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LIST OF ABBREVIATIONS

A.C./AC	Law Reports: Appeal Cases
a.o.	among others
AA	Ars Aequi
Aant.	<i>aantekening</i>
<i>AcP</i>	<i>Archiv für die civilistische Praxis</i>
Adv.blad	<i>Advocatenblad</i>
ANOVA	Analysis of variance
Bd.	<i>Band</i>
BGB	<i>Bürgerliches Gesetzbuch</i>
BGH	<i>Bundesgerichtshof</i>
<i>BGHZ</i>	<i>Entscheidungen des Bundesgerichtshofes in Zivilsachen</i>
Bing. (N.C.)	Bingham's New Cases, English Common Pleas
BW/B.W.	<i>Burgerlijk Wetboek</i>
C.A.	<i>Cour d'appel</i>
C.B.	Common Bench
C.L.R.	Commonwealth Law Reports (Australia)
Cass.	<i>Hof van Cassatie; Corte di Cassazione</i>
Cass. (S.U.)	<i>Corte di cassazione, sezioni unite</i>
Cass.sez. II civ.	<i>Corte di casazione, seconda sezione civile</i>
Cc	<i>Codice civile</i>
Ch.	Chapter; Law Reports: Chancery Division
<i>Corr. giur.</i>	<i>Corriere giuridico</i>
Cost.	<i>Costituzione della Repubblica Italiana</i>
CPC	<i>Codice di procedura civile</i>
CPR	Civil Procedure Rules
CtFR	EU Charter of Fundamental Rights
D.	Digest
D.P.	<i>Dalloz Périodique</i>
DCC	Dutch Civil Code
Diss.	<i>dissertatie</i>
E&B	Ellis & Blackburn's Queen's Bench Reports
E.R.	English Reports
ECHR	European Convention on Human Rights
Ed./eds./edn.	Editor, editors, edition
<i>EdinLR</i>	<i>Edinburgh Law Review</i>

<i>Enc. Dir.</i>	<i>Enciclopedia del diritto</i>
EU	European Union
EWCA Civ	England and Wales Court of Appeal (Civil Division).
EWHC	England and Wales High Court
f	Cohen's f
<i>F</i>	F-ratio (in standard ANOVA)
<i>Foro It.</i>	<i>Il Foro Italiano</i>
Fwelch	Welch F-ratio
<i>Giur. it.</i>	<i>Giurisprudenza italiana</i>
<i>Giur. mer.</i>	<i>Giurisprudenza di merito</i>
GROM	<i>Groninger Opmerkingen en Mededelingen</i>
G	Germany
<i>Harv. Int. L. J.</i>	<i>Harvard International Law Journal</i>
HL	House of Lords
HR	<i>Hoge Raad</i>
Inv.	<i>Invoeringswet</i>
IT	Italy
<i>JW</i>	<i>Juristische Wochenschrift</i>
K.B./KB	King's Bench Law Reports
KMO	Kaiser-Meyer-Olkin measure
<i>La. L. Rev.</i>	<i>Louisiana Law Review</i>
Ltd.	Limited
<i>M</i>	Mean
M. & W.	Meeson and Welsby's Reports
Mass.	Massachusetts
MES	Multidimensional Ethics Scale
Minn.	Minnesota
Mot.	<i>Motive</i>
N	sample size
n.	number
<i>NJ</i>	<i>Nederlandse Jurisprudentie</i>
NL	The Netherlands
<i>Not. Fisc. M.</i>	<i>Notarieel en Fiscaal maandblad</i>
P	probability value
Parl. Gesch.	<i>Parlementaire geschiedenis</i>
<i>Pas.</i>	<i>Pasicrisie belge</i>
PCA	principal component analysis
PloS ONE	Public Library of Science one
QB	Law Reports: Queen's Bench Division
R&R	Reidenbach and Robin
r.o.	<i>rechterlijke overweging</i>
<i>RebelsZ</i>	<i>Rebels Zeitschrift für ausländisches und internationales Privatrecht</i>
<i>Rep.</i>	<i>Repertorio</i>
<i>Resp. civ. prev.</i>	<i>Responsabilità civile e previdenza</i>

RG	<i>Reichsgericht</i>
RGZ	<i>Entscheidungen des Reichsgerichts in Zivilsachen</i>
Rn.	<i>Randnummer</i>
RU	<i>Rijksuniversiteit</i>
RvdW	<i>Rechtspraak van de Week</i>
SD	standard deviation
SPSS	Statistical Package for the Social Sciences
<i>T.B.H.</i>	<i>Tijdschrift voor Belgisch Handelsrecht</i>
<i>TPR</i>	<i>Tijdschrift voor Privaatrecht</i>
U.S.	United States Reports
UK	United Kingdom
UKSC	Supreme Court of the United Kingdom
US/USA	United States of America
v	versus
<i>Va. L. Rev.</i>	<i>Virginia Law Review</i>
Vol.	Volume
VrA	<i>Vermogensrechtelijke Analyses</i>
VU	<i>Vrije Universiteit</i>
W.L.R./WLR	Weekly Law Reports
<i>WPNR</i>	<i>Weekblad voor Privaatrecht, Notariaat en Registratie</i>
<i>Zeup</i>	<i>Zeitschrift für Europäisches Privatrecht</i>
ZPO	<i>Zivilprozessordnung</i>
<i>ZSS GA</i>	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung</i>
<i>ZZP</i>	<i>Zeitschrift für Zivilprozess</i>
α	alpha, significance criterion
β	false-negative error rate
η^2	Eta-squared
χ^2	chi-squared
ω^2	Omega-squared

I. INTRODUCTION

Est enim aliquid quod non oporteat, etiam si licet

Cicero, Pro Balbo, iii.8

I.1. GOAL AND PROBLEM STATEMENT

People and companies have rights. However, they can also be taken advantage of and used excessively in ways that are harmful to others, such as through the building of spite fences in gardens and the use of procedural rights in legal proceedings with the sole purpose of delaying those proceedings. From one point of view, all of this should be allowed since people are autonomous and free. These are important values stemming back to the Enlightenment.¹ Freedom has even been described as the core element of the Enlightenment. The values of autonomy and freedom are underlined by private law codifications.² At the same time, we are familiar with the principle that somebody may not harm another person.³ It took some time after the French Revolution, which embraced the idea of freedom, before the principle of solidarity put the idea of abuse of rights back on the map.⁴ Most contemporary continental legal systems provide that absolute rights – such as the right to do whatever one wishes with their own property – do not entitle anyone to harm another person. When this occurs, it is called an ‘abuse of rights’.

A common example of abuse of rights is when somebody deliberately installs an obstructive wall between two neighbouring gardens. A prohibition on abuse of rights could be an important legal tool (with a remedial function) for addressing cases of excessive or harmful use of subjective rights, when it comes to determining their inherent scope.⁵ On a European (EU) level, it is unclear what the precise scope, content and limits of the prohibition of ‘abuse of rights’ actually entail and why there are differences throughout Europe. Although the doctrine is often recognised, it remains difficult to set and formulate its limits. Disinterested malevolence (acts with the sole intention of injuring another person) should be probably a sufficient condition to establish an abuse of rights but can rarely be proven. Usually, some interest of the actor can, however, be

¹ Gay 1967.

² Milo, Lokin & Smits 2014, p. 8.

³ This points to a tension that is inherent in the use of subjective rights.

⁴ De Morree 2016, p. 123; see already Campion 1925, p. 23.

⁵ La Pergola 1999.

pleaded as to the object of the act.⁶ The abuse of rights doctrine is articulated in various ways, in a spectrum from the subjective to the objective: from the sole malicious intent to harm, to the dominant (not exclusive) motive, to acting with a lack of legitimate interest, to contrary to the 'normal function' of rights, to exercise contrary to its 'socio-economic purpose'.⁷ The question arises as to whether a coherent general framework on abuse of rights, based on the various European approaches and cultures, may be established.

Such a framework may be a significant instrument of progress towards a less individualistic and more socially concerned society, against the individualistic tradition and liberal history of ideas dating back to the *Déclaration des droits de l'homme* (1789), and to Immanuel Kant. The abuse of rights doctrine may offer a method to adapt the law, responding to social needs.⁸ Subjective rights are not intended to trace natural law spheres of freedom into positive law norms.⁹ However, a social purpose of rights,¹⁰ also referred to as the 'social or altruistic component of rights', does exist.¹¹ Rules have functions and purposes and are framed in terms of concepts. According to Gordley, if these concepts are not defined in terms of the purposes of those rules, they will become doctrinal abstractions and as such will be obstacles to their understanding.¹² Rules must be interpreted and the concepts that informed them defined in terms of the purposes that they serve.¹³

1.2. LAW AND MORALITY

The fundamental basis for a theory on the abuse of rights is an extra-legal and moral one.¹⁴ According to Sajó, the protection of fundamental rights is the most efficient form of enhancing individual autonomy, when considered from a utilitarian perspective. He states that rights embody the moral fact that a person belongs to himself and not to others, nor to society as a whole.¹⁵ In the famous French case of the *Cour de Colmar* (the *affaire Doerr*) in 1855¹⁶, the problem was clearly presented as a conflict between morality and law.¹⁷ The use of ownership with the sole intention of causing damage was the oldest form of abuse of rights.¹⁸ The Colmar case however, was neither innovative nor unprecedented.¹⁹ Similarly, in the famous English case *Bradford Corporation v. Pickles* of

⁶ Paton & Derham 1972, p. 475-476.

⁷ Di Robilant 2014, p. 4-5.

⁸ Josserand 1927, p. 315-316.

⁹ Eichenhofer 2019, p. 80.

¹⁰ Josserand 1927; Gutteridge 1933, p. 27.

¹¹ See also Boll 1913, p. 44.

¹² Gordley 2012, p. 110.

¹³ *Ibid.*, p. 113.

¹⁴ Dabin 1952, p. 289ff.; Herman 1977, p. 748 ('abuse of right occupies the intersection of positive law and morals'); Sajó 2006, p. 55; De Morree 2016, p. 126. See also Ripert 1935, p. 169, 191 (issue is a moral one).

¹⁵ Sajó 2006, p. 55, citing *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, at 777, nt. 5 (1986).

¹⁶ C.A. Colmar 2 May 1855, D.P. 1856.

¹⁷ Eichenhofer 2019, p. 11-12. Also in French doctrine, this is one of the views as to the understanding of abuse of rights (*Ibid.*, a.o. p. 76-77).

¹⁸ See also Van Dongen 2020, p. 318-320.

¹⁹ Gambaro 1995, p. 565.

1895, actions, although ‘shocking to a moral philosopher’, could not be stopped by law (see para. 2.5.1).²⁰ The task of abuse of rights provisions may be to bring about a peaceful coexistence between the positive norm order and the ethical norm order, by translating ethical claims into positive law.²¹ In principle, all rules must represent ideas existing in society in order to be effective. For this reason, contemporary societal (‘moral’) views on the abuse of rights were studied empirically. I have investigated the extent to which views on boundaries associated with the maxim of ‘abuse of (subjective) rights’, when placed in their proper context, are consistent with social views on the abuse of rights, and whether differences can be found in three areas of law in four jurisdictions where different elements and requirements may apply. These aspects have been studied in order to answer the following research question: what is the role of cultural factors in the approach to abuse of rights, considering contemporary moral views in society? I provide an answer to this question in my final conclusion.

1.3. DEFINITION

Abuse of rights is not easy to define due to the multiplicity of appearances and various requirements in doctrine and case law. An attempt to define the concept by Giorgio Pino seems acceptable as a working definition, due to its general and functional character. According to Pino, the constitutive elements for an abuse of rights are:

- 1) the party involved is the rightsholder of a subjective right;
- 2) the possibility exists that the concrete exercise of that right is carried out according to a plurality of non-rigidly predetermined modalities;
- 3) the circumstance that the exercise of that right in a concrete case, even if formally with due consideration of the legal framework conferring that right, is carried out in ways that are reprehensible with regard to a certain legal or extra-legal criterion of evaluation;
- 4) the circumstance that there is an unjustified disproportion between the benefit of the rightsholder and the sacrifice falling on some ‘counterpart’ due to the fact that the right has been exercised in a reprehensible way.²²

Legal rules are often over-inclusive: certain conduct falls within the scope of the application of the rule giving a right, but regard to justification of that right based on certain criteria should be excluded. Abuse of rights then becomes relevant but needs to be concretised in the light of legal or extra-legal criteria.²³ Thus, presumptively, conduct cannot be absolutely protected. The presumption of protection can be refuted. Abuse of rights can be considered a generic term for ‘strong reasons’ that are sufficiently powerful to penetrate the presumptive protection of a (subjective) right.²⁴

²⁰ Mayor, Aldermen and Burgesses of the Borough of Bradford v. Edward Pickles, [1895] A.C. 587.

²¹ Eichenhofer 2019, p. 19, discussing François Laurent’s ideas on *abus de droit*.

²² Translation of Pino 2005, p. 165.

²³ *Ibid.*, p. 169. He distinguished between intentional-subjective, economic, moral and teleological criteria.

²⁴ Schauer 1981, p. 230.

1.4. HYPOTHESIS FORMULATION: LAW, CULTURE AND MORALS

Christiaan Brunner (1929-2007), Professor of Private law at the University of Groningen, stated that the doctrine of abuse of rights constantly reminds us of the role of accepted moral and social values in society when determining the limits to the exercise of legal rights. As such, this doctrine keeps law and society together inasmuch as it prevents lawyers from declaring the legitimate exercise of rights considered abusive by the average citizen.²⁵ Whether that difference exists is addressed in this study. The view as to the 'justness' of certain behaviour differs in every society (the 'theory of relativism'). Ethical relativism is a subset of cultural relativism – thus ethical standards vary from culture to culture. As the ethics of one culture are no better than those of another, there are no international rights and wrongs.²⁶

A previous study on abuse of power clarified the influence of a 'strong cultural factor'.²⁷ My preliminary hypothesis is that, considering the differences mentioned by Geert Hofstede,²⁸ a Dutch social psychologist, cultural factors lead to different outcomes as to people's views on abuse of rights as well. As to the aspect of individualism, the more individualist a country, the stronger its citizens' preference for freedom over equality.²⁹ A study conducted by Michele Gelfand, an American cultural psychologist, and others,³⁰ appears to show that a source of cultural variation is the difference between tight cultures, with many strong norms and a low tolerance of deviant behaviour, and loose cultures, with weak social norms and a high tolerance of deviant behaviour. The range of appropriate behaviour seems to be related to the idea of the use or abuse of rights. According to Gelfand and others, individuals in nations with high situational constraints will have more prevention-focused self-guides that are more focused on avoiding mistakes and misbehaviour and will have a higher degree of self-regulatory strength.

According to Gelfand,³¹ a culture exists that reflects the strength of its social norms and the strictness with which it enforces them.³² Tightness is a state of culture that reflects the strength of the social norms in a person's environment. 'Tight' states also uphold specific moral beliefs that reinforce the commitment to cultivating a norm-abiding culture. The American social psychologist Jonathan Haidt mentioned five foundational moral beliefs, including harm to others.³³ Culture is a prime driver of differences in these moral foundations, according to Gelfand. Abusive behaviour intuitively fits into a loose environment. Norms have shifted within cultures over the centuries, often

²⁵ Brunner 1977, p. 745.

²⁶ See, e.g., Donaldson 1996, p. 48.

²⁷ Napal 2005, p. 29-34.

²⁸ Hofstede 1980.

²⁹ Van Dam 2007, p. 68, referring to Hofstede 2001, p. 275. Hofstede on individualism, from more individualist to more collectivist countries: the UK (90), the Netherlands (80), Italy (70) and Germany (65).

³⁰ Gelfand et al. 2011, p. 1100-1104.

³¹ Gelfand 2018.

³² Of course, the particular domain is also relevant; even tight nations have selected domains where anything goes, and loose societies have designated domains of tightness. Nevertheless, countries differ in the overall degree to which they emphasise tightness or looseness.

³³ Haidt 2012.

dramatically, and will continue to shift, but their basic code – tight or loose – remains timeless.³⁴ Although West Germany, Italy and the UK are quite close in this respect, the Netherlands has a much lower tightness score and therefore has a much more loose culture.³⁵

The starting point for this research was the so-called ‘mirror thesis’; the view of law as a reflection of society – a reflection of its customs and morals – functioning to maintain social order (also known as ‘social order thesis’).³⁶ By some, law in a certain society is considered to be the result of the shared ideas and opinions of the inhabitants on a just outcome (‘legal culture’, i.e. the ‘ideas, attitudes, values, and opinions about law held by people in a society’³⁷). Would that mean that a certain area of law would be based on broadly shared norms and values in a country?³⁸ The present study contributes to the body of knowledge on this issue, and specifically on the aspect of abuse of rights.

1.5. APPROACH

This book begins by mapping national developments in various jurisdictions across Europe, summarily discussing legal rules that might be quite distinct but that are often categorised under the theme of abuse of rights; namely, regarding the regulation of ownership rights, personal rights based on contractual relationships and procedural rights (ch. 2). The book first of all maps the criteria and points of view used and the relationship with related doctrines such as unlawful acts and good faith (also a legal ethical duty) – as well as the legal consequences. The question of when judges restrict a right in the event of the abuse of a right depends on the circumstances, which in turn depend on the nature of the (subjective) right in question. Property rights³⁹ are considered to be more sovereign than contractual rights. The underlying mechanism is the same: abstract law does not exist in certain circumstances, or as sometimes argued, existing law may not be invoked in certain circumstances. Thus, a higher standard sets aside a lower standard. This theoretical difference can be seen, for example, in the German debate about the *Innentheorie* and *Außentheorie*.⁴⁰

³⁴ There is no linear relationship between tightness and wellbeing, but a curvilinear relationship whereby both very loose and very tight countries tend to present lower levels of wellbeing. See Harrington, Boski & Gelfand 2015.

³⁵ Gelfand et al. 2011, p. 1103, mentioning for West-Germany, Italy and UK tightness scores of 6.5, 6.8 and 6.9 respectively and 3.3 for the Netherlands.

³⁶ Tamanaha 2001. According to Tamanaha, in situations of low mirroring, the role of the law in the maintenance of social order will be relatively lower than in situations of high mirroring. Ironically, according to Tamanaha, where mirroring is high, there will actually be less need to intervene by law because people will abide the law anyway, due to the influence of other sources of social order. However this may be, rather than making assumptions about relations between law and society, socio-legal scholars should subject such matters to systematic empirical enquiry; see Twining 2008, p. 92.

³⁷ Friedman 1989, p. 1579; Van Dam 2007, p. 57-75.

³⁸ Comp. also Van Boom, Reinders Folmer & Desmet 2018, p. 14ff.

³⁹ Although abuse of rights is a species of the genus of reasonableness and fairness, it is in its turn a genus in relation to several other species, e.g. the abuse of ownership rights. See Schrage 2007, p. 48.

⁴⁰ See Hesselink 2011, p. 641-642, note 118.

Subsequently, the cultural factor in the abuse of rights was studied in a comparative-empirical way to shed light on the role of the cultural factor in terms of views on abuse of rights (ch. 3). Surveys were carried out based on hypothetical situations (scenarios) concerning ethical problems of various kinds in order to assess the influence of the various dimensions of ethical decision-making. This research was conducted in the jurisdictions also studied in Chapter 2. In order to measure abuse of rights, various philosophies of ethics were used, i.e. the principles of relativism, duty and morality. Lastly, this book concludes with a comparison and a number of concluding remarks (ch. 4).