

Legal protection of monuments in their settings: a means of maintaining the spirit of the place

Prof. dr. Anne Mie Draye
Ph.D. in Law
University of Hasselt and Catholic University of Leuven
Winkelsesteenweg 80
B 3020 Herent
Belgium
annemarie.draye@uhasselt.be

Abstract. Several international conventions pay great attention to the safeguarding of the surroundings of protected monuments, landscapes and archaeological goods. In many national legislations, mechanisms aiming at a similar kind of protection were developed.

The purpose of this contribution is to examine the protection of “buffer zones” in the international legal context and in the legislation into force in Belgium, more specifically in the Flemish Region. From a legal point of view, several possibilities do exist: specific rules can be developed within the framework of heritage legislation, but the surroundings of protected goods can also be protected by means of legislation on urban development.

Protecting and maintaining a valuable monument or archaeological site in their historic environment, a landscape in its beautiful natural setting, can contribute in a considerable way to the safeguarding of the spirit of a place. Even if the commented legal rules consider in the first place the more tangible heritage, the awareness of the existence of a profound relationship between tangible and intangible heritage and the need for integrated conservation are the starting points for the contribution.

1. A broader concept of heritage - towards integrated conservation

The last decades, the concept of cultural heritage has been continually broadened.

The interest for (legal) protection of monuments and landscapes came first, as well in the national as in the international context. The need to protect also groups of buildings, was experienced quite soon afterwards. Vernacular architecture, industrial remains and 20th century architecture are nowadays generally considered as cultural heritage; cultural landscapes get protection in many countries.

The latest evolution deals with the intangible heritage, living heritage to be considered as a source of cultural identity. In the most recent convention of UNESCO, dealing with the safeguarding of intangible cultural heritage (Paris, 17 October 2003), we find the following definition: “The intangible cultural heritage means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response with their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity” (art.2).

This Convention completes the legal framework on heritage protection, introducing a specific tool for the vulnerable intangible heritage. It is however not meant to live an isolated existence: the interdependency of the tangible and intangible heritage is generally recognized and should lead to an integrated protection also protecting circumstances enabling communities to recreate on a continuous basis their cultural expressions.

In 2004, the Yamato Declaration on Integrated Approaches for Safeguarding Tangible and Intangible Heritage was issued as the result of a Unesco conference, held in Nara, of international experts dealing with tangible and with intangible heritage. In this declaration, the importance of safeguarding both categories of heritages in their own rights, taking into account their interdependence but also their distinctive characters, was stressed (for the text of the Convention and the declaration, see: www.unesco.org).

2. International and national protection of monuments in their settings

Tangible and intangible heritage both carry memory of humanity: all together this heritage deserves adequate settings in order to maintain its spirit.

Attention must be paid not only to the protection of larger entities, but also to the safeguarding of the surroundings of protected monuments, landscapes and archaeological goods, many times bearers

of intangible heritage, by delimitating so called buffer zones or by adopting appropriate zoning and planning law.

Efforts are needed both at international and national level. At international level, the World Heritage Convention and the conventions adopted by the Council of Europe offer interesting ideas and inspired many national legislations. In the legislation into force in the Flemish legislation - Belgium is a federalized country and the three regions have autonomous competences regarding the protection of immovable heritage - several legal techniques are combined in order to protect the surroundings of valuable heritage. After an overview of the international conventions, this legislation will be commented.

2.1. THE WORLD HERITAGE CONVENTION

At the moment the “Convention concerning the Protection of the World Cultural and Natural Heritage” (hereafter the World Heritage Convention) was adopted, international law on the protection of heritage was a quite new item.

In 1972, heritage law was indeed considered to be a concern of national states.

The World Heritage Convention put an end to this point of view, and introduced at least two innovative ideas: the link between nature and culture for the purpose of establishing a common regime of conservation, and the existence of a category of goods having an outstanding value and therefore belonging to the “World Heritage”, for the protection of which international efforts should be made (See e.g. *World Heritage 2002, Shared Legacy, Common Responsibility*, UNESCO, Paris, 2003).

Although the idea of international protection was embodied in the World Heritage Lists and in the mutual international assistance including the creation of the World Heritage Fund, the World Heritage Convention fully recognized the national sovereignty of the states on whose territory the cultural and natural heritage is situated. National states bare the first responsibility for the safeguarding, maintenance and protection of their “own” World Heritage.

This national responsibility appears clearly from the text of the articles 4 and 5 of the World Heritage Convention. Due to article 5, states parties to the convention must ensure effective and active measures for the protection, conservation and presentation of their cultural and natural heritage. As a minimal obligation they must work

out a protection policy, set up services, encourage research and adopt appropriate legal, scientific, technical administrative and financial measures.

Article 5 (a) deals with the adoption of “a general policy which aims to give the cultural and natural heritage a function in the life of the community *and to integrate the protection of that heritage into comprehensive planning programmes*”.

This last sentence shows at least a general interest for the spatial context, the surroundings of heritage. This idea was taken over in the Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, adopted together with the World Heritage Convention in 1972 (text of this recommendation on www.unesco.org): “The protection, conservation and effective presentation of the cultural and natural heritage should be considered as one of the essential aspects of regional development plans, and planning in general, at the national, regional or local level”(article 8).

The idea of possible buffer zones around World Heritage, was not inscribed as such in the convention text, and this would have been hardly possible at that period of time, when buffer zones were even not yet included in national legal frameworks.

The “Operational guidelines for the implementation of the World Heritage Convention”, aiming at facilitating the implementation of the Convention and being completely reviewed by the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage in 2005, however mention the idea in an explicit way. Under section II.F of the text, the numbers 103-107 are dedicated to the subject and contain a quite complete set of rules.

Number 103 contains the idea of providing an adequate buffer zone, wherever necessary for an appropriate conservation of the property.

In number 104 a description of a buffer zone is given: “An area surrounding the nominated property which has complementary legal and/or customary restrictions placed on its use and development to give an added layer of protection to the property. This should include the immediate setting of the nominated property, important views and other areas or attributes that are functionally important as a support to the property and its protection”.

The delimitation of a buffer zone must be decided on by a case by case approach, but details on the size, characteristics and authorized uses of the buffer zone, as well as a map indicating the precise boundaries of the zone, should be mentioned already in the nomination for inscription.

In this same nomination, a clear explanation of the protective effect of the buffer zone on the proposed World Heritage property must be provided (Numbers 104 and 105 of the Operational Guidelines).

The World Heritage Committee considers the delimitation of a buffer zone as a general obligation, a must: according to number 106, in cases where no buffer zone is proposed, the nomination should include a statement as to why such a zone is not required. In this regard, the Operational Guidelines evolved: in earlier versions, the idea of establishing buffer zones was inscribed, although as a possibility and not as an obligation that can eventually be waived (see e.g. the 1999 version of the Operational Guidelines, nr. 17).

Finally, number 107 of the 2005 Operational guidelines deals with monitoring and control on buffer zones: even if these zones are not part of the nominated property, any modifications subsequent to inscription of a property on the World Heritage List, should be approved by the World Heritage Committee.

With this text, buffer zones are definitively introduced within the protection of World Heritage. No longer a possibility but an obligation, they must be proposed at the moment of the nomination, they are also part of the file that must be handed over to the World Heritage Committee. According to number 132 (referring at the numbers 103-107), the identification of the property nominated for inscription, can only be considered as complete if the boundaries are clearly defined, “unambiguously distinguishing between the nominated property and any buffer zone”. Also in the periodic reporting on the implementation of the World Heritage Convention later on, buffer zones get a place (see e.g. Annex 7, Format for the Periodic Reporting on the Application of the World Heritage Convention, II.2. Statement of outstanding universal value).

Proposing a good of outstanding value for inscription on the World Heritage List without buffer zone remains possible, but only with a due motivation, showing that in practice the effect of the buffer zone has already been reached by other means, most of the time linked to urban development rules.

The impact of the delimitation of the buffer zone is considerable: changes in that zone after inscriptions in the World Heritage List are subject to control and must be approved by the World Heritage Committee.

2.2. CONVENTIONS OF THE COUNCIL OF EUROPE

Intergovernmental collaboration between European states within the framework of the Council of Europe for the safeguarding of heritage started about forty years ago. One of the results of this collaboration was the adoption of three important conventions, respectively dealing with the protection of archaeological heritage, architectural heritage and landscapes. In all these conventions appears a concern for the immediate surroundings of protected properties (for the texts of this conventions and explanatory reports, see: www.coe.int).

The European Convention on the protection of the Archaeological Heritage was adopted in London on the sixth of May, 1969, and revised in Valletta on the sixteenth of November 1992. (Council of Europe, ETS, n° 66 and 143).

The original version of this convention was focussing mainly on archaeological excavations and extraction of information from those excavations. The revised version stands as a testimony to the evolution of archaeological practices throughout Europe and introduces new concepts (Revised Explanatory Report to the European Convention on the protection of the Archaeological Heritage,1).

One of these concepts deals with integrated conservation of the archaeological heritage (art. 5 of the revised convention). When adopting the amended version of the text, large-scale construction projects and major public works became a real threat and the need to reconcile and combine the requirements of respectively archaeology and development plans became was urgent.

The obligations to be respected by the states parties to the revised convention, mainly deals with the introduction of protection strategies for archaeological heritage in planning policies, possible modifications of development plans, environmental impact assessment, regular consultations between planners and archaeologists and possibilities of conservation in situ of archaeological goods found during development works. Concrete measures for the surroundings of archaeological properties are not explicitly inscribed in this convention: taking into account the specific nature of archaeological heritage and the fact that the delimitation of archaeological zonings is not always clear, maybe this would have been quite difficult.

The Convention for the Protection of the Architectural Heritage of Europe, adopted in Granada on the third of October 1985, hereafter “the Granada Convention” (Council of Europe, ETS, n° 121), clearly

contains the idea of integrated conservation, and became well known for that reason. Article 10 of the Granada Convention stresses the importance of including the conservation of protected properties among town and regional planning objectives, and this both at the moment plans are being drawn up and when permits are being granted. It also emphasises the importance of establishing and maintaining links between heritage protection and planning policies. It recalls the value, in the planning processes, of conserving certain structures which are not as such protected but which can be considered as assets in their own settings.

A specific interest to the surroundings of protected monuments and within groups of building or sites (to be understood as combined works of man and nature, art. 1 of the Convention), is inscribed in article 7 of the Granada Convention. The text stipulates: “In the surroundings of monuments, within groups of buildings and within sites, each party undertakes to promote measures for the general enhancement of the environment”. This provision deals more particularly with measures to be taken in respect of public spaces: street furniture, signs, improvements to squares and public gardens (Explanatory report on the Convention for the Protection of the Architectural Heritage of Europe, Council of Europe, Strasbourg, 1986, 14).

Last but not least, according to article 4 of the Granada Convention, states parties engage themselves to require in their own national context the (prior) submission to a competent authority of any scheme for the demolition or alteration of monuments which are already protected or in respect of which protection proceedings have been instituted, *as well as any scheme affecting their surroundings*. This last obligation of “supervision”- it is up to the state party to decide which schemes and alterations are acceptable - automatically leads to an enhanced protection and reminds of the submission procedure for alterations in buffer zones inscribed in the Operational Guidelines for World Heritage.

The most recent convention of the Council of Europe is the European Landscape Convention, adopted in Florence on October 20, 2000, hereafter the “Firenze Convention” , (Council of Europe, ETS, n° 176). This convention aims to encourage public authorities to adopt policies and measures for protecting, managing and planning landscapes. It covers all kinds of landscapes, both outstanding and ordinary, that determine the quality of peoples’ living environment. The text contains a flexible approach to these landscapes of various kinds,

and remains therefore quite general. Nevertheless, one of the “general measures” necessary to implement the Firenze Convention, indicates the need to integrate landscapes into regional and town planning policies (art. 5).

Out of this very short overview, one can conclude that the Granada Convention, dealing with the protection of architectural heritage, pays most attention to the surroundings of protected properties. Even if the possibility of delimitating a buffer zone was not inscribed as such in the text of this convention, it is obvious that the system of previous authorisations for alterations in the immediate surroundings of protected monuments leads to an equal protection. The other two conventions also contain the idea of an “integrated conservation”.

2.3. THE FLEMISH EXPERIENCE

In the Flemish Region, the protection of monuments and of urban and rural sites is governed by a decree of March 3, 1976. This decree was amended already many times; the most important amendments dates of February 22, 1995 and November, 21, 2003. Several implementing orders complete this decree (for all legal texts, see www.onroerenderfgoed.be).

Within the legal system inscribed in this decree, the possibility for protecting the surroundings of a monument is foreseen since 1995: the notion "protected urban and rural site" has got since that date a double meaning: either a larger group of buildings - including yes or no individually protected monuments - being of general interest because of their artistic, scientific, historical, folkloric, technical or other social/cultural value, *either the surroundings of a protected monument having a function for its maintenance* (art.2,3° decree 1976). This last meaning covers the idea behind the buffer zone.

A specific protection regime for archaeological goods was introduced into the Flemish legislation by decree of June, 30, 1993, slightly amended by the decrees of May, 18, 1999, February, 28, 2003 and March, 10, 2006. Several implementing orders complete also this decree.

Are to be considered as archaeological monuments “all remains and objects or any other trace of human existence, which bear witness of epochs and civilisations for which excavations or discoveries are an important source of information” (art.3,2° of the decree). Archaeological zonings are defined as: “all pieces of land being of scientific or cultural-

historical interest for the reason of archaeological goods that might be present, *including a buffer zone*” (art.3,3°).

The protection of landscapes located in the Flemish Region is governed by a decree of April, 16, 1996, amended by decrees of December, 21, 2001, July, 19, 2002, February, 13, 2004 and June,10, 2006. Implementing orders complete this decree.

Landscapes are limited areas with very little building, characterized by a certain coherence. This coherence may be the result of natural processes or social developments. Landscapes must present, like monuments, a general interest, being the result of a scientific, historic, aesthetic or social/cultural value (art. 3 and 5 decree 1996).

By defining a *buffer zone*, a certain protection can be given to the surroundings of a landscape, if this is necessary for the maintenance of the landscape itself.

Whereas the three decrees foresee in the possibility of protecting the surroundings of valuable heritage, a certain support is also organized by zoning and planning law.

In 1999, a new legislation on urban development for the Flemish Region was adopted (for the amended text of the decree, see: www.ruimtelijkeordening.be). It introduces new plans, having a more flexible and dynamic character. With this kind a plans, an enhanced protection can be given to historic city centres and to the surroundings of monuments, archaeological goods or landscapes. The more flexible character is supposed to lead to specific rules and easements for protected goods in their settings

At the level of building licences dealing with all categories of protected goods *or with buildings located in their surroundings*, an enhanced control is organised since many years now. Public authorities competent for delivering this building licences can only do so for protected goods after having obtained a binding advice from the authorities competent for monument protection. When their advice is negative, the licence must be refused; when conditions are imposed by the advice, they must be taken over in the building licence. A similar advice must be asked for when licences deal with works *in the surroundings of protected monuments*. In this situation however, the advice of the “monument services” is not binding.

3. Some conclusions

Protecting and maintaining a valuable monument or archaeological site in its historic environment, a landscape in its beautiful natural setting, can contribute in a considerable way to the safeguarding of the spirit of a place.

It is of great importance to protect the surroundings of tangible heritage, many times bearer of intangible heritage. International and national legal rules must support this protection. The way in which the surroundings are being protected, within the legal framework of heritage legislation or by means of legislation on urban development, is less important. The most effective way must be chosen, and probably this will be the combined effort.