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The protection of publicly owned land from acquisitions through long-term possession

<https://doi.org/10.1515/eplj-2020-0002>

1. Introduction

Land is an essential resource for public administration and infrastructure. Even fallow land that happens to be publicly owned may prove to be useful in the future, even if only as a source of revenue when the land is sold to developers. Poor administration and management of publicly owned land, however, may result in citizens occupying publicly owned land. In many jurisdictions, the user of another person's land may acquire that land after a certain period of time, provided that the non-owner's physical control is strong enough to qualify as what is called '(proprietary) possession' in most jurisdictions.¹ In common law jurisdictions, an acquisition through long-term possession is based on 'adverse possession'. In civil law jurisdictions, the functional equivalents are, for instance, 'acquisitions by prescription',² *Ersitzung*,³ or *usucapione*.⁴

Many jurisdictions protect publicly owned land better from a non-owner's long-term possession than privately owned land and prevent public bodies from being deprived of their ownership.⁵ This raises the question of why, how and to

1 See, for instance, § 900, 872 German Civil Code (*Bürgerliches Gesetzbuch*; BGB); and Art. 3:99, 105 and 107 of the Dutch Civil Code (*Burgerlijk wetboek*; BGB). Note that the concept of 'possession' is unknown to Scandinavian jurisdictions.

2 Art. 3473 and 3486 Civil Code of Louisiana.

3 § 900 BGB.

4 Art. 1158 and 1159 Italian Civil Code (*Codice Civile*; CC).

5 This is an insight from the running 'Common Core of European Private Law' project on 'Acquisitions of Land through Long-Term Use' in 20 jurisdictions, of which the author is the co-editor and reporter for Germany. The author expresses his sincere gratitude to Dr Francesco Mezzanotte, that project's reporter for Italy, for exchanging thoughts on the Italian law on acquisitions through long-term possession.

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what extent different jurisdictions protect publicly owned land from acquisitions through long-term possession. This question prompts a deeper analysis, comparison and evaluation of the protection mechanisms that jurisdictions use to protect publicly owned land from acquisitions through long-term possessions.

Sections 2 to 7 of this Article provide an analysis of the different mechanisms whereby various jurisdictions protect publicly owned land from acquisitions through long-term possessions. In Section 8, a comparison and a normative evaluation, involving a ‘law and economics’ analysis, are made of these approaches. Section 9 concludes this Article.

2. No acquisition of publicly owned land

Some jurisdictions ban all acquisitions through long-term possession of publicly owned land or land that is owned by specific public bodies. These jurisdictions do not distinguish between good faith possessors and bad faith possessors, nor do they only protect publicly owned land with specific functions.

South African law is an example of such a jurisdiction. Under the Prescription Act, a possessor can acquire the ownership of land if s/he has possessed the land openly and as if s/he were owner for an uninterrupted period of 30 years.⁶ However, Section 3 of the State Land Disposal Act⁷ has banned the acquisition by prescription of state land, which includes land owned by other public bodies than the Republic of South Africa. In addition to this protection, publicly owned land meant for use by the public is a *res publica* and non-negotiable.⁸ This means that even if the State Land Disposal Act did not exist, that land could not be acquired by prescription.

Alberta, a province of Canada, is another example. Under the law of Alberta, when the owner reclaims the possession of the land, the non-owner can defeat the owner’s claim after ten years of adverse possession.⁹ During the whole of the ten-year limitation period, the exercise of physical control must be “open and notorious, adverse, exclusive, peaceful (not by force), actual (generally), and continuous”.¹⁰ No distinction is made between adverse possessors acting in good faith and other adverse possessors. Once the claim of the owner has prescribed, the

⁶ Section 1 Prescription Act, No. 68 of 1969.

⁷ No. 48 of 1961.

⁸ C.G. van der Merwe, ‘Things’ in W.A. Joubert & J.A. Faris (eds), *LAWSA*, Vol. 27 (2nd ed, Lexis-Nexis 2014) para 32.

⁹ Sections 3(3)(f) and 3(6) Limitations Act.

¹⁰ Supreme Court of Canada, 17 February 2017, *Nelson (City) v Mowatt*, 2017 SCC 8 (CanLII).

adverse possessor can obtain a court judgment quieting the registered owner's title. Subsequently, the adverse possessor can apply for a certificate of title from the land register.¹¹

The ownership claims of the Province of Alberta and municipalities in Alberta are not subject to the rules on adverse possession. Section 3(4)(a) of the Limitations Act and Section 4 of the Public Lands Act ban acquisitions of Crown land and other public land through adverse possession. Section 609 of the Municipal Government Act further stipulates that adverse possession has no effect on the ownership of municipal land.

The protection mechanism used by these jurisdictions is very simple. They ban acquisitions through long-term possession of publicly owned land or land that belongs to certain public bodies. The intention behind this ban is clearly to protect the assets of public bodies and, incidentally, the capacity of the state to perform public functions on this land. It depends on the quality of the land information system in the respective jurisdiction whether it is easy to determine the owner of the land, particularly of smaller pieces. However, once it is clear who the owner of the land is, there is no doubt whether the land can be acquired through long-term possession.

3. Only acquisitions of publicly owned land in good faith

On Curaçao and Sint Maarten, which formed part of the former Netherlands Antilles, possessors who do not act in good faith cannot acquire publicly owned land by prescription. These islands largely adopted the provisions of the Dutch Civil Code (*Burgerlijk wetboek*; BW). They also adopted Art. 3:99 to 3:106 BW on acquisitions by prescription. This means that a non-owner of the land who has possessed the land in good faith for ten years acquires the land by prescription. Under Dutch and Antilles law, possession refers to the exercise of physical control for oneself or as if the non-owner were owner.¹² This good faith acquisition on the basis of Art. 3:99(1) BW is called an acquisition by acquisitive prescription. Dutch and Antilles law also foresee acquisitions by extinctive prescription. If the owner lost their possession exactly twenty years earlier, their action to reclaim posses-

¹¹ Section 74 Land Titles Act.

¹² Art. 3:107(1) BW; E.B. Rank-Berenschot, *Bezit* (Kluwer 2012) 3; and J.E. Jansen, *Bezit te kwader trouw, verkrijgende en bevrijdende verjaring* (Boom 2011) 270 *et seq.*

sion (*rei vindicatio*) will prescribe.¹³ Whoever is the possessor of the land at that very moment, will acquire ownership on the basis of Art. 3:105(1) BW.

Recently, Curaçao and Sint Maarten introduced Art. 3:106a BW, on 1 January 2012 and on 1 April 2014, respectively. This provision¹⁴ bans the acquisition of publicly owned property by possessors who knew or can be reasonably expected to have known that the occupied land was the property of a public body. This ban is not subject to any other requirements; in particular, the publicly owned land does not need to perform a special function in the public interest.

The explanatory memorandum on Art. 3:106a BW sheds light on its background. The islands have vast uninhabited landscapes. Public bodies condone the use of that publicly owned land. Some inhabitants fenced in parts of that land and later claimed the acquisition of the land by prescription. This has given rise to uncertainty on whether such a non-owner using the land is a possessor or a mere *detentor* (i.e., holder for somebody else) for the public body.¹⁵ To resolve this uncertainty the legislature has chosen to ban altogether acquisitions of publicly owned land by possessors who do not act in good faith.¹⁶ Practitioners state more generally that inhabitants often use publicly owned land and that public bodies omit to enforce their ownership.¹⁷ To avoid the loss of land by prescription on a large scale, the legislature has banned all acquisitions of publicly owned land by prescription, except for good faith acquisitions.

The differentiation between *bona fide* possessors and those who do not act in good faith means that the definition, interpretation, and application of ‘good faith’ are essential to the protection of publicly owned land from prescription.¹⁸ Under Dutch and Antilles law, acting in good faith means that the possessor believes and does not need to doubt that s/he is the owner.¹⁹ Regarding immovable

13 Art. 3:306 BW.

14 Art. 3:106a BW reads as follows: “Ten behoeve van een bezitter die wist of behoorde te weten dat een onroerende zaak of een recht waaraan deze is onderworpen toebehoort aan de overheid, is met betrekking tot die zaak of dat recht jegens de overheid verjaring uitgesloten.”

15 See, for instance, a judgment of the Court of Justice of the former Netherlands Antilles: *Gemeenschappelijk Hof van Justitie van Aruba, Curaçao, Sint Maarten en van Bonaire, Sint Eustatius en Saba*, 2 February 2018, ECLI:NL:OGHACMB:2018:31.

16 *Afkondigingsblad* (Gazette) Sint Maarten, Landsverordening, 9 January 2014, No. 2014/15, pp. 82 *et seq.*

17 N. Joubert & C. King, ‘Verjaring overheidsgrond’ in *Wijzigingen BURGERLIJK WETBOEK* (VanEps, Kunneman & Van Doorne 2012) 25.

18 The analysis of the good faith requirement draws on the analysis in B. Hoops, ‘Legal Certainty is Yesterday’s Justification for Acquisitions of Land by Prescription. What is Today’s?’ [2018] EPLJ 182–208.

19 Art. 3:118 BW.

property, the possessor will never be in good faith if s/he claims to be ignorant of information contained in the public records (*Openbare registers*).²⁰ The public records are a repository of notarial deeds and other legal documents concerning the legal status of, amongst others, immovable property.²¹ If the non-owner possesses somebody else's land not adjacent to their own or a substantial part of an adjacent parcel, s/he will generally not act in good faith because s/he can infer the identity of the owner of the land from the public records. The possessor would only be in good faith if a notarial transfer deed was registered in favour of the possessor on the basis of a void (or avoided) contract and the possessor believed on reasonable grounds that the transfer was valid.²²

However, neither notarial deeds nor the other registered documents include detailed information on the boundaries of a parcel of land.²³ The land register (the *Basisregistratie Kadaster* in the Netherlands; the *kadastrale registratie* on the Antilles) provides maps on the basis of the information contained in the public records and surveying records.²⁴ There is, however, no obligation for the possessor to check the land register. If the non-owner only possesses a small part of somebody else's parcel that is adjacent to their own, s/he might therefore act in good faith. If the possessor moved the boundary of their parcel and expanded it on their neighbour's parcel, s/he will not act in good faith.²⁵ If the possessor purchased the unlawfully used land from the previous owner of their parcel and that land physically formed a unit with the parcel, s/he will generally act in good faith.²⁶ Only if there is an indication in the physical environment of the land that the possessor makes use of somebody else's land, will s/he have to consult the land register or otherwise not act in good faith.²⁷

20 Art. 3:23 BW.

21 A.A. van Velten, *Privaatrechtelijke aspecten van onroerend goed* (6th ed., Kluwer 2018) 381 *et seq.*

22 C.J. van Zeben, J.W. du Pon & M.M. Olthof, *Parlementaire geschiedenis van het nieuwe burgerlijk wetboek, Boek 3, Vermogensrecht in het algemeen* (Kluwer 1981) 409 *et seq.*; and Van Velten (note 21), 418 *et seq.*

23 This is only obligatory if a parcel is split: M.H.G. Giesbers, in W.D. Kolkman & L.C.A. Verstappen (eds), *Handboek Registergoederenrecht 18/19, Deel 1* (Walburg Pers 2018) 163 *et seq.*

24 See on the more advanced Dutch system: W. Louwman, in Kolkman & Verstappen (note 23) section 7.3.

25 Hoge Raad (HR), 20 February 1987, ECLI:NL:HR:1987:AG5543; Hoge Raad (HR), 10 December 1976, ECLI:NL:HR:1976:AC1711; and S.E. Bartels & A.I.M. van Mierlo, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk recht, 3-IV, Vermogensrecht algemeen, Algemeen goederenrecht* (16th ed., Kluwer 2013), Nos. 546 *et seq.*

26 Hoge Raad (HR), 20 June 1997, ECLI:NL:HR:1997:ZC2399.

27 B. Hoops, 'Te goeder trouw, te kwader trouw of geen van beide? Wegwijs in de nieuwe verjaringsverkrijgingsjungle' [2017] WPNR 983–990.

This analysis shows that it will be relatively easy to distinguish between good faith possessors and other possessors where a large piece of public land is unlawfully used. In such cases, it is clear whether Art. 3:106a BW applies and whether an acquisition by prescription has been outlawed. Where only a small piece of land adjacent to the possessor's parcel is concerned, Art. 3:106a BW may not provide the desired clarity and litigation may ensue around the issue of whether the possessor acts in good faith.

4. No acquisition of the 'public domain'

Already the ancient Romans decided that land (and water bodies) with certain public functions had to be reserved for use by the public.²⁸ Examples of such *res publicae* include roads and waterways. This public infrastructure was essential to the functioning of the public administration, public life, and commerce. Such land was *res extra commercium*, could not be alienated and could not be acquired through long-term possession.²⁹

Today, the notion of the 'public domain' still forms part of the law in a lot of jurisdictions. The categories of land falling under the 'public domain', however, widely differ. In the Netherlands, only the seabed of the territorial sea and the Wadden Sea are reserved for the State.³⁰ Other publicly owned things can be alienated and acquired by prescription.³¹ Other jurisdictions such as Belgium, France, Italy, Louisiana, and Spain use a broader concept of 'public domain'. In this section, I will sketch the Italian approach as an example and indicate where other members of this group of jurisdictions have chosen a different route.

The Italian Civil Code (*Codice Civile*; CC) foresees acquisitions through long-term possession (*usucapione*). If a non-owner exercises physical control over the land as if s/he were owner (*possesso*) for twenty years, the non-owner will become owner of the land, regardless of whether or not s/he acts in good faith.³² A 10-year

²⁸ M. Habdas, 'Who needs a park or a city square? The notion of public real estate as *res publicae*' [2011] TSAR 626–649, 629 *et seq.*

²⁹ M. Lernout & J. Van de Voorde, 'Acquisitive Prescription of Public Domain Goods (Government Property) in Belgium, France, the Netherlands and England' in B. Hoops, R. Koolhoven & L. Rostill (eds), *Property Law Perspectives V* (Boom Eleven 2017) 69–93.

³⁰ Art. 5:25 BW.

³¹ H.P.J.A.M. Hennekens, *Openbare zaken naar publiek- en privaatrecht* (2nd ed., W.E.J. Tjeenk Willink 2001).

³² Art. 1140 and 1158 CC.

period applies to bona fide possessors who acquired the possession of the land on the basis of a valid title such as a contract of sale.³³

In principle, this regime also applies to land owned by the Italian Republic (*Stato*), a region (*Regione*), a province (*Provincia*), or a municipality (*Comune*). Certain categories of land, however, are *de iure* or *de facto* exempted from *usucapione*. Art. 822 to 824 CC determine which land falls under the public domain in all cases (*'beni demaniali'*). These goods are *res extra commercium*. They cannot be alienated or acquired by *usucapione*.³⁴

Art. 822(1) CC gives a list of land that is exclusively reserved for the Italian Republic. The list includes rivers, lakes, beaches, and military works. Art. 824(2) CC provides that municipal markets and cemeteries can only be owned by the respective municipality.³⁵ Land with such functions is always *res extra commercium* and can never be acquired by *usucapione* (*demanio esclusivo* or *demanio necessario*).

Art. 822(2), 824(1) CC and Art. 11 of the Act 281/1970 contain a list of land that is *res extra commercium* and can never be acquired by *usucapione* if it is owned by the Italian Republic, a region, a province, or a municipality (*demanio eventuale*). This list includes roads, highways, and railways. 'Roads' (*Strade*) are construed broadly so as to include all pathways used by animals, pedestrians, or vehicles.³⁶

Art. 826, 828 CC and Art. 11 of Act No. 281/1970 extend the special protection to certain categories of land owned by the Italian Republic, a region, a province, or a municipality with a public destination. This land is not *res extra commercium*. The special protection that it enjoys is that it cannot be deprived of its public function (*'beni patrimoniali indisponibili'*).³⁷ This land includes the forests of the Republic and the regions and the buildings of public authorities.

There is also an open category of *beni patrimoniali indisponibili*. Public bodies can give their land a public destination to ensure that the land enjoys the special protection described above. The boundaries of the term 'public destination' still need to be clarified. Examples of public destinations from the jurisprudence of the Court of Cassation are public parks³⁸ and sports fields.³⁹ In order for the land to enjoy the public protection, the public destination needs to be laid down in an

³³ Art. 1159 CC.

³⁴ Art. 823 and 1145 CC; G. Cian (ed), *Commentario Breve al Codice Civile* (13th ed., Wolters Kluwer / Cedam 2018) Art. 823 CC.

³⁵ Cian (note 34) Art. 824 CC, II.1.

³⁶ Cian (note 34) Art. 822 CC, IV.19.

³⁷ Art. 828 CC.

³⁸ Cass. civ. Sez. II, 09/09/1997, n. 8743 (rv. 507700).

³⁹ Cass., Sez. Un., 23/06/2001, n. 10013/2001.

administrative decision⁴⁰ and realised.⁴¹ Once the public destination has been duly determined and realised, only the public owner can revoke the public destination through an administrative decision.⁴²

The question arises of how this special protection of land with a public destination relates to acquisitions of such land through long-term possession. Theoretically, this land can be acquired by *usucapione*. However, possession implies a certain degree of exclusivity, and any possessor would deprive the land of its public destination. As this is prohibited under the Civil Code, judges have found that land with a public destination is *de facto* exempted from *usucapione*.⁴³

The goal of the protection enjoyed by certain categories of publicly owned land is to guarantee that the State and the decentralised authorities can perform their tasks and that land needed for such tasks cannot be alienated despite temporarily prevailing policies to the contrary.⁴⁴ On the one hand, the Italian protection mechanism offers a clear list of publicly owned land that is always protected from acquisitions through long-term possession. On the other hand, it offers flexibility to public authorities in that they can decide to extend special protection to other land. Once the public destination is laid down in an administrative decision, it is clear whether the land can be acquired through long-term possession. Any possessor, however, will have to do research on whether the land has a public destination. Also, it depends on the quality of the land information system whether the boundaries of that land are clear.

An approach involving a list of protected land and an additional open category can also be found in the other jurisdictions that protect land from acquisitions through long-term possession through the ‘public domain’.⁴⁵ In some other jurisdictions than Italy, however, the public destination of land falling into the open category need not be realised for protection from acquisitions through long-term possession.⁴⁶ Also, a distinction between *res extra commercium* and other land that enjoys special protection, by contrast, seems to be an Italian speciality.

⁴⁰ Cian (note 34) Art. 822 CC, III.8.

⁴¹ Cian (note 34) Art. 822 CC, III.6.

⁴² Cian (note 34) Art. 822 CC, III.8; Cass. 4811/1992.

⁴³ Cian (note 34) Art. 828 CC, I.5.

⁴⁴ E. Castorina & G. Chiara, *Il Codice Civile, Commentario, Art. 822-830, Beni pubblici* (Giuffrè editore 2008) 41 *et seq.*

⁴⁵ See, for instance, Art. 538 and 2226 Belgian Civil Code; and Lernout & Van de Voorde (note 29). Besides, the new Belgian property law, recently adopted by Parliament, does not feature any lists, but defines the ‘public domain’ solely on the basis of an open category. See Art. 3.45 of Book 3 of the Civil Code (*Livre 3 “Les biens” dans le nouveau Code civil; Boek 3 “Goederen” in het nieuw Burgerlijk Wetboek*).

⁴⁶ See on Belgian law: Lernout & Van de Voorde (note 29) 76.

5. No acquisition of property *contra tabulas*

If privately owned land is protected from acquisitions through long-term possession in one way or another, publicly owned land enjoys (at least) the same protection. This protection is motivated by other reasons than the protection of publicly owned assets or the state's capacity to perform public functions. The correctness and reliability of the land information system can be one of the grounds for protecting land ownership from acquisitions through long-term possession and limiting the instances in which land can be acquired through long-term possession.

German law is an example of a jurisdiction that does not permit acquisitions through long-term possession against the land register (*contra tabulas*).⁴⁷ The *rei vindicatio* of the registered owner is not subject to prescription.⁴⁸ The reasoning behind this rule is that prescription could not serve its purpose of promoting legal certainty because the land register (*Grundbuch*) already clarifies the legal status of the land and can be relied upon by third parties.⁴⁹ Prescription would rather undermine legal certainty because the registered owner could no longer exercise their registered right of ownership.⁵⁰ If a public body is the registered owner, publicly owned land is thus safe from prescription. Only in the rare cases where the boundary of two parcels cannot be deduced from the land register, is the boundary determined on the basis of the possession of the land under Section 920 of the German Civil Code (*Bürgerliches Gesetzbuch*; BGB).

Only for rectifying flaws in the land register⁵¹ does Section 900(1) BGB provide a basis for an acquisition through long-term possession (*Ersitzung*). This provision foresees the acquisition of land by a non-owner who has been *registered as owner* for 30 years and has been possessing the land as their own (*Eigenbesitz* in terms of § 872 BGB) during that period.

Another route for acquisitions through long-term possession is the court procedure under § 927 BGB.⁵² This procedure, however, only applies to unregistered land or cases where the registered owners is dead or has disappeared without a

⁴⁷ Cf. H. Simón-Moreno, 'Registered Land and Adverse Possession: Comparative Remarks' in B. Hoops & E. J. Marais (eds), *New Perspectives on Acquisitive Prescription* (Eleven International Publishing 2019) 185–206.

⁴⁸ § 902(1) BGB.

⁴⁹ § 892 BGB.

⁵⁰ K.H. Gursky, in *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Band 3, Sachenrecht, §§ 883-902* (Sellier-De Gruyter 2013) BGB, § 902, No. 1.

⁵¹ Gursky (note 50) BGB, § 900, No. 1.

⁵² See for more information on this procedure: A. Pfeifer & T. Diehn in: *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 3, Sachen-*

trace. As a public body cannot be dead or disappear, this provision cannot be applicable.

This legal mechanism offers far-reaching protection for publicly owned and other registered land. Provided that the information on the land is sufficiently detailed, the mechanism makes it very easy to determine whether land can be acquired through long-term possession. If the user is not registered as owner, s/he cannot acquire the publicly owned land through long-term possession.

6. No acquisition of property without notice and subsequent registration

Another mechanism to protect the reliability of the land information system from the adverse effects of acquisitions through long-term possession is to require the possessor to apply for registration as owner, to serve a notice on the registered owner and to give the owner a certain period of time to contest the claim of the possessor. This mechanism protects both privately and publicly owned land.

English law provides an example of this approach. England has a positive system of land registration. Under the Land Registration Act of 2002, as was the case under its predecessor, the Land Registration Act of 1925, the person registered as ‘proprietor’ has the power to dispose of the land.⁵³ To third parties who have acquired the land from the registered owner, it is irrelevant whether the registration was based on a valid acquisition. Except for a few overriding interests, only registered rights can be invoked as against third parties.⁵⁴

Under the Land Registration Act of 1925, adverse possessors still acquired somebody else’s land after twelve years of possession. Adverse possession during twelve years thus constituted an overriding interest vis-à-vis third-party purchasers relying upon the register.⁵⁵ As the legislature found that adverse possession was no longer needed to clarify the legal status of land and that the land informa-

recht, §§ 925-984 (Sellier-De Gruyter 2017) BGB, § 927, No. 11; and J. Heisel, *Grundbuchbereinigung durch Aufgebot* (Carl Heymanns Verlag 2009) 3 *et seq* and 21.

⁵³ Art. 18 lid 1 and Art. 3(xx) Land Registration Act 1925; O. Radley-Gardner, ‘Pye (Oxford) Ltd v. United Kingdom: The View from England’ [2007] *European Review of Private Law* 289–308, 289; B. Bogusz, ‘Bringing Land Registration into the Twenty-First Century. The Land Registration Act 2002’, [2002] *The Modern Law Review* 556–567.

⁵⁴ Art. 20(1) Land Registration Act 1925.

⁵⁵ Art. 75(1) and 70(1)(f) Land Registration Act 1925 and Art. 15 Limitation Act 1980.

tion system was generally sufficient to ensure legal certainty,⁵⁶ the English legislature decided to ban acquisitions of registered land without registration and to give the registered owner the opportunity to contest the possessor's claim. After ten years of adverse possession, the adverse possessor can apply for the registration of their claim.⁵⁷ The land registry will serve a notice on the registered owner. The registered owner can contest the claim within 65 days.⁵⁸ If the registered owner fails to contest the claim on time, the adverse possessor will be registered as owner. If the registered owner contests the claim, s/he will remain owner in most cases and has two years to end the adverse possession, for example through a contract with the adverse possessor.⁵⁹ An exception may apply in boundary disputes. If the occupied land is adjacent to the land owned by the adverse possessor and the boundary has not been determined according to the statutory procedure, the adverse possessor will be registered as owner, regardless of whether the proprietor contests the claim.⁶⁰

This protection mechanism clearly indicates in which cases an adverse possessor can acquire the land. Except for the abovementioned cases of boundary disputes, public bodies can defend their land by contesting the claim of the adverse possessor. If the public body omits to contest the claim, or in those cases of boundary disputes, the adverse possessor will be registered as owner.

7. Strict interpretation of the possession of publicly owned land

Where there are no special restrictions in doctrine or statutes to acquisitions of publicly owned land through long-term possession, the judiciary may be inclined to interpret the legal requirements that apply to both privately and publicly owned land more strictly with respect to publicly owned land. The degree of physical control needed for an acquisition is an obvious candidate because 'possession' (or its functional equivalent) is a vague concept that requires substantial interpretative work before it can be applied to specific cases.

⁵⁶ Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, No. 271 (The Stationery Office 2001).

⁵⁷ Schedule 6 and Art. 96 to 98 Land Registration Act 2012.

⁵⁸ Schedule 6(3) Land Registration Act 2012 and Rule 189 to the Land Registration Act 2012.

⁵⁹ Schedule 6(6) Land Registration Act 2012.

⁶⁰ Schedule 6(5)(4) Land Registration Act 2012.

In the Netherlands, judges have been interpreting the requirement of ‘possession’ more strictly in cases where a non-owner possesses a piece of publicly owned land.⁶¹ Under Dutch law, a possessor exercises (physical) control over an object for themselves (or, in other words, as if s/he were owner).⁶² Whether or not a non-owner exercises physical control for themselves is determined according to common opinion (*verkeersopvatting*) and the facts as they appear.⁶³ Higher standards apply to the physical control by a person who takes possession of a thing or an asset that already belongs to somebody else.⁶⁴ The physical control must be so extensive as to put an end to the possession of the owner.⁶⁵ More specifically, the appearance of ownership must be visible to the owner and so unambiguous that the owner could only infer from the non-owner’s actions that the non-owner was acting as if owner.⁶⁶

These abstract guidelines only give a rough indication of what constitutes possession in a specific case. The judgments of lower courts in the Netherlands show that the owner of the land, the type of land, and its function affect the interpretation of ‘possession’.⁶⁷ They demonstrate that higher requirements apply to publicly owned land. To take possession of privately owned land, the non-owner needs to exclusively use the land and indicate the new boundary through, for instance, a fence, boundary stones, or flower tubs.⁶⁸ By contrast, a low fence, boundary stones, or flower tubs will not be sufficient for the possession of publicly owned land. The non-owner can generally only take possession of publicly owned land by using it exclusively *and* putting up a fence or a hedge that is high enough to block access to the land effectively.⁶⁹ If the land used to be part of a public road, sidewalk or green verge between a private residence and a road,

⁶¹ The analysis of the requirement of possession draws on the analysis in B. Hoops, ‘Legal Certainty is Yesterday’s Justification for Acquisitions of Land by Prescription. What is Today’s?’ [2018] EPLJ 182–208.

⁶² Art. 3:107(1) BW; Rank-Berenschot (note 12) 3; and Jansen (note 12) 270 *et seq.*

⁶³ Art. 3:108 BW.

⁶⁴ Art. 3:113(2) BW.

⁶⁵ Hoge Raad (HR), 18 September 2015, ECLI:NL:HR:2015:2743, para 3.4.2; Bartels & Van Mierlo (note 25) No. 140; Rank-Berenschot (note 12) 49; and Jansen (note 12) 272.

⁶⁶ Hoge Raad (HR), 24 February 2017, ECLI:NL:HR:2017:309, para. 3.3.2; and Van Zeven *et al* (note 22) 408.

⁶⁷ B. Hoops, ‘Het ene hek is het andere niet: Hoe de omgeving van grond en zijn eigenaar het bezitsvereiste in verjaringszaken inkleuren’ [2017] WPNR 1045–1053; and B. Hoops, *Landjepik in Nederland* (Boom 2018).

⁶⁸ Gerechtshof Den Bosch, 17 November 2009, ECLI:NL:GHSHE:2009:BK7631, paras 4.7 *et seq.*

⁶⁹ Gerechtshof Amsterdam, 31 January 2017, ECLI:NL:GHAMS:2017:264, para 3.8. Compare Gerechtshof Den Bosch, 11 October 2016, ECLI:NL:GHSHE:2016:4559, para 3.10 to Gerechtshof Den Bosch, 27 September 2016, ECLI:NL:GHSHE:2016:4295, para 3.5.7.

some courts require the non-owner to do even more than put up a high fence or hedge around the land.⁷⁰ However, it seems that if the non-owner acts in good faith, this hurdle will be lower.⁷¹

The justification put forward by some judges for this higher hurdle is that the use of publicly owned land by inhabitants often benefits both the non-owner and the public because the non-owners mostly make good use of the land. If possession were construed more strictly, the public body would intervene and the symbiosis would cease because the public body would have to ensure that the land could perform its public function.⁷² This argument seems to be flawed because instead of evicting the non-owners, the public bodies could conclude use agreements to end the non-owner's possession. In any case, the Dutch Supreme Court has yet to rule on whether this reasoning is compatible with the concept of 'possession'.

This mechanism relies on the judicial interpretation of 'possession' to protect publicly owned land. The Dutch approach cannot provide sufficient clarity on whether the non-owner can acquire a specific piece of publicly owned land through long-term possession. The first reason is that the jurisprudence is still in flux with the Supreme Court still having to rule on whether the strict interpretation of 'possession' is compatible with the concept of 'possession'. The second reason is that it depends on the circumstances of each case and each judge's application of 'possession' to the case, whether the requirement of possession is met.

8. Comparison and evaluation

The rules protecting publicly owned land from acquisitions through long-term possession differ in many respects, and these differences result in different degrees of protection. The protection can be determined and compared by taking six steps.

The first step is to compare the source of the protection. The special protection of publicly owned land in the Netherlands solely results from a judicial inter-

70 *Gerechtshof Den Bosch*, 24 March 2020, ECLI:NL:GHSHE:2020:1059; *Gerechtshof Den Bosch*, 1 September 2015, ECLI:NL:GHSHE:2015:3422, para 3.3.2; *Gerechtshof Amsterdam*, 23 June 2015, ECLI:NL:GHAMS:2015:2548, para 3.10; and *Gerechtshof Amsterdam* 25 August 2015, ECLI:NL:GHAMS:2015:3495, para 3.13.

71 Compare the judgments in the previous footnote to a judgment of the Amsterdam Court of Appeal on a bona fide acquisition: *Gerechtshof Amsterdam*, 31 January 2017, ECLI:NL:GHAMS:2017:264, para 3.8.

72 *Gerechtshof Den Bosch*, 11 October 2016, ECLI:NL:GHSHE:2016:4559, para 3.8.1.

pretation of the requirement of possession, which has yet to be confirmed by the Dutch Supreme Court. By contrast, the protection of publicly owned land under the other protection mechanisms is based on statute. In the Netherlands, it is thus uncertain, even if the civil code is not changed, whether the land will still enjoy special protection in the future.

The second step is to examine whether the law differentiates between the land of different public bodies. English law and German law do not distinguish between privately and publicly owned land and thus not between the land of different public bodies. Dutch law, South African law, and the law on Curaçao and Sint Maarten grant special protection to all publicly owned land. The law of Alberta and Italian law, by contrast, designate the public bodies whose land is protected. The protection of publicly owned land thus depends on how much land these public bodies own.

The third step is to determine whether the law distinguishes between publicly owned land on the basis of its functions. Alberta, Curaçao, England, Germany, Sint Maarten, and South Africa do not make such a distinction. In Italy, the protection is contingent on whether the land's function is listed in the law or whether the land has received a public destination. In the Netherlands, the judiciary accords diverging degrees of protection to public infrastructure, such as pavements and roads, on the one hand, and other publicly owned land on the other.

The fourth step is to examine whether the law protects publicly owned land less if the possessor acts in good faith. Alberta, England, Germany, Italy, and South Africa do not differentiate between possessors on the basis of whether they could be reasonably expected to know that they were using publicly owned land. On Curaçao and Sint Maarten, publicly owned land is only protected from acquisitions by possessors not acting in good faith. In the Netherlands and on Curaçao and Sint Maarten, non-owners acting in good faith need to overcome a lower hurdle than other non-owners in order to qualify as 'possessor'.

The fifth step is to compare whether the protection of publicly owned land would cease if the non-owner acted as if s/he were owner. In Alberta, England, Germany, Italy, and South Africa, this fact would be irrelevant. On Curaçao and Sint Maarten, if the non-owner acted in good faith, the publicly owned land would not be protected if the non-owner qualifies as possessor. In the Netherlands, despite the strict interpretation of the requirement of 'possession', it is, at least theoretically, possible to take possession of any publicly owned land and to acquire it after a certain period of time.

The sixth step is to examine whether the public owner needs to take action to protect its land. In Alberta, Germany, Italy, and South Africa, the owner does not need to take action. In England, the owner needs to contest a possessor's claim

within 65 days of having received a notice of their claim and to end the adverse possession within two years. In the Netherlands, the public owner needs to end the non-owner's possession before their ownership prescribes. On Curaçao and Sint Maarten, this applies only if the possessor does not act in good faith.

The goals of the protective regimes are different. While in England and Germany, the protection is a by-product of the protection of the system of land registration, the other jurisdictions seek to guarantee that public assets are preserved and can be used for public purposes. This analysis further indicates that Alberta, Germany, and South Africa offer the widest-ranging protection of publicly owned land. Italy protects publicly owned land with certain functions and otherwise designated publicly owned land. England protects publicly owned land only if the public owner contests the possessor's claim. On Curaçao and Sint Maarten, the protection will only apply if the possessor does not act in good faith. Publicly owned land enjoys the least protection in the Netherlands, where its protection depends on whether the non-owner meets the heightened requirements for 'possession'.

A normative evaluation of the protection of publicly owned land from acquisitions through long-term possession should have as its premise that the protection of land intended for a public purpose is a legitimate goal.⁷³ It is also for the democratic legislatures to balance this interest against the disadvantages of a specific protective mechanism. This evaluation points to differences between the protective mechanisms in how they treat the legitimate expectations of the possessor and regarding the extent to which they create additional transaction and litigation costs.

A good faith possessor cannot be reasonably expected to know that s/he is using publicly owned land. Due to a transaction concerning that land with a non-owner, the possessor holds the reasonable belief that s/he is the owner of the land. In Alberta, England, Germany, Italy, and South Africa, these expectations are treated as irrelevant to the issue of whether the publicly owned land can be acquired. In the Netherlands and on Curaçao and Sint Maarten, by contrast, good faith possessors can acquire publicly owned land and good faith users need to overcome a lower hurdle than other non-owners in order to qualify as 'possessor'. These systems thus attach greater weight to the non-owner's legitimate expectations, resulting in outcomes that may be perceived as more equitable.

Transaction costs include the costs for ascertaining or shaping the legal status of the land. Litigation costs consist of the number of litigated cases and the

⁷³ See, for instance, European Court of Human Rights, 4 October 2011, *Zafran v. Greece*, App. No. 4056/08, para 38.

costs of flawed judicial decisions.⁷⁴ The German protective mechanism creates the least additional transaction and litigation costs because German law applies the same regime to privately and publicly owned land. It is thus not necessary to check whether the land is subject to a special protective regime, and the number of litigated cases should remain low because this regime clarifies the legal situation to a large extent. In Alberta and South Africa, the non-owner may incur additional transaction costs to investigate who the land owner is. In Italy, the user not only needs to examine who the land owner is, but also whether the land falls under the ‘public domain’, specifically whether the owner has given the land a public destination if the function of the land is not mentioned by the Civil Code. In England, the adverse possessor needs to pay for registering their claim, and the public owner incurs additional transaction costs for contesting the possessor’s claim and ending the adverse possession. Particularly on Curaçao and Sint Maarten, but also in the Netherlands, the differentiation between good faith possessors and other possessors require additional in-depth investigations of the factual circumstances of each case and registered documents. In addition to these transaction costs, the parties will incur litigation costs due to the vague nature of the requirement of ‘good faith’. This suggests that taking account of the possessor’s legitimate expectations not only comes at the price of losing publicly owned land, but also of additional transaction and litigations costs. On Curaçao and Sint Maarten and in the Netherlands, the costs of determining whether a non-owner qualifies as possessor will also give rise to substantial additional transaction and litigation costs. It thus seems that the weakest protection of publicly owned land is also the most expensive one.

It should be noted that obtaining an eviction order leads to litigation costs in all jurisdictions and, depending on the quality of the available information, the parties may incur additional costs to resolve boundary disputes.

9. Conclusion

Publicly owned land enjoys strong protection from acquisitions through long-term possession. The approaches chosen by the jurisdictions, however, strongly differ from each other and result in additional transaction and litigation costs to varying degrees. If there is a sufficiently reliable land information system in place, the most efficient solution seems to be to permit acquisitions through long-term

74 R.C. Ellickson, ‘Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights’ [1986] *Washington University Law Quarterly* 723–737.

possession only in cases where this is needed to adapt the legal situation to what is registered, as is the case under German law. Particularly in negative systems of land registration, a simple exemption of all public land from acquisitions through long-term possession will provide the protection of publicly owned land as well as clarity and only result in few transaction costs to ascertain whether the land owner is a public body. By contrast, judicial solutions, such as a strict interpretation of the requirement of possession, are likely to lead to uncertainty and give rise to substantial transaction and litigation costs.