PRAVNI ZAPISI, God. XV, br. 2 (2024)

UDK 347.22:340.134(493)
DOI 10.5937/pravzap15-54263

ORIGINAL SCIENTIFIC ARTICLE

ČLANCI / ARTICLES

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THE COMMONS AND ANTICOMMONS IN THE REFORM OF PROPERTY LAW: AN ILLUSTRATION THROUGH THE NEW BELGIAN CIVIL CODE

Abstract: *A property law reform is, in all periods, a most foundational exercise. It determines and translates the (developments in the) relationship of humans with natural resources. This article deals with property law reform in the early 21st century, as it seeks a balance between exclusion and inclusion, the commons and the anticommons, and pursues the protection of sustainability. Apart from other comparative observations, this article takes the new Belgian Civil Code, and especially the property law book, as an example in order to illustrate these developments.*

Key words: Property Law, Civil Code, Law Reform, Belgian Law, Sustainability, Commons, Anticommons, Nuisance.

1. Introduction

Property law is a foundational field of law: it determines the relationship between humans, on the one hand, and the natural or artificial objects, on the other hand. Therefore, huge policy considerations underly the field of property law. Essential to property regulation is the balancing of interests: between the private individual and the State, private rights *versus* public interest, economic benefits *versus* social and environmental protection, individual freedom *versus* collective regulation, etc. This balancing exercise is even more delicate in an era of property law reform, for instance in the framework of a recodification. There is always a property policy underlying a recodification of property law and this property policy has a direct and major impact on daily life.

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When this relationship comes under pressure, one naturally questions the fundamental perspectives of the property legal framework.[1] Therefore, property law must be resilient in times of drastic societal changes, without disrupting the society as a whole. This statement is particularly valid if a recodification process regarding property law is being undertaken, especially if one takes into account that recodifications often only occur in or after a period of drastic (geo)political changes. Societal changes challenge the scope, ambitions and approach of property law in such a recodification process. During the recodification, those who are responsible for the process should coordinate and assess its foundational impact and the underlying policy reasons. As we will see, this is especially true in the recodification of property law, more so than in the recodification of other areas of private law.

This article aims to demonstrate that it is not possible to conduct an "abstract" comprehensive analysis to recodification. Despite the ambitions of some, each recodification is context-related. A recodification never completes its history, in other words: there will never be a final recodification. Even if one can discuss the method, the scope, the democratic process, etc., of each and every (re)codification, it is always dependent upon and in a dialectic relationship with economic, social, political and security circumstances. A recodification process is intertwined with the context within which it operates. The focus on sustainability and refining absoluteness could be entirely different in ten years' time. History shows that the starting points for recodifications are always contingent (and recently even volatile). This does not mean that we should not take this into account or take today's challenges seriously – on the contrary, it is an additional argument for addressing these challenges as they arise, and for understanding the relativity of eternity.

In the paragraphs below, we will try to reconcile this "contextual" nature of private law recodification with the foundational nature of the process of recodification. These contextual and foundational features are especially prominent in the recodification of property law. We will try to support our findings with illustrations related to the recent reform of Belgian property law.

2. Property Law Reform: A Hazardous Exercise

It is a common place to state that a civil code is, at least in civil law countries, the constitution of private law. In general terms, private law, and its codification, provides the foundational rules for the continuity and

1 On resilience and property law, cf. Fox O'Mahony, L., Roark, M., Resilient Property Theory, in: Akkermans, B., (ed.), 2024, *A Research Agenda for Property Law*, Cheltenham, Edward Elgar Publications, pp. 77–92.

harmony of a society. It must ensure, across changes in the political regime, a stable pattern of social relations between citizens.[2] This also is the constitutional dimension of private law. Although the idea of the "constitutionalization" of private law does not express any existing *legal* hierarchy between civil law rules and constitutional rules,[3] it breathes the foundational nature of the civil code into codified legal systems.

A recodification of private law is thus equivalent, as regards its legal impact, a constitutional reform within the field of private law. It is a rare moment of reflection in history; it disrupts the framework which is meant to ensure continuity and must therefore be handled very carefully. Jean Carbonnier, one of the most authoritative 20th century French legal scholars, expressed the importance of recodification by characterizing it as a turning point in history: he argues that a codification of law is a moment for closing the past and opening the future.[4]

What is true for private law in general is even more valid for property law in particular. Property law determines the manner in which human beings deal with goods, both artificial goods and natural resources, and animals. It seals the interactions between humans and nature, but also shapes to a large extent the (patrimonial) interactions between humans among themselves. In this regard, is predeterminant for both the fulfillment of economic (patrimonial) outcomes and for the safeguard of non-economic interests (environment, animal welfare, public health, etc.). The architecture of property law therefore, unsurprisingly, constitutes the foundations for the structure of private law.[5] Consequently, it determines the foundations of social life. To quote Joseph William Singer, we could say that "property law is not just a mechanism of coordination; it is a quasi-constitutional framework for social life. Property is not merely the law of things. Property is the law of democracy".[6] This goes back to the early consciousness about the way in which property law shapes social relations. Frederic William Maitland wrote at the turn of the 20th century: "[t]he whole government system – financial, military, judiciary – is part of the

2 Collins, H., 2008, *The European Civil Code: The Way Forward*, Cambridge, Cambridge University Press, p. 103.

3 For an analysis in French law: Carbonnier, J., Le Code civil, in: Nora, P., (ed.), 2005, *Les lieux de mémoire*, Vol. II, Paris, Gallimard, p. 3; Cabrillac, R., 2005, Le Code civil est-il la véritable constitution de la France?, *Revue juridique Themis*, Vol. 39, pp. 249–259.

4 Carbonnier, J., 2005, pp. 308–325.

5 Smith, H., 2012, Property as the Law of Things, *Harvard L.R.*, Vol. 125, No. 7, pp. 1691–1726.

6 Singer, J. W., 2013, Property as the Law of Democracy, *Duke L.J.*, Vol. 63, pp. 1287–1335.

law of private property."[7] In this regard, property law would even absorb public law to a large extent. The human flourishing theory, promulgated by Gregory S. Alexander, even goes one step further: property law does not only determine relations between human beings, but also determines the internal state of mind of the private individual.[8] All this makes the recodification of property law – wherever it may occur – a hazardous exercise that should be well contemplated and deliberated. This highly fundamental nature of property law also emerges to make its reform more difficult and more sensitive, both at an academic and political level, than for instance the reform of contract law.

We can illustrate this challenging and complex process of recodifying property law with a fairly recent example. In the early 21st century, at the commemoration of the bicentenary of the Napoleonic Civil Code, both the French academia (through the *Association Henri Capitant*) and the French legislator expressed the ambition to reform this civil code. In doing so, they aimed to avoid the 200th anniversary of the French Civil Code initiating its demise. While most core fields of private law (succession, fiducie, security rights, obligations and tort) were successfully and fundamentally revised during this wave of legislative reform, property law has, until now, remained unamended. As a result, property law (the second book of the Civil Code of 1804) undoubtedly remains the most archaic and, according to some, anachronistic chapter of the old Civil Code.

It is not that there were no attempts to reform property law. The French *Association Henri Capitant*, which has served as a special kind of ad hoc "law commission" for numerous successful law reforms, launched a first proposal in 2008, and reviewed following criticism in 2009. Even though the draftspersons emphasized the pragmatic nature of the proposed texts, the very first provision of the draft already reflected a huge policy decision that challenged the foundational principles of the code: "All provisions of this book are of public order, except if provided otherwise." Some legal scholars indicated this umbrella provision as nothing less than a new world of things.[9] This provision, which caused criticism in French scholarship, was removed for the second, revised version of the Draft in 2009.

Finally, both drafts continued to encounter a lot of criticism at an academic level[10] and the *Association Henri Capitant* failed to obtain sufficient

7 Maitland, F. W., 1950, *The Constitutional History of England*, Cambridge, Cambridge University Press, pp. 22–23.

8 Alexander, G. S., 2018, *Property and Human Flourishing*, Oxford, Oxford University Press.

9 Atias, C., 2009, *L'enracinement du droit des biens dans la nouvelle ère du droit civil français*, Paris, Recueil Dalloz, pp. 1165 *et seq.*

10 Dross, W., Mallet-Bricout, B., 2009, *L'avant-projet de réforme du droit des biens*, Paris, Recueil Dalloz, pp. 508 *et seq.*; Zenati, F., 2009, La proposition de refonte du livre II

political and academic support for the project. The sensitivity regarding the fundamental principles of both projects was apparently insurmountably high. The property law reform encountered too many sacred principles which at first glance seemed to be academic, but emerged to have an intrusive societal impact. This reflects and illustrates the sensitivity and foundational nature of the exercise. The result is that the outdated and obsolete rules, focusing on a rural society and shaped to function in the past (feudalism) instead of the future, nowadays still apply in France.

3. Property Law as a Policy Instrument for Anticommons in Early 19th Century Recodifications?

The French codification of 1804 is often considered to be the mother of modern codifications on the European continent. The Napoleonic Code was nothing less than the cornerstone in the construction of the new French Nation,[11] but also of an new order in continental Europe as a whole.

The French codification of 1804 dealt the death blow to the feudal land system. In the aftermath of – and as a reaction against – the French Revolution, ownership was one of major devices to resolve social structures. Ownership was clearly considered in 1789 as an instrument that, in its modern conceptualization, would help to build a society rid of feudal structures and hierarchical "bonds". Ownership was the noose on which to hang feudalism. The French Civil Code was the legal framework within which ownership as "a space of freedom" was to replace ownership as "a source of obligations". The background for this "civil" concept of ownership in 1804 is the Declaration of Human Rights and Citizens of 1789[12] where Article 1 states that "[m]en are born and remain free and equal in rights" and is complemented by the second sentence of Article 2 stating that "[t]hese rights are Liberty, Ownership, Security and Resistance to Oppression".[13] Ownership was thus

du code civil, *Rev. Trim. Dr. Civ.*, Vol. 2, pp. 211 *et seq*. (the latter author qualifies this draft as 'non-sense', both from a substantive and methodological point of view).

11 Cf. Dross, W., Mallet-Bricout, B., 2009, pp. 514–515.

12 The Declaration was approved by the *Assemblée nationale*, which had reformed itself to *Assemblée constituante*, on 20–26 August 1789 in Versailles.

13 The full and original text of the first two articles is as follows:

Art. 1. Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune.

Art. 2. Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression.

mentioned among the most fundamental rights of the revolution and thus acquired constitutional status. The last provision of the Declaration gave specific content to the general protection: "[s]ince the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid" (Art. 17).[14]

While the latter provision was a historical ancestor to the modern constitutional provisions with regard to ownership, the general concepts of Articles 1 and 2 compelled the legislators to develop a modern civil concept of ownership. These features have to be deduced from the famous definition in Article 544 of the French Civil Code, which provides that "ownership is the right to enjoy and dispose of things in the most comprehensive manner, provided they are not used in a way prohibited by statutes or regulations." The new concept automatically applied not only in France, but also in Belgium and the Netherlands, which were French provinces at the time.[15] The definitions in later 19th century civil codes on the European continent take the same approach, although with some technical differences.

What is the cornerstone for the Napoleonic concept of ownership? Article 544 of the French Civil Code is often said to aim to distinguish ownership from other, limited, property rights. It establishes a hierarchy of property rights, emphasizing the prevalence of ownership over the limited property rights. According to this interpretation, ownership is the ultimate property right from which all other property rights are derived.[16]

In fact, exclusion was one of the driving forces for the codification of private law in the early 19th century. The words "in the most comprehensive manner" (in French "*de la manière la plus absolue*") seal the exclu-

14 The original French text being as follows: "*La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité*". In the same logic, the Constitution of 1791 guarantees "*l'inviolabilité des propriété ou la juste et préalable indemnité de celles dont la nécessité publique, légalement constatée, exigerait le sacrifice*." In order to illustrate the importance of ownership in the revolutionary era, the Decree of 18 March 1793 introduced the death penalty for anyone proposing an agricultural statute or any other document violating territorial, commercial and industrial properties (*Décret du 18 mars 1793, punissant quiconque proposerait une loi agraire*).

15 In 1804 both countries were subject to the French regime.

16 Compare Duguit, L., 1923, *Manuel de droit constitutionnel*, Paris, E. De Boccard, p. 294: "*Il voulait affirmer qu'il existe pour celui qui est ou sera propriétaire un droit qui est exclusif du droit que pourraient revendiquer les autres*"; Walt, A. van der, 2009, *Property in the Margins*, London, Hart Publishing, p. 34. The prevailing nature of ownership also emerged from the so-called neo-personalist scholarship of Shalev Ginossar: Ginossar, S., 1960, *Droit réel, propriété et créance. Elaboration d'un système rationnel des droits patrimoniaux*, Paris, LGDJ.

sive nature of the right, creating on the one hand the possibility for the rightholders to exercise their powers in an unlimited manner,[17] and on the other hand giving all remedies to the rightholder to oppose unlawful interferences by third parties or the State. Applied to land, a land owner would have an unlimited right to exercise and develop their real estate according to their own needs, with the exclusion of any interference by third parties. The definition of ownership in Article 544 of the Civil Code would, in widespread opinion, be the expression of the triumph of individualism and private autonomy in the early 19th century.[18] This absolute and exclusive ownership was, in other words, a free space for individual freedom and personal fulfilment, in which the "dominus" was exempt from any interference by third parties (contrary to the feudal system).[19] In the words of Ugo Mattei, "the Napoleonic Code was the synthesis and sanction of this self-serving ideological construction of the bourgeoisie".[20] It thus aims to create a legal cornerstone preventing a return to feudalism.

The ownership concept must also, and mainly, be read from a historical perspective: it does mainly aim to demarcate the modern ownership concept from the feudal ownership concept; it aims to eradicate the division of ownership between *dominium utile* and *dominium directum*, and create a single uniform non-fragmented ownership concept instead.[21] In that regard, the words "in the most comprehensive manner" are rather oriented toward exclusivity than toward absoluteness of ownership. The gravity of ownership leads to all limited property rights coming to an end and finally reintegrating within this ownership concept. In the words of André Van der Walt, "[it] reflects the victory of modern civil law over feudal law."[22] The scholarship of (mainly the second half of) the 19th century has translated this exclusivity into absoluteness, and has given a political translation to the concept.

In view of the historical burden underlying this provision, it must not surprise that this anticommons description of ownership belonged to the

17 Although the beginning of the 19th century still featured quite a few public property burdens, they gradually disappeared in the course of the 19th century.

18 Page, H. de, 1925, *De l'interprétation des lois*, Brussels, Librairie des sciences juridiques, p. 176; Planiol, M., 1928, *Traité élémentaire de droit civil*, Paris, LGDJ, I, No. 2329; Ripert, G., 1902, *De l'exercice du droit de propriété dans ses rapports avec les propriétés voisines*, Paris, Rousseau, p. 15.

19 Mattei, U., 2000, *Basic Principles of Property Law. A Comparative Legal and Economic Introduction*, London, Greenwood Press, p. 122.

20 Mattei, U., Quarta, A., Property Law, in: Mattei, U., Quarta, A., (eds.), 2018, *Ecology, Technology and the Commons*, Cheltenham, Elgar Publishing, p. 23.

21 Patault, A. M., 1983, La propriété non exclusive au XIXième siècle: histoire de la dissociation juridique de l'immeuble, *Rev. hist. dr.*, Vol. 61, No. 2, pp. 217–237.

22 Walt, A. van der, 2009, p. 29.

realm of the new private law. It is also not surprising that the new ownership concept is considered to be the anchor point, not only for the whole system of private law, but also for the new societal structure that was proposed. This also stems from the preliminary reports in which the draft for a new Civil Code was debated. Jean-Étienne-Marie Portalis, one of the four main draftsmen, declared: "The entire body of the Civil Code is devoted to defining everything to do with the exercise of the right to property, the fundamental right on which all social institutions are based, and which, for every individual, is as precious as life itself, since it provides the means to preserve it."[23] Other commentators and draftsmen also qualified ownership as the hinge for the entire system of private law and, even further, for the society they were building.[24] The number of public restrictions to ownership decreased. The absoluteness of ownership arose based on a political inspiration, *e.g.*, a liberal interpretation of ownership as the expression of individual freedom.[25] This liberal approach was supported by philosophical and economic viewpoints.[26] Liberal philosophy considered the free space provided by the owner's freedom as the best guarantee for self-development.[27] In Hegelian terms, ownership was "*die aüssere*

23 Translated by author. The original text is: "*Le corps entier du Code civil est consacré à définir tout ce qui peut tenir à l'exercice du droit de propriété, droit fondamental sur lequel toutes les institutions sociales reposent et qui, pour chaque individu est aussi précieux que la vie même, puisqu'il assure le moyen de la conserver*"; *cf.* Fenet, A., 1827, *Recueil complet des travaux préparatoires du Code civil*, Videcoq, Paris, IX, 132.

24 Also Grenier: "*Tous les titres du code civil ne sont que des développements des règles relatives à l'exercice du droit de propriété*" (Fenet, A., 1827, *Recueil complet des travaux préparatoires du Code civil*, XI, 158). Also Cambacérès, J. J.: "*La législation civil règle les rapports individuels et assigne à chacun ses droits quant à la propriété: le code civil doit donc considérer: 1° les personnes, relativement ... aux caractères qui leur donnent l'exercice du droit de propriété sur quelques biens; 2° les choses pour déterminer si elles sont susceptibles ou non d'une propriété privée et comment le droit de propriété s'établit sur elles par d'autres causes que par l'effet des qualités personnelles; 3° les obligations que les hommes contractent entre eux relativement au droit de propriété.*" See also: Page, H. de, 1957, *Traité élémentaire de droit civil belge*, Brussels, Bruylant, V, No. 894: "*On peut dire que le droit privé presque entier est exposé dans le Code du seul point de vue de la propriété.*"

25 Epstein, R. A., 1985, *Takings: Private Property and the Power of Eminent Domain*, Cambridge, Harvard University Press, p. 60: "*Each person can do with his own land what he pleases as long as he does not physically invade the land of another.*" This is commonly also the interpretation of Locke's theory on the appropriation of land. However, others describe how this interpretation only came in the first half of the 20th century (Alexander, G. S., Penalver, E. M., 2012, *An Introduction to Property Theory*, Cambridge, Cambridge University Press, pp. 54–56, and the references given there).

26 The argumentation is based on Singer, J. W., 2000, *Entitlement. The Paradoxes of Property*, Yale, Yale University Press, p. 4.

27 Waldron, J., 1990, *Right to Private Property*, Oxford, Oxford University Press, p. 60. The idea that property is the ideal manner to achieve self-realization was already im-

Sphäre unserer Freiheit".[28] Economist, on their side, have argued in favor of the individual's autonomy to act, as this would be the best incentive for pursuing economic efficiency.[29]

4. Gradual Development of Social Ownership

Awareness has gradually grown that the 1804 Code was just building a context-specific and policy-oriented legislation. The traditional ownership concept resulted in the tragedy of the anticommons, meaning that the power to exclude leads to non-efficient and inequitable use of the limited natural resources. This also proved to be true for the ownership concept, where under-use of natural resources was a direct and natural threat, due to an excessive emphasis on anticommons.

Perception has emerged that the bundle of rights constituting ownership must be developed in line with the social impact that the exercise of the right can have on third parties and society as a whole.[30] Without endangering the full powers of an owner – which is part of the essence of capitalism and the current socio-economic order – over the centuries the social function of ownership has won weight, limiting the free space of the owner. In other words: ownership can inherently impose obligations upon the owner. Ownership is, in this more recent conceptualization, not a despotic dominium in which the owner can be isolated from society and has

plied in the Aristotle's argumentation: "When everyone has his own separate sphere of interest, there will not be the same ground for quarrels; and the amount of interest will increase, because each man will feel that he is applying himself to what is his own" (*The Politics of Aristotle*, Book II, 5, §§5 et seq.). However, he further clarifies that he sees private ownership as a means to promote friendship and to facilitate generosity and moderation. He also excluded, in his ideal model of city, public property from private ownership. Public property, that is for the common good, could not be appropriated (Alexander, G. S., Penalver, E. M., 2012, *An Introduction to Property Theory*, Cambridge, Cambridge University Press, pp. 83–84). In other words, Aristotle did not think of property in terms of individual sovereignty to be exercised in isolation toward third parties. The individual right was only a prerequisite to build up a political society (polis).

28 Hegel, G. W. F., 1821, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundriss*, Frankfurt-am-Main, s.n., §41.

29 Posner, R., 1986, *Economic Analysis of the Law*, Boston, Little Brown, p. 32: "[I]f every valuable (meaning scarce as well as desired resource were owned by someone (universality), ownership connoted the unqualified power to exclude everybody else from using the resource (exclusivity) as well as to use it oneself, and ownership rights were freely transferable or as lawyers say alienable (transferability), value would be maximized."

30 To rephrase the famous words used by Joseph Sax: "Ownership does not exist in isolation." (Sax, J., 1971, Takings, Property and Public Rights, *Yale L.J.*, Vol. 81, p. 152.

absolute remedies against anyone trying to interfere with it. It is, in property law, not merely about the relation between the holder of the right and the thing that is the object of the right. The awareness that the exercise of property rights (including ownership) can have impact on other individuals – and sometimes on the fundamental rights of other individuals – has been increasing. The highest property right, ownership, does not escape to the idea that the rightholder is not in an isolated relation with the object of the right, nor with third parties. The exercise of ownership can only respect another's ownership if it is done in respect of the ownership of another person. The respect for someone else's interests is a prerequisite for the existence of individual ownership in a society. In the words of Frank Michelman: "No trust, no property."[31] This is also the approach that gained influence on the European continent, even in France.[32]

In many countries, the number of land burdens, imposed in the public interest, increased again in the course of the 20th century.[33] Public authorities and legislators realized that the exercise of ownership was not a matter of a (wo)man alone.[34] The exercise of one's ownership can affect others. Public law restrictions have been increasing and becoming more intrusive in the course of the 20th century, in the sense of increased attention to town planning, urban development, soil pollution, preservation of historic buildings, etc. This development is the co-called "communitization" or "social dimension" of ownership. Environmental law burdens have become more prominent for a land owner. These restrictions can have both a private law origin or a public law origin. This development induces "feedback on the absolutist nature of ownership,"[35] which has been

31 In modern property theory, Michelman, F., 1982, *Ethics, Economics, and the Law of Property*, New York, Nomos, p. 31. Comp. Rose, C. M., 1996, Property as Keystone Right, *Notre Dame L.R.*, Vol. 71, p. 363 ("A property regime thus depends on a great deal of cooperation, trustworthiness, and self-restraint among the people who enjoy it."); Singer, J. W., 2000, p. 18 ("There is no core of property we can define that leaves owners free to ignore entirely the interests of others. Owners have obligations; they have always had obligations. We can argue about what those obligations should be, but no one can seriously argue that they should not exist.")

32 In French law: Duguit, L., 1912, *Les transformations du droit privé*, Paris, Librairie Félix Alcan, pp. 148 *et seq*.; Planiol, M., 1928, *Traité élémentaire de droit civil*, I, Paris, Librairie générale de droit et de jurisprudence, No. 2333; Boivin-Champeaux, J., 1913, *Restrictions apportées à la propriété dans un intérêt esthétique*, Université de Paris. Faculté de droit, PhD thesis.

33 For French law: Halpérin, J. L., 2008, *Histoire du droit des biens*, Paris, Economica, p. 309.

34 Compare: "Ownership does not exist in isolation." (Sax, J., 1971, p. 152).

35 Trebulle, F. G., Environnement et droit des biens, in: Association Henri Capitant (ed.), 2010, *Le droit et l'environnement*, Paris, Dalloz, p. 86, translated by author.

acknowledged across the borders of national legal systems, in French,[36] Belgian,[37] Dutch,[38] and German[39] law.

5. Sustainability in Modern Property Law Reasoning

Sustainability is one of the concepts that underlies many of the policy decisions in the past several years. An important dimension for a recodification *anno* 2024 is the principle of sustainability. While fully absent in the early 19th century, times have changed drastically. The relationship between law and sustainability has become the object of fundamental research by a full generation of property law scholars, such as Bram Akkermans,[40] Dorothy Gruyaert,[41] Bjorn Hoops,[42] Jill Robbie,[43] and many others. This also requires a friendly but steady (r)evolution of the property concepts.

Property law is the law that determines in the most direct manner the powers humans can exercise over things. Things can be both natural or artificial, but in the end, these are created through "Mother Earth". In the long run, property law also determines, by way of consequence,

36 Catala, P., 1966, La transformation du patrimoine dans le droit civil moderne, *Rev. trim. dr. civ*., No. 20, p. 199; Duguit, L., 1920, *Les transformations générales depuis le code Napoléon*, Paris; Trobatas, L., 1930, *La fonction sociale de la propriété privée. Le point de vue technique. Le régime administratif de la propriété civile*, Paris, Sirey.

37 Hansenne, J., 1996, *Les biens. Précis*, Liège, Presse universitaire, p. 582; Derine, R., 1955, *De grenzen van het eigendomsrecht in de negentiende eeuw*, Anvers, De Sikkel, p. 306; Sagaert, V., Nieuwe perspectieven op het eigendomsrecht na tweehonderd jaar Burgerlijk Wetboek, in: Tilleman, B., Lecocq, P., (eds.), 2005, *Droit des biens*, Bruges, La Charte, pp. 43–85.

38 Gilissen, J. H., 1946, *Eigendomsrecht en eigendomsplichten*, Tilburg, Bergmans.

39 Lau, L., 1997, *Die Sozialpflichtigkeit des Eigentums,* Würzburg, Echter, 240 p.

40 Akkermans, B., 2018, Sustainable property law?, *EPLJ*, Vol. 7, No. 1, pp. 1–3; Akkermans, B., Sustainable obligations in property law, in: Demeyere, S., Sagaert, V., (eds.), 2020, *Contract and Property with an environmental Perspective*, Antwerp, Intersentia, pp. 29–46; Akkermans, B., 2022, *Sustainable Property Law. Reckoning, Resilience and Reform*, The Hague, Eleven Publishing; Akkermans, B., 2021, Sustainable Ownership – new obligations toward achieving a sustainable society', *EPLJ*, Vol. 10, No. 2–3, pp. 277–303.

41 Gruyaert, D., 2021, Privaat en publiek goederenrecht en duurzaamheid, *TBH*, Vol. 10, pp. 495–550.

42 Hoops, B., Property Meeting the Challenge of the Commons, in: Mattei, U. et al., (eds.), 2023, *Property Meeting the Challenge of the Commons*, Cham, Springer, pp. 223–250.

43 Robbie, J., Moving Beyond Boundaries in the Pursuit of Sustainable Property Law, in: Akkermans, B. and Dijck, G. van, (eds.), 2019, *Sustainability and Private Law*, The Hague, Eleven International Publishing, pp. 59–78.

our use of natural resources, and the responsibility that we should comply with in this perspective. The latter is the subject matter of radical societal change in the early 21th century. This awareness that property law directly impacts sustainability issues in society has underlain the development of property law from the early 19th century to the beginning of the 21th century. As Jill Robbie states: "As property law rules are those which most directly regulate use of these resources, these rules cannot be untouched by the transformation of our laws, policies and lives that will be required in order to contend with this task."[44]

The concept of ownership as absolute dominion has resulted for many decades in the total absence of a "dialectic" relation between property law and environmental law. Environmental law was, conceptually, the natural enemy of property law: while the latter aims to safeguard individual freedom, environmental law aims to limit individual freedom from the perspective of sustainability and collectiveness. Property law is grounded in the anticommons, and solely focused on profit maximization, while environmental law is based on the idea of the commons.[45] The social, economic and political foundations underlying the early 19th century property law all contradicted environmental awareness. To paraphrase Jean Carbonnier, the inclusion of environmental law in property law would encompass the Creation of the world itself.[46]

The integration of the sustainability dimension into property law results in several innovative perspectives, which could largely differ from the perspective that a 19th or even 20th century legislator would have had. Property law has, in the past, often been regarded as an isolated field of law. However, especially with regard to land law, the way in which a legislator regulates property law (reform) should be in line with the regulations in what is traditionally perceived as other fields of law.

First of all, there is the need for a dialectic dimension between property law and environmental law or, more generally, between private real estate law and public real estate law, the latter including zoning law, soil pollution

44 *Ibid.*, p. 78.

45 Compare Akkermans, B., 2018, pp. 1–3. For an analysis of the antinomy between anticommons and commons, which historically developed in law and economics theory, see Gordon, H., 1954, The economic Theory of a Common-Property Resource: the Fishery', *Journal of Political Economy*, Vol. 62, No. 2, pp. 32 *et seq.*; Friedman, F. A., 1971, The Economics of the Common Pool: Property Rights in Exhaustible Resources, *UCLA Law Review*, pp. 855–873; Heller, M. A., 1999, The Boundaries of Private Property, *Yale L.J.*, Vol. 108, No. 6, pp. 1197 *et seq.* Also Buchanan, J., Yoon, Y. O., 2002, Symmetric tragedies: Commons and Anticommons Property, *Journal of Law and Economics*, Vol. 43, No. 1, pp. 453–473. In French law: Chaigneau, A., (ed.), 2017, *Fonction de la propriété et commun. Regards comparatistes,* Paris, Société de législation comparée.

46 It would risk to "embrasser la Création toute entière" (Carbonnier, J., 2000, *Les biens*, Paris, PUF, No. 46).

regulation, waste law, eminent domain, etc. Environmental law constitutes a regulatory framework for the exercise of property rights (building, zoning, soil pollution, etc.). It is therefore not surprising that environmental law was in the civil law, and conceptually the natural enemy of property law: while the latter aims to safeguard individual freedom, environmental law aims to limit individual freedom from the perspective of sustainability and collectiveness. However, a more dialectic relationship between the two fields of law is probably the way forward; this is already the case in American legal education and scholarship, where property law and environmental law are often included in the same classes and publications.[47]

Apart from environmental law, property rights have another traditional counterpart in housing rights. Housing law aims to optimize the use of the available portfolio in view of demographic developments. Housing issues could raise questions for the legislator as to whether the legislation should provide a remedy in case of non-used properties. Can the rule that ownership cannot extinguish due to non-use be upheld in a society where there is a shortage of housing? Should the legislator provide a counterweight to the risk of oligarchic real estate possession? These are policy choices which a legislator could, and perhaps should, be aware of. These questions relate to the social sustainability of the rules.

While property rights are traditionally grounded in the concept of exclusivity, environmental law and housing law are by nature aimed at inclusion. Embedding the starting principles of the several fields of law and articulating these into property law is essential. This will automatically result in the mitigation, or at least the refinement, of the principle of exclusivity. This does not mean that all property should be shared or common, but rather that property should be made more inclusive, taking into account the societal impact of the exercise of property rights.

6. The New Belgian Civil Code: Ownership Reconciles with the Commons

6.1 GENERAL BACKGROUND OF THE BELGIAN CIVIL CODE[48]

Until recently, the Belgian statutory rules on civil law dated back to 1804. As Belgium was a French province at the time, the Napoleonic Civil Code automatically entered into force in 1804 on the Belgian territory.

47 For a more in depth analysis: Sagaert, V., Property Law, Contract Law and Environmental Law: Shaking Hands with the (Historical) Enemy?, in: Demeyere, S., Sagaert, V., (eds.), 2020, *Contract and Property with an Environmental Perspective*, Chicago, Intersentia, pp. 1–29.

48 For a more extensive analysis, see Sagaert, V., 2021, The background and general principles of the new Belgian property law, *EPLJ*, Vol. 10, No. 1, pp. 3–25.

Surprisingly in a comparative perspective, Belgium did not enact a new Civil Code at the moment of its independence in 1830. Contrary to the French mother system,[49] Belgium did not take the opportunity of the bicentenary of the Civil Code to reform some of the most fundamental dimensions of civil law. Family law and family patrimonial law have had to develop along the case law of the European Court for Human Rights and the Belgian Constitutional Court. However, the classical trilogy – contract, property and tort – remained largely unamended.[50] With some sense for provocation, Belgian law had, in these three crucial fields of private law, become a type of common law, in which statute only played a secondary role and case law has paradoxically become the major legal source. This raised numerous questions, both at a private law level and from a democratic perspective.

Therefore, in 2016 the Belgian Minister initiated an ambitious reform project for several quintessential chapters of Belgian civil law.[51] He initiated attempt to give new building blocks for basic statutes, not only in civil law but also in commercial law, criminal law and company law.[52] With regard to civil law, five expert committees – on (1) the law of evidence, (2) property law, (3) general law of obligations, (4) tort law, and (5) loan agreements – were established in order to develop draft statutes. With regard to property law, the Minister of Justice appointed Pascale Lecocq[53] and Vincent Sagaert[54] as experts in 2016. They developed the first draft, which was submitted to public consultation (December 2017–February 2018). This was the first time in Belgian history that such procedure, inspired by the European legislator, was used for Belgian civil law.

The statute of 13 April 2019 was the first big milestone in the reform of Belgian civil law: this statute not only approved the new law on

49 For an overview of the French reforms, in comparative perspective, see Sagaert, V., (ed.), 2008, *La réforme du droit privé français. Un aperçu franco-belge*, Brussels, Larcier.

50 We make exemption for the few specific fields in which the legislator inserted amendments in the Civil Code, for instance with regard to condominium law (1994, 2010, 2018), penalty clauses (1998), consumer sales contracts (under European influence), etc.

51 The paper which is the foundation for the several reform projects provides for the underlying rationale of the reform and is online at https://www.koengeens.be/policy/hercodificatie (19. 11. 2024).

52 For a comprehensive analysis of the reform of the Belgian Civil Code: cf. Heirbaut, D., Blitzkrieg Codification: The 2020 Belgian Civil Code, in: Graziadei, M., Zhang, L., (eds.), 2020, *The Making of the Civil Codes. Ius Gentium: Comparative Perspectives on Law and Justice*, Singapore, Springer, pp. 127–148.

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54 Professor at the University of Leuven.

evidence, but also the structure and frame of a new Civil Code, consisting of nine books.[55]

After further consultation of the Belgian Council of State and Privacy Commission (the latter only advised with regard to the provisions on land registration), the Belgian legislator (unanimously) adopted the Act introducing the new Book 3 on Property Law, on the 4th February 2020 (Act).[56] Property law was the second field of civil law (after the law of evidence) which was approved by the legislator. This Statute abolishes the book on Property Law in the Napoleonic Civil Code and some ancillary statutes and introduces a new comprehensive system on property law.

The Act introduces 188 statutory provisions and an Explanatory Memorandum (450 pages, articles numbered from 3.1 to 3.188), which can be found online on the website of the Belgian Parliament.[57] The new Book on Property law in itself consists of eight chapters:

Title 1: General chapter
Title 2: Classification of goods
Title 3: Ownership
Title 4: Co-ownership
Title 5: Neighborhood relations
Title 6: Usufruct
Title 7: Emphyteusis ('long lease')
Title 8: Superficies ('building right')

The ambitions of the drafters with the new statute are explained in the Explanatory Memorandum and were fourfold:[58] integration, instrumentalization (functionalization), modernization, and flexibilization. With regard to the latter, the Act abandons the idea encountered in the

55 Article 2 of the Act of 13 April 2019 introducing a new Civil Code and a Book 8 "Evidence" in that Code, *Belgian Official Gazette*, 14 May 2019.

56 Act of 4 February 2020 introducing a new Book 3 in the Civil Code, *Belgian Official Gazette*, 17 March 2020. We refer to the already mentioned special issue of the *European Property Law Journal* 2021, pp. 1–176. For a more comprehensive analysis of the reform: see Lecocq, P. *et al.*, (eds.), 2020, *Le nouveau droit des biens*, Brussels, Larcier; Sagaert, V. *et al.*, 2021, *Het nieuwe goederenrecht*, Antwerp, Intersentia; Sagaert, V., 2020, De hervorming van het goederenrecht, *Tijdschrift voor Privaatrecht*, Vol. 57, pp. 389–654; Sagaert, V., 2021, *Goederenrecht*, Mechelen, Kluwer.

57 The explanatory memorandum and all other acts that were produced during the parliamentary preparation of the Act can be found in French and in Dutch at https://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=N&legislat=55&dossierID=0173 (19. 11. 2024).

58 Chamber of Representatives, 2019–20, Explanatory Memorandum, No. 173/1, pp. 5–9.

19th century, that the whole property law was of public order. The large role for party autonomy in the new Civil Code strengthens this flexible approach of the legislator. This emerges from the very first article of Book 3: "Parties may derogate to the provisions of this Book, except if these provisions include definitions or if the provision stipulates otherwise." (art. 3.1 Belgian Civil Code (translation by the author)).

The structure of Book 3 might, at first sight, seem very classic but in fact it contributes to the ambition of integration pursued by the drafters of the project. Title 5 integrates several legal instruments – with Dutch law as the main source of inspiration – which functionally relate to neighbor relations: nuisance law, common walls, and (conventional and legal) servitudes ('easements').[59] However, the main title of this structure is, without any doubt, title 1. It serves as an umbrella chapter, in an attempt to overcome the fragmentation of property law: it encompasses the modes for establishing property rights, modes of extinction of property rights, transfer of property rights, common feature of property rights (protection against insolvency, right to follow), common features with regard to the object of property rights (real subrogation, unity, specificity), etc.

Comparative law played a major role in the reform of Belgian property law. The expert committee developed a text for a new property law on the basis of a genuine comparative legal method. The drafters took as main source of inspiration three legal systems with recent (draft) acts on property law and with a divergent dynamic: the Dutch Civil Code, the French system (both the current rules of the Civil Code and the Association Henri Capitant Draft Project[60]), and the Civil Code of Québec. This comparative research thus covered one fairly recent Western-European Civil Code with German influences (the Netherlands), one traditional and influential legal system with a pure Romanistic perspective (France), and one mixed legal system with a more recent civil code and common law influences (Québec). The comparative perspective was therefore broader than just French law, thereby taking into account that the influence of the French Code in the modern legislative processes all around Europe (especially in the Eastern European countries) has been in decline. The drafters looked occasionally to German, Swiss and Spanish law.

The Explanatory Memorandum reflects this great attention to comparative law: it mentions, prior to the official comments for each provision, the equivalent (similar or opposite) rule from the relevant national legal systems, and the commentaries often mention foreign inspiration on

59 We refer to Degroote, M. L., 2021, Neighbor Relations in the new Belgian property law, *EPLJ*, Vol. 10, No. 1, pp. 66–80.

60 https://www.henricapitant.org/actions/offre-de-reforme-du-droit-des-biens-2009/.

the substance of the provision. The role of legal comparison has thus been predominant.[61] This allows the reader to assess the policy choices that the Belgian legislator has made and how it has taken position amongst these sources of inspiration.

6.2. SUSTAINABILITY AND COMMONS IN THE NEW BELGIAN CIVIL CODE: SOME ILLUSTRATIONS

As we have illustrated in the first sections of this paper, drafting a Civil Code in the early 21th century requires focus on other values than those it did at the beginning of the 19th century. Most notably, it requires more attention to sustainability as an underlying value of property law; the law of things should be concerned about the sustainability of things. Property law is the law which deals in the most direct manner with the powers we can exercise over things.

This also leads to a more reasonable approach to exclusivity than was the case in 1804. The monopoly awarded to private owners on natural resources must have a minimum of legitimacy. If not, one should consider how others could benefit from these natural resources. The reflections of more sensibility for the commons are popping up in the new Belgian property law. However, these developments are not inserted as revolutionary principles to shake and shock the system, but as concrete applications that can illustrate the central role property law can (and probably should) play in a responsible behavior toward things. The following paragraphs provide some illustrations of this orientation.[62]

The first example can be found in Article 3.50 CC, which is the successor of the famous former Article 544 of the French Civil Code. Article 3.50 provides that "[t]he right of ownership directly grants to the owner the right to use, enjoy and dispose of the object of his right. The owner has full powers, subject to the restrictions imposed by laws, regulations or the rights of third parties." Article 3.50 does not repeat the exclusive nature or the absolute nature of ownership, as had been the case under its predecessor. Ownership is approached in a more functional manner. This already emerges from the physical borders of the object of land ownership. Article 3.63 CC limits the vertical extent of land ownership. The right of ownership on the land extends only to an altitude above or depth below the surface of the land that may be useful to the owner in the exer-

61 Explanatory Memorandum, pp. 8–9.

62 We could also refer to Articles 3.133–3.134 CC, which impose limits to the possibility of grubbing up trees, even if the latter are unlawful, and to Article 3.65 CC, which limits the possibility of the owner of land that is adjacent to a river to use its water.

cise of their powers. Consequently, they cannot object a third party' use at an altitude or depth at which the current owner, in view of the use and condition of the land, could not reasonably exercise their powers of use. The previous ad coelum rule is therefore abolished and substituted with a more functional rule.

Another important concretization within the framework of this contribution is the moderation of the anticommons in those cases in which exclusion is only used in a harmful manner or, at least, triggers disproportionate damage in relation to the advantage of it. For instance, the right to roam is an expression of the withdrawal of the anticommons in property law. Belgian law, pursuant to the law of Scandinavian countries where it has its historical foundations, but also to Dutch and German law, has introduced a right to roam on non-fenced and non-used plots of land, under the condition that it does not cause any damage and that there is no sign that the right to roam is excludes that land.[63] Another illustration of the same idea is that the owner of a plot of land must tolerate that his neighbor has access to that immovable, having given prior notice, if this is necessary to carry out construction or repair work, or to repair or maintain the non-common fence, unless the owner has legitimate grounds for refusing such access.[64] Again, the exclusivity of ownership is mitigated in favor of a more balanced approach of the relation between neighbors.

A prominent example of such balance, which refines exclusivity in order to safeguard the balance of the (sometimes conflicting) property rights between neighbors, is the field of neighborhood nuisance. Neighborhood is the micro-environment. In other words: care for the neighborhood is a first step toward care for the environment. Nuisance law, in our view, is not complementary to environmental law, but is an integral part of it.[65] Belgian law has developed – and for the first time anchored in the legislation of the new Civil Code – an elaborate set of rules, which is grounded in the fundamental idea of the balance the rights of all owners. If, a neighbor has, in the circumstances in question, disrupted the balance between the adjacent property rights in a manner that they caused harm exceeding the normal harm due to neighborship, they can be held liable. This could even result in a limitation of the use of the ownership. The objective balancing between neighboring properties is the standard for liability.[66]

63 Article 3.67, par. 3 of the Belgian Civil Code.

64 Art. 3.67, §2, par. 1 of the Belgian Civil Code.

65 Pontin, B., 2013, *Nuisance Law and Environmental Protection*, Witney, Lawtext Publishing Limited.

66 Article 3.101 CC.

Traditionally, issues between neighbors are, from a legal perspective, solved on the basis of tort law. However, this traditional approach lacks refinement, as it only takes into account the interests of both neighbors, and does not provide due consideration for other surrounding circumstances and public interest components.[67] Therefore, the Belgian legislator has developed a large statutory framework for nuisance law. Setting the standard for nuisance should be independent from the question whether the neighbor has committed a wrongful act, as it mainly affects the equilibrium existing between neighboring parcels. In this view, nuisance law should find its place in property law and not in tort law. This is what the Belgian legislator has expressed in Article 3.101 of the Belgian Civil Code. The first paragraph of the latter provision determines that "[n]eighbors each have a right to use and to enjoy their immovable property. In the exercise of their use and enjoyment, they shall respect the created balance by not imposing any nuisance on the neighbor that exceeds the normal inconveniences of the neighborhood and is attributable to them. In order to assess the excessive nature of the nuisance, all the circumstances of the case shall be taken into account, such as the time, the frequency and the intensity of the nuisance, the preoccupation or the public use of the immovable property from which the nuisance originates."[68]

The Belgian legislator has further strengthened this idea of balancing property interests by allowing a preventive nuisance action if there is a serious and specific health, safety or pollution risk. In other words: one does not have to wait, in one of these three circumstances, until the damage has occurred, but one can ask to judge to prevent these infringements. The underlying idea is that it to prevent nuisance in the micro-environment rather than to provide a remedy. Care for the environment begins at your own door, in taking care of your neighborhood. This can result in a (mutual) limitation of the use (regulation) of ownership and another layer of the social dimension of private ownership. Given demographic and geographic developments, people are living more and more condensed, and in proximity of each other. It is for these reasons obvious that neighborhood and nuisance law have an increasingly important role in property law reform and an intrusive function in the property law discourse.

Another example of a more sustainable approach to recodifying property law in the Belgian Civil Code is the increasing attention to an often forgotten dimension of property law. The 19th-century legislator approached land in two dimensions, in terms of land surface. They hardly contemplated the use of the land above or below the surface. However,

67 Sagaert, V., 2020, pp. 18–20.

68 Translation by the author.

land ownership should not be thought of in terms of flat land, but rather in terms of property volumes on, above and underneath the soil. Such a 3D-approach serves both ecological and economic benefits. On an ecological level, the possibility to create multiple uses of their land, by stacking property volumes above and underneath each other reinforces the optimized use of Mother Earth and helps to safeguard the remaining green areas in the Belgium flatland. If one has more possibilities to build above and underneath each other, there is less need to use the free space on other parcels, which is very important in very densely populated countries like Belgium. On an economic level, it allows a land owner to commercialize different volumes above and below the same land surface in different stages. In establishing the possibility of perpetual building rights, the legislator undermines a basic foundation of property law, which is called the accession. A perpetual building right excludes, without time limit and without termination possibility, accession and thus also infringes the exclusive nature and preeminence of ownership. This is therefore and important and, from a dogmatic perspective, intrusive innovation.

Sustainability is not only dependent upon the manner in which we use our private resources, but also upon the way in which we deal with public resources. We have become gradually more aware of the scarcity of fresh air, clean water, etc. The codification must thus limit the way in which we exhaust these. The long-term perspective must prevail over short-termism. Article 3.43 of the Belgian Civil Code reflects this awareness: "Common objects cannot be appropriated in their entirety. They do not belong to anyone and are used in the public interest, including the interest of future generations. Their use is common to all and is governed by special laws."[69] Air, water, minerals, must be used with the long-term perspective in mind; they cannot be exhausted by the current generation. This is a clear example of the transgenerational approach in the new Belgian property law, creating responsibilities of current generations in favor of future generations. Even if it is uncertain whether this provision can award a specific remedy in specific litigation, it remains an important legal instrument of awareness.

7. Conclusion

The traditional private law trilogy, ownership/sustainability/commons, triggers a difficult relationship between individual freedom and public interest. There is some dialectic interaction between these three dimensions, even on a purely legal basis. History demonstrates that owner-

69 Translated by the author.

ship, and the way it is used, is an important engine, not only in a dogmatic perspective, but also as a tool for addressing societal challenges. History also shows that the pendulum has shifted at pivotal moments in history. The role of ownership in the recodifications in the early 19th century clearly demonstrates that ownership is a central device and engine for building of a society. Contemporary societal challenges are different than the ones in the early 19th century; the enemy is not past feudalism, but a future tragedy of the (anti)commons. This perspective should be preeminent in 21th century recodifications. The impact of inserting sustainability issues into property law can have a major impact on the traditional divisions and paradigms of private law.

We have aimed to illustrate these developments using the reform of Belgian private law. The drafting of the new Belgian Civil Code tried to translate the new considerations into legislation, without throwing away the acquisitions of the past. More orientation toward the impact of property rights on third parties (*e.g.*, neighbors), but also on the public interest (*e.g.*, in exhausting natural resources) are reflected in this reform. It is not up to the author to assess whether this has been successful or not, but at least the ambition to integrate these developments has been largely present.

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ZAJEDNIČKA DOBRA I ISKLJUČIVA SVOJINA U REFORMI STVARNOG PRAVA: ILUSTRACIJA KROZ NOVI BELGIJSKI ZAKONIK

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APSTRAKT

Reforma stvarnog prava, u svim epohama, najosnovnija je vežba. Ona određuje i objašnjava razvoj odnosa ljudskih bića prema prirodnim resursima. Ovaj članak bavi se reformom stvarnog prava na početku 21. veka, traži ravnotežu između isključenosti i uključenosti, zajedničkih dobara i neefikasnosti u korišćenju zajedničkih dobara i teži zaštiti održivosti. Da bi ilustrovao razvoj događaja, pored drugih uporednih zapažanja, ovaj članak kao primer razmatra novi belgijski građanski zakonik, a posebno knjigu stvarnog prava.

Ključne reči: stvarno pravo, građanski zakonik, reforma zakona, belgijsko pravo, održivost, zajednička dobra, smetnja.

Article History

Received: 24 October 2024

Accepted: 25 November 2024