

Property Meeting the Challenge of the Commons in Belgium



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Abstract Belgium features a strong social fabric and tradition of promoting non-profit associations and non-governmental organizations that deal with a variety of common goods. This cultural background has played an important role in the bottom-up political struggles—for instance aimed at reclaiming public spaces—that have been characterized as a resurgence of the commons. This social engagement with the commons is mirrored by a strong scholarly interest spanning many different fields. A recent revision of the Code (art. 3.43) has now made it clear that *res communes* serve the common good, including that of future generations. The revision of the Civil Code has also highlighted a new understanding of ownership, which art. 3.50 no longer describes as “absolute” as in the Code of 1804. This change is not merely symbolic but signals the will of the legislature—as stated in the preparatory works—to emphasize the social function of property. However, Belgian law does not yet truly embrace the challenges of the commons, which is over all a type of collective acting (*agir ensemble*), serving a much broader new social purpose. This contribution was last updated in August 2020, with some new references added in 2022.

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1 Questionnaire: Part I

1.1 *What Legal Categories in Your Legal System May More Closely Correspond to the Notions of the Commons as Deployed in the Introduction?*

There is a ‘resurgence of the commons’¹ across the world, which can also be noticed in Belgium. Evoking commons today means referring to a large array of collective actions,² often inspired by social movements advocating a transition towards a more inclusive society. This resurgence can be observed through a myriad of practical examples. One of them was the occupation of the streets in Brussels city center in order to regain access to public space on cars, to the benefit of all, and to recreate large areas where people could walk, meet, and talk. The initiative, in which intellectuals like Ph. Van Parijs were closely involved, succeeded. Other examples are the shared creation of common vegetable gardens, on all kind of patches of unoccupied land; the multiplication of covered markets aimed at selling local products; the rebirth of the social relation to nature, local agriculture, local seeds; the energization of a service-focused digital economy meant to ease collaborative practices; and even people dancing under the arcades of the Cinquanteinaire in Brussels, every evening, and reoccupying the public space in a festive or sportive way.

What we include here under the word ‘commons’ is not characterized by an object, a territory, an element, but first of all by a behavior, a way of doing.³ There are no commons without *commoning*, writes S. Gutwirth.⁴ Their core dimension is not so much the challenge to property as a desire of inclusivity, access, cooperation, taking-back control, an *agir ensemble*. They all fit within the Ostromian reading grid that the choice to be made between the State or the Market is a false dilemma and that a generative state of mind and way of governance is also possible, under specified conditions. The *commoning* is generative in the sense that it emerges from a community and because it is a factor of change,⁵ potentially game-changing through a spill over effect.

A related characteristic of Belgium is its strong social fabric—including non-profit-minded associations, non-governmental organizations, variegated charities (even if not bearing that designation)—that strongly impacts the public arena on environmental protection matters, cultural heritage, equality and equity, sustainability, animal welfare, as well as open access, data protection, transparency, etc.: all of these are potentially commons-related. However, new forms of mobilization have

¹ Bollier (2014) and Gutwirth and Stengers (2016).

² Gutwirth (2018).

³ Gutwirth (2018).

⁴ Gutwirth (2018).

⁵ Gutwirth and Stengers (2016).

emerged, made possible by social media as a communication vector: people joining together because they share ideas, even without the support of prior structures. Young people joined by thousands came into the streets in 2019 to make their voices heard on climate change and to demand more decisive action from holders of institutional power.

Gutwirth⁶ characterizes the commons and *commoning* by four dimensions. They are practices that bring together and articulate (1) a group of people (2) who self-organize and give themselves their own rules of operation, conflict resolution, and openness, (3) around a resource that concerns them and gives them collective responsibility, and (4) pursue activities characterized by their generative nature.

Such broad approach to the commons does not exist as a legal category in Belgium. However, if we understand the ‘commons’ under the meaning of a shared interest in protecting a shared goal, there is more to say. For example, the legal status attributed to a so-called ‘common heritage’ at regional or federal level needs to be highlighted.

Since 1997, it is established by virtue of the applicable law in the Walloon Region,⁷ inspired by France, that “the territorium is the common heritage of its inhabitants”: « *Le territoire de la Wallonie est un patrimoine commun de ses habitants* ». Similar language is being used, in the same Region, since 2004, in relation to the environment: ‘The environment and, especially, spaces, landscapes, resources and natural elements (milieux), air, soil, water, biological diversity and balances are part of the common heritage of the inhabitants of the Walloon Region and support their existence, their future and their development.’⁸ The main impact of such status is an enlargement of the *locus standi*, to the benefit of the inhabitants, which are credited with the guardianship of a collective interest.⁹

In the same Walloon region, the applicable law asserts that agriculture is “one of the foundations of our society and forms part of common heritage of the Walloon Region” (Walloon Decree on a Walloon Code of Agriculture, 27 March 2014, art. D.1) and that water is part of the common heritage of the Walloon region (Code wallon de l’eau, art.1).

The beneficiaries of such heritage are thus the inhabitants of the region, the regional entity as such, or even mankind. Water, in the Brussels Region, pertains to the common heritage of the Brussels Region and to the common heritage of mankind (Ordonnance-cadre sur l’eau, art.1).¹⁰

⁶Gutwirth and Stengers (2016) and Tanas and Gutwirth (2020).

⁷Walloon Decree of 27 November 1997, establishing a Walloon Code of Land use, town planning and patrimonium. Now replaced by the Code de développement territorial, 20 July 2016, art. D.I.1. See Delnoy (1999), Sambon (2012), and Pâques and Vercheval (2015).

⁸Art.1, General part of the Walloon Code for the Environment, Book 1.

⁹As mentioned by Jadot (2018).

¹⁰That reference to mankind is standard in international law, when applied to so-called global commons, and is also inserted in Belgian legislation that implement international treaties encapsulating that wording. A Royal decree of 10 January 2016 grants the status of common heritage of

That very notion of common heritage recently induced a crucial step forward in France, when applied to the environment (and phytosanitary products in particular). The environment is described by the French Constitutional Council as the common heritage of all humans, a status enhancing the rank and value of its protection.¹¹ The constitutional approach to the environment in Belgium is not similar, and the Belgian constitutional Court does already value the environment as being central in society, apt to impact economic imperatives and even fundamental rights, by virtue of the European Court of Human Rights' case law.¹² The possible spill over effect of that notion of common heritage of all humans merits continuing observation.

Cultural heritage is also a status in relation to which a specific bond between individuals and a collective goal to the benefit of future generations has been established in recent administrative jurisprudence, with the effect of broadening the *locus standi*.¹³ In a case of 2006 dealing with the site of the battle of Waterloo, the Council of State, the highest administrative Court, declared that when a site is to be considered as an exceptional 'cultural heritage' all pretention of exclusivity is excluded:

Whereas, from the moment a property is recognized as part of the cultural heritage, it cannot, by definition, be considered as being the exclusive thing of any public person, even the owner of the place, nor of a specific community, nor even of the present generation, or neighbors or people in the neighborhood. It is more the interest of those who dedicate themselves to its conservation than a random geographic proximity, that can justify the action for the preservation of the cultural good.¹⁴

The collective dimension induced by the concept of heritage broadens everyone's 'feeling' of responsibility with regards to the protected good, on behalf of future generations.¹⁵ However, in order to become a plaintiff and to avoid an *actio popularis*, the individual must still demonstrate a pre-existing active exercise of that duty of care.

mankind to deep-seabed resources that must be explored and managed in the interest of mankind, in order to avoid competition and appropriation for the sake of selective private interests.

¹¹ French Constitutional Council, Union des industries de la protection des plantes, JORF n°0027 of 1.02.2020, text n° 100, ECLI:FR:CC:2020:2019.823.QPC 31 January 2020, JORF n°0027, 1 February 2020, ECLI.

¹² Constitutional Court, case C-57/2016, para B.14.1, B.14.3.

¹³ Council of State, case Rastelli, n°101.950, 18 December 2001.

¹⁴ Council of State, case Brassine-Vandergeeten, n° 165.965, 15 December 2006, and n°185.638, 8 August 2008, as mentioned by Jadot (2018).

¹⁵ See Jadot (2018).

1.2 *Is There Today or Was There in the Past a Concept of the Commons in Your Legal System? In the Affirmative, Is It Statutory, Jurisprudential, Doctrinal or Customary?*

When invoking the commons in a national regime, lawyers will classically refer to the old notions one can find in the civil code such as the *res communes*. They do not correspond to the contemporary approach to the notion of commons. They even mirror and therefore contribute to maintain, as observed by Gutwirth,¹⁶ the well-established binary approach of the world where elements of nature are things that can be either appropriated or not appropriated, in which case they will only be protected from greed and destruction as far as decided by the lawmaker. However, such concepts can evolve and be the receptacle of the transformation of society. In particular, in Belgium, the book of Civil Code dedicated to the notion of goods was recently overhauled by a Law of 4 February 2020, which entered into force on September 1, 2021 (see below),¹⁷ but it remains to be seen if those changes will open the legal regime and transcend the classical divides.

The notions of *res communes*, communal goods, and dependencies of the public domain are worth being highlighted, first as applicable in the current regime and afterwards by considering the possible changes brought by the reform.

1.2.1 *Res communes*

Until 1 September 2021, Article 714 of the old Civil Code read: « *Il est des choses qui n'appartiennent à personne et dont l'usage est commun à tous. Des lois de police règlent la manière d'en jouir.* » “There are things that do not belong to anyone and whose use is common to all. Policy rules organize and limit the enjoyment of such use”. The main characteristics of those *res communes* are that they cannot be physically appropriated, not even by public authority. However, where air, water, or light are not supposed to be owned *as a whole*, fractions of them can be (like a gallon of water,¹⁸ or a quota of carbon emissions), according to case law.¹⁹ It is commonly admitted that air, water, high seas, and light pertain to such status.

Article 714 led to seminal doctrinal developments in relation to the protection of the environment.²⁰ In a climate case pending before a civil tribunal in Brussels (‘Klimaatzaak’), plaintiffs claim their right to use a stable climate, *inter alia* based

¹⁶Gutwirth and Stengers (2016).

¹⁷Law of 4 February 2020 related to Book 3 “The goods” of the Civil Code, *Moniteur belge*, 17 March 2020.

¹⁸Bernard (2014), p. 15.

¹⁹Van de Voorde (2020).

²⁰On Art. 714, see Carette (1998), Jadot (1995) and Carette (1997).

upon Article 714 of the Civil Code (“CC”). They insist on the fragility of the resource and on the limitations characterizing the rights of others in making use of the same unowned environmental resource.

In the new Civil Code, the wording and content of article 714 is transformed in a new article 3.43 CC mentioning that “common things cannot be appropriated as a whole. They do not belong to anyone and are used for the sake of the general interest, including that of future generations. Their use is shared by all and organized by specific laws.” « *Les choses communes ne peuvent être appropriées dans leur globalité. Elles n’appartiennent à personne et sont utilisées dans l’intérêt général, y compris celui des générations futures. Leur usage est commun à tous et est réglé par des lois particulières* ». It assimilates essential elements of the settled jurisprudence (the possibility of a partial appropriation) and adds an explicit purpose and condition to their use, both partial or as a whole: the general interest, including that of future generations: a most appropriate precision that is meant to prove useful in climate change related matters. On the debates surrounding that new article, see Sect. 1.3.

1.2.1.1 Spaces Dedicated to a Common Use of All Inhabitants

Some goods, even if owned by a public authority—an open space, a field, an orchard—are legally dedicated to a collective use, shared by the inhabitants of one or more boroughs or villages, through the intervention of Art. 542 of the old Civil Code: « *Les biens communaux sont ceux à la propriété ou au produit desquels les habitants d’une ou plusieurs communes ont un droit acquis* »: “Communal property is that to whose ownership or product the inhabitants of one or more communes have a vested right” (*communes* here means a municipality, usually the size of a village).

These « *biens communaux* » or ‘communal property’ relate to goods belonging collectively to the municipality, but offered in community.²¹ Communal property is not in the public domain, where access is open to all, but is “assigned to members of the community who can enjoy *usus* and *fructus*.”²² They are mainly land (moors, swamps, natural pastures, ponds, watercourses), forests or livestock that are left at the collective disposal to “compensate for the low productivity of agriculture.”²³

Two categories of communal property can be distinguished: those offering enjoyment in common, and those offering enjoyment on an individual basis. On the one hand, there is the right of grazing, according to which cattle could eat the seeds left on the field after the harvest. This right favoured access to land for those who had none, in order to feed their livestock, while at the same time being of interest to the owner, inasmuch as the livestock left on pasture made manure for the

²¹ Bernard (2017).

²² Centre d’études sur la coopération juridique internationale (2012), p. 142.

²³ Centre d’études sur la coopération juridique internationale (2012).

fields. This system for the benefit of both parties (owner and communal user) maintained coherence, peace, and solidarity in the community. But the right to graze fell into disuse following the improvement of agricultural techniques and the rise of capitalism, encouraging the delimitation of plots to make them more productive (cf. the movement of enclosures). Hunting and fishing rights—mainly stemming from customary law—are part of the same logic of limiting the freedom of farmers, coming into conflict with property rights and its attributes.²⁴

On the other hand, there are gleaning rights, scraping, raking, as many rights of use on communal property for individual use, in the case of lots drawn by lot or put up for auction. Their number has, however, drastically declined. Even if these *sarts* (old-French for communal property) were sold by auction, there was always a ceiling to prevent a villager from buying too many *sarts*.²⁵ These two relics of ancient law, included in the Civil Code but almost forgotten since, are interesting in that they take up the idea of shared enjoyment, but remain limited in a communal setting and essentially agricultural or forestal.

The concept of communal goods is not maintained in the new Civil Code, the ambit of which was to get rid of ‘obsolete’ provisions and depart from a code that was too anchored in rurality. Article 542 might actually have been sucked into the new Article 3.45 of the Civil Code, concerning public property (public and private

²⁴ Centre d’études sur la coopération juridique internationale (2012).

²⁵ Constitutional Court, Decision N° 44/99, 20 April 1999, B.5 (free translation):

Article 542 of the Civil Code does not have the effect of granting the inhabitants of a commune, in a personal capacity, a right of ownership or a right of enjoyment. Communal property is in fact the property of the communes or sections of communes.

By transferring ownership and enjoyment of these communal properties from a section of a commune to a commune, the legislator has not infringed the right of ownership as recognised by Article 16 of the Constitution and by Article 1 of the First Additional Protocol to the European Convention on Human Rights. These provisions cannot, in fact, be invoked for the benefit of persons governed by public law who have been abolished by the legislature;

as well as B.7:

Rights of use granted to inhabitants are rights that are exercised in kind and do not as such give rise to the distribution of sums of money. The Court recalls that, as the analysis of the parliamentary documents has shown, the legislature did not intend to interfere with the rights of use exercised *ut singuli*.

The Court further observes that the removal of the exclusive nature of those rights is not necessarily subject to compensation. Indeed, such a measure does not constitute expropriation within the meaning of Article 16 of the Constitution, since it is not a transfer or deprivation of ownership within the meaning of Article 1 of the First Additional Protocol to the European Convention on Human Rights.

Moreover, in view of its aim of equality and solidarity, the legislature does not violate articles 10 and 11 of the Constitution by deciding not to reserve user rights for the inhabitants of the former sections of communes.

The Court therefore denies any exclusive ownership of communal property, which is a collective with common rights of enjoyment.

domain), but nothing is less certain and the abolition of communal property without any transitional measures could prove problematic, particularly with regard to some rights of enjoyment of local residents.²⁶

1.2.1.2 Open List of Goods in the Public Domain

The Civil Code provides an open list of goods dedicated to a collective use and, therefore, that must not be privatized (*see* Sect. 1.5). They are owned by the State and pertain to the public domain, as a ‘dependency.’ Art. 538 of the old Civil Code asserts that “paths, roads and streets at the charge of the State, navigable or floating rivers and streams, shores, sea shores, harbours, roadsteads, and generally all parts of the Belgian territory that are not subject to private ownership are considered as dependencies of the public domain.”²⁷ The list is interpreted extensively, and includes railways, public libraries, town parks, cemeteries, etc.²⁸ Openness of seashore and seaside is an established feature of the Belgian sealine, at least as far as beaches are concerned. There is no possibility of entire privatization of a beach (even if restrictions of access can be imposed, as observed during the sanitary crisis where people now need to book their place for lying on the beach).

One might observe interesting similarities between that provision and the public trust doctrine in common law, the fundament of which rests on the duties of the State to protect seashores or, among other resources, intertidal zones.

Strangely enough, the new Civil Code does not list the public goods that are dedicated to a collective use, like seashores. According to the initial draft proposal for the new Civil Code, these several articles were supposed to be absorbed in the article defining public property, now art. 3.45 that mentions “the public goods are

²⁶In the first draft of the new Civil Code, the drafters had included a table of concordance showing that former article 542 is included in draft article 3.59 (which became 3.45, but which was also substantially modified between the first draft and the adopted version); *see* Draft law inserting Book 3 “Property” into the new Civil Code, Parl. Doc., Ch., sess. 2018–19, 31 October 2018, No. 3348/001, p. 603.

²⁷Art. 538. “*Les chemins, routes et rues à la charge de l’Etat, les fleuves et rivières navigables ou flottables, les rivages, lais et relais de la mer, les ports, les havres, les rades, et généralement toutes les portions du territoire belge qui ne sont pas susceptibles d’une propriété privée, sont considérés comme des dépendances du domaine public.*” *See also* Art. 539. “*Tous les biens vacants et sans maître, et ceux des personnes qui décèdent sans héritiers, ou dont les successions sont abandonnées, appartiennent au domaine public.*” (“All vacant and unmanaged property, and that of persons who die without heirs, or whose estates are abandoned, belong to the public domain”). Art. 540. “*Les portes, murs, fossés, remparts des places de guerre et des forteresses, font aussi partie du domaine public.*” (“The gates, walls, ditches, ramparts of war squares and fortresses are also part of the public domain”). Art. 541. “*Il en est de même des terrains, des fortifications et remparts des places qui ne sont plus places de guerre; ils appartiennent à l’Etat, s’ils n’ont été valablement aliénés, ou si la propriété n’en a pas été prescrite contre lui.*” (“The same applies to land, fortifications and ramparts of squares that are no longer places of war; they belong to the State, if they have not been validly alienated, or if ownership has not been prescribed against it”).

²⁸Bernard (2014), p. 48.

part of the private domain, unless they are assigned to the public domain” (*Les biens publics appartiennent au domaine privé, sauf s'ils sont affectés au domaine public*).²⁹ However, it is not yet clear what the suppression of these lists means, or if it might open the way to lessen the protection offered by the public domain regime to these goods, especially regarding that the public domain itself has been redefined (see Sect. 1.5).

1.3 Is the Commons Today a Topic of Academic Debate in Your Legal System—and in the Affirmative in What Context?

Scholarship is interested in the notion of commons and recently embraced it from many disciplinary angles (law, economy, philosophy, etc). Political parties also discuss the concept and its integration into constitutional law.³⁰ Society and social movements are influenced by the seminal bestsellers of Dardot & Laval,³¹ Coriat,³² Bollier,³³ etc, and by the literature on transition or by film, such as the 2015 documentary “*Demain*” by Cyril Dion and Mélanie Laurent. In September 2022, the *Journal des Tribunaux*, the most read legal journal among practitioners and scholars in French-speaking Belgium, published a special issue on the commons with papers from the authors of the present contribution. Delphine Misonne wrote a paper on the environmental commons drawing links between notions like ecological prejudice and ecocide, and Marie-Sophie de Clippele focused on cultural commons, analysing the distinction between material and immaterial commons, with a strong focus on participatory governance.

1.3.1 The Civil Code

By contrast, reforming the Civil Code on the chapter of goods did not provoke a large debate on the need to include a new category of ‘commons,’ besides the existing notions of public and private goods. For the revision of the chapter on liability of the same Civil Code, on the contrary, an intense debate was held on the lack of recognition of “ecological damage,” a notion still absent from Belgian civil law.

²⁹Draft law inserting Book 3 “Property” into the new Civil Code, Parl. Doc., Ch., sess. 2018–19, 31 October 2018, No. 3348/001, p. 603.

³⁰See Piron (2017).

³¹Dardot and Laval (2014).

³²Coriat (2013).

³³Bollier (2014).

Written in 1804, the Civil Code needed to be redesigned in order better to fit contemporary issues. The process of revision was launched by the Minister of Justice and entrusted to a select group of experts. On 8 December 2017, a public consultation was undertaken in order to make the new proposals public and allow anyone to react, within the deadline of 1 February 2018. The process is fed by a comparative approach, taking due account of recent developments in The Netherlands, Québec, and France as well as, in a minor way, in Germany, Switzerland, and Spain.

The new article 3.43 is dedicated to both *res communes* and ‘res without owner.’ For the *res communes*, inspiration was found in the Civil Code of Québec.³⁴ The so-called things without owner, other than the *res communes*, can be appropriated, as was the case in the former version of the Civil Code.³⁵ Animals, however, are now distinct from the status of ‘things,’ and pertain to a bespoke category, distinct from the status of persons (art. 3.39).

The approach to the *res communes* rests with the need to settle their relation to appropriation, even though these ‘common things’ are not defined. Because they cannot be globally appropriated, they remain *res* (things) and do not pertain to the category of goods. The category is often raised in relation to the ecological crisis and the scarcity of resources, in order better to frame the recognition of subjective rights to the protection of the environment.³⁶ In the initial draft proposition, there was no reference to any literature on the commons. However, the initial proposal was amended, in order to add the interest of future generations in the new article 3.43.³⁷ The legislator gave the following explanation to this addition:

The current evolution of society is such that more and more attention is being paid to common or collective property. Climate change and a growing ecological and social awareness among the population are pushing more and more citizens to jointly manage goods such as seeds, knowledge or land use, taking into account the interests of future generations. Therefore, it would be appropriate, also in the context of property law, to specify that common things are used with attention to the interests of future generations.³⁸

³⁴ With the mention of one main doctrinal source only, from Paris (Chardeaux 2006).

³⁵ See the second paragraph of article 3.43: “Things, movable and immovable, without owner either they never had one, or their owner has relinquished ownership, may be appropriated in accordance with Article 3.59, § 2, for movables and in Article 3.66 for immovables” (« *Les choses, mobilières et immobilières, sans maître, soit qu’elles n’en aient jamais eu, soit que leur maître ait renoncé à la propriété, peuvent être appropriées conformément à l’article 3.59, § 2, pour les meubles et à l’article 3.66 pour les immeubles* »).

³⁶ With references to Carrette (1998) and Jadot (1995).

³⁷ Article 3.57 of the initial draft proposal read as follows: “The common things cannot be appropriated in their entirety; they belong to no one and their use, common to all, is regulated by particular laws” (« *Les choses communes ne peuvent être appropriées dans leur globalité; elles n’appartiennent à personne et leur usage, commun à tous, est réglé par des lois particulières* »).

³⁸ *Doc. parl.*, Ch., sess. 2019–20, n° 0173/002, p. 5.

The addition is clearly in tune and influenced by the practices of *commoning*, finding legal recognition for the first time, in a provision that was not supposed to be necessarily the most appropriate.³⁹

In scholarship, a new concept emerged in 1995, thanks to the academic work of Professor François Ost: the ‘transappropriation,’ shedding light on the limits to private property, that is by far not as absolute as sometimes thought when reading Article 544 of the old Civil Code (*usus, fructus, abusus*).⁴⁰ That concept is frequently used in legal theory in order to discuss the limits to property, but has not yet formally emerged in more operational discussions.

However, in the new Civil Code property is no longer described as an absolute right: the term ‘absolute’ is deleted. Art. 3.50 states that the right of ownership provides the owner with the right to use directly what is ‘object’ of its title, to use it, and to deal with it, adding that by principle, “the owner enjoys the completeness of its prerogatives, subject to the restrictions imposed by the law or the rights of third parties.”⁴¹

When drafting article 3.50, the legislator meant to be operational and not conceptual. Parliamentary documents mention that property right must be framed in accordance to its social function, as it “corresponds to the evolution of property rights over the last decades, with an increasing emphasis on the social impact of the exercise of property rights”.⁴² Property should, in other words, be exercised according to its social function, meaning it can be limited by other legal rules or by the rights of others. Concerning those ‘others,’ the legislator understands them in a broad sense, referring to “all rights that third parties may have over the property of others.” These ‘third parties’ are also broadly defined and include “not only persons who have a contractual relationship with the owner (tenant, emphyteutic lessee, usufructuary, holder of a servitude, borrower, superficiary, etc.), but also third parties with whom he has no legal relationship (authority, neighbours, etc.).”⁴³ However, the legislator doesn’t seem to interpret widely these limitations to property, mentioning in his parliamentary documents the specific rules of the *abus de droit* (abuse of right) and *trouble de voisinage* (unbalance between neighbors and the use of their own rights). Time will tell what impact this new definition of property might have on the concept itself, perhaps opening towards a more inclusive model, where the commons might gain legal recognition.

³⁹ Gutwirth and Stengers (2016).

⁴⁰ Ost (2003).

⁴¹ See the French version: “*Le droit de propriété confère directement au propriétaire le droit d’user de ce qui fait l’objet de son droit, d’en avoir la jouissance et d’en disposer. Le propriétaire a la plénitude des prérogatives, sous réserve des restrictions imposées par les lois, les règlements ou par les droits de tiers.* »

⁴² « *correspond à l’évolution du droit de propriété intervenue au cours des dernières décennies, mettant sans cesse davantage l’accent sur l’impact social de l’exercice de la propriété* », Projet de loi portant insertion du Livre 3 « Les Biens » dans le nouveau Code civil, *op. cit.*, p. 126.

⁴³ Projet de loi portant insertion du Livre 3 « Les Biens » dans le nouveau Code civil, *op. cit.*, pp. 127–128.

1.3.2 The Environment

Academic debates occur periodically on the right to water. In 2014, a request was made before the Senate to change the Constitution in order to insert a ‘right to water and energy’,⁴⁴ but with no success so far.⁴⁵

There are also debates on the conditions of public-private partnerships. This clearly constitutes a new trend in Belgium, including in relation to the management of public services (a water treatment facility) or the conservation of common heritage (War Heritage Institute⁴⁶), or the management of prison facilities. However, some critics fear it might hamper the general interest such public goods are supposed to follow, by being too much subject to profitable concerns.

Academics seek more radical innovative legal thinking around the commons. Serge Gutwirth and Alessia Tanas call for “the possible legal protection of *commoning*, while hoping that this kind of sustainable and generative action can begin to exist more than marginally in law”.⁴⁷ Their recent paper analyses this *commoning* through three case studies: the concept of transpropriation, the ‘civic uses’ (*usi civici*) in Italian law, and the legal personality of the Whanganui river in New Zealand. They conclude that: “it appears that the law modestly and marginally opens itself to the recognition of the networks of interaction and interdependencies among all living beings that inhabit lands, rivers and territories and to see these as living places”.⁴⁸

Research in human and social sciences is dedicated to the worldwide movement of *Zones à Défendre*,⁴⁹ which also provokes academic discussion and citizen initiatives against the privatization of open (public) spaces.

Community Land Trust, a new tool in the spirit of the commons, is experimented in Brussels and in Leuven (Flanders). According to Professor Nicolas Bernard:

[T]he community land trust (CLT) is a fertile path towards a solution insofar as it immunises the land from individual ownership and grants *time-limited* property rights to the housing erected upon it. In addition, the CLT provides for the restitution to the community of the added value generated by the resale of this title, thereby curbing speculation, and is managed through highly participatory processes. For these reasons, by withdrawing land from the sway of market logic, the CLT may be seen as a paradigmatic current illustration of common property theory (CPT) in the field of housing.⁵⁰

Doctoral research is also taking hold of the notion of commons, for instance in their relevance for the governance of seeds.⁵¹

⁴⁴Document Sénat – Proposition Anciaux - 6-15/1 - SE 2014.

⁴⁵For more information, see de Broux and Portelli (2014).

⁴⁶<https://bit.ly/3gf3HNA>.

⁴⁷Tanas and Gutwirth (2020).

⁴⁸Tanas and Gutwirth (2020).

⁴⁹See, *inter alia*, De Clerck (2018).

⁵⁰Bernard (2018a).

⁵¹Frison (2018).

1.3.3 Data and Intangibles

One of the typical areas in which the concept of the commons emerges is that of the intangible. Much less preoccupied by the scarcity of the resources than for environmental or cultural matters, intangibles are confronted with other challenges when regarded as a potential growing field of the commons. Professor Alain Strowel explores the “paradox that commons on intangibles require some form of appropriation”.⁵² For him:

With the movement of open source software (and free cultural works), the property on the works is used to ensure free use. Similarly, the insurance of a free use of data, potentially a data common, relies on an adequate delineation of (intellectual) property, for instance of the mandatory exceptions to the database right.⁵³

1.4 *Is There Any Kind of Public Property in Your Legal System That Is Absolutely Not Inalienable?*

In the Belgian legal system the concept of public domain implies that the goods part of the public domain are not alienable. However, should there be a decision (express or even tacit) from the ruling authority, i.e. the public owner (the Government, whether federal or from a federate state) to deallocate the good from the public domain, it loses this status and becomes alienable. The inalienability is therefore relative and not absolute.

The other form of public property—private domain, which counts for the majority of the goods in public hands—doesn’t suffer from the inalienability rule.

In other words, there is no kind of public property that is absolutely not alienable. It remains always possible to dispose of public property.

1.5 *Are There Remedies in Your Legal System for Someone to Challenge in Court a Government That Decided Privatization of the Commons?*

Several remedies, discussed below, exist in the Belgian legal system to challenge privatization.

⁵² Strowel (2018).

⁵³ Strowel (2018).

1.5.1 Privatization of the Public Domain or Its Dependencies

If a good is part of the public domain, it cannot be transferred to a private actor (*inaliénabilité du domaine public*). However, public owners may unilaterally decide to deallocate the public domain and this may be challenged by the supervising authority if there is one. See Sect. 1.4 above.

For the same reason, the privatization of a dependency of the public domain is normally not allowed, or at least not permanently. For instance, the coast in Belgium is public domain belonging to the Flemish Region (up to the “low tide line,” after which it is public domain from the Federal State) and cannot be privately owned.

Temporary concessions may be granted by the public owner, provided they can be revoked *ad nutum* and are only temporary. Beach concessions may be granted to a coastal municipality or even to a private operator, as long as they use them in conformity with the allocation of the public domain (in the general interest) and that such use remains temporary.⁵⁴

However, the new Civil Code now presents the possibility of granting rights *in rem* (*droits reels*) on public domain, therefore moving further away from a notion of inalienability. In other words, it will be possible to grant perpetual rights *in rem* on public domain (*emphytéose* and *superficie*) and not only temporary concessions. This may raise substantial difficulties as it is not clear if the public authority granting such a perpetual right may end it at will (*ad nutum*) as has always been the case for temporary concessions. In the absence of clear wording of the law, it might therefore be recommendable to specify in the act granting such permanent rights *in rem* what sanctions shall be applied were the benefactor not to conform with the allocation of the public domain.

The new article 3.45 doesn't offer a clear definition of the public domain, lessening the legal protection of its specific regime. Article 3.45 simply states that:

Public property belongs to the private domain, unless they are in the public domain. Property in the public domain is not likely to be owned by acquisitive prescription by another private or public person and may not be the subject of an accession in favour of any other private or public person, or of any other original mode of acquisition. However, a personal or real right of use may exist over a public domain property as long as the destination of this property does not preclude it.

(Les biens publics appartiennent au domaine privé, sauf s'ils sont affectés au domaine public. Les biens du domaine public ne sont pas susceptibles de prescription acquisitive par une autre personne privée ou publique et ne peuvent faire l'objet d'une accession en faveur de toute autre personne privée ou publique ou de tout autre mode originaire d'acquisition. Toutefois, il peut exister un droit personnel ou réel d'usage sur un bien du domaine public dans la mesure où la destination publique de ce bien n'y fait pas obstacle.)

⁵⁴ See the Decision from the Flemish Government of 26 April 1995 concerning beach concessions, *Moniteur belge*, 28 August 1995.

The initial draft version was more explicit on defining the public domain, referring to their allocation (*affectation*) to the public service or to the general use.⁵⁵ It seems when adopting the new article 3.45 the legislator wanted to favor a more “profitable” view of the public domain and reduce the protective regime specific to these goods in the public domain (less inalienable, no more ‘precarious’ and only temporary real rights on the public domain). Yet the absence of any definition or specific legal regime leaves it to case law and doctrine to specify the public domain (as it used to be). It could, however, liberate the notion and allow private owners *de facto*—and almost *de jure*—to own public domain.

1.5.2 Privatization of a *res communes*

Privatization of common things should in theory not be possible as they belong to no one and cannot be owned as a whole (by contrast with things without any owner (*choses sans maître*)).

Impacts on such *res communes* are being argued in litigation on climate change policies, where plaintiffs argue of a restriction to their right of use of the climate, which is not supposed to be owned (and destroyed) by others due to the fragility of the resource and the need to maintain it for the sake of the general interest and future generations. This avenue was already tested, with success, in tort liability cases concerning a river, deforestation, bird-hunting, and disposal of dangerous waste.⁵⁶ The uses made by some make the common thing less suitable for the use of others.

The difficulty is the *locus standi*. However, access to justice on environmental matters has been broadened considerably under the impact of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and associated case law.⁵⁷

The challenger can consolidate its claim by invoking Article 23 of the Belgian Constitution: one of the obligations of the legislator is to guarantee the protection of (subjective) fundamental social, economic, and cultural rights, which entails a principle of standstill. This would especially be the case if measures were already taken by the legislator to implement these rights and if privatization risks diminishing the level of protection already acquired (standstill-doctrine) without

⁵⁵First sentence of Article 3.59 of the draft proposal (the rest remains unchanged): “Goods that are explicitly or implicitly assigned either for general use or for a public service constitute the public domain.” (« *Les biens qui sont affectés explicitement ou implicitement soit à l’usage de tous, soit à un service public, constituent le domaine public* »), *Projet de loi portant insertion du Livre 3 « Les Biens » dans le nouveau Code civil*, *Doc. parl., Ch.*, sess. 2018–19, 31 October 2018, n° 3348/001.

⁵⁶Van de Voorde (2020).

⁵⁷Law of 17 December 2002 portant assentiment à la Convention sur l’accès à l’information, la participation du public au processus décisionnel et l’accès à la justice en matière d’environnement, et aux Annexes I^{re} et II, faites à Aarhus le 25 juin 1998, *M.B.*, 24 April 2003, Entry into force on 21 April 2003.

being justified by a motivation to meet the general interest.⁵⁸ However, the conditions set for meeting the threshold of the standstill doctrine are extremely severe and rarely met. Its main impact is on process, at it forces the lawmaker to motivate possible changes in the level of protection.

In environmental matters, when privatization causes a risk for the environment (eg, a forest is sold to a private company), an injunction from the tribunal of first instance (*action en cessation*) may be requested as a matter of urgency by an environmental organization or a commune (and its representatives).⁵⁹ The claim must be based on the infringement of environmental legislation or on a threat of such violation.

Important changes also occur in order to ease the protection of cultural heritage. The Belgian Council of State (*Conseil d'État*) admits, for example, that organizations whose purpose lies in the protection of cultural heritage may have standing, as well as a person who has *personally and during a certain duration* held at heart heritage conservation.⁶⁰ The extension of standing—a positive sign to recognise the role of the community with regards to cultural heritage—does not, however, necessarily mean the merits will be heard.

Concerning civil action, a new paragraph has been added in the Judiciary Code granting standing to some organizations acting for the collective interest of the protection of fundamental rights. Article 17 § 2 of the Belgian Judicial Code reads:

The action of a legal person, aimed at protecting human rights or fundamental freedoms recognized in the Constitution and in international instruments binding on Belgium, is also admissible under the following conditions:

- 1° the corporate object of the legal person is of a particular nature, distinct from the pursuit of the general interest;
- 2° the legal person pursues this object in a durable and effective manner;
- 3° the legal person acts in justice within the framework of that corporate object in order to ensure the defense of an interest related to that object;
- 4° only a collective interest is pursued by the legal person through its action.⁶¹

⁵⁸ Hachez (2008).

⁵⁹ Jadot (2018) and Tulkens and Pijcke (2007).

⁶⁰ See the decisions of the Council of State n° 165.965 of 15 December 2006 and n° 216.504 of 25 November 2011, where the judge considers that no rule of law limits the introduction of an action to the inhabitants of the neighbourhood alone, that the interest in protecting the heritage is sufficient if the person shows that he or she has personally committed himself or herself for a certain period of time to the protection of the heritage. « *l'intérêt de se dévouer à la conservation du bien est un intérêt personnel suffisant, plus que le critère de proximité géographique aléatoire, pour justifier l'action pour assurer la préservation du bien* », C.E. n°165.965 du 15 décembre 2006, p. 15 et C.E. n° 216.504 du 25 novembre 2011, p. 9, « *c'est-à-dire avoir consacré du temps et de "l'intérêt" au bien patrimonial concerné* », C.E. 2011, p. 8; see Jadot (2018).

⁶¹ Article 137 of the Law of 21 December 2018 laying down several provisions relating to justice, Moniteur belge, 31 December 2018:

This new paragraph constitutes a “small revolution” and confirms a “long sequence of uncertainties and developments” in case law regarding the possibility of bringing a collective interest action before courts and tribunals.⁶²

Finally, non-judicial means are always an option and consist of campaigning against such measures in the media and on the public and political scene in general.

1.6 Are There Remedies in Your Legal System for Someone to Challenge in Court a Government That Decided Nationalization of the Commons?

Considering the commons in a broader sense than the mere *res communes* of Article 3.43 of the new Civil Code, nationalization of any private or even publicly owned good (including goods that may be considered as commons) occurs in Belgian law through public utility expropriation (*expropriation d'utilité publique*). If a public authority expropriates an owner, it will afterwards become owner itself and then nationalize the good if necessary.

If a public authority proves there is a public utility or general interest justifying its action, it has the power to expropriate the owner, provided due compensation is granted. Article 16 of the Belgian Constitution, already adopted in 1831, protects the owner against unlawful expropriation and sets out the rule of fair compensation:

Nul ne peut être privé de sa propriété que pour cause d'utilité publique, dans les cas et de la manière établis par la loi, et moyennant une juste et préalable indemnité.

The procedure for expropriation is three-fold, starting with an administrative phase, a negotiation phase, and finally the procedural phase (if no agreement is found between the authority and the owner during the negotiations).

During these three periods, the owner may challenge the decision to expropriate, be it during the negotiation or before the civil courts. As such, the owner may counter the nationalization of the commons. However, if the public authority wants

L'action d'une personne morale, visant à protéger des droits de l'homme ou des libertés fondamentales reconnus dans la Constitution et dans les instruments internationaux qui lient la Belgique, est également recevable aux conditions suivantes:

1° l'objet social de la personne morale est d'une nature particulière, distincte de la poursuite de l'intérêt général;

2° la personne morale poursuit cet objet social de manière durable et effective;

3° la personne morale agit en justice dans le cadre de cet objet social, en vue d'assurer la défense d'un intérêt en rapport avec cet objet;

4° seul un intérêt collectif est poursuivi par la personne morale à travers son action.

⁶²Romainville and de Stexhe (2020), p. 189.

to nationalize a *res communes* (i.e. a common thing without owner), some options do exist, even though less clear.

If it would concern, for example, the nationalization of the sea outside of its territorial waters, this violates the UN Convention on the Law of the Sea of 1982, which Belgium ratified on 13 November 1998, and would be challenged before the International Tribunal of the Law of the Sea or through arbitration (some decisions have already been taken by the Permanent Court of Arbitration concerning other countries).

The legislator may also decide to requalify certain *res communes*, by adopting new legislation modifying the former and welcoming some *res communes* in its own hands.⁶³ This new legislation may be challenged through the classical procedure before the Constitutional Court, provided it violates one of the constitutional rules the Court is competent to adjudicate.

Finally, in the hypothetical nationalization of light or air or other *res communes* that are not part of the public domain and therefore not partly appropriated already by a public owner, an action on the basis of article 3.43 of the new one could be considered. This article grants what Johan Van de Voorde calls an “inclusive subjective right” to challenge such a decision before the civil courts, by introducing a legal action against an unlawful situation (*action en dénonciation d’illicéité*).⁶⁴ This inclusive subjective right allows anyone to ensure the collective use of common things.

However, legislating these aspects (like when imposing an emission’s trading scheme or imposing environmental permits regulating the use of the ambient air) cannot be considered nationalization. The Constitutional Court accepts that the use of such commons is administered by the public authority.

1.7 To What Extent Is Private Property Considered a Fundamental Right in Your Legal System, and What Other Constitutional Rights Could Defeat It in a Balancing Test?

Private property was enshrined in the first version of the Belgian Constitution in 1831, under Article 16 (part of the Second Title of the Constitution concerning the Belgians and their Rights (*Des Belges et leurs droits*: their fundamental rights):

⁶³This may be the case, for example, in the Walloon Code for Water, where Article D.34 states: “The minor bed of a non-navigable watercourse is presumed to belong to the manager designated under section D. 35 [a public owner], and is in the public domain.” (« *Le lit mineur d’un cours d’eau non navigable est présumé appartenir au gestionnaire désigné en vertu de l’article D. 35, et relève du domaine public* »).

⁶⁴Van de Voorde (2020), pp. 274–278.

Nul ne peut être privé de sa propriété que pour cause d'utilité publique, dans les cas et de la manière établis par la loi, et moyennant une juste et préalable indemnité.

Even though the article refers only to the public utility expropriation, it is considered as the basis for the recognition of private property as a fundamental right.

Article 544 of the old Civil Code also defined property right and mentions the legal limits this so-called absolute right may suffer:

La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.

In that respect the new version of Article 3.50 of the new Civil Code seems clearer:

Le droit de propriété confère directement au propriétaire le droit d'user de ce qui fait l'objet de son droit, d'en avoir la jouissance et d'en disposer. Le propriétaire a la plénitude des prérogatives, sous réserve des restrictions imposées par les lois, les règlements ou par les droits de tiers.

Private property is indeed not absolute and must take other interests into consideration. By contrast with other countries that refer to the social function of property or its need to be balanced with obligations or other public or collective interests, this is not explicitly mentioned in Article 16 of the Belgian Constitution, but timidly in Article 544 of the Civil Code (when the article was drafted in 1804 it was not supposed to entail large limitations to the 'absolute right of property' such as there are now), and more frankly in the new Article 3.50. But this doesn't mean there is no balance to be struck.

Case law demonstrates that various interests can legitimately pretend to be balanced against property right and justify its limitation. In recent decades this proportionality test has extended under the influence of the European Court of Human Rights. Belgian judges integrated this balancing test into their own judicial control, confronting the individual interest of the owner to collective interests (*eg*, environment, cultural heritage, urban law, housing).

These collective interests are often part of the economic, social, and cultural fundamental rights as enshrined in Article 23 of the Belgian Constitution (right to work, social security, right to decent housing, right to a healthy environment, right to cultural and social enjoyment, right to social help for families) and are as such also balanced against property. There is, however, no need for these interests to be recognized fundamental in order to strike a fair balance with property right.

1.8 Private Property Is an Institution Aimed at Allowing Exclusion from Land. Is There Any Limit to Such a Power of the Owner to Exclude, Justified by a Right of Access to the Private Non-owner?

There are important limits indeed.

First, the right to enclose (Art. 647 of the old Civil Code) is not absolute. The public can enjoy a right to pass on private land, under conditions (Art. 682 of the old Civil Code). These provisions are now found in Art. 3.61 of the new Civil Code.⁶⁵

Such a public right to pass on private land can either be established by the public authority—by a regulatory decision (at local level, with an appeal procedure before the Government; *see* the Walloon Decree of 6 February 2014 on vicinal roads⁶⁶ or the Flemish Decree of 3 May 2019 on vicinal roads⁶⁷) or by a convention between the owner and the local authority (*see* Art.10 of the same Walloon Decree)—or acquired by public easement, as a consequence of the regular passage by any person of the general public, during the last thirty years.

The use of the path (accessible to all) is clearly distinct from the ownership of the piece of land on which the right to pass has been granted actively (though designation, inscription on an atlas) or passively (through regular passage by non-owners). According to the Walloon Decree of 2014 on vicinal roads, ownership of the piece of land on which the passage occurs can be transferred to the local authority, under certain conditions.

The maintenance of the right to pass on private land (and as a consequence of a ‘right to walk through’) is an important dimension of ‘the resurgence of the commons’ in Belgium. For long, but also more recently, due to a renewed interest in all forms of slow mobility at large (*eg*, the ‘Ravel’ of the transformation of old railways and riverbanks into cycle paths).

Still, the issue of passage on private land, for the mere sake of walking or enjoying the benefit of a shortcut, remains contentious. On the countryside, private owners still install fences in order to bar the way, or decide to plough a site and make it disappear, even when the path was used for decades by the general public. Intimidation cases are not rare (‘interdiction,’ ‘no passage,’ ‘traps,’ ironwire, etc). Even in urbanized areas, problems occur at the occasion of administrative procedures, where town-planning projects cause a threat to long-recognized (or on-the-verge-of-being forgotten) rights to pass.

The role of citizens in the protection of such ‘commons’ or ‘common heritage’ has long been decisive. At local level, non-governmental associations aiming at the

⁶⁵ *See* § 1: “Any owner may fence off his plot in accordance with the legal and regulatory requirements up to the limit of the plot without infringing the rights of third parties” (« *Tout propriétaire peut clôturer sa parcelle conformément aux prescriptions légales et réglementaires jusqu’à la limite de celle-ci sans porter atteinte aux droits de tiers* »).

⁶⁶ Decree of 6 February 2014 *relatif à la voirie communale*, *Moniteur belge* 4 March 2014.

⁶⁷ Decree of 3 May 2019 *houdende de gemeentewegen*, *Moniteur belge* 12 August 2019.

protection of cultural heritage, including these rights to pass and to walk, exist for decades and can be quite successful, starting by inviting people to keep walking in order to entertain the servitude. They play a decisive role of guardian and watchdog, especially where the local public authority remains deficient or where the citizen's facing such threats is less well informed.

The importance of public participation with regard to the protection of the right to pass has now been explicitly recognized by law. The Walloon Decree of 2014 on vicinal roads reckons public participation, either through public enquiries or via the constitution of specific ad-hoc local experts' groups, in order to facilitate inventories and to enhance the protection of existing rights. That new Act enhances the protection of vicinal paths, as it makes their suppression more difficult.

Also, the Flemish Decree on vicinal roads of 3 May 2019 governs all public roads managed by local authorities, no matter their origin. It has been prone to some critics on its adoption process and on its new rules, less clear than they were supposed to be.⁶⁸

Still, even if the protection of public paths is robust, this does not mean these paths cannot be displaced, in due respect of both procedural and substantial conditions. See more information on this at www.sentiers.be.

Second, and more importantly, Article 3.67 § 3 of the new Civil Code introduces some sort of right of access, inspired from Dutch law (article 5:22 of the Dutch Civil Code) but also known in some countries as a "right to roam" (eg, Sweden, Scotland), understood as a 'tolerance of the owner'.⁶⁹ The new provision permits the following:

Where an unbuilt and uncultivated immovable good is not fenced, anyone can go there unless it causes damage or harm to the owner of this parcel or if the latter has made it clear that access to the parcel is prohibited to third parties without his authorization. Whoever makes use of this tolerance shall not invoke neither Article 3.26 nor Article 3.59.

Lorsqu'un immeuble non bâti et non cultivé n'est pas clôturé, quiconque peut s'y rendre, sauf si cela engendre un dommage ou nuit au propriétaire de cette parcelle ou si ce dernier a fait savoir de manière claire que l'accès au fonds est interdit aux tiers sans son autorisation. Celui qui fait usage de cette tolérance ne peut invoquer ni l'article 3.26 ni l'article 3.59.

The above articles refer to the right to acquire ownership through occupation (*usucapio*) and to acquire ownership of found movables on another's parcel, which couldn't apply in case of such access. This tolerance is not limited to neighbours but is open to anyone, without providing further explanation, which in turn might cause some difficulty for the courts when applying such a right of access.⁷⁰

⁶⁸ Draye (2020).

⁶⁹ Van de Voorde (2020).

⁷⁰ Bernard and Defraiteur (2020).

2 Questionnaire: Part II

2.1 Housing⁷¹

John, Orri, Sekela and Satoshi, desperate to find a home at an affordable cost, together with their families (including several children) inhabit homes in a development project, suspended due to delayed authorizations. The four friends and their families work on both the buildings and the land to enhance their living conditions (for instance, by painting the walls and adding a little garden). After a couple of months, the legal manager of the land discovers the four families and attempt to remove them. The families refuse to leave and the manager brings a claim against them.

2.1.1 Analysis of the Case

Various elements have a certain weight in favour of the occupants in the balance of interests that the judge must inevitably reach in this type of case (for the right of ownership is also recognised by the Constitution):⁷² let us single out three of them.⁷³

First, the public status of the owner must be pinpointed. It is difficult for a public authority to point to the occupants' fault when it has itself failed to allocate its property to some use. The parallel is even more cruel when this public owner's mission is to house people. The public service mission that is supposed to drive the public authority obligates the authority to play an exemplary role, a duty that forces it to look at its own wrongs first. More generally, the authorities' powerlessness to provide a socially sufficient housing supply in proportion to the demand can justify, to a certain extent, the fact that people then occupy property belonging to these same authorities in "compensation."

Another element that plays to the occupants' advantage is the lack of any plans (on the part of the owner) for the property being squatted. As a rule, property left vacant is not left vacant for a particular reason (or one to which the owner can admit). Most of the cases of vacancy are the result of negligence or real estate speculation. Such situations last a long time, which confirms that the owner has no real need to use the property. Consequently, if everything is weighed on the scales, the prejudice (stemming from the occupancy) that is sustained by an owner who, in any event, has no immediate need for her property, often seems much less serious than the prejudice that an expulsion would generate for the squatters (who are actually living on the premises).

⁷¹This first case was answered by our colleague Nicolas Bernard, professor of private law at Université Saint-Louis—Bruxelles.

⁷²Art. 16.

⁷³Legal principles applicable to squatting are less likely to be found in the law than in court rulings.

Finally, the situation of the occupants' vulnerability (poor, sick, elderly, refugees, etc.) carries weight. Why? Simply because the possibility of an expulsion makes rehousing them less easy. Furthermore, several judges have subordinated evictions (when property belongs to a public authority) to having the said authority search for a relocation solution.

What about possible improvements made to the property by the occupants? This circumstance has but a marginal role in the courts. It is not sufficient to counter the (massive) argument of the right of ownership in all cases. At most, courts sometime allow that the care the occupants have taken in tending to the building proves their desire to give the premises a new lease on life and attests to the credibility of their rehabilitation plans.

For a very long time, squatting someone else's property (*i.e.*, occupying it without a deed or right to do so) was not a criminal offence in Belgium; only breaking into a third party's building or entering it by violence was, by virtue of Article 439 of the Belgian Criminal Code. Consequently, a squatter who took advantage of the fact that a building was unoccupied to slip in without breaking anything and then live in it was not liable to criminal prosecution. On the contrary, and provided that she made it her home,⁷⁴ the squatter would actually be protected by Article 439 of the Criminal Code in that she could claim the inviolability of her home, even against the owner's wishing to expel the squatter by force. As a result, the owner was prohibited from taking the law into her own hands (for example by entering the premises under her own authority, dumping the squatter's belongings in the street, and changing the locks).⁷⁵ The owner then had no other possibility than to turn to a civil jurisdiction (justice of the peace) to get the squatter evicted,⁷⁶ a procedure that could sometimes take a year.

There are, of course, some faster procedures, such as the *ex parte* application, which takes just a few days to treat (before the president of the court of first instance), for the simple reason that the occupants are not called to defend their case.⁷⁷ However, several conditions must be met for this. The first one has to do with the impossibility of identifying the occupants,⁷⁸ which justifies launching an expulsion without calling them into court. Now, far from hiding, today's squatters are increasingly making certain to give copies of their IDs to owners who come to dislodge them, for the express purpose of avoiding the *ex parte* application. Second, this procedure is contingent on the assumption of "absolute necessity,"⁷⁹ which

⁷⁴ There is no need to show that one has moved into a building regularly to get a domicile. It is a notion of pure fact, independent of all legal conditions, that must meet only one requirement: proving one does indeed live there.

⁷⁵ This prohibition has remained, despite the adoption of new legislating incriminating squatting described below.

⁷⁶ Art. 591, 1°, of the Belgian Judicial Code.

⁷⁷ Art. 1025 and *ff* of the Belgian Judicial Code.

⁷⁸ See, among others, *Cass.*, 25 February 1999, *R.D.J.P.*, 1999, p. 94, note by H. Boularbah.

⁷⁹ Art. 584, Para. 4 and *ff* of the Belgian Judicial Code.

covers extreme urgency. Now, the (often long) time that the owner takes to react, combined with the premises' standing vacant for several months, even years, destroys all notions of urgency. Also, and for precisely this reason, the civil court of Namur has just rejected the request made by a public owner to recover, by means of an *ex parte* application, a building that has been occupied⁸⁰ by squatters.

On the contrary, this judge stresses the occupants' right to housing, a fundamental right inserted in the Belgian Constitution (Article 23)⁸¹ in 1994. Moreover, extensive jurisprudence has grown up on the basis of this provision, especially as regards squatting, which in several cases has culminated in the maintenance of the occupancy of the premises.⁸² In parallel, the simple fact of leaving a dwelling vacant has become a genuine (administrative) offence (*infraktion*) in Brussels⁸³ and Wallonia.⁸⁴ Leaving real estate vacant is thus no longer a legally and morally neutral behaviour examined in light of (local) taxes only; it is now officially considered *reprehensible* by lawmakers, who punish it by a fine the non-payment of which can lead to the forced sale of the property, with the State's having a legal mortgage or statutory lien on the price.⁸⁵ When measured by this yardstick, illegality is not always where you think it is.

2.1.2 Policy Questions

There is no certainty these various guardrails are the incontrovertible markers of the emergence of "commons" in Belgian law. At the very least, however, they attest to the lawmakers' will to grant primacy to the actual use of property over the simple holder of the property rights. In other words, an effort is being made (to a certain extent) to protect those who are actually making use of the dwelling in question, even if it isn't theirs. In the current housing crisis context, this pragmatic attitude seems less unreasonable, if only to palliate the shortcomings of the State.

There is more: a change in mentality is currently under way, for occupancy is gradually being seen from a *positive* angle. After trying (in vain) to quash the phenomenon, owners now acknowledge that having their property occupied has various advantages. Such occupancy enables them to avoid taxes and fines on empty

⁸⁰Civ. Namur (ref.), 14 October 2017, *J.L.M.B.*, 2018, p. 35, obs. of N. Bernard.

⁸¹In the international arena, see Art. 8 of the European Convention of Human Rights, Art. 31 of the revised European Social Charter, Art. 34.3 of the European Union's Charter of Fundamental Rights, Art. 25.1 of the Universal Declaration of Human Rights, Art. 11.1 of the International Covenant on Economic, Social, and Cultural Rights, Art. 27.3 of the International Convention on the Rights of the Child, Art. 9.1 of Regulation (EEC) No 1612/68 regarding the freedom of movement of workers inside the European Community, and the International Labour Organization's Workers' Housing Recommendation (Recommendation No 115).

⁸²See, among other sources, Bernard (2015).

⁸³Art. 20, §1^{er} of the Brussels Housing Code.

⁸⁴Art. 85^{ter}, §1^{er} of the Walloon Housing and Sustainable Habitat Code.

⁸⁵Art. 20, §4, al. 4 & 5 of the Brussels Housing Code.

buildings, slows down the degradation of the property, prevents acts of vandalism, and so on. So, a growing number of owners, both public and private, are signing contracts with the occupants to regularise and provide a framework for the occupancy. In legal terms, these are *sui generis* agreements, called “precarious occupancy” agreements, which provide for the occupants’ departure when, but not before, the owner’s plan to re-use the building for something else takes shape.⁸⁶ These agreements of a new type have officially entered the Brussels Housing Code.⁸⁷

This consideration for moorings in a place can also be discerned in another strand of legislation called the humanisation of expulsions.⁸⁸ This law protects not those who occupy someone else’s property without a deed or right, but tenants of housing for which they have not fulfilled all their contractual obligations. While in such a situation, the owner has the right to sue for termination of the lease, the law in question sets a series of conditions, such as requiring the judge to take account of the risk of the nuclear family’s falling apart if it is evicted and to take the winter season into consideration, or even the setting of a minimum one-month deadline before the expulsion order may be carried out.

As we can see, a huge movement to recognise occupancy is underway, at least on the regional level, for the approach is completely different on the federal level, the powers of which cover expulsions rather than housing (which has devolved to the regions in Belgium). The federal government has traditionally veered farther right than the Brussels and Walloon Region, and federal lawmakers have adopted the so-called “Anti-squatting Act” that upsets the balance maintained until now.⁸⁹ Basically, simply staying in a building “without the residents’ permission” is now a criminally punishable offence, even in the absence of any forced entry, violence, or physical damage. The law provides for a fine and prison sentence (which can be as high as 1600 euros and one year in prison, respectively, if the defendants refuse to submit to the expulsion order). Most importantly, the decision to expel the unwanted party may henceforward be taken by the King’s Prosecutor, rather than a judge, and in an extremely short time span (one week). What is more, the King’s Prosecutor may dispense with hearing the squatters’ arguments first “if it is not possible to hear them because of the specific circumstances of the case.”

Besides violating the constitutional right to housing, this law, which was adopted in reaction to a specific and highly marginal case in practice (someone who occupied a property in Ghent that was already lived in⁹⁰—quite an unusual case), will penalise

⁸⁶Cf. Bernard (2018b).

⁸⁷Art. 41, 16°.

⁸⁸Law of 30 November 1998 modifying certain provisions of the Judicial Code regarding procedures in renting things and the law of 30 December 1975 concerning property found outside private properties or put out in the street in the execution of expulsion orders, *M.B.*, 1 January 1999.

⁸⁹Law of 18 October 2017 regarding the illegitimate penetration into, occupation of, or stay in someone else’s property, *M.B.*, 6 November 2017.

⁹⁰The owners were away on holiday for a few weeks.

the entire sector and appears to be disproportionate. Of course, it remains to be seen whether it will be enforced in actual practice. In an exception to usual procedures in the field, it will be possible to prosecute this new offence only if a complaint is lodged.

2.2 *Nature*

Hamid, Heba, and their two children used to spend many weekends walking and playing in one of the few green areas at the outskirts of the city where they live. The land belongs to a private owner who lives in a small house near the lake. Corporation C acquires the green area and converts it into a members-only country club. Hamid and Heba sue. A local environmental group also sues claiming access to what they consider a natural commons.

2.2.1 Analysis of the Case

2.2.1.1 Administrative Authorization for Changing the Assignment of the Property

Corporation C needs an administrative authorization in order to change the assignment of the public property: transformation of a house and garden dedicated to housing into a private country club. Furthermore, especially because the land is located in a 'green area,' the land also probably falls under the special protection offered by planning instruments (structural plans) or environmental instruments (Natura 2000), which will also need to be analysed. One must also assess the specificities of the 'country club.' If transformed into a restaurant, swimming pool, or nightclub, it shall create nuisances and it is therefore submitted to the prior obtaining of an environmental permit.

At the occasion of the request for authorization(s), all citizens, including NGOs, will be offered a possibility to react to the public inquest and share thoughts on the new project, with public authorities and representatives of Corporation C being present at a public hearing, if needed. Such meeting is foreseen in the administrative procedures, a request the respect of which is severely controlled, should the compulsory conditions (deadlines, display) not be respected. The family or the association can try to convince Corporation C not to enclose the land.

If the authorization(s) are delivered by the public authorities, there are different possibilities of appeal before administrative courts, in order to check the legality of the procedures. However, on the substantive aspect, the privatization of a land previously used as a common but owned by a private person and with no special planning affectation (green area only), we do not see any avenue against that privatization in the current state of the law, except for two aspects:

- in relation to the protection of walking-through paths
- in relation to an access to the lake and to the banks of that lake, should it pertain to the public domain

2.2.1.2 Privatization, Except for Paths and Access to the Lake

The right to enclose (Art. 3.61 of the new Civil Code) is not absolute. The public can enjoy a right to pass on private land, under conditions. If Hamid, Heba, and their two children can demonstrate that people actually used to cross that land for years, and that a right to pass has actually been acquired through the ages, they can sue Corporation C before the justice of the peace in order to contest the legality of fences and of the restricted access. It would be easier for the environmental group to sue the private owner, if that association aims at protecting the common heritage, a notion the protection of public paths is part of and recognized as such.

In the Walloon Region, clarification has been brought by a law of 2014, one of the main tools being the revival of an atlas of most small paths that are deemed to be kept accessible to the general public for the sake of the general interest.

The public right to pass on private land can be established either by the public authority—by a regulatory decision (at local level, with an appeal procedure before the Government; *see* the Walloon Decree of 6 February 2014 on vicinal roads) or by a convention between the owner and the local authority (*see* Art.10 of the same Decree)—or acquired by public easement, as a consequence of the regular passage by any person of the general public during the last thirty years. The use of the path (accessible to all) is distinct from the ownership of the piece of land on which the right to pass has been granted actively (though designation, inscription on an atlas) or passively (through regular passage by non-owners).

The role of citizens in the protection of such ‘commons’ or ‘common heritage’ has long been decisive. At local level, non-governmental associations aiming at the protection of cultural heritage, including these rights to pass and to walk, have existed for decades, and can be quite successful, starting by inviting people to keep walking in order to entertain the servitude. Hamid, Heba, and the local NGO should organize regular walks and sitting in order to reclaim the path before it is enclosed.

The Walloon Decree of 2014 on vicinal roads reckons on public participation, either through public enquiries or via the constitution of specific *ad hoc* local experts’ groups, in order to facilitate inventories and to enhance the protection of existing rights. That new Act enhances the protection of vicinal paths, as it makes their suppression more difficult. The local association should subscribe to such initiatives and participate in the *ad hoc* expert group.

2.2.1.3 Access to the Lake and to the Lakebanks

The status of the lake can play a role in the issue of access. If the lake pertains to the public domain, it should be deallocated by a ruling from the competent authority (*see* Sect. 1.5).

2.2.2 Policy Questions

The maintenance of the right to pass on private land, and as a consequence of a ‘right to walk though,’ is an important dimension of ‘the resurgence of the commons’ in Belgium for a long time, but also more recently, due to a renewed interest in all the forms of slow mobility at large (*eg*, the ‘Ravel’ of the transformation of old railways and riverbanks into cycle paths).

Still, the issue of passage on private land, for the mere sake of walking or enjoying the benefit of a shortcut, remains contentious. Intimidation cases are not rare (‘interdiction,’ ‘no passage,’ ‘traps,’ ironwire, etc). In that context, the role of associations remains crucial: they play a decisive role of guardian and watchdog, especially where the local public authority remains deficient, or where the citizen facing such threats and abuse is less well informed.

2.3 Territory

Yellowriver is a small village sitting within a large and remote forest area. The government grants to Gold Masters Corporation permission to dig seeking for gold in order to develop a nearby mine. Aware of the high polluting risks of gold extraction to the nearby river, villagers erupt in protest and attempt to stop the project by legal means. Do they have any available action to protect the river—either as individuals or as an endangered community?

2.3.1 Analysis of the Case

Mining is a regionalized competence in Belgium, as far as environmental impact is concerned. For the purpose of this case, we consider that Yellowriver is a small village located in the Walloon Region.

Mining operations, including in the exploration phase, must request prior permission in Belgium. Such permits are delivered at regional level, based on a specific

legislation on mining⁹¹ (Regional Act of 7 July 1988 on Mines, partly cancelled by the Constitutional Court⁹² but updated in 2008 with regard to environmental crime,⁹³ and a Regional Decree of 26 July 1990 dedicated to research activities).

According to those old texts, a research permit can be granted by the Government for a maximum period of five years, after a consultation of the public (without any precision) and a formal request of the opinion of the Council of State (art. 6). Such a research permit can be renewed. Once confirmed, the development project requires another type of authorization, named a 'concession,' with financial guarantees offered to the owners of the surface. A concession shall only be granted in respect of specific procedural conditions. A public enquiry must be made, which respects criteria that are imposed to any environmental permit according to the Environmental Code, Book 1. As far as substance is concerned, developers are required to respect the content of general specifications. But none has been written so far in relation to gold mining, due to the lack of relevance in Belgium. Specifications on other mining activities include consideration of the impact on water (Regional Governmental Decree of 2003 on water and coal mining). All effluents must comply with specific conditions (pH, temperature, components), which are not elaborated. The exploration or concession titles can be withdrawn by the public authorities when general or specific conditions are not complied with.

The entire regional body of legislation on mining and exploration is outdated. Current regulation of mining is weak in the Region today, due to lack of contemporary applications. Mining has also always been separately regulated and the relevant legislation did not evolve much, in contrast to other sectors such as quarries.

Gold mining would today be framed within the implementation of European Union Law, a law that needs to be translated into regional texts, the update and appropriateness of which, with regard to mining operations, would need verification.

That framework includes legislation on the facilities (the 2010/75 Industrial Emissions Directive of 2010: production and processing of metals, and its 'best available techniques'), on management of extractive waste (the 2006/21/EC Directive on the management of waste from the extractive industries), on major-accident hazards (Directive 2012/18 on the control of major-accident hazards), on water quality (Water-Framework Directive), on impact assessment (Directive 85/337), on the need to prevent or repair damage to the environment (Directive 2004/35 on Environmental Liability, applicable to 'environmental damage caused by any of the occupational activities listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities,' that includes most discharges into water resulting from industrial facilities). The river and the nearby forests could also benefit from a specific status of protection according to the Habitat Directive.

⁹¹ A different legislation from that applicable to quarries. Mines differ from quarries, not based on the type of activity, nor on the fact operations occur in open air or not, but based on the kind of resource. Seeking for gold means mining.

⁹² C.A. 5/90, 8 February 1990.

⁹³ Regional Act of 5 June 2008.

Villagers and other plaintiffs could sue the Government or the Corporation, either in order to prevent the damage or to ask for reparation. Preventive action could include:

- an action before an administrative jurisdiction, in order to challenge the permits, either on procedural or substantive grounds, and obtain a suspension or cancellation. This action would raise the question of the compatibility of the current regional legislative framework with European Union law, through a request for a preliminary ruling before the European Court of Justice;
- an urgent action before the tribunal of first instance in order to prevent the occurrence of an imminent damage, based on a law of 12 January 1993 that allows the Tribunal to give an injunction to stop the occurrence of imminent damage to the environment, upon request made by an association, a local administration, or even the inhabitants of the village;
- an administrative action based on texts of the Environmental Code, Book 1,⁹⁴ implementing the Directive on Environmental Liability and allowing the public authority to impose urgent preventive action upon the developer.

Action after the damage has occurred could include:

- an action brought before a civil jurisdiction, raising the question of the fault of the developer or of the public authority, possibly also in relation to the Liability Directive and its implementation;
- an action brought before a penal jurisdiction, for breach of compliance with the conditions of the permit (or operations without permitting), or for breach of compliance with other legislation, such as the protection of water quality and the prevention of damage to water. In direct relation to mining, trespassers are liable to a penalty of 100 EUR to one million EUR, or imprisonment for up to three years, with a minimum of 8 days.⁹⁵

2.3.1.1 Locus standi

Due to the growing impact of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *locus standi* for associations has considerably expanded in recent decades in Belgium, but to a certain extent only (no *actio popularis* on environmental matters), with differentiation according to the type of jurisdiction (administrative/judiciary).

An association aiming at defending the river could act against the permits before an administrative court, in order to obtain their suspension or cancellation. Such *locus standi* depends upon the *raison d'être* of the association; the protection of the river must fall within its legitimate goals. A *contrat de rivière* (river contract)—a

⁹⁴ Art. D.112, *etc.*

⁹⁵ Walloon Code for the Environment, Book 1.

collective structure (through a Convention with the Walloon Region and the allowance of a subvention) that gathers around the different functions of a river and the need to protect them, various interests (anglers, walkers, industry, etc)—would probably be most appropriate in order to ease access to Court.

Inhabitants can also try to provoke an urgent reaction from the Tribunal of First Instance, based on a Law of 1993 on urgent actions in environmental matters, even against the authorities of the village if they decide not to react.

2.3.2 Policy Questions

2.3.2.1 Endangered Community

The concept of ‘endangered community,’ as such, is not applicable in Belgium, in relation to rivers or forests.

2.3.2.2 Rivers Do Not Have Legal Personality

Rivers do not fall into the category of persons under Belgian Law. They do not have a legal personality. They pertain to the public domain. As a consequence, except their relation to the public domain, they are not connected to a specific community that could play a role of guardianship or tutorship.

However, a community can emanate from a conventional procedure that *a priori* resorts to the field of gentleman’s agreement: the river contract.⁹⁶ Launched in the nineties, river contracts are an interesting way of raising the interest of riparians in the ‘resource’ they all share, including with public authorities. The main objective is to inform and to facilitate dialogue on how to reach a good water status. Partners can decide to adopt and allocate specific objectives, based on respective competencies. There are 16 river contracts active today in the Region (see http://environnement.wallonie.be/contrat_riviere), with an involvement of public authorities.

2.3.2.3 No Gold Mining

Mining legislation in Belgium is obsolete. By contrast to the regime applicable to quarries, which has been aligned with contemporary legal requirements, mining legislation, by lack of application, is not up to date. Gold is not topical in Belgium; however, mining could return due to a worldwide competition for getting access to rare minerals. A regional Act of 10 July 2013 implements recent EU law on carbon storage, in a brand new type of legislation.

⁹⁶Water Code, D.32 and administrative guidelines (the last one in 2007).

2.3.2.3.1 *Investment Protection*

Would Gold Masters Corporation be deprived of its authorization due to risks to the environment or non-compliance with the conditions of a permit; could it sue the Walloon Region for breach of investment protection? This all depends on whether the company is protected, as a foreign company, under a bilateral investment protection treaty (eg, CETA), and how the issue of indirect expropriation is settled, including the possible impact of a closure for breach of environmental requirements.

2.3.2.4 Gold and Mercury

The future impact of the content of the 2013 Minamata Convention on mercury (which entered into force on 16 August 2017), as far as artisanal gold mining is concerned, needs to be considered in assessing the future of all applicable environmental regimes worldwide.

2.4 *Culture*

State funding to a nonprofit local theater is cut in response to austerity measures; as a result the theater will be sold to a private company that wants to operate the theater at a profit. Evgenia, Misha, and Katia are actors, and along with other concerned citizens that protest the sale and other workers, they occupy the theater, and continue the theater's programming for the public through a combination of volunteer work and donations. The municipality brings suit to evict against Evgenia, Misha, Katia, and the other actors.

Consider whether it would make a difference if this was a historic theater of cultural relevance both in that the building is a historical building and history of offering public performances.

Variation: Assume that the actors obtain permission to stay and to use the theater provided that they run it as a commons in the interest of culture and future generations. What legal form should they use to this purpose?

2.4.1 *Analysis of the Case*

2.4.1.1 Occupation of the Theater

As discussed in Sect. 2.1 relating to housing, occupation of buildings, especially empty buildings, is since recently more strictly regulated in Belgian law than before. Occupying as such is not a crime in our Penal Code, even though burglary is (Article 468 of the Penal Code). The domicile, however, is protected, as article 15 of our Constitution provides:

The home is inviolable; no visits to the home may be made except in the cases provided for by law and in the form prescribed by law.

Le domicile est inviolable; aucune visite domiciliaire ne peut avoir lieu que dans les cas prévus par la loi et dans la forme qu'elle prescrit.

But an owned building that is not the domicile of someone—such as the theater—cannot so easily be protected against squatting (*i.e.*, illegal occupation) by a homeless person seeking to live in an empty building.

If the building is empty and if there is no offense or infringement when entering, the occupation may become legal, although less easily since the law of 18 October 2017. There are not that many legal actions the owner may undertake to evict those squatters, besides going before the *juge de paix* and requesting an order of expulsion on the grounds of Article 591, 1° of the Judiciary Code or through the law—yet to be set out in practice—of 18 October 2017, as mentioned in Sect. 2.1 for housing.

In the case of the theater it is somehow different because Evgenia, Misha, Katia, and other actors don't occupy the theater in order to live there but rather to continue working there. However, it may be argued that the building was probably left empty after the decision to sell the theater and that these actors will probably still have the keys to access the building without committing any offenses. From that perspective, they may be considered under Belgian law to occupy legally the building and their eviction may prove difficult, especially if the situation is happening for a certain period of time (a few months/years rather than a few days/weeks).

2.4.1.2 If the Theater—Public Property of the Municipality—Is Public Domain

An important aspect for this case concerns the property issue: local authorities own the theater. Under Belgian law, this theater would probably be in the public domain because it serves the public and is put to use for all by giving access to culture. In principle, the local authority cannot sell this building and certainly not to a private actor: the theater is inalienable. By doing so, it will probably lessen the public service the authority is supposed to render. If the sale of a public good is nonetheless going to happen to a private actor the public owner must first unilaterally decide to deaccess the good, and this decision may be challenged by the supervisory authority (the Regions, in our case).

2.4.1.3 If the Theater Is Historic and of Cultural Relevance

If the theater were a protected monument under one of the three regional legislations and the decree of the German Community,⁹⁷ it wouldn't really change the principles outlined before. It would probably heighten the duty of the State to take good care of

⁹⁷ Flemish Region: Onroerenderfgoeddecreet, 12 July 2013;

it and diminish the possibility to “get rid of it” by selling it to a private actor. In other words, it’s more the argument of the public domain that may halt the sale than the fact that the theater is a historic building.

2.4.1.4 Variation: If the Actors Obtain Permission to Stay and to Use the Theater Provided That They Run It as a Commons in the Interest of Culture and Future Generations, What Legal Form Should They Use?

Classical figures of private law may provide sufficient legal structure to a commonly run theater. The most obvious would be to form a nonprofit organization (*association sans but lucratif*) where the way the theater will be run is outlined in the statutes. Another option might be creating a similar form of nonprofit organization, the *foundation*, centred on goods rather than people, which could then be the maintenance of the theater. Other legal structures are more oriented towards profit (*société*) and can be useful, but they might relinquish the spirit of running a theater in common in the interest of culture and future generations.

2.4.2 Constitutional Right to Culture

Another way of approaching this question is through State responsibility under Article 23 of the Constitution, which provides:

Everyone has the right to lead a life in accordance with human dignity.

To this end, the law, decree or rule referred to in article 134 shall, taking into account the corresponding obligations, guarantee economic, social and cultural rights and determine the conditions for their exercise.

These rights shall include in particular:

... 5° the right to cultural and social development

Chacun a le droit de mener une vie conforme à la dignité humaine.

À cette fin, la loi, le décret ou la règle visée à l’article 134 garantissent, en tenant compte des obligations correspondantes, les droits économiques, sociaux et culturels, et déterminent les conditions de leur exercice.

Ces droits comprennent notamment:

... 5° le droit à l’épanouissement culturel et social

Brussels Region: Code bruxellois d’Aménagement du Territoire et d’Urbanisme, Article 206 and following;

Walloon Region: Code wallon du Patrimoine, Article 185 and following;

German Community: Dekmalschutzdekret of 23 June 2008.

In other words, cultural rights are protected in the Constitution. The State has therefore the duty to ensure the implementation of those rights. Doctrine divides the right to culture into three categories: the right to protect, the right to respect, and the right to fulfil, each one's entailing negative or positive obligations toward the State (Romainville 2014).

Cutting funding of a public theater could be seen as a reduction of the protection of the right to culture and could be challenged before the courts. The doctrine of standstill, theorized in Belgium by Isabelle Hachez in her PhD work (Hachez 2008), prohibits a public actor to regress in the level of human rights protection unless justified by imperial motives of general interest. Lack of budget is not enough to justify such a regression. The actors could go before the administrative court, the *Conseil d'État*, and challenge the legality of the decision to cut funding with regards to article 23, 5° of the Constitution. The action may be twofold: suspend the decision (and also the decision to sell) if there is a serious prejudice and imperative motives to do so in the first place, and later on obtain the annulment of the decision if it were illegal.

2.5 Climate

Diletta, Flavio, and Antonella became aware of the reality of climate change when their school teacher decided to work on reading materials that were circulated at the time of the 2015 Paris Agreement on Climate Change. Although just turned 18 years old, all the three of them took the information quite seriously and started to worry about the gloomy expectations they learnt about: dangerous rise in the global temperature, water scarcity, droughts, forest fires, possible displacement of populations, etc. After the scandal involving the Popcar Corporation, concerning the manipulation of computer system for the control of emission in cars, Diletta, Flavio, and Antonella are struck by the quite feeble sanctions inflicted to the car manufacturer—not only in their jurisdiction. For this reason Diletta, Flavio, and Antonella decide to take action in the interest of future generations. They sue their government and the global corporation Popcar.

2.5.1 Analysis of the Case

We must first ascertain under which jurisdiction and based on which legal framework Popcar, the car manufacturer, has been sanctioned.

2.5.1.1 A Collective Action in Relation to Consumer Protection

Actions against corporations are eased in Belgium since September 2014, and the entry into force of a new Code of Economic Law, that introduces a possibility of

collective action where consumer interests are violated. The conditions for such collective action are:

- all plaintiffs must qualify as a consumer, and suffer from the same kind of reprehensible practices;
- victims are represented by one person, meeting certain conditions. That person may be a recognized association or a well-known organization acting in favor of the protection of consumer interests,⁹⁸
- the procedure must proceed before the judicial jurisdictions in Brussels;
- the incrimination must concern a breach of a contract, European regulation, or national law listed in the Code, including the chapter on fair market practices (cheating is forbidden: the manipulation of a computer system in order to transform information on emissions would fall within the scope of the Code) and the main legislation on consumer protection. It does not expand on specific legislation on cars, except for insurance protection and mileage measurement provisions; environmental provisions are not mentioned.

Another condition is that the collective action is supposed to be more efficient than a normal action, based on generally applicable provisions (torts, for instance).

Can Diletta, Flavio, and Antonella qualify as a consumer, and be among the plaintiffs that would be represented by an association? The consumer is, according to the Code on Economic Law, any physical person who acts in order to defend interests that do not fall within a professional, industrial, craftlike, or liberal sphere. It does not entail, as a consequence, that our three young people must be the owners or users of a car. Of course, they must be impaired by the same kind of reprehensible practices, but one does not know yet, by lack of case law, the determinants of the collective prejudice. The aim of the collective action is to obtain and negotiate the reparation of the collective damage, not to impose sanctions (in the sense of a fine or imprisonment).

2.5.1.2 Breach of Criminal Law

Actions before criminal courts are kept separate from such collective actions.⁹⁹

The transformation of a computer system in order to favor unfair and illegal practices falls within the Code of Economic Law and its penal provisions. Unfair practices are condemnable. But if the problem is an impact on climate change, the possibility for our three young adults to act as a plaintiff in the general interest is, as far as we know, vain.

On the environmental side, the regulation of the control of emissions in cars is highly Europeanized in Belgium, meaning it is ruled under EU law as implemented under Belgian Law. Sanctions and prosecutions remain the resort of national law,

⁹⁸ Art. XVII.39, Code of Economic Law.

⁹⁹ Art. XVII.67.

except for the type of incrimination. The unlawful discharge of emissions into the air is a criminal offence and must be established as such in the law of Member States, according to Directive 2008/99 on the protection of the environment through criminal law. General legislation on car emissions¹⁰⁰ is listed among the provisions the infringement of which constitutes an unlawful conduct. EU legislation is evolving on these aspects, including on measurement and reporting requirements of car emissions.

Emissions of cars, when a condition of access to the Belgian market, for environmental reasons are a federal jurisdiction. On the environmental aspects, it is mainly governed by the Federal Law of 21 December 1998 on product legislation, and related regulations, including those implementing the regulation of information on CO₂ emissions from cars. But its application is intertwined with provisions of the Code of Economic Law, especially as far as fairness in market practices is concerned. Control of the general information, as provided for by the car manufacturer to the general public, is the resort of the Economic Inspectorate.¹⁰¹ To our knowledge, the Belgian Government has never taken action against a car manufacturer or importer in order to contest the breach of regulatory requirements on emissions information and control.

Enforcement is widely recognized as the weak dimension of EU air quality policies at large. Diletta, Flavio, and Antonella could add their voices to the many complaints already made to the Commission that breaches of EU Law on emissions by cars should force the Commission to bring a case for non-compliance before the European Court of Justice.

As already mentioned, even if the control is national, emissions from cars and information on these emissions is a highly Europeanized subject. As a consequence, any national action should be informed by an interpretation of EU applicable law, including the Lisbon Treaty provisions and Charter of Fundamental Rights, according to which a high level of protection of health and the environment must be ensured through all EU policies.

New CO₂ emissions targets are currently being discussed at the EU level. On 8 November 2017, the European Commission published its clean mobility package. A proposal on the reduction of CO₂ emissions from passenger cars between 2020 and 2030 is at the core of that package. The issue is highly sensitive. Discussions focus on the level of ambition, *i.e.* the level of severity of the proposed targets, which is considered as not sufficient by consumer associations (Beuc, for instance).

Via a Commission Regulation adopted in execution of Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers (and of systems,

¹⁰⁰Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States on measures to be taken against air pollution by emissions from motor vehicles; Council Directive 72/306/EEC of 2 August 1972 on the approximation of the laws of the Member States relating to the measures to be taken against the emission of pollutants from diesel engines.

¹⁰¹Royal Decree of 5 September 2001 on information on car consumption and greenhouse gas emissions.

components, and separate technical units intended for such vehicles), new technical rules on monitoring CO₂ emissions were also adopted, which remain a contentious issue due to the sensitivity and acuteness of the air pollution problem.

Diletta, Flavio, and Antonella could try to convince a Member State or an Institution like the European Parliament to sue the European Commission for breach of the Treaty, based on the weak ambition of these different regimes, in relation to the need to protect a high level of health and environmental protection.

2.5.2 Policy Questions

The main national consumer protection association, Test-Achats, launched different actions against Volkswagen in the aftermath of Dieselgate, not in relation to climate change (greenhouse gases) but due to unfair practices in relation to the prevention of emissions of NO_x into the air. The problem that is being raised is a problem of fraud: a fraud due to the difference between the information on emissions that is proposed to the buyer and real emissions on the road. The consumer must assume a higher fuel consumption than what was predicted. Even after a refit process, the car does not suit the requirement of the EURO 5 standard, due to an excess of NO_x.

The first type of action is a collective action brought before the Tribunal of First Instance in Brussels. That collective action gathers consumers who bought their cars after the entry into force of the new regime, *i.e.* starting on 1 September 2014. For other consumers who bought their car before that date, Test-Achats acts as the representative of each individual separately, on a case-by-case basis. In the collective procedure, the judge decided in December 2017, after months of proceedings, that the collective action, as proposed by Test-Achats, is indeed admissible and confirmed the *locus standi*.

On climate change and the absence of progressive effort made so far by the Belgian Authorities, a civil suit has been introduced before the Tribunal of 1st instance in Brussels, in April 2015, by an association called Klimaatzaak, based on the model of the Urgenda case (still pending at that time). The case is filed against all competent powers *in solidum*: the federal state and the three regions (Walloon Region, Flemish Region, Brussels Region). The claim of negligence is based on general civil law: art. 1382 (fault), art. 743 (*res communes*; interpreted as a right to use non-owned resources). It also raises issues of Constitutional law, among which are art. 23 and the right to a healthy environment which, in Belgium, does not have yet a direct effect. It also claims a breach of the human right to life, of the principles of prevention and precaution at large.

The action is described on the website of the case (<https://affaire-climat.be>) as a 'collective action that aims to force the government to respects its commitments,' in relation to climate change. Belgium's particularity, however, is that climate change is a transversal issue, that falls within the exclusive competence of both the Federal State and the three Regions. An action *in solidum* leads to the question of the appropriateness of the choice of the language of the procedure (can the Flemish Region be sued, in French, before a Brussels Court?). The case is now referred, on

that procedural aspect, to the Court of Cassation (higher level), which might take quite a while.

The Klimazaak action focuses on insufficient reduction of greenhouse gases, by comparison to what science requests and to what the EU commitments at that time (2014–15) entailed.

One of the features of that case is beyond the judiciary. It is characterized by high impact of communication to the general public: like other similar cases in the world, communication is central here. The association Klimazaak is not a renowned classic NGO but a specific association funded by TV stars and other celebrities, with ambassadors of the cause (artists, writers), and trying to bring on board as many co-plaintiffs as possible, with a possibility to join online, and also with explicit requests to contribute to funding. More than 31,400 people have joined the action so far: an action that cannot enjoy the status of a collective class action under Belgian Law, as it does not exist beyond the sphere of the Code of Economic Law and Consumer Protection. The easiest avenue for Diletta, Flavio, and Antonella would be to join the action—by a simple click on their computers—and see what happens.

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