PROHIBITION OF ABUSE OF RIGHTS: FROM *RULE* TO *PRINCIPLE*

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Contents: 1. The apparent lack of prohibition in *common law* systems. 2. The birth of the abuse theory in the French system. 3. Paragraph 226 of the German Civil Code: an unfailingly disapplied rule. 4. The irrelevance of *ius positum* in the Italian practice. 5. The "living law" of the Court of Justice of the European Union. 6. The rediscovery of the *principle* in the lawfulness of the concrete case.

1. Although the abuse of rights issue has been under scrutiny for more than half a century[1], the debate does not seem to be exhausted[2], reappearing from time to time with renewed interest, given its difficulty to fit into a formula with uncertain contours and its insusceptibility to a *reductio ad unitatem*[3].

In point of fact, the contradiction is already present in the definition itself, as evidenced by the terminological incoherence in the juxtaposition of *right* and *abuse*, where the existence of one seems to exclude the emergence of the other[4].

A very clear contrast indeed, if one considers that the abstract recognition of an active juridical situation is followed by the time of its actual exercise. During such time, a gap may easily arise between how the conduct *ought to be* (i.e. compliant with the legal paradigm), and how it *is* in actuality.

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[1] Records of it can be found as early as in Roman Law in the dialogical relationship between *ius* and *aequitas*, which encapsulates the idea that the application of a right, grounded in a merely formal basis, can lead to unfair results. On the topic, see S. RICCOBONO, *La teoria dell'abuso del diritto nella dottrina romana* in *Bullettino dell'Istituto di diritto Romano*, 1939, 1, 1 ff. The concrete expression of the prohibition of abuse of rights appears in institutions such as the *aemulatio*, which condemns those who exercise a right with malicious intent to the detriment of others, and the *exceptio doli*, which guarantees a defense to a formally correct but substantially unfair trial action. On the subject, see, among others, S. RICCOBONO, *Emulazione (diritto romano)* in *Noviss. Dig. It.*, VI, Turin, 1957, 520 ff.; V. SCIALOJA, *Aemulatio*, in *Enc. giur. it.*, I, 2, Milan - Naples, 1982, 431 ff. For more recent study, see L. GAROFALO (*edited by), L'eccezione di dolo generale. Diritto romano e tradizione romanistica.* Padua, 2006, *passim*.

[2] Among the main contributions, D. MESSINETTI, *Abuso del diritto*, in *Enc. del diritto*, Milan, 1998, 1 ss.; U. NATOLI, *Note preliminari ad una teoria dell'abuso del diritto nell'ordinamento giuridico italiano*, in *Riv. trim. dir. proc. civ.*, 1958, 37 ff.; S. PATTI, *Abuso del diritto*, in *Noviss. Dig. it., Disc. priv.*, Turin, 1987, 2 ff.; P. RESCIGNO, *L'abuso del diritto*, Bologna, 1998, *passim*.

[3] As evidenced by authoritative writings on the matter: «Più se ne discute, più si complicano le concezioni dell'abuso: perché la dottrina spesso ne parla come se tutti dovessero procedere da una definizione unitaria, stipulativa, e non controversa; sì che la formula "abuso del diritto" senza altre qualificazioni appare altamente allusiva, quasi che non sorgessero problemi definitori ed il suo significato fosse da tutti condiviso». In G. ALPA, *Appunti sul divieto dell'abuso del diritto in ambito comunitario e i suoi riflessi negli ordinamenti degli Stati membri*, in *Contr. e Impr.*, 2015, 2, 245.

[4] Following the well-known brocard *qui iure suo utitur, neminem laedit.* On the subject, see M. PLANIOL, *Traité élémentaire de droit civil*, Paris, 1949, 248.

It is therefore in the dynamic phase of the exercise of the right that the acting person's conduct must be assessed. This may result, in its unfolding, in an *abusive* act, depending - as will be later clarified - on the meaning accepted among several possible declinations.

It can be argued that the orientation which used to confine abuse of rights to a meta-juridical dimension, beyond the dogmatic constructions of *scientia iuris*, has now been superseded[5]. The view of abuse as merely a social occurrence is in fact overshadowed by the importance that the phenomenon has gained – even in cases where its possible existence was denied - and by its formal recognition in EU law. This is the case of common law systems in which, although it is not possible to find a conceptualization comparable to that existing in civil law systems, legal importance is recognized for cases of abusive conduct[6].

A well-known leading case that initially rejects the claims for protection against a landowner, who acted «in excess of his right as a landowner» according to the plaintiff, is *The Mayor of Bradford v. Pickles*[7]. This was a landownership matter in which the court ruled that «if it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it». The precedent is referred to in a contractual matter, *Allen v. Flood*[8], in which the malicious behaviour of a subject exercising his lawful right did not constitute a sufficient element to condemn his conduct.

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[5] This view sprung in France, where it was later developed by R. Savatier, who sees abuse of rights as a kind of behaviour that goes against morality. Abusive conduct is, in the author's opinion, the result of an action perfectly abiding by the *regola iuris* but censurable from an ethical point of view. It is the morality criterion that simultaneously serves as a limit to the exercise of the right and as an indicator of abuse. It follows that the phenomenon thus understood, i.e. a mere moral precept, cannot in any way condition the rules of law, as it clearly operates outside the legal system. R. SAVATIER, *Traité de la responsabilità civile en droit français*, Paris, 1951, 23 ff. In Italy, one of the proponents of this interpretation is M. ROTONDI, who considers abuse of rights to be an ethical question, i.e. a problem of social relevance. In his view, *L'abuso del diritto*, in *Riv. dir. civ.*, 1923, 116, abuse is seen as «… un fenomeno sociale, non un concetto giuridico, anzi uno di quei fenomeni che il diritto non potrà mai disciplinare in tutte le sue applicazioni che sono imprevedibili: è uno stato d'animo, è la valutazione etica di un periodo di transizione, è quel che si vuole ma non una categoria giuridica, e ciò per la contraddizione che non lo consente». See also, by the same author, *L'abuso del diritto. Aemulatio*, Padua, 1979, *passim*.

[6] Particularly interesting is the issue about the relationship between abuse of rights and punitive damages, i.e. if it is possible to settle the latter in cases of abuse, not only for deterring and sanctioning purposes, but also to compensate for the granting and quantification of compensatory damages through an instrument that escapes precise determination. See F. BENATTI, *Danni punitivi e abuso del diritto*, in *Contr. e impr.*, 2015, 4-5, 862 ff.

[7] *Mayor of Bradford v. Pickles* (1895) AC, 587. The case concerns Bradford Waterworks, a company which had supplied water to the town of Bradford for several years, drawing it from a source on a hillside near the property of Mr. Pickles. He had started works on his land that would divert the flow of groundwater, preventing the abovementioned company from continuing its drawing activity. The lawfulness of the works was questioned by the company, on the grounds that the works started concealed Mr. Pickles' the real intent, which was to obligate the company to purchase the rights on the groundwater which had been previously drawn freely. The House of Lords rejected Bradford Waterworks' claim for protection, deeming Pickles' actions perfectly within his lawful right, thus not recognizing the abuse of rights principle. On the precedent, see J. B. AMES, *How far an act may be a tort because of the wrongful motive of the actor*, in *18 Harv. L. Rev.*, 1904-1905, 411; H. T. TERRY, *Malicious torts*, in *20 L. Q. Rev.*, 1904, 10 ss.; F. P. WALTON, *Motive as an element in torts in the common and in the civil law*, in *22 Harv. L. Rev.*, 1908-1909, 501 ff.

[8] *Allen v. Flood* (1898) AC, 1, 46, conclusion reads as follows: «Any right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determine the enforcement of the right. It is hardly too much to say that some of the most cruel things that come under the notice of a judge are mere exercise of a right given by contract».

This initial closure is probably due to the limited power of the judge to intervene on the content of contractual agreements, seen as an expression of the sovereign will of the contracting parties[9].

As is well known, in following the mercantile principle of *freedom of contract*, Anglo-Saxon systems hardly tolerate reviewing on the substantial effects of the exchange. In this frame, the job of courts is to rule on the validity and enforceability of contracts, and not to replace the will of private individuals through the use, in the exercise of rights, of indefinite criteria such as *reasonableness* and *common sense*.

The absolute irrelevance of motive for the purpose of assessing conduct must, however, be tempered by the existence of corrective actions. These include, as in the case in question, the applicability of *tort of nuisance* regarding non-contractual liability.

Born in the context of landownership, the concept translates into the rule which states that the owner who obliges a neighbour to tolerate a certain number of inconveniences, due to the unreasonable exercise of their right, is obliged to pay compensation for any damage caused.

It is, quite clearly, a form of liability reminiscent of the "emulative acts" regulation typical of continental practices[10], with which it shares the purpose of preventing the harming or harassing of others, albeit in the exercise of one's right.

The essence of *private nuisance* consists in the unreasonable interference in the use and enjoyment of the property of others; the subjective element of *malice* is not strictly necessary for the purpose of ascertaining liability, but its existence constitutes, undoubtedly, an indicator of it.

American courts of the nineteenth and twentieth century have resolved the disputes arising from a conflict between property rights through *reasonableness* and *malice* rules[11].

Subsequently, the aforementioned criteria were also used to settle disputes in contractual matters, especially in cases where a third party, while exercising the right to free competition, had interfered in a contractual relationship existing between two parties in order to obtain some kind of profit[12].

The so-called *malice* and *reasonableness* rules have been used by courts in different contexts, from property to labour matters, to the economic-competitive field in the broader sense.

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[9] On abuse of rights in common law practices, see H. C. GUTTERIDGE, *Abuse of rights*, in *Cambr. L. J.*, 1933, 22 ss; R. O.' SULLIVAN, *Abuse of rights*, in *Current legal problems*, London, 1955, 60 ff. More recently, M. BYERS, *Abuse of rights: an old principle, a new age* in *Mc Jill law Journal*, 1 February 2002, 395 ss.

[10] Cf. § 4.

[11] In *City of Franklin v. Durgee*, 58 L. R. A. 112, 51 A. 911 (1901), it is stated that «The common law right of the ownership of land [...] does not sanction or authorize practical injustice to one landowner by the arbitrary and unreasonable exercise of the right of dominion by another, but makes the test of the right the reasonableness of the use under all circumstances. In such case the purpose of the use, whether understood by the landowner to be necessary or useful to himself, or merely intended to harm another, may be decisive upon the question of right. It cannot be justly contended that a purely malicious use is a reasonable use».

[12] See J.T. NOCKLEBY, *Tortious Interference with Contractual Relation in the Nineteenth Century: TheTransformation of Property, Contract and Tort*, 93 *Harv. L. Rev.*, 1510 (1979-1980). One of the earliest precedents is *Lumley v. Gye*, Court of Queen's Bench (Coleridge, Erle, Wightman and Crompton, JJ.) [1853] 2 E&B 216.

This has resulted in the creation, according to legal authors, of a veritable «legal framework for economic change»[13].

Thus, an *apparent* absence of the prohibition emerges[14], which, although initially non-applicable in the decisions of courts, acquires importance as a sort of "functional equivalent" through *tort of nuisance* in non-contractual liability.

Since its existence is not recognized explicitly, but only in a mediated way, it is not possible to think of prohibition of abuse in terms of "dogmatics", as is the case in civil law jurisdictions.

Indeed, in the latter, as previously mentioned, doctrinal approaches alternate with jurisprudential interpretations on the foundation of the rule, its application and the remedial tools.

The constitutive features of abuse are still matter of debate. It is disputed whether the existence of the objective element alone is sufficient, or rather a subjective requirement of liability is necessary. If so, the discussion particularly concerns whether liability implies the sole consciousness of prejudicing the legal sphere of others, or rather a *quid pluris*, consisting in the *animus nocendi*, is needed.

Even in systems where the prohibition has received explicit codification, such as Germany, Switzerland and others[15], the debate is not dormant but revived in light of its recognition in various fields of EU law.

This state of affairs raises further questions regarding its nature, the rationale behind it and, consequently, its "remedial aspect".

The attempt to provide some answers to the questions raised by this controversial phenomenon cannot be separated from an approach of a comparative nature, considering the large number of contributions on the subject in systems belonging to civil law practices.

It should however be noted, as will be seen below, that the different formants within each system accept abuse of rights in a markedly inhomogeneous way.

Furthermore, a thorough analysis of the issue must also consider the existence of prohibition of abuse of rights in EU law, which can be used as an instrument with a twofold purpose, i.e. to circumvent the internal laws of the single states or to obtain undue benefits resorting to EU regulations[16].

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[13] «Easily manoeuvrable, they allowed courts to expand or restrict at need the range of reasonable, and hence lawful, social and economic "uses" or "activities The facilitative role played by these rules is not to obscure their ideological function. As suggested earlier, emphasis on shared socioethical standards of "reasonableness" helped justify and naturalize changing notions of "permitted" uses of property, "legal" organized labor activity and "lawful" business competition, ultimately precluding alternative arrangements and different distributive outcomes». In A. DI ROBILAND, *Abuse of Rights: The Continental Drug and the Common Law*, at *htt://works.bepress.com.*

[14] See J.M. PERILLO, *Abuse of Rights: A Pervasive Legal Concept* (1995) 27 Pac. *L. J.* 37 at 40, who argues that abuse exists in the American legal system, and is «employed under such labels as nuisance, duress, good faith, economic waste, public policy, misuse of copyright and patent rights, lack of business purpose in tax law, extortion, and other». Similarly, A. GAMBARO, *Abuso del diritto, (diritto comparato e straniero)*, in *Enc. giur. Treccani*, I, Rome, 1988, 6, who argues that the blame and repression of abusive behavior of owners «..è presente anche nell'esperienza di *common law*, solo che essa si presenta nel capitolo della responsabilità civile e non in quello della proprietà». On the topic, see also P. G. MONATERI, *Abuso del diritto e simmetria della proprietà (un saggio di Cmparative law and Economics)* in *Diritto Privato*, Torino, 1997, III, 89 ff. More recently, the assumption was reasserted by E. REID, *The doctrine of abuse of rights: Perspective from a mixed jurisdition*, in *Electronic Journal of Comparative Law*, vol. 8.3 (October 2004), in *www.ejcl.org.*

[15] Cf. § 3

[16] Cf. § 5.

2. Due to its large number of contributions on the topic, the reference system for abuse of rights and the related prohibition is, without a doubt, the French model. Starting from the end of the nineteenth century, French scholars have devoted themselves to defining the phenomenon and finding a normative foundation for it.

Said speculative activity resulted in a number theories with the most varied contours, some of which, however, appear now to be outdated[17]. These include the theory which denies legal dignity to abuse of rights on account of the *contradictio in terminis* of the phrase itself[18].

In this regard, it has already been pointed out that the question seems to be wrongly formulated[19], in that it confuses two distinct aspects, i.e the legal recognition of the person's active position and its concrete exercise. In fact, the act committed within abuse of one's right cannot be considered compliant with it, inasmuch as it is outside the perimeter of its normal course; in other words, the abuse begins where the right ends[20].

Once recognized the legal dignity of the concept, it is useful to review the different theories of French scholars, in order to get to the fundamental core of prohibition of abuse and give it a juridical justification.

According to an early interpretation, the concept of abuse of rights responds to the need to compose a conflict of rights[21].

Abuse would arise from the unfair exercise of the powers constituting a right, eventually creating a contrast with other equally protected prerogatives. Such an interpretation has been subjected to harsh criticism[22], proving inadequate to explain the concept of abuse.

On closer inspection, it is an immanent requirement for any legal system to provide settlement of potential conflicts arising from right-based interests. Every relation between legal persons implies the existence of conflicting positions and legal rules are required to settle them.

It can then be argued that the conflict may represent the starting point of abuse or a revealing factor, but certainly not the solution to the problem of its systematic definition[23].

More in line with the divergence between the static moment of the right's recognition and the dynamic phase of its exercise is the theory that identifies abuse as an *exercice anormal du droit*, which has in Saleilles its main exponent[24]. The abnormality would consist, in the author's thinking, in the contrariness to the economic or social destination of the right, to be assessed exclusively in objective terms.

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[17] On the need to "relativize" some contributions, in light of almost half a century of studies on the subject, see G. ALPA, *op. cit.*., 247, who maintains that a good number of interpretative issues are now outdated, due to the change of context.

[18] See M. PLANIOL, *op.cit.*, 284.

[19] Cf. § 1.

[20] On the subject, see M. ROTONDI, *L'abuso del diritto. Aemulatio*, *op. cit.*, 18.

[21] As argued by M. DESSERTAUX, *Abus de droit ou confit de droits*, in *Revue trim. de droit civil*, 1906, 124 ff.

[22] Again, M. ROTONDI, *op. ult. cit.*, 25.

[23] According to M. MESSINA, *L'Abuso del diritto*, Naples, 2004, 86, who criticizes *Dessertaux*'s theory, abuse may be defined as «… una particolare forma di conflitto, dal momento che quest'ultimo non risulterebbe composto in una specifica norma scritta che già contenga in sé il criterio del bilanciamento».

[24] R. SALEILLES, *Étude sur la théorie générale de l'obligation dans la second rédaction du projet de code civil allemand*, Paris, 1985, 371 ff.

This last remark represents the strength of the concept at stake. The possibility of qualifying as "abusive" a behaviour that harms the legal sphere of others, purging it from any investigation aimed at ascertaining consciousness or also intentionality, means relieving the passive subject from the burden of proving the subjective element. The responsibility of the agent, based on purely objective parameters, actually translates into an anomalous use of the right, which does not comply with the criterion of "normal exercise" of its prerogatives.

It should also be noted that the "illicit" activity is often characterized by the formal respect of the *regola iuris*, however in violation of its content.

This discordance is at the basis of the interpretation of abuse as "misuse of purpose", which theorizes the split between the external compliance with the legal rule (i.e. observance of its limits), and the substantial transgression, determined by the pursuit of unlawful ulterior motives[25].

The *détournement de pouvoir* is a defect of form typical of administrative acts, attributable to excess of power - a jurisprudential creation - which condemns the unlawful activity of public administration[26].

Borrowed from public law, the concept was adopted by the exponents of said theory to describe abuse of rights as an activity that violates the function or purpose of the law conferring the right itself.

Although the idea of abuse as an activity that does not conform to the legal paradigm shows certain similarities to the "symptomatic figure" of "misuse of purpose", the juxtaposition of private subjective juridical situations to categories typical of administrative law presents evident criticalities.

In fact, it should be pointed out that misuse of purpose, as well as other concrete hypotheses falling within the excess of power defect, are all situations pertaining to administrative discretion and its actual exercise.

Unlike its *sensu stricto* bound counterpart, free administrative discretion presents a certain margin of autonomy in the issuing of administrative measures, although it is still obliged to serve a higher public purpose, which is considered to be a legal obligation[27]. Conversely, in the

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[25] The main exponents of this theory are M. HARIOU, *Précis élémentaire de droit administratif*, Paris, 1898, *passim* e E. PORCHEROT, *De l'abus du droit*, Dijon, 1901, 215. Such a theory is further investigated by F. GENY, *Méthode d'interprétation et sources en droit privé positiv*, Paris, 1919, *passim*.

[26] The *excès de pouvoir* was originally used as a technical tool to check complaints about incompetence and then to censor defects of form. Only later did the *Conseil d'État* apply the *détournement de pouvoir* as a new remedy tool for excess of power, starting with the *Pariset* case. In developing this notion, French courts have come to identify three types of *détournement de pouvoir*: a) the act does not serve any public interest; b) the act is adopted for a different public interest from that for which it should be issued; c) administration feigns the content of an act having a different end in order to evade some formal rules or to reduce certain guarantees. With the circulation of legal models, the *excès de pouvoir* was introduced in Italy through the law establishing the 4th Section of *Consiglio di Stato*. As a result of parliamentary debate, three distinct defects for administrative acts were identified in Italy: incompetence, violation of the law, excess of power. After a long scholarly process, the last one of the three, originally indicating an act detrimental to the powers of others, has come to signify "misuse of power", to which various symptomatic figures have been gradually added. Through the examination of French decisions, it can be noticed that the Italian practice has followed in parallel the transalpine approach of *détournement de pouvoir*. See, among others, E. LAFERRIÈRE, *Traité de la juridiction administrative*, I, Paris, 1896, 394 ff.

[27] The literature on the topic is vast. See, among others, G. AZZARITI, *Dalla discrezionalità al potere,* Padua, 1989; *passim*; L. BENVENUTI, *La discrezionalità amministrativa,* Padua, 1986, *passim*. M. S. GIANNINI, *Il potere discrezionale della P.A. Concetto e problemi,* Milan, 1939, *passim*; C. MORTATI, «Potere discrezionale», in *Noviss. Dig. It.*, Turin,

private law, the exercise of the right does not contemplate a power comparable to that of public authorities, especially in the "obligatory" dimension, typical of administrative measures.

As for application, it must be noted that French case law has also provided significant insights into the development of a theory on abuse of rights, mainly through the reference to art. 1134 of the *Code Civil*, which provides for the obligation of the parties to act in good faith[28].

The main, though not exclusive, area of interest, as will soon be shown, is property law.

The first case in chronological order is a 1855 decision of the Court of Appeal of Colmar in which the uselessness of a building is recognized, even within the legitimate exercise of the right of property, with consequent removal[29]. The decision states that the *ius utendi et abutendi* which characterizes property must entail in any case the pursuit of a serious and legitimate interest and not cause harm to others. A similar ruling was reached by the Court of Appeal of Lyon in 1856 on a case concerning waterworks[30]. But the most famous case is undoubtedly the *arrèt Coquerel/Clèment-Bayard*, ruled upon by the *Cour de Cassation* on 3 August 1915[31].

This was a truly singular decision in which the Court of Cassation opted for a reconciliation of opposing interests, recognizing however the abusiveness of a certain conduct. The matter concerns the owners of two neighbouring plots of land, one of whom used his property as a runway for airships. The other owner, in order to force the neighbour to purchase his land, built a fence with rows of eleven-meter posts ending with metal piles which had no other purpose, in actuality, than to inhibit the passage and the easy landing of airships, to the point that one of them was irreparably damaged.

Having brought the matter to trial, the court recognized the full lawfulness of the speculative purpose, since it the owner is entirely allowed to derive maximum profit from his land, but sentenced him to the removal of the metal piles and compensation for the damage caused through the illegitimate means used for the sole and exclusive intent to harm.

In addition to the property sector, the "abuse theory" is used in several other areas of private law.

Particularly in labour law, abuse of rights became a control instrument to verify the lawfulness, hence the lack of abusiveness of the employer's withdrawal from contract.

Subsequently, the creation of the principle of just cause and its legal transposition have made it unnecessary to employ it in such a circumstance.

1939, 76; ID, *Norme non giuridiche e merito amministrativo,* in *Stato e diritto,* 1941, 131 ff.; A. PIRAS, «Discrezionalità amministrativa», in *Enc. dir.,* XIII, Milan, 1964, 65.

[28] Which states «Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi».

[29] Colmar, 2 May 1855, in *Recueil Dalloz*, 1856, 2, 9. The matter concerns the construction of a faux fireplace that prevented light from reaching a neighbour's windows. This was an act of questionable "usefulness", as merely ornamental and objectively harmful to other people's rights.

[30] The case regards the existence of three water sources located on three plots belonging to different owners, but communicating underground. Canalization works made by one of the owners brought about considerable reduction in the water flow of the sources owned by the others, without an objective benefit for the first owner. In the absence of any real benefit, recognizing that the act was determined solely by the desire to damage the neighboring plots, the court invoked the general rule set forth in art. 1382 of the C*ode Civil* regarding non-contractual liability.

[31] *Coquerel/Clèment-Bayard*, in *Recueil Dalloz*, 1917, I,1917,705 ff.

Further application of the prohibition is found regarding the possibility of reviewing the exercise of the right to strike, if this is exercised for purposes that do not conform to the actual granting of the right, particularly for ambiguous and instrumental purposes.

Finally, the concept is particularly relevant in social law, with reference to the exercise of the right to vote in a meeting, if the right is thought to be used for the purpose of favouring a situation in clear contrast with the social interest[32].

3. While the French system, in the absence of any legislative declaration of prohibition of abuse, is characterized by a remarkable study tradition, stimulated in turn by a rich case law, paragraph 226 of the German Civil Code of 1900 (henceforth BGB) provides that the exercise of a right is inadmissible (*unzulässig*) if it has the sole purpose of causing harm to others.

Thus, if in the French practice the prohibition of abuse appears to be an unwritten *principle*, in the German legal system it *should* emerge as an unfailingly codified *rule*[33], to which the alleged cases of unfair exercise of rights should be referred.

The use of *should* is mandatory here. Indeed, this provision, which not only condemns abusive conducts explicitly, but also acquires wider significance as not exclusive to a specific sector of private law, has been basically ignored in actual application, to the point it remains a dead letter. Apart from a few sporadic cases, the rule is unfailingly disapplied today[34].

The reasons for the non-implementation of this legal prescription are probably to be found in its difficult application. In fact, the highly subjective connotation of the specific case, which in its formulation explicitly refers to «… the purpose of harming others», makes it difficult, if not impossible, to extend it to the majority of alleged cases, as its text seems to suggest. The difficult verifiability of the *animus nocendi* for evidentiary purposes could actually have been tempered by resorting to the mechanism of legal presumptions. This allows to infer, from the lack of objective usefulness of the act, the proof of the agent's subjective element[35]. However, the legislator being silent, the vicarious function of case law has modelled the concept of abuse in highly rigorous terms. The extremely faithful interpretation of the legal text has resulted, as an obvious consequence, abuse was very scarcely of recognized in all those cases sub-

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[32] With reference to such theories, see A. LAS CASAS, *Trattati essenziali del modello dell'abuso del diritto nei sistemi giuridici europei e nell'ordinamento comunitario*, in the same volume, July 2013.

[33] As in Switzerland, due to the general clause in art. 2 of the Civil Code of 1907, according to which anyone is obliged to act in good faith in the exercise of their rights and in the fulfillment of obligations, as the manifest abuse of their right is not protected by law. On the topic, see P. TERRIER, *L'abus de droit en droit privé suisse*, in M. ROTONDI (edited by), *Inchieste di diritto comparato*, Padua, 1979, 444 ff. Similarly in the Spanish system, in which the prohibition is codified in art. 7, paragraph 2, of the preliminary provisions of the civil code, as amended by the 1974 reform. On the topic, see M. ATIENZA - J. R. MANERO, *Illeciti atipici. L'abuso del diritto, la frode alla legge, lo sviamento di potere*, Bologna, 2004, 37 ff; J. CALVO SOTELO, *La doctrina del abuso del derecho como limitación del derecho subjetivo.* Madrid, 1917, *passim.* Art. 281 of the Greek Civil Code of 1946 also prohibits the exercise of a right that clearly exceeds the limits imposed by good faith or morality.

[34] Such a fact confirms the need, in the study of law, not to limit oneself to legislative provisions alone. This is one of the fundamental assumptions of the comparative method which, in following the third methodological rule, entails a cognitive analysis that draws on the totality of the legal sources of the single systems involved. It is rather common, in fact, that the apparent virtuosity of the *norma legis*, capable of elevating the model examined to paradigm, is contradicted by the practical application of the rule, thus creating discordance from the situation envisioned. It is worth mentioning R. SACCO, *Introduzione al diritto comparato*, Turin, 1990, 50 ff.

[35] Similarly, A. LAS CASAS, *op.cit.*, 23.

mitted to the examination of the judicial bodies, as falling within the provisions of paragraph 226 of the *BGB*.

This did not entail the expulsion of the specific case from the legal system, but it "forced" case law to search for other textual bases that would allow to censor the aforementioned phenomenon. Normative appendages have been identified in the rules laid down for non-contractual liability as well as those aimed at protecting good faith and fairness regarding obligations.

This refers specifically to paragraph 826 of the BGB, which provides for the obligation to compensate for the damage caused as a result of violation of morality, and to paragraph 242 on the general good faith clause[36].

The use of paragraph 826 has covered the alleged cases of intentionally caused damage, in violation of morality, albeit within the exercise of a right.

Case law in this area includes, for example, the case in which defects of form are claimed that would entail the nullity of the contract after accepting the opposing party's service, or if a right is exercised after such a long time that it has engendered in the counterparty a legitimate expectation regarding its non-exercise.

This particular situation is at the basis of the German theory of *Verwirkung* which legitimizes, in the situation described above, the other party's defence to paralyze the tardive exercise of the right through the alleged violation of the principles of fairness and good faith, in force in the relation[37].

Further applications, as in the French legal system, are found in the field property law, in neighbourly and social relations, any abusive behavior in the exercise of voting rights, which may harm the social interest.

In time, the recourse to paragraph 826 of the BGB gave way to the application of the good faith clause in paragraph 242, which regulates, in general terms, the fair exercise of rights through the prohibition of abusive conducts, i.e. committed with intentionally harmful purposes to the detriment of third parties.

Hence, after examining the situation, one fact emerges as clear: the discordance between the jurisprudential formant and the legislative one makes the German model a pretty far example from what one would have been expected at a first reading. In fact, while the code sets a precise *rule*, the highly subjective connotation of the very rule determines its substantial non-application and the consequent search for normative appendages by scholars which can justify the existence of the *principle*, considered applicable nonetheless, particularly through the use of the good faith clause.

4. One of the reasons that seemed to constitute an obstacle to the recognition of abuse of rights in the Italian legal system is the principle of legal certainty[38], whose applicability is to be found in the need to guarantee a non-arbitrary application of the law by judges. In truth, the absence of a codification of abuse of rights defining its extension and limits would have

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[36] On the topic, see, among others, F. RANIERI, *Norma scritta e prassi giudiziale nell'evoluzione nella dottrina tedesca del Rechtsmißbrauch* in *Riv. trim. dir. proc. civ.*, 1972, 1216 ff.; R. MÜLLER ERZBACH, *Der Rechtsmissbrauch. Sein Erfassen durch das kausale Rechtsdenken*, Italian translation, *L'abuso del diritto secondo la dottrina giuridica teleologica*, in *Riv. dir. comm.*, 1950, I, 89 ff.

[37] On the subject, see S. PATTI, *op. cit.*, 3.

[38] On the topic, see M. MESSINA, *op. cit.*, 111.

led to an excessive dilation of the judges' powers, resulting in further limits to the exercise of the rights, besides those explicitly established by law.

The checking of the various *facultates agendi*, carried out in the dynamic phase of the exercise, would have given the judicial bodies the possibility to establish what is supposed to be within the powers of the holders of the subjective rights and what is not, on account of being "abusive".

The absence of the *rule*, read through the lens of legal certainty, would have equalled the inexistence of the *principle*.

On closer view, the complaints made about the abuse/certainty relationship concern, on general terms, all cases in which the judge is required an interpretative activity, i.e. an expression of discretionary power.

According to the strict interpretation of the separation of powers principle, the judge is exclusively responsible for the application of the rule of law to a specific case through a mechanism that entails the mere subsumption of the concrete case to the abstract provision of law.

In fact, it is evident that such an operation necessarily involves an interpretative activity of a certain discretion, the extent of which is determined by the level of certainty and exactness of the legal case being assessed. Judicial discretion, in fact, is directly proportional to the generality and abstraction of the normative precept: the greater the indeterminacy rate of the formulation, the wider the autonomy reserved for the judgement.

Naturally, such discretionary power is not absolute, but lies within substantial limits which determine the various legitimate alternatives of judgement and impose the search for a solution compatible with the axiological principles of the legal system.

The supposed incompatibility between abuse theory and legal certainty is also strongly challenged on the assumption that, on the contrary, it is precisely the indiscriminate exercise of law, with no possibility of verifying its limits, which undermines the legal certainty of a system, leaving ample space for individual referees[39].

The initial denial of the phenomenon gives way, therefore, to the search for a *rule* in precise legislative provisions that legitimize its applicability.

The first rule identified by legal authors is art. 833 of the civil code regarding emulative acts[40]. Considered to be the expression of a principle of social solidarity between private individuals and a precept to follow for using property in compliance with the interests of the whole community, the provision has for years been a regulatory framework capable of justifying the existence of prohibition of abuse.

The provision stating that «the owner is not allowed to commit acts which have no other purpose than harming or harassing others», aptly sums up the idea of prohibition of an anomalous exercise of the owner's rights.

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[39] That is the view of U. NATOLI, *op. cit.*, 33.

[40] Being unable to provide an exhaustive list of bibliographical references, see, among others, M. ALLARA, *Atti emulativi*, in *Enc. dir.*, IV, Milano, 1959, 33 ff.; F. D. BUSNELLI - E. NAVARRETTA, *Abuso del diritto e responsabilità civile*, in *Diritto privato*, III, *L'abuso del diritto*, Padua, 1998, 206 ff; M. COMPORTI, *Contributo allo studio del diritto reale*, Milan, 1977, 264 ff.; A. GAMBARO, *Jus aedificandi e nozione civilistica della proprietà*, Milan, 1975, 45 ff.; ID., *Emulazione*, in *Noviss. Dig. It. (discp. priv.)*, Turin, 1991, 439 ff.; U. MATTEI, *La proprietà immobiliare*, Turin, 1995, 186 ff.; S. RODOTÀ, *Note critiche in tema di proprietà*, in *Riv. trim. dir. civ.*, 1960, 1268 ff.

It must be stated, however, that the wording of the rule, combined with its context of application (landownership) and the interpretative contribution of the jurisprudential formant, in spite of a far too extensive interpretation by scholars, have eventually determined the impossibility for the rule itself to constitute a starting point for the recognition of a general principle on prohibition of abuse of rights. In fact, similarly to the wording of paragraph 226 of the German Civil Code, the highly subjective nature of the specific case results in the considerable restriction of the provision's application scope. Following the principle *onus probandi incumbit ei qui dicit*, it is up to the victim of abuse to provide proof of the right holder's intention to harm.

In an attempt to mitigate the rigor of the subjectivistic approach of art. 833 of the Italian Civil Code, scholars have developed several theories, driven by the desire to provide a different reading of the legal text. According to one interpretation, the intention to harm does not imply a conduct aimed at causing damage, but rather expresses the mere awareness of detriment that accompanies the exercise of the right.

Borrowing concepts from penal law, the willfulness of the act should be replaced by the sole consciousness of the possible negative consequences of one's behaviour[41].

On the other hand, a different orientation, aiming at switching the assessing criterion for harmfulness to a more objective level, focuses on the "purpose of acts", considering some of them detrimental, regardless of a real intention to harm[42]. Unlawfulness should not be assessed with regard to the subjective element, but exclusively with reference to the scope of harmfulness of the act itself.

Although supported by the commendable purpose of allowing for less rigorous interpretation, the abovementioned theories do not conceal a certain "interpretative stretch", also evidenced by case law, which remains, in the application of the rule, definitely faithful to the legal text.

Even in a diachronic investigation, there have been several precedents in which the Supreme Court has always required the presence of the subjective element of *animus nocendi* as a conduct aimed at causing harm[43].

A further requirement that significantly conditions the extension of the rule is the reference «to acts that have *no other purpose* than to harm or harass». The literal interpretation of the provision implies that, for the purpose of the subsumption of the specific case to the abstract model referred to in art. 833 of the Italian Civil Code, it is necessary that the only motive for the right holder's behaviour is the will to harm, thus excluding cases where a benefit for the holder can be recognized.

Another – also rejected – interpretation suggested extending the precept's application scope to cases in which there was some kind of benefit for the owner, albeit lesser than the

[41] Not a conduct, therefore, supported by representation of tort and willingness to commit it, but a different psychological attitude characterized by the acceptance of the occurrence of possible negative consequences of a behavior bent on a legitimate purpose. On the topic, see G. FIANDACA - E. MUSCO, *Diritto penale* (*parte generale*), Bologna, 2005, 328 ff.

[42] See M. ALLARA, *op. cit.*, 35.

[43] On this matter, Cass. civ., 25 March 1995, n. 3558, in *Giur. It.*, 1996, I,1, 378, stating that «Cass. civ., 22 January 2016, n. 1209, in *Foro It.*, 2016, 3, 1, 842, stating that «… ai sensi dell'art. 833 c.c., integra *atto emulativo* esclusivamente quello che sia obiettivamente privo di alcuna utilità per il proprietario ma dannoso per altri».

harm caused to third parties[44]. This possibility would have implied a comparative assessment of damages and benefits leading to the application of art. 833 even in cases where the former were greater the latter. Case law has however rejected this theory on the assumption that «… per aversi atto emulativo, vietato dall'art. 833 c.c., è necessario che l'atto di esercizio del diritto sia privo d'interesse ed utilità per colui che lo compie e che sia stato posto in essere al solo scopo di nuocere o recare molestia ad altri[45]», recently reasserting that «… non è riconducibile a tale categoria un atto comunque rispondente ad un interesse del proprietario, non potendo il giudice compiere una valutazione comparativa discrezionale fra gli interessi in gioco o formulare un giudizio di meritevolezza e prevalenza fra gli stessi».

This brief analysis allows us to exclude that art. 833 may be indicated as a provision capable of justifying the existence of prohibition of abuse of rights as a general *principle*.

This is due to the definitory troubles of the legal text, so univocal as to leave no room for the various and commendable attempts of scholars to provide a reading that lies outside the landownership context. It is also due to the literal interpretation of case law, which does not allow for an application of the provision that could go beyond the context in question[47].

It is not surprising, therefore, that authors have looked elsewhere for a provision to which to prohibition of abuse should be traced, identifying it in the general clause of objective good faith[48]. A rule of conduct to conform to, having now risen to inspiring criterion for all property relations, it certainly presents a certain contiguity with abuse of rights. This similarity was also recognized by the jurisprudential formant, which used it as leverage to legitimize the existence of a general prohibition of abuse of right in the Italian system[49].

Particularly interesting in this respect is the ruling of the Court of Cassation 20 April 1994, n. 3775, also known as *caso Fiuggi*[50], in which good faith is defined as «… regola di governo della discrezionalità soggettiva», prohibiting abuse and granting the injured party a far more effective remedy than damages, that is, the termination of the contract.

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[44] Strongly supported by U. NATOLI, *La proprietà. Appunti delle lezioni* , I, Milan, 1976, 165.

[45] Cass. civ., 16 March 1996, n. 301, in *Mass. Giur. It.*, 1996.

[46] Cass. civ., 22 January 2016, n. 1209, on *www.italgiure.giustizia.it*.

[47] Among others, see Cass. civ., 17 October 1969, n. 3394, on *www.italgiure.giustizia.it.*, stating: «Non costituisce applicazione di un principio generale di divieto per il proprietario di compiere atti che non abbiano se non lo scopo di nuocere o recare molestia ad altri; pertanto la norma dell'art. 833 c.c. non può essere invocata fuori dal campo per cui è dettata e, in particolare, contro un condominio, il quale eserciti il proprio diritto di rivolgersi al giudice per far dichiarare l'asserita nullità di una deliberazione dell'assemblea dei condomini».

[48] U. NATOLI, *op.cit.*, 1958, 37 ff.; P. RESCIGNO, *op.cit.*, 13 ff.; S. ROMANO, *Abuso del diritto*, in *Enc. del diritto*, I, Milan, 1958, 168 ff.; S. PATTI, *op. cit.*, 2 ff.

[49] Among the numerous, and in some cases dated, judgements, see, for instance, Cass. civ., 15 November 1960, n. 3047, in *Mass. Giur. It.*, 1960 stating: « L'abuso del diritto non è previsto nel c.c. vigente come particolare figura di illecito. Peraltro, in singoli casi, con riferimento ai fondamentali precetti giuridici della buona fede e della rispondenza dell'esercizio agli scopi etici e sociali per cui il diritto è riconosciuto e concesso dall'ordinamento giuridico, l'uso anormale del diritto può condurre il comportamento del singolo fuori della sfera di esso in modo da costituire un'attività avente carattere di illiceità». See also Cass. civ., 23 July 1997, n. 6900, in *Mass. Giur. It.*, 1997; Cass. civ., 14 November 1997, n. 11271, in *Mass. Giur. It.*, 1997; Cass. civ., 31 May 2010, n. 13208, on *www.italgiure.giustizia.it.* Particularly interesting is the assessment of abuse of rights with reference to the breach of contract in Cass. civ., 31 May 2010, n. 13208, on *www.italgiure.giustizia.it*, stating: «

[50] For an account of the facts, see decision in *Foro Amm.*, 1997, 414 ff.

However, it should immediately be stressed that the two concepts should not overlap[51]: good faith is a criterion for assessing behavior among persons in the unfolding of their relations. Prohibition of abuse of rights concerns the relationship between the rule and the holder of the legal situation that the latter assigns to them. In other words, the dogmatics of abuse translates into the necessity for the holder to exercise their right in compliance with the provision.

It is obvious that, in assessing abuse, objective good faith plays a fundamental role, as it is a suitable clause to provide private individuals with a paradigm for good conduct, though it is imperative not to fall into the methodological error of considering one the product of the other.

On the contrary, it is believed that abuse of rights has an autonomous and broader conceptual dignity than that of good faith, as evidenced by the sanctioning response to abusive conduct, which emerges as quite diversified in character.

In addition to the classic compensatory solution which often accompanies the injunction and notifies the termination of the abusive conduct[52], case law has declared, as a remedial action, the termination of the contract being abused, as in the aforementioned *caso Finggi*.

Sometimes art. 1438 of the Italian Civil Code is invoked, according to which the threat to enforce a right - which is likened to the abusive use of the right – is cause for annulment of the contract if it is aimed at achieving unlawful benefits.

The *exceptio doli generalis* is also considered to be generally applicable. This grants its holder the possibility to oppose to a claim or defence of others which is abstractly founded, but is actually an expression of an unfair exercise of the right on which it is based.

Abuse of rights and good faith are, therefore, two contiguous but not coinciding phenomena[53].

The fact that it seems impossible to isolate a rule, or better, a single rule, to which the all the hypothesis of abuse of right can be univocally traced back, together with the absence of an explicit recognition of such a concept by the legislator, must not and cannot lead to denying its existence and applicability in the Italian system, as happened in the past.

A major role in the development of an "abuse theory" is surely played by art. 833, as well as by the general clause of good faith, and also by articles 2 and 3, paragraph 1 of the Italian Constitution on the principle of solidarity and formal equality in a constitutionally oriented reading of the phenomenon. The theory, however, does not lend itself to being confined within narrow boundaries.

On the other hand, it is commonly thought that its failed "positivization", i.e. the absence of a *rule*, ends up confirming the full applicability of the unwritten principle, which, on closer view, is able to express the phenomenological variety of abuse[54].

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[51] On the topic, see G. D'AMICO, *Recesso* ad nutum*, buona fede e abuso del diritto*, in *I contratti*, 2010, 22.

[52] This was born in the context of landownership as an action taken by the owner of the damaged plot to obtain the elimination of the causes of immissions in order to definitively ascertain their unlawfulness and to achieve the completion of the structural changes to the property to make them cease. It was then extended to other sectors such as consumer goods, protection of engineering works, unfair competition, etc.

[53] Similarly, judgement n. 20106 Cass., del 18 September 2009, in *Contr.*,, which has explicitly recognized abuse of right as a general principle in the Italian legal system.

[54] Particularly significant in this respect are the words of N. LIPARI, who argues that «In sostanza, il principio dell'abuso del diritto si proietta necessariamente nella complessità delle vicende applicative e quindi si sot-

Our brief analysis of the French and German legal systems also proves said assumption. Indeed, the former shows strong similarities with the Italian practice, while the latter, despite accepting prohibition of abuse in an explicit way, has resorted, in the application stage, to other rules to sanction the multiplicity of the potentially subsumable conducts of the specific case.

5. Once established that prohibition of abuse constitutes a general principle in most legal systems of the European Union, it is necessary to ask oneself whether the applies to the framework of EU law as well[55].

Before examining the issue, a clarification is necessary: since EU law is characterized by an eminently pragmatic nature compared to that of the single national models, a positive answer to the question cannot imply conceptual identity, but necessarily the enucleation of an autonomous and more complex notion than that of the individual states[56], considering the multi-layered level (internal and supranational) of protection of rights involved.

The starting point is represented by art. 54 of the Charter of Fundamental Rights of the European Union (also known as Charter of Nice) entitled *Prohibition of abuse of rights*, which reads: «nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognized in this Charter or at their limitation to a greater extent than is provided for herein». Truthfully, the text does not seem to correspond to the title, as there is no explicit reference to abuse, to which the provision is actually entitled. Nevertheless, the meaning is absolutely clear.

It should be noted that there are no written rules in Treaties that refer to abuse of rights[57], but with the enforcement of the Lisbon Treaty, the Charter of Nice has taken, from a formal point of view, the nature of multilateral treaty and, from a practical point of view, the same legal value as the founding Treaties of the European Union, becoming in actuality a primary source of EU law.

Rather than the "written" law of the EU, it is the "living" law of the Court of Justice of the European Union that we need to consider in order to identify all the arguments for an autonomous theorization of abuse of rights in "community" law.

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trae ad ogni ipotesi di formalizzazione. In chiave di teoria generale la riflessione non può essere diversa a seconda che l'abuso sia o meno sanzionato da un testo legislativo, proprio perchè, com'è stato giustamente osservato, l'abuso del diritto riflette la storia stessa di un problema di misura del diritto inteso… come insieme di ragioni coesistenti in un sistema». *Ancora sull'abuso del diritto. Riflessioni sulla creatività della giurisprudenza*, on *www.questionegiustizia.it*, fasc. 4, 2016.

[55] On the topic, see, among others N. BROWN, *Is there a general principle of abuse of rights in european Community Law?*, in D. Curtin, T. Heukels (edited by), *Essays in honour of Henry G. Schermers: Institutional dynamics of European integration*, II, Dordrecht, Boston, London, 1994, 511 ff.; S. CAFARO, *L'abuso del diritto nel sistema comunitario: dal caso Van Bisberger alla Carta dei diritti, passando per gli ordinamenti nazionali*, in *Diritto dell'Unione europea*, 2003, 291 ff.; R. DE LA FIERA, *Prohibition of abuse of (community) law: the creation of a new general principle of EC law through tax*, in *Common Market Law Review*, 2008, 395; M. GESTRI, *Abuso del diritto e frode alla legge nell'ordinamento comunitario*, Milan, 2003, *passim*; K. E. SORENSEN, *Abuse of rights in community Law: a principle of substance or merely rhetoric?*, in *Common Market Law Review*, 2006, 423 ff.

[56] The clarification is by G. ALPA, *op. cit.*, 247.

[57] Some believe, however, that the concept of abuse is referred to in art.4 par. 3 of T. F. U. E., which states that «The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union».

The examination of the cases covered by the CJEU shows that the notion of abuse of rights corresponds to at least three distinct types, notably a) the circumvention of state regulations through the instrumental use of powers recognized by EU law; b) violation of EU law through the factitious attribution of prerogatives deriving from it; c) the exercise of a right based on a community provision which however alters, in practice, its original purposes (the so-called abuse of rights in the strictest sense)[58].

As already mentioned, the theorization of abuse in EU law is unsurprisingly more complex than in national systems, considering the fields in which it was isolated – all regarding fundamental freedoms – and especially for the rather difficult harmonization between national and supranational rules.

Among the numerous precedents[59], the *Halifax* case stands out in fiscal matters[60], i.e. regarding the application of indirect tax regulations, in which the Court specifies the elements constituting a conduct considered abusive: «… For it to be found that an abusive practice exists, it is necessary, first, that the transactions concerned, notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and of national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions. Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage».

The Court clearly identifies three requirements, namely the merely formal compliance with a rule, the subject's reliance on the acquisition of an advantage resulting from the application of the rule, the violation of the purpose underlying the rule.

In what follows, the remarkably more pragmatic approach of EU law emerges. In fact, in requiring the substantial violation of the precept, the Court makes exclusive reference to contrariness to the purpose, without mentioning wilfulness or consciousness of undermining the legal positions of others. But there is more: for evidentiary purposes, the aim of obtaining an undue advantage must be inferred from *a number of objective elements* characterizing abusive conduct, regardless of the need to ascertain and prove the intention to circumvent the provision.

In full awareness of the difficulty to provide positive proof of the presence of *animus nocendi* or, more simply, the willfulness to violate the law, the Court of Justice considers a merely objective ascertainment to be sufficient for the recognition of abusive conduct. Failure to comply with the specific purposes of the rule which, in other legal systems, is seen as an indispensable subjective element for the emergence of abuse, may be induced, through a presumption mechanism, by objective elements indicating the unlawful conduct.

The reference to a case of abusive practices ascertained through eminently objective criteria is nearly a constant in most judgements of the Court of Justice in the various matters in which it has ruled[61].

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[58] On the topic, see F. LOSURDO, *Il divieto dell'abuso del diritto nell'ordinamento europeo*, Turin, 2011, 135 ff.

[59] See, for instance, judgement of 3 December 1974, case C-33/74, judgement of 5 October 1994, case C-23/93, judgement of 2 May 1996, case C-206/94, judgement of 19 October 2004, C-200/02, etc.

[60] Judgement of 21 February 2006, case C-255/02, on *https://europa.eu/european-union/law/find-case-law_it.*

[61] Reference is made to rulings regarding freedom of movement of services, freedom of settlement and movement of people, etc.

In the *Emsland Staerke GmbH*[62] it is restated that: «… finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved».

6. Prohibition of abuse of rights is therefore an *autonomous principle*, which is no longer possible to doubt[63]; it is fully effective in national systems as well as in EU law, where it emerges both as source and interpretative criterion, given the function of case law of the Court of Justice in light of which EU law sources should be interpreted[64].

The enucleation of the concept of abuse is not accidentally entrusted to the "creativity" of case law; it is not in the European context, in which the Court of Justice has played and continues to play a major role in the characterization of the phenomenon; it is not in the national systems such as Germany or Italy, in which judges have tried to fill the gaps of the law-maker being "too strict" in the former case and "absent" in the latter.

Actually, on closer inspection, it probably could not have been otherwise precisely with reference to a concept expressing not the static moment of granting a subjective right but the dynamic phase of its actual exercise. In fact, it is in its realization that the occurrence of the event and its legal qualification are welded in the search for the juridical enunciation or the principle to which the solution of the case is to be traced back.

Such a consideration makes it possible to reflect on abuse of rights from a different perspective, no longer grounded to the search for a legal paradigm according to the fitting and, perhaps too simplistic, subsumption of the concrete case to the abstract model: the constant complexity of juridical relations in which different, hardly predictable interests intertwine, imposes a kind of assessment that eschews schematic preconceptions.

We have already pointed out the inadequacy of qualifying abuse as a mere hypothesis of a tort concerning injurious damages, a paradigm that would mortify its remedial perspective. This does not mean accepting arbitrary solutions or broad evaluative discretion: it is obvious that any judgement remains confined to its respective legal framework.

Of secondary importance is also the failure to formalize abuse in punctual regulatory provisions in view of a rethinking of the very concept of legality, which does not necessarily arise from the emergence of an imposed precept and therefore from a *rule* of law, but also and especially from the necessity to engage in the exercise of the right, assessing it with reference to its impact on the whole of the interests at stake in the concrete case.

It is therefore totally acceptable to claim the inadmissibility of a conduct which, while complying with the normative framework of reference, is, however, illegitimate for its purposes[65].

Prohibition of abuse properly responds to the logic of the consideration of the right *in fieri*, in the witted statement that «behind all rules there is always a principle»[66].

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[62] Judgement of 14 December 2000, case C110/99, on *https://europa.eu/european-union/law/find-case-law_it.*

[63] In the *Centros* case, it is explicitly stated that «… the principle which prevents individuals from improperly or fraudulently taking advantage of provisions of Community law … is among the general principles of Community law». Judgement of 9 March 1999, case C-212/97, on *https://europa.eu/european-union/law/find-case-law_it.*

[64] In his respct, see G. ALPA, *op. cit.*, 253.

[65] In this respect, see the in-depth analysis of N. LIPARI, *op. cit.*, on *www.questionegiustizia.it.*

[66] A. GENTILI, *Il diritto come discorso*, Milan, 2013, 464.