



HISTORICAL PERSPECTIVE OF HERITAGE LEGISLATION.
BALANCE BETWEEN LAWS AND VALUES





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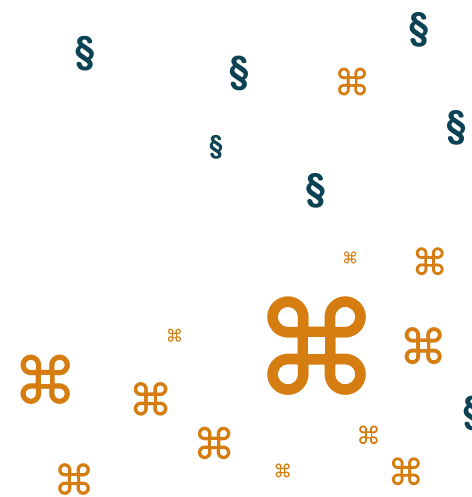
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LEGISLATION AND COMMON VALUES: A REPORT FROM BELGIUM/ THE FLEMISH REGION

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Already in 1835, very shortly after the “creation” of the Kingdom of Belgium, a Royal Commission for Monuments was appointed by royal decree. The duty of this expert commission consisted of advising the Belgian government on several aspects of heritage preservation. This early public interest in the maintenance of historic buildings is very often linked with the firm intention of a young nation to affirm its own identity through the remains of a glorious past, and with the state of neglect of many monuments as a result of the French Revolution. Despite the efforts of the Royal Commission, it would last until 1931 before a formal law was voted on the protection of monuments and sites. This first Belgian heritage law offered possibilities for protecting monuments presenting a national interest due to a historic, artistic or scientific value. In order to preserve these “common values” for the future, the property rights of owners were restricted: they were not allowed to bring alterations to the exterior of a monument without prior permission of the Royal Commission for Monuments and the local authorities. These restrictions, public easements, didn’t lead to compensation for the owners of protected monuments. However when restoration works became necessary, subsidies could be granted within the budget available. The intention to preserve monuments even led to the inscription in this first monument law of an article creating the possibility of expropriation for the national and the local authorities when a monument was threatened with severe damage or decay in case it remained in the hands of his owner.

Back to history

Already in 1835, shortly after the “creation” of the Kingdom of Belgium, a Royal Commission for Monuments was appointed by royal decree.¹ The task of this expert commission consisted of advising the Belgian government on several aspects of heritage preservation. This early public interest in the maintenance of historic buildings is very often linked to the firm intention of a young nation to affirm its own identity through the remains of a glorious past, and by the state of neglect of many monuments as a result of the French Revolution. However, despite the efforts of the Royal Commission, it was not before 1931 when a formal law was voted on the protection of monuments and landscapes.²

This first (Unitarian) Belgian heritage law offered possibilities for protecting monuments which were of *national interest* due to a *historic, artistic or scientific value*.³ In order to preserve these “common values” for the future, the property rights of owners were restricted: they were not allowed to alter the exterior of a monument *without prior permission* of the Royal Commission for Monuments and the local authorities. These restrictions, or so-called public easements, did not lead to compensation for the owners of protected monuments. When restoration works became necessary, subsidies could be granted within the budget available. The will to preserve monuments even led to the inscription in this first heritage law of a provision allowing for expropriation by the national and the local au-



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¹ Arrêté qui institue une Commission pour le conservation des monuments du pays, 7 January 1835, Bull. off, January 11 1835, no. 111.

² Loi sur la protection des monuments et sites, MB, September 5th 1931, MB September 5 1931, hereafter called as the 1931 Heritage Law.

thorities in case a monument was threatened with severe damage or decay if it was to remain in the hands of its owner.⁴

The 1931 Heritage Law enabled also the protection of landscapes, *presenting a historic, aesthetic or scientific value of national interest*.⁵ No subsidies were foreseen for maintenance works on protected landscapes. However, in case the protection caused significant damage (loss of at least 50% of the value of the landscape), owners could claim a compensation. This first heritage law also provided for specific enforcement measures: unauthorized works carried out on protected monuments or protected landscapes could lead to rather significant fines as well as to the obligation of restoring the monument or landscape into its former state.

Many different values can justify protection; the Flemish region as an example

From 1970 onwards, a state reform transformed Belgium from a Unitarian to a Federal state. On the 1st of January 1989, the power to govern the preservation of immovable heritage was allocated to the Regions. The three Regions, and due to a later transfer of powers also to the German Community, adopted decrees and ordinances on the preservation of monuments, urban and rural sites, landscapes and archaeological sites. Many of the basic principles inscribed in the 1931 Heritage Law, were copied in the first decrees and ordinance.

Compared to the 1931 Heritage Law, the values enabling legal protection were *expanded* in all these legal texts. This evolution was influenced by international texts. It was also the consequence of an increasing interest for various types of landscapes, formal gardens, minor architecture, and industrial heritage. The idea of what a monument or landscape could and should be, changed, and so did the values on the basis of which protection was allowed.

For instance, in the recent Flemish Immoveable Heritage Decree of 12th of July 2013 (entered into force on 1st of January 2015), monuments, cultural landscapes, urban and rural sites and archaeological sites presenting a *general interest* due to an *archaeological, architectural, artistic, cultural, aesthetic, historic, industrial- archaeological, technical, urbanistic, social, folkloric or scientific value* can be protected.⁶ Precisely the presence of one or more of this values assigns an actual or future significance to the monument or site. When monuments host valuable (movable) *cultural goods*, these goods can be protected at the same time as the building itself. In such cases the individual protection decision contains a detailed inventory of those goods.

A discretionary power for the executive power

The values enumerated in article 2.1.26 of the Flemish Immoveable Heritage Decree, mentioned above, offer the criteria for the Flemish Government - or by delegation

the competent minister - for protecting various kinds of objects. These criteria confer an almost discretionary power upon these authorities, but offer *a very poor judicial protection* to owners of valuable goods. Owners have the possibility to make remarks and objections during the protection procedure, however, their consent is not requested for a definitive protection decision. Since protection criteria are described in a broad and even vague way, it is not always easy for an owner to argue that a specific value is not present. In practice, the specific protection policy can vary considerably from minister to minister, ranging between restrictive and mild.

Nevertheless, every individual protection proposal and final decision must be formally motivated. This means that the competent authorities must indicate in the decision itself, for every monument, cultural landscape, archaeological site or urban or rural site, the specific “public interest” and explain which values are supposed to justify the protection. This motivation offers owners a guarantee against unlawful protection. In case of insufficient motivation, the Council of State can annul the protection decision.

Legal consequences of a protection

The legal consequences of a protection as a monument, cultural landscape, urban or rural site or archaeological site are significant. Most of the consequences concern the owners.⁷ The listing decisions enter into force at the moment of the first ministerial decision, i.e. the start of the protection procedure. First of all, the Immoveable Heritage Decree stipulates that owners of (provisionally) protected goods must maintain them in a good condition by carrying out the necessary maintenance and restoration works. They must also take adequate security measures and manage the relevant goods properly.⁸ This principle is generally referred to as the “Active Maintenance Principle”. The second important obligation for owners of (provisionally) protected goods consists of the prohibition of disfiguring, damaging or destructing the goods. Any activity leading to diminution of the “heritage values” is also prohibited.⁹ This second obligation which, for legal purposes qualifies as an easement, is called the “Passive Maintenance Principle”. Easements imposed by a protection decision generally have a relative character: the acts they prohibit at the moment of the protection, can be allowed later on by a specific ministerial decision or by means of an urbanistic permit.

In addition to the maintenance principles, mentioned above, two specific legal consequences apply.¹⁰ Protected monuments cannot be entirely demolished: a permit to this end cannot be granted. A partial demolition remains possible; at least when it does not harm the monumental values that have led to protection. Cultural goods included in the protection, cannot leave the monument without a previous permission of the competent Heritage Agency. When this permission is refused, there is a possibility for appeal. A second refusal can be appealed before the Council of State. This administrative high court can annul an unlawful refusal which, however, does not automatically lead to a permission.

3 Article 1, 1931 Heritage Law.

4 Article 4-5, 1931 Heritage Law.

5 Article 6, 1931 Heritage Law.

6 Article 2.1.26, Immoveable Heritage Decree of July 12 2013, MB October 17 2013.

7 The decree mentions not only owners, but also holders of other rights in rem.

8 Article 6.4.1., Immoveable Heritage Decree.

9 Article 6.4.3., Immoveable Heritage Decree.

10 Articles 6.4.5 and 6.4.7., Immoveable Heritage Decree.



Maintenance obligations, easements and specific consequences of a protection are described in detail in a voluminous *implementing order*, issued by the Flemish Government.¹¹ This order contains quite detailed rules for protected goods in general or in relation to specific categories of goods. Additionally, *individual obligations* can also be inscribed in the protection decision itself. In fact, this is the preferred technique of the Flemish Government for the future. Individual obligations incorporated in the protection decision take priority over general obligations and easements. The Flemish Immovable Heritage Decree still provides measures to enforce maintenance obligations and easements. In the past, certain owners were condemned by judicial courts for negligence or for carrying out works without the required prior authorization or permit.

Easements with or without compensation

Preserving our past for the future is widely accepted by society as an important task for public authorities. Active preservation policies, including the abovementioned easements and maintenance obligations, are generally accepted as a tool for preserving the common values of monuments and sites for future. They can however impact property rights in a very significant and far reaching way. Especially the last decade, courts were confronted on a regular basis with the important question whether those restrictions were to be accepted by owners with or without compensation.

A general principle in Belgian administrative law, which has been confirmed at several occasions by (higher) courts, stipulates *that restrictions to property rights for public interest purposes, not being the result of an unlawful act of a public authority, do not lead to a compensation entitlement for owners, unless a law or a decree explicitly provides such a compensation*¹². Easements cannot be assimilated to expropriation: in case of expropriation, legal title to the property as such is transferred to a public authority, whilst easements leave legal title to the property with the owner, even when they significantly constrain his property rights.¹³ Some heritage decrees instore a compensation for specific categories, as the 1931 Law did. However, this is not the case for the Flemish Immovable Heritage Decree.

All decrees and the Brussels ordinance instore a premium or subsidy system. These systems, however, cannot be considered a compensation in the strict sense of the word. This is the case as their only aim is to cover the additional cost in case of maintenance or restoration works, due to the fact that special conditions are imposed for protected heritage. Premiums or subsidies never cover the entire cost of works. Besides, they are only granted within the limits of the budgets available. Numerous court cases demonstrate that the discussion about compensation for easements is not new and it is certainly not limited to heritage preservation law. In the past, court cases were also introduced in the field of town and country planning, nature conservation, preservation of dunes, etc.

The issue was also dealt with by the European Court of Human Rights. Particularly the Varfis case¹⁴, in the field of landscape protection, deserves attention. After having bought a piece of land in Marathon, important restrictions were brought to the property rights of Mr. Varfis: whereas at the moment of the purchase a building right existed, this was skipped by the protective measure taken two years later. No compensation was granted to the owner. He addressed the European Court of Human Rights, invoking the violation of Article 1 of Protocol No 1.¹⁵ The Court reaffirmed¹⁶ in its judgement that restrictions can be put on private property rights in the light of heritage preservation and/or nature conservation, both legitimate aims presenting a public interest. The Court considered the interference by the Greek government in the property rights of Mr. Varfis as justified, but stressed in its judgement the obligation of the government to offer compensation in case of excessive burden put to a property right. The protective measure imposed to Mr. Varfis seemed indeed excessive to the European judges.¹⁷

The recent case of Matas v. Croatia¹⁸, dealt with heritage protection. Mr. Matas was the owner of a commercial building in Split which he used as a car repair shop. At the time of purchase of the building no limitation on its use was registered or apparent. Two years later, a measure of preventive conservation was taken by the Split Department for the Conservation of Cultural Heritage, pending the final evaluation of the (early industrial architectural) value of the commercial building. According to the Croatian Law, the measure of preventive conservation remained valid for a period of three years, offering the same protection as a final protective measure. After the expiry of the three-year period no final decision was taken; the Department ordered although a new preventive protection measure arguing that the determination of the heritage value required further assessment. Finally, no definitive protection measure occurred. Also in this case, the Court decided that the interference in the applicants right of a peaceful enjoyment pursued a legitimate aim; only the concrete circumstances and especially the double period of preventive protection without due motivation, were considered as a violation of the fair balance between the demands of the general interest of the community and the protection of the individual property right.

The Belgian jurisprudence: a turnover

For many years, Belgian courts have adhered to the abovementioned principles regarding compensation. Since 2010, however, jurisprudence has been evolving. In a judgement concerning a *lawful* house search which severely damaged a private property, the Court of Cassation stressed the principle that public authorities cannot impose a burden upon a citizen which is more important than the burden this citizen must bear to serve the common interest, without any form of compensation.¹⁹ This judgment laid down the principle that a burden cannot be *disproportionately* imposed on one citizen or on a limited group of citizens. Burdens are to be spread in

11 *Decree of the Flemish Government of May 16; 2014 implementing the Immovable heritage decree of July 12 2013.*

12 See e.g. *Court of Cassation*, March 16, 1990, Cass 1989-90, 922.

13 *Constitutional Court*, July 2 2003, no. 94/2003; *Council of State*, November 10 2001, no. 216.218; *Court of Cassation*, June 13 2013, TBO 2014, 91.

14 *ECHR*, July 19 2011, Varfis v. Greece, Requête no. 40409/08.

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

16 See e.g. *ECHR*, November 8 2005 Saliba v. Malta, no. 4251/02.

17 See also *ECHR*, November 13 2014, Varfis v. Greece, no. 40409/08 about the compensation.

18 *ECHR*, October 4 2016, Matas v. Croatia, no 40581/12.

19 *Court of Cassation*, June 24 2010, RW 2010-11, 1217.

an equal way over all members of society. The (dis)proportionate character of a burden has to be evaluated by the civil courts on a case-by-case basis. Only if, and to the extent that a burden was disproportionate, compensation will be due.

Other judgments followed. This short overview will address two judgments of the Constitutional Court. The first judgment, delivered in 2012,²⁰ underlined the constitutional value of the principle of equality of citizens before public burdens (*égalité devant les charges publiques*) and accepted it as a basis for compensation in case of lawful government acts. The power to enforce this principle was constitutionally,²¹ allocated to the civil courts. In case of absence of a legal rule providing compensation, the citizen address such a court. The second judgment, explicitly deals with heritage preservation legislation, more specifically with the Flemish Immovable Heritage Decree.²²

Following an appeal by private owners of a protected monument and by a heritage association, the Constitutional Court had to decide on the absolute lack of compensation for owners of protected goods in this decree. In its judgement, the Court confirmed as a general rule that public authorities can impose restrictions on property rights to serve the general interest, without being automatically required to pay a compensation. The Court decided that the Flemish authorities had the power not to instore a compensation, which it considered a policy decision, at least when owners of protected goods, which are confronted with heavy burdens that exceed the average burden a citizen can expect, have the right to address civil courts in order to obtain a compensation.

The decision whether a burden should be considered disproportionate is left to the civil courts, under a case-by-case approach. The Constitutional Court stresses that the impact of a legal protection on property rights, in accordance with the Flemish decree, can vary considerably taking into account that the legal consequences of a protective measure will be defined in a rather specific way in every protection decision. Additionally, owners can find themselves in very different situations: was the good protected at the moment they purchased it, or could they at least have expected a legal protection decision? Or did they apply for protection themselves? And what about the impact of the protection on the economic value of the good?

In many cases, the protection will not lead to an excessive burden. In case there is an excessive burden, civil judges will have to decide on a compensation. They can base their decision on the heritage value of the good, subsidies or premiums already obtained, state budgets available. In this framework, the judge will not have the power to question the expediency of the protection as such.

Some comments on the 2015 judgement of the Constitutional Court

The recent decision of the Constitutional Court deals with the balance between public/common values and private property rights, in the specific field of heritage preservation. The principles are quite clear: owners must bear “normal” restrictions to their property rights without any compensation. In case a legal protection results in a disproportionate burden, they can obtain partial compensation. But of course “the proof of the pudding is in the eating”. The judgement was rendered at the end of 2015, so there is no jurisprudence of the civil courts available yet.

The future will show, in the first place, whether many owners will address courts and will be able to prove that they are indeed subject to an extraordinary burden. The task of the civil courts will be difficult, their responsibility important: they will have to decide whether a protection decision results in a disequilibrium or not. It will also be challenging for these courts, which are not really specialized in heritage preservation, to decide on the amount of the compensation. The regime of ad hoc judgments in specific cases implies uncertainty for competent authorities. It will be very difficult to estimate the budget to be reserved for compensations. A non-desirable side effect could even be a diminution of the number of protection decisions.

Considering the aforementioned, it would likely be better to consider the (re)introduction of a general compensation system by decree, providing a clear regime within well-defined limits. In any case, the most appropriate legal approaches towards preserving common values - and at what price - need to be reconsidered by public authorities.

²⁰ Constitutional Court, April 19 2012, no. 55/2012.

²¹ Article 144 of the Belgian Constitution.

²² Constitutional Court, October 1, 2015, no. 132/2015.



Bibliography

Arrêté qui institue une Commission pour le conservation des monuments du pays, 7 January 1835, Bull. off, January 11 1835, no. 111.

Belgian Constitution, article 144.

Constitutional Court, 1 October 2015, no. 132/2015.

Constitutional Court, 19 April 2012, no. 55/2012.

Constitutional Court, 2 July 2003, no. 94/2003.

Council of State, 10 November 2001, no. 216.218.

Court of Cassation, 13 June 2013, TBO 2014, 91.

Court of Cassation, 16 March 1990, Cass 1989-90, 922.

Court of Cassation, 24 June 2010, RW 2010-11, 1217.

Decree of the Flemish Government of 16 May 2014 implementing the Immovable heritage decree of 12 July 2013.

ECHR, 13 November 2014, Varfis v. Greece, no. 40409/08.

ECHR, 19 July 2011, Varfis v. Greece, Requête no. 40409/08.

ECHR, 4 October 2016, Matas v. Croatia, no. 40581/12.

ECHR, 8 November 2005 Saliba v. Malta, no. 4251/02.

Immovable Heritage Decree of July 12 2013, MB, 17 October 2013.

Loi sur la protection des monuments et sites, MB, 5 September 1931.

