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The Abuse of Right Principle in Japan and Germany

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Summary. The article "The abuse of right principle between legal certainty and case-by-case justice deals with the application practice of the abuse of rights principle in Germany and Japan. As an instrument for resolving tensions between written law and the cultural and moral ideas of Japanese judges, the concept was imported to Japan in the 19th century in the course of the westernisation of the legal system. In the beginning, German and Japanese application practices were naturally very similar, but as time and historical development progressed, the two application regimes increasingly diverged. The Japanese judiciary has retained the free and little-controlled application practice of the 19th century, while the German judiciary today controls the concept much more tightly. In practice, this means that the Japanese Supreme Court does not give the lower courts any formal guidelines on application, but rather seeks to prevent grossly arbitrary applications by classifying possible arguments. The German judiciary, on the other hand, developed a complex structure of so-called case groups. Case grouping means that arguments are not classified as in Japan, but rather the actual factual constellations are conclusively determined as admissible or inadmissible. Thus, after approx. 120 years of independent development in Japan and Germany, there are considerable differences between the application practice of the prohibition of abuse of rights, despite the same starting point. The reasons for these differences are multifaceted in nature; within the framework of this paper, it was primarily possible to identify historical factors in the form of experience with arbitrary justice, cultural influences in the form of community orientation in Japan and institutional reasons in the form of court organisation.
Keywords: Legal Theory, Comparative Law, Japanese Law, Civil Law, Legal History.

Piktnaudžiavimo teise principas Japonijoje ir Vokietijoje

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Santrauka. Straipsnyje „Piktnaudžiavimo teise principas tarp teisinio tikrumo ir individualaus teisingumo" nagrinėjama piktnaudžiavimo teise principo taikymo praktika Vokietijoje ir Japonijoje. Kaip priemonė įtampai tarp rašytinės teisės ir japonų teisėjų kultūrinių bei moralinių idėjų spręsti, ši koncepcija į Japoniją buvo importuota XIX a., vykstant teisinės sistemos vakarietizacijai. Iš pradžių Vokietijos ir Japonijos šio principo taikymo praktika, savaime suprantama, buvo labai panaši, tačiau laikui bėgant ir vykstant istorinei raidai abu taikymo režimai vis labiau skyrėsi. Japonijos teismai išlaikė XIX a. laisvą ir mažai kontroliuojamą piktnaudžiavimo teise principo taikymo praktiką, o Vokietijos teismai šiandien daug

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griežčiau kontroliuoja šią koncepciją. Praktiškai tai reiškia, kad Japonijos Aukščiausiasis Teismas nepateikia žemesnės instancijos teismams jokių oficialių taikymo gairių, o veikiau stengiasi užkirsti kelią šiurkščiai savavališkam taikymui, klasifikuodamas galimus argumentus. Kita vertus, Vokietijos teismai sukūrė sudėtingą vadinamųjų bylų grupių struktūrą. Bylų grupavimas reiškia, kad argumentai neklasifikuojami kaip Japonijoje, o galutinai nustatoma, faktinės aplinkybės yra priimtinos ar nepriimtinos. Taigi po maždaug 120 metų nepriklausomos raidos Japonijoje ir Vokietijoje draudimo piktnaudžiauti teise taikymo praktika, nepaisant to paties pradžios taško, labai skiriasi. Šių skirtumų priežastys yra daugialypės; šiame straipsnyje pirmiausia buvo nustatyti istoriniai veiksniai, pasireiškiantys savavališko teisingumo patirtimi, kultūrinė įtaka dėl orientacijos į Japonijos bendruomenę ir institucinės priežastys, pasireiškiančios teismų organizacija.
Pagrindiniai žodžiai: teisės teorija, lyginamoji teisė, japonų teisė, civilinė teisė, teisės istorija.

Introduction

The connection between law and morality is one of the most discussed problems in legal science and theory. One problem to be placed in this context is the use of rights by the individual that is harmful to society. In principle, everyone is free to exercise their rights as they please; no separate social justification is required beyond the mere legality of the action. This basic idea is consistent with the Enlightenment concept of subjective law, through which the individual was to be emancipated from society in the exercise of his or her rights (Vesting, 2019, pp. 17ff; Savigny, 1840, p. 53). Even today, it corresponds to the elementary principle of private autonomy that the individual does not have to morally justify himself to the state, society or his counterpart in the justification and exercise of his rights. However, this focus of the legal system on the subjective desires of the individual, in combination with the necessary generality of the laws, creates situations in which the solution to a problem prescribed in the law places the selfish goals of an individual above societal norms in such an obvious way that the legal system cannot accept it.

This is where the so-called prohibition of abuse of rights comes into play as a legal-ethical corrective to be applied in individual cases, which is superior to all civil law and can be used to prohibit the abusive exercise of a subjective legal position. In essence, this is a gateway for social normative ideas into the law in the form of a "negative self-reference" (Guski, 2021, p. 19f). This prohibition of the abuse of rights is not only of great interest theoretically, but also practically. Precisely because of its superiority over any civil law norm, the principle creates a risk of a lack of legal certainty. The expectability of judicial decisions is an elementary component of a functioning legal system, so that a tension arises here between the generally recognised need for a social corrective and legal certainty. Since the application of the prohibition of abuse of rights is incumbent on the courts, which could in principle examine in every civil law case whether a party's conduct was abusive of rights, it seems sensible to look at the practice of the courts for an analysis of the trade-off between individual case justice and legal certainty in a particular legal system. This paper will look at the particularities of the implementation strategies of the principle in Japan and Germany and compare them. This approach is appropriate because the principle of abuse of rights, in its function as a superordinate corrective, must necessarily also refer to values and ideas that are superordinate to individual laws. In this sense, the comparative analysis of the application practice makes it possible not only to gain a deeper understanding of the rather fuzzy principle, but also to draw conclusions about the legal culture in which the principle exists. In a first step, the history of the implementation of the principle as well as the cultural foundations in Germany and Japan are presented, in order to compare contemporary approaches to the application of the abuse of rights principle in Germany and Japan in a next step.

1. The abuse of rights principle in Germany and Japan

1.1. History of the abuse of rights in Japan

1.1.1. Westernisation of the legal system

In the Tokugawa period from 1600–1868, there were no civil courts in Japan; village communities were expected not to trouble the state with civil disputes, but to resolve them within the framework of the community affected by the dispute (Hirano, 2021, pp.15f). The resulting strong orientation towards compromise and community orientation can still be observed in parts of Japanese society and law today. With the Meiji Restoration of 1868, however, the Japanese government saw itself forced to import elements of Western legal systems, among other things, in order to "catch up" as a state with the European colonial powers (Baelz *et. al*, 2022, p. 4). These elements included the adoption of codified civil law based on the Franco-German model. In adopting civil law from Europe, however, Japanese jurists were confronted with the challenge that the very basic idea of subjective rights would mean a paradigm shift in Japanese law. In fact, there was not even a word for them in the Japanese language, so the neologism "kenri" had to be created (Sokolowski, 2010, p. 112). This paradigm shift in Japanese law, however, did not come without criticism; some authors saw it as a departure from the communitarian principles of Japanese culture and feared a division and atomisation of society through an extreme subjectification of legal positions (Harashima, 1985, p. 27). Although these very fundamental concerns did not prevail due to the practical necessity of adopting Western legal ideas, there nevertheless remained a fundamental unease against an overly egoistic exploitation of the new emancipation of the individual against society. Perhaps also because of this general unease, it did not take long for the first case of abuse of such a position to be established by a court. The much-discussed Hatakematsu case marks one of the first known applications of the principle in Japanese law (Fujioka *et al*, 1975, p. 1037). However, this case dealt with the liability of the Japanese state to a private citizen, so the principles developed by the competent court in this case could not be easily applied to civil law as a whole. Nevertheless, this case, along with other subsequent decisions, provided the dogmatic basis for the development of the general principle of abuse of rights in Japan by recognizing the fundamental idea of value-based restrictability of subjective rights. The inspiration for the figure of abuse of rights comes directly from Europe, with Japanese authors mostly pointing to Germany as a source (Hirano, 2021, p. 342). This also makes sense, since the abuse of subjective positions was not originally a Japanese problem, but also had to be solved academically and legally in Europe. At that time, however, abuse of rights as a legal category had not yet been codified in the Japanese Civil Code but was merely recognized as a judicial development of the law (jap: hôri) parallel to the principle of good faith (Uchida, 2011, p. 488).

1.1.2. Recognition of the abuse of rights

At this point in time, when the interest of Japanese jurisprudence in German law had reached its peak and the above-mentioned decisions had created a fruitful basis for a far-reaching implementation of the principle in Japanese law, the Japanese courts received a case that still plays a central role in Japanese legal education as a textbook case for the principle of abuse of rights. This so-called "Onsen case" from 1935 (hanketsuminshû vol. 14, p. 1965) will be presented (simplified) below for the purpose of illustrating the principle.

> *A woman A had been running a hot spring (onsen) including a hotel in a small Japanese town for many years. In order to get water for the said hot spring, a water pipe was laid under the*

neighbouring property when the onsen was put into operation. This pipe was not approved by the owner of the neighbouring property, whether he knew about it when the pipe was built could not be clarified. The pipe ran under a part of the property that could neither be walked on nor built on and was worthless for any kind of use. Investor B learned about the situation with the pipe and then bought the land from the woman's neighbour at the usual market price. He then approached A and offered her the said land for 10 times the market value. When she refused, B threatened to sue her for the removal of the water pipe. If A were forced to remove the pipe, this would not only destroy her business due to the enormous costs involved but would also cause great harm to the village community by closing the hot spring. Therefore, A continued to refuse to buy the neighbouring property and B filed a lawsuit.

The deciding court was now confronted with the problem that although the B had a claim to the removal of the pipe under applicable Japanese law, the court considered the B's claim to be highly immoral when looking at the situation as a whole. This is where the court came in and applied the principle of abuse of rights to a problem of general civil law. Argumentatively, the court first found that the claim existed in principle. Afterwards, however, the court explained that even a claim that exists can be abusive and thus inadmissible due to objective and subjective factors in the overall view of the circumstances. In the context of the objective factors, the court first focused on the economic disproportionality of the claim. The land overlying the pipe was completely worthless to the B, and on the other hand the A would incur enormous costs to remove the pipe. Furthermore, in this category of argumentation, the court also argued that the negative effects of the claim on the village community were unacceptable. In a final step, the court also based the application of the abuse of rights principle on subjective factors. Here, particular attention was paid to the fact that the B had "obviously" only acquired the land to put pressure on the A with his claim. Although the B's conduct was not technically punishable, the law could not put itself at the service of injustice.

1.1.3. Post-war history

Following this landmark ruling, the principle was codified in Article 1 III of the Japanese Civil Code after the Second World War, whereby abuse of rights as such is mentioned and prohibited here. Interestingly, contrary to the original draft of the law, which only provided for good faith (Article 1 II JCC), the norm on the prohibition of abuse of rights was introduced at the behest members of the Japanese lower house. The reason for this was that the principle was understood less as a danger to legal security than as a protection of the small citizen against the machinations of the state and large landowners (Minutes of the Committee for Judicial Matters, no. 50, 27.10.1947). This positive attitude towards the idea of abuse of rights can still be found in Japanese jurisprudence and practice today. The principle enjoys great practical popularity, especially in the lower courts. Despite the codification of the principle after the Second World War, the courts have essentially adhered to the European-inspired line on the application of the abuse of rights principle established by the Onsen case to this day. In particular, the strict separation of objective and subjective factors has also been maintained, although it is disputed in the literature whether both factors must be present cumulatively or alternatively (Nômi, 2022, p. 48). There are only trends in case law; for example, Japanese legal scholars observe that in recent years the influence of objective factors has risen in court arguments, i.e. in particular the disproportionality of the claim to the economic damage caused by it (Nômi, 2022, p. 46). The mostly unrestricted use of the legal figure has also been maintained, so the discussion about an "abuse of the abuse of rights" has never really taken root in Japan. The application is free primarily because Japanese courts can only rely on established objective and subjective factors; no

further (formal) legitimisation is necessary for an application (Yoshida, 2007, p.50). Japanese textbooks and commentaries mention the "minor self-interest" as a relevant case-group, but always point out that it is the effect on society and general considerations that matter most in the application (Wagamatsu, 2021, p.21). In some cases, it is even pointed out that the formulation of preconditions for such a principle would be superfluous anyway (Matsuoka, 2012, p. 7). On the level of legal theory, the abuse of rights is discussed in a similar way to the other general clauses in Japanese theory from the point of view of the legal act as a value judgment (Kawashima, 1962, p. 129). Overall, Japanese jurisprudence and justice seem to believe the principle of abuse of rights is essentially a problem of the courts and therefore a theoretical analysis or criticism is not appropriate from the outset.

2. History of the abuse of rights in Germany

2.1. The codification of German civil law

Although the discussion on the abuse of rights as a legal ethical restriction of subjective law in Germany can be traced back in parts to the Middle Ages (Ranieri, 2009, p. 1083), the first discussions of interest to today's methodology were held at the time of the creation of the first German civil law codification, the BGB (Haferkamp, 1995, p. 85ff). Since the aim of this codification was to unify the entire civil law for the newly unified Germany, this also raised the question of whether and to what extent general legal principles that had been recognised inconsistently by German courts for a long time should be transferred to the common law. At that time, it was particularly contentious whether and how abuse of rights, as a figure that had been recognised in rudimentary form in case law since the 19th century, was to be integrated into the new code (Haferkamp, 1995, p. 124). This debate overlapped to a large extent with the question of social justice; not unlike the considerations of the Japanese parliament after the Second World War, socialist legal scholars in particular pleaded for such a general clause to curb abuse of the new civil code by rich large landowners (Merger, 1890, p. 65; Gierke, 1889, p. 22). In addition, there were also nationalist tendencies in the form of the assertion of a dichotomy between the egoistic Roman law and the community-oriented Germanic understanding of law (Haferkamp, 1995, p. 56). In this respect, the parallels to Japan are already apparent, since there, too, the actual Japanese culture was set against the cold and egoistic Western standards. In the end, it was decided not to include the principle in the law, fearing in particular that judges might abuse a principle that was formulated too generally (Haferkamp, 1995, p. 130). However, this strategy of the legislator was completely and decisively ignored by the courts. The wording of §242 BGB, which was codified into the law, only regulated good faith: *An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.*

The German courts after the creation of the BGB ignored the express wish of the legislator to regulate only the principle of good faith with this paragraph and interpreted it contrary to the clear wording to also include the principle of abuse of rights (Eichenhoffer, 2019, p. 104). In the following years, the Reichsgericht applied the principle freely and developed basic principles, parts of which have survived to this day. Likewise, a tendency emerged at this time to ignore the theoretical debates to a large extent and to understand the principle as the sole area of competence of the courts (Eichenhoffer, 2019, p. 157).

2.2. National socialist abuse

The next big step was taken by the principle of abuse of rights in Germany during the National Socialist era. Without delving too deeply into the subject, the judiciary under National Socialism was

characterised by a very extensive interpretation of general clauses for the purpose of achieving legal results that were in line with National Socialist ideology. This was particularly necessary because the National Socialist party did not manage to create its own ideological civil code during its 12-year rule, but had to rely, at least formally, on the rules of the BGB, which is still in force today (Schroeder, 2016, p. 7). The principle of the prohibition of abuse of rights was of particular interest to the courts here, as National Socialist jurists took pains early on to reinterpret quite fundamental legal concepts, which in turn provided the courts with an argumentative line on how they could effectively apply principles such as abuse of rights in line with National Socialist ideology. One example of this is that the application of the clause prohibited Jewish people from invoking rules of tenant protection. This was justified, among other things, with one of the most infamous legal quotations of the time: *"A comrade in law is only who is a national comrade, national comrade is only who is of German blood"* (Larenz, 1935, p. 21).

If, according to this logic, Jewish people could not be of German blood, then an appeal to the (generally applicable and non-discriminatorily formulated) German law on protection against tenancy termination would be abusive and should be rejected. This and other repugnant excesses of application make it clear what devastating effect general clauses such as the abuse of rights can have. As a principle above civil law as a whole, rulings could be freely adapted to National Socialist ideology without the need to change the law at all.

2.3. Post-war history

Against the backdrop of this arbitrary political justice, the Federal Supreme Court made it its task after the fall of the Nazi regime to put the dogmatics of the abuse of rights back on the ground of the rule of law. This clear departure from the abuse of the law is also reflected in jurisprudential literature. In the popular German commentary on the BGB, the Palandt, the same author who, even before the fall of the Nazi regime, emphasised the importance of the free application of the abuse of rights, wrote that a control by judges in the application was necessary (Haferkamp, 1995, p. 318). The newly founded Federal Supreme Court constructed this control in application via the concept of case group, the most important case groups being the prohibition of contradictory conduct and forfeiture (Guski, 2021, p. 186). Case groups refer to defined constellations of facts in which application is possible. The principle cannot therefore be applied in every case; rather, in addition to value-related criteria, there must also be factual circumstances that fit into a case group recognised by the Federal Supreme Court. The rulings based on the principle of abuse of rights and the dogmatics all act in this respect in relation to case groups, whereby general equity considerations of social acceptability are not part of the methodology (Grueneberg, 2023, p. 268). This practice also reflects current theory in Germany, which particularly emphasises the importance of case groups to avoid arbitrary judgments (For example BGHZ 204, 145, 147).

3. Comparison of contemporary methodology

The compatibility of law and social-moral concepts is a problem that transcends countries and legal systems, with the principle of the prohibition of the abuse of rights representing one aspect of this problem. Japan and Germany, as legal systems, have developed different approaches in theory and practice to deal with the problem of the community-damaging use of law. It is interesting to note that Japanese dogmatics in this respect has at least been formally influenced by German dogmatics. For example, even the German terms Schikaneverbot (prohibition of harassment) and Generalklausel (general clause)

are either phonetically translated into Japanese or presented in Latin script in the Japanese text in some contributions on the abuse of rights (Anniversary Committee, 1962, p. 287). This close connection of dogmatics makes it possible to analyse the principle comparatively. It is particularly interesting to look at today's methodology against the background of this different development. The principle of the prohibition of abuse of rights enables the courts in Germany and Japan, at least in principle, to allow extra-legal considerations of a cultural and social nature to flow into the administration of justice. However, the way Japanese courts deal with the tension between justice in individual cases and legal certainty differs considerably from the approach of German courts.

3.1. Conditions of application

a) Conditions

The requirements for the application of the principle are the biggest factor in limiting judicial arbitrariness and preserving legal certainty. By setting limits on judges' application of the free principle, the risk of arbitrary judgments can be reduced the more stringent these requirements are. German legal practice developed the case groups explained above for precisely this purpose after the Second World War. Although case groups in other areas of German law primarily serve to structure arguments, in the dogmatics of abuse of rights the case groups have been elevated to a requirement of the facts, the transgression of which means an error of law that must be overturned on appeal. In practical terms, this means that in order to apply the principle in Germany, a court must prove two things by argument, firstly, the existence of a factual constellation recognised by the Supreme Court and, secondly, why this constellation is more unfair than normal in this specific case (Grueneberg, 2023, p. 262). Using the example of contradictory conduct as the most important of the case groups, this means that a court must first establish that one of the parties has contradicted its own previous conduct. This may be the case, for example, if a party pretends to be an entrepreneur during contract negotiations and then invokes norms of consumer protection law after the conclusion of the contract. After this factual finding, it must additionally be argued why this contradictory conduct was particularly disloyal or immoral. Through this type of limitation, the Supreme Court can control the application of the lower courts via the construction of limits and prerequisites of the case groups and prevent an excessive moralisation and ideologisation of the principle of abuse of rights.

The Japanese judiciary does not recognise any such formal prerequisites for application. None of the rulings of lower courts uses the legitimising intermediate step of a group of cases in the argumentation; rather, the cases of application are spread over a variety of nonexclusive factual constellations (Nômi et. al, 2021, p. 50-55). The Supreme Court of Japan also very rarely overturns applications of abuse of rights and never because any formal requirements were not met (Yamamoto, 2022, p. 17). In this respect, the application in this first step of the examination is much freer and more flexible in Japan. Interestingly, this corresponds to the customary application of abuse of rights in Germany (and France) in the 19th century – i.e. at the time of importation to Japan (Eichenhoffer, 2021, p. 37; 100).

b) Reasons for exclusion

However, a negative application requirement or ground for exclusion common to Germany and Japan is the principle of *lex specials*. According to this general legal principle, the application of a general norm is prohibited if a more specific norm covers this case (Bydlinski, 2023, p. 465). Two exclusion scenarios can be distinguished here. First, the abuse of rights in its general form is excluded if special rules for certain sub-areas of the law or individual constellations specifically and more explicitly regulate the abuse of rights for these than do the general principles in Art. 1 III JCC or §242 BGB. For example,

there are rules in Japanese labour law that specifically prohibit the "abuse of the right of termination". In these cases, application of the more general principle would be redundant (Koga, p. 4). This group also includes rules that conclusively regulate the abuse of rights in certain constellations, such as rules in German property law that regulate a neighbour's obligation to tolerate only a slight overhang onto a property. The second group consists of norms that determine a case-by-case consideration, which is not identical to the abuse of rights, but covers its function as a case-by-case corrective. These include, for example, the German rules on protection against dismissal, which, unlike in Japan, are not directly classified as an abuse of rights, but nevertheless give the judge the opportunity to include the circumstances of the individual case in the assessment (Grueneberg, 2023, p. 264). In such cases, the necessary corrective function of abuse of rights is already fulfilled by these standards, and recourse to the general construct is thus unnecessary. Although these grounds for exclusion are relevant for practice, they rather serve to place the principle systematically correctly in the legal system.

3.2. Consideration of equity

Another important point in limiting the principle of abuse of rights is the regulation of the balancing methodology, or the limitation of the permissible application arguments. German case law, once the hurdles of the formal requirements have been overcome, argues relatively freely in the actual balancing. The higher courts only require that the explanations on the injustice in the individual case show a reference to the respective case grouping. Thus, if it is to be argued why a constellation of contradictory conduct is in breach of trust and thus abusive of the law, the court's arguments must be based on the trust built up by the defendant in the plaintiff's prior action; explanations about disproportionality, on the other hand, would be inadmissible, for example, as they refer to the other case group of "gross disproportionality". The clear division according to case groups is thus also carried through to the actual individual case-related balancing by dividing the possible factors of the individual case assessment together with the case groups. The considerations of Japanese courts are even freer in the way, that only a classification of arguments in objective and subjective categories is necessary. This provides the bare minimum of control, as overt considerations of personal opinion are excluded (Yoshida, 2009, p. 51).

3.3. Reason for the different evolution

a) Cultural and historical differences

As already indicated above, one reason for the much stricter restriction of the principle in Germany is the historical experience with arbitrary justice under National Socialism. Although coming to terms with the National Socialist influence on the law in Germany leaves much to be desired in places, the abuse of general clauses in particular had left a deep wound in the consciousness of the German judiciary. The fact that case groups developed immediately after the Second World War as a strong formalisation and restriction of the principle of abuse of rights testifies to the fact that this methodology, which is still valid in Germany today, was strongly influenced by this idea. In this respect, too much freedom of the judge in applying the law tends to be eyed with suspicion, as contemporary essays on this topic also show (Hirsch, 2007, 230–235). This kind of historical awareness is lacking in Japan. Although there is a discussion on the abuse of the law (kenri no ranyô no ranyô), this is methodologically rather than historically based (Rahn, 1990, 107). The reason for this may be that the reappraisal of the fascist dictatorship in Japan is very weak overall. For this reason, the fear of arbitrary and ideologising judges does not exist to the same extent as in Germany since social awareness of the horrors of the war years is generally weaker than in Germany.

On another level, the Japanese judiciary's formally open approach to the principle could also have cultural reasons. In research on Japanese law, there has long been the idea that the law imported from Europe in the 19th century was unable to gain a proper foothold in the social reality of Japan. According to this view, Japanese culture is much more oriented towards harmony and community than Western cultures, which is why a legal system based on subjectively enforceable rights against the community could only be adopted with modifications This could be demonstrated, for example, by the very low number of court disputes in Japan (Haley, 1978, p. 377). From this, one can conclude that a general clause such as abuse of rights allows courts to transport cultural ideas – namely community orientation – into what is perceived as rather foreign law without calling the system as a whole into question. In this sense, in the case of Japan, the abuse of law could be understood as an outlet through which the Japanese judiciary can absorb communitarian ideas of community life into the Western-structured legal system. This also fits in with the above insight that, in addition to minimal formal prerequisites for application, the balancing process itself, about the balancing arguments, tends to demand a view of the overall situation rather than divide considerations into different groups. If one follows this explanatory approach, it makes sense why the application methodology was not formalised too much, since, in contrast to Germany, the focus is less on the fear of arbitrary judgment, but rather on the flexibility and the justice-creating function of the principle.

b) Institutional reasons

The explanation of legal phenomena solely by cultural factors bears the danger of an essentialist over-simplification of reality. Therefore, in addition to the historical reasons mentioned above, institutional reasons must also be analysed. In particular, the court structure of Germany and Japan should not be neglected when comparing the two concepts of application. The highest instance for reviewing civil law decisions in Germany is the Federal Court of Justice (Bundesgerichtshof), which maintains legal unity in civil law with 13 benches and a total of 104 judges. This is contrasted on the Japanese side by the Supreme Court, where 15 judges in three senates not only act as the highest civil court but also have to adjudicate on criminal, administrative, and constitutional law. This extreme imbalance becomes even more striking when one considers that Japan has a population about 50% larger than Germany. It follows from this imbalance that the Japanese Supreme Court does not have the organisational capacity to maintain a complex internal system of the abuse of rights principle. Thus, in the last 10 years, the Japanese Supreme Court has adjudicated 8 cases on abuse of rights, while the German Federal Supreme Court has adjudicated approximately 500 cases. The fact that the German Federal Supreme Court has the organisational possibility to evaluate a multitude of constellations, to classify them in the system or to reject them, creates the possibility to demand the formalistic and highly complex structure of the application in the first place. In contrast, the Japanese Supreme Court cannot, in purely practical terms, impose the same requirements of a complex case group system on the lower courts, as it does not have the capacity to effectively enforce them. Therefore, it stands to reason that only cases that either belong to new areas of law or concern completely new constellations can be decided in order to provide the lower courts with rough guidelines for balancing.

Conclusions and evaluation

The above research has shown that although Japan and Germany had the same starting point, namely the 19th-century European doctrine of abuse of rights, current application practice differs greatly. German practice, as a result of National Socialist arbitrary justice, is highly formalised and thus strongly

emphasises the aspect of legal certainty, to the detriment of flexibility. The Japanese judiciary, on the other hand, applies the principle rather freely, whereby this is based both on practical constraints of the Japanese court organisation and on cultural aspects of the community orientation of Japanese society, which is difficult to map in modern legal systems. In comparative jurisprudence, evaluations must always be handled with caution, which is why no opinion is expressed here as to which system is "better" or "worse". With regard to the question of weighing individual case justice and legal certainty, however, it can be said that the Japanese system places much more emphasis on the aspect of individual case justice, while the German judiciary is more concerned with legal certainty. The advantage of the Japanese system is that the original purpose of the principle can be realised with a free application, while the advantage of the German system lies in a stronger reviewability and the avoidance of arbitrary judgments. Conversely, a disadvantage of the German system is that the actual fiction of abuse of rights as a single-case corrective could possibly be limited too much by very strong restrictions, as this makes it difficult to react effectively to new constellations. The disadvantage of the Japanese regulation, on the other hand, is that the prevention of an abuse of the principle practically only works based on trust and through implicit restrictions; to this extent, there could be a greater risk of abuse of rights here.

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