DE GRUYTER EPLJ 2021; 10(1): 3–25

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The background and general principles of the new Belgian property law

https://doi.org/10.1515/eplj-2021-0002

I. General overview of the reform of Belgian civil law

1. Introduction – As we have said in the Preface, Belgian statutory rules on civil law dated back from 1804. As Belgium was at that moment a French province, the Napoleontic Civil Code automatically entered into force in 1804 on the Belgian territory and Belgium did – surprisingly in a comparative perspective – not enact a new Civil Code at the moment of its independence in 1830. Contrary to the French mother system[1] – which reformed succession law, property security law, estate law (including a fiducie) and (in a later stage) the law of obligations – Belgium did not grasp the opportunity of the 200th anniversary of the Civil Code to reform 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 unchanged. European Directives impacting on one of these fields of law have been implemented by the Belgian legislator outside the Civil Code in a separate statute or exceptionally – but without affecting the common rules – in the Civil Code (such as the consumer sales Directive).

It must, therefore, not be a surprise, that Belgian law had become obsolete, archaic and grounded in a largely rural society. 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 become a major field of law. This raised numerous questions, both on a private law level and from a democratic perspective.

1 See for an overview, in comparative perspective, of the French reforms: V. SAGAERT (ed.), *La réforme du droit privé français. Un aperçu franco-belge*, Brussels, Larcier, 2008, 182 p.

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2. Reform process – The Belgian Minister of Justice Koen Geens[2] therefore initiated in 2016 an ambitious reform project for several quintessential chapters of Belgian civil law. The project was framed in the policy paper, authored by the Minister of Justice and entitled "*Jump towards the law of tomorrow: re-codification of the foundational statutes*", and approved by the Belgian government on 20 July 2017.[3] This policy paper provides for the foundations of the reform of the basic statutes, not only in civil law but also in commercial law, criminal law and company law.

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, which did not start from, or operate within, the framework of the existing texts of the Napoleontic Civil Code, but which started from scratch. The expert committees had a large space of liberty in their operations and choices, but there was a general coordination between the operations of the different expert groups.[4] For instance, with regard to property law, several meetings with the contract law group have been organized in order to align both substance and form.

3. Framework of a new Civil Code – The statute of 13 April 2019 was the first big milestone in the reform of Belgian civil law: this statute did not only approve the new law on evidence, but also the structure and framework of a new Civil Code, consisting of nine books[5]. Each book will be numbered separately, restarting in Article 1.

- Book I: General Part (which takes over general concepts and principles)
- Book II: Person and Family Law
- Book III: Property Law
- Book IV: Succession Law, Donations and Wills
- Book V: Law of Obligations
- Book VI: Contract Law
- Book VII: Law on Security Rights
- Book VIII: Law of Evidence
- Book IX: Prescription

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3 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 .

4 Two academics – one from the Flemish-speaking side and one from the French-speaking side – preside and coordinate the several working groups: Eric DIRIX (University of Leuven) and Patrick WERY (Université de Louvain-la-Neuve).

5 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.

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The new Civil Code has entered into force on 1 November 2020. It entered into force as mere framework, which only got body because of the rules on evidence in Book VIII. The approval of the Book on Property law, on which the rest of this article is focusing, gives more flesh to the bone with regard to Book III. Legislative proposals for Books II and IV and for Book V have been submitted, but are still subject to political discussions of which the outcome has to be awaited.

II. The reform of Belgian property law

4. Methodology in the reform process of property law – With regard to property law, the Minister of Justice has appointed the professors Pascale Lecocq[6] and Vincent Sagaert[7] as experts in 2016. They developed the first draft, which was submitted to public consultation in order to enhance the support base and to receive input on the technical and policy dimension of the draft (December 2017 – February 2018). It was the first time in Belgian history that this procedure, inspired by the European legislator, was used for Belgian civil law. The drafters got more than 200 pages with observations, criticism, proposals, etc.

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 III on Property Law on the 4th February 2020 (hereafter: "the Act").[8] 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 Napoleontic Civil Code and some ancillary statutes and introduces a new comprehensive system on property law.

As we have said, the drafters started for the establishment of the new Act from scratch, instead of amending the existing provisions. There is one major exception to that: the provisions with regard to condominium law. The latter provisions are inserted in Article 3.84 up to Article 3.100 CC. These Articles have been the object of several legislative amendments since 1994, and have been further re-

6 Full Professor at the University of Liège.

7 Full Professor at University of Leuven.

8 Act of 4 February 2020 introducing a new Book 3 in the Civil Code, Belgian Official Gazette 17 March 2020. For a more comprehensive analysis of the reform: see P. LECOCQ, I. DURANT, N. BERNARD, B. MICHAUX, J.F. ROMAIN and V. SAGAERT (ed.), *Le nouveau droit des biens*, Brussels, Larcier, 2020, 446 p.; V. SAGAERT, J. BAECK, N. CARETTE, P. LECOCQ, M. MUYLLE and A. WYLLEMAN (ed.), *Het nieuwe goederenrecht*, Antwerp, Intersentia, 507 p.; V. SAGAERT, "De hervorming van het goederenrecht", *Tijdschrift voor Privaatrecht* 2020, 389–654.

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fined by Act of 18 June 2018[9] These provisions have been copied without any modification from the old Civil Code. The ambition of the drafters with the new statute was fourfold[10]:

(1) The drafters aimed to integrate Belgian property law, both with regard to the structure and the substance of the Articles. For example with regard to the structure, the Act abolishes the separate statutes of 10 January 1824 on emphyteusis and superficies rights, and integrates these property rights into the Civil Code.[11] On a more substantive level, the Act integrates public goods within the general property law, whereas these goods traditionally had had a *sui generis* status.[12]

(2) The drafters instrumentalized ('functionalized') property law. The drafters have, deliberately, not begun with an enumeration of definitions. The definitions are rather scarce. For each property right, the chapter begins with a description which is result-based, focusing on the powers granted by the said property right. Of course, these developments may not lead towards blasphemy. The old Gods must not be written off in an inconsiderate manner. Thoughtful and balanced developments must prevail on hasty work. As we will demonstrate at the end of this contribution, the legislator has not enacted one main element of the Draft Act which fitted well in this ambition of instrumentalization, the fiducie (cf. *infra*, n°. 24).

(3) Property law is now modernized. As we have said, Belgian property law rules had become obsolete and archaic, in such way that a lot of these rules had become useless and powerless. They focused on a rural society and did not take into account a more industrial – leave alone a service-based – society. The increasing role of incorporeals in our society, the development of new technologies, the importance of intellectual property as component of an estate, the new societal realities, etc. have been translated in the new statute.

(4) Property should get more flexibility. In the 19th century, one encountered the idea that the whole property law was of public order. The large role for party autonomy in the new Civil Code, on which we will come back, strengthens this flexible approach of the legislator (cf. infra, n°. 10).

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9 Belgian Official Gazette 2 July 2018. Professor Pascale Lecocq and Professor Vincent Sagaert presided an expert committee ad hoc for these provisions, in which all stakeholders of condominium law were present. The Minister of Justice separated these provisions from the more general re-codification, given the societal impact of an amendment of these rules. More than 3.5 million Belgians have an apartment or live in an apartment.

10 Explanatory Memorandum, www.dekamer.be, 2019–20, n°. 173/1, p. 5–9.

11 We refer, for both these rights, to the article of Alexander Appelmans in this special issue.

12 We refer, for an analysis of article 3.45 CC, to the article of Bram Maeschaelck in this special issue.

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The Act introduces 188 statutory provisions numbered from Article 3.1 to Article 3.188, and an Explanatory Memorandum of 450 pages, which can be found online on the website of the Belgian Parliament[13].

5. Structure of the new Belgian property law – The new Book on Property law consists in itself of eight titles:

Title 1: General chapter
Title 2: Classification of goods
Title 3: Ownership
Title 4: Co-ownership
Title 5: Neighbourhood relations
Title 6: Usufruct
Title 7: Emphyteusis ('long lease')[14]
Title 8: Superficies ('building right')[15]

This structure might, at first sight, seem very classic but in fact contributes to the ambition of integration pursued by the Drafters of the project. Title 5 thus integrates, with Dutch law as main source of inspiration, legal devices which functionally focus on neighbor relations: nuisance law, common walls and (conventional and legal) servitudes.[16] However, the main title of this structure is, without any doubt, title 1. It serves as an umbrella chapter, trying to overcome the fragmentation of property law, as we will set out under heading IV of this contribution (cf. infra, n°. 12 *et seq.*).

III. The role of comparative law in the reform of Belgian property law

6. Predominant comparative perspective – Property law is generally thought in terms of the Cinderella of comparative European private law. It is often perceived as the field of private law in which comparative and cross-border dimen-

13 The explanatory memorandum and all other acts which were produces during the parliamentary preparation of the Act can be found in French and in Dutch on https://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=N&legislat=55&dossierID=0173 .
14 In Dutch: "Erfpacht", in French: "Emphytéose".
15 In Dutch: "Opstal", in French: "Superficie".
16 We refer to the contribution of Marie-Laure Degroote in this special issue.

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sions are relatively scarce. However, the cross-border mobility of goods has tremendously increased over the last decades. Therefore, it is important to overcome the differences between national legal systems that share trade. The initiatives on harmonization of property law have gradually multiplied over the last quarter of a century.[17]

As was the case for the reform of property security law, comparative law had a major role to play 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 have taken 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 Draft Project Henri Capitant[18]) and the Civil Code of Québec. This comparative research thus covers 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 more occasionally into German, Swiss and Spanish law.

The Explanatory Memorandum reflects this large attention for 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 the substance of the provision. The role of legal comparison has thus been pre-dominant.[19] This allows the reader to assess the policy choices that the Belgian legislator has made and how he has taken position amongst these sources of inspiration.

IV. General principles of property law, as laid down in the Act

7. Umbrella for property rights – Probably the most innovative – and having the most impact – title of the Act is Title I, encompassing 37 provisions. It serves as an

17 For an overview: cf. S. VAN ERP en B. AKKERMANS (ed.), *Cases, Materials and Text on Property Law*, 1011 *et seq.*

18 http://www.henricapitant.org/avant-projet-de-reforme-du-droit-des-biens .

19 Explanatory Memorandum, p. 8–9.

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umbrella chapter, covering general features of property law and applying (save for statutory exceptions) to all property rights. It aims to create an atrium in the house of property law, which risked to get fragmented into different rooms (constituted by the property rights) without any interconnection. Indeed, Belgian law reflected such fragmented approach, as each different property right was subject to its own (and not always coherently developed) features, duration, grounds for acquisition or termination, etc. The general principles of property law have had, through Title I, a major role to play in the establishment and elaboration of a new Belgian property law. These general principles can be classified in several categories:

- Some provisions deal with the enforceability of property rights, such as the priority principle in case of conflict between property rights ('*prior tempore potior iure*') (Art. 3.4)[20], the protection against insolvency (Art. 3.5) and the power to dispose of property rights (Art. 3.6).
- Other provisions of the general chapter cover the general features of the object of property right: the principle of specificity and unity of the object of property rights (Art. 3.8), the rule '*accessorium sequitur principale*' (Art. 3.9), the tracing of the object of property rights (real subrogation (Art. 3.10), the effects of the transformation (Art. 3.11) and commingling (Art. 3.12) of the object of property rights.
- General rules with regard to the acquisition (Art. 3.14) and the termination (Art. 3.15–3.16) of property rights give an overview of the common manners of acquisition and termination, but are further completed by specific grounds for acquisition and termination in specific property rights.
- The Act contains in this general chapter provisions with regard to the publicity of property rights. Possession is described as a means of publicity for movables, and in the same development the rules for acquisitive prescription, based on a lawful possession, are inserted in the general chapter (Art. 3.18–3.29). Moreover, this general chapter develops substantive rules for land registration (Art. 3.30–3.34).
- Finally, the general chapter contains rules with regard to the unity and indivisibility of the estate (Art. 3.35–3.37).

20 The legislator makes a reservation for the good faith of third parties.

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A. The closed system of property rights in balance with party autonomy

8. Legal certainty *versus* party autonomy – A first, main choice in creating a new property law system is to determine the space for party autonomy which will be allowed and, thus, to take position in the question of standardization of property rights. To phrase it otherwise, the Belgian legislator had to opt between a closed system of property law ('*numerus clausus*') or a full party autonomy, and all shades of grey in between those two.[21] This most fundamental policy choice determines the scope, internal structure and external demarcation of property law. Opposing forces meet in Belgian law at the intersection of the closed system of property law.

The traditional starting point of the narrative in Belgian property law is that the freedom of contract of the parties is seriously curtailed by the *numerus clausus* principle.[22] This is in line with the traditional narrative that almost all national legal systems – not only in the civil law, but also in the common law – have a degree of standardization for property rights. Moreover, some legal-economic arguments support such solution, as a balanced avoids both the tragedy of the commons and the tragedy of the anti-commons: "*A limited exclusion anticommons regime, where a demarcated group have rights to exclude, resembles that of common property arrangements, where the allocation of the right of use is restricted to members of the group*"[23].

On the other hand, French case law – which is influential to Belgian law – clearly takes distance from the *numerus clausus* principle, on the basis of an identical legal framework: parties are free to establish property rights under the sole limitation of public order. This may surprise, but has its roots in the ancient and famous *Caquelard*-judgment, which the French Supreme Court reaffirmed in the last decade.[24]

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21 Cf. S. VAN ERP, *European and National Property Law: Osmosis or Growining Antagonism?*, European Law Publishing, Groningen, 2006, p. 15: "*Legal systems are careful not to accept property rights too easily and therefore limit their number and content. In some legal systems this limitation is stronger than in others, but it can be found in both common as well as civil law, although it has been more theoretically developed in civil law systems*."

22 For an in depth analysis, *cf.* V. SAGAERT, "Het goederenrecht als open systeem van verbintenissen? Poging tot een nieuwe kwalificatie van de vermogensrechten", *Tijdschrift voor Privaatrecht* 2005, 983–1086. See also H. DE PAGE, *Traité élémentaire de droit civil belge*, Brussels, Bruylant, I, n°. 130; J. HANSENNE, "La limitation du nombre des droits réels et le champ d'application du concept de service foncier" (noot onder Cass. 16 september 1966), *RCJB* 1968, 167 *and seq* ; W. VAN GERVEN, *Algemeen Deel*, in *Beginselen van Belgisch Privaatrecht*, Antwerp, Standaard 1987, 96, n°. 34.

23 B. DEPOORTER, *Fragmentation of Property: the law and economics of the anticommons*, 67.

24 The French *Cour de cassation* reaffirmed its famous Caquelard-judgment of 1834 (Cass. fr. (req.) 13 February 1834, *arrêt Caquelard*, *S.* 1834, I, 205, *D.* 1834, I, 118) in 2012, ruling that parties are free

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9. *Numerus clausus*-principle – In spite of the major influence of French law on Belgian law, the Act unequivocally opts for the introduction of a closed system of property rights, which, for the first time in Belgian law, gets firm legal ground.[25] Article 3.3 of the (new) Civil Code categorizes the acknowledged property rights: (1) (co-) ownership, (2) property rights to use, which are sub-categorized as usufruct, long lease and building rights and (3) property security rights, which are sub-categorized in specific statutory rights of priority, pledge, hypothec, and liens ('droit de retention').[26]

The underlying *rationale* for this strict '*Typenzwang*' is highly comparative[27]: in almost all national legal systems, even in the common law, a standardization of property rights applies to a larger or lesser extent.[28] Some legal-economic arguments have been put forward in favour of the acknowledgment of this principle: it would enhance legal certainty and reduce transaction costs.[29] This is the underlying argument for the famous words by Bernard Rudden, "'*Fancies' are for contract, not for property*".[30] Hence, it remains forbidden to think in property law 'out

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to establish property rights under the restriction of mandatory law and public order (Cass. fr. (civ. 3) 23 May 2012, no. 11–13202).

25 Article 543 of the old Civil Code already gave some reference to a closed system of property rights, but it was incomplete and object of a lot of legal debate.

26 Article 3.3 provides in its original French version as follows: *"Seul le législateur peut créer des droits réels. Les droits réels sont le droit de propriété, la copropriété, les droits réels d'usage et les sûretés réelles. Les droits réels d'usage sont les servitudes, le droit d'usufruit, le droit d'emphytéose et le droit de superficie. Les sûretés réelles, au sens de ce Livre, sont les privilèges spéciaux, le gage, l'hypothèque et le droit de rétention réglés au Livre 7. »* We refer, for the English translation to the translated Book 3 further on in this special issue.

27 Explanatory Memorandum, pp. 15–16.

28 B. AKKERMANS, *The principle of numerus clausus in European Private Law*, Antwerp, Intersentia, 2007, 657 p. See also P. SPARKES, "Certainty of Property: *Numerus Clausus or the Rule with No Name?", ERPL* 2012, 769–804.

29 H. HANSMANN and R KRAAKMAN, "Property, Contract and Verification: the *Numerus Clausus* Problem and the Divisibility of Rights", *Journ. L.S.* 2002, 373–451; T.W Merrill, "Introduction: the Demsetz Thesis and the Evolution of Property Rights", *Journ. L.S.* 2002, 331–358; T.W. MERRIL and H.E SMITH, "Optimal standardisation in the Law of Property: The *Numerus Clausus* Principle", *Yale L.J.* 2000, 1–70; F. PARISI, "Entropy in Property", *Am. Journ. Comp. Law* 2002, 595–632; B. RUDDEN, "Economic Theory v. Property Law: The Numerus Clausus Problem", in J. EEKELAAR en J. BELL (ed.), in *Oxford Essays in Jurisprudence, Third Series*, 239–263; S. VAN ERP, "A numerus quasi-clausus of property rights as a constitutive element of a future European property law?", in K. BOELE-WOELKI, C.H. BRANTS en G.J.W. STEENHOF (ed.), *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof. mr. E.H. Hondius* (Deventer: Kluwer 2003), 41.

30 B. RUDDEN, "Economic Theory v. Property Law: The Numerus Clausus Problem", in *Oxford Essays in Jurisprudence*, 243.

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of the box'. The boxes with property rights are given. The enumeration of the property rights is one of the exceptional enumerations in the new Act. The drafters have aimed to ensure the sustainability of the statute by using 'open categories' and avoiding closed lists. The technological developments in society have as result that any enumeration get outdated very fast and thus recreates a need for change.

10. Contractual freedom in property law – However, the counterweight for the closed system of property rights is found in Article 3.1 of the new Civil Code: in principle, parties are free to contractually derogate from the statutory provisions. In civil law terms: the provisions of the new property law are of non-mandatory ('suppletive') law. This provision aims to strengthen party autonomy in property law. This should ensure a flexible system in favour of legal practice. The new Civil Code permits to finally contradict the general, but old-fashioned and only historically mistaken, perception that the entire property law must be considered as being of public order.[31] The acknowledgment and integration of contractual freedom within property law is one of the ambitions of the Draft. The draft thereby goes into the opposite direction than the one taken by the first version of the French Draft, developed within the *Association Henri Capitant*, which took as a starting point that the provisions on property law are all of public order.[32] This starting point of the French draft statute proved to be too controversial to survive and probably was one of the reasons why the draft was not brought to the political level. However, the basic principle of party autonomy in the Act is subject to two exceptions.

First of all, parties can not contractually stipulate in another sense that prescribed by a definition. As we have said, the Act contains a (functional) definition per property right. The definitions mention the core elements of each property right

31 H. CAPITANT, *Introduction à l'étude du droit civil, Notions générales,* Parijs, A. PEDONE, 1921, nr. 31; C. BEUDANT, *Cours de droit civil français*, Parijs, Rousseau, 1988, IV, nr 70.

32 http://www.henricapitant.org/storage/app/media/pdfs/travaux/Avant-projet_de_reforme_du_droit_des_biens_19_11_08.pdf. The first article of the 2008 draft provided as follows : « Les articles du présent livre sont d'ordre public, sauf disposition contraire. » The Explanatory Memorandum of this French draft statute gives a justification for this rule: ""*L'article, 516, commence par affirmer le caractère d'ordre public du Livre II, sauf dispositions contraires. Ce choix de la commission présente l'avantage de clarifier une question souvent discutée, ambiguë qui oblige le juge à décider, au cas par cas, quels sont les articles impératifs et les autres. Mais, comme il ne saurait être question de supprimer toute marge de souplesse ou de mise à l'écart contractuelle d'un certain nombre de règles du droit des biens, il rend nécessaire la précision expresse, pour chaque article supplétif de volonté, de ce caractère. Cependant, dans la mesure où le nombre d'articles supplétifs de volonté reste néanmoins faible par rapport au total, l'inconvénient est apparu supportable pour les membres de la commission qui ont donc posé le principe du caractère impératif du livre II, sauf exceptions prévues dans les textes*" (*Ibid.*).

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from which parties can not contractually deviate. If this exception was not introduced, this would have contradicted the *Typenfixierung* as central dimension of the closed system of property rights. The core of the different property rights must comply with the components of the definition. Definitions are primary rules falling, giving legal ground to the other rules and thus falling outside the scope of party autonomy. To give an illustration: article 3.138, par. 1 CC defines the right of usufruct as follows: "*Usufruct confers on its holder the temporary right to use and enjoy the property of the bare owner, such as a cautious and reasonable person would, in accordance with the destination of that property and subject to the obligation to return the property at the end of his right*." Hence, it is not possible to contractually agree that the usufructuary can give another destination to the object of the property right.[33]

Provisions can, as an exception to the general starting point, expressly provide that they are mandatory, so that any contractual deviation would be invalid. This is in the Act more precisely the case for provisions with regard to the time limits of the different property rights, especially property rights to use.[34] The mandatory nature of these provisions should safeguard the 'attractiveness', in the sense of gravitational force, of the right of ownership. Moreover, the full chapter on so-called compulsory co-ownership is of mandatory law (Art. 3.100 CC).[35] The most important example of compulsory co-ownership are the rules on condominium law, which is – in Belgian law – traditionally of mandatory law in order to avoid that a real estate developing company could impose its unilateral intention to other owners in the condominium scheme.

11. *Typenzwang* and *Typenfixierung* – In sum, and to take a comparative perspective, the Belgian legislator adheres in its newly adopted regime of property law to a strict *Typenzwang*, but flexibilizes its system with regard to the *Typenfixieuring*.[36] In

33 We refer for a more in depth analysis to the contribution of Ghijsbrecht Degeest in this special issue.

34 The maximum duration of a long lease right is 99 years (Art. 3.169 CC). The maximum duration of a right of usufruct is the duration of the life of its holder (usufruct; Art. 3.141 CC). The usufruct of a legal person is subject to a double limitation: the existence of the right holder and a maximum of 99 years. For building rights, the maximum duration is, as a matter of principle, also 99 years (Art. 3.180 CC). Exceptionally, a building right can be perpetual (1) if it is created for reasons of public domain or (2) to allow for a division in volumes of a complex and heterogeneous immovable property, which includes various volumes which could qualify for independent and varying use and which have between themselves no communal part (cf. Art. 3.180, par. 2 CC).

35 It is called compulsory co-ownership because it relates to the nature of the co-owned goods.

36 For these two dimensions of the *numerus clausus* principle, we refer to S. VAN ERP en B. AKKERMANS (ed.), *Cases, Materials and Text on Property Law*, in *Ius Commune Casebooks for a Common Law of Europe*, London, Hart Publishing, 2012, pp. 68–72.

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other words: it is not possible to create innominate property rights, but there is a large space for contractual freedom within the mandatory borders of the nominate property rights. Parties can not think out of the box, but the boxes are widened up. In doing so, the Belgian legislator aimed to reconcile the need for legal certainty in the law and economics discourse with the need for flexibility in legal practice.

B. The 'priority rule' for property rights

12. Principle of priority – As we all know, property law is to a large extent 'third parties law'. The enforceability of property rights in relation to third parties is quintessential to property rights. In this respect, an important general principle of property law, is the '*prior tempore, potior iure*' rule. This rule is often referred to as the "priority rule" or the "anteriority rule".[37] Again, Belgian law was familiar with this traditional rule without any statutory ground. The reform of Belgian property law has given firm anchoring to this principle in the legislation: Article 3.4 CC provides as follows: "*Without prejudice to Articles 3.28 and 3.30 of this Book and Article 96 of the Mortgage Act, an older property right has priority over a posterior property right. Therefore, subject to the same provisions, a property right confers a right to follow enabling the holder to enforce his right against any successive acquirer of a right to the property*." The exceptions mentioned in this provision, refer to the third party protection rules with regard to movables (Art. 3.28 CC) and with regard to immovables (Art. 3.30 CC and Art. 96 Mortgage Act). With regard to property security rights, this explains why a priority (registered) pledge or hypothec prevails on a later registered pledge or hypothec. The latter is, in that case, a security right in second rank.

It is remarkable and theoretically rather innovative that Article 3.4 CC conceives the 'right to follow' as an application of the '*prior tempore*' rule. If A burdens a good he owns with a property right in favor of B, and A afterwards transfers this good to C, B's property right will be effective against C, subject to third party protection rules. The transferee must, thus, respect the prior property rights burdening the good. The reason therefore is that the right of A was vested earlier than the right of C. It fits within the general idea of '*prior tempore*'.

37 See for a recent analysis in Dutch law: L.M. DE HOOG, De prioriteitsregel in het vermogensrecht, in Ars Notariatus, Deventer, Wolters Kluwer, 2018, n°. 167.

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C. Protection of property rights against insolvency

13. Effectiveness of property rights in insolvency proceedings – As an application of their third-party effectiveness, property rights have strong force in case of insolvency. Property rights should, in the traditional and general formulation, remain outside the insolvency proceedings of a third party. Their existence or exercise are thus not affected by insolvency of a third person. This insolvency protection is, for the first time in Belgian law, laid down in Article 3.5 CC: "*Without prejudice to Articles 3.28 and 3.30, ownership, co-ownership and property rights to use remain outside the concursus created by the insolvency of third parties. Property security rights give a right of priority over the proceeds of the sale of their collateral.*" For instance, the depositor may vindicate his (identifiable) assets if the depositee is declared bankrupt, the holder of a usufruct or holder of an emphyteusis right may oppose his property right against the insolvency administrator of the bare owner, etc.

This provision should be read together with Article 139 of the Belgian Code of Economic Law, which prohibits the bankruptcy trustee to terminate agreements with regard to property rights in case of bankruptcy of one of the parties. Although this rule seems, from a proprietary point of view, self-evident, it makes an end to developing and floating case law in Belgian bankruptcy law.[38]

D. *'Nemo plus'* rule

14. 'Open' power to dispose – Another important general principle, at the intersection between contract and property, is the rule that nobody can transfer more rights than he has himself. In other words: one must have the power to dispose on the ground of his proper right. If the transferor is not holder of ('entitled to') the rights he transfers, the transfer will remain ineffective, except for some third party

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38 This provision was introduced in 2017 as a reaction to the case law of the Belgian Cour de cassation / Hof van Cassatie, which ruled that the possibility to terminate ongoing agreements at the moment of the bankruptcy also applied on agreements creating a property right (Cass. 3 december 2015, *Rechtskundig Weekblad* 2016–17, 1113, note V. SAGAERT, *Tijdschrift voor Belgisch Handelsrecht* 2016, 846, note J. MALEKZADEM: "*Aldus kan de curator wanneer de voorwaarden hiertoe vervuld zijn een einde maken aan overeenkomsten inzake het gebruik en het genot van onroerende goederen ook al beantwoorden de aldus verleende rechten aan een zakelijk recht.*"). Taking this case law to its ultimate effects, it could even trump property rights in case of insolvency, which would of course have endangered legal certainty in real estate transactions. For a more in depth analysis: cf. R. JANSEN en M.E. STORME, "Zakelijke rechten en insolventie", in V. SAGAERT (ed.), *Themis Vastgoedrecht*, Bruges, die Keure, 2016, 129–181.

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protection rules or acquisitive prescription rules. This rule originates from the dynamic dimension of property law, applying in case of the transfer of a property right. Under the Civil Code of 1804, the Belgian legislator did not give statutory ground to this rule, at least not in a coherent manner, and not with regard to its proprietary dimension.[39]

Article 3.6 of the new Civil Code fills this gap. This section both governs the possibility to transfer property rights within the limits of the own powers of the transferor and the consequences of such transfer with regard to the affiliated obligations: "*The holder of a property right may dispose of his right. He may only dispose of this right together with the main object to which it is attached, if the nature of the right obliges him to do so. If the holder of a property right transfers his right of use, he shall remain jointly and severally liable with the transferee towards the owner for the personal obligations which constitute the consideration for the creation of this right and which are payable after the transfer. In respect of obligations falling due earlier, the transferor shall be exclusively liable.*" If the transferor does not have the power to dispose, the transfer will – from a proprietary point of view – remain ineffective in relation to the person whose rights have been transferred. Third party protection rules – possession with regard to movables (Art. 3.28 CC: cf. supra, n°. 20) and registration in the land register for immovables (Art. 3.30 CC) – are the traditional exceptions, also taken over in the new Belgian Civil Code.

15. Limits to the power to dispose – This provision can be connected to Article 3.53 CC, which provides that an owner may validly give his consent for a restriction of his power to dispose his good under the mandatory conditions that (1) the clause is limited in time and (2) the clause corresponds to a legitimate interest.[40] The Civil Code of 1804 took a hostile position towards contractual clauses restricting the right to dispose of goods, as this created in the pre-codification

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39 The only rule connected with '*nemo plus*' rule was a provision within the chapter on sales agreements, article 1599 Civil Code: "*The sale of another's good is void. It may open the remedy of compensation if the seller did not know that it was the good of another*". This provision causes more legal uncertainty than it solves problems. First of all, a contract law provision should not determine the property law effects of a defective transfer. Secondly, legal scholars agree that the voidness of article 1599 CC in fact points towards a rescission for non-execution rather than the voidness (H. DE PAGE, *Traité élémentaire de droit civil belge*, IV, n°. 128; J. DEL CORRAL, *De leveringsplicht bij de overdracht van roerende lichamelijke goederen*, Antwerp, Intersentia, 2013, n°. 333 *et seq.*; R. JANSEN, *Beschikkingsonbevoegdheid*, Antwerp, Intersentia, 2009, n°. 585; B. TILLEMAN, *De totstandkoming en de kwalificatie van de koop*, in *Beginselen van Belgisch Privaatrecht*, Mechelen, Kluwer, 2001, n°. 1025).

40 In French: "clause d'inaliénabilité", in Dutch: "vervreemdingsverbod".

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period the phenomenon of the 'death hand'[41], which resulted in the donation of important economic assets in favor of religious estates, which could not take part in the economic trade. Such situation was detrimental from a legal-economic point of view. That is one of the reasons why the Belgian legislator did not adopt, as a general legal device, the fideïcommis.

Case law gradually admitted these clauses under the two said conditions, and they have become part of legal practice, for instance in donations with retention of usufruct.[42] Article 3.53 CC gives statutory ground to this case law. The new Civil Code is not explicit on the legal effects of the violation of such restrictions to the power to dispose. The reason is obvious, at least with regard to corporeals: a violation of the power to dispose is sanctioned on a pure contractual level. It does not result in the ineffectiveness of the transfer, except if contract law provides otherwise.[43]

16. Real obligations as accessory of property rights – The obligations connected to property rights are often addressed as 'real obligations'.[44] These are obligations which are entered into as a holder of a property right, in such way that it transfers with the holdership of the property right. The idea of the new civil Code is that the holder of a property right cannot discharge himself from obligations which were the counterpart for the creation of a right, such as the compensation in favor of the person vesting the right, an obligation to construct a building, etc. With regard to these obligations, the legislator cannot accept that the creditor can be confronted with a new (exclusive) debtor – the transferee of the principal property right– whose solvency and liquidity is uncertain and has not been taken into account by the creditor at the moment he granted the credit. That is different for

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41 In French: "mainmorte".

42 For an overview: cf. R. JANSEN, *Beschikkingsonbevoegdheid*, Antwerp, Intersentia, 2009, 577–701; V. SAGAERT, "Nieuwe perspectieven op het eigendomsrecht na tweehonderd jaar Burgerlijk Wetboek" in P. LECOCQ, B. TILLEMAN and A. VERBEKE (eds.), *Zakenrecht*, Bruges, die Keure, 2005, 46–55.

43 For example: if the transferee is also in bad faith, this can result in the voidness of the transfer as reparation in kind for extra-contractual liability (Cour de casation/Hof van Cassatie 27 April 2006, *Pasicrisie* 2006, I, 976, *Tijdschrift voor Belgisch Burgerlijk Recht* 2008, 507, note J. DEWEZ).

44 For a recent in depth analysis in a comparative perspective: S. DEMEYERE, *Real obligations at the edge between contract and property* (Antwerp: Intersentia 2020). See also in a comparative analysis in this Journal: S. DEMEYERE, "Affirmative Land Burdens in German, Dutch and Belgian Law: Possibilities, Restrictions and Workarounds". *European Property Law Journal*; 2017; pp. 196–235. For an analysis under the old Belgian law: V. SAGAERT, "Real rights and real obligations in Belgian and French law", in J. MILO en S. BARTELS (ed.), *The content of real rights, Ars notarius*, Deventer, Kluwer Rechtswetenschappen, 2004, 47–70.

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the obligations of the holder of the property right which do not constitute a counterpart for the creation of the property right. For instance, obligations of maintenance of a usufructuary (Art. 3.153 CC) or a long lease holder (Art. 3.173 CC) are generally not the counterpart for the creation of a proprietary burden. The latter obligations thus follow the property right, discharging the original holder of the property right after the transfer. The legislator assumes that the solvency of the debtor is not a main element in the assessment of entering into the agreement.

17. Power to dispose for a limited property right holder – There is, under new Belgian property law, no identity between ownership and power to dispose. Limited property right holders can grant, on the burdened good, a limited property right, as long as he does not exceed the substantive and temporary limits of his powers. For instance, a holder of an emphyteusis can grant a usufruct or building right within the time limits of his own right.

Exceptionally, the Belgian legislator even allows a right holder to dispose of the object of his property right beyond the borders of his own right. That is, for instance, the case for a usufructuary. The latter is normally limited to the borders of his own right, but Article 3.148 CC provides for three exceptions: "*A usufructuary may dispose of the burdened property outside the boundaries of his powers if (1) a special legal provision allows so, (2) it is in accordance with the destination of the property that already existed at the time the usufruct was created or was contractually agreed upon between the parties, and is inherent to his obligation of cautious and reasonable management; or (3) the usufruct relates to consumption goods*"[45]. It is an important exception to the 'nemo plus' rule, taking a functional approach on the division of powers between the usufructuary and the bare owner.

E. The object of property rights: unity, specificity, real subrogation and transformation

18. Principle of specificity – The anti-pole of the property right is its object. It is a common principle of property law that property rights can only have as their object identified or identifiable assets. Property rights can never concern an abstract value.[46] This principle, known as the principle of specificity, now gets firm

45 A usufruct on consumption goods was a difficult issue under the old Civil Code, as it is not possible to use these goods without consuming these. Therefore, such usufruct was often characterized as a quasi-usufruct.

46 This principle was formulated by the Supreme Court in 1947: a vindication claim can only be accepted if and to the extent it concerns specific property, and it cannot be exercised based on the

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legal ground in Article 3.8, 1st par. of the new Civil Code. However, this principle gets a modern and rather flexible content: on the ground of Article 3.12 of the new Civil Code, the commingling of generic goods that form, fully or partly, the object of different pre-existing property rights, does not affect these property rights. The holders of the latter property rights on the commingled generic goods can enforce their rights on the commingled goods in proportion to their rights. Hence, a so-called co-ownership can come into existence among the different sellers of this category of property.[47] The specificity principle thus applies on a more collective level, not on an individual basis. Therefore, Belgian property law allows a property right holder to trace the value of his object through the mixtures, without making and distinction between granular mixtures and fluid mixtures. Such a general tracing possibility, which already got specific statutory ground with a narrow scope, narrows the gap between civil law and common law, as the common law traditionally has more generous rules on tracing and commingling.[48]

19. Principle of unity – The principle of unity of the object of property rights, as laid down in Article 3.8, 8th par. of the new Civil Code, is a principle which was implicit in Belgian property law, but which gets now general and firm statutory ground. It has a static and a dynamic dimension: a property right cannot be created on an inherent component of a good (static dimension). A property right on a good automatically relates to the inherent components of that good and every act of disposition with regard to that good also relates to its inherent components (dynamic dimension). Some legal scholars mentioned this principle in publications, but it was not as such recognized as overriding principle. The introduction of the principle is the result of a comparative approach and was largely inspired by Dutch law.[49]

This principle has major legal effects for land law. It determines both the standard for incorporation into the ground, which transforms a movable into an immovable (Art. 3.47 CC) and the standard for accession, which grants to the

amount due: Cass. 9 May 1947, *Arr. Cass.* 1947, 148, *Pas.* 1947, I, 193, *Tijdschrift voor Belgisch Handelsrecht* 1948, 208 and *Revue de la banque* 1948, 282. H. JONES, "Dépôt irrégulier et abus de confiance", *Rev. not. b.* 1974, p. 622, n° 14.

47 For a comparative approach: S. VAN ERP en B. AKKERMANS (ed.), *Cases, Materials and Text on Property Law*, 671–678. In Belgian law: E. DIRIX, "Eigendomsvoorbehoud", *Rechtskundig Weekblad* 1997–98, p. 491, n° 30; V. SAGAERT, *Zakelijke subrogatie*, Antwerp, Intersentia, 2003, n°. 426 *and seq.*

48 See, in the common law: P. BIRKS, "Mixing and tracing. Property and restitution", *Curr.L.P.* 1992, 69–98; R. GRANTHAM and C. RICKETT, "Tracing and property rights: the categorical truth", *Mod. L.R.* 2000, 905–911; G. McCORMACK, "Mixture of goods", *L.S.* 1990, 293–306.

49 Article 3:4 *iuncto* article 5.3 Dutch Civil Code.

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ground owner a presumption that he is also owner of the buildings and plantations erected on, above or below the ground (Art. 3.70 CC). It also implies that a contractual deviation from this principle is only possible to the extent as admitted by the law, meaning that all contractual deviations to the accession principle identify with the creation of a superficies right.[50] Under the old laws, this would mean that it is limited to a maximal duration of fifty years. We will analyze below that, under the Act, the time limits have been opened up: a superficies right can last for 99 years or, exceptionally, perpetual.[51]

20. Real subrogation and tracing – Another feature on the level of the object of property rights is that they are protected by the principle of real subrogation ('(simple) tracing').[52] According to this principle, a property right can be maintained despite the loss of its original object through the transfer of the property right to the substituting asset. Until now, specific statutory provisions provided in this legal device, but there was no general legal ground. The Act fills this gap through Article 3.10 of the new Civil Code, which recognizes real subrogation as a general remedy for property rights. However, real subrogation is a subsidiary remedy, in the sense that the holder of a property right can only take recourse to real subrogation if no other remedy (right to follow, *actio pauliana*, etc.) is available. In giving a subsidiary nature to the principle of real subrogation, the legislator has aimed to avoid – what is called in English law – 'the geometric multiplication of (the object of) a property right'.[53] For instance: a secured creditor is entitled to a right of priority on the insurance claim after the destruction of the asset which originally was the object of the security right.

21. Transformation of the object of a property right – Finally, Article 3.11 *iuncto* Article 3.56 deal with the status of property rights in case of *specificatio*. *Specificatio* means that materials are used to make a new thing with an identity differ-

50 In Belgian law, there was some discussion on this issue in case law: old case law of the Cour de cassation indeed implied that no derogation from the accession was possible outside the border of a superficies right

51 We refer to the contribution of Alexander Appelmans in this special issue.

52 V. SAGAERT, *Zakelijke subrogatie*, Antwerp, Intersentia, 2003 792 p. In common law: L.D. SMITH, *The Law of Tracing*, Oxford, Oxford University Press, 1995.

53 SMITH argues as follows: "*One way to solve this problem would be to say that a plaintiff cannot assert proprietary rights in the traceable proceeds of a disposition unless the effect of the disposition was such that he lost his rights in the original asset. Civilian systems, particularly those which maintain a rigorous theoretical structure governing the creation of rights, have reached this conclusion. This avoids the geometric multiplication problem, and also arguably provides a stronger theoretical justification for the assertion of proprietary rights in the new asset.*" (L.D. SMITH, *The law of tracing*, 322).

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ent from the identity of the materials used. The transformation of the object of a property right triggers the question whether the property right stays in place on the newly created good. Moreover, if the manufacturer is different from the owner of the original object, a conflict arises over ownership of the new object.[54] The rules of the old Civil give rise to a large amount of legal uncertainty, as the rules referred to natural equity as standard to solve the property rights conflict.[55] The new Act aims to enhance legal certainty in putting forward a more mathematical standard: as a matter of principle, the manufacturer becomes the owner of the newly created good, except if the value of the initial good exceeds by far the value of the manufacturing.

F. The transparency of property rights

22. Reference – The rules on transparency of property rights are analysed in the contribution of Benjamin Verheye, which is also included in this special issue. We refer to that contribution.

V. Theory of the estate ('patrimony')

23. Definition – The Belgian legislator has, in the Act, integrated the provisions on the estate. These used to be part of the Hypothec Act of 16 December 1851[56], but their scope is much more general than only for hypothecs. Meanwhile, the Belgian legislator has paid, in inserting these rules in the new Civil Code, attention to the developments this theory has undergone. Traditionally, the unity and indivisibility of the estate had an absolute nature. The estate identified with the estate holder.

The definition of the estate in Article 3.35 CC makes clear that not only present but also future goods and not only goods but also obligations can be part of an estate. In doing so, the legislator aimed to catch the different situation of goods with a negative value, such as polluted soil or immovables with inherent tax duties exceeding the value of the immovable property.

24. Fiducie? – Is any division of the estate, or trust-like relationship conceivable in Belgian private law? The proposal for the statute provided, with French law as

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54 S. VAN ERP en B. AKKERMANS (ed.), *Cases, Materials and Text on Property Law*, p. 679.
55 Cf. article 565 old Civil Code.
56 Belgian Official Gazette 22 December 1851.

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inspiration, for the introduction of a full 'fiducie'.[57] The Drafters had deliberately opted to include this device in the general chapter, and not in the chapter on ownership, in order to avoid the fierce debate as to the exclusivity of ownership when trust-like arrangements appear. The '*fiducie*' was defined as a contractual arrangement that allows parties to transfer goods to one or more 'fiduciaires' ('*trustees*') who will keep them separate from their personal patrimony, in order to affect these goods to a specific destination in favour of one or more beneficiaries.[58] The rights of the beneficiary would be protected on a proprietary level: the fiduciary goods are not subject to insolvency proceedings opened against the *fiduciaire* ('trustee') and the beneficiary is protected by tracing rules (right to follow, real subrogation).[59] Given the sensitivity of civil lawyers towards trust-like arrangements, the proposed provisions restricted the fiducie in scope and included some measures that should guarantee transparency to the highest possible extent.[60] However, the legislator has not enacted these provisions. The political hostility popped up during the parliamentary process, mainly for tax reasons: the legislator was afraid of tax avoidance schemes through this mechanism, but did not exclude to introduce this legal device in a later stage.

57 Act on the *Fiducie* of 19 February 2007, to be consulted at www.legifrance.gouv.fr. (accessed 02-05–2010).. A similar trust-like device was introduced, for instance, in Italian (in 2006; Art. 2645-ter Codice Civile) cf. and Luxemburg law (Act of 27 July 2003). The Draft Common Frame of Reference also included a book (X) on trust: article 1:201 DCFR provided that a trust is "*a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes*."

58 Article 3.38 of the draft Act : «*La fiducie naît par contrat et est l'opération par laquelle un ou plusieurs constituants transfèrent des biens ou un ensemble de biens à un ou plusieurs fiduciaires qui, les tenant séparés de leur patrimoine propre, agissent dans un but déterminé au profit d'un ou plusieurs bénéficiaires*.»

59 Article 3.39 of the draft Act: «*Les biens qui font l'objet de la fiducie restent séparés du patrimoine du fiduciaire au profit du bénéficiaire. Sous réserve du droit de suite attaché à une sûreté antérieure ou de la fraude aux droits des créanciers du constituant, seules les créances nées de la gestion ou de la conservation du patrimoine fiduciaire peuvent être recouvrées sur ce patrimoine.*
Les biens objet de la fiducie tombent hors du concours entre les créanciers personnels du fiduciaire et toutes les opérations afférentes à ces biens peuvent être opposées à la masse pour autant qu'elles se rapportent à la destination de ces biens. Ces biens tombent également en dehors de la liquidation du régime matrimonial et de la succession du fiduciaire.»

60 The *fiducie* was made subject to measures of publicity to the extent that its object should be registered when it is made subject to a property security right. Only certain persons can act as third parties. That is the case for those persons of which third parties (creditors) should be aware that the money they manage is third party money. A contract of *fiducie* can never be a gift. If the '*causa*' of the *fiducie* is the '*animus donandi*', then the contract is void. In this way, the drafters aim to prevent tax avoidance. The contract of *fiducie* must be in writing and have several mandatory stipulations.

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25. Trust account – However, the Belgian legislator re-integrated one specific trust-like device, the trust account, in Article 3.37 of the new Civil Code. This device already existed since 2013 in Belgian law and allows some professional categories to hold a bank account in favour of clients which is insolvency-proof: personal creditors of the account holder can not seize the bank account or, in case of bankruptcy, it will be separated from the insolvency estate. It only applies to professional accounts of attorneys, notaries public, bailiffs and (since 2017) real estate brokers.

VI. Sustainability in the new Belgian property law

Accounting for sustainability in property law – Drafting a Civil Code in the early 21th century requires more attention for the sustainability approach of property law. The law of things should be concerned about the sustainability of things. Property law is the law which in the most direct manner deals with the powers we can exercise on things.[61]

The reflections of more sensibility for the commons are popping up in the new Belgian property law, not as groundbreaking principles shaking the system, but as concrete examples of the central role property law has to play in a responsible behaviour towards things. We give, in the following paragraphs, some illustration of this attention, without any ambition to give a limitative enumeration.[62]

Sustainability in the micro-environment – A nice example is the field of neighbourhood nuisance. Neighbourhood is the micro-environment. Thus care for the neighbourhood is a preliminary step towards care for the environment. Belgian law has developed, and ancred for the first time in the legislation in the new Civil Code, an elaborate set of rules, which is grounded in the basic idea of the balancing of the rights of all owners. If, the one has, according to the circumstances at stake, disrupted the balance between the adjacent property rights in a manner

61 As J. 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.*" (J. ROBBIE, "Moving Beyond Boundaries in the Pursuit of Sustainable Property Law", in B. AKKERMANS and G. VAN DIJCK (eds), *Sustainability and Private Law*, Eleven International Publishing, 2019, 77–78; cf. B. AKKERMANS, "Sustainable Property Law?", *EPLJ* 2018, 1–3.

62 We could also refer to Articles 3.133–3.134 CC, which imposes limits to the possibility to grub-up trees, even if the latter are unlawful, and to Article 3.65 CC, which limits the possibility of the owner of ground which is adjacent to a river to use the water of the river.

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that he caused a harm exceeding the normal harm due to neighbourship, he can be held liable. This could even result in a limitation of the use of the ownership. The objective balancing between neighbouring properties is the standard for liability.[63]

More importantly for sustainability purposes, 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 risk for health, safety or pollution. In other words: one does not have to wait until the pollution or health problems have occurred, but one can ask to a judge to prevent these infringements. Sustainability is the common ground for allowing such an action, as it is better to prevent nuisance in the micro-environment than to grant for a remedy.

Optimization of ground use – Another example of a more sustainable approach in recodifying property law is the growing attention for the third dimension of ownership. The legislator thought about land in two dimensions, in terms of land surface. He did not contemplate of the use of the land above or underneath the surface. However, land ownership should not be thought of in terms of flat land, but in terms of property volumes on, above and underneath the land. The possibility to create multiple use of his land, by stacking property volumes above and underneath each other reinforces. Efficent land use if a land owner can constitute different volumes with different uses and destinations of his land, then he can not only optimize the value of the land, but also safeguard other lands from being built. Ff one has more possibilities to build above and underneath each other, there is less need to use the free space on other parcels. The new Belgian civil code deliberately expands the possibility to create "ownership of volumes" under the form of perpetual building rights on volumes. In doing so, the legislator undermines a basic foundation of property law, which is called the "accession". A perpetual building rights excludes, without time limit and without termination possibility, the accession and thus also infringes the exclusive nature and preeminence of ownership.

Common resources – Sustainability is not only dependent upon the manner in which we use our private resources, but also with the way in which we deal with public resources. We have become gradually more aware of the scarcity of fresh air, clean water etc. A codification must thus limit the way in which we use these. Article 3.43 of the Belgian Civil Code reflects this awareness : "*Common objects*

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63 Article 3.101 CC. We refer for a more extensive analysis of this provision to the contribution of Marie-Laure DEGROOTE in this special issue.

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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." Air, water, minerals, must be used with a long term perspective ahead, they cannot be exhausted for the current generation future. This is a clear example of the commons in the new Belgian property law.

VII. Conclusion

26. Construction in legal practice – This contribution provides for an introduction in the background and the principled approach of new Belgian Civil Code book on Property Law. The search for general principles by the legislator, and the legal ground they have been given, has to be praised. However, as we have explained, it would – given my direct commitment to the statute – not be decent to give an appreciation or comment of the statute. It is my sincere hope that all legal scholars and legal practitioners will become co-architects in the outlook, equipment and coherent decoration of the new building of Belgian property law.

This analysis did not take into account the analysis of the technical rules which elaborate the general rules on a more in-depth level. It only gave a glimpse of some general provisions, to the extent that they were useful to execute this general test. The following contributions will, in the framework of these general principles of property law, develop the more in depth legal-technical analysis for each of the different topics of the new Belgian Civil Code with regard to property law.

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