

*'To speak of an abuse of a right without attempting to determine its nature is simply to indulge in a rhetorical flourish which finds its only echo in an empty phrase. Some definite criterion is required. . .'*

H. C. Gutteridge, 'Abuse of Rights', 5 *Cambridge Law Journal* (1933), 22.

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## Matters of Nomenclature

### 'Concepts', 'Principles', and 'Rules'

In his familiar study *General Principles*,<sup>1</sup> Cheng did not refer to abuse of right as a 'principle' but a theory. Indeed, the words 'abuse of right' seek to convey nothing more than a concept. They cannot literally define a principle any more than the two words 'negligence' or 'murder' could do so. To state a principle, one would have to add something like '. . . is wrong' or, depending on the context, '. . . unlawful'. (That this may be obvious, given the pejorative connotations inherent in the word 'abuse', is another matter.)

As the simple designation of a topic for discussion, abuse of right may be referred to indifferently as a *notion*, *concept*, *idea*, or *theory*. The expression, it seems fair to say, assumes that rights may in fact be abused, although that is not much of an insight; of course rights may be abused.

A *principle* expresses a judgment. The Ten Commandments provide familiar illustrations – for example, *thou shall not* take the name of the Lord thy God in vain; *thou shall* honour thy father and mother. A principle may be expressed more gently: 'honesty is the best policy'. The principle associated with the expression *abuse of rights* is that it should be forbidden.

The question then becomes whether a concept endowed with a value judgment, and thus entitled to be referred to as a principle, should become a rule of law.<sup>2</sup> Some ancient principles, like *an eye for an eye*,

<sup>1</sup> B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953; paperback, 2006); see the subtitle used by Cheng for chapter 4.

<sup>2</sup> Consider the bold-faced words of a United States Supreme Court judgment rendered in early 2019: "The phrase "immunity enjoyed by foreign governments" is not a term of art

are now rejected. Others, however morally solid, are nevertheless unsuitable as rules of law. We teach our children not to lie, but we do not have a law that forbids lying because it would be too indeterminate, creating endless disputation unworthy of the attention of public institutions. Of course, there are innumerable laws that punish dishonesty in specific circumstances. They reflect disapproval and indeed sanctions of various types of prevarication, but do not make lying punishable in general.

So, rights can be abused, and the abuse of rights is to be condemned. There are laws that reflect intolerance of the abuse of rights in particular circumstances. Of course, such laws are confirmations of the principle that the abuse of rights is not acceptable, but that confirmation is superfluous; we know it already. The significant question is rather whether the existence of such laws proves the existence of a general principle of law *applicable without further specificity as a rule of decision*.

Specific rules, whether established by the law-maker or by long-established judicial pronouncements which the legislature has seen no reason to amend, would not be necessary in a legal system that contented itself with the broad principle of the unlawfulness of abuse of rights because it can rely on a stratum of well-understood specific underlying criteria to provide implicit rules of decision. The thesis of this book is that few, if any, legal systems – and certainly not the international one – can make such a claim and that the notion of abuse of rights is therefore unsuitable as a universal rule of decision because of its irremediable indeterminateness, which leads to open-ended discretion and unpredictability.

This is not to say that a rule of decision may not be broad. The law of civil responsibility for torts seems to function without granular rules as to whether conduct is negligent, or that at some point negligence is aggravated. The finder of fact is trusted to examine the factual circumstances and, being a member of a given society, endowed with shared notions of acceptable conduct, able to assess the reasonableness of behaviour in the circumstances.<sup>3</sup>

But when the legislator has made detailed prescriptions for what is (or is not) wrong-doing or abuse, or anything else that makes it impossible to claim a right, the theory of abuse of right adds nothing (save perhaps confusion). As the great French scholar Marcel Planiol famously

with substantive content but rather a **concept** that can be given scope and content only by reference to the **rules** governing foreign sovereign immunity.’ See *Jam et al. v. International Finance Corporation*, 586 U.S. – (2019), pp. 9–11.

<sup>3</sup> Still, in systems when the finders of fact are the members of a jury, losing parties may complain on appeal about the trial judge’s instructions to the jury, which then, in effect, seem elevated to sub-issues of law.

objected: 'the right ends where the abuse commences'.<sup>4</sup> Numerous scholars in civil law jurisdictions have similarly resisted the theory of *abus de droit*.<sup>5</sup>

In 1987, thirteen eminent scholars from England and France (mostly from the universities of Paris and Oxford) produced a remarkable treatise of comparative law entitled *Le contrat d'aujourd'hui: comparaisons franco-anglaises*.<sup>6</sup> If *abus de droit* was a general principle of the importance that its adherents seek to give it, one would have expected a conceptual confrontation, or perhaps a rapprochement, of the two systems. To the contrary, the expression appears only fleetingly in the last chapter of the book,<sup>7</sup> devoted to a French *lex specialis* – namely, the special protection against the consequences of abusive termination of automobile dealerships in consideration of the investments typically made by dealers in their businesses, which is the very kind of particularised application of the concept this book endorses.

<sup>4</sup> See Chapter 2, note 22.

<sup>5</sup> A few quotations will suffice. Professor Antonio Gambaro of the University of Milano: 'The doctrine of abuse of rights has a long history but little future', in A. Gambaro, 'Abuse of Rights in the Civil Law Tradition', *European Review of Private Law* (1995), 561; he referred at p. 570 to the doctrine as based on 'a gallery of miseries that are unworthy of such attention by celebrated jurists who should have something better to do'. Professor Antoine Pirovano of the University of Nice, in A. Pirovano, 'La fonction sociale des droits: Réflexions sur le destin des théories de Josserand', 13 *Receuil Dalloz-Sirey Chronique* (1972), 67: 'the "great majority of authors" consider that abuse of right is a "pure application of the general principles of civil liability . . . simply a tort committed when using a right . . . we are far from the audacity of Josserand for whom abuse of right was "conduct contrary to the institution, the spirit, and the purpose of law"'. In the sentence following her citation of this very phrase from Josserand, Professor Elspeth Reid of the University of Edinburgh: 'The obvious weakness of this wide definition is that it confers a wide discretion on the courts in determining social purpose,' in E. Reid, 'Abuse of Rights in Scots Law', 2 *Edinburg Law Review* (1998), 129, 137; she continued, at p. 141: 'If whenever the individual chooses whether or not to do something, he is exercising a right which is susceptible of abuse, the doctrine of abuse of rights can be extended almost indefinitely. It is being invoked to demand specific performance where there is in fact no underlying obligation.' An extended quotation from the Swiss scholar Jean-Daniel Roulet's comprehensive rejection of the abuse of right as a general principle, J. D. Roulet, *Le caractère artificiel de la théorie de l'abus de droit en droit international public* (Baconnière Neuchatel, 1958), is reproduced in Chapter 2, note 11.

<sup>6</sup> D. Talon and D. Harris (eds.), *Le contrat d'aujourd'hui: comparaisons franco-anglaises* (Librairie générale de droit et de jurisprudence, 1987).

<sup>7</sup> Talon and Harris, *Le contrat d'aujourd'hui*, pp. 331 et seq.; see especially p. 353.

### The Particular Unhelpfulness of the Word ‘Abuse’

Abuse is always wrong. It is wrong to abuse friendship, or trust, or alcohol. But reaching for an emotive word does not produce a useful legal rule of decision. The law will specify the circumstances in which there has been a fraud, or dissipation of assets intended for underage beneficiaries of a will, or ‘driving under the influence’ justifying the loss of a driving license or a prison sentence. We all know that ‘abuse of process’ is not to be tolerated, but the phrase itself leads nowhere until it is given some specificity, as when trial judges identify and reject ‘vexatious’ or ‘oppressive’ procedural tactics.

When licensed automobile drivers commit traffic violations, it would not occur to anyone to say that they have *abused their right* as licensed drivers. The rules of the road define the relevant rights, irrespective of licenses. Just so, a building contractor may be entitled to increase his price if the cost of the specified marble increases, but there is no reason to say that he *abuses his right to be paid* if he demands an exaggerated price. The straightforward position is that he had no right to make a claim for anything more than the objective inflation of the price of marble; beyond that point, he had no right that he could abuse. An excessive *demand* may well be said to be abusive, particularly if the circumstances suggest an element of extortion, but the word ‘abuse’ expresses a value judgment rather than a legal characterisation, and the non-existent right plays no part of the discussion. When the law explicitly identifies particular terms of contract as unenforceable (whether using qualifications such as ‘unfair’, ‘unconscionable’, or the like), it is unnecessary and therefore pointless to say that it is an abuse of right to invoke them. (Of course, it then becomes necessary to develop a more specific understanding of *those* qualifications, which happens naturally in the particular context of their application.)

Similarly, we do not need to say that persons living on a residential street *abuse their right* as homeowners if they produce deafening noise throughout the night; they simply do not have the right to create a nuisance.

The notion of abuse of right is obviously problematic. Is the term nonetheless justifiable and does it fill a gap which would become evident if we ceased using it? This is a debatable question, and will be given the fullest attention in the pages that follow. But the answer to the next question – namely, ‘What does it matter?’ – should be clear. It is this: we should be careful about elevating unnecessary abstractions to the

status of fundamental principles, because they contribute to unpredictability and arbitrariness. They also encourage imprecise legislation that leaves citizens and other subjects of the law uncertain of their rights and obligations. The rule of judges is not the rule of law.

Planiol, who as we shall see in Chapter 2 was an unbeliever, regretted the popularity of the word *abus*, which, he wrote, *a fait fortune* ('has struck it rich') in the context of a lively debate among French scholars that began in the 1890s. The most prominent promoter of the theory – Louis Josserand – would himself have preferred the term *détournement de droit*. (This expression is difficult to translate out of context; common uses like *détournement de fonds*, i.e., embezzlement, or *détournement d'avion*, i.e., airplane hijacking, suggest 'misappropriation' or simply 'misuse'.) Marc Desserteaux, a specialist of comparative law (unlike his French colleagues Planiol and Josserand), considered that *abus de droit* could equally be considered as 'the conflict of rights', *conflit de droit*, a rather ingenuous suggestion since it describes the typical reason for the dispute that has arisen, in either national or international contexts.<sup>8</sup> (A property owner's right to build collides with his neighbour's right of access to sunlight; the territorial sea of two states overlap.)

A few decades later, the prominent English comparatist H. C. Gutteridge wrote that for the purposes of his commentary 'we may conveniently adopt the phrase "abuse of rights" because it emphasises the underlying conception that the law should prohibit the exercise of a right for a purpose which shocks the conscience of mankind'.<sup>9</sup> No one can disagree with this formulation as a statement of principle, but of course in and of itself it is no more than a 'rhetorical flourish' (see the epigram that introduces this Chapter). Yet, as we shall see in Chapter 3, there are countless definitions that achieve no more than this and thus give us only what Gutteridge called 'empty phrases'.

At any rate, the expression 'abuse of rights' is no more self-defining than 'negligence' or 'murder'. To kill a human being *may* be murder – but not necessarily. What if a disturbed individual dashes into the middle of a busy highway and is hit by a motorist who was obeying all the rules of the road? Even negligence on the part of the driver would not lead to a finding of murder, given the absence of an intent to crash into the victim. What if the defendant in a murder trial had been a protagonist in

<sup>8</sup> M. Desserteaux, 'Abus de droit ou conflit de droit', *Revue trimestrielle de droit civil* (1906), 337.

<sup>9</sup> H. C. Gutteridge, 'Abuse of Rights', 5 *Cambridge Law Journal* (1933), 22.

a bar-room quarrel who punched a stranger, causing him to fall awkwardly and break his neck? (Although the *impact* was intended, the *result* was not.) We certainly distinguish between an impulsive altercation and a premeditated deadly attack. None of this is simple; it requires distinctions among a group of concepts like ‘manslaughter’, ‘wrongful death’, and ‘involuntary homicide’, not to mention the other refinements of ‘degrees’ of culpability leading to consequences that are understood only by persons well acquainted with the applicable law.

Nor is ‘negligence’ self-defining. Although the concept cannot be transformed into mechanically applicable prescriptions, this does not mean that it signifies whatever the particular trier of fact may think of as careless. In jurisdictions where this is decided by a jury, the judge gives instructions as to the standards they should apply, and a mistaken instruction may result in a reversal for misapplication of the law. And if it becomes necessary in a particular national court to assess the tortiousness of conduct in accordance with the law of a foreign jurisdiction where the jury system is not used in civil matters, experts will certainly be able to give better answers, notably by reference to patterns observed in prior judgments, than to say that ‘negligence is whatever the court finds to be careless’.

With such examples, we must also consider the concept of remedies and sanctions. Here again, the law gives better answers than ‘whatever the judge feels is right’. In one case, the judge will be informed by the Criminal Code as to the meaning and consequences of *mens rea*; in the other, he will have to consider things like the distinction between direct and consequential damages – and, in some jurisdictions, the possibility of punitive damages.

Suffice it to say that the words ‘abuse of right is unlawful’ cannot provide the *ratio* to decide a single case unless there are adequately acknowledged definitions of the conduct that falls under it. The word ‘unlawful’ is also equally useless unless the consequences are defined. The project to establish a general principle of abuse of right fails in both respects, for reasons that do not permit the expectation that it will ever succeed in the international community as we know it today.

The crux of the problem seems to lie in the single word ‘abuse’. It is a part of everyday language, conveying many different meanings. Most of them contain a value judgment that has no legal consequence. *Abusing* someone’s generosity is poor manners. *Substance abuse*, such as the excessive consumption of alcohol or prescription medicine, will be reprimanded by the doctor. Neither type of behaviour is, in most countries,

a matter for the judge. *Child abuse* is a different matter. And judges, when applying laws that *explicitly* call for equitable or discretionary assessments, may use the word ‘abusive’ to describe unreasonable conduct. There is abuse of process, abuse of office, abuse of discretion – the list goes on. Judges cannot simply wave a wand, recite the words ‘abuse of right’, and pretend that they have satisfied the obligation to give a legal basis for deciding in favour of a party which has displeased them.

The diffuse senses of the word muddy the waters. They may impede a proper understanding of principles intended to justify or deny legal remedies, because such principles require specific constitutive elements that generate legal security for those who are subject to the law and seek security by acting in accordance with them.

#### Four Alternative Uses of the Word

If we do not take the trouble to be precise in identifying the features of behaviours we wish to regulate, we experience them, to quote William James’s famous phrase, ‘all as one great blooming, buzzing confusion’. James was a prominent American intellectual figure of the late nineteenth century in the fields of philosophy and psychology. He reasoned that our minds must be trained by both association and disassociation; the former being necessary for synthesis, the latter for analysis: ‘Any number of impressions, from any number of sensory sources, falling simultaneously on a mind which has not yet experienced them separately, will fuse into a single undivided object for that mind. The law is that all things fuse that can fuse, and nothing separates except what must.’ And so on to the famous passage: ‘[T]he baby, assailed by eyes, ears, nose, skin, and entrails at once, feels it all as one great blooming, buzzing confusion.’<sup>10</sup>

‘Nothing separates except what must.’ James’s ‘law’ continues to be debated by psychologists, but is surely a useful thought to be kept in mind for legal analysis. Just so, four uses of the word *abuse* must be ‘separated’ (distinguished). Only the fourth should ever be used as part of the expression ‘abuse of rights’ – and even that one does not generate an autonomous rule of decision.

The first is a way to characterise conduct by reference to inevitably subjective standards such as reasonableness – for example, in connection with an obligation to give reasonable notice or the prohibition of

<sup>10</sup> W. James, *Principles of Psychology* (Henry Holt and Company, 1890); see chapter 13 (‘Discrimination and Comparison’), p. 483.

unreasonable restraint of trade. If a judge declares that the notice is *abusively* short, or that the territorial scope of a non-compete clause has *abusive* consequences, there is no need to speak of ‘abuse of rights’, since the legal standard when applied to the facts as found by the decision-maker (judge, arbitrator, or jury) involves the absence of a right to give such short notice, or to rely on such a broad prohibition.

Instead of using the word ‘abusive’ in this sense, the decision-maker might have said ‘excessive’, ‘unduly burdensome/onerous’, ‘oppressive’, or the like.

Of course, someone wedded to the expression ‘abuse of rights’ could insist terminologically on viewing the matter as one of abuse of the ‘right’ envisaged by contractual stipulations. The point is that it is unnecessary, since the right is limited by specific rules of law. To speak of abuse thus has no utility. To the contrary, it is likely to lead to arbitrariness.

The second use is merely a way of characterising simple unlawfulness. ‘Child abuse’ is not the abuse of a right; it is simply punishable behaviour. ‘Abuse of power’ is excess of power and therefore does not involve the exercise of a right. For the reason stated in the preceding paragraph, I hardly need to observe the pedantry that would be involved in insisting that we are talking about the abuse of the *right of custody* and of the *prerogatives of office*. Going down this dogmatic route would turn practically everything into an examination of the abuse of some right – exceeding the speed limit or playing loud music after midnight would be the abuse of a driver’s license or of the right of homeownership. Indeed, expressions such as ‘abuse of financial regulations’ generally mean nothing more or less than violation of the law by disregard, circumvention, or fraud. There is no right involved, whether used or abused. (For the last time: speaking of abusing the right to issue corporate securities, an extensively regulated matter, would be the expression of a pointless *idée fixe*.)

This may be the moment to observe that a key to the occasionally peremptory resistance of the common law to the notion of abuse of right may simply be terminological. In English, ‘the law’ and ‘a right’ are separate words for different things. In French, *droit* covers both, as does *Recht* in German. If a common lawyer were told about the principle that one should not ‘abuse the law’, he might quickly say not only ‘of course’ but be instinctively convinced that the common law agrees: the law should not be misused.

This leads to the third sense, precisely that of *misuse*. From my adolescence, like anyone raised in the Swedish language, I was aware of



the expression *rättsmissbruk*, which is in a lexical sense a cognate to the German *Rechtsmissbrauch* – and assumed not only that both are essentially equivalent to abuse of right but, more importantly, that they are applied in a manner supportive of the concept as a general principle. My subsequent readings have led me to conclude that we should not leap to the conclusion that *misuse* of a legal process is synonymous with the *abuse* of a right. For example, the right to bring a civil suit does not include vexatious or oppressive actions; they are simply not allowed. Moreover, the two words should be distinguished by the element of intentionality, always present in abuse, not necessarily in misuse.

The most cited study of the subject in Sweden is an essay by Professor Jori Munukka of the Stockholm University Law Faculty, which appeared in 2008 under a title that announces ‘a legal concept in progress’.<sup>11</sup> (*Rättsmissbruk*, like *Rechtsmissbrauch*, can be rendered as either ‘abuse of law’ or ‘misuse of law’.) It is an interesting and sober piece of scholarship; much credit should be given to the author for his objective account of judicial pronouncements that clearly disappoint his explicit desire that the concept be adopted in Swedish law. For example, the essay’s second sentence is instructive; it acknowledges that the expression ‘has until now most prominently been employed in the limited sense of describing avoidance of law and moreover seems not to have been generally accepted’. It is a remarkable admission. The first of these points does not provide much support for the need of the concept, since law-avoidance can certainly be disallowed as such without speaking of abuse of right. The second is plainly fatal to the notion that any principle of abuse of right is part of Swedish law.

The author nevertheless writes of a ‘growing tendency’, which he contends is manifest in four cases decided between 1981 and 2002. Not only does this seem a meagre harvest, but an examination of the cited cases is unpersuasive. In one case the argument was made but not accepted. Another citation was to the individual opinion of a judge, and thus not part of the judgment itself. Yet a third instance concerned the abusive call of an on-demand guarantee; that decision explicitly referred to a case from England (where the doctrine of abuse of right is *not* a part of the law) as persuasive support for the unsurprising idea that payment will not be ordered in ‘clear cases of fraud’.

<sup>11</sup> J. Munukka, ‘Rättsmissbruk – En rättsfigur under framväxt’, in M. Schultz (ed.), *Stockholm Centre for Commercial Law Årsbok* (Iustus Förlag, 2008), 135–64.

The demonstration is not assisted by a last, complicated German case that, in the end, seems to have involved an unremarkable rejection on factual grounds of a failure-of-mitigation defence under an insurance contract. The author notes one scholar's expression of doubt that even the 'intention to cause harm' moves the boundary between permitted and forbidden conduct; admits that a similar function is ascribed by Swedish courts to the duty to abstain from chicanery (perhaps borrowed from a well-known article of the German Civil Code) and the duty of 'loyalty' in contractual relations; and finally writes as follows, while acknowledging that this criticism borrows from Planiol's famous, century-old aphorism *le droit cesse, là où l'abus commence* (already translated previously): 'When an abuse of right is invoked, it might be objected that the entitlement relied upon does not extend as far as it has been taken. This would thus not involve a misuse of a right, since the conduct does not actually correspond to an entitlement.'<sup>12</sup>

If this means that there was something of a hiccup in the progress of this doctrine in Swedish law, perhaps some reassurance could be gained by looking at the result of the great work of a multitude of scholars that resulted in the UNIDROIT Principles of International Commercial Contracts. Their goal was to distil general principles with such a degree of confidence that UNIDROIT explicitly invites parties to international contracts to use its Principles as the applicable substantive law of their agreements. It is natural therefore to consult the massive *Oxford Commentary* on the Principles, the second edition of which has grown to comprise no less than 1,528 pages, including a very extensive index.<sup>13</sup> There perhaps would be a treasure trove of references to abuse of right.

Alas, no – and not because the expression was overlooked. In fact, there is one single reference to it, included to explain why 'abuse of right' was *not adopted* as part of the Principles.<sup>14</sup> The editor opines that 'the practical results reached by employing a separate doctrine do not differ'<sup>15</sup> from those produced under the general terms of Article 1.7, which provides: 'Each party must act in accordance with good faith and fair dealing in international trade.' This is plainly a broader formulation than

<sup>12</sup> Munukka, 'Rättsmissbruk', p. 162.

<sup>13</sup> S. Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd ed. (Oxford University Press, 2015).

<sup>14</sup> Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, p. 221.

<sup>15</sup> Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, p. 222.