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Abstract In different branches of the Dutch legal system, there are categories and rights that serve to protect specific commons through different methods. Sunlight and air (including wind for windmills) can be freely used by everyone. Waters in the sea and rivers are things under private law, but do not have any owner until water is extracted. The seabed of the territorial sea and the Wadden Sea are State-owned and cannot be alienated. State-owned markets, schools, and swimming pools are public things. The public may claim access to private roads. Certain privately owned forests are maintained, in return for tax benefits, in the public interest. Health care, food, education, housing, and environmental protection are protected commons. Nationalisation requires an expropriation unless the owner is willing to sell: property may be expropriated only if in the public interest and the owner is compensated. In private law, there are specific grounds on which a non-owner can claim access to somebody else's land.

1 Questionnaire: Part I

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

There is no overarching category of tangible or intangible goods that satisfy a real or fundamental need outside of market exchange and thus need to be protected. The "public interest" (*algemeen belang*), which may justify infringement of property rights, covers the creation or preservation of commons, but also includes other goals.

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In the different branches of the Dutch legal system, there are legal categories and rights that serve to protect specific commons through different methods.

There are goods that do not qualify as things under private law and cannot be subject to property rights. Sunlight and air can be freely used by everyone.[1] As the Netherlands is famous for its windmills, it should come as no surprise that owners of windmills may have a "right to catch wind", which obliges the owners of surrounding properties not to disrupt the wind flow.[2]

The water in the sea and the water in a river are things under private law, but do not have any owner (*res nullius*) until the water is extracted (appropriation).[3] Subject to public law, anyone can make reasonable use of this water. Art. 5:40 of the Dutch civil code (*Burgerlijk wetboek*; BW) specifically provides for this right with respect to agricultural uses. The seabed of the territorial sea and the Wadden Sea are stated-owned and cannot be alienated.[4]

In public law, state-owned facilities, such as markets, schools and swimming pools, are public things (*openbare zaken*).[5] Subject to limitations entrenched in public law, anyone may make use of these facilities.

There is specific legislation that protects goods that may constitute commons. In the following paragraphs, I sketch examples of such protective legislation. However, I do not purport to provide a complete account.

The authenticity, beauty, and aesthetics of historical buildings, for instance, are protected under the Monument Act (*Monumentenwet*). The Minister of Education, Culture, and Science may declare things to be protected monuments. Based upon this administrative decision, the owner will have to maintain the building and preserve its outward appearance.

The public may claim access to private roads. Under the Roads Act (*Wegenwet*), privately owned roads are deemed open to the public if they have been physically open for 30 years or, subject to the municipality's consent, designated as open to the public by the private owner. Once the road is open to the public, it will only become a private road again if it has not been physically open to the public for 30 years or if the municipal council decides to designate it as a private road.

Privately owned forests are not open to the public. However, the owner of the forest may apply for their property to be recognised as a property whose natural beauty needs to be preserved under the Natural Beauty Act (*Natuurschoonwet*). The owner will then have to maintain the property in the public interest and keep it open to the public. There is a strong incentive for owners to do this because they will receive substantial tax benefits in return.

Also, health care, food, education, housing, and environmental protection are commons protected by specific legislation. They are not enshrined in legal

[1] Hennekens (2001), pp. 18 and 55 *et seq*.

[2] Andreae (1919), pp. 431–42.

[3] Hennekens (2001), pp. 21 and 38.

[4] Art. 5:25 BW.

[5] Hennekens (2001), pp. 16 and 160; and Bröring and De Graaf (2019), pp. 565 *et seq*.

categories, but social security legislation and environmental law ensure access to them to a large extent, through minimum allowances, the attachment-exempt threshold, insurances, housing benefits, public schools and universities, and environmental standards.

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

With one exception, the design of commons as a legal concept never went beyond the doctrinal and judicial interpretation of the legislation discussed under Sect. 1.1 and other legislation protecting goods that are effectively regarded as commons. In the past, there was a doctrinal discussion about whether things that perform a public function, such as roads, could be alienated or were *extra commercium*.[6] Today, however, there is no such discussion or category (except for the seabed of the territorial sea and the Wadden Sea, which are state-owned and cannot be alienated).

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

I am not aware of any legal debate in the Netherlands about the commons as a single legal category comprising all goods that satisfy a real or fundamental need outside of market exchange. However, there are debates about the legislation described under Sect. 1.1 and whether they sufficiently preserve the commons that they are meant to protect.

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

The Dutch Civil Code allows for the alienation of any kind of asset owned by a public body. The only property that can never be alienated is the seabed of the

[6] Hennekens (2001), p. 17.

territorial sea and the Wadden Sea. Art. 5:25 BW stipulates that the state is the owner thereof.[7]

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

A public body's decision to dispose of an asset is a juridical act in private law and no administrative decision. Therefore, adversely affected persons cannot bring an action before the administrative courts.[8] They could challenge the juridical act if it constitutes abuse of right,[9] which is very unlikely to be the case, or if the disposal is unlawful because it is contrary to a provision in public law.[10]

It may be more fruitful to challenge administrative decisions accompanying the privatisation of publicly owned assets. A privatisation of land, for instance, typically leads to a change of the use of the land. In order for the new use to be lawful, the municipality in the concerned area would have to change its zoning plan (*bestemmingsplan*). This change can be challenged with the highest administrative court in the Netherlands (Judicial Division of the Council of State; *Afdeling bestuursrechtspraak van de Raad van State*). However, the change of the land use is subject to a very limited judicial review because the municipal council enjoys wide discretion.[11] Also, the new owner needs a permit to erect buildings on the land.[12] Opponents of the privatisation may want to challenge this permit. This system will stay the same under the Environment Act (*Omgevingswet*), which will come into force on 1 July 2023.[13]

[7] Hennekens (2001), pp. 20 *et seq*.

[8] ABRvS, Judgment of 16 April 2014, ECLI:NL:RVS:2014:1334; and Bröring and De Graaf (2019), pp. 168 *et seq* and 563 *et seq*.

[9] Art. 3:13 BW.

[10] Art. 3:14 BW.

[11] Hoops (2017), pp. 226 *et seq*.

[12] Art. 2.1(1) of the General Provisions of Environmental Law Act (Wabo; *Wet algemene bepalingen omgevingsrecht*).

[13] See, amongst others, Art. 2.4 and 5.1 of the Environment Act.

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

Nationalisation requires an expropriation unless the owner is willing to sell the property. According to Art. 14(1) of the Dutch Constitution, property may only be expropriated in the public interest and is subject to the payment of compensation. Art. 1 of the First Protocol to the European Convention of Human Rights ("ECHR") stipulates that a person may only be deprived of possessions in the public interest. The Expropriation Act concretises these requirements.

The Crown is generally the state body that takes the administrative decision to expropriate property under the Expropriation Act, mostly on the basis of a preceding planning decision. A person with a legitimate interest (*belanghebbende*) in terms of Art. 1:2 of the General Administrative Law Act (*Algemene wet bestuursrecht*; Awb) can lodge an appeal against the planning decision.[14] The Crown tests the expropriation as to whether it would serve the public interest and whether it would be urgent, necessary, and proportionate.[15] In the proceedings before the civil courts that follow the expropriation decision of the Crown, the courts review the application of those criteria by the Crown.[16]

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

The protection of property as a fundamental right in the Netherlands is based upon both an international treaty and the Constitution (*Grondwet*; Gw). Art. 1 of the First Protocol to ECHR (Art. 1 P1 ECHR) reads as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[14] Art. 8:1 Awb.

[15] Hoops (2017), p. 196.

[16] Hoops (2017), pp. 252 *et seq*.

Art. 1 P1 ECHR has direct effect in the Netherlands.[17] Art. 14 Gw provides as follows:

(1) Expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament.
(2) Prior assurance of full compensation shall not be required if in an emergency immediate expropriation is called for.
(3) In the cases laid down by or pursuant to Act of Parliament there shall be a right to full or partial compensation if in the public interest the competent authority destroys property or renders it unusable or restricts the exercise of the owner's rights to it.

Art. 14 Gw merely provides a negative guarantee of property because this provision subjects the exercise of state power to certain restrictions, but does not positively affirm property as a fundamental right protected under the Constitution.[18] However, this negative guarantee sufficiently implies the recognition of property as a fundamental right.[19]

Subject to the payment of full compensation and on the basis of an Act of Parliament, property in the Netherlands may be expropriated for virtually any public benefit, including the protection of other fundamental rights.[20] To protect other fundamental rights the Dutch legislator has introduced various legislative restrictions to property or statutory bases for administrative regulations limiting property rights. Tenancy law and environmental law, to name but two legal fields, provide many examples of such restrictions. Such restrictions in the public interest are generally deemed proportionate and, therefore, lawful. Where a restriction imposes an individual and excessive burden upon a holder of property rights, the principle of proportionality or the principle of *égalité devant les charges publiques* (equality of citizens before charges levied by the state) entails that the state will have to pay compensation for the excessive burden.[21] A 1991 judgment of the Dutch Supreme Court (*Hoge Raad*; HR) provides an example. The state prohibited farmers from feeding slaughterhouse waste or food waste to their pigs to prevent an outbreak of swine fever. This prohibition brought farmers who fed only such waste to their pigs to the brink of bankruptcy. For this reason, compensation was awarded to such farmers.[22]

[17] Art. 93 Gw; Barkhuysen and Van Emmerik (2005), p. 30.

[18] Elzinga et al. (2014), p. 437.

[19] Ministerie van Binnenlandse Zaken (1969), pp. 85 *et seq*. Differing: Asser/Velten, Van & Bartels 5 2017/14; and Peters 2013. They state that although Art. 14 Gw recognises the importance of property, Art. 14(1) Gw only protects the fundamental right to fair compensation upon expropriation.

[20] *See* Chapter 4 in Hoops (2017).

[21] ABRvS, Judgment of 8 November 2006, *ECLI*:NL:RVS:2006:AZ1762, para 2.6. *Cf.* Tjepkema (2010), pp. 355 *et seq*; and Sanderink (2015), pp. 315 *et seq*.

[22] Hoge Raad, Judgment of 18 January 1991, ECLI:NL:HR:1991:AC4031.

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

In private law, there are specific grounds on which a non-owner could claim (temporary or permanent) access to somebody else's land. For example, Art. 5:56 BW obliges the owner to tolerate the use of property by a non-owner for the improvement of the non-owner's property. More general grounds can be found in the doctrine on abuse of right and tort law. Art. 3:13(2) BW stipulates that an owner abuses their right where the right is exercised only to harm another person, where the right is exercised for another goal than for which it has been conferred, or where it would be unreasonable to exercise the right because the harm done to other interests is disproportionately severe in relation to the owner's interest in exercising the right. The traditional example is a home that extends onto somebody else's land by a few centimetres. For the owner to demand the demolition of the unlawfully built part of the home would probably constitute abuse of right because it would disproportionately affect the non-owner's interest, in particular their right to home.[23] A nuanced rule on this issue has been introduced in Art. 5:54 BW. In tort law, a non-owner's emergency situation may justify infringing property rights. Also, Art. 6:168 BW stipulates that a court may decline to order an injunction against an on-going unlawful act, such as the infringement of a property right, if the unlawful act serves a public interest of great importance.

In addition, the owner will have to respect rights granted to a non-owner under public law.[24] Refer to Sect. 1.1 for examples.

2 Questionnaire Part II

2.1 Housing

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

[23] Hoge Raad, Judgment of 17 April 1970, ECLI:NL:HR:1970:AC5012.

[24] Art. 3:14 BW.

This case takes us back to an intriguing chapter of Dutch legal and economic history. After the Second World War there was a severe shortage of (affordable) housing in the Netherlands, particularly in the metropolitan areas. Taking possession of someone else's vacant building and living in that building against the owner's will became necessary for a lot of people to have a roof above their heads. This phenomenon is called *kraken* in Dutch. *Kraken* does not constitute criminal trespass under Art. 138 of the Penal Code (*Wetboek van Strafrecht; Sr*)[25] if the building has not been in use for one year or more.[26] As the shortage of housing diminished, however, attitudes within society changed. In 2010, Parliament (*Staten-Generaal*) adopted Art. 138a of the Penal Code under which *kraken* is a criminal offence punishable with up to one year in prison. As they have only been living in the building for a couple of months, John, Orri, Sekela, and Satoshi thus commit a criminal offence under both Art. 138a and 138 of the Penal Code. As is demonstrated in the next two subsections, the owner can obtain an eviction order that can only be suspended under very narrow conditions. Housing law and social security law, however, assist John, Orri, Sekela, and Satoshi in finding affordable housing. An acquisition by (extinctive) prescription on the basis of Art. 3:105 and 3:306 BW, which requires possession during a period of 20 years, is not possible because the legal manager demanded that they leave the land after "a couple of months". Note that I do not discuss the power of the police to order an eviction under Art. 551a of the Criminal Procedure Code (*Wetboek van Strafvordering*) or other similar powers of the municipality under administrative law.[27]

2.1.1 Eviction Order or No Eviction Order: Balancing the Right to Ownership Against the Right to Home

The company can file for an eviction order with the courts competent to decide on private law matters. This action is based upon the basic norm of Dutch tort law, Art. 6:162 BW.[28] The owner, in principle, has the right to use or not to use the property as s/he pleases and to exclude others from using it.[29] As John, Orri, Sekela, and Satoshi live in the building without any right, contractual or otherwise, to live in the vacant buildings, they, in principle, commit an unlawful act in terms of Art. 6:162(2) BW.[30] Therefore, the company can, in principle, obtain appropriate relief against the unlawful act in the form of an eviction order.

[25] Hoge Raad, Judgment of 2 February 1971, ECLI:NL:HR:1971:AB3474.

[26] Van Gemert et al. (2012), p. 198.

[27] Moné and Eeken (2010).

[28] Moné and Eeken (2010).

[29] *See*, for instance, Rechtbank Amsterdam, Judgment of 29 January 1992, ECLI:NL:RBAMS:1992:AK0455.

[30] Moné and Eeken (2010).

Under particular circumstances, the owner may not be able to obtain an eviction order.[31] In the heydays of *kraken*, in the 1970s and 1980s, some lower courts developed very nuanced criteria for assessing whether the actions of occupiers like John, Orri, Sekela, and Satoshi were unlawful in terms of the predecessor of Art. 6: 162(2) BW[32] or, alternatively, whether the owner was abusing the right of ownership (*see* Art. 3:13 BW).[33] They balanced the owner's property right and the occupier's right to home,[34] which is protected under Art. 8 ECHR and Art. 12 Gw.

A very instructive case decided by the District Court (*Rechtbank*) of Middelburg in 1980 evolved around a mother of three children who had been the victim of domestic violence. The family lived at a home for such victims. Her applications for housing were dismissed. The children were doing badly at school. It was only after this development that she decided to take possession of an apartment that had been vacant for less than six months. The apartment had previously formed part of the Dutch government's social housing programme. The owner had bought it in order to sell it to a commercial party to make a profit. The owner filed for an eviction order.

The District Court considered that *kraken* was not unlawful if the right of ownership was exercised in a socially unacceptable manner and the apartment was *gekraakt* in a socially acceptable manner. The exercise of the right of ownership would only be socially unacceptable under certain (cumulative) conditions. First, there had to be a great number of people waiting for housing. Secondly, the apartment had been vacant for at least six months. Thirdly, the apartment had formed part of the social housing sector and it was the owner's intention to sell the apartment to a commercial party. These factors weaken the position of the owner. There also need to be factors that strengthen the position of the occupier or, in other words, make the occupation socially acceptable. First, the occupier must act like a good tenant and, in particular, pay the rent. Secondly, the occupier's applications for housing would not be successful. Thirdly, the occupier would leave the apartment after the sale of the apartment to a party who wishes to live in the apartment.[35] The District Court eventually granted the eviction order because the apartment had been vacant for less than six months. However, had the apartment been vacant for more than six months, the right to home would have outweighed the right of ownership.

On the basis of this judgment, John, Orri, Sekela, and Satoshi would only be protected under very narrow conditions that concern the housing market in general, the conduct of the owner, and the economic situation and conduct of the occupiers. Concerning the state of the housing market, a significant number of people are not

[31] Moné and Eeken (2010).

[32] *See,* for example, Rechtbank Middelburg, Judgment of 24 December 1980, ECLI:NL: RBMID:1980:AC7089.

[33] *See*, for instance, Rechtbank Amsterdam, Judgment of 29 January 1992, ECLI:NL: RBAMS:1992:AK0455.

[34] *See*, for example, Rechtbank Middelburg, Judgment of 24 December 1980, ECLI:NL: RBMID:1980:AC7089; Rechtbank Amsterdam, Judgment of 29 January 1992, ECLI:NL: RBAMS:1992:AK0455; and Rechtbank Alkmaar, Judgment of 13 November 1986, WR 1987, 20.

[35] Rechtbank Middelburg, Judgment of 24 December 1980, ECLI:NL:RBMID:1980:AC7089.

able to find affordable housing. The facts of the case do not elaborate on the state of the housing market. Therefore, it is uncertain whether John, Orri, Sekela, and Satoshi would meet this criterion. Concerning the conduct of the owner, the owner must have left vacant for at least six months a building that used to be available as affordable housing for low-income tenants and must intend to sell the building to a party that is not likely to rent it out at affordable prices. The facts of the case suggest that the building has never been rented out to tenants and that the owner does not intend to sell it. The courts are thus likely to grant an eviction order.

Concerning the situation of John, Orri, Sekela, and Satoshi, they need to establish that they would not be able to find affordable housing. The facts of the case do not indicate whether their *kraken* was necessary to have a roof above their heads. Given the assistance provided by the Dutch government, which is set out below, it is unlikely that they do not have any other choice but to take possession of the building of the private company. Even if they had no other choice, they would still have to pay the rent, which John et al do not seem to do, and act as "good tenants". Moreover, they would have to leave the house once there is a new owner who wants to use the building. This means that even if they met all requirements, their protection would only be temporary.

It should be noted that since this judgment in 1980 the acceptance of *kraken* in the Netherlands has decreased. It is therefore more likely that the criteria for protecting occupiers have become stricter rather than more lenient.

2.1.2 The Suspension of an Eviction Order

Under Art. 438 of the Civil Procedure Code (*Wetboek van Burgerlijke Rechtsvordering*), John et al can apply for a suspension of the eviction order. The courts will only grant a suspension of the eviction order where the eviction would result in an emergency situation.[36] Such an emergency situation will not occur where John et al can find provisional accommodation with other people or institutions until they can find appropriate housing.[37] It seems that only if the eviction necessarily resulted in homelessness, would John et al succeed in obtaining a suspension of the eviction order.

2.1.3 Improvements

To the extent that improvements are connected to the building or the ground in such a way that they seem to be intended to stay there permanently, the building's owner also becomes the owner of the improvements through accession, Art. 5:20(1)(e) BW.

[36] Hoge Raad, Judgment of 22 April 1983, ECLI:NL:HR:1983:AG4575, para 3.2.

[37] Gerechtshof 's-Hertogenbosch, Judgment of 22 December 1981, para 10, as confirmed by: Hoge Raad, Judgment of 22 April 1983, ECLI:NL:HR:1983:AG4575, para 3.3.

However, assuming that they are (bad faith) possessors of the house, John et al can exercise a *ius tollendi* and remove the improvements, art. 3:123 BW. If they are not possessors, an analogous application of the right of tenants to remove improvements may be the solution, art. 7:216(1) BW. Otherwise, John et al may be able to bring a claim against the building's owner on the basis of unjust enrichment, Art. 6:212 BW. To the extent that the improvements are not permanently connected to the building or the ground, John et al remain the owner of the improvements and can claim them back.

2.1.4 Assistance in Finding Adequate Housing

Dutch institutions help John et al find affordable housing in various ways. One instrument is making available housing to low-income tenants. There are public housing corporations in larger Dutch cities that offer affordable apartments for which they can ask no more than EUR 763.47 per month (in 2022, excluding electricity, gas, and other services). These corporations have to rent out more than 80% of their apartments to households earning no more than EUR 45,014 per annum (in 2022).

Another instrument is subsidising living expenses, in particular the payment of the rent. Dutch citizens, EU citizens that have been residents in the Netherlands for five years and other lawful residents may have a right to at least a basic allowance (*bijstandsuitkering*), which amounts to EUR 1,091.71 per month for single persons aged 21 or older (in 2022, including a vacation supplement of EUR 54.59). Single persons earning no more than EUR 33,400 per annum can apply for the rent subsidy (*huurtoeslag*) if the rent paid for the apartment does not exceed EUR 763.47. One example: A single person earning EUR 15,000 per annum would receive EUR 307 per month for an apartment for which the tenant pays EUR 600 (including utilities) per month. It may be argued, of course, that all this assistance is insufficient for John et al to rent a home. However, as can be deduced from the judgment of the Middelburg court, this will only be relevant if a large group of people struggle to rent a home, which is not the case at the moment.

Dutch legislation also gives the municipalities means to combat the shortage of housing in order to ensure the availability of affordable housing. The original Vacancy Act (*Leegstandswet*), which was adopted in the heydays of *kraken*, provided that the mayor and the members of the municipal executive (*College van burgemeester en wethouders*; hereinafter the municipal executive) could make use of vacant buildings for housing purposes. According to Ex-Art. 40 of the Housing Act (*Huisvestingswet*), the municipal executive could require the owner of a vacant building to make the building available for housing purposes for not more than 10 years if this was necessary for a balanced and just distribution of housing.[38] The Judicial Division of the Council of State (*Afdeling rechtspraak van de Raad van State*) ruled in 1988 that the municipal executive could generally exercise this power

[38] Dozy and Jacobs (1999), p. 355.

if compared to the situation where it is not exercised an administrative decision provided more people with a home. However, the municipal executive should not make extensive use of this power and should first negotiate with the owner.[39] Today, the municipal executive no longer has this power. The current Art. 5(1) of the Vacancy Act provides for the discretionary power of the municipal executive to recommend a certain tenant to the owner of a building that has been vacant for more than 12 months. The recommendation is binding upon the owner unless it finds another tenant within three months.

2.2 Health Care

Together with other people from her neighborhood, Emanuela has organized a volunteer non-profit medical clinic in what appeared to be an abandoned building offering free services to irregular migrants who have no health insurance. Soon after, Syntech Corporation, the owner of the building, realizing that the market value of the building has increased since they acquired it, decides to sell it at a profit. Syntech would like Emanuela and her volunteers out of the building within a few days in order to sell it, and initiates an eviction action. Many people in the area are upset by this news. Emanuela defends.

Note that I do not discuss the power of the police to order an eviction under Art. 551a of the Criminal Procedure Code (*Wetboek van Strafvordering*) or other similar powers of the municipality under administrative law.[40]

2.2.1 Abuse of Right or Emergency Situation

Such a case has never reached the Dutch courts. It is therefore difficult to predict the outcome of such proceedings. However, the points of departure that apply to the case on housing also seem to apply here. Syntech can file for an eviction order, relying upon its right of ownership. Syntech, in principle, can decide not to use the building and to exclude Emanuela and her fellow volunteers from using the building. As Emanuela et al make use of the building without any right, contractual or otherwise, to operate a clinic, they, in principle, commit an unlawful act in terms of Art. 6:162 (2) BW. Syntech can seek appropriate relief in the form an eviction order.

Two routes may provide solace. Emanuela could state that Syntech abuses its right of ownership, which would be an unlawful exercise of the right of ownership, Art. 3:13(1) BW. Art. 3:13(2) BW stipulates that an owner abuses such right where it would be unreasonable to exercise the right because the harm done to other interests

[39] Afdeling Rechtspraak van de Raad van State, Judgment of 13 January 1988, ECLI:NL:RVS:1988:AN0136.

[40] Moné and Eeken (2010).

is disproportionately severe in relation to the owner's interest in exercising the right. Alternatively, Emanuela could invoke an emergency situation (*overmacht-noodtoestand*) that would render taking possession of the building lawful, Art. 6: 162(3) BW.

As the doctrine on abuse of rights does not give enough guidelines, it seems appropriate to draw on the existing doctrine on emergency situations and, as Emanuela et al also commit a criminal offence under Art. 138 and 138a of the Penal Code, the jurisprudence on the housing case. An appropriate first condition seems to be that Emanuela et al have or protect an interest that is worthy of legal protection and would otherwise be harmed.[41] As Art. 2 ECHR recognises the right to life, the health of the irregular migrants is, without any doubt, such an interest. An appropriate second condition would be that the infringement of Syntech's right of ownership must be necessary to give the migrants access to health care.[42] As is shown hereunder, however, irregular migrants do have appropriate access to health care so that the use of Syntech's vacant building is not necessary. Were it necessary, the courts would have to conduct a balancing of interests to determine whether the health care of the irregular migrants outweighs the ownership interest of Syntech.[43] Following the jurisprudence of the Regional Court of Middelburg, I would submit that this would only be the case where the building was formerly used for medical purposes and has been vacant for a considerable period of time for no legitimate reason and if Emanuela et al paid an appropriate rent. Also, the interests of the migrants would only outweigh Syntech's interest as long as Syntech does not put the building to reasonable use. The conclusion would be that Emanuela et al would have to leave the building.

2.2.2 Access of Irregular Migrants to Health Care

Irregular migrants, meaning foreign citizens without a valid residence permit, can theoretically take out a health insurance policy. If they do not want or cannot afford to do that, they will be entitled to the health care that insured people would receive. Should they not be able to pay for their treatment by a GP, the CAK (an authority under the Ministry of Public Health, Well-Being and Sport) will reimburse 80% of the normal rate. This is in line with Art. 13(1) of the European Social Charter, which gives everyone the right to medical assistance.

[41] Fokkens et al. (2020), Art. 40 Sr, No. 5.
[42] Fokkens et al. (2020), Art. 40 Sr, No. 7.
[43] Fokkens et al. (2020), Art. 40 Sr, No. 7.

2.3 Food

Marta, Mattias, and Madison, together with their families and neighbors, cultivate a communal garden on a vacant plot of land as a food source. Max Corporation, the owner of the plot of land, discovers the three families and tells them to leave. Max Corporation brings a claim against the three families for their removal and the removal of the food grown by the families on its land.

Note that I neither discuss whether Marta et al commit a criminal offence under Art. 138 Sr nor the powers of the municipality to forbid their activities and evict them under administrative law.

2.3.1 Eviction Order

Art. 5:22 BW gives Marta et al the right to enter the land as long as it is not fenced. Max Corporation, however, can apply for an eviction order anytime, relying upon its right of ownership. As Marta et al occupy the land of Max Corporation without any right, contractual or otherwise, to use it, they, in principle, commit an unlawful act. Only if Max Corporation abused its right of ownership or Marta et al were in an emergency situation, would the courts not issue an eviction order.

Based upon the requirements developed for the health care case, Marta et al would certainly fail to prevent an eviction order. As Art. 2 ECHR protects the right to life, access to food is a vital interest worthy of legal protection. However, the infringement of the property right of Max Corporation is not necessary. As is demonstrated hereunder, at least a basic allowance guarantees that Marta et al have enough financial means to purchase food. For this reason, the courts will issue an eviction order.

An exception would be that Marta et al have acquired the ownership of the land by prescription. If Max Corporation lost the possession of the land more than twenty years ago, the possessor of the land at that moment in time would become the owner, Art. 3:105(1), 3:306 BW. The facts of the case, however, provide insufficient information on whether and, if so, when Max Corporation lost the possession of the land.

As has been noted above, to have an eviction order suspended, the eviction would have to result in an emergency situation for Marta et al. As the state provides a basic allowance, no emergency situation should arise.

2.3.2 Basic Social Security

Dutch citizens, EU citizens that have been residents in the Netherlands for five years, and other lawful residents may have a right to at least a basic allowance (*bijstandsuitkering*), which amounts to EUR 1091.71 per month for single persons aged 21 or older. This allowance is also meant as financial means to purchase food.

Should Marta et al find this amount insufficient to cover their costs of food, the jurisprudence on *kraken* seems to suggest that this would only be relevant if a large group of people struggled to make ends meet with this allowance.

2.3.3 Food

The plants that have yet to be harvested belong to the owner of the land, Art. 5:20(1)(f) BW. Once they are harvested, they are fruits of the land. Max Corporation is the owner of the fruits of the land, Art. 5:1(3) BW. That does not necessarily mean that Max Corporation can claim the plants, whether harvested or not. When Marta et al make food from the harvested plants, they invest their labour and change the nature of the plants. For example, they may turn wheat grain into flour. Marta et al will become the owners of the food owing to *specificatio*, Art. 5:16(2) BW. Max Corporation could therefore not claim this food. As for the rest of the plants, Marta et al would have a claim against Max Corporation on the basis of unjust enrichment, Art. 6:212 BW. If Marta et al are bad faith possessors of the land, they may take the plants away, Art. 3:123 BW.

2.4 Water (Rural)

Maya, Malik, and Mei depend on the water of Flumia, a nearby river. The three villagers together with other villagers in the area build aqueducts and an irrigation canal from the river to their respective homes and fields. After a few years, a private corporation diverts the water of the Flumia River. Soon after, Maya, Malik, and Mei realize that water no longer flows to the aqueducts and irrigation canal from the river. Maya, Malik and Mei sue.

2.4.1 The Entitlement of Maya et al to Use the Water

Under Dutch law, nobody owns the water of a river.[44] Both public law and private law determine whether or not Maya et al can use the water. If they are the owners of (or have a contractual or property right to use) land that is situated along the river, neighbour law provides that they can use the water for irrigation purposes and to water their animals unless using the water causes nuisance to other owners that amounts to an unlawful act in terms of Art. 6:162 BW.[45] This right, however, is still subject to restrictions under public law. Moreover, if Maya et al are not the owners of such land (or do not have such a use right), only public law gives the answer.

[44] Asser/Van Velten & Bartels 5 2017/96 *et seq*.

[45] Art. 5:40(1) BW.

Rijkswaterstaat, on behalf of the kingdom, and local water boards (*waterschap*) administer the use of rivers. *Rijkswaterstaat* administers the big rivers and canals in the Netherlands.[46] Let us assume that the kingdom administers the use of the river in our case. Art. 6.5(a) of the Water Act (*Waterwet*) stipulates that a decree can provide that the use of water from a river requires a permit issued by the competent Minister. Art. 6.16(1) of the Water Regulation (*Waterregeling*) stipulates that, in principle, a permit is required for using more than 100 m^3 per hour if the river flows faster than 30 cm/s. Should the river flow more slowly, Maya et al will still have to notify *Rijkswaterstaat* of the use if they consume more than 100 m^3 per hour.[47] This hourly amount is also applied to the use of water from some smaller rivers managed by local water boards.[48] As Maya et al are unlikely to use more than 100 m^3 (100,000 l) of water per hour (or 2.4 million litres of water per day), they are entitled to use the water.

2.4.2 The Status of the Aqueducts and the Irrigation Canal

Provided that they have an environmental permit and the right or permission to use the land for that purpose,[49] Maya et al can legally build the aqueducts and the irrigation canal. An environmental permit will only be issued if the use of the land is not contrary to the municipal zoning plan and Maya et al comply with building regulations and other applicable rules.[50] Without an environmental permit, the municipality can order Maya et al to demolish the aqueducts and the irrigation canal.[51] Should Maya et al not comply, the municipality can have the works demolished.

Should Maya et al succeed in obtaining an environmental permit without a right or permission to use the land, the owner of the land could exclude them from using the land and have the aqueducts and the irrigation canal demolished. It is unlikely that Maya et al are in an emergency situation or that such an exercise of the right of ownership would constitute an abuse of right because, in the Netherlands, all municipalities are connected to the water supply and social security law ensures that people have enough financial means to pay for the water. After 20 years of using the aqueducts and the irrigation canal, however, the owner may have to tolerate the use of the aqueducts and the irrigation canal on his land because Maya et al may have acquired a servitude by prescription.[52]

[46] Art. 3.1 Waterwet; Bijlage II, Waterbesluit.

[47] Art. 6.17(1) Waterregeling.

[48] Art. 3.7 and 13.1 Brabant Keurregels.

[49] Art. 2.1(1)(a) Wabo.

[50] Art. 2.10(1), in particular (c) Wabo.

[51] Art. 5:7, 5:21 Awb, read in conjunction with Art. 5.2, 5.1 en 2.1(1)(a) Wabo.

[52] Art. 3:105(1), 3:306 BW.

2.4.3 Remedies Under Administrative Law

Even if the private company exercises its right to use of the river flowing along its property,[53] the company in all likelihood fails to comply with public law. Without a permit, it is only allowed to take 100 m^3 of water per hour (if the river flows faster than 30 cm/s). In diverting a river for its own purposes, the company certainly takes more than 100 m^3 of water per hour. If the company has not obtained a permit, *Rijkswaterstaat* is, in principle, obliged to enforce the water regulation by ordering the company to restore the natural flow of the river,[54] and have another company restore the flow if the company fails to do that. As interested parties in terms of Art. 1:2 Awb, Maya et al can request such measures.[55]

If the company has obtained a permit, it is close to impossible that the company complies with the conditions of the permit. It is the goal of the Water Act to avoid a lack of water and to ensure that water can fulfil its societal function.[56] Also, there are water boards that have adopted policy rules that explicitly stipulate that a permit must not lead to damage caused by a lack of water unless compensation is paid.[57] Therefore, a lawful permit would not allow a diversion of the river's water. Again, *Rijkswaterstaat* could enforce compliance with the permit. The only scenario in which the actions of the company would be lawful would be the diversion of a river for an approved project after an extensive planning procedure.

2.4.4 Remedies Under Private Law

Maya et al could file an action against the company for damages and the restoring of the natural flow of the river. The basis would be the basic norm in Dutch tort law, art. 6:162 BW. The diversion of the water of the river constitutes an unlawful act because, as has been concluded above, the private company in all probability diverts the water without the required permit or contrary to the conditions of its permit.[58] Should Art. 5:40(1) BW apply, the company could not rely upon it because public law specifies the entitlement of the owner. In order to claim damages or obtain a court order for the restoration of the river's natural flow,[59] Maya et al must establish that the violated rules are intended to protect the legitimate interests of Maya et al.[60] As the Water Act is meant to prevent a lack of water and to ensure that water can perform its societal function, the Water Act protects the interests of those who use

[53] Art. 5:40(1) BW.

[54] Art. 5:7, 5:21 Awb, read in conjunction with Art. 8.1(1) Waterwet en Art. 6.16 Waterregeling.

[55] Art. 5:24(3) and 5:31a Awb.

[56] Art. 2.1(a) and (c) Waterwet.

[57] See, for instance, Art. 9.3 beleidsregel Brabant Keur.

[58] Asser/Hartkamp & Sieburgh 6-IV 2015/45.

[59] Asser/Hartkamp & Sieburgh 6-IV 2015/153.

[60] Art. 6:163 BW.

water for legitimate purposes. Also, the unlawful act must be attributable to the company,[61] which does not pose an obstacle because the company wilfully diverted the water. Maya et al then need to establish the damage caused by the diversion.

2.5 Water (Urban)

Jose, Jasmine, and Horatio are three friends that inhabit an apartment together in a city, Flumiapolis. Following a large increase in the price of water (200% in one year), the three friends fail to pay their water bills. After failing to pay their third bill, the water management cuts off their access to the water supply. Jose, Jasmine and Horatio sue.

A water supply company can only cut off the access to the water supply of a person who consumes less than 5 m^3 (5000 l) per hour after following the procedure laid down in the *Regeling afsluitbeleid voor kleinverbuikers van drinkwater*.[62] The goal of this regulation is to avoid that the water supply is cut off.[63] The regulation makes a distinction between vulnerable consumers and those who are not vulnerable. Vulnerable consumers are persons who would suffer severe medical harm if the water were cut off.[64] The company cannot cut off the water supply of a vulnerable consumer unless the consumer so requests, has acted fraudulently, has abused the water supply, or the water installation is so unsafe that the water supply must be cut off.[65]

Having sent the first invoice, the water supply company needs to send at least one written reminder.[66] In this reminder, the company needs to notify the consumer of the opportunity to seek advice from debt advisors and offer to send the consumer's contact details upon request to such an advisor. The company also needs to highlight that the consumer can submit a doctor's declaration that the consumer is vulnerable.[67] Also, a representative of the company needs to try to contact the consumer in person to instruct the consumer about the assistance provided by debt advisors.[68] Given the goal of the regulation, the company can then only cut off the water supply of normal consumers if the consumer does not respond to the reminder and the attempts to contact him/her personally or if s/he fails to seek advice from a debt advisor.

[61] Art. 6:162(3) BW.

[62] Art. 2 Regeling afsluitbeleid voor kleinverbuikers van drinkwater, Art. 1(1) Drinkwaterwet.

[63] Art. 9(2) Drinkwaterwet.

[64] Art. 1(a) Regeling afsluitbeleid voor kleinverbuikers van drinkwater.

[65] Art. 6 Regeling afsluitbeleid voor kleinverbuikers van drinkwater.

[66] Art. 3(1) Regeling afsluitbeleid voor kleinverbuikers van drinkwater.

[67] Art. 3(2) Regeling afsluitbeleid voor kleinverbuikers van drinkwater.

[68] Art. 4 Regeling afsluitbeleid voor kleinverbuikers van drinkwater.

2.6 Nature

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

2.6.1 The Private Law Perspective

Art. 5:22 BW stipulates that everyone has a right to roam around on somebody else's land. This right, however, does not trump the owner's right to exclude others from using the land in terms of Art. 5:1 BW. To the extent that the land is fenced or there are buildings on the land, non-owners cannot roam on the land.[69] Also, if the owner puts up a sign or otherwise announces that entering the land is prohibited, Hamid and Heba cannot rely upon Art. 5:22 BW.[70] Furthermore, Hamid and Heba may not cause nuisance or otherwise commit an unlawful act on the land. Hamid and Heba do not have any other right to use the land. To sum up, under private law, the corporation can exclude Hamid and Heba from using the land. The access to the natural commons claimed by the local environmental group shares the same fate.

2.6.2 Country Club Inconsistent with the Municipal Zoning Plan

Art. 3.1(1) of the Spatial Planning Act (*Wet ruimtelijke ordening*; Wro) stipulates that the municipal council adopts a municipal zoning plan for its area of jurisdiction. In this plan, the council lays down the permitted uses of a parcel of land. It is prohibited to use land contrary to the municipal zoning plan without a permit to do so.[71] The original use may have been "green" (*groen*) with "residential" (*woon*) elements or *vice versa* or only "residential". The rules on the use of the land may possibly have included an obligation to refrain from excluding others from using the green area. To run a members-only country club, with both recreational elements and services typical of a bar or a restaurant, would be inconsistent with the designated use of the land and require a change of the designation.

Should the corporation run the country club without a change of the land use, this use would be unlawful. The municipality can order the corporation to stop running the country club.[72] In principle, the municipality is even obliged to halt the unlawful

[69] van Zeben et al. (1981), p. 129.

[70] van Zeben et al. (1981), p. 129.

[71] Art. 2.1(1)(c) Wabo.

[72] Art. 5:7, 5:21 Awb, read in conjunction with Art. 5.2, 5.1 en 2.1(1)(a) Wabo.

conduct.[73] Unlike Hamid and Heba, the environmental group, provided that it is a recognised legal person and its articles of association and activities demonstrate that the group specifically advocates environmental protection in the area, is likely to be a person with a legitimate interest in terms of Art. 1:2 Awb so that the group could request the municipality to take such measures.

As the corporation would act unlawfully and the unlawful act is attributable to the corporation, Hamid and Heba as well as the environmental group could possibly file for an injunction under Art. 6:162 BW. The broken norm, however, must be meant to protect Hamid and Heba and the interests that the environmental group wishes to advocate, respectively.[74] Municipal zoning plans promote good spatial planning, which term refers to a stable balance between the needs of a dynamic society, more specifically an ever increasing demand for housing, professional facilities, infrastructure, recreation, water, and nature, and the protection of vulnerable groups and public interests, such as less affluent citizens and environmental protection.[75] As recreation is one of the interests that the municipality needs to take into account, it seems likely that the prohibition to use land contrary to the zoning plan also protects Hamid's and Heba's interest in using the green area for recreational purposes in accordance with the plan. The same is true of environmental protection as an interest advocated by the environmental group. Hamid and Heba as well as the group seem to have a sufficient personal legitimate interest in terms of Art. 3:303 BW. The environmental group, however, needs to meet the requirements of Art. 3:305a BW before it can file for an injunction. The group must have established a foundation or an association with legal personality. The action filed by the group must serve environmental protection, another general interest or the private interests of a group of people.[76] *In casu* this would be environmental protection. The last requirement is that the legal person's articles of association stipulate that it is the goal of the legal person to protect that interest. It is immaterial whether or not the municipality can order the corporation to stop.[77]

2.6.3 Changes to the Municipal Zoning Plan

The appropriate route for the corporation to follow would be to suggest changing the zoning plan to the municipal council. In the planning procedure, Hamid, Heba, and the group can raise objections against the change.[78] The decision of the municipal council must be based upon a balancing of all relevant interests. As has been noted

[73] Bröring and De Graaf (2019), pp. 620 *et seq*.

[74] Art. 6:163 BW.

[75] Memorie van Toelichting (explanatory memorandum), Wet ruimtelijke ordening, Kamerstukken II, 28 916, No. 3, p. 9.

[76] Asser/Hartkamp & Sieburgh 6-IV 2015/156.

[77] Asser/Hartkamp & Sieburgh 6-IV 2015/150.

[78] Art. 3.8(1)(d) Wro.

above, environmental protection and recreation are two of these interests. If the municipal council decides to change the plan according to the wishes of the corporation, the group, if it is an interested party, can lodge an appeal against the plan with the Judicial Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*).[79] The group can argue that there are too few green areas within the municipality and that the change to the zoning plan leads to a disproportionate impact upon recreation and environmental protection. The Judicial Division tests whether the change would be inconsistent with good spatial planning because there are not enough green areas. The court's scrutiny is, however, very limited because the municipal council exercises a discretionary power. This seems to be a reason why there is no reported case in which this objection has been successful.

If no appeal is lodged against the plan or the Judicial Division does not overturn the zoning plan, the corporation can build the country club once it has obtained an environmental permit.[80] If the plan complies with the zoning plan and other applicable legislation and regulations,[81] the corporation is certain to obtain the permit that will withstand judicial scrutiny. Should the country club not comply with the requirements of the permit or with the rules of the zoning plan, the described remedies under both administrative law and private law would be available.

2.7 Territory

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

If they are persons with a legitimate interest in terms of Art. 1:2 Awb, the members of the community can lodge an appeal against the administrative decision to permit the search for gold.[82] The community as a whole cannot have the status of a person with a legitimate interest unless a legal person advocates the protection of the river according to its articles of association. Under Art. 6(1) of the Dutch Mining Act, the search for minerals is prohibited without a permit issued by the Minister of Economic Affairs. In the administrative procedure following an application for a permit, persons with a legitimate interest can submit objections to the municipality,

[79] Art. 8:1 Awb, Art. 2, *Bijlage* (Annex) 2, Awb, read in conjunction with Art. 8:6 Awb.

[80] Art. 2.1(1)(a) Wabo.

[81] Art. 2.10(1) Wabo.

[82] Art. 142(1) Mining Act (*Mijnbouwwet*), read in conjunction with Art. 20.1(1) of the Environmental Management Act (*Wet Milieubeheer*).

which objections must be heard.[83] The Minister may decline to issue the permit for several reasons. From the perspective of the community, the most important ground of refusal would be that the Minister finds the area unsuitable for mining operations because of their adverse impact upon the environment.[84] An appeal against the Minister's decision, however, will generally be unsuccessful unless s/he failed to consider important facts or fails to observe statutory standards of environmental protection. In this context, water protection legislation is of particular importance. Art. 2(2) of the Regulation on Environmental Quality Standards regarding Dangerous Substances in Surface Waters (*Regeling milieukwaliteitseisen gevaarlijke stoffen oppervlaktewateren*) provides that all administrative bodies whose decisions may have an impact upon surface waters have to observe the standards contained in the regulation. Annex I provides the maximum amount of certain substances that surface waters may contain. Apart from this, the Minister enjoys discretion when deciding whether to decline to issue the permit. In addition, it seems that he has a margin of discretion when considering whether the selected site is suitable for mining. The judiciary will thus subject the balancing of interests and conclusions to a very limited review.

2.8 Culture

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

Such a case has never reached the Dutch courts. The courts, however, are very likely to issue an eviction order. The municipality can rely upon its right of ownership. In occupying the theatre without any right to use the building and against the owner's will, Evgenia et al, in principle, commit an unlawful act, Art. 6:162 BW. As a right to cultural activities is not recognised under Dutch law, it is unlikely that there is an emergency situation. The municipality would only abuse its right of ownership if it sold the theatre and excluded Evgenia et al from using it in order to harm a person working at the theatre or who is otherwise involved.[85] However, this is not the case. The course of action that Evgenia et al should (have) follow(ed) is to influence the decisions of the municipal council and the municipal executive on the sale of the building and the possibly required changes to the municipal zoning plan.

[83] Art. 6a, 16(2) Mining Act.
[84] Art. 9(1)(f) Nos. 3 and 4 Mining Act.
[85] Art. 3:13(2) BW.

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

The actors should found a foundation (*Stichting*), which is a not-for-profit legal person. The foundation is independent of its founders and serves a certain goal laid down in its articles of association. It is run by directors who are not employees of the foundation and can be dismissed by courts. It is regulated in Art. 2:285 BW *et seq*.

2.9 Climate

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

2.9.1 Private Law Actions Against the Government

Diletta, Flavio, and Antonella have a sufficient legitimate personal interest in terms of Art. 3:303 BW to bring an action before the civil courts against the state because the emission of greenhouse gases and climate change adversely affect their lives. Their action against the government for an injunction may be successful under the basic norm in tort law (Art. 6:162 BW).

The state will act unlawfully as against Diletta, Flavio, and Antonella if the state infringes their subjective rights. The rights guaranteed under the European Convention of Human Rights (ECHR) have direct effect under Dutch law.[86] Art. 2 ECHR protects everyone's right to life. This protection may impose upon the state the obligation to take positive measures to safeguard lives from the actions of private persons, including actions harming the environment. In the context of environmental protection, the European Court of Human Rights found that this obligation applies where dangerous activities, such as nuclear tests, chemical factories that emit toxic substances, or waste-collection sites, are undertaken. According to the Council of

[86] See 1.7.

Europe's Manual on human rights and the environment, the extent of the state's obligation depends upon several factors, such as the harmfulness of the dangerous activities and the foreseeability of the risks to life.[87] The threat that climate change poses to life itself is not as immediate and severe as the dangerous activities mentioned in the manual. However, as climate change will adversely affect the human environment dramatically, it is conceivable that the state infringes the right to life of Diletta, Flavio, and Antonella by not curbing greenhouse gas emissions sufficiently and thus commits an unlawful act in terms of Art. 6:162 BW. As far as too lenient sanctions imposed upon car manufacturers for committing fraud are concerned, however, it seems likely that the European Court would conclude that the decision on the severity of the sanctions falls within the wide discretion ("margin of appreciation") granted to the signatory states.[88]

Another source of positive obligations of the state may be Art. 8 ECHR, which protects the subjective right to the home, privacy, and family life. With respect to environmental protection, however, this provision mainly protects Diletta, Flavio, and Antonella from nuisance that has a direct physical or mental effect.[89] It is, therefore, unlikely that they can rely upon Art. 8 ECHR.

The state will also commit an unlawful act if it breaches a duty of care towards Diletta, Flavio, and Antonella. Although they do not have direct effect, which means that Diletta, Flavio, and Antonella cannot derive subjective rights from them, several international, European, and constitutional norms influence the concretisation of the state's duty of care:

- Art. 21 of the Dutch Constitution obliges the state to strive for environmental protection;
- The United Nations Framework Convention on Climate Change, which aims to protect the climate, based upon the precautionary principle and the principle of sustainability;
- Art. 191 TFEU, which provides that EU policy shall strive for a high level of environmental protection, following the precautionary principle and the principle that preventive action should be taken, and based upon available scientific and technical data.

Moreover, the Dutch state has committed to reducing greenhouse gas emissions under the Paris Agreement.

In the *Urgenda* case, a foundation brought an action against the Dutch state and demanded that the state take measures to limit greenhouse gas emissions to a greater extent. In this case, the District Court of The Hague found that the state had breached its duty of care by not taking enough measures to reduce greenhouse gas emissions to a level generally regarded as necessary to prevent the most severe consequences of

[87] Council of Europe 2012, Part II, Section A, Chapter I, Art. 2b.
[88] Council of Europe 2012, Part II, Section A.
[89] Council of Europe 2012, Part II, Section A, Chapter II, Art. 8c.

climate change.[90] The District Court ordered the state to take measures to limit greenhouse gas emissions accordingly. The Court of Appeal of The Hague confirmed this judgment in 2018, ordering the state to reduce greenhouse gas emissions by 25% on 1990 by the end of 2020.[91] In December 2019, the Dutch Supreme Court found that Art. 2 and 8 ECHR obliged the state to reduce greenhouse gas emissions in line with international commitments and that a failure to do so would constitute an unlawful act.[92] The Court of Appeal's order to reduce emissions was thus upheld. If such an order is their aim, Diletta, Flavio, and Antonella will probably be successful. If aimed at imposing more severe sanctions upon car manufacturers, however, their action will be unsuccessful. The state enjoys such wide discretion when choosing the means to combat climate change that the courts cannot be called upon to declare a specific measure insufficient and thus unlawful.[93]

2.9.2 Actions Under the ECHR Against the Government

Once all remedies have been exhausted, Diletta, Flavio, and Antonella could appeal to the European Court of Human Rights and rely upon Art. 2 and 8 ECHR. The application of those provisions has been discussed above.

2.9.3 Administrative Law Actions Against the Government

Dutch courts do not scrutinise the constitutionality of legislation.[94] Therefore, Diletta, Flavio, and Antonella cannot challenge the legislation upon which the sanction against the car manufacturer is based. They may be able to lodge a complaint or an appeal against the administrative decision to impose the sanction that they perceive as too lenient.[95] However, they would need to have a legitimate interest in the matter in terms of Art. 1:2 Awb. As long as their interest is not different from the interest of any other person in the Netherlands, they will not be able to challenge the decision. They could establish a legal person whose purpose is to combat climate change. If the legal person's articles of association and activities demonstrate that the group specifically combats climate change, the legal person could lodge a complaint or an appeal.

[90] Rechtbank Den Haag, Judgment of 24 June 2015, ECLI:NL:RBDHA:2015:7145.

[91] Gerechtshof Den Haag, Judgment of 9 October 2018, ECLI:NL:GHDHA:2018:2591.

[92] Hoge Raad, Judgment of 20 December 2019, ECLI:NL:HR:2019:2006, paras 5.8, 7.1 *et seq* and 8.3.5.

[93] Rechtbank Den Haag, Judgment of 24 June 2015, ECLI:NL:RBDHA:2015:7145, para 4.101.

[94] Art. 120 Gw.

[95] Art. 7:1 and 8:1 Awb.

If sanctions were more lenient than prescribed by primary legislation, the courts would strike down the decision. If the competent authority has a discretionary power, the courts will only subject the decision to a very limited review.[96]

2.9.4 Actions Against Popcar

Diletta, Flavio, and Antonella have a sufficient legitimate personal interest in terms of Art. 3:303 BW to bring an action before the civil courts against Popcar. They could base their action on Art. 6:162 BW. Assuming that Popcar violated primary legislation by manipulating the computer system controlling emissions, Popcar committed an unlawful act. If the legislation is intended to protect Diletta, Flavio, and Antonella, they could obtain an order from the court for Popcar to comply with the legislation.

An action to obtain an order on the basis of Art. 6:162 BW for Popcar to generally reduce its emissions may be successful. Popcar's duty of care may include reducing its emissions. The abovementioned international, EU and constitutional norms are directed at the signatory states, EU Member States, and the Dutch state, respectively. It is true that international, EU and constitutional norms may have a horizontal effect on the extent of Popcar's duty of care.[97] However, the contribution of each private actor to combating climate change is not specified and can hardly be concretised by the courts. The prevailing opinion seems to be that it is for the legislator to concretise Popcar's duty to reduce emissions.[98] Note that a Dutch environmental NGO brought an action against the oil and gas producer Royal Dutch Shell for an order to reduce greenhouse gas emissions. The District Court of Hague ruled against Shell on 26 May 2021 (ECLI:NL:RBDHA:2021:5337), finding that Shell's duty of care included reducing its emissions, relying on a distinction between "severe polluters" like Shell and "less severe polluters".[99] If such a distinction is confirmed on appeal, it will depend on the amount of greenhouse gas emissions produced by Popcar as to whether it has to reduce its emissions.

[96] Bröring and De Graaf (2019), pp. 378 *et seq*.

[97] Elzinga et al. (2014), pp. 284 *et seq*.

[98] Elzinga et al. (2014), pp. 287 *et seq*.

[99] Cf. Fleurke and Smeehuijzen (2018), pp. 2232–2238; L.E. Burgers, "An Apology Leading to Dystopia: Or, Why Fuelling Climate Change is Tortious", Transnational Environmental Law 11(2) (2022) 419–431; T.R. Bleeker, 'Aansprakelijk voor klimaatschade: een driekoppige draak', Nederlands Tijdschrift voor Burgerlijk Recht 1(2) (2018), 4–11.

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