composition and views expressed herein are not necessarily identical because of the joint-work.

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1. 26 Saiko Saibansho minji hanreishu. 1067 (Sup. Ct., June 27, 1972) [hereinafter cited as Minshu].

2. Id. at 1069.
society, the requirement of "an infringement of another's right" has been construed as requiring illegality. And, this illegality may be found in the relativity between the kind of interest infringed and the manner of the infringement. In nuisance disputes, such as the Mitamura case, this relativity test involves balancing legitimate interests which conflict. In the Mitamura case, the owner's right to make use of his property clashed with his neighbor's interest in enjoying sunshine and air. The court certainly could have applied article 709 of the Civil Code in solving the dispute, but the decision is unique in that the court emphasized the abuse of right as a basis for the plaintiff's recovery. Why did the court rely on the abuse of right doctrine rather than on the traditional tort theory? Are these two approaches really different?

Where one of the conflicting interests is classified as a right (e.g., property ownership) and the other interest is not (e.g., enjoyment of sunshine), adjustment involves a judgment as to when the sufferer should no longer be expected to bear the inconvenience arising from the other's exercise of a right. This approach presumes that certain inconveniences should be borne by others where one is exercising his right. For this reason, the relativity test for establishing the "illegality" required for tort liability has another name when nuisance is involved: i.e., the "acceptable limit of endurance" test. Only where an invasion exceeds this limit is "illegality" established. If an interest not traditionally classified as a right, such as enjoyment of sunshine, could be elevated to the status of a right (e.g., right to enjoy sunshine) would it enjoy greater protection? Our answer is no.

This paper analyzes the function of the abuse of right doctrine in the Japanese jurisprudence. Emphasis is placed on the operation of the doctrine in the law of nuisance as illustrative of the peculiar role of the doctrine in Japan.

II. THE DEVELOPMENT OF THE "ABUSE OF RIGHT" DOCTRINE

The abuse of right doctrine emerged from reflection on the absoluteness of a right which exercise is left entirely for


4. WAGATSUMA, JIMUKANRI FUTÔRITOKU FUHÔKÔI (Unsolicited management, unjust enrichment and tort) 125 (1937).

5. KATÔ, FUHÔKÔI (Tort) 106 (1974).
individuals: *Qui iure suo utitur, nemini facit iniuriam.* The doctrine emphasizes that exercise of a right cannot be considered in isolation of the interest of others who might be affected thereby, because the notion of a “right” serves only as a tool for regulating individual relationships in the society. The doctrine is now expressly prescribed in article 1(3) of the Japanese Civil Code, which was incorporated at the time of the revision of the Code in 1947. Article 1 reads: “(1) A private right shall conform to the public welfare; (2) The exercise of right and performance of duties shall be conducted in good faith and sincerity; (3) No abuse of rights shall be permitted.” It is important to note that the doctrine constitutes only a part of article 1. No direct answer has yet been given in the Japanese jurisprudence as to whether the other provisions in article 1, particularly paragraph (1) concerning the public welfare, have independent roles or are only subsidiary in support of the abuse of right doctrine. Nevertheless the public welfare notion, which is provided as inherently restrictive of a private right, might influence some judges in evaluating the meaning of the abuse of right doctrine in article 1 (3), since the abuse of right doctrine is directed toward the adjustment of conflicting private interests in the light of the social life.

The abuse of right doctrine, however, was not new to the Japanese jurisprudence even before it was expressly incorporated into the Civil Code in 1947. The Great Court of Cassation, a former body of the present Japanese Supreme Court, was already providing room for the emergence of the doctrine through its decisions. The influence of other civil law countries, especially France, which favorably treated the doctrine of abuse of right as a means to solve the question of nuisance.

7. *Id.* at 101-02.
8. See Okada’s comment on Harajima, *Mimpō ni okeru “kökyō no fukushi” gainen* (Concept of public welfare in the civil law), 41 *HORITSU JIHO* 114 (no. 3) (1969). As to a view which gives an independent meaning to paragraph (1), see Wagatsuma, *Kōkyō no fukushi shingiisoku kenri ranyō sōgo no kankei* (Mutual relationship among public welfare, the principle of good faith and the abuse of right), 1 *KENRI NO RANYŌ* 58 (1962) (The abuse of rights), published in celebration of Professor Suekawa’s 70th birthday. Some doubt if the abuse of right doctrine and the principle of good faith were really distinguishable. See Kawashima, *Kenri ranyō no imiron-tekii kōsatu* (A consideration on the abuse of right), 1 *KENRI NO RANYŌ* 147 (1962) (The abuse of right”). See also text at note 44.
provided grounds for the development of this doctrine in Japan in the early 1900's.\(^9\)

**Judicial Decision During Taisho Era**

Our examination of cases which affected the development of the doctrine shall commence from the Taisho era (1912-1925). In *Tonomura v. Osaka Alkali Co.*,\(^{10}\) the question involved was the recoverability of the damages to agricultural products caused by air pollution from the defendant's factory. The defendant contended that he should not be held for damages because he had used all the equipment available to reduce the pollution. In rendering a decision in favor of the defendant, the court relied on the traditional principle of negligence. The court said that the defendant was not negligent because he was reasonably diligent in endeavoring to avoid damages. The decision impliedly recognized that even an allegedly legitimate exercise of the right of ownership could create tort liability if damage results to others due to the lack of reasonable care in exercising the right. This decision may initially appear to be simply an application of existing tort law, but it provided an important basis for the next decision.

In *Mori v. Tsumashika*,\(^{11}\) a creditor in executing a court decree which enabled him to remove the debtor's house from his land, recklessly destroyed the house, making the remains unfit for the debtor's use. In awarding damages in favor of the debtor, the court still based its judgment in tort and did not explicitly refer to the abuse of right doctrine. The court, however, did state that in implementing any execution decree granted by a court, the party was not free to exercise his entitlement in the fashion he chose but was bound to proceed "with a method recognizable to be proper within the boundary of the Law."\(^{12}\)

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\(^9\) See Makino, *Kenri no ranyo* (The abuse of right), *Hōritsu Ni Okeru Shinka To Shimpo* (Evolution and progress in the field of law) 223 (1924). In addition to his recognition of the French influence, it is also interesting to observe that he also stated: "As a thought of collectivism has gradually prevailed over the individualism..., we might say that the rise of the abuse of right doctrine was an inevitable result due to the reflection on the reality of modern life which was experiencing great changes." *Id.* at 237.

\(^10\) 22 Daishin'in minji hanketsuuroku 2474 (Sup. Ct., Dec. 22, 1916) [hereinafter cited as Minroku].


\(^12\) *Id.* at 16-17 (emphasis added).
ABUSE OF RIGHTS IN JAPAN

Then came *Shimizu v. Japan*, a leading case in the development of the abuse of right doctrine. In this case, a pine tree of good lineage which had been located adjacent to a switchyard near a National Railway station died because of smoke emerging from trains. The judgment was against the National Railway. After citing *Mori v. Tsumashika*, supra, the court stated that the conduct of the railway in emitting smoke over the tree went beyond the scope socially acceptable, even though it was a by-product of a business which was otherwise legitimate. After finding that the amount of smoke at the location was far greater than other places along the line, the court pointed out that the railway could have either selected a different location for the switchyard or could have erected a wall by the tree to prevent its death.

These three cases have relevancy for the development of the abuse of right doctrine in the Japanese jurisprudence even though the questions involved could have been solved through the application of the law of negligence in tort. It must be noted that the notion of the absolute nature of a right, including the absolute legitimacy of its exercise, had a much stronger hold in those days, and the introduction of a new test for the restriction of the exercise of a right such as "propriety within the boundary of the law" or "the socially acceptable scope" was unique.

**Judicial Decisions During the First Half of Showa Era**

The Showa era (1926- ) brought a new type of case which denied the absoluteness of ownership in a more direct fashion. These cases involved disputes wherein the plaintiff, an owner of land, was a victim of trespass, and the relief sought by the landowner—removal of the trespass—was denied. One case, *Shinagawa v. Kurobe Railway Co.*, involved a controversy where the owner of land complained that the defendant maintained a pipeline deep under his ground without permission. The pipeline had been constructed before he became the owner of the land and it was necessary for the defendant to draw hot water from a near-by spring for operating a resort business. The plaintiff claimed that the pipeline should be removed from his land. The area in question, how-

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ever, was only a very small fraction of the plaintiff's land. The land was a waste one, left unused. Moreover, it appeared that the plaintiff purchased the land from the previous owner in consideration of a very small sum of money, requested the defendant to purchase the land at an extremely high price, and then brought this suit upon failure of the attempt to conclude that profitable sale. In rejecting the plaintiff's claim, the court balanced the substantive interests of the parties involved and declared that the plaintiff had no substantial interest in obtaining the removal of the pipe from his land. According to the court, the plaintiff's claim, based on his property right, should not be granted because it constituted an abuse of right by exceeding the permissible scope for the exercise of the property right in view of the prevailing social norm.

This decision, if broadly interpreted, provided a theoretical basis for giving priority to a business activity affecting the public over the individual property right. The following two cases might appear to have adopted this hypothesis. In Fujita v. Tokyo Electric Co., an electric company constructed, without permission, a waterpipe 30 feet deep under the plaintiff's land, the surface of which he used for taking certain rock material. Denying the plaintiff's request to have the pipe removed from the land, the court said that the cost of removing the waterpipe would be extraordinary as compared to the damages suffered by the plaintiff, and emphasized the public nature of an electric power plant. In Arimitsu v. Kochi Railway Co., part of the plaintiff's hilly pine-land close to the sea-shore was adjacent to the construction site of a railroad, and was reshaped when the railway company cut down trees and filled slopes with soil. Despite the plaintiff's persistent complaints, the railway company did this to make the construction of the railroad on the company's land easier and the company did finish construction of the line. Denying the claim by the plaintiff for restoration of the land to the original shape, the court first found that the requested restoration, if implemented, would cause serious difficulty for the safe operation of the railroad because of the peculiar character of the section. The court also found that the plaintiff had not used the land and that the plaintiff's interest would not in fact be

15. 3511 Horitsu Shimbun 14 (Sup. Ct., Dec. 20, 1932).
much affected by keeping the land without restoration. The
court, emphasizing the public character of the railroad, found
that the plaintiff’s request, based on his ownership of the
land, constituted an abuse of right. It must be noted, how-
ever, in both cases, the court stated that it was deciding only
on the requested relief and implied that if the suits had been
brought for the recovery of damages, the decision might have
been different.  

Development After the Incorporation of the Doctrine in the
Civil Code

How have the courts proceeded after the abuse of right
doctrine was expressly incorporated in the Civil Code in 1947?
The generality in provision of the doctrine in article 1(3)
of the Civil Code would permit judges flexible approaches to
concrete disputes. The rigidity of other legal rules would no
longer be a barrier for a judge where he wished to avoid an
undesirable result arising from the strict application of such
other rules of law. On the other hand, the free hand given to
courts through this general provision might make a judge a
sole arbiter of disputes according to his own standards.  
The difficult question in applying such a general provision is how
to achieve some flexibility in the resolution of individual dis-
putes while retaining a desired legal stability or predictabil-
ity. So far the Japanese courts refrained from an unduly

17. In this connection, it may be noted that the court, in Fujita v. Tokyo
Electric Co., in rejecting the removal of the pipe-line, emphasized that the
removal was economically impossible. Under the Anglo-American system this
issue may be considered as a question whether the equitable remedy should
be granted as contrasted to the ordinary common law remedy of damages.
But in Japan the selection of remedies between damages or specific perfor-
manee (or both) is plaintiff’s decision. Neither of the two remedies is an
exception to the other. But cf. text at note 61.

18. Yoshimi, Shingisoku no kinō ni tsuite (Concerning the function of the
principle of good faith), 47 HITOTSUBASHI RONSO 73-75 (no. 2) (1962).

19. The function of general clauses in formulating new rules of law to fill
the lack of specific rules in the Code is closely connected with the relationship
between judiciary and legislature. As to how scholars treat this question, see
M. Ishida, Seiteiho no kosokuryoku (Binding force of statutes), 550 JURISTO 18
(1973); M. Ishida, Hōkaishaku hōhō no kiso riron (1) (Fundamental theory
concerning methodology on the interpretation of law), 92 HŌGAKU KYŌKAI
ZASSHI 65 (1975); Kurusu, Hō no kaishaku ni okeruseiteihō no igi (The place of
a statute in the application of law by the judiciary), 73 HŌGAKU KYŌKAI
ZASSHI 1 (no. 2) (1956). As to the possible danger of an abusive use of general
clauses, see Igarashi, Nachisu hanrei ni okeru ippan jōkō no kinō—Rüthers
extensive use of article 1(3). The Japanese judiciary has proved conservative regarding use of this general provision, as contrasted to a relatively progressive attitude of academia.\textsuperscript{20} The judge's attitude is, of course, partly due to their understandable reluctance to resort to a general provision where a dispute, however complicated, could be handled by maneuvering within the realm of interpretation of concrete rules provided elsewhere in the Code. The number of cases wherein the abuse of right doctrine is applied did not notably increase after incorporation of the doctrine into the Code. The courts have relied on the abuse of right doctrine only in exceptional cases where no other alternative could bring about a fair solution of a dispute. This attitude is a sound one.\textsuperscript{21}

The recent Mitamura case, involving an exercise of the right of ownership which disturbed another landowner's enjoyment of sunshine has already been noted. A similar approach was used in solving a dispute where digging for the purpose of obtaining a hot spring on one person's land affected another's enjoyment of a hot spring already in use in a nearby area.\textsuperscript{22} The abuse of right doctrine was also applied to a situation similar to Mori v. Tsumashika,\textsuperscript{23} involving enforcement of a compulsory execution decree.\textsuperscript{24} In addition to these classic ones, other types of disputes are also noteworthy.

According to article 612 (2) of the Civil Code, subletting of a leasehold by a tenant without the landlord's permission constitutes a ground for rescission by the landlord. However, several lower courts have refused in certain cases to give

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\textit{no shoosetu ni tsuite} (Function of general clauses which appeared in judicial cases during the Nazi period—Comments on the Rüthers' view), 2 ISOMURA (ed.), MIMPÔGAKU NO KISO TEKI KADAI (Fundamental subjects of the civil law) 39, 61, 68 (1974) published in celebration of Professor Obo's 60th birthday [hereinafter cited as Igarashi].

\textsuperscript{20} Igarashi, \textit{Hanrei rippô to minji saiban} (Judicial precedents, legislation and civil cases), 201 \textit{HANREI TAIMUZU} 27-28 (1967). \textit{Contra}, Yoshimi, \textit{Mimpô hanrei to Saikosaibansho} (Civil cases and the Supreme Court), 42 \textit{HÔRITSU JIHO} 40-41 (1970).

\textsuperscript{21} Accord, Igarashi, \textit{supra} note 19.

\textsuperscript{22} Daimaru Besso Co. v. Takeishi, 12 Minshu 1640 (Sup. Ct., July 1, 1958).

\textsuperscript{23} 23 Minroka 14 (Sup. Ct., Jan. 22, 1917).

\end{flushright}
effect to such a rescission, basing their refusal on article 1 (3). The Japanese Supreme Court, while exhibiting some reluctance to rely on this general provision, sustained those decisions.\(^{25}\) In doing so, the Court stated in *Uchino v. Kobayashi*\(^{26}\) that termination of a landlord-tenant relationship was not justified merely because conduct of the tenant formerly constituted ground for rescission under article 612 (2), unless the relationship became such that the landlord could no longer have faith in leaving his property to the tenant. The Court thus avoided a rigid application of article 612 (2). In a series of decisions where the occupancy of a leasehold tenant was protected even after the title for the subject property had been transferred by the landlord to another party, the courts refused the new owner's request that the tenant evacuate the leased property because the transferee lacked legitimate practical interests.\(^{27}\) It is important to note, however, that the period when these decisions were rendered was after World War II when the shortage of houses was very keen, and that the legislature had been active to strengthen the tenants' position through the enactment of a landlord-tenant statute.

*Matsumoto v. Japan*,\(^{28}\) the so-called *Itatsuke Air Base* case, illustrates another type of dispute where the doctrine becomes applicable. In that case the Japanese Government had a lease of land from a citizen for use by the American Air Force in accordance with an administrative arrangement between the two Governments. The government rejected the landlord's claim for return of the land on expiration of the lease. The court sustained the government's contention that the citizen's assertion of reclamation constituted an abuse of

\(^{25}\) See, e.g., Kawaguchi v. Mizunoya, 24 Minshu 2015 (Sup. Ct., Dec. 11, 1970); Chinzai v. Iwakuni, 10 Minshu 475 (Sup. Ct., May 8, 1956); Endo v. Kyoto Daichi Shingu Seizo Shisetsu Kumiai, 9 Minshu 1294 (Sup. Ct., Sept. 22, 1955); Uchino v. Kobayashi, 7 Minshu 979 (Sup. Ct., Sept. 25, 1953). It may be noted, that in some situations the court did direct itself positively to the question of the applicability of the general provision. But in those instances the court's conclusions were negative in granting remedies. *But see* Ochi v. Yamano, 26 Minshu 1015 (Sup. Ct., June 15, 1972). See, e.g., Ishikawa v. Morimoto, 10 Minshu 1581 (Sup. Ct., December 20, 1956); Ishikawa v. Nashimoto, 7 Minshu 116 (Sup. Ct., January 30, 1953).

\(^{26}\) 7 Minshu 979 (Sup. Ct., Sept. 25, 1953).


\(^{28}\) 19 Minshu 233 (Sup. Ct., Mar. 9, 1965).
right. The court stressed that the basis of the protection of a private right by law lies in its social and public utility. The repossession sought by the landlord would have created a serious problem for the maintenance of the air base, and the court felt that repossession would not give the landowner greater protection of his right. In passing, it may be noted that the motive of the plaintiff in bringing this suit was rather political.

_Obonai v. Orizume Sangyō Co._ exemplifies still another type of dispute. Performance of a contract declared null and void because it contradicted with an administrative regulation was to be regarded as retroactively illegal where the performance had taken place before the nullity became known to the parties. In such a case, a party to that invalid contract might wish to take advantage of its nullity, asserting that the execution under the contract constituted a tortious wrong. This case, however, denied a claim for damages based on this theory. The court said that such a claim for damages could constitute an abuse of right.

### III. THE FUNCTION OF THE ABUSE OF RIGHT DOCTRINE

Various institutions or concepts contained in the Civil Code have a deep connection with the social and economic life prevailing at the time they were conceived. The Code, however, remains static. The abuse of right doctrine enables courts to adjust their contents to changes in society.

Judicial precedents applying the abuse of right doctrine may be divided into three categories. The first group are those imposing tort liability for abusive exercises of rights which exceed socially acceptable standards, as in _Mori v. Tsumashika_ and _Shimizu v. Japan._ In this group of cases, the doctrine was used to articulate the scope of a right. The issue was the scope of a right which was stated in general terms; the abuse of right doctrine operated as a tool in finding that scope. This is a supplementary function of the doctrine. It is also a creative one in that the doctrine provides room for

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29. 19 Minshu 2212 (Sup. Ct., Dec. 21, 1965).
30. See Suzuki, Zaisanbō ni okeru kenri ranyō riron no kinō (The function of the abuse of right doctrine in the property law), 30 HÔRITSU JIHÔ 16 (no. 10) (1958) [hereinafter cited as Suzuki].
33. Suzuki at 17-18. The same philosophy may be found in the French expression, _le droit cesse ou l'abus commence._
the judiciary to pronounce more detailed rules with regard to
a right prescribed in the code in general terms.

The second group of cases are those which narrow or re-
strictively modify the scope of a right which has been ex-
pressly prescribed to exist in a specific form. Civil Code
article 612 (2) expressly entitles the lessor to rescind a lease when
the lessee sublet the object without the lessor's permission.
But execution of this entitlement may be restricted under
certain circumstances. Here, the abuse of right doctrine pro-
vides a basis to modify the scope of existing statutes. The
judiciary's role in implementing certain social policies would
be illustrated most vividly in this type of case.

The third group includes those cases where courts
employed the doctrine to accomplish a compulsory concilia-
tion. For example, in both Shinagawa v. Kurobe Railway Co. and
Fujita v. Tokyo Electric Co., the court stated that a
claim by the landowner against a third party to clear inva-
sion on his land constituted an abuse of right, although the
third party had no legitimate interest at all on the claimant's
land. While this approach clearly contradicts with the tradi-
tional approach within the civil law, no solution could be at-
tained in this type of case without resort to the abuse of
right doctrine, even if the approach hurts a sound legal mind
when considered apart from a concrete dispute. The cases
illustrate an equity function of the doctrine.

What role, then, has the abuse of right doctrine played in
the field of nuisance, which is deeply linked to neighborhood
relationships? Those parts of the civil code which regulate
property rights and the neighborhood relationships lack con-
crete provisions on nuisance. Our hypothesis is that the doc-
trine has been utilized to create laws in the field of nuisance
due to the lack of concrete rules on nuisance in the Civil
Code, in order to prescribe definitely the exercisable scope of

34. See also 709 HANREI JIHÔ 56 (Tokyo D. Ct., Dec. 5, 1972); Iida v. Ohshio, 1
Kaminshu 996 (Kobe D. Ct., June 26, 1950); Noguchi v. Yamashita, 1 Kaminshu
845 (Tokyo D. Ct., May 31, 1950). See, e.g., Ohta v. Kamei, 1 Kakyu saibansho
minji hanreishu 532 (Fukuoka High Ct. April 10, 1950) [hereinafter cited as
Kaminshu].
37. 3511 Horitsu Shimbun 14 (Sup. Ct., Dec. 20, 1932).
38. Suzuki at 20-22.
39. See also Harajima, Mimpô ni okeru kokyo no fukushi gainen (Concepti-
tion of public welfare in civil law), JAPAN SOC'Y OF SOCIOLOGY OF LAW (ed.),
KÔKYÔ NO FUKUSHI (Public Welfare) 19-20 (1968) [hereinafter cited as
Harajima].
existing rights. The importance of identifying concrete rules in this field is becoming evident, because the expansion of city life and industrial developments, unknown at the time of codification of the Civil Code, emphasize the need to readjust neighborhood relationships. The life of the abuse of right doctrine lies in the adjustment of conflicting interests in a changing society.

A recent study, however, indicates that most nuisance cases are solved through the application of other rules and not through direct application of the abuse of right doctrine. The study also states that while the abuse of right doctrine serves as an indirect guide for judges in applying concrete rules, the doctrine was not essential in arriving at decisions. The change in emphasis from the right-oriented Schikane approach to the balance-of-interests approach in the modern jurisprudence may already have obscured the importance of the abuse of right doctrine since the balance-of-interests approach can handle many difficult problems by way of flexible interpretation of a concrete rule even without the aid of the doctrine. However, it was the philosophy underlying the abuse of right doctrine which gave impetus for the switch in approach in modern jurisprudence. The emergence of the “acceptable limit of endurance” as the test for finding tort liability in nuisance cases is a good example. Our appreciation of impact of the abuse of right doctrine should not be based solely on those cases where it is expressly employed.

Japanese courts emphasize abusive exercise of a right in connection with the public welfare, as exemplified by Shinagawa v. Kurobe Railway Co.41 The Civil Code now incorporates these two notions in the same provision, article 1.42 Many scholars indicate concern that the otherwise proper exercise of a private right might be unduly suppressed in the name of the public or social character of a conflicting right.43 Link with the public welfare might also provide a basis for

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40. Higashi, *Kōgai to kenri ranyō ron* (Nuisance and the abuse of right doctrine), 294 HANREI TAIMUZU 2, 6, 7, 9 (1973).
42. See discussion supra, note 8.
43. See, e.g., Kainō, *Kenri ranyō to kōkyō no fukushi* (The abuse of right and public welfare) 30 HÔRTSU JIJÔ 4 (no. 10) (1958); Matsumoto, *Wagakuni ni okeru kenri ranyō riron no tokushitsu ni tsuite no ichi-kōatsu* (On a characteristic of the abuse of right doctrine in Japan), 9 HÔGAKU RONSHU (Kansai University) 81 (No. 5.6) (1960). Compare the text following Shinagawa v. Kurobe Railway Co. supra, note 14, where two examples are illustrated to show that such a fear appeared to have materialized.
the judiciary to create a new social structure of ownership.\textsuperscript{44} Thus, many are skeptical of the utility of the abuse of right doctrine where the public welfare notion is emphasized. However, even those scholars opposed to use of the doctrine in that connection do not necessarily oppose application of the abuse of right doctrine to the field of nuisance. The doctrine's function in creating laws of nuisance is acceptable to one commentator because the doctrine adjusts conflicting interests of the same dimension. Exercise of a right would not be suppressed for the protection of other properties but of other citizens.\textsuperscript{45}

IV. CREATING NUISANCE LAWS

The drafters of the Japanese Civil Code were probably aware that nuisance disputes might become common due to the modernization of industries. No provision was included in the Civil Code section relating to the neighborhood relationship so that regulation could be left to administrative laws;\textsuperscript{46} from the beginning of the Code, specific rules were lacking with regard to nuisance. According to the prevailing view, compensation for damages due to nuisance must be sought within the framework of the law of tort, in particular by resort to Civil Code article 709, the general provision providing for tort liability.\textsuperscript{47} In case of nuisance, the question whether an alleged tortfeasor had abused his right is asked in terms of whether illegality can be found in the light of the acceptable limit of endurance, which is a test of relativity for nuisance disputes. And, so long as illegality may be determined relatively, reference to the abuse of right doctrine may no longer be necessary.\textsuperscript{48} However, since the abuse of right doc-

\textsuperscript{44} Harajima at 26.
\textsuperscript{45} Id. at 20. See also Isomura, Schikane kinshi yori kyakkanteki riiki koryō enō hatten (The development from the Schikane approach to the objective balancing of interests), 1 KENRI NO RANYŌ (1972) (The abuse of right).
\textsuperscript{46} The original version of the Civil Code, which had never been enforced after its proclamation in 1890 but replaced by the 1898 version, had provided in article 264 that the measures for the protection against nuisance be regulated through administrative regulations. During the process to formulate the 1898 version of the code, Mr. Ume, one of the drafters, commented that provision was omitted from the new draft because it provided the matter of course. 9 HÔTEN CHÔSAKAI GIJI SOKKIROKU (Stenographic records of proceedings of the parliamentary committee on the Civil Code) 59-60 (1894).
\textsuperscript{47} See text preceding note 4, supra.
\textsuperscript{48} Accord, Funahashi, Shoyûken no ranyō (Abuse of ownership), 1 KENRI NO RANYŌ (The abuse of right) 25 (1962).
trine has traditionally been viewed as a narrow exception to the principle of free exercise of a private right to be applied only in extreme cases, emphasis was often necessary that a
nuisance consisted of an aggression on a personal interest of
the victim. In nuisance cases, most disputes arise as a conflict
between the exercise of a right by an aggressor and the claim
for protection by the aggeree of his interest. Both parties' assertion of their interests are legitimate in the absence of the conflict. Had it been clearly conceived in Shimizu v. Japan, an epoch-making decision for the development of the abuse of right doctrine, that the court utilized the doctrine to perform a legislative function, filling the gap in the Civil Code, the law of nuisance may have developed earlier to formulate a unique area of law which is distinct from a mere tort.

In nuisance disputes, the difficult task for the court is where to draw the line between conflicting interests in order to establish a criterion in finding the required illegality. A good example, illustrating an operation of the relativity test for the determination of the acceptable limit of endurance, may be seen in Ishikawa v. Tokyo. In sustaining the claim for mental damages by neighboring inhabitants because of noise from the construction of a metropolitan subway line, the court stated: "However socially useful the noise-producing conduct may be, it still could constitute a tort where the noise was such as to exceed the limit within which everyone was reasonably expected to bear in the pursuit of social life. This was true even if the situation did not fall within the category of cases where available technical methods for reduction of noise had not been employed although the adoption of such methods had been economically feasible." Implicit in the decision was that the court considered, as an element in finding the illegality, whether reasonable measures to reduce the noise had been taken. However, as already seen in Tonomura v. Osaka Alkali Co., the traditional court's attitude was to regard this question as a factor in finding negligence, not illegality. Such confusion between

49. SAWAI, KŌGAI NO SHIHŌTEKI KENKYŪ (Studies on private law aspects of nuisance) 355 (1970) [hereinafter cited as SAWAI].
51. See Harajima at 19.
52. 15 Kaminshu 1591 (Tokyo D. Ct., June 22, 1964).
the required two elements for tort liability may be observed in many recent decisions. Some scholars regard this phenomenon meaningful and postulate that courts are formulating a new test in finding liability in nuisance cases—a new endurance-limit theory. They advocate that the “acceptable limit of endurance” as a test for finding liability in nuisance cases should be treated as a consolidation of the traditional requirements of illegality and negligence, and that mere assertion and proof that a certain aggression had exceeded the acceptable limit should be sufficient to impose liability on the defendant. This approach is, in effect, stepping closer to a non-fault liability. A similar approach, which also shows a sharp contrast to Tonomura v. Osaka Alkali Co., may be observed in Ono v. Showa Denkō Co. This case concerned a chemical plant which allegedly caused serious personal injuries to surrounding neighbors by pouring its chemical waste into a river. The court, rendering decision against the defendant chemical industry, stated in dictum that, where dangers to human lives or bodies were foreseeable even with the adoption of a top-level engineering technique in an effort to prevent such dangers, the industry should either reduce production or cease its operation.

Some assert that true protection of citizens from nuisance activities can be attained only through introduction of a new legal institution based on non-fault liability. The new endurance-limit theory interestingly tries to accomplish the same result without special legislation. A modern trend to switch subjective tests to objective ones in finding negligence is laudable, but it is submitted that a further switch from negligence to non-fault liability is for the legislature. Should,

55. See Awaji, Köga ni okeru koi kashitsu to ihösei (Willful intention, negligence and illegality in nuisance cases), 485 JURISTO 372 (1970); Professor Nomura's view appearing in Kato (ED.), Köghô No SEISEI To TENKAI (Creation of the law of nuisance and its development) at 400 (1968).
56. Shinomiya, Köga shihô no hatten ni tsuite (On the development of the nuisance law as a private law), 610 SHÔJI HÔMU KENKYÛ 8 (1972).
57. 642 HANREI JIHÔ 96 (Niigata D. Ct., Sept. 29, 1971).
58. See, e.g., Suehiro, Mimpô Zakkichô (Collection of essays on the Civil Law) 198, 323, 339 (1940).
then, the new trend in court decisions in the nuisance field be accused as contrary to the Civil Code article 709, which requires negligence as well as illegality for tort liability? In considering this question, one must be reminded of the fact that the drafters of the Civil Code intentionally omitted from the Code any rule relating to nuisance, and that the abuse of right doctrine has a function to create laws to supplement the vacancy. Could the recent confusion in the law of torts with regard to the requirements of illegality and negligence, particularly in relation to nuisance disputes, not have been avoided if nuisance cases had been isolated from the traditional tort law?  

A trend to employ different standards for endurance, dependent upon whether remedies sought are for injunctions or damages, is also a welcome one.  

Adoption of different standards would enable certain activities to continue at the cost of damages while others could not. The law-creating function of the abuse of right doctrine would, in this way, serve in establishing relevant tests for the selection of appropriate remedies in a given situation.

V. RECENT JUDICIAL ATTITUDE FOR THE PROTECTION OF ENVIRONMENTAL INTERESTS

Identification of an acceptable limit of endurance in a given situation establishes in turn an outer limit for the exercise of a right. The net result is the emergence of interests legitimately endorsed by courts as worthy of protection. Various interests have been recognized, through nuisance cases, as worthy of protection, defeating the alleged legitimacy in the exercise of conflicting rights. Recognition of such interests is a by-product of the law-creation by courts in the field of nuisance. It would be natural, however, for such an interest soon to seek recognition and judicial protection as a right. The new terminology often heard recently, "the right to enjoy environment" or "the environmental right" is a typi-

60. See Kawashima, Mimpō i: Sōron-Bukken (Civil law I: General remarks and real rights) 203 (1960), where he expresses that the compensation for nuisance should not be regarded the same as the ordinary award of damages under the traditional law of tort.

61. See Ito, Sashitome seikyūken (Injunction), 5 Gendai Songai Baishōhō Kōza (Lectures on the modern law of damages) 395, 407 (1973); Kato (ed.), Kōgaihō No Seisei To Tenkai (Creation of the law of nuisance and its development) 13 (1968); Sawai at 146.
abuse of rights in Japan

cal example. It may be that, where the self-sustaining scope of such interest be clearly identified in a concrete form, the traditional approach to resort to the acceptable limit of endurance test may be replaced by a more direct approach wherein the parties endowed with such an environmental interest claim the protection of their right against invasion.

The phrase "environmental right" was first used in Japan by a study group of the Osaka Bar Association in 1970. They defined the environmental right as a right for a person to enjoy and control good environment. Such environment includes natural surroundings such as air, water, land, scenic beauty, calmness and sunshine as well as various social assets. Environmental assets are to be shared by all citizens regardless of whether they have property rights. According to the study group, the merit in identifying the environmental interest as a right lies in its power to dominate over the environment thereby preventing its invasion.62

Examination of the following cases, however, discloses that the environmental right has not obtained full legitimacy in jurisprudence. But it is clear that the courts are treating environmental interests as a more important element in the consideration of disputes than in the past, and that they realize that environmental interests can hardly be identified on an individual basis, but must be recognized on a broader basis.

These trends are evident in those cases involving disputes related to the enjoyment of sunshine, particularly where a conflict exists between a builder of a tall building and the neighboring residents. In Hiroshima v. Tsubaki,63 for example, the court granted an injunction to prohibit the construction of a three-story apartment house in a residential area developed by a railway company to accommodate private houses. The court said that a residential environment, equipped with adequate sunshine, proper ventilation of the air, and decent scenery, was essential for the maintenance of a healthy and pleasant life. Where, as in that case, an ideal residential environment had been maintained as a consequence of a project aimed at development of a low-story residential area, the court felt the area should be accorded maximum protection against the high-rising use of part of the area, which

63. 592 HANREI JIHÓ 41 (Itami Branch of Kobe D. Ct., Feb. 5, 1970).
was inconsistent with its ideal residential environment. Thus, the dispute was not a conflict between two individual property owners but a conflict between assertion of a property right by one owner and the interests shared by all the surrounding neighbors. Recognition of such an interest would not have been possible if the dispute related to individual properties. What is unique in this decision is a positive recognition by the court of an interest held by people as contrasted to a property right. A similar approach was also employed in Ebara v. Kinki Nippon Railway Co., where construction to provide illumination equipment to an already existing baseball stadium for night games was restrained to maintain a quiet residential environment.

Two additional cases are Morishima v. Hanshin Kōsoku Dōro Kōdan and Ueda v. Japan. The former case involved a request by citizens adjacent to a freeway construction area that the construction cease; they claimed the construction gave damages to the good neighborhood, particularly through its noise, vibration, worsening of ventilation, lessening of sunshine, and an electric wave disturbance affecting TVs. The court, reluctant to recognize the existence of an environmental right as such, accomplished the same result by protecting the environmental interest through award of damages to the complaining citizens and through its order to the construction agency to refrain the continuance of the construction unless certain preventive measures be adopted. In Ueda, two hundred and sixty-four inhabitants living in the crowded area surrounding a busy airport sought an injunction against the port authority prohibiting any night flight between 9:00 p.m. and 7:00 a.m. The court prohibited night flights after 10:00 p.m., but still showed hesitation in recognizing the environmental right as such and consequently resorted to a traditional tort approach. But it is obvious that the court's solution to the claim could be better comprehended if we conceive the existence of certain legitimate interests shared by citizens in relation to the environment and to decent treatment as human beings.

Indeed, the courts are becoming more aware of the importance of identifying interests connected to maintenance of

64. 717 HANREI JIHÔ 23 (Osaka D. Ct., Oct. 13, 1973).
66. 729 HANREI JIHÔ 3 (Osaka D. Ct., Feb. 27, 1974).
decent living, not as interests held individually, but on a broader local scale. For example, in granting standing to sue, the courts do not necessarily look at the interest of an individual but the interest of the locality as a whole. The recognition by courts of the necessity to solve disputes of a local nature on the locality basis seems to be an upward trend. The two cases, Kamikawa v. the Town of Yoshida and Fujihara v. the City of Izumi, which protected the interests of neighboring residents by prohibiting construction of waste disposal stations, are typical ones. The net result is a creation of increasing difficulty for governmental authorities desiring long-range city planning.

VI. EPILOGUE

Why do plaintiffs in nuisance cases often insist on treating their environmental interest as a “right”? What practical difference, if any, does the distinction between “environmental right” and “environmental interest” bring about? The real intention of the advocates for the recognition of the environmental rights seems to be based on their understanding that the vesting of a “right” will give the protection of the environment a stronger position, because a right is an exclusive connotation by definition. According to them, an invasion of a right establishes the existence of the requirement of illegality which is necessary as a prerequisite for claiming damages; it may also provide a stronger basis for obtaining an injunction against conduct dangerous to the environment. The vesting of a “right” will also make it no longer necessary to adopt the passive approach in nuisance cases in finding protected environmental interests only as a consequence of application of

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67. As a positive appreciation of this approach from the viewpoint of the law of civil procedure, see Matsuura, Kankyoken shingai sashitome karishobun sosho ni okeru tojisha teki kaku to goitsu kakutei no hitsuyosei (The standing to sue and the required consistency in judgment with regard to all the parties concerned in granting injunctions to protect environmental rights), JUTAIHO TO TETSUZUKIHO NO KOSAKU (Relationship between the rules of substance and those of procedure), published in celebration of Prof. Yamakido's 60th birthday, 302 (1974).
68. For the positive appreciation of this trend, see Sawai, 70-nendai kogai sashitome saibanrei no ayumi (The new tendency of nuisance cases during 1970's), 541 JURISTO 84, 91 (1973).
69. 631 HANREI JIHÔ 24 (Hiroshima D. Ct., May 20, 1971).
70. 663 HANREI JIHÔ 80 (Kishiwada Branch of Osaka D. Ct., April 1, 1972).
the acceptable limit of endurance test because, as a right, its content could be positively defined.\textsuperscript{71}

However, the wisdom of recognizing an environmental right has been seriously questioned, since it might negate the balancing of interests which was indispensable in the consideration of nuisance disputes.\textsuperscript{72} This criticism seems to be justified. We have already noted that the accumulation of judicial decisions in nuisance disputes gradually enabled the identification of various interests which the courts desired to protect. The more clearly identified an interest becomes, the holder of such interest is more apt to assert it positively. Once identification of protected interests has been made, the originally passive character of such interests, as only defenses for the purpose of drawing lines in the operation of the acceptable limit of endurance test, tends to be forgotten. Such an interest would gradually assert its own existence as such. However, what would happen if advocates for recognition of an environmental right insist on its absolute scope? Are they ready to accept application of the abuse of right doctrine to the assertion of an environmental right when its assertion goes to an extreme?

The nuisance disputes are products of social life where the legitimacy of exercising conflicting interests is questioned by opposing parties. The adequate solution of nuisance cases depends on each peculiar circumstances. In this field utmost flexibility must be provided. Advocates of an environmental right seem to be merely shifting the pendulum to the other end. The law-making function of the abuse of right doctrine, through the accumulation of cases, has brought the recognition of certain environmental interests worthy of protection against allegedly legitimate exercises of a right. This was possible only through the balancing of conflicting interests in each concrete case. Why do those benefited by denial of the absoluteness of a “right” of an aggressor now insist on a right rather than content themselves with a judicially protected interest?\textsuperscript{73} If the intent of the advocates of such a right is

\textsuperscript{71} See Osaka Bengoshi Kai Kankyōken Kenkyūkai, Kankyōken 87, 100, 109 (1973).

\textsuperscript{72} Kato, Kankyōken no gainen o megutte (Concerning a concept of the environmental right), Mimpō Ni Okeru Ronri To Rieki Kōryo (Logic and balancing of interests in the civil law) 121 (1972); Yabu, Nisshō no shihō teki hogo ni kansuru shomondai (Several problems concerning the protection of sunshine under the civil law), 25 Hōkaidai Hōgaku Ronshū 19 (no. 3) (1974).

\textsuperscript{73} See, Fujioka, Sashitome no uttae ni kansuru kenkyū josetsu (On injunctionary relief by courts), 21 Hōkaidai Hōgaku Ronshū 109-112, 175, 180-83 (1970).
merely for a continued or better protection of their environment by courts, it would do no harm. But if their desire for recognition of an environmental right is motivated by a desire for absolute protection of the interest, making possible claims by others that the environmental right has itself been abused, they are opening a door for recycling of the history of the abuse of right doctrine from the other end. The abstract battle of conflicting rights based on absoluteness of a "right" should be avoided. The peculiar issue in nuisance cases should remain how and where to draw a line between conflicting interests in concrete situations. The abuse of right doctrine has certainly heretofore played an important role in establishing a necessary test to this end. A new situation where the function of this abuse of right doctrine might be abused need not be created if we continue to balance conflicting interests through concrete cases.