

Art Law & Balances. Increased Protection of Cultural Heritage Law vs. Private Ownership: Towards Clash or Balance?

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Abstract: Private ownership and cultural heritage protection are two interests in continuing tension. The traditional conception of property right is based on an *absolute* individual right to the peaceful enjoyment of possessions. However, interference in this right may restrict its exercise and impose charges on the owner, such as classification measures and conservation easements. This paper formulates a hypothesis about an increased protection of cultural heritage along with that of private ownership.

Against the background of a complex constitutional allocation of cultural powers, Belgian law provides a pertinent illustration of this development. At the one hand, Belgian governments have been adopting more extensive legislation protecting cultural heritage. On the other hand, Belgian courts, traditionally reluctant to recognize any compensation right when the protective measure only restricts the ownership, gradually appear to undertake a more thorough analysis of the fair balance between the conflicting interests, notably in favor of the owner.

The authors gauge the merits of a new model of cultural heritage protection.

I. PRIVATE OWNERSHIP AND CULTURAL HERITAGE PROTECTION ARE TWO INTERESTS IN CONTINUING TENSION

Traditionally, Belgian law is protective of the owner and favors, in line with classical Roman law, the *bona fide* possessor and the acquisition of ownership

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through *usucapio*. This liberal legal culture may partly be explained by the socio-historical fact that in 1830, when the Belgian state was created, a bourgeois society drafted the Constitution and most property laws. Article 16 of the Belgian Constitution states that: “No one can be deprived of his property except in the case of expropriation for a public purpose, in the cases and manner established by law, and in return for a fair indemnity paid beforehand” and according to article 544 of the Civil Code, which has been founded on the French Civil Code of Napoleon, the right of ownership confers to the owner the absolute right to enjoy a property and to dispose thereof in conformity with the law.

Still, ownership right is not absolute and some interference in this right may restrict its exercise and impose charges on the owner.¹ Measures to control the use of ownership right with regard to cultural heritage may vary from low to high interference.

Conservation easements in the name of the general interest to protect cultural heritage, also called “classification measures” in continental law, restrict ownership rights and may sometimes weigh heavily on the shoulders of the owner. For movable cultural heritage, the export ban, meaning the refusal to access the international art market—one of the consequences of the classification measure—risks a severe loss of economic value of the object. For immovable cultural heritage, the burden to maintain in good state a listed monument appears equally heavy as the subsidies may vary depending on the available resources. If the conservation easement is disproportionate, however, it allows sometimes for compensation.

More interfering is the *de facto* or *de iure* expropriation (deprivation of possessions), which can only be done by law and must always be compensated (see article 16 of the Belgian Constitution). The difficult question in this case with regard to cultural heritage is the amount of the compensation: How does one evaluate a historical building? If any, how much betterment can be taken into consideration compared to an ordinary building?

Public domain is the most constraining status. This regime for public goods eludes the prejudice question, but contains some serious interferences by prohibiting alienation unless the goods are no longer affected to the public service, which may particularly be burdensome for good faith possessors having acquired the object without knowledge of the public domain status (such as church property).

Even though most of these measures for cultural heritage protection have existed since the nineteenth century, their impact on actual ownership and their importance in current Belgian legislation is rapidly increasing. On the one hand, this paper witnesses an expansion of cultural heritage protection in Belgian legislation, in parallel with the expansion of the notion of cultural heritage (part 2). On the other hand, Belgian jurisprudence, influenced by recent decisions of the European Court of Human Rights, seems to counterbalance the trend towards increased heritage protection by taking into consideration the interests of the private owner, thereby confirming a dialectic movement between both interests (part 3).

These two considerations might open the way for the search of a new balance between private ownership rights and the general interest of cultural heritage protection (part 4).

II. THE INCREASED PROTECTION OF CULTURAL HERITAGE IN BELGIUM

A. A segmented competence for cultural heritage, undermining but also reinforcing its protection

As a federal state, Belgium is composed of federated entities which are all competent for some aspects of cultural heritage. Since 1971, cultural heritage falls within the powers of the three Belgian Communities (the Flemish, French, and German-speaking Communities). When subsequently, cultural heritage was split in two segments, movable and immovable cultural heritage, the powers to rule the latter were transferred to the three Belgian Regions (the Flemish, Walloon, and Brussels Regions). As a result of this separation, there now exist six different regulations concerning the protection of cultural heritage in Belgium. There is, however, a territorial overlap between federated entities, increasing the complexity of Belgian legislation on the matter.

This complexity sometimes undermines a coherent protection policy, yet at the same time it points out lacking powers of the federal authorities, which tend to be assumed by the federated authorities (see B, below).

i. Federal cultural heritage protection—nothing but an empty shell?

At the *federal level*, one of the first and primary national patrimony laws in Belgium is based on legal doctrine and seeks to protect the assets owned by the state, called the “public domain,” at least to the extent the state (which concept includes, within Belgium, various other public authorities and entities) owns these assets for the public interest. Government-owned assets belong to the public domain only when they are assigned to the use of all or to the exercise of a public service, either by their nature or by an implicit or express decision by the relevant authority. If not, they belong to the private domain and are subject to the same regime of title and ownership as private property.

The rules governing the public domain are specific and create a regime of unavailability. Once cultural goods are part of the public domain, they cannot be sold or transferred (*inaliénable / onvervreemdbaar*), nor be seized (*insaisissable / onbeslagbaar*), nor can their ownership be acquired over time (*imprescriptible / onverjaarbaar*), unless they are disused (*désaffectation / disaffectatie*).

Public domain assets typically include public museum collections, public libraries, and archives, a substantive part of which is in the hands of federated entities (belonging to their regional or community public domain).

Specific legislative measures to protect national cultural property include a Law of 16 May 1960 relating to the nation's cultural heritage, which enables the government to regulate—and impose a license for—the exportation of certain classes of movable cultural property (this law has never been executed, however), and a Law of 7 August 1931 on the conservation of monuments and sites, which contains a separate section on the protection of movable objects: it provides that objects belonging to certain public authorities that are of national importance from an artistic perspective must be included in an inventory. However, as no official inventory has ever been drawn up, this law has never been effective either.

In practice, the federal authorities often tend to neglect their heritage, hiding behind budgetary constraints or behind the complexity of Belgian institutions. Two cases illustrate this lack of involvement of the federal state with regard to the preservation of its cultural heritage.

First, the buildings and fittings of the Royal Conservatory of Brussels, which are federal property, host music classes for Flemish- and French-speaking students. The Flemish and the French Communities, each for their students, govern education, using classrooms and a common concert hall owned by the state. Neglected for more than twenty years, the buildings are in a shameful state, some rooms are about to collapse, others suffer from water floods, and sometimes classes are given in the utilities rooms. This spring, the Agency for Immovable State Property (*La Régie des Bâtiments*)—which manages the property—asked the two Communities for 20 million EUR each in order to help the state bearing the restoration costs.² The amount is so ridiculously high because of the absence of action to maintain the protected buildings in a good state.

Second, in the *Parc du Cinquantenaire* in Brussels there is a pavilion built by the famous architect Victor Horta in 1890, named *Pavillon des Passions humaines*. It shelters a giant work made by the Belgian sculptor Jef Lambeaux in 1898, carrying the same name “*Les Passions humaines*”. Having as principle theme human passions, it depicts scenes that were considered inappropriate and shocking by society then, mostly managed by the Catholic Church. For that reason, the work was locked away from the public since 1899. In 1979 King Baudouin offered the ensemble to the ASBL Islamic Centre of Belgium that wanted to set up an Islamic museum in the pavilion. This meant that the works by Lambeaux had to be removed. The dismantlement of the works began without authorization but was soon shut down by the Royal Commission of Monuments and Sites stating that the two works, the pavilion and the sculptures decorating it, were inseparable since their classification as an ensemble in 1976. No solution was found and the Islamic Museum never opened. The pavilion and Lambeaux’ masterpiece remained without use. When it became urgent to renovate the pavilion, problems of ownership arose. The pavilion and its sculptures were the property of the ASBL Islamic Centre of Belgium since 1979, but were managed by multiple actors of different inclination. None of them cared about the bad state of the works. The decision to renovate was the result of long and troublesome discussions between the Régie des Bâtiments, the Islamic

Centre, Beliris, and the Royal Museum of Art and History.³ At the end of the renovation works, the *Pavillon des passions humaines* by Horta and “*Les Passions humaines*” by Lambeaux will finally be open to the public on an occasional basis.⁴

ii. Regional and community cultural heritage protection, taking the lead

At the *regional level*, the three regions are competent for monuments and sites, including archaeology (movable archaeological objects are subject to regional rules as long as they remain under the ground, otherwise they are considered cultural goods protected by the Communities). Each region has its own protection regime, but all three are fairly similar in the way they protect monuments and sites and provide for subsidies and even for partial tax relief.

At the *community level*, the three communities take measures for (movable) cultural goods and intangible cultural heritage. While the French Community Decree is very protective of cultural heritage, the Flemish Community Decree seeks a different balance between the public interest of safeguarding cultural heritage and the respect of private ownership. This diverging priority is reflected in several measures established by either regime such as listing rules and export restrictions.

The situation in *Brussels* is however complex, not to say intricately complicated, because not less than five authorities can take measures with regard to cultural heritage. The Brussels Region takes measures for monuments and sites as well as archaeological excavations. The French and the Flemish Communities govern movable cultural heritage owned by Brussels-based institutions exclusively attached to the Flemish or to the French Community respectively, leaving private owners outside their scope. The federal state is in theory still competent for residual matters even though it never executed the old Law of 16 May 1960 on national heritage, which is still in force. Finally, recent institutional reforms provide that starting from 1 July 2014 cultural powers belonging to the federal state but which have a regional interest should be exercised by the Common Community Commission. The latter federated entity is solely active in Brussels in order to fill the gaps when the French or the Flemish Community is not competent. It remains to be seen how the notion of “common cultural powers of regional interest” will be interpreted in practice... Either way, major national monuments or museums are not concerned.

This territorial overlap in Brussels creates a legal vacuum for private movable cultural property, falling outside the scope of all authorities, at least as long as the federal state does not take measures to execute the Law of 1960. The absence of any rules concerning the protection of privately owned cultural goods, besides the European legislation on the matter, might partly explain the recent rush of international auction houses and international art galleries to open offices and exhibition venues in Brussels. While a few decades ago, the city was rather well known for being a hub of international illicit art trafficking, things have changed under the impulse of the European and international legislation. Even though Brussels is still poor in rules protecting movable cultural goods, other federated entities

in Belgium have adopted several legislations in order to increase cultural heritage protection—movable, immovable, and intangible—which will be discussed below.

B. The Extension of the Scope of Legal Measures Regarding Cultural Heritage Protection

In the last decades, several federated authorities have taken measures to extend the scope of cultural heritage protection. It should be highlighted that the increasing number of legal texts goes together with the enlargement of the notion of cultural heritage. Various fields are part of cultural heritage, redefining the notion itself. Today, cultural heritage not only concerns the “fine” arts but also encompasses all the “treasures” of the past,⁵ to be preserved for future generations.⁶

i. Movable cultural goods

Two decrees were adopted in Belgium in order to protect cultural goods:

1. The French Community Decree of 11 July 2002 on the protection of cultural goods and intangible heritage.⁷

If the cultural object is situated in the French language area (or appertains to an institution situated in the bilingual area of Brussels that by reason of its activities is deemed to belong exclusively to the French Community) the French Community decree applies. This decree has an exorbitantly wide scope: all cultural goods (as defined, referring to the EU export regulation categories) are subject to the decree (and, although debatably, to its export license regime) even if not listed.

The obligations imposed by the decree on the owner, possessor, or holder of a protected object include the duties to keep the object at all times in a good condition, to obtain the prior consent of the French Community government for physical alterations to the object except in emergency situations, and to notify the French Community government of any change of the place where the object is kept, of its loss or destruction, or any change to its physical condition or legal status. In consideration of observing those duties, the owner, possessor, or holder may apply for subsidies for the conservation or restoration of his object.

Owners of cultural goods referred to in the decree need authorization of the government to export the goods out of national or European Union territory. In other words, any classified object or “treasure of the French Community” (*trésor de la Communauté française*) must be accompanied by a temporary export (outside EU) or dispatching (within EU) license before leaving the European Union or the national territory, as the case may be. The license is issued by the French Community government (or another authority designated by it) and is valid for one year.

The license may be refused if the dispatching or export risks causing a serious prejudice to the cultural heritage of the French Community. A treasure of the

French Community may not definitively leave the French Community and any application to that effect will be refused. No compensation is provided in these cases.

The present wording of the decree is most unsatisfactory as to the question of whether a license is required for goods that are not classified as treasures, which is why the government intends to amend the decree to clarify this and certain other ambiguities that the present version contains.

2. The Flemish Community Decree of 24 January 2003 on the protection of cultural goods of exceptional importance (Topstukkendecreet)⁸

The Flemish Community decree applies to objects situated within the Flemish Community, meaning the Dutch language area or (parallel to the French Decree) institutions situated in the bilingual area of Brussels that by reason of their activities are deemed to belong exclusively to the Flemish Community.

The scope of the Flemish decree is much narrower than its French counterpart. The Decree only applies to a list of cultural goods of exceptional value (*topstukken*), which are subject to the protective measures of the Decree. On 25 April 2014, the Decree was amended because the Flemish authorities came to the conclusion that of the more or less 342 objects and 15 collections,⁹ only a small percentage was privately owned; the majority of private collections could circulate freely and remain unprotected as long as they were not on that list. The recent amendment provides an extension of the decree's scope to *all* cultural goods with *potentially* exceptional importance ("*topstuk* value"), however counterbalanced by a "ruling" system to redress the balance in favor of the owner allowing him to foresee potential listing of his cultural good.

The obligations of the owner and other right holders are similar to those in the French decree and likewise confer a right to obtain subsidies.

In line with the regulation of the French Community, the decree of the Flemish Community also imposes authorization for exporting a cultural good out of national or European Union territory and can be summarized as follows:

a. Government consent to bring a listed object outside the Flemish Community

The definitive or temporary "exportation" of a listed object outside the Flemish Community requires the consent of the Flemish government (note that, in contrast with the French decree, no listed objects may be transported to another part of Belgium without applying for such consent). However, in no event may the Flemish government prevent a listed object from definitively leaving the country. The government must give or refuse its consent within two months of receiving the application.

b. Mandatory purchase offer from the Flemish government in the event of refusal

If an application to export is rejected, the applicant may request the Flemish government make an offer itself or procure a third party offer. In that case, the

Flemish government must enter into negotiations with the applicant with a view to acquiring the object.

The purchase price must be fixed on the basis of the object's international market value at the time of the export application without, however, exceeding the declared value. If the parties disagree, an expert committee can be appointed to fix the price. A binding offer must be made within ten months from the applicant's request to make a purchase offer with a possible extension of up to four months.

If the Flemish government (or the designated third party) fails to make an offer within that period, the object is free to leave the Flemish Community.

If an offer is made, the applicant may still reject the offer but, in that case, no export application may be filed for three years.

An implementing decree sets out the detailed procedure for the application and the pricing of an offer.

This difference in export regime between both communities reflects a diverging balance of interests between the public interest of safeguarding cultural heritage and the respect of private ownership.

ii. Immovable cultural heritage

In the field of immovable cultural heritage, each region has its own protection regime. All three are fairly similar in the way they protect monuments and sites and provide for subsidies and even for partial tax relief. Other aspects of immovable heritage, such as archaeological heritage and maritime heritage, will briefly be discussed.

Monuments and sites

1. The Walloon Code of Territory Planning, Urban Planning, Heritage and Energy of 1984.

This code dedicates one of its chapters (articles 185–237) to the preservation of cultural heritage, consisting of immovable goods that are worth protecting for historical, archaeological, scientific, artistic, social, technique, or landscape reasons. The code uses an inventory, a “list” system, and a classifying system, and imposes restrictions to the peaceful use related to physical changes.

2. The Flemish Decree of 13 July 2013 on Cultural Heritage.

In 2013, the Flemish Region decided to merge several decrees on cultural heritage into a single decree, dealing with monuments, archaeology, cultural landscapes, and town and village views. Entering into force on 1 January 2015, the decree follows all the steps in order to protect Flemish cultural heritage: list, protect, manage, finance through subsidies and premiums, maintain, and sanction. The decree imposes on the owner and on the users the obligation to maintain the listed property in good state by taking the necessary measures of maintenance, security, management, and repair. It is also forbidden to disfigure, damage, or destroy properties.

3. The Brussels Code for Territory Planning of 9 April 2004.

The Brussels Code for Territory Planning uses an inventory and a list system for its immovable cultural heritage (articles 206–250). Like the Walloon Code and the Flemish decree of 2013, it imposes some positive obligations on the owner such as the obligation to maintain the property in good state and the prohibition to alter the cultural heritage value of the listed property.

Archaeological heritage. Archaeological heritage is protected under the same regimes as immovable heritage. All three regional regimes, enshrined in the above-mentioned legal texts, provide an administrative regime of prior authorization to conduct lawful excavations (even in one's own grounds) and impose certain reporting obligations in relation to archaeological objects. Prohibitions, such as not damaging or destroying archaeological artifacts, sites or ensembles, or not detecting archaeological artifacts on an archaeological site using a metal detector without authorization, are provided in all three regional rules. Owners, possessor, or holders also have to keep the artifact, site, or ensemble in good condition.

A particular aspect of archaeological heritage concerns the regulation of cultural finds. The general rule in relation to finds is laid down in article 716 of the Civil Code stating that the ownership of chattel discovered by pure coincidence (a "treasure") belongs to the finder if discovered in his own grounds, and if the treasure is found in someone else's ground, it is owned half by the finder and half by the landowner. This is in line with article 552 of the Civil Code, which provides that the owner of the land owns everything that lies on and below it, including what he finds pursuant to his own excavations. As long as the object lies in the ground it is considered immovable, forming part of the land; but from the time it is taken or dug out of the ground, it becomes movable and different ownership rules apply.

The above-mentioned regional regulations on archaeological heritage do not affect the ownership of chattels found during excavations or by pure chance, which remains governed by the Civil Code. The finder (mostly the building contractor) must report found objects, safe keep them, and make them accessible for research during a certain period, but the public authorities cannot claim title to them.

The owner of the land in which excavations are conducted may be entitled to compensation in certain circumstances. In practice, building contractors, promoters, and archaeologists often agree with the landowner to pay for a share of the rights on the finds or to remunerate the finder.

Special rules apply to discoveries of wrecks and other maritime property (see below).

Maritime heritage. Various national or regional (such as coastal) legislations regulate how stranded objects or objects found in wrecks and other maritime

property discovered under or above water must be reported, handled, and, as the case may be, protected.

On the international level, all federated entities (regions and communities) as well as the federal state have approved the ratification of the UNESCO Convention on the Protection of Underwater Cultural Heritage of 2001.

On the national level, the Belgian Law of 4 April 2014, published on 18 April 2014, implements the 2001 UNESCO Convention on the protection of underwater cultural heritage, which entered into force on 1 June 2014.

Underwater cultural heritage covers heritage found in the Belgian territorial sea, in the Belgian exclusive economic zone, and on the continental shelf, except wrecks and fragments of wrecks protected under the Nairobi International Convention on the Removal of Wrecks (2007).

The receiver of underwater cultural heritage, appointed by the King, must be notified about any find; failing this the found object can be confiscated. The receiver must draw up a report and, if his advice is positive, the King may protect the underwater cultural property in situ and take any necessary measures, individual or regulatory, required to preserve it, after assessing any potential impact of those measures on the environment.

The law innovates by elaborating a hierarchical system of appropriation to resolve the question of title to underwater finds.

The owner of the cultural property at the time of sinking is the first in line to claim title to the find, provided he can prove his title within nine months of the discovery (article 10). If this is not the case, the find may be appropriated by a public administration or a museum that has expressed an interest in owning it within the same time period (article 11). If both parties compete, a dispute resolution procedure will be triggered (article 12). If neither party claims the cultural property within this nine months period, title will vest in the finder (article 13). If the finder rejects it, title will vest in the Belgian state as a last resort (article 5).

The law further states, literally quoting the UNESCO Convention, that “proper respect shall be given to all human remains,” which again is a novelty in a Belgian legislative text concerning cultural heritage.

Another striking feature in the new law is the general prohibition to hold or sell illicit finds (article 15). This wording seems to suggest the intention of the legislator to consider underwater cultural heritage as part of the “public domain” and to submit it to the regime of “inalienability” peculiar to public ownership.

On the regional level, only the Flemish Region (which borders the North Sea coast and manages Belgium’s two seaports: Antwerp and Zeebruges) has a specific regulation for the protection of maritime heritage (the Flemish Decree of 29 March 2002 on Maritime Heritage and the Flemish coastal regulations).

iii. Protecting the “ensemble” of a monument, a special case

In all three regional legislations concerning monuments and sites, the definition of monuments entails also the “fixtures and fittings” forming an integral part with the

protected building. Yet the scope of this notion has not always been clear and only recent case law sheds light on the importance of ensemble protection. The landmark case of the *Palais Stoclet* constitutes another illustration of increasing cultural heritage protection in Belgian law (see below).

The fixtures and fittings of the Palais Stoclet. The *Palais Stoclet* case is an interesting example of a far-reaching ensemble protection. In order to protect the ensemble of this UNESCO World Heritage Monument, in 2006 the Brussels Region classified the fixtures and fittings (“*installations et éléments décoratifs faisant partie intégrante de ces réalisations*”) of the monument¹⁰—which involved valuable collectible items such as Wiener Werkstätte furniture and jewels realized by the famous art nouveau architect and designer Joseph Hoffmann himself—as “inseparably linked” ensemble to the real estate having already been classified as immovable cultural heritage in 1976. However, according to the Belgian constitution, the Brussels Region is only empowered to protect immovable cultural heritage, excluding movable cultural goods.

The *Palais Stoclet*’s fixtures and fittings could not be considered immovable by destination because the owner of the land and mansion—the company SAS Compagnie Immobilière—was different from the individuals owning the furnishings (the Stoclet siblings). Bypassing the classical civil law distinction between movable and immovable assets and in line with the Convention of Granada on the Protection of the Architectural Heritage of Europe (1985), the Brussels cultural heritage code permits classification of an ensemble of immovable and movable cultural heritage provided the latter has an inseparable link with the former. Needless to say that this interpretation did not satisfy the heirs of the Stoclet couple who intended to sell almost 300 furniture and interior objects at auction in London. All of a sudden, the wide interpretation of monument with its fittings and fixtures precluded them from moving these objects outside the protected monument, let alone outside the country.

They went before the administrative court in order to quash the classification decision and before the civil court for damages. Eventually, all Belgian supreme courts were seized (Constitutional Court,¹¹ Conseil d’État [administrative court],¹² Court of Cassation¹³), yet all of them upheld the use of the “ensemble” classification procedure in the interest of cultural heritage protection. None of the judges recognized a violation of the ownership rights of the heirs, so no compensation was allowed.

The requirement of an inseparable link. Three other cases which refer to the inseparable link between the fittings and fixtures with the monument further clarify the notion of an “inseparable link”.

First, in the case of the Villa “Maeger Scorre” in Knokke-Zoute (Flanders),¹⁴ the Flemish Region classified two paintings by the Flemish artist Edgard Tytgat together with the Villa wherein they were located. The inseparable link was established by

the fact that the paintings, in which the villa was depicted, were made at the specific request of the owners. The owners challenged the classification before the administrative court, but their claim was rejected. The judgment of the administrative court was confirmed by the Constitutional Court, which in its decision determined that certain objects are, by their nature, so firmly attached to a monument, contributing to the socio-cultural, artistic, or historic value, that they must be protected together with the monument.

Second, the case of the Convent *Zusters van Maria* in Izegem (Flanders) concerns the interior of a convent protected as an ensemble together with the convent.¹⁵ The decision of the Flemish minister was eventually rejected on the basis of incompetence. However, the fact that the decision classified the convent and its interior as a total was never found incorrect. The latter was said to have an inseparable link with the former, which meant that the interior had to be protected together with the convent.

Third, the facade, roof, and interior (workshop) of the house of the painter André Hennebicq in Brussels was also subject to an ensemble protection.¹⁶ The heirs challenged the decision before the administrative court. The court avoided giving a large interpretation of the notion of fittings by stating that no procedure had been started to classify movable goods. Regarding the fitting in question, however (the disputed object was a canvas that decorated the roof of the salon on the main floor), the judgment points out the fact that decorative elements that are part of the monument are specifically mentioned in the definition of immovable heritage. The administrative court concluded that the canvas being neither signed nor attached to the salon roof did not necessarily prohibit its classification as a fitting, part of the protected house.

Even if the courts only assess the balance of interest on a case-by-case analysis, it would be interesting to explore whether some general criteria can be derived from it. One might think of a reference to the integration of the object from the outset (*intégration d'origine*) or the intrinsic cultural value of an object. Up to now the notion has been construed *ad hoc*, but it remains important to determine if a wide or strict interpretation is required to allow owners to foresee the potential classification of their fittings and fixtures.

This foreseeability is even more necessary in Belgium and particularly in Brussels where (movable) cultural goods owned by private persons remain in practice unprotected for the time being.¹⁷

III. THE PROPORTIONALITY TEST AS A COUNTERBALANCE?

As the preceding chapter clearly pointed out, the owner is constrained in the peaceful enjoyment of his possessions by numerous rules concerning cultural heritage protection. Restriction of his ownership right resulting from some of these rules may cause a disproportionate burden on the owner. Similarly, deprivation without fair compensation *prima facie* violates his ownership right.

These threats of violation of ownership right are liable to challenge before the courts, which are to operate a fair balance between both interests. The lines of reasoning of the Belgian courts appear to be influenced by the European Court of Human Rights' jurisprudence. It is therefore useful to briefly examine Strasbourg case law before analyzing Belgian case law.

A. The European Court of Human Rights

Ever since the famous *Beyeler* case in 2000, the fair balance between the general interest of cultural heritage protection and the individual ownership right became a legal issue. The claimant, a Swiss art dealer, complained that the Italian Ministry of Cultural Heritage exercised its pre-emption right far later than the invalidated sale of a painting of Vincent Van Gogh ("The Gardener"), which Mr. Beyeler acquired through a Roman antique dealer. The court held that Article 1 of Protocol No. 1 was breached because of the absence of a fair balance when exercising the pre-emption right. Following that case, the European judge has given in the range of fifteen judgments and decisions related to cultural heritage versus individual ownership.

Gradually, the general interest of cultural heritage protection has taken more importance in Strasbourg judgments, although general case law in this area remains scarce.¹⁸

When controlling the respect of the peaceful enjoyment of possessions, the reasoning of the court is invariably the same, questioning (1) the existence and (2) the validity of the interference.

First, the court controls whether there is interference and if the claimant holds a right for his request.¹⁹ The court also qualifies the nature of the interference: is it a measure to control the use of property, a deprivation of property, or a breach of the general rule to protect the peaceful enjoyment of possessions?

Second, the court examines the validity of the interference almost always in three steps. In order to be deemed compatible with Article 1 of Protocol No. 1 the interference must (i) be lawful, (ii) pursue a legitimate aim, and (iii) be proportionate to this aim. These are discussed below.

i. Compliance with the principle of lawfulness

The first essential condition for interference is that it should be lawful. This also presupposes "that the applicable provisions of domestic law be sufficiently accessible, precise and foreseeable."²⁰ Very few decisions held a violation of ownership right on the basis of illegality.²¹

ii. The aim of the interference

Secondly, any interference must pursue a legitimate aim founded on the general interest, in this case the protection of cultural heritage. Member states benefit from a wide margin of appreciation in order to assess the protection of their heritage. The court even assumes that the pursued aim is legitimate, and this assumption

can only be reversed if the decision is evidently not reasonably founded. The burden of proof weighs heavily on the shoulders of the owner while the legislator benefits from some latitude.

For immovable cultural heritage, the court often held that “the conservation of the cultural heritage, and, where appropriate, its sustainable use, have as their aim, in addition to the maintenance of a certain quality of life, the preservation of the historical, cultural and artistic roots of a region and its inhabitants” (*Potomska and Potomski v. Poland* [GC], 29 March 2011, § 64; this case concerns the expropriation of a nineteenth century Jewish cemetery several years after the building permit was issued to the owners of the land, which the court held as disproportionate).

For movable cultural heritage, the court considers that “the control by the state of the market in works of art is a legitimate aim for the purposes of protecting a country’s cultural and artistic heritage,” further pointing out that the national authorities enjoy a certain margin of appreciation.²² Moreover, if the artist is a foreigner, the court considers it may be legitimate for a state to take “measures designed to facilitate in the most effective way wide public access to [the works of this artist], in the interest of universal culture.”²³

Up to this date, the Court has never held against the aim to protect cultural heritage.

iii. Was there a fair balance

Finally, the proportionality test almost always forms the central part of the court’s appreciation. The Strasbourg judge must assess the fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. With particular reference to the control of the use of property and therefore interference with proprietary rights, the state has a wide margin of discretion as to what is “in accordance with the general interest,” particularly where environmental and cultural heritage issues are concerned.²⁴

The court takes several parameters into consideration, such as the severity of the imposed restriction. Also, “consideration must be given in particular to whether the applicant, on acquiring the property, knew or should have reasonably known about the restrictions on the property or about possible future restrictions, the existence of legitimate expectations with respect to the use of the property or acceptance of the risk on purchase, the extent to which the restriction prevented use of the property, and the possibility of challenging the necessity of the restriction.”²⁵

One of the most important factors of the court’s assessment is the compensation awarded to the owner.

The compensation claim depends on the nature of the interference, whether it is a measure to control or a deprivation of the ownership right.

In case of a *deprivation* or expropriation, the owner must be reasonably compensated. A total absence of compensation is justified only in exceptional circumstances. When assessing the amount of the compensation, which should be a

reasonable sum in order to fully compensate the owner, several elements are taken into account.

First, the court looks at the market value of the good at the time of the deprivation and irrespective of the price paid by the owner. In some cases, the court however admits that the: “Legitimate objectives of ‘public interest’ may call for less than reimbursement of the full market value of the expropriated asset. In the Court’s view, the protection of the historical and cultural heritage is one such objective.”²⁶

In the *Kozacıoğlu v. Turkey* case the claimant complained about the expropriation of a monument he owned which was not compensated properly. Even if the court recognizes the difficulty of evaluating a listed property, it does not accept that Turkish law makes it impossible to take into account that part of a property’s value that results from its rarity and its architectural and historical features.²⁷ As such, the evaluation mechanism laid down in the Turkish law is not only likely to penalize those owners of listed buildings who assume burdensome maintenance costs, but it also deprives them of any value that might arise from the specific features of their property.

Furthermore, the court interestingly observes that the practice of a number of Council of Europe member states in the area of expropriation of listed buildings indicates that, despite the absence of precise rules or common criteria for valuation, the option of taking into account the specific features of the properties in question when ascertaining appropriate compensation is not categorically ruled out.²⁸

Second, the court can also verify if the compensation was paid within a reasonable period of time. In the *Ruspoli Morenes v. Spain* case, the Spanish Minister of Education and Culture exercised the state’s pre-emption right on the painting “*La Condesa de Chinchon*” by Francisco de Goya owned by the aristocratic family Ruspoli Morenes. The fact that the state paid the price for this painting over a period of two years, without accruing the price, does not breach the fair balance.²⁹

Measures to control the ownership, as opposed to deprivation, do not require compensation. The obligation to compensate is replaced by judicial procedures where the claimant can argue his economic interests and whether he had to bear a disproportionate and excessive burden.

Finally, another important factor for the verification of the fair balance concerns the respect of procedural safeguards. Given that member states have a wide margin of discretion and that the court can only control measures in the second place, the importance of procedural safeguards increases. Even if Article 1 of Protocol No. 1 remains silent about which procedures are to be followed, the court imposes procedural safeguards that are far from insignificant. In the decision *Helly v. France*, the court noted that: “the compensation had been determined following a procedure that had ensured an overall assessment of the consequences of the expropriation, in which the individuals concerned had been given due opportunity to defend their rights, and the expropriations judge had, to that end, applied criteria which did not

appear arbitrary.” The court held that the respondent state had not overstepped its margin of appreciation and the applicants had obtained a sum that was reasonably related to the value of the property of which they had been dispossessed. The “fair balance” between the demands of the general interest of the community and the protection of the right to peaceful enjoyment of possessions had therefore not been upset.³⁰

Procedural safeguards protect against arbitrary decisions and offer a better balance between individual and collective interests in order to protect cultural heritage. Nonetheless, this criterion may not override the necessity of examining the merits of each case.³¹

B. The Belgian courts

Most of the cases brought before the Belgian courts by owners with regard to their cultural property concern the question of compensation. This section will, therefore, focus on the compensation issue as it indicates the recognition of a prejudice caused to the owner.

i. The classical legal culture

Traditionally, in line with the European Court of Human Rights’ jurisprudence, Belgian judges clearly distinguish whether the owner is deprived of or simply restricted in his ownership right to assess the impact on ownership rights.

In the first case, a fair compensation will always be allowed, as the constitutional rule does not provide any exception. In that aspect, the Belgian safeguard for the owner is stricter than the European, which exceptionally accepts expropriation without compensation.³² Even if the amounts may vary, depending on the factors taken into account, the owner must in principle be fully compensated.

However, in the second case, Belgian judges are reluctant to recognize any compensation right when the protective measure only restricts the ownership without expropriating the owner, unless the law expressly provides so. They do not consider restrictions, such as classification easement, a prejudice to the owner;³³ therefore compensation is considered an exception rather than a general rule.

This narrow interpretation of the right to compensation when the owner’s rights are only restricted may at times be severe to the owner.

In the *Palais Stoclet* case, the claimants complained that the listing of the fixtures and fittings precluded them from enjoying their possessions, as the objects could not be moved—separately or in their integrity—nor sold; they felt expropriated yet without receiving any compensation. The civil court refused to recognize any compensation right as they ruled the listing did not transform these fittings and fixtures into immovable goods owned by the owner of the building (the claimants only owned the fittings and fixtures, the building being owned by a legal entity). Furthermore, the owners could still transfer their ownership right among each other, to the corporate owner of the building, or to a third party. As such,

the listing did not deprive them of their ownership right, only restricted them in the exercise of their ownership right.

In another case concerning Iranian vessels brought to Belgium, the judge refused also to recognize the illicit exportation as a prejudice allowing compensation.³⁴

ii. Evolution under the influence of the Strasbourg jurisprudence and its proportionality doctrine

Under the impulse of Strasbourg jurisprudence, recently Belgian judges appear to be undertaking a more thorough analysis of the fair balance between the interest of cultural heritage protection and the peaceful enjoyment of the individual property, especially in the case of measures to control ownership rights.

In some recent cases, the judges faced with this paradigm deem themselves to be bound to assess the issue in light of the ownership right enshrined in Article 1 of Protocol No. 1 of the European Convention on Human Rights.

In certain restitution cases concerning illicit trafficking of cultural goods, reference is made to Article 1 of Protocol No. 1 with a view to preventing the return of the cultural good to its country of origin.³⁵

Recently, the Constitutional Court annulled a legal measure in the Brussels” classification decree that failed to provide any compensation right to the owner, which the court held to be an “excessive burden” resting on the owner.³⁶ In this case, the owner of land in Brussels was granted a construction permit in the 1990s but when the land was classified as a protected site in 2006, the public authorities cancelled the permit and any construction was refused to the owner, without compensation. This absence of compensation was ruled to be discriminatory with regard to owners of a non-listed land subject to urban planning modifications. The court evaluated the burden referencing the jurisprudence of the European Court of Human Rights.

Another principle that supports the proportionality doctrine is the equal duty of citizens to bear the public burden (*égalité des citoyens devant la charge publique*). This argument was put forward in a case before the Constitutional Court concerning the holder of a building permit on a protected sand dune.³⁷ The court held that, with regard to the equality principle, the authorities could not impose burdens exceeding those that ought to be supported by a private person in the name of the general interest. The court ruled, accordingly, that the holder should be compensated. The court further held that the fact that the holder of a building permit could not apply for compensation whereas the owner of a sand dune was entitled to do so was a discrimination that needed to be remedied.

IV. TOWARDS A NEW MODEL OF CULTURAL HERITAGE PROTECTION?

These recent developments indicate that the apparent trend towards increased cultural heritage protection, requiring more sacrifices from the individual owner, requires a counterbalancing exercise based on a kind of proportionality test.

It may seem paradoxical but inevitable that the more reliance is made on international rules for cultural heritage protection, such as the UNESCO and UNIDROIT Conventions—which both gain wider acceptance and which are driving forces of the view favoring more protection—the more opposition is to be expected from defenders of the right to individual ownership by invoking the European Convention of Human Rights, thereby creating an apparent conflict of (international) laws.

Nonetheless, this paper believes that the dialectic movement between “our” heritage and “my” property primarily aims to preserve and pass on cultural heritage, thus seeking a balancing interaction rather than a clash.

This paper noticed: an increased degree of cultural heritage protection through a higher number of rules interfering in private property; a broader definition of cultural heritage; and the evolution of the classical legal culture toward a more human rights approach where proportionality between collective and individual interests is key.

Even though ownership right is still strongly enshrined in Belgian law, it has shown some limits leaving both individual and collective interests unsatisfied. The question would then be whether there exists any other legal model suitable for cultural heritage in all circumstances? Figures such as shared responsibility or custodianship lay there to be explored. For the time being, only very partial reflections derived from environmental law and the concept of “natural heritage” may open the way to devising a new model.

ENDNOTES

1. For an analysis of the ambiguity of the ownership right with regards to other fundamental rights, see Krenc and Renauld 2013, Xifaras 2004, and Colloque international 2006.

2. See press releases on the matter: “Conservatoire de Bruxelles: Servais Verherstraeten demande un effort de 20 millions des Communautés,” *La Capitale*, 25 March 2013, <http://www.lacapitale.be/690461/article/regions/bruxelles/actualite/2013-03-25/conservatoire-de-bruxelles-servais-verherstraeten-demande-un-effort-de-20->; Sarah Delafortrie and Christophe Springael, “Rénovation du Conservatoire royal de Bruxelles,” *PressCenter.org*, 24 April 2014, <http://www.presscenter.org/fr/pressrelease/20140425/renovation-du-conservatoire-royal-de-bruxelles> (accessed 15 October 2014).

3. Beliris is a cooperation between the federal state and the Brussels Region, aiming to promote Brussels as the capital of Belgium and of Europe. Beliris realizes some construction or renovation projects in that aspect. For further info, see <http://www.beliris.be/qui-sommes-nous/>.

4. See press releases on the matter: Johan Vanderborght, “Bruxelles Parc du Cinquanteaire – Restauration du Pavillon Horta,” *Régie des Bâtiments*, 17 May 2013, http://www.regiedergebouwen.be/persberichten_fr.cfm?key=381; “La Mosquée du Cinquanteaire autorise la restauration du Pavillon des Passions humaines,” *La Capitale*, 10 October 2011, <http://www.lacapitale.be/226266/article/regions/bruxelles/actualite/2011-10-10/la-mosquee-du-cinquanteaire-autorise-la-restauration-du-pavillon-des-pass>; and Callataÿ 1989 (accessed 15 October 2014).

5. Chastel and Babelon 1994, 11.

6. The English term “heritage” reflects the collective concept even better than the French term “patrimoine.” For an analysis of the translation between the French and English terms, see Desvallées 1995, 14.

7. Decree of 11 July 2002 concerning the movable cultural goods and the intangible heritage of the French Community, *Moniteur belge*, 24 September 2002.

8. Decree of 24 January 2003 concerning the protection of the exceptional movable cultural heritage of the Flemish Community, *Moniteur belge*, 14 March 2003.

9. Departement Cultuur, Jeugd, Sport & Media, <http://www.kunstenerfgoed.be/wat-doen-weschermen-cultuurgoederen/topstukkenlijst> (accessed 15 October 2014).

10. Convention for the Protection of the Architectural Heritage of Europe, Granada, 3 October 1985, art. 1, 1.

11. Constitutional court, decision n° 25/2010, 17 March 2010.

12. Conseil d'Etat, decision n° 210.958, 2 February 2011.

13. Court of Cassation, decision C.12.0091.F/1, 13 June 2013.

14. Conseil d'Etat, decision n° 193.429, 19 May 2009, *n.v. Compagnie Het Zoute*. Clippele 2014, 87.

15. Conseil d'Etat, decision n° 184.936, 30 June 2008, *V.Z.W. Zusters van Maria*.

16. Conseil d'Etat, decision n° 100.286, 25 October 2001, p. 10, *Simon et Hennebicq*.

17. See above: 1. a. ii.; The only competent entity would be the federal state, but it never put into practice the only federal law which could govern movable cultural property at national level (and so in Brussels), see Loi du 16 mai 1960 relative au patrimoine culturel mobilier de la Nation, *M.B.*, 5 août 1960.

18. For a broader overview, see also Clippele 2014, 913–35.

19. E.Ct.H.R., *Prince Hans-Adam II von Liechtenstein v. Germany*, 12 July 2001, §85.

20. *Beyeler v. Italy* [GC], 5 January 2000, § 109.

21. Yet, see *Silahyürekli v. Turkey*, 26 November 2013, concerning the classification measure of a land into an archaeological site resulting in the annulment of the ownership right; in §§ 40 and 45 the court holds that the interference is illegal because unpredictable, arriving more than sixty years after the acquisition of the land by its successive owners.

22. *Beyeler v. Italy* [GC], § 112.

23. *Ibid.*, §113.

24. *Potomska and Potomski v. Poland* [GC], 29 March 2011, § 67; see also *Beyeler v. Italy* [GC], § 112, and *Kozacıoğlu v. Turkey* [GC], 19 February 2009, § 53.

25. *Potomska and Potomski v. Poland* [GC], § 67.

26. *Kozacıoğlu v. Turkey* [GC], § 64.

27. *Ibid.*, § 69.

28. *Ibid.*, § 70.

29. *Ruspoli Morenes v. Spain*, 28 June 2011, §§ 44–45.

30. *Helly v. France*, 11 October 2011.

31. *Van Drooghenbroeck* 2009, 65.

32. See the European case *Ex-Roi de Grèce et autres c. Grèce*, 23 novembre 2000, § 98 where the Court recognizes a breach in ownership rights when there is a total absence of compensation, yet without explaining the exceptional circumstances.

See Belgian jurisprudence, Court of Cassation, 31 January 2008, C.06.0250.N/7: “Article 16 of the Constitution states that no one can be deprived from his ownership for public utility reasons without a fair and prior compensation. This compensation must encompass all the damages suffered by the expropriated owner and have a causal link with the expropriation.” *Pâques and Vercheval* 2011, 815–16.

33. Conseil d'Etat, decision n° 26.043, 9 January 1986, *Laureyssens*. The administrative court (*Conseil d'Etat*) often reiterated that: “Given that the imposition of a public utility easement does not deprive the owner of his ownership; that he maintains his right in the limits fixed by law; that the rules related to expropriation are not applicable in this case; that, like article 1 of the First Protocol, article 11 (16) of the Constitution leaves untouched article 544 of the Civil code: that if article 11 (16) of the Constitution established the general principle of compensation for any forced deprivation of ownership, article 544 of the Civil code however reserved the right to the legislator to order or to make the competent authority order, yet without any compensation, the restrictions to the enjoyment in the name of the general interest; that the right to compensation which is the rule for article 11 (16) of the Constitution becomes the exception outside the scope of this article yet must then be recognized by a special legal measure.”

34. Court of appeal of Brussels (4th room), 20 June 2011, Dutreix v. the Belgian State and the Islamic Republic of Iran, in presence of Vanden Berghe, unpublished., R.G. n° 2002/AR/1993, 22–23.

35. See however, Court of Cassation, n° P.11.0927.F/1, 15 November 2011, which recognizes the right of return to the country of origin despite the ownership right.

36. Constitutional Court, decision n° 12/2014, 23 January 2014.

37. Constitutional Court, decision n°55/2012, 19 April 2012.

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