

## *Editorial*

# Comparative and Reflective Remarks on Abuse of Rights and the Role of the General Interest

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## 1. Introduction

1. *Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim.*<sup>1</sup> The late-classical Roman lawyer Domitius Ulpianus (ca. 170–223 AD)<sup>2</sup> contrasts the public and private. He does so in terms of interests: the public domain is the domain of the public (or general) interest, and the private domain that of private interests. Public interests are those interests that cannot be reduced to private interests without losing anything. The government, as an embodiment of the public interest, should not hand over these interests to private or quasi-private institutions because that would be theft from the electorate, according to Ankersmit.<sup>3</sup> When we look at ecological sustainability, one of the major social challenges of our time, the question is in which category it fits. Central to the current debate is ecological sustainability in the context of climate change and the need to find a solution to excessive greenhouse gas emissions. Many have long maintained that ecological sustainability should mainly come from the government.<sup>4</sup> However, by not only enforcing or creating incentives through public law, but especially by facilitating private law, the law can encourage citizens and companies to take action themselves.<sup>5</sup>

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1 *Inst.* 1.1.4.

2 See W. KUNKEL, *Die Römischen Juristen. Herkunft und soziale Stellung* (Graz, Weimar: Böhlau Verlag, 2nd edn 2021), pp 245ff.

3 F. ANKERSMIT, ‘Over publiek en privaat belang’, in O.O. Cherednychenko et al. (eds), *Publiek/privaat: vervlechten of ontvlechten?* (Antwerpen Oxford: Intersentia 2010), p 20.

4 J. BLEWITT, *Understanding Sustainable Development* (London, New York: Routledge, 2nd edn 2015), pp 6ff.

5 B. AKKERMANS et al., ‘Duurzaam privaatrecht voor de 21<sup>ste</sup> eeuw: het leven van een rechtswetenschappelijke subdiscipline’, *TPR* 2023, p 201.

2. One of the cornerstones of private law is (the freedom of) the right to property – which finds its limitations in the rights of others. Moreover, one may not invoke one’s property right to the extent that one abuses it. The right to property is not absolute – the extreme absolutization that is sometimes invoked, is that coming from (a short period of) legal positivism in the past.<sup>6</sup> The idea of a prohibition to abuse one’s rights applies not only to property law, but also to other areas of law, such as contract law and procedural law. What exactly abuse of rights entails must be concretized based on legal and extra-legal criteria.<sup>7</sup> The idea of abuse of rights can be an important instrument for progress towards a less individualistic and more socially involved society.<sup>8</sup> A socially involved society, in our view, is one that also takes into consideration the interests of future generations.

3. Moreover, it has been argued that property law needs to be ‘resilient’, to help respond to global challenges, such as climate change.<sup>9</sup> It has been suggested to introduce a so-called ‘sustainability principle’ into private law, through a channel, namely objective good faith or reasonableness and fairness, the doctrine of abuse of rights and, finally, the associated figure of nuisance to neighbours.<sup>10</sup> With the path taken by the Dutch Supreme Court (*Hoge Raad*) in the famous *Urgenda* case, in which liability law is used to make a general standard leading in determining an obligation to pay compensation in kind, a sustainability obligation could be incorporated in the general standard for abuse of rights.<sup>11</sup> Gillaerts recently discussed the extent to which open standards in contract law, such as abuse of rights, good faith, public order and reasonableness and fairness, can serve as an entry point to prevent unsustainable practices based on sustainability considerations.<sup>12</sup> Also Akkermans and Van Melle outline a regenerative concept of ownership with inherently positive obligations

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- 6 G.C.J.J. VAN DEN BERGH, *Eigendom. Grepen uit de geschiedenis van een omstreden begrip* (Deventer: Kluwer 1979), p 32; E.G.D. VAN DONGEN, ‘Rechtsmisbruik in het Belgische en Nederlandse recht: over individuele vrijheid, maatschappelijke zorgvuldigheid en asociale rechtsuitoefening’, *TPR* 2022, pp 1055–1056.
  - 7 G. PINO, ‘L’esercizio del diritto soggettivo e i suoi limiti. Note a margine della dottrina dell’abuso del diritto’, *Ragion pratica* 2005, pp 161–180.
  - 8 J. GORDLEY, *The Jurists* (Oxford: OUP 2013), p 295.
  - 9 Comp. B. AKKERMANS, *Sustainable Property Law. Reckoning, Resilience, Reform* (The Hague: Eleven Publishing 2022).
  - 10 B. AKKERMANS et al., *TPR* 2023, p 237.
  - 11 Hoge Raad (HR) 20 Dec. 2019, ECLI:NL:HR:2019:2006, *NJ* 2020/41 (*Urgenda*).
  - 12 P. GILLAERTS, ‘Duurzaamheid in het gemene contractenrecht: ecologie van een andere orde?’, in B. Akkermans, B. Hoops, E. van der Sijde & B. Verhey (eds), *Privaatrecht 2050. De weg naar ecologische duurzaamheid* (Brugge: Die Keure 2022), pp 115–132.

for the owners, for example on the basis of the private law doctrine of abuse of rights.<sup>13</sup>

4. An interesting example from Belgium case law, which also gave us the reason for the theme of this special issue, is the following. In 2021, the Supreme Court (*Hof van Cassatie*) decided in a case of overhanging branches of trees in a private park.<sup>14</sup> The neighbour wanted the branches to be pruned, since the branches led to significant disadvantages for him, such as excessive leaf drop and loss of light. This seems like an everyday case, but it became interesting where the Court of the first instance decided that the proportionality test in case of abuse of rights demanded that the public interest was taken into account. In this case, given the urban environment, it was not in the public interest to prune the branches, which would threaten the viability of the trees. The Supreme Court however, decided differently and stated that when a private person invokes a right against another private person, the judge cannot assess the proportionality of their exercise of this right in the light of a collective interest distinct from their respective interests.<sup>15</sup>

## 2. Abuse of the Rights: Possibilities and Consequences

5. A prohibition on abuse of rights could be an important legal tool (with a remedial function) to address cases of excessive or harmful uses of subjective rights, as it comes down to determining their inherent scope.<sup>16</sup> At the European level, the doctrine is often recognized, although setting and formulating its limits is difficult. Disinterested malevolence (acting with the sole intention to injure another), probably should be a sufficient condition for abuse of rights but can rarely be proved. Usually some interest of the actor can however be pleaded as to the object of the act.<sup>17</sup> The doctrine of abuse of rights is variously articulated, in a spectrum from subjective to objective: from sole malicious intent to harm, to dominant (not exclusive) motive, to acting with a lack of legitimate interest, to contrary to the ‘normal function’ of a rights, to exercise contrary to its ‘socio-economic

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13 B. AKKERMANS & K. VAN MELLE, ‘Regeneratieve eigendom – naar een hernieuwde benadering’, in B. Akkermans, B. Hoops, E. van der Sijde & B. Verhey (eds), *Privaatrecht 2050. De weg naar ecologische duurzaamheid*, pp 193–208. By regenerative property they mean a property right in which the owner is entitled to the use, enjoyment and transferability of an object, but the owner is also under a property law obligation to use his property in a sustainable manner; where one’s own needs can be met, without depriving future generations of the opportunity to do so (see p 195).

14 Hof van Cassatie 22 Oct. 2021, ECLI:BE:CASS:2021:ARR.20211022.1F.

15 See also the contribution of Van Dongen and Visser in this special issue.

16 A. LA PERGOLA, Conclusion, Court of Justice 9 Mar. 1999, *Centros Ltd v. Erhvervs- og Selskabsstyrelsen*, C-212/97, I-1461.

17 G.W. PATON & D.P. DERHAM (eds), *A Textbook of Jurisprudence* (Oxford: Clarendon, 4th edn 1972), pp 475–476.

purpose'.<sup>18</sup> At an international level, the prohibition of abuse of rights can be read in Articles 29(3) and 30 of the Universal Declaration of Human Rights (UDHR), Article 5(1) of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 17 of the European Convention on Human Rights (ECHR).<sup>19</sup>

6. As to the consequences for acting against the prohibition of abuse of rights, or broader: for abusing one's rights, judges decide that a power invoked by the litigant cannot be exercised, that damages have to be paid – in the Netherlands – imposed on the basis of an unlawful act and, most often, order to pay the full legal costs. In addition, the judge can also attach other consequences to the abuse of procedural law, such as refusing to take note of documents submitted in the proceedings.<sup>20</sup> The options of inadmissibility, paying costs and compensation for natural or legal persons who have suffered damage as a result of a certain method of litigation have received renewed interest in European legislation on *Strategic Lawsuits Against Public Participation* (SLAPPs). In this type of lawsuit, legal intimidation proceedings are initiated against, for example, journalists or activists who stand up for the public interest.<sup>21</sup> Recently, the European Anti-SLAPP Directive entered into force which aims to protect persons who engage in public participation from manifestly unfounded claims or abusive court proceedings in civil cases with cross-border implications. According to Article 15 of the Directive, Member States shall ensure that courts or tribunals seized of abusive court proceedings against public participation may impose effective, proportionate and dissuasive penalties or other equally effective appropriate measures, including the payment of compensation for damage or the publication of the court decision, where provided for in national law, on the party who brought those proceedings.<sup>22</sup> In Belgium, it is already possible to

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18 A. DI ROBILANT, 'Abuse of Rights: The Continental Drug', *Public Law Research Paper* no 14-28, pp 4-5.

19 N. FERREIRA, *Fundamental Rights and Private Law in Europe. The Case of Tort Law and Children* (Oxford: Routledge 2011), §3.2.4.4. The prohibition is linked to and can be traced back to Art. 4 of the Declaration of the Rights of Man and the Citizen of 1789 ('freedom means to be able to do all that does not others').

20 See for Dutch law, E.G.D. VAN DONGEN & R.W. PLANTINGA, 'Remedies bij misbruik van procesrecht', in: L. Dalhuisen et al., *Rechtvaardig redresseren. Een verkennend juridisch-empirisch onderzoek naar rechtvaardigheidsopvattingen over remedies bij verantwoordelijkheid en aansprakelijkheid* (The Hague: Boom Juridische Uitgevers 2025), pp 184-185.

21 T. HARTLIEF, 'De aanpak van SLAPPS in het procesrecht: effectieve regeling of symboolwetgeving?', *AA* 2023(1), p 19.

22 Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 Apr. 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation').

impose a fine in the event of abuse of procedural law, in order to sanction people who uselessly and deliberately delay a procedure.<sup>23</sup>

### 3. Abuse of Rights and the General Interest

7. Thus far, abuse of rights has mainly been analysed in the context of conflicting private interests. The Belgian case mentioned before opens an interesting discussion about the interests involved in abuse of rights in general, and more specifically about the potential role of the general interest. In this special issue, we hone into the potential role of the general interest in the abuse of rights doctrine. We chose to use, *general* interest instead of *public* interest, to broaden the question to overarching interests, i.e., interests that transcend the private interest that is mostly debated in abuse of rights discussions. General interests can overlap with public interests, but are not necessarily similar. Also to stay away from discussions on whether specific sustainability measures are in the *public* interest, when there clearly is a *general*, i.e., party-transcending interest.

8. Abuse of rights in various countries have different standards. Furthermore, abuse of rights is a variable concept that takes on a particular interpretation depending on the time and place,<sup>24</sup> it even depends on the area of law and on the circumstances. Hammerstein, in his introductory speech at the symposium which is at the basis of this special issue (*Abuse of Rights and the (Potential Role) of General Interest*, 14 May 2024 in Utrecht), stated that in substantive private law, as in neighbour law, the function is a different one than in civil procedural law where, in the extreme, it must prevent or punish unfair or needless litigation. Inspired by Yanagihara's novel *A Little Life*,<sup>25</sup> he stated that the interest of the individual must sometimes give way to the social interest, even if it is not perceived as reasonable. Hammerstein argued that it is a social interest that rights are not absolute, that freedoms can be limited and that rights (or: competences) should be used only within their purpose; and that it is a societal interest that justice is not burdened with chicanery and that procedural law is not used to gain unjust advantages. When anyone who goes outside the bounds of the law, with the purpose of prejudicing another person or achieving a result that is manifestly unfair, who litigates in bad faith or in a manner that no reasonable and prudent person would think of, the task of the judge, in the interest of all of us, is to draw a line: up to here and no further or to attach a sanction to this misconduct. Abuse of rights and public interest are therefore connected.<sup>26</sup> The (prohibition of) abuse of rights is, however, not an independent cause of action which allows to instigate

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23 See e.g., E.G.D. VAN DONGEN, *TPR* 2022, p 1067.

24 E.J.H. SCHRAGE, *Misbruik van bevoegdheid* (Deventer: Wolters Kluwer, 3d edn 2018), p 5.

25 H. YANAGIHARA, *A Little Life* (London: Pan Macmillan 2016).

26 Introductory lecture A. Hammerstein at the symposium (not published).

legal proceedings. It is a defensive, and not an offensive, legal instrument.<sup>27</sup> The reparation of damage that an abuse of rights has produced will, however, must be pursued based on general principles of the law of civil liability, with the possibility to resort to tort, contract etc.

#### 4. Comparative Remarks

9. As said, the Belgian tree case and the discussion that followed were the starting point for this special issue, dedicated to the potential role of general interest in the doctrine of abuse of rights. Given the current transition towards a sustainable economy and society, the authors were asked to reflect on the role of the doctrine of abuse of rights in general, and the challenges posed by the sustainability development in the light of the central theme, from different, comparative perspectives. This way, the different perspectives and interests can be properly highlighted, creating interesting points of view. The aim of this special issue is therefore to show these different views on the potential role of the general interest; to provide fuel to the discussion to what extent the abuse of rights doctrine can contribute to add a so-called ‘sustainability principle’ into private law, as discussed above. The different papers show the diversity of views on the desirability of introducing a general sustainability interest.

10. Haferkamp and Habdas approach the theme by a historical reflection of the role of the general interest in the abuse of rights doctrine.<sup>28</sup> Both point at the risk of a political influence, when general interests play a role in the weighing of interests, depending on the political wind that blows. Moreover, this is possible without (drastically) changing the provision itself. Haferkamp shows that during the National Socialist era, good faith was politicized and §242 BGB, that prescribes inter alia that good faith should be taken into account in contracts, was used to bound the people and the judiciary to National Socialist guidelines, making it impossible to exercise the law against the national interests. Using this experience, Haferkamp describes the danger of legal uncertainty when judges can decide without clear legal guidelines about the public (read: Nazi state) interests. Currently, the shift has been made from political private law to constitutional law, with the Constitution as the basis for all judicial evaluations, also for good faith and thus abuse of rights. Habdas describes a similar development, where Article 5 of the Polish General Provisions of Civil Law, containing the abuse of rights principle based in the Western legal tradition, retained more or less the same wording during the socialist era. Here also, a more political

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27 See the contribution of Habdas in this special issue.

28 H.-P. HAFERKAMP, ‘On the history of the German doctrine of abuse of rights and public interests’, *ERPL* 2025(4); M. HABDAS, ‘The role of the general interest in the abuse of rights doctrine in Polish law – private and property law aspects’, *ERPL* 2025(4).

interpretation became more prominent. Habdas states that, given the trauma left by the experience of socialism, the abuse of rights principle must only balance private interests, instead of securing the general interest.

11. Bargelli, Ruda, and Van Dongen & Visser approach the theme by comparing legal systems in which the abuse of rights doctrine plays a role.<sup>29</sup> Bargelli approaches the theme by comparing Italian and EU law. She shows that in both systems, the abuse of rights doctrine serves as a means of last resort, but they are used differently. In EU law, the abuse of rights doctrine is a general principle that can prohibit individuals from invoking their EU rights, if these rights were exercised beyond their rationale, while in Italian law the doctrine is a gateway to moral, social, and economic evaluations, as well as a means of governing the complexity of legal sources. However, in neither of the systems, the general interest plays a direct role. In Italian law, the general interest can enter via the (indirect) horizontal effect of constitutional and supranational rights and principles, while under EU law, as Bargelli points out, it is more appropriate to change the legislative design of EU rights (such as consumers' rights) when the aim is to take general interests such as an environmental impact of the exercise of a right, than to use the abuse of rights doctrine. Interestingly, Bargelli considers the taking into account of sustainability and preventing climate change as general interests as a step forward in the abuse of rights doctrine. Ruda compares the abuse of rights doctrines in Spain and Portugal and shows that geographical vicinity does not equal corresponding legal institutions. Especially in Spain, the statutory rule, with a basis in case law from 1944, is rather vague. Strikingly, Ruda also points out that the introduction of the abuse of rights doctrine was advocated by a star judge of the Franco regime, Castán, handing the judge a possibility to deactivate the application of the law and confer greater power to the judge. Like Haferkamp and Habdas, Ruda also states that the abuse of rights doctrine may be a dangerous tool in the context of dictatorship. Furthermore, Ruda shows that although the 1944 judgment leaves room for judges to take the collective interest into account, leaving the door open for environmental interests playing a role in abuse of rights questions, this possibility has not been central in the scholarly comments or case law. However, it seems unlikely that such an interest will be taken into account in Spain nowadays, since the right to the environment is protected by legislation, and the current doctrine in case law is that, for abuse of rights, it is required that an interest not protected by legislation is damaged. In Portugal, the abuse of rights institution is seen as an exception for

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29 E. BARGELLI, 'The Role of General Interests in Abuse of Rights Cases: Comparing the Current Italian system with EU law (with an emphasis on environmental protection)', *ERPL* 2025(4); A. RUDA, 'Before the Law. Collective Interests and Abuse of Rights under Spanish and Portuguese Laws', *ERPL* 2025(4); E.G.D. VAN DONGEN & I. VISSER, 'Balancing Interests: Exploring the Tensions between General Interest and Individual Rights in the Context of Abuse of Rights in the Netherlands and Belgium', *ERPL* 2025(4).

situations that are blatantly unjust. Here, the judge can apply this provision *ex officio*. Similarly to Spain, the discussion on the interests that can be taken into account, including the general interest, in the question of abuse of rights, is hardly elaborated in Portugal. Ruda states that in both jurisdictions, the scholarly interpretation is that a collective interest can be considered. Van Dongen & Visser reflect on the abuse of rights doctrine in Belgium and the Netherlands. Since 1 September 2021, the Belgium Civil Code explicitly states that the public interest can be taken into account in private property disputes in case of overhanging branches and roots – the neighbour may require the owner to cut it away, unless the judge considers this to constitute an abuse of rights. In making this decision, the judge shall take into account all circumstances of the case, including the public interest (Art. 3.134 Belgian Civil Code). In this light, the Supreme Court decision of 2021 (see above) is even more surprising, although the new legislation was not applicable to the case. Van Dongen & Visser discuss the lively debate among Belgian scholars that rose from this decision. In the Netherlands, the debate about the influence of public interests has also started, but mostly in different fields of private law than the abuse of rights doctrine. However, an example of a case in 2013 about abuse of rights by a mortgage lender, shows that there might be an opening for weighing the public interest here as well.<sup>30</sup> They conclude, with reference to Eichenhofer,<sup>31</sup> stating that the task of the idea of abuse of rights – and thus of courts and lawyers – could be to bring a peaceful coexistence of the positive and ethical norm order, by translating ethical claims in positive law.

12. Combe and Smári Petersen discuss the theme for jurisdictions in which the abuse of rights doctrine is not so self-evident as in the other legal systems.<sup>32</sup> Combe compares Scotland with England and shows that while in England the abuse of rights doctrine does not exist (malicious exercising of ownership rights does not in itself provide a reason to sue someone), the *aemulatio vicini* in Scotland offers the possibility to prevent an owner from maliciously using their property to the detriment of a neighbour, but is little used in practice. In England, the nuisance doctrine offers an alternative to abuse of rights but does not cover all situations. Furthermore, the role of general interest in these cases seems insignificant, according to Combe. In Scotland, existing case law concerning *aemulatio vicini* does not embrace considerations of public interest. Combe refers to Anderson here, who is critical about taking the public interest into account in disputes around encroachments. This leads Combe to the conclusion that the embracement of collective

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30 Court of first instance Amsterdam 13 May 2013, ECLI:NL:RBAMS:2013:CA0869, uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBAMS:2013:CA0869.

31 P. EICHENHOFER, *Rechtsmissbrauch* (Mohr Siebeck 2019).

32 M. COMBE, 'Abuse of [property] rights in Scots law and English law: a workable doctrine, in the public interest?', *ERPL* 2025(4); V. SMÁRI PETERSEN, 'Abuse of rights in Icelandic Property Law with a comparative survey of the other Nordic countries', *ERPL* 2025(4).

interests in the *aemulatio vicini* doctrine should not be rushed. However, the current land law reform in Scotland shows that there are attempts to change the culture around landownership, which offers a path towards land management in a way that is closer to the public interest. Smári Petersen reflects on the theme by comparing Iceland to the other Nordic countries. For Iceland, he concludes that the doctrine of abuse of rights probably exists, or at least should exist since the nuisance principle does not cover all aspects of abusive exercise of ownership. As concerns the other Nordic countries, Norway has the strongest tradition of accepting the principle of abuse of rights, while the doctrine also exists in Denmark. For Sweden and Finland, it is also advocated that the doctrine exists. Returning to the topic of public interests, Smári Petersen concludes that the owner can use private and public interests as a defence in case of abuse of ownership rights. Icelandic scholars mention economic public interests in this perspective, but in Smári Petersen's view, also ecological interests could be considered.

13. Finally, Hoops was asked to give a general and concluding reflection on the potential role of the general sustainability interests in the abuse of rights doctrine.<sup>33</sup> In his paper, he explores the methodological, substantive, and economic challenges. He concludes that reforming the doctrine to include public interests is a worthy, but cumbersome endeavour. This shows that, although – as stated before – the abuse of rights doctrine can be an important instrument for progress towards a less individualistic and more socially involved society, it might be a rugged pathway towards a more sustainable society. The potential is there, however, and, given the thorough reflections of the authors, this special issue contributes to this potential. Although the contributions show different approaches to the topic of this special issue, they also show that – until now – little consideration has been given to the role of the general interest in general, let alone the sustainability argument, in the context of abuse of rights.

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33 B. HOOPS, 'Abuse of Rights: A Sensible Last Resort to Save the Planet from Ownership?', *ERPL* 2025(4).

