Abuse of Rights – the Historic Perspective: Reception of Law or Reasonableness and Natural Law

Franciszek Longchamps de Bérier

Roman law is the history of the law, in which questions are constantly raised about our understanding of its values and the principles that guide it, as well as primarily the correctness and regularity of conduct in human communities. The study of Roman regulations, and their impact on European legal traditions, provides the grounds, as well as extensive material for independent thought about the subject of private law. It helps to deal with contemporary problems, creating a historical and dogmatic perspective, but without being bound by the wording of a currently applicable legal regulation. The wording is not the starting point, although it does frequently inspire academic research. And such wording is not of primary importance.

The question of the reception of law or of lack of its reception is a good opportunity to return to the issue of the abuse of rights.[1] The perception of such abuse in Roman law seems to cast an interesting light on the issue of reception as well as natural law and the nature of law. Nowadays reference is usually made to the abuse of substantive rights, although the concept of substantive rights in itself gives rise to a number of problems. I have tackled the issue about the experience of Roman law as follows: what does Roman private law say about the experiences that the nineteenth and twentieth century doctrine refers to as abuse of rights or – if someone prefers – substantive rights. For obvious reasons, the use of the term substantive rights does not actually help when studying the past. You could then say that there is a danger of anachronism. Anachronisms should be avoided wherever possible. However, in its contemporary structure, the abuse of substantive rights has developed as a tool for dealing with the conflicts of interests of various legal entities that arise in practice.[2] This proved to be necessary because the Polish legislator, i.e. the Polish Civil Code, abstractively specifies the area in which it is possible

[1] F. Longchamps de Bérier, Nadużycie prawa w świetle rzymskiego prawa prywatnego, 2 ed. amended and supplemented. Wrocław (2007), and now an edition in Italian: F. Longchamps de Bérier, L'abuso del diritto nell'esperianza del diritto privato romano. Giapicchelli (2012).

[2] M. Pyziak-Szafnicka, Prawo podmiotowe, in: System Prawa Prywatnego, vol. 1, ed. M. Safjan, Warszawa (2007), p. 771.

to operate within the law – which is treated as a system – and therefore gives powers that serve to make laws real. Within the theory of the law, the notion of the abuse of rights is one of the trends for opening up legal institutions to criteria outside the legal system.[3] And it is precisely these criteria, which are currently called criteria outside the system, to which reference is made when the question arises of the Roman legal experience. It is obviously possible to ask about this experience in various contexts.[4]

In its implementation, the Napoleonic Code – mainly in order to make rights as well as the certainty of the law absolute – did not provide for the ability to refer to abuse. This concept needed, therefore, to be developed in the judicature in France – obviously, the statement "needed to be" arises when looking at it from the perspective of the experience of Roman law. French case law from the 1870s, initiated by the ruling of the court of appeal in Colmar in 1855, provided a particular incentive for a discussion on the abuse of rights.[5] In contemporary French doctrine, it is constantly emphasized that each case of an abuse of substantive rights needs to be reviewed separately. And since, nowadays, it is impossible to present a single concept of the abuse of substantive rights, which is common to all civil law relationships, the courts do not feel bound by any of the criteria indicated by the doctrine. In case law, they simply apply the principle of fairness – *l'équité*.[6]

Abuse of rights is usually related to their implementation, which is treated as taking steps which lie within the sphere of the ability to behave in the manner specified by that law.[7] And at least two views of the concept of abuse of rights are proposed: namely the broad view and narrow view. According to the former, the judge would receive a standard authorizing him to make corrections to the binding provisions of the law in each case in which he considered the application of such provisions to be unfair or unjust. *Ius aequum* would operate here at the expense of *ius strictum*. However, in the narrow approach, only the behaviour is to be assessed and not the regulations or – more precisely – the consequences of their application. This only happens in the case of exercising rights; namely making use of one's rights. Therefore,

---

3 L. Leszczyński, Nadużycie prawa – teoretycznoprawny kontekst aksjologii luzu decyzyjnego, in: Nadużycie prawa. Konferencja Wydziału Prawa i Administracji 1 marca 2002, ed. H. Izdebski and A. Stępkowski. Warszawa (2003), p. 27.

4 Cf. e.g. F. Longchamps de Bérier, Rechtsmissbrauch in der Rechtsprechung polnischer Gerichte zum BGB, in: Deutsches Sachenrecht in polnischer Gerichtspraxis, ed. W. Dajczak and H.-G. Knothe. Berlin (2005), pp. 265-9.

5 The Judgement of 02.06.1855, D.P. 1856. 2. 9.

6 M. Pyziak-Szafnicka, op. cit., p. 775.

7 A. Wolter/J. Ignatowicz/K. Stefaniuk, Prawo cywilne. Warszawa (2001), p. 147.

a correction is made in the event of the unlawful use of a right.[8] In this context, it is clearly visible that the dispute between the external and internal theory of abuse of rights, which is so highly emphasized in Poland, is essentially academic. This is because the difference boils down to specifying the source of the illegality, hence this dispute does not appear so clearly in other countries. A lawyer, who uses the so-called internal theory to reconstruct the applicable legal standard, takes into account all the relevant provisions of the given act of law. He, therefore, also takes into account the prohibition to take advantage of the law, as expressed in Article 5 of the Polish Civil Code, which would be in conflict with the socio-economic purpose of the law and the rules of social coexistence. Proponents of the so-called external theory, first reconstruct what is "named" as a given person's right based on the provisions of the Code, with the exception of Article 5 of the Polish Civil Code. Only then, by treating the provision containing the prohibition to act in conflict with the rules of social coexistence and the socio-economic purpose of the law – as the fundamental provision – do they treat it as the standard, which is addressed to persons "having a right."[9] However, the practical consequence of both methods of reasoning is the same: behaviour in conflict with the criteria set out in Article 5 of the Polish Civil Code is considered illegal.

Two allegations with regard to the internal theory appear to be particularly important. The first applies to making substantive rights contingent on the facts and variable assessments from the point of view of social coexistence and the socio-economic purpose of the law. The second is the doubt regarding actually equating action, which is outside the law, or which is illegal, with abuse of rights. This is because the difference between normal illegal behaviour and behaviour, the illegality of which arises from the abuse of rights, is clear and cannot be removed by recourse to the internal theory. The illegality of the conduct of an entity which is abusing substantive rights is transient and is unquestionably relative, and not permanent – at least until the acquisition of the rights – and absolute, i.e. independent of whether or not it strikes at anyone's rights or breaches anyone's interests.[10]

It is always possible to refer to the tradition of Roman law. The comment formulated by Gaius in the 2nd century AD, *male enim nostro iure uti non debemus* – "we should not wrongly benefit from our rights" [11] is today proudly displayed at the entrance to the building of the Supreme Court in Warsaw.

---

8 M. Pyziak-Szafnicka, op. cit., pp. 782f.

9 S. Wronkowska, Analiza pojęcia prawa podmiotowego. Poznań (1973), p. 88.

10 M. Pyziak-Szafnicka, op. cit., pp. 789-90.

11 Gai. Inst. 1,53.

The next comment, attributed to the 3rd-century jurist, Paulus: *non omne quod licet honestum est* – "not everything that is permitted, is honest"[12] – can be seen on another pillar of the Palace of Justice. Contemporary scholars also recall that the system of private law does not allow the exercise of substantive rights in breach of moral standards and the purpose of the law.[13] The prohibition of abuse is addressed to entitlees, from whom the legislator does not remove such entitlement, even though they breach the rules of social coexistence or the socio-economic purpose of the law. The law giver qualifies the entitlees behaviour as illegal, even though they have exercized one of the rights to which they were entitled within the framework of the abstractively phrased content of a given substantive right.

Making reference to the abuse of the rights and therefore noticing the need to adjust how advantage is taken of one's rights in specific cases gives rise to theological analogy. Reflecting on the Revelation in an orderly manner leads to the formulation of various arguments or conclusions, the construction of dogmatic theories or even theological systems. However, their correctness is verified by their application and the practical consequences: the orthodox or unorthodox result. A community of believers keeps invariable truths of its faith as a deposit, which is proclaimed to successive generations in different ways. Theologians propose scholastic or modern structures to which they are more or less convinced. However, they all pass the simple Biblical test "by their fruit you will recognize them."[14] If it does not produce "good fruit", this means it does not work. Obviously, the community assesses whether or not the fruit is good, but this is frequently plain to everyone. Likewise with the feeling of justice, that appears and constitutes the final justification for a correction of an abuse of rights. This also happens with the law and its structures with respect to social reality and with respect to people in general. Meanwhile, it is well known that certain philosophical and legal concepts are late, so to say, with respect to the development of the law, while others arise even before their time, without bringing any real effects.[15] The abuse of rights was noticed before such structure arose in private law, and before talk of substantive rights began. After all, an acquired right does not need to be, *sensu stricto*, substantive, that is at least indicated by the research on abuse in the area of criminal proceedings.

---

12 D. 50,17,144 pr. Paul.

13 M. Pyziak-Szafnicka, op. cit., p. 791.

14 Mt 7,16.20.

15 T. Giaro, 'Abusus iuris' a nadużycie prawa, Uniwersytet Kardynała Stefana Wyszyńskiego. Zeszyty Prawnicze 7.1 (2007), p. 286.

In the age of Codes and legal positivism, reference to experience has been made far more difficult by concentrating on the solutions adopted by the legislator. It therefore proved necessary to create the structure of the abuse of rights. Just like this structure, the institution of unjustified enrichment and offset (*compensatio*) were not known under Roman law. Fortunately, nobody claims that Roman law was unaware of cases of the social problems to which they apply and did not try to remedy them effectively. Therefore the question regarding universality remains current: also in the light of the difficulties with defining what a substantive right is and what is an abuse of rights; specifying the relationship between a substantive right and an entitlement and the question of experience in terms of "exercising one's rights." Essentially, it boils down to the question of the criteria for assessing use: not abstract and theoretical, but in specific cases. Hence, for example, the proposal to read Roman sources, which, by assumptions, do not have ideological assumptions,[16] not in order to seek a reflection of one's own ideas in them, but to understand the historical symptoms of the reaction. French literature willingly looks for examples of an effective reaction to the abuse of rights centuries before Colmar case law. It is also possible to deduce such a judgement from the previously emerging case law.[17] However, it is not possible to escape from the question – although lawyers are rather reluctant to ask it, perhaps thinking they are not competent – about the sources of such social or legal reactions.

The basis of the proposed question regarding ancient experience includes starting from the typologically specified problem of the abuse of rights, in order to then examine how the Quirites solved this problem.[18] Despite the lack of structure or even theory concerning the abuse of rights in ancient Rome, this applies to a real phenomenon, which can be specified typologically. Today, when dogmatics of civil law developed a structure and theory of abuse of rights, the considerations most frequently boil down to the specific types of cases reviewed by the courts. And it is they that decide with considerable freedom when, in practice, to consider that substantive rights have been abused.

It can be seen in both the activities of the courts and in the ancient reactions to certain methods of exercising personal rights that, in the first instance,

---

16 F. Longchamps de Bérier, 'Summum ius summa iniuria'. Sulle premesse ideologiche nell'interpretazione delle fonti antiche, in: 'Fides, humanitas, ius'. Studii in onore di Luigi Labruna, vol. 5, Napoli (2007), pp. 2919-32.

17 H. et L. Mazeaud/J. Mazeaud/F. Chabas, Leçons de droit civil. Obligations. Théorie générale, 9 ed. Paris (1998), vol. 2.1, pp. 477f.; A. Gambaro, Abuse of rights in civil law tradition, European Review of Private Law 4 (1995), p. 565; see also U. Mattei, Comparative Law and Economics. Michigan (1997), p. 36.

18 T. Giaro, op. cit., p. 274.

the abuse of rights appears as a problem in the role of ethics in law. From a structural point of view, this is related primarily to exercising governing rights, although it can arise in various eras and various dogmatic contexts. In all certainty, the matter does not boil down to terminological issues as, for instance, the history of using the statement *abus de droit*, *Rechtsmissbrauch*, the abuse of substantive rights. We tried to pay attention to this in our textbook on Roman law. We decided to present Roman law by extending the "angle of vision by the so-called second life of Roman law in contemporary Europe, which also affects the presentation of its ancient history. Some legal historians reject such view as being an anachronistic measure of the past using a contemporary yardstick. In accordance with the purist directive to only use source terms, they fall into nominalism, which assumes that the criterion for the existence of a given institution is the use of its own name. Hence, the ideal rule of law would appear together with the name *Rechtsstaat*, and repression of the abuse of rights would appear together with the term *abus de droit* – in both cases as late as in the 19th century. Meanwhile, at the start of the development of the law, which, as a rule, took place through an unconscious practice, the name of the legal institution is frequently younger than the institution itself. It is sufficient to mention the phenomenon of silent law, preceding the articulated language, or many alleged discoveries of the modern theory of the law, involving the naming of phenomena which have been known for a long time. It is also erroneously assumed that the significance of Roman law to modern times arises from the continuity of its development to the present days, allegedly guaranteed by the formal reception of Roman law in contemporary Europe. However, wherever institutional continuity is interrupted, no references, renaissances and models or indirect inspirations are recognized."[19] The most recent international encyclopaedia of legal history is not afraid of including considerations from only Chinese law under the term of *rule of law*. Initially, the restriction made in the legal area in which not only traditionally, but also generally, nobody really expects the term of rule of law to be used, is surprising. It is all because of despotic emperors and their 20th-century successors. However, the authoress of the term initially gives the definition that the *rule of law* should be understood as a constellation of values and methods of proceeding based on the assumption that a healthy legal order subordinates the interests of the ruling elite to the law. She cites Aristotle, because she is aware that the rule of law is identified with the classical Greek definition and liberal institutions of countries from

[19] W. Dajczak/T. Giaro/F. Longchamps de Bérier, Prawo rzymskie. U podstaw prawa prywatnego. Warszawa (2009), p. 36.

the West. Even so, there are no doubts that elements of the *rule of law* may also be noticed in traditional Chinese political culture. She starts her overview in the 4th century BC, tracing it up to the times of the last dynasty and the era of turbulent socio-political changes in China in the last century.[20]

The procedural approach is highly typical of Roman law, so lawyers who are more aware immediately respond to the question of the abuse of rights in Roman law as: *exceptio doli*, which is rightly also called the allegation of an abuse of rights. However, this is not the only sign of Romans noticing an abuse of rights. It constitutes a response to someone filing a complaint, as a result of which – in a specific case – the praetor allowed for a correction. Unfortunately, there is insufficient room here to present other incidences of ancient responses to the abuse of rights, although this has been referred to more extensively elsewhere. However, we need to be guided towards the conclusions stemming from them.

As in ancient times, the abuse of rights is a noticeable social problem even in contemporary times, as a result of which a response from the legal order is expected. Roman experience tends to show the external theory route. Inevitably, internal theory is only possible in the legal system. However, in the age of decodification, it is not – at least in the enlightenment sense – every legal order which increases the significance of making reference to the experience of Roman law. And it is precisely in the context of the question about the abuse of rights that Roman law enables the trend to be noticed in man, which is more original than conviction and not necessarily rooted permanently in the individual or collective consciousness, while simultaneously being independent of any reception, acquisition or model of conduct. This trend usually appears in extreme cases. It manifests itself in specific reactions to wrongly exercising the rights granted by the law – wrongly more in the social than in the individual meaning. It most clearly manifests a sense of justice, which is part of human nature. A sign of natural law is visible here, because this trend in the method of perceiving reality proves to be a regularity which is, by nature, original with respect to human convictions – rather than just their derivative. Compared with ancient sources, this observation appears to be so important to the question of humanistic universality that the Roman example in this regard is very different from contemporary examples. In the case of the ancient examples mentioned, there is still no mention of the influence of Christianity. Questions of natural law should not necessarily be combined

[20] K. Gottschang Turner, s.v. rule of law, The Oxford International Encyclopedia of Legal History, ed. S. Katz, vol. 5, Oxford University Press (2009), pp.164-6. Rec. F. Longchamps de Bérier, Forum prawnicze 2 (2010), pp. 88-95.

with religious issues, but they should without doubt be combined with moral issues. And this does not contain any ideology. The Roman example is always interesting because the legal solutions used by the Quirites still appear as central pragmatic considerations. And so, Roman private law shows that the ethical element can play an important role and makes itself known in the practice of applying the law. The source of this is a trend which is noticeable in man. It constitutes not only one of many expressions of public awareness, but an important and interesting expression of public awareness arising from common sense, which shapes social relations and reaches as deep as the natural and original sense of justice. To conclude, even if there is no reception of law, it does not mean there are no historic arguments – particularly deriving from Roman law – that are interesting and instructive.