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Abuse of Rights in Dutch Law

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ABUSE OF RIGHTS IN DUTCH LAW

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I. Abuse of Rights in Civil Law

A. Preliminary Observation

1. *The Semantic Question*

"Abuse of right" is a *contradictio in terminis*, if Planiol was right when he wrote that a right ends where its abuse commences. This statement is not necessarily correct: it depends on the actual consequences which the law attaches to the abuse of right, whether abuse of right is equivalent to acting outside its limits and, therefore, without it. If Dutch law would go no further than obliging him who abuses his right to pay damages, at the same time recognizing that he exercises his right, then abuse of right would not be equivalent to acting without right.[1]

A survey of cases concerning abuse of right shows convincingly that Dutch courts deal with abuse of right as a behavior without right. This is illustrated by judicial decisions which dismiss legal actions, based on an existing right, on the ground that the plaintiff abused his right and, therefore, exceeded its limits.

A case in point is the decision of the Amsterdam District Court, *Rechtbank Amsterdam*,[2] concerning a leaning wall. The neighbor demanded its removal on the sole ground that it leaned over his land. This claim was dismissed, although the court found that the fact that the wall was leaning constituted a tort and entitled the neighbor to damages. Commentators pointed out[3] that the dismissal of the plaintiff's claim for demolition of the wall cannot be explained by the law of torts and was, in fact, an application of the doctrine of abuse of right. The neighbor could rightfully complain of the fact that the wall leaned over his land, but apparently his right did not stretch so far that he could successfully sue for its demolition.

Abuse of right is not just a tort, but is exceeding the limits of the right;

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1. This was pointed out by F.G. Scheltema, *Misbruik van recht*, W.P.N.R. (*Weekblad voor Privaatrecht, Notarisambt en Registratie*) 3417 (1935) [hereinafter cited as Scheltema].

2. N.J. 1915, no. 817.

3. Scholten, *Uitbouw en bouwen over de erfscheiding*, W.P.N.R. 2550 (1918); Scheltema, *supra* note 1, at 3419.

this means that the existence of the right can no more justify the behavior than would be the case if the right did not exist at all. Abuse of right may amount to a tort, but this depends on the further question whether the interests of others are harmed in a manner which is characterized as tortious. The aforementioned decision of the Amsterdam Court is a good example of a case in which the abuse of right did not at the same time amount to a tort.[4]

In Dutch law, as applied by the courts, there is overwhelming evidence for the proposition that "abuse of right" is an excess of right, instead of the reprehensible (abusive) exercise of a right.[5] Nevertheless, there is widespread agreement among commentators that, for certain types of cases, "abuse of right" aptly describes what is meant,[6] even if the expression may be incorrect. The *Hoge Raad* (Supreme Court) has accepted the expression as a technical term,[7] and there can be no doubt that the expression is here to stay.

2. *When the Question Arises*

It seems a truism to say that an act not based on a right should be treated by the law as just that. It is, however, too simple to conclude from this that the doctrine of abuse of right can and should be dispensed with.

The essence of the doctrine is[8] that certain behavior can only be branded as an abuse of right, when it initially and prima facie appears as the legitimate exercise of a right. Only in closer examination, when the interests of others are taken into account, does doubt arise whether what appeared to be exercise of a right, did not in fact exceed its limits. Therefore, the question will not arise, when the act is clearly illicit, and where no one would think of it as the legitimate exercise of a right. This explains why no cases are found, in the Netherlands or elsewhere, in which firing a shotgun in a crowded market place was qualified as an abuse of the right to have a

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4. The fact that abuse of right is not necessarily equivalent to the committing of a tort is sometimes overlooked by Dutch commentators. *Cf. e.g.*, 3 ASSER-RUTTEN, DE VERBINTENIS UIT DE WET 65 (4th ed. 1975); 2 EGGENS, VERZAMELDE PRIVAATRECHTELIJKE OPSTELLEN 70, 74 (Alphen 1959) [hereinafter cited as EGGENS].

5. To my knowledge, only once has a Dutch court (*Gerechtshof 's-Hertogenbosch* April 24, 1951, N.J. 1952, no. 402) held that the abuse of a right might give rise to liability in tort, but, nevertheless, should be accepted as the exercise of a right; see 2 HOFMANN-DRION, HET NEDERLANDS VERBINTENISSENRECHT 94 (8th ed. 1959) [hereinafter cited as HOFMANN-DRION].

6. *See* HOFMANN-DRION *supra* note 5, at 95; 2 ASSER-BEEKHUIS, ZAKENRECHT, BIZONDER DEEL 1[e] Stuk 43 (9th ed. 1963) [hereinafter cited as ASSER-BEEKHUIS]; EGGENS, *supra* note 4, at 80.

7. H.R. April 17, 1970, N.J. 1971, no. 89.

8. *See* EGGENS, *supra* note 4, at 80, 118.

gun. In the famous French case decided by the Court at Colmar in 1855,[9] the question of abuse of right arose, only because Article 552 of the French Civil Code expressly entitles the owner of land to build on it as he deems fit. Building a chimney on his house, therefore, was prima facie the exercise of a right of the owner. Only when the interests of the neighbor were taken into account and the fact that the chimney was a dummy, obviously intended to harm the neighbor, was it found to be an excess of the right to build.

The foregoing has two important implications:

(a) The doctrine of abuse of right can be applied, only if the act as such could prima facie be considered as the exercise of a right;

(b) The doctrine determines to what degree the interests of others must be considered when a right is exercised.

The function of the doctrine is to delineate the limits of private rights. It does so by restricting them because of the interests of others, which would be unacceptably harmed by the exercise of those rights to the fullest extent that the words of the statute would appear to allow. The revival of the doctrine in the 20th century shows that in formulating the rights of the individual, the French Civil Code (and in its wake also the Dutch Civil Code) overstressed the freedom of the individual to make use of his rights at his discretion, inasmuch as it underrated the social aspect of the exercise of those rights, namely, that the interests of others may not be completely disregarded. Insufficient regard for the interests of others may render the exercise of a right unacceptable. The real problem is: to what extent should the interests of others be regarded when a right is exercised.

The doctrine of abuse of right, in its application, determines the social aspect of private rights. It could, in theory, function also to represent the socialist notion that rights should be exercised to further the general interest. In Dutch law, however, the doctrine determines only to what extent the interests of specific individuals should be regarded, not to what extent the general interest restricts the exercise of a private right. The general interest is protected by specific legislation, *e.g.*, restricting the use to be made of immovable property, but not by the application of the doctrine of abuse of right.

B. BASIS OF THE DOCTRINE

The Dutch legal system is essentially an equity system, in the sense that its rules are intended and construed to promote equitable results. Since the beginning of this century, the role which equity plays in the law has

9. May 2, 1855, D. 1856.2.9.

increased considerably.[10] Of paramount importance in this development, has been the extension, which the *Hoge Raad* (Supreme Court) gave to the law of torts: in 1919[11] the Court ruled that it constitutes a tort, not only when there is an infringement on the rights of others and the neglect of legal duties, but also when any act is contrary to public morality or contrary to the standards of care which must be observed in society, with respect to others and their goods. By this decision, both ethical and social values were incorporated in the law of torts. As a result of this decision, the question whether the immoral exercise of rights or the use of rights with complete disregard to the interests of others would constitute a tort. It further explains why traditionally the abuse of rights is treated as a special application of the law of torts;[12] this also explains its revival in Dutch law around 1920.

Theoretically, the inequitable exercise of contractual rights could also be regarded as an abuse of right. However, the doctrine is not applied to contractual rights because in that area of the law the role of equity, in determining the contents and the limits of the rights of the contracting parties, has always been recognized and is expressly provided for in the Dutch Civil Code. Article 1374 provides that contracts should be performed in good faith, and Article 1375 that they oblige, not only to what is expressed in them, but also to what is required by equity, custom, and statute. Consequently, the exercise of contractual rights in a manner which is unreasonable and inequitable is contrary to performance in good faith, and on that ground constitutes an excess of the proper limits of those rights.

The doctrine of abuse of right (at least in Dutch law) is resorted to only in those areas of the law, where it is uncertain whether and to what degree the exercise of legal rights is restricted by the interests of others. Between the parties to a contract, that is not the question, because the interests of both parties are fully taken into account to determine whether performance is made "in good faith."

C. FIELD OF APPLICATION

This brings us to the more practical question: in which areas of the law is the doctrine applied? Contracts are excluded because equity requires that the rights of the other party are fully taken into account, in order to meet the

10. For an enlightening resume, see Pitlo, *De ontwikkeling van een gesloten naar een open systeem van verbintenissen in de rechtspraak van de Hoge Raad*, TIJDSCHRIFT VOOR PRIVAATRECHT 163-93 (1973).

11. H.R. Jan. 31, 1919, N.J. 1919, no. 161.

12. That this, however, is too limited a view was explained *supra* in text at notes 3 and 4. The tortious use of a right undoubtedly is an abuse of right, but conversely each abuse of right does not constitute a tort.

test of performance in good faith. Consequently, the field of application of the doctrine is considerably limited. A further restriction follows from decisions of the *Hoge Raad* (Supreme Court), in which certain relations of a non-contractual nature were held to be relations of mutual confidence and, therefore, subject to the same test of good faith. This was applied to the relationship between heirs,[13] between former spouses with regard to goods jointly owned by them,[14] and between the shareholders of a limited company.[15] It is now generally accepted that joint owners should exercise their rights "in good faith," that is, with full respect for the rights of their partners.[16]

This leaves, roughly stated, only property rights (including so called "industrial property rights" such as patents, trademarks, copyrights, etc.) for the application of the doctrine of abuse of rights. What these have in common is that they, in principle, confer upon their owner the right to use them as he sees fit and to rely on the law of torts for violation by others.

A survey of the cases in which the doctrine was applied shows that most of them concern the exercise of property rights. Conspicuously absent, however, are cases concerning the alleged abuse of movable property. This fact has puzzled Dutch commentators. One explanation offered is that it is typical to real property, as opposed to movable property, that its use affects the neighbors.[17] An additional explanation would seem to be that the use which a landowner makes of his land is primarily considered as the exercise of a right, which is at his discretion, whereas the use made of movable property is primarily viewed as one of conduct rather than the exercise of a property right. So, if I use a breadknife to cut the throat of my neighbor, it is the illegality of the act, and not the abuse of property rights, which is primarily thought of. This is shown convincingly by the fact that it would seem immaterial whether I owned the knife or had stolen it. With respect to movable property, the doctrine of abuse of right is not applied, because its abuse does not appear initially as the exercise of property rights.

The field of application is not limited to real property and industrial property. In recent years, the doctrine has found a new important field of application in administrative law. Following French examples, it is now accepted law in the Netherlands that public authorities abuse their rights if

13. H.R. Dec. 20, 1946, N.J. 1947, no. 59.
14. H.R. May 9, 1952, N.J. 1953, no. 563.
15. H.R. Oct. 30, 1964, N.J. 1965, no. 107.
16. This is expressly provided in Article 3.7.1.1 of the Government proposal for a new Civil Code.
17. *See* HOFMANN-DRION, *supra* note 5, at 95; ASSER-BEEKHUIS, *supra* note 6, at 44.

they exercise the powers conferred upon them arbitrarily ("*abus de pouvoir*"), or for ends different from those for which they were given ("*détournement de pouvoir*"). Especially, the idea that rights are abused if they are exercised for purposes different from those for which they were given, has opened a new perspective for the general notion of abuse of right.

Professor Meijers, in his draft for the new Dutch Civil Code, took up the idea by proposing a general provision to the effect[18] that a right is abused if it is exercised for purposes different from those for which it was granted. It is doubtful, however, whether it can be said of those private rights, to which the doctrine of the abuse of rights is applied, that they are granted for a certain purpose. With regard to property rights, Meijers himself explained[19] that in the law of the Western countries these are not conferred upon the owner because of the use he will make of them, but because of occurrences in the past. It is different for legal powers granted to public authorities: these are conferred upon them to achieve specific purposes. The purchaser of real property becomes the owner, not because of what he will do with it in the future, but because he purchased it. In Dutch law, the use which the landowner may make of his land is restricted in the general interest by extensive legislation. Within these limits the landowner remains free to use his land as he sees fit. His property rights do not serve specific ends, but are at his discretion as long as he exercises them within the limits of the law.[20]

The *Hoge Raad* denied the contention that a trademark was abused when it was exercised for the admitted purpose of keeping prices high, although the declared object of the Trade Marks Act was to prevent confusion as to the origin of industrial products. It was held that there could be no question of abuse of a trademark as long as it was exercised to protect a legitimate interest, even if it differed from those which the legislator had in mind when the statute was enacted.[21]

The purpose for which certain rights are granted, therefore, does not appear to be relevant for property rights, nor for "industrial property." It

18. Article 8 of the "introductory provisions" to the new Civil Code.

19. 1 MEIJERS, VERZAMELDE PRIVAATRECHTELIJKE OPSTELLEN 73 (Leyden 1954) [hereinafter cited as MEIJERS].

20. *Cf.* DUTCH CIV. CODE art. 625: "Ownership is the right to freely use a thing and to freely dispose of it in the widest sense, on condition that its use is not incompatible with the statutes and regulations, made by such authorities which have the power to make them under the Constitution; and, on the further condition, that the rights of others are not infringed upon" (translation by the author).

21. H.R. Jan. 12, 1939, N.J. 1939, no. 535; H.R. June 14, 1940, N.J. 1941, no. 109.

may well have, however, some relevance for procedural rights, which have been held to serve certain objects.

Summarizing the above, the field of application of the doctrine of abuse of rights in Dutch law would appear to be restricted to real property rights, "industrial property," powers of public authorities, and procedural rights.

D. THE TESTS

In order to determine the scope of the doctrine, it is important to know what tests are applied to decide whether the exercise of a right amounts to its abuse; the stricter the test is, the smaller will be the practical significance of the doctrine.

For a long time, Dutch courts have applied the strict tests adopted in French law; these tests were also traditionally propagated in the Roman Dutch law of the 17th and 18th centuries, namely, absence of a reasonable interest and exclusive intention to harm.

To show that these tests are in the Dutch tradition, one finds references to the Town Regulations of Tiel of 1659, which provided[22] that, by building, a landowner may take away light and view from his neighbors, "unless this is done only out of spite or irritation, in order to vex his neighbor without any profit or interest to himself." Scholtens investigated old Dutch law, but found no convincing evidence that the doctrine was generally recognized as part of the law, although its existence was known.[23] A case mentioned by Van Bynckershoek[24] and decided by the *Hoge Raad* on July 31, 1732, comes close to the application of the doctrine, but cannot be regarded as conclusive evidence that the doctrine was accepted.[25] When the doctrine was applied by the *Hoge Raad* in this century, initially[26] the test applied was the absence of a reasonable interest. In later decisions, the

22. *See* VAN APELDOORN, INLEIDING TOT DE STUDIE VAN HET NEDERLANDSCHE RECHT 36 (8th ed. 1948).

23. J.E. Scholtens, *Abuse of Rights*, 75 S. AFR. L.J. 39, 47 (1958) [hereinafter cited as Scholtens].

24. VAN BYNCKERSHOEK, OBSERVATIONES TUMULTUARIAE no. 2713.

25. Scholtens was cited by Cueto-Rua, *Abuse of Rights*, 35 LA. L. REV. 965, 980 & n.65 (1975). Scholtens, *supra* note 23, at 48 concluded: "However, the decision does cast additional doubt on the correctness of the emphatic statement by Groenewegen with regard to the non-recognition of the doctrine of abuse of rights in the practice of the law. The decision of the Hoge Raad as reported by Bynckershoek leaves the question open."

26. H.R. Feb. 17, 1927, N.J. 1927, no. 391; H.R. June 15, 1928, N.J. 1928, no. 1604.

intention to harm, together with the absence of a reasonable interest, was mentioned.[27]

If there was any difference of opinion between Dutch commentators, it centered on the question whether the (subjective) intention to harm and the (objective) absence of a reasonable interest were cumulative or alternative requirements.[28] It was said that the intention to harm cannot be sufficient, because the exercise of a right may be free from reproach on that account (*e.g.*, if someone bequeaths his goods to the declared enemy of his relatives). On the other hand, the absence of a reasonable interest does not necessarily imply that a right is abused (*e.g.*, if a landowner arbitrarily admits one visitor and refuses admittance to another).

In those cases, however, in which the exercise of a right was declared abusive by the courts, the absence of a reasonable interest coincided with the obvious intention to harm. Article 8 of the Draft for an Introductory Title of the New Dutch Civil Code provides that the exclusive intention to harm renders the exercise of a right abusive. But the same article contains a reminder: certain rights are completely at the discretion of their owners and, therefore, cannot be abused.

The restrictive manner in which Dutch courts applied the doctrine of abuse of rights is best illustrated by two cases, which were decided by the *Hoge Raad* in 1936 and 1937.

The first, *Stolk v. Van der Goes*,[29] arose out of a dispute between neighbors over a footpath. Stolk was denied its use by Van der Goes. In order to show to Van der Goes that an amicable settlement was to be preferred, Stolk erected high poles with rags on his land, which spoilt the fine view Van der Goes had from his terrace over the river Maas. Van der Goes obtained an injunction from the court ordering Stolk to remove the poles, as they served no useful purpose and had been erected with the exclusive intention to harm Van der Goes. Stolk removed them, but then built a huge water tower on the same spot. However, the tower, consisting of a water reservoir and an American windmill, was not connected to the water supply system nor to a well, so Van der Goes obtained a new injunction for its removal, since the building of the tower was still considered to be an abuse of right. Its removal was ordered by the court "as

27. H.R. March 13, 1936, N.J. 1936, no. 415; H.R. Dec. 2, 1937, N.J. 1938, no. 353.

28. Scholten defended the view that both were required; see his comments under the decisions mentioned in note 27, *supra*, and ASSER-SCHOLTEN, ZAKENRECHT 130 (8th ed. 1945) [hereinafter cited as ASSER-SCHOLTEN].

29. H.R. March 13, 1936, N.J. 1936, no. 415.

long as it cannot function properly." Stolk did not remove it, but connected it to the water supply system, claiming that now it served a useful purpose for the watering of his greenery.

The Court of Appeal held that—even if Stolk now had some use for the tower to water his land—its erection on this spot amounted to an abuse of right, because he could and should have erected it in a place where it would not have spoilt the view of Van der Goes. This decision was, however, reversed by the *Hoge Raad* (Supreme Court), which held that the Court of Appeal should have gone into the question whether Stolk built the tower with the exclusive intention to harm Van der Goes, and whether Stolk had a reasonable interest to have a water tower on this particular spot for the watering of his land. The *Hoge Raad* went on to say that the law does not require a person who wants to do something which can be done in different ways, to renounce one of those ways for no other reason than that it would cause damage to others, as long as the rights of others are not infringed upon.

A year later, the *Hoge Raad*[30] upheld the decision of the Court of Appeal, which had reconsidered the matter and had found that the tower, although connected to the water supply system, did not serve any useful purpose to Stolk and had been built with the exclusive intention to harm Van der Goes.

The second case, *Teunissen v. Driessen*,[31] also concerned a dispute between neighbors, whose wives were not on neighborly terms. They lived on opposite sides of a courtyard owned by Driessen, who decided to put an end to the constant haggling of the wives by erecting a wooden fence ten feet high at a distance of less than a foot from the windows of his neighbor's sitting room and kitchen. Understandably, Teunissen complained that the erection of the fence amounted to an abuse of right, but he was unsuccessful. The Court of Appeal found as a fact that Driessen had not acted with the intention to vex his neighbors, but with the sole objective of making visual contact between the wives impossible. The *Hoge Raad*, which had to base its decision on the fact that no malice was involved, held that the erection of the fence did not amount to a tort, because Driessen was free to build the fence on his own land as he deemed fit, even if, by building the fence further away from the neighbor's house and to a lesser height, he would also have achieved his objective to preclude all contact between the wives, thereby avoiding or diminishing the harm to the Teunissen family.

30. H.R. April 2, 1937, N.J. 1937, no. 639.
31. H.R. Dec. 2, 1937, N.J. 1938, no. 253.

What transpires from these decisions is that once a reasonable interest is shown for the exercise of the right, and if it is not inspired exclusively by malice, the interests of others may be disregarded. The much broader test applied by the Belgian Supreme Court[32] accepting the principle that among several possible ways of exercising one's rights, which are all equally useful, one may not choose that which is harmful to others ("*entre différentes façons d'excercer son droit avec la même utilité, il n'est pas permis de choisir celle qui sera dommageable pour autrui*"), was rejected by the *Hoge Raad*.

Professor Meijers criticized the narrow view taken by the *Hoge Raad*, in a lecture given at Louvain University in 1937,[33] and he suggested as abusive also the exercise of a right, whenever there is a great disparity between the interests served and the harm done to others.[34] When, after the war, Meijers was commissioned to draft a new Civil Code, he incorporated the broader test in Article 8 of his Draft for the Introductory Title which, in free translation, provides:

(1) The abuse of a right is prohibited.

(2) A right is abused, when it is used either for the exclusive purpose of harming others, or for a purpose different from that for which it has been granted, or when it is exercised in circumstances in which, taking into account the interests served and those which are harmed, no reasonable person would have decided to exercise it.

(3) A right cannot be abused, if its exercise is left completely to the discretion of the person who has it.

In 1970, the *Hoge Raad* by anticipation[35] adopted the broader test in *Kuipers v. De Jongh*.[36] Kuipers had built a garage between his house and that of Mrs. De Jongh. Before its construction the neighbors discussed the exact position of the border between their lands, as they had some doubt whether an existing hedgerow coincided exactly with it. It was their common assumption, however, that the position of the hedgerow could be wrong only by a few inches, and they agreed that Kuipers would indemnify Mrs. De Jongh, if later it would turn out that, by taking the hedgerow for the

32. Cass. July 12, 1917, Pas. belge 1919, 1.65.

33. MEIJERS, *supra* note 19, at 62.

34. Others like Scholten approved of the strict test; see ASSER-SCHOLTEN, *supra* note 28, at 130.

35. *See* Hartkamp, *Civil Code Revision in the Netherlands: A Survey of its System and Contents, and its Influence on Dutch Legal Practice*, 35 LA. L. REV. 1058, 1087 (1975).

36. H.R. April 17, 1970, N.J. 1971, no. 89.

border, the garage would be partly on her land. When after the construction of the garage a survey revealed that it was on the land of Mrs. De Jongh by about two feet, she demanded its removal from her land. Kuipers relied on the agreement for compensation, but he was unsuccessful because the courts accepted Mrs. De Jongh's argument that it was not applicable in this case, since the parties had contemplated a transgression of the border by Kuipers for only a few inches, and not for a few feet.

Kuipers, as a further defense, submitted that the demand for the removal of (part of) the garage under the circumstances amounted to an abuse of right, as the damage he would suffer by its removal would be "disproportionately larger" than the benefit which Mrs. De Jongh would have from it.

The Court of Appeal rejected this defense, pointing out that Kuipers could and should have established the position of the border before he started to build. The *Hoge Raad* upheld the decision, but in doing so expressly accepted the broader test proposed by Professor Meijers:

> In principle, De Jongh is entitled to demand the removal of that part of the garage which has been built on her land, even if Kuipers acted in good faith and has offered to pay a reasonable compensation. This, however, does not exclude the possibility that De Jongh would have abused her right by demanding the removal of the garage from her land, instead of accepting a reasonable compensation, in case the loss Kuipers would suffer by its removal, considered both independently and in comparison to De Jongh's interests, would be so heavy that De Jongh could not reasonably have decided to exercise her right to demand the removal.

Kuipers' defense failed, however, because he had omitted to furnish information on the basis of which the courts could have weighed his interests compared to those of Mrs. De Jongh. His submission, that his loss would be "disproportionately larger" than the benefit which Mrs. De Jongh would have from the removal, was deemed insufficient for this purpose.

Summarizing the above, it would seem that the question, whether malice and absence of a reasonable interest are cumulative requirements for abuse of right, has now been answered negatively. The malicious exercise of a right always amounts to its abuse; the absence of a reasonable interest serves only to provide prima facie evidence that malice is involved.

A reasonable interest cannot always justify the exercise of the right. The interests of others must also be taken into consideration, be it only marginally. A great disparity of the respective interests can render the

exercise of the right abusive, but only if no reasonable person under the circumstances would have exercised it in this manner. It was pointed out by some commentators[37] that the practical difference between the stricter and the broader test is very small. Others have suggested that the social function of the law should be given more weight, by accepting the single fact of great disparity of interests as the test for abuse of rights.[38]

There is a natural tension between the freedom of the individual to pursue his own interests when exercising his rights, and the interests of others which are harmed thereby. Also, the general interest makes its own demands. The balance struck between these conflicting interests differs from country to country and from time to time. To protect the general interest, specific legislation has abounded in the Netherlands over the last 50 years, so that the individual's free exercise of his rights has been substantially restricted. In a densely populated country, such as Holland, legislation limiting the permitted use of real property understandably takes first priority. Within the limits set by such legislation, the predominant view, as reflected in the tests applied by our courts for abuse of rights, remains that the individual may largely pursue his own interests as he sees them. The interests of others play only a minor role: they may not be completely disregarded by the person who exercises his right, but his right comes first by a wide margin.

This implies that the practical significance of the doctrine is rather limited.

II. ABUSE OF RIGHTS BY PUBLIC AUTHORITIES

In recent years the doctrine has found a new field of application in administrative law which has given it a completely new aspect.

In Dutch law, private citizens have recourse to the courts to claim redress for torts committed by public authorities. A considerable part of administrative law, therefore, is also part of the civil law of torts. Our courts do not give an opinion on the quality of administrative practice, but only on its legality *vis-à-vis* private citizens. In principle, the administration may use, at its discretion, the powers conferred upon it by law as long as it does not infringe on the rights of the citizens or neglect its legal duties towards them. The courts decide, if and to what extent, the fact that the administra-

37. *See* Köster, *De grensoverschrijdende garage*, 19 ARS AEQUI 542 (1970); Wery, *Review of Asser-Beekhuis II* (9th ed.), RECHTSGELEERD MAGAZIJN THEMIS 264, 278 (1966).

38. *See, e.g.*, ABAS, BEPERKENDE WERKING VAN DE GOEDE TROUW 65 (dissertation Amsterdam 1972) [hereinafter cited as ABAS].

tion represents the general interest, justifies the infringement on rights of private citizens or the nonfulfillment of specific duties.

It is characteristic of administrative powers that the law grants them to the administration for the promotion and protection of specific public interests established in the law. Our courts have deduced two important rules of law from this fact. The first is that the arbitrary or frivolous exercise of public powers is incompatible with the general interest and, therefore, should be regarded as an abuse of legal powers. The second is that those powers may be used only to promote and protect the specific interests for which they were granted; this implies that their use for other ends constitutes an excess of legal power and, for this reason, is abusive. In developing these principles, our courts followed largely the rules laid down by the French *Conseil d'Etat*, which explains why in Dutch textbooks the French terms "*abus de pouvoir*" (for arbitrary government) and "*détournement de pouvoir*" (for the excess of the specific purpose of the powers) are commonly used. The main difference between French and Dutch law would seem to be that the Dutch ordinary courts have jurisdiction over administrative abuse of power, if and when the abuse constitutes a tort. Consequently, the abuse of power by the administration is part of the civil law of torts, whereas in France it is considered as part of the public law.

How Dutch law applies the two basic rules on the abuse of legal powers by the administration may be illustrated by the decisions of the *Hoge Raad*.

In *Conscript De Boer v. the State of the Netherlands*,[39] De Boer sued for damages in tort, alleging that the military authorities, by lack of proper care for his health, had caused his disablement. The *Hoge Raad* held that the courts may not go into the question whether the authorities had given sufficient weight to the private interests of De Boer in the performance of their public duties. How much weight that should be given, in comparison to the other interests they had to serve, was for them to decide. However, the disablement of De Boer should be considered as the result of a tort committed towards him, if their conduct could not in fairness be regarded as the outcome of a decision-making procedure, in which his interests were taken into account together with other interests they had to serve. In that case, their conduct would constitute prima facie evidence of an abuse of powers, not justified by the circumstances involved.

In *Requisitioning by the Town of Doetinchem*,[40] the *Hoge Raad* reiterated that the courts may not go into the question whether the town had

39. H.R. Nov. 13, 1936, N.J. 1937, no. 182.
40. H.R. Feb. 25, 1949, N.J. 1949, no. 558.

properly weighed the interests of the house owner whose house had been requisitioned, and the public interest. How much weight should be accorded to each is for the administration to decide. However, the courts may intervene if the requisitioning was arbitrary; this would be the case if the town could not in fairness have decided to exercise its powers. In such a situation, it must be assumed that the interests of the citizen had been completely disregarded. However, the decision to make use of its powers could not be qualified as arbitrary if reasonable people, taking into account the conflicting interests involved, could have arrived at different decisions.

It appears from these decisions that only the complete disregard of the private interests of the citizen justifies the qualification of arbitrariness. As long as reasonable people could have decided to use the legal powers, also taking into account the private interests at stake, the exercise of the powers is not arbitrary and, therefore, not abusive.

In *Requisitioning by the Municipality of Zandvoort*,[41] the house owner did not complain that his house had been requisitioned arbitrarily, but that it had been done on grounds and for purposes which were not within the authorizing legislation. The municipality admitted that it had picked the plaintiff's house for requisitioning because thereby it could put a stop to his charging excessive rents far above the maximum allowed by law. The Housing Accommodation Act of 1947 was enacted after the war, when there was an acute shortage of housing accommodation, with the declared objective "to promote an efficient distribution of the available housing accommodation." The *Hoge Raad* held that the municipality had exceeded its powers when it requisitioned the plaintiff's house to serve ends for which these powers had not been granted. Therefore, the requisitioning amounted to a tort, and the municipality was ordered to stop its implementation.

In a later decision in the same year, *Kweldergronden*,[42] the *Hoge Raad* combined the two previous decisions by ruling that the courts may intervene against the exercise of legal powers by public authorities if there is prima facie evidence that the powers were used for objectives other than those for which they had been granted, and also if their exercise was arbitrary.

These tests for the abuse of rights by public authorities have since been upheld by our courts, and they determine whether civil law offers remedies against abuse of right.[43]

41. H.R. Jan. 14, 1949, N.J. 1949, no. 557.

42. H.R. June 24, 1949, N.J. 1949, no. 559.

43. It is to be noted that recourse against the administration is not restricted to the application of the law of torts by the ordinary courts. Many acts expressly provide

III. Abuse of Right in Civil Procedural Law

Traditionally, the relationship between the parties in a civil lawsuit is not treated as one which is governed by the standards of "good faith,"[44] that is, where the respective rights of the parties are determined by taking into account the interests of both parties. On the contrary, as their relation is far from one of mutual confidence, each party makes use of its procedural rights in its own interest. If the interests of the opponent must be taken into account, this is done only marginally. The situation is, therefore, comparable to that of the exercise of property rights which may be used largely at the discretion of the owner, so long as he does not abuse them. This explains how the question of the application of the doctrine of abuse of rights has arisen in the procedural law.

In 1959, the *Hoge Raad*[45] ruled that the appeal by the husband against a decree of separation had rightly been dismissed as abusive, because it had been instituted with the sole intention to frustrate his wife's petition, and not with the objective to obtain a decision of the Court of Appeal on his objections against that decree. The husband's lawyer had tried to achieve this by instructing the bailiff to serve the writ of appeal at the latest possible moment, thereby rendering it impossible for the wife to appeal from a separation decree which had been granted on the husband's cross petition. By a mere technicality of the divorce law, the simple fact of the appeal by the husband, in the absence of a cross appeal by his wife, would have meant that no alimony would be due by him to his wife. The *Hoge Raad*, however, held that his interest in achieving this result, by what was clearly considered sharp practice, was not an interest which at law should be respected.

It is interesting to note that the abusive character of the appeal was based on a combination of three grounds: (1) intention to frustrate the rights of his wife, (2) absence of a respectable interest, and (3) use of the right of appeal for a purpose that was different from the purpose for which it had been granted.

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for administrative appeals, and those which do not, are governed by the recent Act on administrative appeals from decisions of public authorities (AROB), enacted on May 1, 1975, and in force since July 1, 1976. As this article is confined to civil law remedies against the abuse of rights, the significance of the doctrine in administrative law, if any, is not considered here.

44. *Cf.* Gerbrandy, *Gebruik en misbruik van procesrecht*, ADVOCATENBLAD 325, 374, 508 (1959) [hereinafter cited as Gerbrandy]. This principle is not undisputed: *See* Veegens, note under H.R. June 26, 1959, N.J. 1961, no. 553; and Haardt, *Fair play in het burgerlijke geding* 17 (inauguration address at Leyden University 1958); *cf. also* ABAS, *supra* note 38, at 330, contra, Zeiler, ADVOCATENBLAD 506 (1959).

45. H.R. June 26, 1959, N.J. 1961, no. 553.

Nevertheless, it is somewhat uncertain whether the doctrine of abuse of rights adds to the long established principle of procedural law that a litigant is thrown out of court if he does not show an actual, immediate and legitimate interest in obtaining a decision from the courts. The principle is derived from French law and is commonly referred to as "*point d'intérêt, point d'action*." Although commentators sometimes characterized this principle as an application of the doctrine of abuse of rights,[46] it is doubtful whether this is correct.

The basis of the principle would appear to be that courts should be protected from unnecessary litigation. Thus, the principle also applies if both parties request the court to give an opinion on academic questions, as for example, what their rights would be under hypothetical circumstances. Dutch courts have applied this principle independently and separate from the doctrine of abuse of rights and without reference to it. A few decisions of the *Hoge Raad* may illustrate how the principle is applied.

Complaints of misinterpretation of the law by lower courts are dismissed by the *Hoge Raad* if the appellant's rights were not adversely affected by the decision.[47] If a court refuses to hear certain evidence, only the party who wished to bring it may appeal from this decision, but not the other party whose rights were not adversely affected by it.[48] A bankrupt may complain in court of the measures taken by the receiver, but only if his interests are involved. The nature of remedies granted by the law implies that they are available only to those whose interests are involved.[49] A bankruptcy petition should be dismissed, if the petitioner has no reasonable interest in the bankruptcy.[50]

There is a connection, however, with the doctrine of abuse of rights, in the case where the commencement of proceedings or the exercise of a procedural right is aimed primarily at harming the opponent. Vexatious exercise of procedural rights amounts to an abuse of right and constitutes a tort, even if the party using them may have a clear and great interest in doing so. In those cases, full stress is laid on the impropriety of the exercise of the right and not on the lack of interest. The doctrine of abuse of procedural rights would seem to have practical significance, mainly on the ground that procedural rights are granted for certain specific purposes and, therefore,

46. *See, e.g.*, STAR BUSMAN, HOOFSTUKKEN VAN BURGERLIJKE RECHTSVORDERING no. 148 (3d ed. 1972).

47. H.R. June 19, 1914, W 9670; H.R. Dec. 6, 1918, N.J. 1919, no. 102.

48. H.R. May 7, 1920, W 10589.

49. H.R. June 13, 1928, N.J. 1928, no. 1379.

50. H.R. Dec. 14, 1934, N.J. 1935, no. 95; H.R. Sept. 4, 1942, N.J. 1942, no. 617.

are abused if they are exercised for the achievement of other ends.[51]

IV. Concluding Remarks

The doctrine of abuse of rights has been and still is the subject of debate among Dutch lawyers. Its theoretical foundation, its practical significance, its scope, and the tests to be applied, are all disputed. A number of books[52] and numerous articles have been written on the subject, and also the courts have had ample opportunity to express themselves on it. Although there is still considerable confusion, it cannot be doubted that it is part of the Dutch law and—to all appearances—will remain so in the foreseeable future. Several times it has been declared nonexistent or dead, but it always emerged alive with new aspects and fresh scopes of application.

On theoretical grounds, it may be argued that the doctrine of abuse of rights is not indispensable for Dutch law, and that by other means the same results could have been obtained. Even if that were true, it still has merit in reminding us constantly that moral and social values, accepted in society, play a role in determining the limits within which legal rights may be exercised. As such, it keeps law and society together inasmuch as it prevents lawyers from declaring legitimate the exercise of rights, where ordinary citizens would see only their abuse.

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51. For a comprehensive survey of court cases, in which it may be argued that the doctrine of abuse of right was applied, see Gerbrandy, *supra* note 44, at 367 *et seq.*

52. Wijnstroom, Misbruik van recht (dissertation Amsterdam 1921); Okma, Misbruik van recht (dissertation Amsterdam V.U. 1945); Helmich, De theorie van het rechtsmisbruik in het Romeinsche, Fransche en Nederlandsche recht (dissertation Nijmegen 1945).