Property Meeting the Challenge of the Commons

Ugo Mattei and Alessandra Quarta

Abstract

The paper analyzes the results of a comparative legal research devoted to investigate the impact of the original category of the commons on property rights. The authors have studied 15 different legal systems throughout a questionnaire that mix open questions and factual cases. The study shows the main contradictions of a paradigm of property based on the right to exclude, but at the same time shows how access and the commons can change this perspective.

1 The Entrance of the Commons on the Stage of Comparative Law

1.1 Introduction

The study of property law represents a classic of comparative legal research, while the topic of the commons appears for the first time on the stage of comparative law. The interest of this field of studies for the commons can be explained by considering that in the last 10 years, the concept has become popular in social studies and political activism and in some countries domestic lawyers have shared the interest for this notion. Even if any (existing or proposed) statutory definition of the commons is still very rare, lawyers heard of the commons through the filter of property law where it has been quite discredited. In fact, approaching property law, many students of different legal traditions use to learn the origins of property rights starting from the "tragedy of the commons", the "parable" made famous by Garrett Hardin in the late nineteen sixties. According to this widespread narrative, the impossibility to avoid the over-exploitation of those resources managed through an open-access regime determines the necessity of allocating private property rights. In this classic argument, the commons appear in a negative light: they represent the impossibility for a community to manage shared resources without concentrating all the decision-making powers in the hand of a single owner or of a central government. Moreover, they represent the wasteful inefficiency of the Feudal World, characterized by many forms of communal ownership masterfully studied by Paolo Grossi.

This vision has dominated social and economic studies until 1998, when Elinor Ostrom published her famous book *Governing the Ccommons* offering the results of her research on resources managed by communities in different parts of the world. Ostrom, awarded with the Nobel Prize in 2009, demonstrated that the commons are not necessarily a tragedy and a place of no-law. In fact, local communities generally define principles for their government and sharing in a resilient way avoiding the tragedy to occur. Moreover, Ostrom defined a set of principles for checking if the commons are managed efficiently and can compete with both private and public arrangements for managing the resources.

Ostrom's studies represented an important challenge to the dominant ideology in economic studies: she demonstrated that market and its foundational institution, private property based on exclusion, are not the only efficient structures for managing resources. This insight, when transposed into legal studies, offered the possibility of reopening an important debate about the legitimacy of private property. In this field, the research of economists has not been the only contribution, considering the role and the studies of legal scholars in different countries and especially in the United States and in Italy with the works of Carol Rose and of the so called Rodotà Commission respectively. On both the shores of the Atlantic, the commons have produced an innovative path of

The research has been conducted jointly. Alessandra Quarta has drafted Sects. 1, 2 and 3; Ugo Mattei Sects. 4 and 5. Thanks to the national reporters and especially to Filippo Valguarnera; thanks to Saki Bailey for the first version of the questionnaire and to the IUC staff.

U. Mattei (✉) · A. Quarta (✉)
University of Turin, Department of Law, Turin, Italy
e-mail: matteiu@uchastings.edu; alessandra.quarta@unito.it

© The Editor(s) (if applicable) and The Author(s), under exclusive license to Springer Nature Switzerland AG 2021

K. Boele-Woelki et al. (eds.), *General Reports of the XXth General Congress of the International Academy of Comparative Law - Rapports généraux du XXème Congrès général de l'Académie internationale de droit comparé*,
Ius Comparatum - Global Studies in Comparative Law 50, https://doi.org/10.1007/978-3-030-48675-4_2

legal development, not necessarily linked to their medieval roots.

According to this innovative path, we can consider the commons as a challenge to ownership/property both private and public: this general conception means that we must investigate the impact of the commons on both public and private property law.

1.2 The Raise of the Commons in the Italian Legal Debate

In the Italian academic debate, the commons have emerged in the context of a legal reform directed to modify the articles of the Civil Code devoted to public goods (arts. 822–830). In order to achieve this objective, in 2007 the Italian Ministry of Justice created a commission and appointed the famous late property law scholar Stefano Rodotà as its chairman. The motivating factor of the Commission was the necessity of modifying the rules on *public domain*, a category that many legal scholars considered obsolete in its direct derivation from the Code Napoléon (1804) already at the time of codification in 1942. Because of this obsolescence and of the blurring boarders between this notion and other forms of public property, a public good can very easily pass from the public domain to alienable public property. Consequently, the normative framework appeared to be particularly inadequate to deal with the increase of privatizations of public goods and services, a political and economic trend that, due to the rise of Neoliberalism, visited upon Italy in a particularly strong way. Because public goods for a value exceeding 130 billion Euros were privatized in the first few years of the nineteen-nineties in the absence of any limiting legal principle, the Rodotà Commission proposed to introduce a notion of the commons modifying the old taxonomy and granting to the goods so classified a particularly strong protection against privatization: a rigid inalienability rule, a regime supposed to take care of the interest of future generations and a very open standing to sue in order to obtain injunctions of activities threatening the commons. Commons were defined as goods that produce utilities that are functional to the fulfillment of fundamental human rights and the free development of human beings. These mainly included natural resources and the cultural heritage.

Even from this scanty description of their origins in the Italian experience, it is evident that a legal scholar associates the commons with public property and in particular with the role of the public owner. In the age of privatizations, governments as well as local authorities have failed to defend their own public property, so that in many countries public assets have been alienated without taking into consideration the concerns and resistance of the people and the interests of future generations outside of any justiciability and due process of law. A weak legal protection of public goods has allowed this kind of political behaviors as well as an imbalance between private property (strongly protected by the judicial process) and public property that can be transferred in private hands by unchallengeable exercises of political discretion.

For this reason, the first challenge of the commons concerns public property, aiming to give legal relevance to the difference between the so-called “State-community” as the aggregate of citizens, as opposed to the “State-apparatus”, as the government bureaucracy. If the State is community, then the citizens with their rights and needs represent the focus of public action. If the State is just apparatus, then the management of public goods can concern itself with its own bureaucratic organization and needs (for instance a better budget).

In the Italian proposal drafted by the Rodotà Commission, the legal concept of the commons was employed to introduce a new classification of public goods, limiting what the State apparatus can do as a consequence of the delegation of power received by the people. The State cannot sell the commons in its own interest (i.e. in the interest of the apparatus) because the majority in office that decides a privatization process is just the State apparatus and therefore cannot claim to be representative of the whole State community (the common), which includes also of future generations that have an interest in the resources that are being sold.

In the accompanying report to the proposed reform, however, the Commission indicated that commons could be public or private goods, thus suggesting that the notion could serve another function on top of the one that we just mentioned. This further function possibility is explained by the connection between commons and fundamental rights; its main consequence is that the models of commons governance prevail on the formal title of ownership. Concretely, the governance structure is the one that guarantees access to the commons and the right to use them.

The idea of the commons as it emerged in the Italian legal debate does not aim at abolishing private property, but it denounces the effects of the unlimited accumulation of private capital made possible by the unrestrained capitalist model that has emerged after the fall of the Berlin Wall. It is easy to understand this critique by looking at the international context. The Rodotà Commission was organized in 2007, just a year before the international financial crisis of subprime; the effects of an unequal distribution of wealth could be appreciated everywhere by that time and 4 years later, the Occupy movements denounced them with the idea of the 99%. The commons as a socio-political possible path of empowerment against the abuses of the 1% suddenly became a common grammar of social movements worldwide.

1.3 Conceptualize the Commons

Institutionally, the commons became the tool of contestation of political and economic mainstream dogmas, including the unquestionable efficiency of both market and property rights in the allocation of resources. Within this critique, the dominant paradigm of property is an ideological shield for a biased law of the wealthy because in a system where resources are finite, their exclusive distribution through property rights means deprivation of non-owners. The research of new tools for managing resources has been realized in several experimentations that generally occurs at the local and urban level: scholars and practitioners use to define these experiences as 'urban commons'.[1]

To contrast the dominant vision, dubbed neoliberal, the commons aim at conceiving the proprietary relationship as qualitative rather than quantitative, based on access and inclusion rather than exclusion and deprivation. Thus, when private goods can be described as commons, access of non-owners must be protected and the right to exclude of the owners must be limited throughout a balancing mechanism that allow a redistribution of resources carried out without a procedure of expropriation. The value of the commons is enriched by participation and access. Exclusion many times in front of absentee owners (or governments) determines the decay of its object.

This radically critical vision needed to be tested by the empirical reality of the different legal systems where the grammar of proprietary exclusion, as the default rule of the system, seems dominant among jurists. The commons, to that point a "constituent force" in the hands of activists, needs to penetrate the domain of positive law (something that was only superficially achieved in Italy because the proposal of the Rodotà Commission was abandoned) in a process of strong resurgence of neoliberal policy across Europe. Such a policy of proprietary exclusion has received a significant boost by the European Court of Human Rights, whose case law now has restored private property as a sort of natural right, rejecting any "social function" evolution with an astonishing zeal.

1.4 Comparative Projects on the Commons

To test this evolution, in 2013 at the 19th meeting of the Common Core of European Law Project, the group on property law chaired by Professor Antonio Gambaro has launched a project on the commons that was entrusted to the General Editor of the Common Core, Ugo Mattei and to the Swedish scholar Filippo Valguarnera with the assistance of the International University College Director of Research and Goteborg PhD candidate in comparative law Saki Bailey.

Three subsequent meetings of the Common Core Group were convened to develop and discuss a factual comparative law questionnaire (which is now substantially reproduced in Sect. 2 of this Report). When at the Paris Meeting of the International Academy of Comparative Law in 2016 a decision was taken to launch a project on the Commons for the Fukuoka meeting and the general editorship was offered to Ugo Mattei, the opportunity was seized to reinvigorate a project that within the common core network looked somewhat dormant (because of the difficulty to identify respondents with an approach broad enough to handle the questions in many legal systems).

Thus the new Director of Research of the IUC, and commons scholar and University of Turin faculty member Alessandra Quarta joined the team replacing her predecessor, a first part of the questionnaire was introduced ex novo and circulated in both English and French.

2 Structure and Sense of the Research

2.1 The Commons as the Challenge

It must be clearly accepted that questionnaires are not neutral tools and that the question you ask do determine the answer you get. Fifty years after the establishment of the common core methodology by the late Professor Schlesinger at Cornell, and 25 years of testing his hypothesis in European Private Law allow us to be aware of this epistemological shortcoming that challenges any claim of neutrality in comparative law.

Our framework in this questionnaire undoubtedly derives from the Italian experience and background of these editors, but it was thoroughly discussed with scholars of very different legal background and certainly contains elements that can be generalized and appreciated in a comparative legal study. The following must be appreciated *in limine*.

First, the notion\category of the commons is not foreign to global legal culture. In the past, and even today in many rural parts of the world (especially in the global south), open fields, common pastures and particular sorts of customary collective uses represent a well-known institutional tradition. Moreover, the debates around the global commons in International law (Antarctica etc.) as well as the rise of creative commons in the field of intellectual property law, represent an important shared base for grasping the essential features of the commons for the more general purpose of investigating their challenge to proprietary exclusion. The main characteristic features of the commons are the following:

[1] Urban commons are the object of a research project coordinated by the University of Turin funded by H2020 program (Grant Agreement n. 822766). The project Generative European Commons Living Lab aims at mapping and studying European urban commons. It is coordinate by prof. Alessandra Quarta.

1. They are both material or immaterial goods requiring collective activity to be organized and cared for. Among them, natural resources (to be preserved for future generations), the cultural patrimony and the sets of traditional knowledge are recurring examples.
2. They claim for a special legal protection and to be managed in a manner different from public or private exclusion. This feature takes into consideration not only the role of the commons in the human life (their relationship with fundamental rights) but also *the life of the commons*, according to an ecological sensibility and an environmental emergency. The commons deny exploitation both of humans and of nature.
3. Access to commons must be ensured and guaranteed by the law whenever exclusive forms of ownership produce distortions and inequalities.

Commons require a *collectivity* taking care of them (community of care), whose size varies according to the nature of goods and to the concrete circumstances. Thus, global commons require global communities (which opens up special legal problems), while in other cases a local community is the best solution.

Second, the global effects of neoliberal policies of the last quarter century and the diffusion of privatization as political and economic strategy to deal with the consequences of the economic and financial crisis creates a problem shared by every jurisdiction: the legal weakness of the institution of public property as opposed to private ownership. Such weakness typically emerges when we test the *inalienability rule* that in many countries is provided in the civil codes or fundamental principles to protect public property, against the concrete easiness through which public goods are alienated or otherwise privatized, without any consideration of citizens' opinions and outside of any effective justiciability of the issue.

The *third* element that can be generalized and discussed comparatively is the variable dynamic of *exclusion and access in property law* (both private and public). The role of the right to exclude in private property may be described in two different ways, considering the civil law and common law traditions. In the civil law tradition, the right to exclude is sufficient to convene a compact idea of *mine*, that describes private property as the relationship between an owner and a material object.[2] In the famous metaphor of property as a tree, we can imagine that the right to exclude is the trunk (the essence of ownership), while the branches represent a different mix of the other powers of the owner that can change and be mixed according to the legal and factual characteristics of the goods. According to this image, the right to exclude is always present; without it, the owner cannot exercise the other powers, so the right to exclude becomes the necessary and sufficient condition to private property.

In the common law tradition, the very famous metaphor of property as a bundle of sticks, builds on the Hohfeldian fundamental *legal relationships*, to see ownership as a set of rights, powers, privileges and immunities (and corresponding duties and liabilities) between individuals and not between an individual and a material object. This metaphor does not give to one of the rights in the bundle a predominant position corresponding to the essence of property. The sticks are dynamic and they can be arranged in different ways and allocated to different individuals, so that in this description the right to exclude does not claim a different status than the right to use or dispose. In the last 30 years, some American scholars have called this classic presentation into question, by stressing the centrality of the right to exclude in the bundle of rights. They present it as the essential prerogative to build proprietary relationships.

The rise of this theoretical position has produced a rich debate among American legal scholars.[3] This academic debate, and the mentioned case law evolution of the European Court of Human Rights, demonstrates a sort of path of theoretical convergence in the field of property between the civil law and the common law traditions, both evolving to visions of property as exclusion determined to a large extent by neoliberal economics-based ideology. Thus, the limits of a paradigm of property reversed to a *fundamental right to exclude others from something* suggests a comparative discussion around this fundamental power and its polar opposite the *fundamental right to access and to be included,* i.e. the central feature in the discourse of the commons.

The reader should keep in mind that this contrast between exclusion and access does not shed light on private property alone and it is quite independent from the private or public nature of the title. The exclusion can be determined as much by the ordinance of a major closing a square or a park as by a corporation closing a shopping mall or precluding certain sets of individuals to access it.

2.2 The Questionnaire

In the light of these premises, the questionnaire intended to collect and investigate the rise of the commons and their capability to challenge public and private property both in their content and in their binary claim to exhaust the horizon

[2] It derives from both a certain interpretation of Roman Law and the subjective right theorized by German scholars.

[3] A group of scholars organized around "The progressive property manifesto" is hindering the centrality of the right to exclude by demonstrating how property law is a mix of different special values or how limits to the powers of the owners are essential to ensure the general welfare.

of legal possibilities. The commons challenge the zero-sum vision of private and public that characterizes the modern legal mind. It is not true that more public means less private and vice versa. The commons is at least a strong and vibrant, quite hidden as of today third possibility in the law: perhaps even more than that.

According to the needs of making the commons *emerge* from legal obscurity the questionnaire is composed of a first part, which was absent in the one prepared for the Common Core of European Private Law Project, that follows the methodological guidelines of the IACL: we have composed open questions to:

(a) understand the category of the commons (from Q1 to Q3);
(b) check the *law in the book* in the field of public property and its adequacy to face privatizations (Q4–Q6);
(c) identify the role of private property in national legal systems (and its degree of sanctity) and the possibilities to balance it with other constitutional rights. This should allow to define the relationship between exclusion and access (Q7–Q8).

The second part of the questionnaire, follows the Schlesinger's methodology, according to which factual cases are developed in order to formulate questions as "neutral" as possible, overcoming biases determined by the embeddedness of both the drafters and the respondents in different legal traditions. The drafting of "common-core style" questions is always quite a complex exercise and requires much back and forth between drafters and potential respondents. In the case of the questionnaire on the commons we experienced on the one hand less difficulty because the concept is almost everywhere absent as such, so that there is no embeddedness in one or other framework. On the other hand, many of those that attended our long preparatory seminars felt that because of the large scope of the issue, there was a need of very interdisciplinary legal knowledge and skills that just one respondent could not possibly handle. Moreover, it proved to be quite difficult in the domain of the commons to phrase the issues in the usual adversary manner (clearly reductionist) typical of the classic common core research.

Nevertheless, we deemed crucial to maintain the second part to limit the risk of being stuck with mere black letter answers because of the vagueness of the commons as positive legal topic and its "emerging" nature. For this reason, even if fully aware of the limits due to reductionism, (especially since commoning is more of a cooperative than a competitive attitude) we strived to translate the commons into justiciable issues, conflicts between plaintiffs and defendants, in other words into the structural mold of modern law.

Special caution was required in this field, since general hypothetical conflicts between commons and property have been identified starting from a specific Italian legal debate that followed the Rodotà Commission. Moreover, legal hypos had to be extracted from a concept that is particularly ambiguous in the international debate where it is rarely deployed by lawyers and receives several meanings according to different economic, social and political studies where it is mostly in use. The factual approach allows investigating commons as an analytic category that includes ideas of access, participation in the management, special protection for future generations and connection with fundamental human rights. In a sense it was important to throw a wide net without losing control of it.

For this reason, the cases concern conflicts around housing, health care, food, water, natural resources, territory, culture and climate. The aim is to identify principles, values or rules that emerge in balancing the right to exclude with the right to be included and design a special sector of law governed by the principle of access and its consequential rules. Ultimately the case-based questionnaire was completed, translated into French by a sophisticated scholar serving as translator (Michele Spanò of Paris) and circulated among the identified respondents.

The answers to these questions will be analyzed in this report in order to define the common core of legislation, doctrine and jurisprudential solutions in the field of the commons.

2.3 The Legal Systems Covered

The questionnaire was circulated to 20 different potential reporters through the world, which generated timely answers for 15 systems. In alphabetical order, we obtained questions from: Belgium, Brazil, Canada, Croatia, England and Wales, Germany, Hungary, Italy, The Netherlands, Quebec, Russia, Slovakia, South Africa, Sweden and the United States.

Reports were invited from a number of independent respondents, on top of the official ones selected by the International Academy of Comparative Law. This group was mixed with the correspondent group who was already active in the Common Core of European Private Law Project and they met in Turin in July 2016 to discuss a first draft of the answers that the national reporters submitted at the beginning of June. This meeting was very important for both sharing the objectives of the survey and understanding the role of the commons in the transformation of property, even considering the different background of national reporters: private law or public law scholars. Moreover, the discussion in Turin produced the result of integrating a new question in the survey in order to investigate legal issues related to climate.

Using a traditional taxonomy we obtained answers from the civil law (Belgium, Quebec, Germany, Italy, The Netherlands), from the common law (England and Wales, United States and Canada), from former socialist law (Croatia, Hungary, Russia, Slovakia), from Scandinavian Law (Sweden), from countries outside the Western legal tradition, Latin American (Brazil) and African (South Africa). Unfortunately, we missed significant parts of the puzzle (China, Islamic and Indian countries).

2.4 A Comparative Discussion

A comparative discussion involving 15 legal systems faces the problem to define a taxonomy to work as a compass in the jungle of legal systems covered. We opted for a simple tri-partition, defined according to the role and structure of private property. In fact, we can have a group composed by six countries that represent continental and non-continental Europe and whose legal arrangements historically were rooted in Feudalism and are presently influenced by the European Convention of Human Rights. In this group, Sweden is an exception because this country did not know feudal relationships and in that period the distribution of property was not a political battleground. A second group is composed by four countries where socialist law shaped in a very original manner property law, so that it is interesting to analyze the role of the commons in the current legal framework of private property. The last group is composed by five countries that experienced colonization. This political element is relevant because property law was imported from Europe and substituted earlier indigenous conceptions of the commons that have found a way to resist and survive until today being quite resilient.

The following sections will follow the partition indicated in par 2. We will present general trends that emerge in each group of answers and few final remarks to comment the picture we can extract from comparing the answers according to the taxonomy that we have introduced above.

3 Open Questions

3.1 Understanding the Commons

This section is composed of four questions aiming to investigate the presence of the legal category of the commons or, at least, the current or past existence of concepts or rules corresponding to it. The third question inquiries on the state of an academic debate around the commons.

The first question investigates the possible presence of legal categories that closely correspond to the notion of the commons as deployed in this introduction as well as in the text that the reporters have composed for accompanying the questionnaire.

In order to answer to this question, reporters have singled out some elements of the definition and have identified categories that correspond to the commons. This interpretative strategy clearly emerges in all the reports, but it is openly denounced in the report of United States, where the very useful concept of “analytic commons” has been suggested and introduced.

Thus, the description provided by Professor Eppinger does not limit itself to the objective dimension, describing the commons as a particular material or immaterial resource, but it sheds light on the role of *communities* in the management (commoning), the position of the commons outside the realm of the market, the sets of social rules, customs and the institutional arrangements that can be introduced to govern them beyond the traditional public or private structures. These elements do not compose a legal definition, but they can be traced in different existing legal categories.

The reporters from the legal systems of continental Europe generally find some characteristics of the commons in goods belonging to the state apparatuses (and lower articulations): this connection is mainly based on two elements. Firstly, the rule of inalienability established for public goods included in the public domain and, secondly, their common usage.

Belgium defines territory and natural resources as “common heritage”, a concept through which it can highlight the centrality of small or large communities. In Belgium, in fact, the common heritage can benefit any kind of community, such as the inhabitants of a Region as well as the humankind as a whole. Nevertheless, no precise remedy follows this statement, so that a formal or informal community is not provided of a special action to protect common heritage.

Also Germany displays attention towards a global community. Indeed, the reference to future generations in the field of protection and management of public resources has been introduced in art. 20a of the Basic Law. In Italy, the public domain shares elements with the description of the commons, but the reporter denounces the existence of contradictory indications in the Italian legal system that determine ambiguous paths. In fact, in some cases the interest of present and future generations is able to define a special regime of protection for public goods, while in other cases the exchange value of public goods obscures their use value and authorizes their transfer, by introducing an exception to the rule of inalienability.

We know that the in Belgium and in Italy the codification was influenced by the experience of the Code Napoléon. For this reason, it is not surprising that the theory of public property in these countries closely follow the traditional French classification of public property. In particular, the concept of *public domain*, in spite of its weakness in protecting common resources from Government-determined

privatization, continues to be intended by the interpreters as a patrimony that belongs to the citizens (State-community) and, in this sense, it is common and only managed by public entities (State-apparatuses) in the interest of them.

Another legal category that Belgium and The Netherlands (but also Brazil and Russia) identify as correspondent to the idea of the commons is that of *cultural heritage*. This concept certainly derives from the influence of the U.N. international treaties and the mentioned European legal systems use it to define the cultural patrimony that must be preserved and maintained in the interest of future generations. Finally, Sweden identifies legal institutions that correspond to the commons in those goods managed by small communities, villages and in the Allemansrätt that knows its own special regulation.

We can thus conclude that for lawyers of the continental European legal systems, public property covers the area of the commons, stressing its management in the interest of a (small or large) community and its common usage. According to this generalization, it is very interesting to link the answers to this question to the analysis of the answers to Q4 and Q5, in order to identify the correspondence between such vision of the law in the book and the concrete political choices that inspire the management of public property.

An interesting profile emerges from the Belgian Report and concerns the possibility of *exclusion* in the management of cultural heritage. According to a decision of the Council of State, no claim of exclusivity is admitted in the management of goods that are included in this category. This clarification is very important to avoid the risk of a closed management of the commons, a hypothesis that can occur not only when property rights are distributed, but also when a specific *community* is involved in the management.

The most interesting framework comes from England and Wales, where a legal category of the commons exists and identifies common lands, town and village greens. The Commons Act has been adopted in 2006 and it is the result of a debated issue in England and Wales that probably started with the enclosures of open and common lands in the nineteenth century. However, the definition of commons remains "nebulous". According to the national reporter "common land can be defined as land in which rights of common may be legitimately exercised and enforced and subject to any public access rights that may be imposed by Acts of Parliament. A right of common can be defined as the legal right of one or more persons to use or take some portions of the produce of upon the land of another". Town or village greens are not precisely defined: social centres, pastoral centres, market centres, defensive centres and post-inclosure greens. Thus, they are characterized by amenities (seats, shade trees, drinking fountains, etc.) and they can be fenced against grazing animals. This second category is very interesting because it can be used by inhabitants to prevent building or for its conservation. The Commons Act regulates the registration of commons: the commoners ("persons who live in a particular community or locality of common lands with rights of common over such common lands") have to register these areas and the related right of common, shave no right of ownership. The Commons Act regulates also the management of the commons, since local authorities and commons councils are involved in the management and control of rights to common, common lands, town and village greens.

The correspondence between commons and public property emerges also in the reports from Croatia, Hungary and Russia, two legal systems where few traces of the socialist tradition have resisted. In particular, in the Russian Constitution, we find only a mention to the "all people domain", a concept that derives from the former Soviet Constitution and is now applied for indicating natural territories. The Croatian report includes some interesting remarks about the classification of public goods, but some clarifications would be necessary in order to distinguish common goods from things in public use or in common use. In the Russian report, the regulation of private things that belong to cultural heritage is very interesting for two main reasons. It introduces the idea that even private goods can be considered as commons; furthermore, this special regulation introduces special limits in order to ensure access to non-owners. In the Hungarian report, commons correspond to public goods and any legacy of the feudal age is actually alive. In particular, many forests and pastures were managed as commons and communities took care of them until they have gained legal personality.

Finally, if we consider the legal institutions that correspond to the commons in post-colonial legal systems, the picture is jag. The reporters of Canada, United States and South Africa, consider as commons the legal tradition of indigenous, their solutions for managing the lands and the customs produced before the conquer of European countries. They are generally connected with past conflicts (in the report of United States, the commons are associated with the idea of the genocide) or recent disputes around the Aboriginal titles (Canada). The dominant model of public property is instead present in Brazil, where we find again the idea of the common usage, while in the report of Quebec we find the category of the *choses communes* (that come from the Code Napoléon and are present also in the Belgian Civil Code but not in the Italian one) defined as things that cannot be owned, like air or water. The reporters for Quebec describe the doctrine of the *affectation* that permits to link private and public goods to a special purpose or destination and they affirm that this legal category is opposed to the idea of appropriation, because it introduces powers over the thing and not subjective and exclusive rights.

3.2 Past and Present of the Commons

The second question asked to national reporters was whether the commons exist in their current legal systems or have existed in the past; in case of affirmative answer, they were required to describe the origins of this concept (jurisprudential, doctrinal or statutory).

Considering the commons as resources that cannot be object of appropriation, only Belgium and Quebec have in their civil code a similar definition, although there is only a partial correspondence to the definition provided in our introduction.

As we have already said above, this definition of *choses communes* derive from the French civil code, but it does not appear in the Italian civil code. In Italy, at the moment there is no statutory definition of the commons, because the proposal of the Rodotà Commission failed. In the past, the idea of the commons was in some sense represented by the notion of *usi civici*, a legal concept retained from medieval communal traditions of access to forest resources that continue to exist, especially in Regional regulation. The Italian reporters mention the decision n. 3665/2011 of the Corte di Cassazione, where the judges applied for the first time the concept of the commons as proposed by the Rodotà Commission, in order to indicate the necessity to increase the protection to public goods that are strictly connected with constitutional values. Although this statement is only an *obiter dictum* in the decision, it has been widely commented and emphasized by scholars as evidence of a dialogue between doctrine and jurisprudence that stems from the inadequacy of the legal notion of public domain to protect the commons against unprincipled privatizations.

In continental European legal systems, the concept of the commons is thus presently absent as a legal category, while it was generally present in the past, as collective ownership or shared rights of access to natural resources, as in the survived Italian notion of *usi civici*. In Germany, the ancient institution of *allmende* indicated lands used by local communities, a notion extended to the territory that corresponds to "the area constituting Germany". This statement is particularly interesting because shows how the commons generally disappear because of a process of nationalization and State-building that transforms them into public property belonging to the State or divides them up and assigns to private owners.

The German reporter explains that the disappearance of *allmende* is generally due to the evolution of agriculture, requiring land enclosure in order to facilitate a more intense cultivation, and the transformation of communities in municipalities.

The process of enclosure is well known and documented at the origins of capitalism, and this resilient concept presented in the German report is similar to the Sweden allmänning, an existent but recessive model. In the report that describes England and Wales legal tradition, commons are better understood as common lands and right to common and, as we have already said, are regulated by the Commons Act, adopted in 2006. However, common lands back to the pre-Norman era, when communal properties permitted the allocation of lands for practicing, for instance, areas of common pastures. In the feudal period, the progressive transformation of common lands in private property determined a particular evolution, according to which "the idea of common lands evolved as a different mode of having rights to particular land distinct from other types of land". However, the massive enclosures of open fields and common lands started in the fifteenth and seventeenth centuries and then crystallized in the eighteenth and nineteenth century significantly reduced in England and Wales the total amount and the availability of common lands that survived only in agricultural villages. In these areas, common lands were used not only for economic activities but also for leisure or for assembly. Beside this historical tradition of common lands, in England and Wales the category has recently known revival thanks to the Commons Act, adopted in 2006. According to the data provided by the national reporter, "at the time the law was debated in Parliament, it was estimated that there was 550,000 hectares of common land in England and Wales". Thus, the number of common lands and the resilience of commons rights has forced the Parliament to adopt an act for protecting common lands, towns and village greens. In the Dutch report, we do not find any reference to the commons, so we do not know if in the past, and in particular during the Feudal period, they existed. The reporter points out that a debate exists in doctrine around the nature of those goods that perform a public function and in particular about the possibility to put them extra commercium. In the former socialist legal orders, the reporters stress the element of community in the idea of the commons. According to this perspective, Croatia identifies the collective ownership existed until 1990 as ancestor of the commons, while the Russian report give us information that covers a longer historical period. While the famous *mir* (assembly) is widely assimilated to the notion of the *usi civici* and other forms of medieval communal property, in the pre-Soviet period, forms of public servitudes existed and they were called rights of common participation and consisted in legal solutions for giving public access or introducing a mandatory passage. This reference is probably provided starting from the element of access that characterizes the analytic concept of the commons. In the Soviet period, all the lands and natural resources formed the category of all-people domain: they were not privately owned, but managed and protected by the State. At the end of the Socialist experience, the all-people domain was declared public (belonging to the State assets) and open to a process of privatization. No information on this topic is provided from the reports of

Slovakia and Hungary, even if the Hungarian reporter referred to a feudal tradition of communitarian managements of forests and pastures.

United States and South Africa present a composed picture of the commons. In the latter legal order, despite the inexistence of a uniform definition of the commons, this concept is well known in different fields: (1) the Roman Dutch tradition consigns to modernity the idea of *res communes*; (2) in the indigenous law, land is shared and cultivated by communities and no boundary exists; (3) commonage properties indicate those things that belong to municipalities and are devoted to the free use of inhabitants for grazing or other agricultural purpose. The last point is very interesting because commonage property is certainly a form of public property but it can be shaped according to the needs of the inhabitants and in particular to the "plight of the poor".

The United States report informs us that commons were present in the culture of peoples native to the Americas: common lands and their sets of relationships and traditional knowledge were erased by the colonization and the introduction of private property. Natives were expropriated and killed, so the history of the commons in the United States corresponds to that of genocide. The conquest of America is linked with the *terra nullius* doctrine that was formulated in order to assume European conquerors as the original owners of lands. The conflict between commons and public/sovereignty has been recently confirmed by the political negotiations to allow indigenous people to obtain small parts of lands in which constitute their Tribal reservation and Indian Nations.

No reference to the colonial period is included in the Brazilian report, nor in the Canadian one even if it is well known that colonization has followed the same pattern of land plunder supported by natural-law ideology through the Americas. On the contrary, the reporter from Quebec claims that there were no commons in the past, although France, the colonial power, knew in the Feudal period that kind of arrangement. The land of Quebec was conceived as a place of pure exploitation, so all the special rights created by indigenous people before the colonization were abolished. These rights were the result of a special relationship with land and they consisted in forms of rights to use and temporary possessions (*droits d'usufruits pour l'utilisation et l'occupation*). Thus, in spite of nominal differences, the pattern of free exploitation of what was deemed a *terra nullius* seems confirmed.

3.3 Academic Debates on the Commons

The last question about commons concerned the state of the academic debate about this category. Does it at all exist?

Few reporters (Quebec and Slovakia) declare the complete absence of an academic debate around the commons. All the other reports present academic debates that in some cases are directly connected with the category of the commons, in others, develop a critique to public property in accordance with the effects of privatization (Croatia, The Netherlands, Germany and Russia). In Hungary, any academic debate is present, even if researches in the field of public goods are conducted.

An academic debate devoted to the commons as new legal category is present in Belgium and it was generated by the process of the revision of the civil code. The proposal of December 2017, art. 57 suggests the introduction and regulation of "res communes". The report does not explain the relationship between this new category and the already existing rule about *choses communes*, but the *ratio* of the reform seems to be the identification of new rules through which facing the ecological crisis. In England and Wales, the debate mainly concerns the use of commons with two opposite positions: on the one side, there are those who propose an economic use of the common lands, while on the other side, their use connected with biodiversity and environment is supported.

The reporter of South Africa affirms that an academic debate around commons is gaining momentum and it is direct to define a precise content of the commons considering that they are mentioned in different sources of law. Similarly, in Sweden an academic debate is starting because of the institution of allemansrätten can be connected with the idea of the commons. Moreover, the idea of creative commons is developed in the domain of intellectual property. In Germany, the academic debate among lawyers is focused on creative commons and global commons.

In Brazil, the academic debate on the commons has been inspired by the Italian one and in particular by the role of this category in the political campaign of 2011 against the privatization of the water supply system. Moreover, some reflection on the commons stems from a general debate on the theory of goods that takes into consideration the Anglo-American theory of the bundle of rights.

In the United States, the academic debate around the commons follows two main strands of work. The first is dedicated to the collective action problems that commons produce. This approach remains linked with the argument of the tragedy of the commons. Another important line concerns the *public trust doctrine* and its development in order to be applied for the protection of natural resources. The same lines of work characterize the academic debate in Canada and they start from the statement of Macpherson about collective property and follow the arguments of Ostrom, Rose and Sax.

3.4 Comparative Analysis

The answers to these questions allow highlighting some elements which are shared by the majority of the legal

systems investigated. In absence of a precise legal definition, reporters identify public property as the most similar institution to the commons. They are generally aware of the limit of this definition and, in fact, they find new concepts to gather the deep meaning of the commons, as the cultural heritage demonstrate. Cultural heritage is characterized by a focus on future generations, but no special remedy is provided for protecting them against the infringement of their interest in the preservation of these goods. Furthermore, the other limit that emerged from the answers to Q3 is that there is a clear tension between the (official) rule of inalienability and the law in action allowing for a political and economic practice of privatizing the public wealth.

All the legal systems investigated show a particular sensitivity for those goods that are connected with the fulfillment of constitutional rights, even if this link is not always made explicit. In those countries in which constitutional rights influence the legal protection of public goods, we find additional rules to allow access to non-owners and special duties of preservation and maintenance.

The most interesting results about the life of the commons concern their relationship with public property: the majority of legal systems shows how the disappearance of the commons depends on the expansion of public sovereignty.

In many reports, the idea that commons can be held with private titles is admitted and the conciliation between commons and private interests is ensured through special limits to the powers of the owners.

We can conclude that a general sensitivity for the commons is diffused, even if it is easier for reporters to discuss the different forms that can be grouped under this category rather than attempting a fully fledged theoretical reconstruction of the notion. The challenge that the commons bring to property seems clearer in the field of public domain rather than in private property.

The different patterns of the academic debates show how difficult is for legal scholars to discuss about legal institutions in absence of a regulation or a jurisprudential decision. Nevertheless, the legal debate is able to both gather the ideas given by economic, political or sociological studies and organize them in an original manner.

3.5 The Protection of Public Property Beyond the Law in the Books

This section of the questionnaire was dedicated to investigate the public property and the relationship between commons and public institutions. The first question aims at understanding how the rule of inalienability works in different legal systems. In particular, we try to explore if it is an absolute condition or a relative one. This analysis is important in order to verify the necessity to provide a stronger protection for the commons, as suggested in the proposal of the Rodotà Commission.

The second and the third questions aim at collecting answers about the privatization of the commons and their nationalization. The idea is to investigate the process through which commons are transformed into private or into public ownership. This latter profile, was introduced after the meeting of July 2016, during which Professor Ghangua Liu, a Chinese colleague, put in evidence the necessity of including also the hypothesis of nationalization for covering those situations in which goods that belong to communities are forcefully transferred to the state. This question probably did not achieve this objective, considering that all the reporters have considered nationalization equivalent to expropriation, except Germany and Italy where some elements emerge.

3.6 Inalienability of Public Goods

The answers to the question about absolute inalienability of public property allow stressing the weakness of this provision. In fact, the reports demonstrate that relative inalienability is the rule, while the absolute prohibition to sell public goods is just an exception. This is true for the majority of the interviewed reporters. Finally, a common bulk does not emerge, since the circumstances and the kind of absolute inalienability is variable across systems. Germany identifies things that are absolutely inalienable in the Constitution: according to art. 90(1) motorways and highways are included in this category as well as the enterprises that can help the Federation in their management (Art. 90(2)). This statement is valid also for railways (art. 87e(3)). The inalienability, in other words, covers the ownership of the public asset but also its management, introducing a very interesting mechanism for avoiding the inversion of the substantial and formal ownership that occurs when the public good continues to belong to a public entity, while the management is given to a private enterprise with a long-term lease or concession. In a similar situation, the possibility to control for a very long period the management of a public resource generally means the accumulation of the kind of asymmetrical information and power which makes the manager the real owner. Beyond the case of Germany, only The Netherlands among the continental European legal systems knows a hypothesis of absolute inalienability for the territorial sea and the Wadden Sea. The Swedish legal system allows the Government to dispose of public assets but when they consist in immovable properties, they cannot be alienated if they are required for the functioning of the State and their value exceed 75 million crowns. It is interesting to note that in continental European legal systems, the decision to alienate public assets can be taken by the Government in office and only in Sweden an

authorization of the Parliament is needed to sell immovable properties of higher value. No particularly original profile can be detected in the other groups of legal systems. In Russia and Croatia, the inalienability of public goods is relative as leases and concessions to private entities can be introduced. The Croatian reporter indicates that the maritime domain is absolutely inalienable as well as public goods in common use, forests and forest lands; in Russia, the absolute inalienability covers only military assets while the market system is generally extended to public goods, sometimes giving a market-oriented interpretation to the Constitution. This is the case of Art. 72 Cost. according to which properties of common use as land, water objects and natural resources are managed and cared jointly by the Federal Powers and the Subjects of the Russian Federation. In 2014, the Supreme Commercial Court held that this statement does not imply an exemption for these goods from the possibility of being alienated as it does not establish an exclusive public status for them. In Hungary, a list of inalienable public goods is included in the Act CXVI adopted in 2011 to regulate national assets: conditions of privatizations have also been defined and those contracts of alienation that do not respect them can be declared invalid.

In the post-colonial legal systems, we generally find statements of absolute inalienability. Thus, in the United States navigable waters, parks and monuments are inalienable, while other federal public assets can be the objects of leases or concessions. A special category of inalienable assets derives from the indigenous tradition: things defined cultural patrimony by Native American are not alienable as well as their sacred or funerary objects. In Canada, only the beds of the sea and the tidal waters are inalienable; an original case of inalienability concerns the right to fish that cannot be assigned in exclusive forms. In Quebec, the rule is that public assets can be alienated and no exception exists; special authorizations are required to alienate some natural goods. Finally, in Brazil, we find solutions that coincide with the models introduced by the continental European legal systems, so that the inalienability is relative and leases are admitted.

3.7 Remedies Against Privatizations

Question 5 required reporters to analyze those remedies trough which a legal reaction to privatization is possible. In this question privatization is not defined but the nature and the objective of this act have already been discussed in the introduction: it consists in the alienation of public assets to private entities or, according to a larger definition, in the transformation of a public enterprise into a private one. Privatization can be carried out at different levels of government, because every public owner (State or local authority) can alienate public assets. This question represents the natural continuation of Q4, because now we know that the alienation of public assets is generally admitted as a rule in the majority of the legal systems interviewed.

Privatizations can be resisted in court in many legal systems; in fact, only the Canadian report excludes legal actions and considers exclusively political opposition to this kind of public decisions being possible. Reports highlight remedies in the field of public law such as special referendum to stop privatization and\or civil or administrative actions to challenge in court the decision of public authorities. Germany shows a local referendum to challenge privatizations at the Lander level, whose effects are genuinely able to protect public properties. In fact, the referendum can concern the repurchase of the privatized state property, as in the case of the gas supply system in the Land Hamburg, privatized and then repurchased by the local authority after a winning citizens' initiative. In Italy, national referendum can be promoted to abolish national laws that have privatized public services or assets, as occurred in 2011 with the referendum against the privatization of the water supply system. This kind of democratic tool, however, is quite different from the German local initiative because the Italian one can only produce an abrogative effect, while no mandatory purposeful effect is admitted. The national reporter for England and Wales does not identify a national remedy, but suggests that challenges to State privatizations can be done though Article 1, Protocol 1 under the European Convention of Human Rights, according to the principles and the conditions provided against expropriations.

If we take into consideration only an abstract discourse, the decision to privatize can be challenged in court in many countries and national reporters provide examples of possible remedies. However, the answers raise at least two problematic issues. First, the essential problem is represented by the qualification of the *locus standi* to challenge the privatization; second, when the remedies are admitted, they are generally individual actions, while collective actions are not foreseen. This shortcoming is again the result of a problem of standing, so that only environmental associations, who can represent an interest diffused in the collectivity, may challenge those acts which are able to produce an environmental damage.

The reports highlight this procedural complication and, in fact, reporters have typically answered to this question trying to imagine the national remedy or the doctrine that could be applied to challenge privatizations; however, real cases and jurisprudential decisions are not so diffused.

According to this general presentation, the Belgian reporters argue that the privatization of public goods can be challenged through two remedies. The first one consists in a legal action before an administrative court promoted by an environmental association in those cases in which privatization might (injunction) or has been able (ex post

remedy) to produce an environmental damage. The second strategy consists in applying the *standstill doctrine*, according to which everyone can take a legal action against the public entity if the privatization risks diminishing the levels of protection already acquired ex art. 23 of the Constitution. In some sense, this legal itinerary is followed also by the Swedish system, where an individual action can be taken against the decisions of the Government that affect one of the fundamental rights protected by the European Convention of Human Rights or by the art. 9.2 of the Aarhus Convention. The concrete infringement must be proved in the judicial process, so that the plaintiff's standing is again very complicated to demonstrate. In Italy and in The Netherlands as well as in Slovakia, administrative actions can be taken against the public measure that establishes the privatization through the ordinary means of judicial review. This implies that it is difficult (almost impossible) to argue against the merits of the provision, which is generally left in the discretion of the public authority.

On the contrary, the administrative procedure can be challenged on the usual formal grounds (violation of law, lack of jurisdiction, excess of power).

The difficulty for the plaintiff of having *locus standi* is described in the German report, too. Here we find an interesting case in which the infringement of an individual right caused by the decision to privatize a public asset (a local Christmas market) has been able to overwhelm the whole privatization scheme. The Federal Administrative Court held that the privatization of the Christmas market constituted a violation of the guarantee that certain municipal affairs had to be self-governed by the municipality, since the decision to privatize prohibited municipality from influencing the private organizers. Russia and Brazil present original actions to challenge privatization. In Russia, privatization can be nullified by an action taken by the Public Prosecutor or the Federal Agency in those cases in which the public decision has been adopted against the law. This is an example of reaction against privatization of public properties that are absolutely inalienable. It is a procedural control that remains within the administrative circuit. In fact, private persons cannot claim for the nullification of a privatization but they can always file their complaint to the Public Prosecutor, asking him to take the legal action described above. However, the report does not allow us to know more about this legal tool and in particular, we wonder whether the private persons must have a specific and current interest to file their complaint or, similarly, whether it is mandatory for the Public Prosecutor to take a legal action after the reception of a private complaint.

In Brazil, two different remedies can be applied to challenge privatization. The report mentions a popular action that would seem to be a type of *actio popularis*, but unfortunately, no details are provided in the report. To the contrary, the public civil suit is described and similarities emerge with the Russian tool. In fact, the Constitution assigns this action to the Public Prosecutor in order to protect public and social property, the environment and diffuse and collective interests. The action is an ex post remedy, so that he can obtain a money remedy if the privatization has caused a damage or the fulfillment of an obligation to do or not to do something in the cases in which these kind of remedies better fulfill the purpose. The report points at a decision of the Superior Court of Justice after a public civil suit of the Public Prosecution Office of the State of Rio Grande do Sul about an act of the Municipality that intends to turn a square—included in those goods for the common use of the people—into transferable public property in order to sell it to the social security entity. The object of this civil suit concerns procedural issues: in fact, the Public Prosecutor aims to know if a public civil suit against the Municipality is possible. Nevertheless, as far as we can understand from the report, the privatization has already been decided and Public Prosecutor can claim only to obtain a proper compensation for the removal of the urban green area. In an *obiter dictum*, the decision includes harsh words about the decision to privatize, demonstrating the ecological sensibility of the court. The public civil suit is an interesting remedy for the protection of the commons, even if it is only an ex post remedy, so it does not give any chance to stop the privatization. Moreover, the initiative is completely referred to the Public Prosecution Office and we do not know if citizens can demand his intervention.

Finally, no information arrives from the report of the United States, where both the cases of privatization and nationalization are faced through the regulation of expropriation. Similarly, the legal system of Quebec does not foresee any remedy against privatization but the reporters mention those situations in which the State expropriates lands that belong to indigenous nations in order to build a pipeline. The procedure allows an opposition to the project and the organization of public debates to discuss the reasons of the resistance.

3.8 Remedies Against Nationalization of the Commons

The question n. 6 was directed to analyze remedies against the nationalization of the commons that means their transformation in public properties.

All the reporters have responded to this question assuming that nationalization requires the expropriation of private properties for a public purpose. Many procedural and judicial similarities can be described: in fact, expropriation is typically characterized by the elements of the public interest and the compensation for the privation of private property.

The decision to privatize can be challenged before administrative courts for procedural claims, while the amount of compensation before civil courts. Beside the case of full expropriation, some legal systems know expropriative measures that consist in the application of limits to property rights in order to achieve a public purpose. Thus, there is not a privation of the good (that generally is a land) and in Germany, this solution implies that compensation depends on the extension of the interference. Russia is the only legal system where expropriation assumes a punitive function: the State may acquire private properties when the owner carries out improper uses or infringes the boundaries of the zoning or other land categories. Moreover, in this former socialist legal system, expropriation can be challenged throughout a collective action. To the contrary, the United States is the only country where expropriation can be applied to achieve a public purpose that is concretely carried out by a private entity: the reference is to the famous case *Kelo v. City of New London* where private lands had been assigned to a private corporation after a taking procedure against small private owners. Excluding those answers in which the remedies against nationalization coincide with those provided for expropriation, Brazil, Quebec, Italy and Germany present original institutions. We have already discussed in par. 6.2 the Brazilian public civil action and the remedies through which in Quebec indigenous nations or communities can challenge the expropriation directed to the construction of pipelines. We must now take into consideration the German and the Italian answers, although the interesting profile does not concern remedies against nationalization, but a special hypothesis of nationalization. In fact, the German Constitution regulates "socialization", that is a transfer of land, natural resources or means of production to the state; this forced transfer is followed by the payment of a compensation. Unfortunately, no socialization has ever been carried out, so we cannot understand the situations in which this institution is applied and its political consequences. Similarly, the Italian Constitution (art. 43) states that enterprises which provide essential public services, energy or are monopolist in their market sector and are able to fulfill a preeminent public and general interest, can be nationalized and transferred to the State, public entities or *communities of users or workers*. This rule is particularly advanced, because we find "traditional" nationalization but also a transfer to formal or informal *communities*. Like in Germany it provides compensation. We have only one example of nationalization ex art. 43 Const. that was the base for the famous judicial dispute of European law *Costa v. Enel* in 1962. The rule has never been applied to transfer productive assets to communities.

3.9 Comparative Remarks

The analysis of these answers highlight how existing remedies and doctrines could be interpreted and applied to resist against privatizations. This is the only available solution in most legal systems since only Russia and Brazil have a special action for such litigation. Despite these specific institutions, the Brazilian public civil suit and the action promoted by the Public Prosecutor or the Federal Agency in Russia do not allow the participation of inhabitants and maintains the remedy within a public or administrative circuit. Similarly, as emerges in the Russian report (but not in the Brazilian one, where the point is not clarified) only procedural errors are relevant, while the merits are not object of the legal debate. Moreover, these actions are ex post remedies and they intervene when the privatization has been completed. In Russia, privatization can be cancelled only if the public act can be nullified for the infringement of a mandatory rule, while in Brazil the only effect of the public civil suit consists in obtaining a compensation or an obligation to do or not do something, but we do not know if it includes a duty to repurchase privatized assets.

Taking now into consideration those tools, rules or doctrines that can be adapted to challenge privatizations, the Constitutional argument is the most influential one. In fact, in Belgium and Sweden (here the reference is to ECHR and the Aarhus Convention) the infringement of fundamental rights or the diminishing of the level of protection already acquired represent two important arguments; similarly, the reporters of Quebec state that art. 36 of the *Loi Constitutionnelle* of 1982, by introducing a legal standard for the federal government in the provision of public services, could be used to challenge privatizations, but there are not available examples.

All the legal systems share the problem of the *locus standi*: according to the definition of legal standing, it is almost impossible to demonstrate that privatization infringes an individual subjective right or a relevant interest. Furthermore, no collective remedy allows individual inhabitants to take a legal action and only environmental associations can apply for representing a collective or diffused interest.

This solution is very restrictive because it introduces a subjective limit (single private persons and informal communities are excluded) as well as an objective limit, because only environmental damages can be claimed.

We could conclude that the protection of the commons is insufficient; this is true also considering that no remedy exists to claim in the interest of future generations and, again, the huge limit to this kind of approach is represented by the limitations introduced by standing to sue.

3.10 Private Property and the Commons

Q7 and Q8 aim at investigating the fundamental laws concerning property rights, by considering whether private property is considered a fundamental right and which are the other subjective positions against which it can be balanced. Answers to this question are relevant because they should allow us to understand the flexibility of property rights and their capability to be modified after a proportionality test. In fact, property rights can clash with rights of housing, the protection of the environment, rights to health and others, as we will see with the factual cases in section II of the questionnaire. In these situations, there is a conflict between an owner and a non-owner/possessor or a conflict between the protection of property rights and a diffused interest. As explained in the introduction, the category of the commons is often used to signify the necessity to redistribute resources: for this reason, the flexibility of private property is essential to balance different interests.

The same objective is pursued in Q8, where we have intended to analyze the role of exclusion and access, their conflicts and the concrete possibilities to balance them. The right to access and the perspective of inclusion find their first representation in the technicalities of the rules of private property: we want to arrange these elements in order to describe a complete micro-system of access to property.

3.11 Private Property and Constitutional Protection

In the continental European legal systems, private property finds different and original constitutional definitions. In these countries, art. 1 of ECHR Protocol 1 considers private possessions as a fundamental right, producing important effects mainly in jurisprudential decisions of those countries where private property does not have the high standing of a fundamental human right, as occurs in Italy and Sweden.

In Germany, Belgium and The Netherlands, instead, private property is considered a fundamental right but this status (though limited by the social function clause) is explicitly declared only in Germany, while the other two derive it from the position of the rule within the Constitution. Both the Belgian and Dutch definitions, in fact, refer to expropriation and, by so doing, introduce a negative guarantee that confirm the fundamental status of this right. Nevertheless, balances are possible, even if these constitutional definitions do not include a social function of property as in Italy, Brazil and Croatia and Germany. In Belgium, in fact, through a balancing test based on a control of proportionality, the protection of environment or cultural heritage, urban law or the right to housing could defeat private property. Similarly, in The Netherlands, the right to health can limit property rights, as a decision of the Dutch Supreme Court declared in 1991. Compensation can be provided to the owner who suffers limitations, according to the intensity of the interference. In the German Constitution, private property is a fundamental right but it is not absolute, so the balancing with other rights is always possible. In this legal system, private property is always defeated by the necessity to protect human dignity. In Italy, private property is included among social and economic rights and it is characterized by the provision of its social function and the idea of accessibility; a balancing test is admitted in particular when there is a clash between property rights and the right to health, human dignity or the environment. In the Italian legal system, the impact of the conception included in the ECHR—that is mandatory according to art. 117 par. 1 of Italian Constitution—has been significant, in particular in the field of "occupazione acquisitiva", a special case of expropriation that occurs before the adoption of the corresponding public decree. Compensation of the sacrificed private property has been fixed at the market value after several decisions of the European Court of Human Rights that condemned Italy for the infringement of art. 1, Protocol 1 ECHR thus forcing the Constitutional Court to abandon its previous case law that accepted statutory limits to the amount of compensation as practical applications of the "social function clause". The most original conception of private property can be found in Sweden, where a precise definition does not exist. This conception is the result of a historical evolution during which ownership and the redistribution of lands have never been the battleground of political conflicts, probably because the low density of the population, the absence of feudalism and the presence of peasants' representatives in the Parliament since very early on. Similarly, legal scholars do not debate about the abstract idea of property: their approach has been very influenced by legal realism, so they prefer to study and analyze concrete and specific problems. According to this approach, the old Swedish Constitution—the Instrument of Government of 1809—forbade the executive branch to deprive a citizen of her property without a lawful judgement, but the element of compensation has been introduced much later, with the Instrument of Government of 1974. Since 1976, the Instrument includes private property among fundamental rights. This change, however, has not caused any interpretative innovation. The impact of the ECHR case law has been particularly problematic for the Sweden legal order, because it emboldened the political supporters of a strict definition and protection of private ownership. In fact, in 1994 a new reform modified Chapter 2 § 18 of the Instrument, introducing the limit of public interest to deprive private owners, while in 2011 a new legal reform stated that everyone—not only Swedish citizens—if expropriated can obtain a full compensation for the taking in the amount of the market value plus a standard increment. Nevertheless, in 1994 the

allemansrätt has been introduced in the Instrument as an autonomous right, so it is not conceived as a limitation to private property.

In Brazil, private property is included among inviolable rights together with the right to life, liberty, equality and security. As we have already said, the Brazilian Constitution and Civil Code contemplate its social function that allows to balance property rights and produces two additional effects: the owner cannot retake his or her private goods that are employed for activities of social interests; moreover, when so used, they are not subjects to attachment for the payment of the owner's debts. Existential interest can always prevail in a balancing test with private property. A similar legal regime makes the law in action in South Africa and the United States, where guarantees against racial discrimination limit property rights and makes formal equality prevail in certain legal conflicts with private property. This arrangement inspires the US public accommodation doctrine, according to which the owner of a public accommodation cannot exclude people unreasonably, in an arbitrary or discriminatory manner. In Canada, private property is not a constitutional right; a balancing test seems to be admitted, but this point is not made clear by the report. In Quebec, private property is regulated in the *Charte Quebecoise* as a fundamental right, but limits are possible to protect environment or to introduce zoning laws.

Looking to the former socialist legal systems, we can note that private property is today a constitutional right. In Croatia, it is classified among the economic, social and cultural rights and a duty to contribute to the general welfare is established for owners or users. In Russia, it represents a fundamental right and the balancing test is possible: the human right to have a place to stay always prevails in a clash with property rights. No information about this issue is provided by the Slovak report, so we only know that private property has a Constitutional definition. In the Hungarian report, any reference to a Constitutional framework is provided and the answer to this question is not clear, since the reporter just takes into consideration the guarantees provided against expropriation.

3.12 Exclusion and Access in Property Law

The limits to the right to exclude justified by a non-owner's right to access present a homogeneous classification in the 15 legal systems analyzed. In particular, limits can be voluntary—accepted and introduced by the owner—or mandatory, established by law.

The first case does not represent a true limit to the right to exclude, but only one of the ways in which the owner can exercise it. In fact, he can exclude others or he can permit their access. In this category, we can include voluntary servitudes that are regulated in Belgium, Germany, Italy, England and Wales (easements), Croatia, Russia, South Africa, United States and Quebec. In many countries, the right to transit on private lands for having access to a public road is generally conceived as a public servitude, so its creation is mandatory for the owner who has the right to obtain a compensation. This case is included in the second group of limits to the right to exclude: we are speaking about those situations in which the owner must suffer the access of the non-owner. In The Netherlands, Italy and Croatia, the non-owner has the right to access private property when he must carry out restorations to his own property. In this category of limits, we can include the installation of conduits (gas, water, Internet, etc.) that cannot belong to the owner of the land plot or the building on which they stand. This hypothesis is regulated in Croatia, where the owner who suffers the installation must obtain a fee when conduits are private or a compensation when conduits are public, and in Russia (conducts are defined *linear objects*), where conflicts between owners can break out. In Hungary, access is regulated in the civil code and it finds three different solutions: access to the neighboring land—for doing works of public interest, harnessing animals, gathering fruits, removing branches or roots, for the construction or the maintenance of a building and "for other important reasons"; access without a permission in emergency situations; and use for public purposes, category that includes acts of tolerance and easements.

In Germany, Italy, The Netherlands and in some sense in South Africa, access of non-owners must be suffered by the owner when it is based on a state of necessity, an emergency situation in which interferences must be tolerated. It is very interesting to note the position of this provision: in the German BGB, it is positioned after the definition of private property, so that the relationship rule/exception (exclusion/access) is clear. In the Italian civil code, instead, the state of necessity is regulated in the sections dedicated to tort law, because it limits the payment of compensation. In The Netherlands, the infringement of private property to have access must be tolerated when it serves a public interest of great importance, but no example is provided.

In the group of limits established by law, we can include several provisions that concern access to nature. The more articulated institution is the Swedish allemansrätt, while in other countries such as Italy, Slovakia or in Canada (Nova Scotia), it represents an exceptional feature without a strong protection. Access to common lands is protected in England and Wales, since these goods are mainly private property, except in special cases. It is regulated in the Countryside and Rights of Way Act as right to way or right to roam in registered common lands and open country.

3.13 Comparative Remarks

The answers to these two questions show that private property can be balanced and limited despite its nature of fundamental right. In other words, we can see that private property is not an absolute right and limits do not represent an exception but actually, its physiological functioning in a relational context. We have not, however, sufficient information to describe the way in which the balancing test is performed, whether the law leaves it openly to judicial discretion or whether it attempts to regulate it. In The Netherlands, it is based on a proportionality judgment, but except this specification, we do not know any detail. The right to health, human dignity, the right to housing or the protection of the environment can all prevail on private property in all legal systems surveyed, as the solutions to factual cases will demonstrate.

Among the limits to property rights, those interferences that concern the right to exclude are quite diffused, even if *access* does not represent a legal notion per se. We find it in the Italian Constitution—where art. 42 provides that it is the social function of property to make it accessible to everybody—and in the South African Bill of rights, where sections are devoted to access to land or natural resources. In this quite recent Constitution, access is employed also outside the field of property law and it generally refers to the possibility of enjoying rights or public services.

Access against the will of the owner is admitted only in particular situations: some of them are legal, such as access to a public road or to forests; others are generated by an unlawful act, an infringement of private property that is exceptionally admitted, such as in the state of necessity doctrine.

However, combining the results of Q7 with those of Q8, we can conclude that the protection of fundamental rights can theoretically determine limits to the right to exclude: the factual questions should allow analyzing how the balancing test concretely works.

4 Conflicts and Cases

4.1 Introduction

The factual questions aim at providing a concrete description of the solutions to the following disputes:

(a) A first group of cases discusses conflicts between owners and unlawful possessors who infringe property rights in order to fulfill constitutional rights. In these cases, the abandonment of property is a recurrent theme, because our objective is to understand the tension between a dynamic and (arguably) altruistic behavior of the possessor (commoning) with an inactive rent-seeking attitude of the owner. In this kind of situations, the conflict could be solved by understanding the material interest of the owner to exclude others when he has no use value, in order to balance actual uses of possessors, with possible future projects of the owner (including extraction of rent).
The aim of this part of the questionnaire is to understand how the balance test can concretely work when private property clashes with right to housing (Q1), health care (Q2), right to food (Q3), access to nature (Q5) and cultural production (Q7). The results of these questions will be analyzed in the same section of this report because they all together offer a complete picture of the legal and judicial possibilities to balance property rights

(b) Two questions are devoted to access to water, analyzed in rural and urban contexts (Q4a and Q4b). In the first case, a conflict between different uses of water exists and it opposes three villagers to a private corporation. The aim of this case consists in understanding the role of the principle of prior use in the management of water sources, in particular in those situations in which a subject uses them for fundamental and basic needs and the other for commercial purposes. In the second case (placed in urban context), we present a conflict between users of the water supply system and the corporation who manages the service. The dispute is generated by a large increase in the price of water. After failing to pay their third bill, users suffer the detachment of the water supply, so that they are not able to access this fundamental resource. In this case, the dispute opposes the detachment for lateness in the payments—that is generally mentioned in the water supply contracts signed by the users—and the fundamental human right to water that in an urban context can be fulfilled only throughout the access to the industrial service.

(c) The last group of cases includes two questions. The first concerns the possibility to judicially challenge the development of a mine that risks polluting the territory, through collective remedies (Q6). The second concerns the protection of climate in the interest of future generations (Q8) and combines elements from both the Volkswagen's scandal of polluting emissions and the Urgenda Case, in which an association sued the Dutch government for its insufficient engagement in the protection of the environment and of climate against activities determining its change. The solutions of these cases should allow to focus on individual and collective remedies to protect the commons in the interest of current and future generations.

4.2 Property Rights vs Other Constitutional Rights

4.2.1 Right to Home

The first case introduces a quite common situation: a private corporation suspends building activity before final completion because a public authority requires some public authorization and stops it. The unlawful possessors infringing the development's company private property are families in need with children. They occupy the building and start to improve it, by carrying out several ameliorations. After a couple of months, the legal manager of the corporation discovers the occupations and attempts to evict the families through legal means.

The main legal issues concern:

(a) The solution of the conflict between an owner who is not using his building and unlawful possessors who are living a state of necessity. According to these elements, the case allows to understand the remedies that the owner can deploy and in particular the role of private law and criminal law.
(b) The relevance of abandonment in the resolution of such conflicts. In this case, and in all our factual hypothesis we take into consideration, the exercise of the *right not to use* of an owner generates a de facto abandonment. Though the owner is not relinquishing his property through formal acts or declarations, his behavior together with the state of neglect of the building makes it clear that he is not interested in its use value. In Q1, the lack of use derives from the lack of a public authorization.
(c) The right of the possessors to obtain some compensation for the ameliorations that they have carried out to improve and use the building.

The solutions to the legal issue sub (a) are very similar in most the legal systems considered. In the continental and non continental European legal systems, Germany, Italy, England and Wales, The Netherlands and Sweden, the private corporation would prevail and obtain a judicial remedy to evict the families. In Germany, the owner can bring a claim relying on para. 1004 BGB—in order to stop the interference of the possessors—or para. 985 BGB to recover the building against the possessor. The state of necessity of the families cannot be opposed and it does not constitute a valid argument against their eviction: in fact, the solutions provided by public assistance are deemed sufficient to ensure alternatives to people in need. For this reason, no relevance can be assigned to the right of housing or to the protection of vulnerable children. In Italy, the owner would prevail in a civil action by claiming the recovery of possession against the possessor (art. 948 of the civil code), while he would not prevail in a criminal action because the state of necessity would work as a justification to the crime. In The Netherlands, the owner would obtain an eviction order against the possessors, since the families would have public assistance for their particular situation. In this country, after 2010, the occupation of vacant buildings has been considered a criminal offense: before that date, taking possession of someone else's abandoned building was justified by the large necessity of housing determined by the disasters produced by the Second World War and squatting generally tolerated. In Sweden, the owner can successfully apply for an eviction order based on disturbance of possession. The rules about trespass cannot be applied to this case, because they are provided to protect offices, factories and areas where people generally work. In 2017, the judicial procedure to obtain an eviction order has been modified, in order to protect the owner also in those situations in which he is not able to provide the identity of the occupiers. After the reform, he can apply for eviction by demonstrating his reasonable effort to obtain that information. The reform has introduced a special protection for the occupiers: in fact, an eviction proceeding includes a proportionality test, according to which this order can be approved "insofar as the reasons to apply the measure offset the inconvenience or detriment to the defendant".

In England and Wales, the occupation of a building is unlawful if the owner of the building does not give the authorization or tolerate the occupants. The occupation is a trespass to land and it is regulated by the rules of tort if the occupied building is non-residential. On the contrary, occupation of residential buildings is considered a criminal offence and it is punishable by 6 months' imprisonments and a 5000 fine. Eviction of squatters is specifically regulated in the Protection form Eviction Act (1977): to evict squatters, the owner has to apply for an interim possession order after 28 days of noticing their presence. This procedure is mandatory and unlawful eviction is a prosecutable offence. Welfare statutes and housing assistance exist to support people in economic difficulty, especially in those cases in which there are children: housing benefit payments to persons who have no income or social housing solutions. Local authorities are responsible to provide support and accommodation in case of homelessness.

The most original and interesting solution is reached in Belgium, the only legal system among the continental European ones to let non-owners prevail in the dispute against the owner of the building. Three main factors make this solution possible: families were in state of necessity at the time of occupation; the building was not used and no plan is available to understand its future destination; the eviction of the families would have more serious consequences than the prejudice suffered by the owner. In Belgium, the occupied building is considered a domicile, so the right to housing of the squatters is protected against any interference. Until October 2017, the owner could apply for an eviction order

only before a civil court whose reasoning would have been the one just mentioned. Last year, instead, a new federal regulation has been introduced to criminalize squatting. We do not have information on how this picture can be reconciled.

With the exception of the Belgian answer, the most interesting element that emerges from the set of solutions to the issue under point (a) is that in Germany, The Netherlands and Sweden welfare state continues to be considered a valid support to people in need. The judicial solutions generally focus on civil remedies and procedures, even if, as far as we can understand by reading the reports, the occupation of immovable property is also a crime. No information is provided about the relationship between these legal fields, so we do not know if a priority exists or if, to the contrary, the owner can apply for the remedy he prefers.

We can assume that in continental European legal systems, the civil remedies are generally applied.

The solutions to the legal issue under (b) show that the state of neglect and the abandonment of the building is not able to influence the result of the proceeding. As we have already discussed, only Belgian judges can take it into consideration when they evaluate the effects of eviction for both the squatters and the owner; furthermore, in this legal system, some federal regulations consider the abandonment of a dwelling an administrative offense, punished with a fine. In Brussels, the Housing Code admits that special precarious occupancy agreement can be signed with the squatters in order to assign them the use of the vacant building. These agreements are valid until the owner submits a plan for the future development of the building.

In Italy, the abandonment influences the decision about damages produced through the occupation. In fact, some decisions argue that squatters must compensate the owner because the occupation *in re ipsa* damages the owner, while other judgments state that evidence of the damage must be proved. Damages only emerge if the occupation precludes the owner from renting, selling or obtaining other returns from his building. In other words, we could say that the interest of the owner to use and to exclude is relevant and without it, the occupation does not necessarily constitute a damaging event.

Finally, in continental European legal systems, the solutions to the legal issue under (c) are very different, although they share a common ground. In particular, Germany, Italy, The Netherlands admit a compensation for ameliorations in connection with the good faith or the bad faith of the possessor. In Germany, a possessor in bad faith who has committed a tort cannot obtain compensation for the works and improvements carried out; moreover, the ameliorations described in the case (painting the walls and adding a little garden) are considered useful for the possessors' living conditions but they are not necessary for the building. The Netherlands share the same solution: the possessor in bad faith can only remove the amelioration if it is possible; as an alternative, he can sue the owner for unjust enrichment, deploying a remedy that is available also in Sweden. In Italy, the possessor even in bad faith can be refunded for extraordinary works in the lesser sum between the increased value of the land and the building and the costs incurred.

In post-colonial legal systems, we find different solutions to the legal issues under point (a). In fact, in Brazil and South Africa, the possessors might prevail; In Brazil, this solution depends on the preference of the system towards dynamic uses of property against the inactivity of the owner. In South Africa, the main argument for the prevalence of the possessors regards the protection of the right to housing and the presence of vulnerable people (the children); nevertheless, formally speaking, the unlawful possession of the building is still constructed as a trespass. To the contrary, in the United States, Canada and Quebec the owner would apply for an ejection or an eviction in order to recover the present possession of the building. The only limit to this action would be the successful acquisition of property through adverse possession, but in Q1 we know that the families spend only a short period in the building. The state of necessity is not relevant and in the United States an emergency is required to recognize this special condition. The right to housing is not relevant to decide this case and in Quebec it is not a justiciable right because it is not considered as fundamental but just as an economic and social right. Similarly, the examination of the legal issue under point (b) shows that abandonment can influence the judgment only in Brazil where it can work as an index to evaluate the social function of property. In South Africa, the *de facto* abandonment does not have any consequence, while the *de jure* abandonment—that would consist in a formal surrender to property rights—is not admitted, because vacant immovable cannot be *res nullius* and they belong to the state. The criterion to define the right to obtain compensation (legal issue under point (c)) depends once more on the good faith or the bad faith of the possessor. In Brazil and Quebec, the evicted families could apply for the reimbursement of the sum invested in the ameliorations, while in South Africa and Canada, they can sue the owner only for unjust enrichment. In the Canadian system, the possibility to fail is high, considering that occupation is an unlawful act. In the United States, the possessor has no possibility to obtain compensation not even under the unjust enrichment doctrine.

In the former Socialist legal orders, the protection of property rights makes the owner prevail. In fact, in Croatia, Hungary, Slovakia and Russia he can sue in trespass, obtaining an ejection or an eviction order even through an urgent procedure. The owner can sue the possessors to recover the possession of the building and damages for the interferences caused by the occupation. Thus, analyzing the

legal issue under (a) we can state that property rights are not generally balanced against the right of housing; in Russia, this constitutional right influences only the removal of the levy applied to the debtor's housing property, while in Croatia, the protection of the right to housing can be claimed only against public authorities and not within private relationships. The presence of the children is not sufficient to change the solution to this case: in fact, in Hungary and Russia, a representative of the municipal guardianship body would intervene in the eviction procedure in order to take responsibility over the children and find for them an alternative housing solution. In Slovakia, the presence of vulnerable persons can sustain an argument for a possible infringement of human rights, assuming that eviction is contrary to "good morals".

The legal issue under point (b) does not present unexpected turns. In fact, the solution of the case is not influenced by the vacant condition of the building, because the *de facto* abandonment is not relevant if the period of time sufficient to acquire through adverse possession has not elapsed.

The families can obtain compensation for the ameliorations only in Slovakia, while in Croatia and Russia they cannot sue the owner because the improvements were necessary only for their own enjoyment of the building. In these countries, a possessor in bad faith can ask a compensation only if the ameliorations were necessary and useful for the owner.

4.2.2 Comparative Remarks

The answers show several common features. The first concerns a generalized impossibility to balance property rights with the right to housing, even if the building is vacant and the families are in need. The state of necessity is applied only in few countries and it generally works as a justification for criminal law only. The second shared element arises from the insignificance of *de facto* abandonment, so that in the legal systems investigated in this report, the right to use normally includes its negative version, i.e. the right not to use and therefore to abandon. Only in Brazil, the right not to use clashes with the social function of property and in Belgium, it can determine the application of an administrative fine. The third element is the lack—Belgium excluded—of temporary solutions to assign unused buildings in absence of a plan that describes their future development.

Some points still need clarification and would need an in-depth analysis. In particular, we have not sufficient elements to understand the relationship between civil and criminal remedies. Furthermore, judicial orders to remove the squatters are described as ejections or evictions, but no information is provided about the actual intervention of public force to execute the removal of the unlawful possessors. This is true even in this cases where a precise regulation of evictions has been introduces, as in England and Wales.

The possibility to obtain a compensation for the improvements of the building has been generally analyzed through two main categories: the good or bad faith of the possessor and the unjust enrichment doctrine. A related element taken into consideration concerns the necessity of the improvement. In order to compensate the evicted possessors or at least to reimburse their costs, the improvement must be generally necessary or useful for the owner. This criterion is incompatible with the possibility to compensate the bad faith possessor (as the squatter would be qualified), especially when the necessity of the improvement is evaluated ex post, by consulting the owner. The Italian solution from this point of view shows both originality and an objective criterion.

4.2.3 Right to Health

The factual case in Q2 presents a dispute similar to Q1; the different elements are (a) property rights collide with the right to health; (b) the vulnerable people are migrants. Their position is particularly delicate if they are "irregular". In this case, access to public health care could entail a risk for their permanence if doctors or health workers denounce their presence (which in most countries is required by law). For this reason, self-organized assistance, beyond the public service, can represent for irregular migrants the only possibility to be treated; (c) the building acquired a higher value because of the self-organized medical center. Thus, the owner takes advantage of someone else's efforts of urban regeneration.

Despite these elements, the solutions to this case do not present relevant differences compared to the answers to Q1.

In continental and non continental European legal systems, the owner would prevail against the unlawful possessors and the protection of migrants' health is not sufficient to defeat property rights in a balance test. In Italy, it could work as mitigating circumstance of the crime if the owner would decide to seek criminal prosecution of the occupiers; in The Netherlands, an emergency situation could be invoked by the occupants perhaps stressing the fundamental role of health care in the ECHR; nevertheless, according to the Dutch report, emergency would be very difficult to be demonstrated, because many alternatives are provided by public assistance, so migrants could easily have access to public health care. Still in The Netherlands, the abandonment of the building could be qualified as an abuse of rights, but this is certainly not a strong argument. In the Swedish report, the problem presented under point (b) is taken into consideration: access to public health facilities is ensured to irregular migrants and it is supported by a duty of secrecy for healthcare professionals in order to protect the migrant's privacy. In England and Wales, the non-profit medical clinic cannot prevail against the owner, but however,

refugees, asylum seekers and other particularly weak categories of persons are entitled to free medical treatment.

Among the post-colonial legal systems, we find only one solution of the case in favor of the occupiers. According to Brazilian legal theory, the report informs us, the owner who abandons the building infringes the social function of property, while the possessors carry in out in action. Moreover, because in Brazil migrants' access to public healthcare facilities is not ensured, the activities of the unlawful possessors are truly able to fulfill constitutional rights that otherwise would remain only on paper. In the South African report, the solution of the case needs clarification. It appears that in a conflict between property rights and right to health, the latter would prevail in the balance test. However, art. 27 of the South African Constitution protects right to health, but access to healthcare for irregular migrants, especially in ordinary situations when no emergency occurs, is not in practice guaranteed by this article. Moreover, the material effect of conceiving the eviction as "just and equitable" is not so clear. In Unites States, Canada and Quebec the owner would prevail and obtain an eviction order; we discover that in the US system, abandonment can concern only personal properties, so the vacant building of Q2 is just unoccupied. This condition does not prohibit the owner from excluding others and claiming possession.

The same picture seems to emerge by studying the answers of Croatia, Hungary, Russia and Slovakia. The prevalence of property rights over the right to health is clear. In Slovakia, the abandonment of immovable property is not possible, apparently because they are registered in the cadastre; nevertheless, a debate among legal scholars exists on this issue. In Croatia, the solution of Q2 involves profiles of criminal law, since helping irregular migrants is criminally punished.

The results of this analysis demonstrate that the balance test can determine a compression of property rights only if adverse possessors are defending their own rights. In fact, there is an evident distinction between the position of migrants that are beneficiaries and the role of the occupiers providing service for them. In two countries, the possessors even risk being persecuted for violation of zoning law (Germany) and for infringement of the Healthcare Protection Act (Croatia: the dwelling occupied is not adequate to organize a medical clinic).

4.2.4 Right to Food

In the factual case n. 3, the balance test involves the right to food. A private vacant land is transformed by a group of individuals (commoners) into a communal garden where fruits and vegetables are produced. The following conflict between ownership and possession involves the property of fruits derived from an activity not authorized by the owner. The solution of this case probably needs a preliminary study about the meaning of the right to food (let alone of food as a commons) but it seems from the answers that this is not (yet?) the framework of discussion in any legal system.

The ownership of fruits produced through an unauthorized and illegal activity is faced in very different ways but the results still clearly favors ownership. Generally speaking in fact, since this the conflict is not approached by the law as an issue of right to food, ownership of the land generally includes the right to keep its fruits even when the owner did not contribute any labor for their production.

In continental European legal systems, the owner generally would prevail when suing the possessors claiming the surrender of the land. In Germany, the cultivation of the vacant land plot is a special type of improvement, but the possessors are in bad faith, so they cannot obtain any compensation for their work. Moreover, according to the reporter, ownership of the land plot includes that of the fruits and the vegetables, before and after their separation from the soil. The meaning of the right to food is not clarified; it could prevail on property rights in theory but in Germany a variety of public financial supports make sure that people have not access to food so it would not be relevant in this case. In Italy, the owner can apply for recovering possession of the land plot and the possessors in bad faith must return the fruits and compensate the owner for those things that they have used before the starting of the judicial proceeding. In The Netherlands, instead, possessors can acquire the ownership of the harvest transformed in food thanks to the rule of "specification" which assign property rights to someone who has manufactured a new thing with materials belonging to another person. Without this process of transformation, raw materials—fruits and vegetables—belong to the owner. In Sweden, the cultivation of private vacant land is prohibited and it is not included in the set of rights that derive from the allemansrätt: in fact, people who roam on private land can only pick a reasonable quantity of berries or mushrooms, but the decision to cultivate belongs to the owner of the land plot. This report shows how the essential role of public assistance in excluding the possibility to identify the (otherwise relevant) state of necessity, since access to food is ensured by public authorities. In England and Wales, the Commons Act could protect urban gardens against the private owner if the plot is registered as a commons and the persons who take care of it have registered their right of common to cultivate garden as food source. Otherwise, fruits, trees and plants belong to the land's owner. The payment of a compensation for improvement to the land plot could be matter for a court, since any tenancy agreement exists in this case between the plaintiff and the defendants.

The former Socialist legal systems show very different solutions to this case. In Hungary and Russia, fruits and vegetables belong to the owner who can sue the possessors on the basis of unjust enrichment, because they took

advantage of an activity not authorized. Nevertheless, if the Court orders possessors to clean the land plot before leaving it, they can take away fruits and vegetables at that time grown. Croatia is the only legal system where the right to food would prevail on property rights, since it is essential for sustaining human life. Thus, if the cultivation of the land plot has ensured the possessors' survival, the state of necessity justifies their violation of the right of ownership. In Slovakia, the possessors who are forced to leave the communal garden can detach fruits and vegetables that they have planted. They can apply for a compensation only if the owner seeks damages.

In post-colonial legal systems, there is a general prevalence of property rights in the balance between ownership and possession, except in Brazil, where the social function doctrine would give to possessors the right to stay and use the land plot. Thus, they do not acquire property, but their dynamic use could be enhanced and protected. In South Africa, possessors have no action to obtain fruits and vegetable or to ask a compensation for their work. In this country, a special protection of the right to food does not exist, but specific public initiatives struggle against children' malnutrition. In the United States, according to the unjust enrichment doctrine, the squatters can apply for obtaining a compensation for the cultivation, while in Canada no remedy for the unlawful possessors exist. Finally, in Quebec, the rule is very similar to the Italian one: possessors in bad faith must return fruits and vegetables to the owner, while possessors in good faith could conserve them.

4.2.5 Culture

In the last factual case characterized by a conflict between (public) property rights and antagonistic possession, occupiers (commoners) use the violation of public property as a political tool to challenge the privatization of a public theater. This case comes from the Italian struggles for the commons organized after the successful referendum against the privatization of the water supply system. The best-known case is the occupation of the Valle Theater in Rome, where a group of actors (cultural commoners) occupied this ancient theater to avoid its privatization in June 2011. In this case, followed by many others through Italy, squatters organized cultural activities open to everybody in order to ensure inclusion rather than exclusion in dealing with culture as a commons. This qualitative standard, essential for the life of the commons, was achieved through an internal organization of the informal community capable of avoiding the development of a closed community excluding outsiders from participation in managing the public space. For this reason, we asked to national reporters to identify the best legal institution to organize an inclusive management of the commons should the squatters obtain permission to stay.

The solutions to this case show that commoners cannot legally defend their occupation that can remain active only trough political means. From the legal point of view, the public owner can easily evict them. Cultural productions as well as the involvement of the citizenship through open activities is not sufficient to allow them to stay and manage the theater. Thus, as far as the final solution is concerned, no difference exist between the infringement of private or public property. However, some (weak) remedies are available to contrast the public decision to privatize.

In Belgium, the decision of the municipality to privatize the theater can be challenged by the Region as supervising authority. The special protection reserved to the cultural and historical patrimony makes such an intervention likely to happen. Nevertheless, the public owner keeps the right to evict the actors, even if it is not easy to do so politically, especially when months or years pass. The occupation of the actors cannot be considered unlawful if they had the key of the building, and no break-in was committed. Culture is protected in the Belgian Constitution, so the actors could argue that their occupation is justified by the standstill doctrine. In Germany, eviction is not the result of a civil action: when the owner is a public authority, it is an administrative act, enforceable through the intervention of police units. The same legal framework is shared by the Italian legal system, where Prefects generally order eviction. Actors cannot challenge the public decision to privatize the theater because they do not have legal standing.

In England and Wales, the particular nature of the immovable and the connection with right to culture—that is not specifically regulated in the United Kingdom—do not introduce original elements to evaluate the behaviors of squatters. In fact, the occupation is a trespass and the eviction has to be implemented according to the Protection from Eviction Act. Nevertheless, if the theatre is an ancient monument according to definition of the Ancient Monument and Archaeological Areas Act—section 61 (12), citizens could try of apply for an interim injuction halting their eviction, while they challenge the decision to sell the theater.

The occupation of the theater is an unlawful trespass in The Netherlands, Sweden, Croatia, Hungary, Russia, and Slovakia. In all these countries, actors cannot legally defend their occupation. In Sweden, the only possibility they have is to demonstrate that eviction is an excessive measure considering that they are offering cultural services. Nevertheless, according to the national reporter, success seems unlikely. In Russia, the privatization can be challenged by the public prosecutor.

Only in South Africa among post-colonial legal systems, the actors would be able to defend their occupation by stating that it has been functional to maintain the cultural production, without determining costs for the municipality. In Brazil, the case appears difficult to imagine according to the reporter

because the function of the public building cannot be changed after the privatization. The theater could not be turned into a supermarket and so it would survive privatization. Nevertheless, the actors could defend their occupation by arguing the constitutional value of culture: this existential value prevails in the Brazilian legal system on exclusive patrimonial interests. In the United States and Quebec, the municipality can evict the actors since it has the right to possession and of discretionary exclusion. In Canada actors would prevail if they can demonstrate that the occupied theater is the only public space to organize performances and artistic activities. In this case, eviction would represent an infringement of the Charter of Rights and Freedoms and the proportionality of this measure must be demonstrated by the public authority.

The answers about the legal institutions that actors can deploy for managing the theater through an inclusive and participated structure show an important convergence among different legal systems. Non-profit organizations, foundations and trusts are the most diffused models, even if no reporter analyzes the basic features of these institutions that allow participation and protection in the interest of future generations.

4.2.6 Access to Nature

In this case, access to nature is analyzed not only with the aim of understanding the extent of the right to exclude, but also to investigate the role of customs and uses in the domain of the commons.

Q5 introduces a family who uses to roam in a green area during the weekend; the land plot and the lake within are sold to a corporation who decides to transform the area in a country club, making access to nature impossible. This plan is challenged by an environmental group seeking to protect access to natural commons.

In continental European legal systems, different legal strategies are possible to defend access to the green area, but the legal standing of the environmental group seems problematic.

Although a special right to roam is regulated in Sweden and in England and Wales only, the other countries of this group present different remedies to protect access to nature. In fact, forms of access are ensured by public paths (Belgium), rights of common usage that include access to free landscape for recreational purposes (Germany), public rights to way (Italy), limited forms of right to roam (The Netherlands).

In particular, in Belgium, the family (and other inhabitants of the area) rather than the environmental group can sue the corporation in front of the justice of the piece in order to limit her right to enclose the green area through fences. They must demonstrate that during the ages a public path has been consolidated, thus the plan to enclose the green area infringes the common heritage. Similarly, in Germany, individual members personally affected by the decision of the corporation can challenge the decision to enclose the area. They must demonstrate that the green is included in the “free landscape”, a concept that is not explained by the reporter. In Italy, public rights of way can be acquired through adverse possession. The plaintiffs suing the corporation must demonstrate a 20 years-long use of the path to cross the private area. In this case, the public rights of way work as a burden that follow the land plot, so that the new owner cannot refuse access. In The Netherlands, the right to roam on somebody else’s land is admitted only if the owners are not using the land, but fences are sufficient to indicate the interest of the owner to exclude others. Obviously, the most complete solution is given by the Swedish legal system, thanks to the allemansrätt: the corporation cannot exclude families from the green area. She can only apply for obtaining an order that prohibit them from disturbing beyond the point of tolerance. Families can claim their allemansrätt asking to the judge for ordering to the owner the open of a gate to give public access to the area. In England and Wales, the solution of this case depends on the classification of the private land: the Commons Act can protect their access if the private land has been registered as open access land and the CRW can intervene if the land has been designated as place of outstanding natural beauty.

Among former Socialist legal systems, only Croatia admits special forms of right to roam. Although access to nature does not exist as a general institution, the Nature Protection Act identifies exceptions to the power to exclude by defining a set of cases and types of private property affected by such limitation. It is not clear if the situation described in Q5 corresponds to one of the hypothesis regulated in the NPA. However, the reporter states that walking and playing can support an acquisition by adverse possession of an easement that is not further defined but that is probably similar to a public path. In Russia and Slovakia access to nature is possible only in natural parks or public green areas. In the Russian legal order, families can apply for a servitude of passage because of the presence of the lake that belongs to the public domain; they can ask to the public prosecutor for intervening in the legal proceeding. In Slovakia, the right to free passage can be acquired through long time possession but possessors must be in good faith.

In every legal system thus far considered, legal arguments are based on the existence of uses and customs that support public access. Thus, access to nature is indirectly ensured through legal solutions stemming from a variety of fields of private law. Similar solutions are not possible in Brazil, South Africa, the United States and Quebec. Only Canada displays remedies and legal tools similar to the continental European ones.

In particular, in Brazil, the right of free passage can be established for ensuring access to public roads and water sources only; similarly, in South Africa access to private property is not possible and in the factual case the right to roam must be authorized (maybe implicitly tolerated) by the former owner. The corporation can legitimately revoke the consent and enclose the green area. In the United States, the acquisition through adverse possession of a right to walk cannot be demonstrated because families did not possess in an exclusive (hostile) way and the owner was not excluded from the green area. In the Canadian system, families can argue the consolidation of a public right of way, whose essential elements are: the dedication, that is the opening by the owner to the public use and the acceptance of the public. These features can derive also from a long and open use of the green area, so it is not necessary to have any formal declaration or act.

4.2.7 Partial Final Remarks

These answers demonstrate that access to nature can limit the right to exclude of the owners only when supported by the development of special uses or easements. For this reason, the passing of time is fundamental, because most of the answers shows that the best solution is the acquisition through prescription or adverse possession. According to this framework, we could conclude that access to nature cannot be protected if it is a recent practice except in those legal systems that establishes special rules for the conflict between access and exclusion.

Another interesting element is the role of environmental associations. Few reporters analyze its standing, because the majority of them think that persons directly affected by the transformation of the green area can directly sue the corporation. This approach is justified by the facility to demonstrate their interest in promoting the judicial proceeding while such an interest of the environmental group is less obvious. In some reports, the association can sue the corporation claiming the infringement of environmental laws, because the country club can produce a negative environmental impact. The environmental groups could also sue for violation of zoning laws or of procedural requirements to obtain building permissions.

4.3 Access to Water

Q4 (a) and Q4 (b) aim at investigating access to water in urban and rural contexts. As showed in the introduction of this report, water is a commons and the first part of the questionnaire has already showed that legal systems generally classify it as a public good or a res communis omnium. These factual cases seek to understand the material implications of those classifications, focusing on access to water and uses of the resource.

4.3.1 Rural Context

In Q4 (a), the case presents a diversion of the river, whose waters are used by the nearby villages through local aqueducts and irrigation canals. A corporation diverts the course of the river, so water no longer flows to villages' basic infrastructures, making cultivation and other activities impossible. The aim of the case is to investigate the legal title to use water and what kind of use prevails in the described dispute. The most problematic issues occur when both activities have been correctly authorized. In all continental European systems, both parties need a public permit to use the water of the river that belongs to the public domain. Some distinctive legal traits can however be identified. In Germany, villagers must obtain public authorization if they do not own the lands over which the water flows. Thus, we can derive from this statement that private waters exist and in this case the owner can freely use the river. The activity of the corporation can be stopped if it has caused the diversion. Thus the prior-appropriation water rights doctrine according to which the first person to take a quantity of water from a water source for beneficial uses (agricultural, industrial, household) has the right to continue to use it seems to be the law. With regards to this point, no information is provided by the Italian report who specify that both the parties need a permit to use the water of the river. If waters are not public, the judge can solve the dispute by applying art. 912 of the Italian civil code. This rule establishes a balancing test according to which the judge must conciliate the opposite interests of the parties; the riparian owner who must tolerate the compression of his right to use can obtain a compensation. In The Netherlands, water is a res communis omnium, so the dispute concerns opposite rights to use, since ownership cannot be introduced. Villagers can use water through the irrigation canal if they own the lands along the river without demanding a public permit, while this latter is necessary in case of building of an aqueduct. Villagers would prevail on the corporation because of the priority of their use. They can challenge the corporation in court to stop activity, claim compensation for the suffered damages (that the diversion has caused) and having the river flow restored. In Sweden, both the parties need a public authorization to use water, that can be granted if the disadvantages from an environmental, economic and health perspective do not outweigh the disadvantages. Thus, the prior use of the villagers matter as the disruption of the waterflow can be considered a serious disadvantage from a social and economic point of view.

In England and Wales, access to water is a fundamental right and rights to access and use water are recognized in custom and common law. In particular, three categories of uses have been described in the decision *Swindon*

Waterworks Co Ltd v. Wilts & Berks Canal Navigation Co Ltd (1875). A first form concerns the use of water for domestic reasons and watering livestock, while it does not cover industrial purposes like spray irrigation. Any kind of restriction can be applied to this form of use that describes a riparian right. The second form concerns extraordinary or secondary purposes and it gives raise to right. The last form is not connected with a riparian right and concerns purposes foreign to or unconnected with the riparian tenement. Beyond this riparian rights described by the common law, others have been identified and regulated in different statutes that limit the common law riparian rights. According to this legal framework, villagers can apply against the corporation for protecting their riparian rights, but statutes could limit their claim. Moreover, villagers have practiced the second type of use and even if they have a right on water, its protection is particularly difficult. The prior-appropriation water rights legal doctrine is applied also in the former Socialist legal systems, where villagers will prevail over the corporation, obtaining the restoration of the flow as well as a compensation for damages. Similarly, Russia, Croatia and Slovakia share the need of a public authorization to build an aqueduct. In particular, in Slovakia the permit is linked to special use of water, while its general use is free. In Hungary, rivers are national assets, so the diversion of their water represents a violation of the national law. In the post-colonial legal systems, the set of remedies is not original, although the type of use has a more important role in defining the dispute. In Brazil, water is a public good that is able to support multiple uses. The Brazilian civil code states that people who are not supplied with water, have a right of vicinage that give access and the right to use (arts. 1293–1294). According to this provision, the diversion can be prohibited because damages villagers' access to water and the fulfillment of their basic necessities. From the South African report, the solution of the case is not evident: the prior-appropriation water rights doctrine could be applied if the activity of the villagers is legal and this depends on the period in which they have built the irrigation canal and the local aqueduct. In fact, before 1994, running waters could be owned by private subjects, so private infrastructures to canalize it were admitted. After 1994, a reform established that water is a resource common to all, so property rights cannot be allocated. Public authorities can only authorize the private use of the resource. Thus, if the villagers have built their irrigation canal and aqueduct after this reform and without a special public permit, their activity is unlawful and it could be defeated by the corporation. In the United States, villagers can sue the corporation arguing that the diversion constitutes a private nuisance; they must demonstrate their interest in land that determines the title to use water, considering that the legal classification of this resource changes according to national jurisdictions. If the damage of the diversion has been suffered by the public, in general, rather than individuals, villagers can sue for public nuisance, arguing that the corporation has endangered their life, safety, health and property, obstructing the enjoyment of a right common to all. They can file a citizen action or a class action and ask for an injunction to stop the diversion, the restoration of the river flow and a compensation for the suffered damages. In Canada, the villagers can sue the corporation and obtain a permanent injunction to stop the unreasonable diversion of water carried out by the corporation. The diversion is "unreasonable" because it has reduced the flow of the river in quantitative and qualitative terms, infringing the limit that federal regulation establishes for extraordinary uses of water. In fact, the Canadian legal regime of water identifies ordinary uses, that are domestic or animal, and extraordinary uses which includes irrigation and manufacturing. If both the parties have been authorized by the public authority to use the river, the dispute would be solved according a variable criterion of priority. In particular, priority of use will be assigned to the upstream riparian owner; in some provinces this decision is influenced by the kind of use, because the domestic use of water generally prevails on agricultural or commercial purposes. Finally, villagers can stop the diversion even in Quebec, by suing according to articles 980, 981 or 982 of the civil code. Art. 980 states that the owner of a spring, a lake or a pond can use them but must preserve their quality; art. 981 concerns running water and prohibits the owner from changing in quality or quantity the regular course of the water that leaves his land. The owner is also enjoined from preventing other riparian owners from exercising the right to use water. Finally, art. 982 states that "a person having a right to use a spring, lake, sheet of water, underground stream or any running water, may prevent the water from being polluted or depleted" and requires "the destruction or modification of any works by which the water is being polluted or depleted".

The answers demonstrate strong commonalities of regime among the legal systems considered. In particular, the prior-appropriation water rights doctrine seems to be the most diffused solution to reconcile opposite interests in the use of water. This kind of approach is not influenced by the legal classification of water. In fact, even where the river can be considered as a private good, the diversion is prohibited and the prior use prevails. Scant attention is reserved to the type of uses: Canada and Brazil are the only systems in which the private use of water is classified according to the typology of use and such classification can influence the solution of the case. This kind of approach could be important in those situations in which the prior use belongs to a corporation that uses water for industrial activities: in this case, in fact, villagers who divert the river to fulfill basic needs may lose against the corporation. For this reason, the best rule to govern conflicts for the use of water derives from a mix of

criteria. The prior-appropriation water rights doctrine might be completed by a focus on the use of water, giving priority to household uses and agricultural essential activities, and by a balance test to reconcile opposite interests like in the Italian solution disciplined by art. 912 of the Civil Code. This complex mechanism would be able to give a strong protection to access to water.

4.3.2 Urban Context

Access to water in urban contexts depends on the universality of the water supply system. In other words, access is connected to: (1) a material condition, that is the capability of the pipelines to distribute water everywhere, even in those areas where the costs of the distributions exceed the profit; (2) an economic standard, according to which the price of water must exclude profits and be reasonable.

In Q4 (b), the water supply system is managed by a private corporation and the price of water suffers an increase of 200% in 1 year; the three users of our case fail to pay the water bill and after the third bill not paid, the corporation cuts off their access to water.

Among the continental European legal systems, only in The Netherlands the users would fail in the lawsuit against the corporation. Here, only users who can demonstrate to be vulnerable people are protected by special rules against the detachment of water. Germany, Italy and Sweden exclude that the corporation can cut off access to water. In particular, in Germany and Italy, the private supplier is not completely free in fixing the price of water because public standards exist. Furthermore, German users can legitimately refuse to pay the bill and complain the unreasonableness of the price, demanding a civil court to fix a new rate. The corporation can defend the increase of the price by demonstrating that it depends on special works or investments to improve the water network. The Italian users can sue the provider before administrative court if the price is not consistent with the public standards, while they can apply for civil remedies against the cutting off. In Italy, the cutting off is possible only if the users do not pay a sum equivalent to 1 year provision of the minimum quantity of water (50 L/day). However, this quantity must be provided even if the users are not able to pay the bill, because it is the minimum quantity of water necessary to survive. The most interesting solutions comes from Sweden, where this kind of dispute seems to be only an abstract problem. In fact, the water supply system cannot be managed by a private entity and the price of water cannot exceed the costs required to arrange and run the water distribution: thus, profit is excluded from the water supply system. Similarly, the complete cutting off is not admitted. Any information about detachment is provided in the report of England and Wales, where significant social benefits are regulated to support people in need. In former Socialist legal systems, the detachment is limited by procedural devices only. In fact, in Croatia and in Slovakia, the provider must communicate the detachment with a notice. In Croatia, the users can prevail by demonstrating that the corporation has not sent the notice, so that the detachment is irregular. The most rapid remedy is a possessory action. After the notice, the failed payment of two bills is sufficient for regularly cutting off access to water. In this country, the public authority fixes a maximum rate to the price of water and the provider cannot exceed the 60% of this basic sum. According to the Croatian report, in the last year, disputes similar to Q4 (b) have been recurrent, because of the increase of poverty caused by the economic crisis. Nevertheless, vulnerable people who respond to precise public standards can ask for public assistance and obtain free access to water.

In Slovakia, the system is more severe: in fact, after the notice, the user must pay within 30 days to avoid the detachment. The price of water cannot be challenged, if it has been approved by the Network Industries Regulation Authority. In Russia, users would fail, because cutting off access to water is admitted and legal after two payments failed; no notice is necessary and the provider can execute the detachment in 1 day. However, the price of water can be challenged before an administrative court, being fixed by public authorities. In Hungary, access to potable water is regulated in the Fundamental Law of Hungary (art. 20) and according to Act CCIX adopted in 2011, the household private use of water has a priority against industrial use in cases of scarcity. The (public or private) provider of the water supply system can cut off access to water only after 60 days of delay in the monthly payment and only after two written warnings. In post-colonial legal systems, users generally will prevail against the corporation if it has not sent the notice of detachment. In Brazil, the users can argue such procedural irregularity, while if the cutting off has followed a regular notification, they can only try to demonstrate that access to water is essential to enjoy other basic services. The detachment is not possible for schools, hospitals and health stations. In the United States, Canada, Quebec and South Africa, the absence of the notice is the only argument for the users who sues the corporation; thus, cutting off cannot be obstructed if the procedure has been followed by the provider. In South Africa, the only guarantee is a basic allowance of water that must be provided in any case (42 L/day). The national reports demonstrate that access to water in urban context finds a sufficient protection only in continental European legal systems, where the right to water has a role in the dispute against the provider, even if it is not generally applied explicitly as an argument to defend the failed payments. In the other legal systems analyzed, users are protected only by procedural formalities, so the notice ensures a sort of due process. The relationship between users and providers are governed by contract and it seems

that constitutional rights rhetoric does not have much of an impact. One must consider that the right to water is not an autonomous constitutional right but it can be extracted from the right to life or to health.

4.4 Informal Communities and Future Generations

As we said in the introduction to this second section, the factual cases n. 6 and n. 8 aim at investigating collective remedies to defend territory and climate.

4.4.1 Territory

In Q6, villagers try to stop mining operations carried out by a corporation and authorized by the government through a permission to drill for gold. The reporters were required to identify the legal actions that the villagers can promote as individuals and as community to oppose activities that seriously risk to pollute the territory and the nearby river.

In continental European legal systems, the villagers' possibilities to succeed are very limited, because of the presence of a public authorization given by the Government.

In Belgium, Germany, The Netherlands and Sweden, the villagers can challenge the public permit, demonstrating irregularities in the administrative procedure or the infringement of environmental standards. Villagers can apply for individual remedies, while the community as an informal subject does not enjoy legal standing. In Belgium, Germany and Sweden, environmental associations can file a lawsuit but they must demonstrate a direct interest in the protection of the river. In the Italian report, there is an important reference to the precaution principle, according to which the villagers can apply for stopping the mining operations because of the risk of pollution. Individual citizens and associations that work in the field of environmental protection can file first before the Minister of the Environment and then, before an administrative court. The association must demonstrate to be suing representing a widespread interest.

In Croatia, the villagers can discover the levels of pollution by asking for an inspection before starting the civil lawsuit. They can sue for an order to remove the risk of harm but the judge can deny protection arguing that mining operations and the corporation activities are "socially useful" (art. 1047 Obligation Act). This clause is not clear and legal scholars disagree about its content. However, in Q6 the government has authorized the activity of the corporation, so that it is quite difficult to challenge its social utility. Thus, the main legal issue arises from the risk of polluting, because if pollution was actual, the villagers could sue the corporation in private nuisance in order to enjoin future polluting activities. This remedy is residual, so the users can apply for it only if other legal tools are not available; in this case, the plaintiffs can challenge the public permit before an administrative court. In Russia, no preventive action is admitted and an actual damage must be demonstrated to challenge the public license. This act generally establishes precise environmental standards and their infringement can determine the revocation of the license, as occurred in a real case in 2012. The villagers can sue as individuals or as co-claimants and they can ask the public prosecutor to assist them.

In post-colonial legal systems, the solutions to the case are variable. In South Africa, the villagers can sue the corporation arguing a threatened breach of the National Environmental Management Act that protects against risks of polluting and of negative impact on the environment. Class action is admitted for the infringement of a constitutional right if the villagers are able to demonstrate that mining operations have violated their right to life, health or environment. In the United States and in Canada, private or public nuisance are legal action that could offer remedies to the villagers. Nevertheless, the chances of success of a public nuisance suit are quite limited, considering that the government has authorized mining. In Quebec, the mining activity cannot be stopped and the villagers can ask for an injunction only if the damage is serious and irreparable.

The results of the analysis of these answers show that the endangered community has no legal action, which demonstrates a general diffidence towards collective remedies. Moreover, the risk of polluting is not sufficient to obtain protection and only in the Italian report the precaution principle is mentioned as legal base of prevention.

4.4.2 Climate

This reluctant approach emerges in Q8, too. This case has been defined mixing elements from the Volkswagen emissions scandal (concerning the manipulation of computer system for the control of emission in cars) and the famous Urgenda case. The plaintiffs are 18 years old, they do not own a Popcar but they want to sue both the government and the car manufacturer in the interest of future generations, complaining the feeble sanctions inflicted by the first to the latter. The point of this case is not the amount of the sanction but what this sum symbolizes, that is a scarce engagement of the government in protecting climate, the environment and the interest of future generations. Thus, it is easy to find the weak point of the case: the legal standing of the plaintiffs. The reporters were required to explain how they can succeed in a civil lawsuit, starting from their particular condition of teenagers. In continental European legal systems, the young plaintiffs would generally fail against the car manufacturer, because they do not own a Popcar, so no legal relationship exist. The lawsuit against the government can have different solutions. In fact, in Belgium, this kind of action is possible and a similar case is actually pending. Indeed, the association

Klimaatzak, following the model of Urgenda, has suited the State and three Belgian regions for the absence of efforts to fight against climate change. The association has argued the defendants' fault (art. 1382), the breach of the precaution principle, the infringement of art. 23 of the Belgian Constitution and art. 743 of the Belgian Civil Code that protects res communes. The solution to this case is very interesting, because commons are directly involved. In Germany, the plaintiffs can sue the public authority responsible in the region where they live if the standards fixed in the clean air plan have been exceeded by the emissions of Popcar. However, they cannot challenge the sanction because the government can discretionary determine its amount. In Italy, instead, this kind of challenge is admitted by art. 310 of the Environmental Code: the plaintiffs demonstrating to be directly affected by the environmental damage produced by the polluting of Popcar can challenge the sanction as too feeble and not proportionate. In The Netherlands, thanks to the Urgenda precedent, the plaintiffs can sue the government arguing under tort law that the emissions of greenhouse gases and the climate change affect their life. This action is based on the idea that the protection of constitutional rights impose on the government a duty to take positive measures, so actions to prevent climate change must be adopted by public authorities. In Sweden, the plaintiffs cannot challenge the sanctions imposed to the car manufacturer, but they can complain the eventual infringement of the standards established in the environmental quality regulations. They must be able to demonstrate that they have been directly harmed by this infringement, otherwise the damage represents only a hypothetical scenario that is not sufficient to justify their legal standing. The reporter mentions a lawsuit promoted by a network of associations against the government to challenge the decision to privatize a public corporation engaged in mining operations. In that case, the plaintiff argued that privatization increased the risk of polluting, but his interest was not considered serious, because no actual harm existed.

The existence of specific statutes that protect environment or the quality of air is the necessary condition for Croatian plaintiffs to sue the government. Without this kind of rules, they have no possibility to succeed. In Russia, instead, citizens can sue the government assisted by the public prosecutor, because they can defend the environment independently from an actual harm to their health or property rights. In these countries, the plaintiffs cannot sue the car manufacturer, because they do not own a Popcar and remedies of contract law cannot be applied.

The Russian solution is shared by South Africa, where plaintiffs can sue for an infringement of their right to a healthy environment. Nevertheless, no precedent exists and the reporter was consequently able to define their possibilities to succeed.

In the other post-colonial legal systems, we find the same legal issues. The plaintiffs are not consumers and they cannot sue the car manufacturer. In the United States, (Oregon case law) no legal action can be promoted because the injury complained by the young plaintiffs is not concrete, particularized, actual or imminent, thus the harm is only conjectural. In Canada, according to the reporter, the plaintiffs can argue a public nuisance against Popcar, even if the burden of proof is not too easy. Finally, in Quebec, the legal action is connected to an infringement of the standards fixed by art. 19.1 of the *Loi sur la qualité de l'environment*, that enlarges the *locus standi*.

As already demonstrated in other sections of this report, the protection of the interests of future generation is particularly difficult because the notion of legal standing is very strict. The burden of proof to demonstrate a direct interest and an actual and concrete harm makes these kind of legal remedies useless, while a direct application of Constitution seems to be the best solution to force government to adopt positive strategies of protection. Moreover, another problematic point arises in the relationship between commons and contract law. In fact, in Q8 the plaintiffs have no legal remedies against the car manufacturer because they are not consumers, they do not have signed a contract of sale with Popcar. The defense of the commons ask for a paradigm shift not only in property law but also in contract law whose privity doctrine limits the protection of constitutional rights. In fact, present and future generations are affected by a damage that derives from the production and the circulation of cars that is made possible through many contracts of sale. Thus, in the current marketplace the effects of contracts are suffered also by subjects who are external to a contractual relationship.

5 Conclusive Remarks

The study of the answers included in national reports shows a complex picture. In fact, we could say that the national reporters are aware of the legal transformations implied by the rise of the commons, even if this category is not regulated or object of an academic debate. The problems included in the analytic version of the commons and summarized in the introduction are generally shared by different legal orders. Privatizations show a general weakness of the public domain in the relationship with private entities. Moreover, there is a necessity to identify inclusive strategies through which carry out a redistribution of resources. The limits of public property clearly appear in front of such challenges.

The answers to the open questions dedicated to the conflicts between property rights and other constitutional rights generally admit a balance test, whose result cannot be taken for granted in favor of the private owner. The solutions

to the factual cases, however, clearly show the might of ownership especially if the possession derives from an unlawful act. The relationship between property and possession is therefore not so dynamic and constitutional rights struggle to find an effective protection.

Nevertheless, we think that this kind of scenario is not completely negative for the rise and future of the commons, since it is still dominated by a complete trust in the welfare state that is however increasingly betrayed. This is the other contradictory result that emerges from comparing the answers to the open questions—where the role of the public domain is criticized—with the solutions to factual cases, where the infringement of property rights is generally considered not justifiable because the public assistance is assumed able to fulfill basic needs.

The weaker profile of the commons concerns legal actions to protect them. All the legal systems analyzed adopt a very strict notion of *locus standi* and prefer to assign the protection of diffused interests to environmental associations or government agencies. Individual actions are thus generally the prevailing solutions, while future generation who do not actually exist cannot find for the time being any form of protection.

Ugo Mattei is Professor of Civil Law at the University of Turin, Department of Law and Professor of Comparative Law at the Hastings College of Law, California. He is research fellow at Collegio Carlo Alberto (Turin).

Alessandra Quarta is Assistant Professor at the University of Turin, Department of Law and Director of Research at the International University College of Turin (IUC).