Public and Private Sovereign Powers in Liberal Models of Property Protection

Belgium, Sweden, and The Netherlands

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I. Introduction

In his Pulitzer award winning book, *The Powerbroker,*[1] Robert Caro documents the thirst for power animating Robert Moise, the mastermind behind the transport network and urban planning in New York between the 1920s and 1960s. In particular, Moise used extensively and creatively intricate statutory authorisations granting expropriation powers to his private corporations (we would call them 'special purpose vehicles' in today's parlance), shielded from public scrutiny. In this way, Moise socially reshaped whole parts of New York and struck compromises with major property owners around the city. Major differences awaited minorities living in socially close-knit – albeit somewhat deprived – sections of New York and establishment members living on large estates. Caro's minute investigations highlighted the interplay between law, social positions, and political preferences. This story calls to mind the intricate political and legal links between the protection of private property as the stronghold of individual freedom and security, and the rule of law as the bastion against executive arbitrariness on the other side of the Atlantic.[2]

International investment law pays close attention to the protection of property rights and the rule of law, especially to legal certainty: it focuses on the existence of a general principle of 'fair and equitable treatment'.[3] While international investment law draws on comparative public law,[4] identifying European core principles of expropriation has been largely the task of private law.[5] Focusing on comparing liberal systems (Belgium, Sweden, and the Netherlands) as such highlights how deeply expropriation lies at the crossroads between different areas of public law (eg, constitutional law, fundamental rights and freedoms, and general administrative law), private law (eg, property as a right), and mixed fields (eg, environment and planning law). Despite an overall system protecting property rights against administrative arbitrariness at a rather similar level in Belgium, Sweden and the Netherlands, many technical compromises and concrete solutions are reached via different routes, highlighting variations in preferences in liberal systems to curtail administrative powers: Belgium provides fragmented answers as it relies heavily on judge-made law in addition to its federalised system, whereas the Netherlands sequences the administrative process, compartmentalising it in fairly watertight stages where environmental plans and expropriation are kept separate, and Sweden addresses issues pertaining to expropriation topic by topic.

II. Shared Background and its Limits

Belgium, the Netherlands, and Sweden are all representatives of the French model of expropriation, ie, a model strongly influenced by the Napoleonic idea of sacred property, as proclaimed in the French Civil Code of 1804 (Article 544), with 'sovereign' property owners enjoying full control over their property: the first part of Article 544 provides that '[p]roperty is the right to enjoy and dispose of things in the most absolute manner'. In this liberal approach, property is deemed inalienable (see Article 17 of the 1789 French Declaration of the Rights of

[1] *The Power Broker: Robert Moses and the Fall of New York* (Knof 1974).
[2] J Sluysmans, S Verbist and E Waring, 'Expropriation in Europe' in J Sluysmans, S Verbist and E Waring (eds) *Expropriation Law in Europe* (Kluwer 2015) 1-26, 9.
[3] OECD, 'Fair and Equitable Treatment Standard in International Investment Law', Working Papers on International Investment, nr 2004/3 (September 2004).
[4] S Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010).
[5] J Sluysmans, S Verbist and E Waring (eds), *Expropriation Law in Europe* (Kluwer 2015).

Man and the Citizen[6]). Article 545 of the French Civil Code confirms this by providing that '[n]o one may be compelled to surrender his property, except in the public interest and in return for fair and prior compensation'. Thus, in contrast to a more social model, property is not understood as having a social function as the core of its very essence (as it would be in the German model of property rights). However, Article 544 of the French Civil Code opens the door for limits to the absolute sovereign power of the property owner when it states that '[p]roperty is the right to enjoy and dispose of things in the most absolute manner, provided that they are not used in a manner prohibited by laws or regulations',[7] which together with Article 545, allows for regulating property rights and expropriation in the name of the general interest. A specific act of 1810 was adopted to regulate expropriation in France, which then travelled across Europe, including Belgium, the Netherlands, and Sweden.

As a response to industrialisation and the need to develop railways,[8] key legislation regarding expropriation, strongly modelled on the French approach, was adopted in all three countries in the 19th century (in 1835 in Belgium, and it is still in force although more recent legislation applies in very urgent circumstances; in 1845 in Sweden – it was in force until 1917, and was reformed again in 1972; in 1851 in the Netherlands – it will be in force until a reform adopted in 2016 enters into force; at the time of writing, the official date is not known). The Dutch and Belgian constitutions also included the specific protection of property (Article 164 of the Dutch Constitution of 1815,[9] included in Article 14 of the Dutch Constitution of 1983; Article 11 of the Belgian Constitution of 1831, formally co-ordinated under Article 16 in 1994 with no substantive change), while Sweden included no bill of rights in its first Constitution of 1809 but supplementing that of 1974 with a specific chapter on fundamental rights in 1980 (and the protection of property in Article 15 of the Instrument of Government).

This shared liberal approach to property across the three countries is especially noteworthy as it is not as straightforward as it might seem. Indeed, in many other respects, France, Belgium, the Netherlands, and Sweden have different traditions when it comes to civil law and State organisation. Space allows us to mention only some of these differences here, such as the reception of Roman law in France, Belgium, and the Netherlands but its absence in Sweden.[10] However, Grotius left his mark all over Europe, including Belgium, the Netherlands, and Sweden.[11] In terms of executive power evolving into absolutism, the three countries did not have a long-lasting and shaping experience of deep-seated absolutism such as the one that peaked in France from the 17th century onwards. The 1809 Swedish Constitution marked the transition from some form of absolutism to a constitutional monarchy,[12] confirmed by the Act of Succession of 1810, which regulated the right of French Prince Bernadotte to accede to the Swedish Throne. The Low countries (the Netherlands and Belgium) had long been part of the Habsburg Empire until the French Revolution. They then had close ties with Napoleonic France, as Belgium had been annexed in 1795, and from 1806 to 1810 the Dutch King was

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[6] 'Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid'.

[7] Underlining added.

[8] For Sweden: T Kalbro and J Paulsson, 'Development of Swedish Legislation Regulating Compensation for Compulsory Acquisition – A Law and Economics Perspective' (2014) 3(3) European Property Law Journal 215-30, 222.

[9] The protection of property can be officially traced back to 1798 (<https://www.denederlandsegrondwet.nl/id/vkugbqvdtzxh/artikel_14_onteigening> last accessed 28 June 2021).

[10] T Lundmark, *Charting the Divide between Common and Civil Law* (OUP 2012) 418.

[11] Sluysmans, Verbist and Waring (2) 1-26, 4.

[12] Lundmark (10) 425, according to whom the Swedish kings never enjoyed the power of absolutist monarchs in the same way as they did in France: they shared power with a more or less independent parliament and with a judiciary that often sided with parliament in confrontations with the king.

Napoleon's brother, leaving traces of a Napoleonic approach to administration in the Dutch system up until the famous *Benthem* arrest.[13] Overall, in reaction, Belgium developed a pragmatic stance against all things authoritarian once it gained independence in 1831.[14]

After WWII, Belgium, the Netherlands, and Sweden also became party to the same international instruments, such as the European Convention on Human Rights, and in particular the First Protocol to the European Convention on Human Rights, whose Article 1 protects property. More recently, there have been reforms or additional pieces of legislation regulating expropriation in all three countries. In Belgium, the legislation most often used now dates back to 1835 and 1962 (in the case of very urgent circumstances);[15] in the Netherlands, a major expropriation reform is due to enter into force in 2022; in Sweden, major socio-economic reforms have been adapting the landscape since the 1970s.

Despite these changes, the core features of the expropriation procedure and the protection of property against expropriation remain faithful to the liberal approach. Overall, expropriation is seen as an ultimate solution when no other option has proved successful.[16] All three legal systems lay strong emphasis on achieving an amicable transfer of property to the public authority based on negotiations with the property owner. Secondly, a legal ground is needed for expropriation. Thirdly, the expropriation has to pursue a public purpose. This condition is framed differently in the three systems. In Belgium, the public purpose is interpreted very widely and may include private interests (but not speculation: eg, the provision of a hospital by a private entity is accepted). Judges have only limited power to scrutinise this public purpose. In the Netherlands, the expropriation needs to be in the interest of the development, use, or management of the physical environment. In Sweden, an exhaustive list of ten public purposes is set out. These ten purposes range widely from urban development to 'the need for space for a building [...] of significant importance to the state or to a certain population group'. In addition, a condition of emergency exists for one of the main expropriation procedures used in Belgium, while necessity and urgency are required in the Netherlands. A balance between the general and individual inconvenience and the benefit resulting from the expropriation needs to be made in Sweden. Furthermore, the possibility of 'self-realisation' is open in the Netherlands and Belgium, allowing property owners to carry out a public project if they have the capacity to do so. The importance of property as such (and not only as an economic value that can be swapped for money) can be identified to various degrees across the three legal systems. Indeed, in Belgium and the Netherlands there is a right to repurchase the property when the public purpose has not been achieved within a certain period of time or when the property has turned out not to be needed for the public project to be realised. Much discussed in Sweden, this option has been dismissed as resulting in too many intricated issues with no clear and fair outcomes. A last difference pertains to the fact that while there is no general right in Belgium[17] or in the Netherlands for a property owner to request a public authority to purchase a property, Sweden does recognise a right of redemption in some circumstances (see the discussion of the cases pertaining to excessive noise and taking).

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[13] *Benthem v. Netherlands* (8848/80) 23 October 1985 ECtHR [Plenary].

[14] Y Marique, 'Belgian Constitution (1831)' Max Planck Encyclopaedia of Comparative Constitutional Law (fc).

[15] Until 2007, the 1962 Act had provided the default procedure, but judges then started to intensify their scrutiny of 'very urgent circumstances', hence limiting the use of the 1962 Act, which resulted in a revival of the 1835 Act.

[16] It has been noted that Belgium historically opted for this solution because it was mindful of the limited resources of the newly created State rather than for reasons linked to the political ideals enshrined in the constitution (S Verbist, 'Expropriation Law in Belgium (Flanders)' in J Sluysmans, S Verbist and E Waring (eds), *Expropriation Law in Europe* (Kluwer 2015) 27-59, 27). This is one illustration of Belgian pragmatism.

[17] Specialised legislation such as the one applicable to Walloon airports is a rare exception to this.

III. Structural differences

Despite these commonalities, four major features need to be discussed to understand how Belgium, the Netherlands, and Sweden organise expropriation in administrative terms: their State organisation, the outlook of their constitutional and administrative law, the content of property rights, and their legislative strategies.

A first major difference between the three administrative systems is the degree of centralisation. Indeed, Sweden and the Netherlands are centralised States, while Belgium is a federal system,[18] with a distinctive legal framework regarding a range of matters relating to expropriation, such as the regulation of airports, urban planning, and cultural heritage. However, this does not seem to be determinative of the entities that are allowed to proceed with expropriation. In Belgium, local, regional, and federal government enjoy this right. In the Netherlands, municipal, provincial and State government also enjoy expropriation rights despite stronger centralisation there. In Sweden, by contrast, only the central government enjoys this right, but delegation to the Country Administrative Board or to another public authority is provided for in limited circumstances. In addition, local self-government is recognised in different ways in the three countries. For instance, due to the Dutch spatial configuration, water authorities are a distinctive form of local government in the Netherlands, enjoying expropriation powers on a par with 'ordinary' local government. Although Belgium also had sophisticated legislation regulating water authorities, they do not enjoy expropriation powers: another public authority will in principle carry out the expropriation required to manage the water system.[19]

A second major difference between the three administrative systems relates to structural features of administrative law and constitutional review. Indeed, Belgium, the Netherlands, and Sweden share a similar view on parliamentary sovereignty when it comes to the allocation of roles between Parliament and the Executive, although the Swedish administration is more independent from the Executive than it is in principle in Belgium and the Netherlands.[20] However, the role of courts varies deeply when it comes to their contribution to guaranteeing that the constitution and the legislation are complied with. When it comes to the system of constitutional review, only Belgium has a centralised system with a constitutional court and an extensive constitutional review with detailed case law on the protection of fundamental rights and freedoms, including the protection of property rights.[21] In Sweden, courts play only a limited role in deciding on fundamental rights, yet public authorities are expected to review whether a decision complies with norms of a higher rank.[22] Constitutional review is prohibited

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[18] This means that a Flemish Decree (*Vlaams Onteigeningsdecreet* 24 February 2017) and a Walloon Decree (Decree 22 November 2018 *relatif à la procédure d'expropriation)* coexist with the federal legislation of 1962 (L 26 July 1962 *relative à la procédure d'extrême urgence en matière d'expropriation pour cause d'utilité publique*).

[19] No right to expropriate in *Loi* 5 July 1956 *relative aux wateringues*. In Wallonia, the Government may expropriate (eg, *Décret relatif au Livre II du Code de l'Environnement constituant le Code de l'Eau*, Article 171 §2 second sentence); in Flanders, regional, provincial or local government may expropriate as a matter of principle (Decree 15 Juni 2018 *coordinatie van Decreet van* 18 July 2003 *betreffende het integraal waterbeleid*, Art 1.3.3.1.1).

[20] J Rechel, 'The Pan-European General Principle of Good Administration in Sweden – Undeniable but Partial Vehicles of Changes' in U Stelkens and A Andrijauskaite (eds) *Good Administration and the Council of Europe – Law, Principles, and Effectiveness* (OUP 2020) 256-74, 258.

[21] For one illustration: Constitutional Court, nr 69/2005, 20 April 2005. In addition, the Constitutional Court links Article 16 of the Constitution with Article 1 of the First Protocol, see G Rossoux, *Vers une dématérialisation des droits fondamentaux* (Bruylant 2015) 873-94.

[22] H Wenander, 'Administrative Constitutional Review in Sweden: Between Subordination and Independence' (2020) 26(4) European Public Law 987-1010.

in the Dutch Constitution.[23] By contrast, the three legal systems are placed in a mirroring position when it comes to the formalisation of administrative procedures, another technique used to limit and channel administrative power. Indeed, there is a formal procedural act codifying administrative procedures in Sweden (since 1971) and the Netherlands (adopted in stages since 1994),[24] while Belgium did not adopt such a codification of the administrative procedures: it relies on general principles of good administration developed by courts to supplement a very fragmented legal and constitutional framework organising the duties of the administration.

A third major difference between the three legal systems is that property rights are actually *not* conceived in the same way in the civil law. Belgium stayed close to the French civil code until 2020,[25] while the Netherlands has evolved away from it to a larger extent as the civil code was deeply reformed in 1992 and Sweden was influenced by legal realism from the early 20th century onwards.[26] These differences need to be noted as they point towards a key distinction between the ways property is protected as such against arbitrary encroachment by public powers under constitutional and administrative law on the one hand, and how property is regulated and understood in private relationships under private law, on the other.

A fourth major difference between the three legal systems relates to general legislative strategies. Indeed, Sweden provides many highly specific solutions in specialised legislation (such as the Civil Protection Act or the Heritage Act). The Netherlands also has specialised legislation, but the most noteworthy feature is that many legal issues related to the expropriation procedures in other legal systems have been hived off outside the expropriation framework, in a different legislative framework, namely that of the adoption of the environment plan. This means that certain legal issues are supposed to have been addressed elsewhere prior to the expropriation. By contrast, Belgium has a system that relies more extensively on solutions developed through case law. There is specific legislation providing partial answers to questions pertaining to some aspects of expropriation, but this legislation, by and large, does not exhaustively or systematically cover the legal issues arising in expropriation, and judges fall back on two default provisions, either article 1 of the First Protocol to the European Convention on Human Rights or article 1382 of the Civil Code on general (administrative) liability with a view to awarding compensation.

IV. Direct Expropriation: Process and Substance

In Belgium, the Netherlands, and Sweden, a classic expropriation procedure when the property owner sees a piece of real estate being compulsorily taken away from her is a two-stage process, with an administrative stage, a judicial stage, and a possible outcome: full compensation.

A. Judicial Stage

[23] Article 120 of the Dutch Constitution.

[24] JB Auby (ed), *Codification of Administrative Procedure* (Bruylant 2014).

[25] There has been a reform of property rights in Belgium (*Loi* 4 February 2020 - *Nouveau Code Civil, Livre 3 "Les biens"*, *Official Journal*, 17 March 2020, entry in force for the most part on 1st September 2021). Belgian property rights will become less absolute in the future. See *Le droit des biens réformé* (Bruylant 2020).

[26] For the development in relation not to real estate but movables: K Rakneberg Haug, 'The Historical Development of the Scandinavian Functional Approach to Transfer of Ownership: A Tale of Change and Continuity' (2017) 6(2) EJPL 236-71, 237.

As a matter of principle, courts play a crucial role in ensuring that property rights are respected and that the administrative process is regular in the three legal systems. In Belgium, expropriation is, by its very nature, a judicial decision rather than an administrative one: the administrative authorities have to submit a request to a court, which will examine the legality of the expropriation and decide on prior compensation. In the Netherlands, expropriation can only come into force after an administrative court has acknowledged it: the authorities have to initiate the judicial proceeding themselves. In Sweden, expropriation is an administrative decision, but ordinary courts decide on the compensation, and the Supreme Administrative Court may review the lawfulness of the decision on expropriation.

B. Fair Administrative Process

Belgian, Dutch, and Swedish judges broadly address substantive and formal defects in the administrative process concurring with expropriation and have a tendency to quash a decision if it has adversely and substantively affected the rights of the property owners. However, beyond this basic core similarity, differences appear that are not per se connected with the protection of property rights but with the ways in which administrative decisions are understood to be lawful in each system.

A first difference regards the information organised around the expropriation, the ways notice is given, and the consequences of defects at this stage. In Belgium, a case such as the one of Mr Burns would be unlikely. The expropriation decision needs to be notified to the addressees, including the property owners, and it is likely that specialised procedures will set out how the public needs to participate in greater detail, and the property owner will ordinarily be notified of the expropriation as a part of the judicial proceedings. In the Netherlands, the authorities have the duty to notify the (draft) expropriation decision. However, the court might not conclude that failing to notify will lead to quashing the decision as the property owner may not have been adversely affected by this lack of notification, and even if this were the case, it may still be possible to repair the defect during judicial proceedings. In Sweden, property owners have a right to be heard during the expropriation procedure. However, if they are not, a court may accept that such a hearing was not 'obviously necessary', as the relevant legislation recognises this to be a ground for leaving a decision to stand despite procedural defects.

A second difference in the administrative process appears in relation to the right to participate in the revision of an urban plan, which may affect a property subject to expropriation. In Belgium, revisions of urban plans usually require such public participation. According to the case law of the administrative judge, the lack of such public participation can be considered to be an essential formality whose violation leads to quashing the resulting administrative decision. In the Netherlands, property owners have no individual right to be notified of the revision of the plan, but notification is widely organised, and the owner can object to the revision. If participation requirements are not complied with, this procedural defect does not lead to automatic quashing of the plan, as the court will have to deem it to be a substantial defect to reach such a result. In Sweden, property owners have the right to be consulted, and notification takes place by means of publicity on the municipal noticeboard and in a local newspaper. If these requirements are not complied with, the property owner can appeal to the Land and Environmental Court. Through application of the relevant legislation, failure to comply with participatory requirements leads to quashing the revision to the plan, and the decision is remanded to the decision-making authority. In short, as a matter of principle, each system organises a form of participation but with different modalities. Methods of ascertaining that the participation requirements have not been adequate differ: it should lead to automatic quashing of the defective decision in Sweden and, according to the case law, will

probably lead to quashing in Belgium, while it will depend on the facts of the case in the Netherlands.

A third difference concerns the duty to give reasons. In Belgium there is a formal obligation to give reasons in individual administrative decisions, such as expropriation: the legal and factual grounds of the decisions need to be communicated to the property owner. This allows for a discussion about the reasons the expropriation was necessary and how other possible options were assessed. From the substantive standpoint however, once the formal duty to give reasons has been complied with, the judge only exercises marginal control over the decision taken by the administration. There is no such duty to explicitly provide reasons in Sweden. In the Netherlands, the duty to give reasons is more limited as discussions about which property needs to be expropriated to carry out a public project should be held prior to the expropriation, when the environment plan is adopted.

C. Outcome: Full Compensation

In all three legal systems, compensation needs to be paid prior to expropriation and is deemed to be 'full'. There may however be questions about how the economic value of the property is assessed. Experts are normally involved in this assessment in some way.[27] Beyond compensation being paid in relation to the economic value of the expropriated property, the right to compensation can vary. Indeed it can be deemed 'full' in different ways and to varying extents. In the Netherlands, moral damages are excluded; in Belgium, compensation includes the economic value of the property as well as a range of expenses that the property owner had to reasonably cover ensuing the expropriation. In addition, compensation may be obtained if the property owner can prove moral damage; in Sweden, compensation is calculated at 125 % of the economic value of the property to cover both the loss and moral damages.

In addition, compensation can be claimed in court when a property owner has suffered some harm following a procedural error or when the interference with personal property rights is disproportionate.

V. Property Related Rights and Indirect Expropriation

International investment law draws attention to interferences in property rights other than the classic case of expropriation of real estate, namely the so-called 'indirect expropriations'.[28] Nationalisation is, of course, the most extensive case, at one end of the spectrum of these other interferences, and there are a range of lesser interferences with property rights that can be material in nature or limit or reduce the use and enjoyment of property rights to varying extents, at the other.

Belgium, the Netherlands, and Sweden have no specific legislative framework for nationalisation, but there is little doubt that the same principles as those governing expropriation would apply. When it comes to 'lesser' interferences, the similarities and differences are more difficult to map. Indeed, one first important step in the reasoning process consists in correctly labelling the interference and its legal consequences. In this case there is no clear pattern. For instance, a licence (to exploit a public estate) does not have the same administrative features in the three legal systems. It is a contract in Sweden, while it is

[27] Sluysmans, Verbist and Waring (2) 1-26, 26.

[28] OECD, *International Investment Law: A Changing Landscape – A Companion Volume to International Investment Perspectives*, 2005, chapter 2.

considered a unilateral administrative decision in Belgium. The legal consequences are then consistent with the label attributed in each legal order. Other examples are discussed further, based on two cases analysed in the national chapters of this edited collection.

A. Cultural Heritage

Limitations to property rights such as the sale of artefacts belonging to the national cultural heritage would not be understood as an expropriation *sensu stricto* in Belgium, the Netherlands, and Sweden*:* first it may relate to movables only, and secondly, there may be no compulsory purchase by public authorities, but limits are set on the right to sell the artefact. Dedicated legislation applies in Belgium, the Netherlands, and Sweden. The details and technicalities of each piece of legislation differ deeply. In the Netherlands, a negotiation between the property owner and the public authorities will ensue regarding the price and conditions of the sale, while in Sweden, the procedure only regards obtaining permission to transfer an artefact outside the country with no possibility of compelling the public authority to purchase or compensate for a refusal to export the artefact. There is no compensation in Belgium either, except if the interference with property rights is deemed to be disproportionate and therefore noncompliant with Article 1 of the First Protocol to the European Convention on Human Rights.

B. Urban Planning

One of the widest, if not the widest, differences across the three countries relates to the interplay between expropriation and urban planning. Indeed, in Belgium problems frequently arise due to the unlawfulness of an urban planning act and its ripple effect on expropriation decided on the basis of a planning act later found to be unlawful. In the Netherlands, this situation is only impossible because technically an expropriation can only happen if there is no possibility to challenge the environment plan at the basis of the expropriation. In Sweden, there would be no problem either but for another technical reason: once the expropriation has happened, the former owner no longer has any right over the property. After long discussions, the legislator consciously decided there would be no right to re-purchase the property as the situation would become too complicated.

Behind this difference in outcome, one may pinpoint diverging views regarding the interconnections between the autonomy of the various administrative procedures and rights over a specific piece of real estate. Sweden and the Netherlands adopt a 'compartmentalising' view, where rights and administrative processes are kept separate, located in different 'boxes' deemed to become as watertight as possible so as to prevent the weakening of new rights created over the real estate. The specific technique for this compartmentalisation seems to differ, however. On the one hand, Sweden adopts a problem-oriented approach[29] (providing solutions to identified problems),[30] while, on the other, the Netherlands adopts a process-oriented approach, where each phase of the overall process represents a slice, and one can proceed to the next stage only if a stage is completed (ie there is no longer any way to challenge it). Contrasting with these compartmentalising strategies, Belgium adopts a far more 'overlapping' view, where multiple rights (such as public servitudes or the theory of neighbourhood disturbances in the case of excessive noise for instance, where personal rights

[29] S van Erp, 'Comparative Property Law and Politics' (2015) 4(2) EPLJ 81-84, 83.

[30] In addition to the acts mentioned in the Swedish chapter in this collection, a list of the specific acts applicable to expropriation can be found in T Kalbro and J Paulsson, 'Development of Swedish Legislation Regulating Compensation for Compulsory Acquisition – A Law and Economics Perspective' (2014) 3(3) EPLJ 215-30, 224, table 1.

conflict with rights *in rem*) are accepted as co-existing with each other over time. This statement is striking because Sweden is a country where property is usually understood to be seen as more segmented, so it is approached through its different functions.[31] Providing an explanation for the existing solution in Belgium is not easy. One possible explanation may lie with the liberal approach favoured there when it comes to the protection of subjective rights. This has two expressions: on the one hand there is a strong tendency to protect property, even if it becomes fragmented, in the hope that, over time, partial rights will either be bought back or will elapse, allowing for full property rights to be reunited to the property owner (this is also in this sense that the property owner is 'sovereign'); on the other hand, the liberal protection of subjective rights also means that the exception of illegality is understood in a broad sense with no time limit in principle (Article 159 of the Constitution),[32] hence allowing the unlawfulness of an administrative decision (eg, an urban plan) to be open to dispute down the line, such as an expropriation.

VI. Liberal protection and its administrative variations

This comparison between Belgium, the Netherlands, and Sweden highlights the enduring French legacy outside France. In a 2019 world ranking of countries with expropriation risks, Belgium was ranked number 132, the Netherlands 157, and Sweden 168.[33] All three belong to the category with the lowest risk of expropriation. Rankings and quantitative indicators are often difficult to interpret in a more qualitative way. However, a public authority wanting to expropriate a property in Belgium, the Netherlands, or Sweden can reach its objective even if the negotiations with the owner fail. The procedure may be varyingly cumbersome, lengthy, and expensive, but there is little doubt that in the majority of cases, the expropriation will succeed. But liberal protection lies elsewhere. Despite the reforms, the Belgian, Dutch, and Swedish systems remain deeply liberal in the sense that individual owners do not primarily have duties to use property for a social purpose: the public authorities will take care of this, directly or indirectly.

Against this background, the deepest difference between these legal systems relates to the overarching structure of the solutions to issues relating to expropriation. Belgium relies heavily on case law and its pragmatism, while the solutions are differentiated across the sub-national entities and supplemented by general provisions by default (Article 1382 of the Civil Code and Article 1 of the First Protocol to the European Convention on Human Rights); the Netherlands tends to limit litigation and problems in removing possible objections to a public project and hives them off in a different procedure with its own logic. Sweden, however, tends to favour legal certainty by cutting all links between the property owner and the property after expropriation, and for the rest has many detailed specific solutions across specialised pieces of legislation. In short, the differences between the administrative cultures are not primarily about the level of individual protection but about the means of achieving it, especially how balances of interests are struck and how the court grounds its decisions on the interplay between special solutions and general legal provisions.

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[31] Rakneberg Haug (26) 236-71.

[32] J Theunis, S Van Garsse and E Vleugels, 'Balancing Legality and Legal Certainty: The Plea of Illegality in Belgian Public Law and the Role of the Council of State and Other Judicial Bodies' in M Eliantonio and D Dragos (eds) *The Plea of Illegality in Europe* (Routledge fc).

[33] <https://www.theglobaleconomy.com/rankings/expropriation_risk/> last accessed on 28 June 2021.