

THE DEVELOPMENT ON THE LOCAL DEMOCRATIZATION IN BELGIUM

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INTRODUCTION

In Belgium there is important long tradition of self-government in the country, which may appear to exemplify a liberal approach to guaranteeing this principle. With the development of Belgium into a federal state, the preparations for which were to be found in a number of reforms implemented since 1970, and which was formally instituted by the officially “new” but in reality “co-ordinated” Constitution of 17 February 1994 (Articles 1-7) there have been a number of changes to the application of this principle.

Accordingly, a federal law of 13 July 2001 transferred competence for matters pertaining to local self-government to the regions. Nevertheless, in certain matters, the new law maintains the powers assigned to the federal state at that level, and in other fields the Communities have been entrusted with the right of supervision of local authorities. A new law on local authorities is in the drafting stage in the different parts of the country. Obviously this allocation of functions between federal state, regions and communities raises the question not only of the future function and role of the provinces as bodies between central government and local authorities, but also of the general impact of such a state structure on self-government in local communities.

Belgium was one of the initial signatory states to the European Charter of Local Self-Government on 15 October 1985, ratified the 25 August 2004. However, the European Convention for the Protection of National Minorities was signed by Belgium on 31 July 2001, but has not yet been ratified. The European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities was signed

on 24 September 1980 and ratified on 6 April 1987 and has been in force since 7 July 1987, but Additional Protocol no. 1, signed on 25 July 1997, has not yet been ratified.

2. THE CONSTITUTIONAL FRAMEWORK

Belgium, an independent state since 1830, with an initial Constitution dated 7 February 1831, is nowadays governed by the (“coordinated”) Constitution of 17 February 1994, with 16 further modifications. The country covers a surface area of 30,514 km² and has (as at 1 January 2002) 10,309,725 inhabitants. Traditionally Belgium was a unitary state, composed of a parliamentary monarchy at central level with a bi-cameral system (Chamber of Representatives and Senate) and a government with a central administration. At intermediate level, in addition to Brussels as capital, there were nine and are currently ten provinces. There are also local authorities in the municipalities, the number of which was reduced in the 1970s from about 2,669 (the situation in 1969) to 589. Accordingly, the population in the municipalities averages nearly 17,000, and although this number is high on account of the existence of several large towns (like Antwerp with 447,664 inhabitants, whereas the region of Brussels-Capital consists of 19 municipalities), there is a relatively small number of municipalities with fewer than 5,000 inhabitants (98, or 16.7 % of the total, and only one has under 1,000 inhabitants). There is, therefore, a good basis for an efficient local administration.

But the principal political, constitutional and administrative problem of Belgium in the last fifty years was and continues to be the language problem with its legal solution. After serious conflicts leading, among others, to a judgment of the European Court of Human Rights on 2 July 1968, different reforms of the political system were carried out in 1970, 1980, 1988/89 and 1993/94, the latter culminating in the existing Constitution. Its outcome (apart from the above mentioned constitutional and administrative system) was the recognition of four language territories (Article 4.1 of the Constitution): German, French, Dutch and bilingual Brussels-Capital. Accordingly, the language problem

determines the existence of three Communities: the German-speaking Community, the Flemish Community and the French Community (Article 2). They are competent for cultural and “personal” matters (matters on which Belgian citizens are entitled to correspond with the authorities in their mother tongue anywhere in the country), enumerated in Article 127 of the Constitution and specified in the special law of 8 August 1980, with later modifications by special laws. In addition to this, Belgium comprises three Regions, the Walloon region, the Flemish region and the Brussels-Capital Region (Article 3). Under the Constitution (Article 39), they are competent for other important powers set out in Article 6 of the Special law, leaving only a limited competence¹ to the federal state. Thus Belgium is explicitly a federal state, composed of Communities and Regions (Article 1). At state level, in addition to the federal state, there are three Communities and three Regions, making (in principle) seven members. All the Communities and Regions have their own councils (Parliaments), all directly elected (although with functions of some of the elected representatives for the Region as well as for the Community) for five years by the population (Articles 116 and 117 of the Constitution), and governments. In the event of conflict, the Constitution lays down special procedures and principles of loyalty and for a Constitutional Court (*Grondwettelijk Hof*, *Cour constitutionnelle*, Article 142 of the Constitution), result of the evolution from *ex* Court of Arbitration until 7 May 2007.

The above-mentioned system of federalism is placed above the traditional system of devolved administration and self-government. In Brussels-Capital, the local authorities of the nineteen municipalities are incorporated within a region, exercising at the same time the functions of a province, and in committees of the language Communities. In the rest of the country, the Constitution and the laws provide, in respect

¹ “résiduel”, cf. Article 35 of the Constitution. However, this has been suspended by a transitional provision and the article in question has yet to be implemented; see Court of Arbitration, judgment no. 156 of 6 November 2002.

of the provinces, for provincial councils elected directly by the people for six years, and governors of the provinces, appointed on a permanent basis by the executive power and supported by a permanent deputation elected by the council. These organs are competent for tasks of provincial interest and for the implementation of laws at provincial level. At local level, the 589 local communities have their own directly elected councils, whose term of office is also six years. Their “burgomasters” (mayors) are appointed for six years by the executive power, previously of the central state, now of the Region, in a legally regulated procedure in which the local political situation and the advice of the governor are taken into account. In addition, the councils elect, in proportion to the population of the local community, a board of between 3 and 10 representatives (*échevins, schepenen*) who form, together with the burgomaster, an executive organ. The existence of governors and burgomasters makes it possible to assign to the provincial and local authorities not only competence for “everything that is of provincial and communal interest” (Article 162 II n. 2 of the Constitution), but also responsibility for the implementation of state laws and decisions. This is important for the essential fields of administration, with special regulations relating, amongst others, to social welfare and the public centres set up for that purpose (CPAS, OCMW), as well as the local police. But other special tasks, like tax administration (collection), are fulfilled by special decentralized authorities (offices) of the central state at local level.

3. THE REGIONALIZATION IN THE FIELD OF LOCAL AUTHORITIES

This organization, described here in a very general way, has undergone and is undergoing major changes due to the federalization of the state. After the creation of the Communities and the Regions in the constitutional reform of 1970, the constitutional reform of 1980 was the result of a special law, the Special Law of 8 August 1980 on Institutional Reforms providing for the transfer of powers to the Communities and Regions, and a large number of modifications of that law have, since 1980, broadened the range of powers of the Communities and Regions. One of the most important of these laws, following on from a series of earlier ones since 1988, (which, moreover, is one of the factors prompting the

present report), was the law of 13 July 2001, the Special Law of 13 July 2001 transferring various powers to the regions and communities. In application of this law (Article 6 §1, VIII), the power of legislation in the fields of provincial and local government, (including – since 1988 – the power of supervision of its application) was mainly transferred to the Regions. As a consequence of this law, each Region may enact new, and therefore different laws in the field of provincial and local organization. The existing laws have to be applied by the regional authorities. They have the power of supervision, and they may exercise the power of appointing the governors and burgomasters, formerly the prerogative of central government. Nevertheless, other fields of law, which have to be implemented by the governors and burgomasters, remain in the competence of the federal state, while others have been transferred to the competence of the Communities. Thus, the position of the local authorities falls not only between state administration and local self-government, but between federal state, region, community and self-government. Obviously this situation creates new and interesting legal and political problems.

Given that this innovation with its evident political importance has been regulated by a “special law”, without modification of the Constitution, and has to be put into effect by regional “decrees with force of law” (Article 134 of the Constitution), the question may be raised whether this is constitutionally correct. As a matter of fact, Article 162 of the Constitution provides that the provincial and local institutions are regulated by the law. Therefore the Council of State, in its advisory opinion on the Bill for the Law of 13 July 2001, raised several objections, questioning the constitutional legitimacy of the Bill and mentioning many precedents in doctrine and political practice calling for either a federal state law to regulate local authorities, or a modification of the Constitution before such power could be transferred to the Regions². Nevertheless the federal government, cooperating since 1999 with an intergovernmental and inter-parliamentary conference for institutional reform, decided in an agreement of 16 October 2000, in Lambermont, not to follow this

² Opinion of the Council of State no. 31.226/VR, 20 February 2001.

argumentation, but to consider the reference to the law in Article 162 of the Constitution as allowing the special legislature to transfer power to regional decrees. In fact, this solution had been mentioned in an earlier judgment of the Constitutional Court³. Thus, although each argument was well-founded⁴, the Constitutional Court has, in fact, rejected the objections against the Special law of 13 July 2001⁵. In fact, from a principal point of view, the Court argue, on the one hand, that the power to regulate the organization of provincial and local authorities is so important that it should be clearly attributed by the Constitution, while on the other hand, that in a federal state laws of the regions have the same force as those of the federal state.

4. THE SITUATION IN THE DIFFERENT REGIONS

The situation whereby competence to regulate the local authorities has been transferred to the Regions, while the federal state and communities also participate in implementing the laws to be executed by the local authorities (thereby playing a role in the supervision of this implementation), seems extremely complicated. There are in the Constitution some rules, which determine the powers of each level, but almost invariably subject to the provisions of legislation. Accordingly, it is the legislation, especially the Special law of 8 August 1980, with its numerous modifications, introduced in particular – for the fields of interest here - by the Special law of 13 July 2001, which determines the powers of federal state, regions and communities and, in respect of these powers, the remaining field of local self-government. It is obvious that the delimitation of these powers (despite being

³ Judgment no. 44 of 23 December 1987.

⁴ Discussed in detail in J. Brassinne de La Buisnière, *La régionalisation des lois communale et provinciale et de la législation connexe*, CRISP no. 1751-1752, 2002, p. 11-16.

⁵ Judgement no. 35 of 25 March 2003.

distributed primarily in accordance with a number of constitutional guidelines), is extremely comprehensive and complicated⁶. Every governor and burgomaster has to implement legal rules adopted at federal state, regional, community and local council levels, and, in the necessarily frequent cases of uncertainty or of conflict of competence, to decide on the difficult question of which regulation and which order shall prevail.

Inevitably such decisions may be influenced by the level of dependence each official may be subject to ie whether they are elected or appointed; the importance of the power of appointment may indeed be increased. In this connection, it is interesting to note that, on the one hand, the power to nominate of the burgomaster has – despite the importance of guarantees for the majority of the council and the procedure of appointment and swearing in – passed to the regional governments. But on the other hand the consequent transfer of disciplinary power to the Regions has, through a special legal provision, been deferred until 31 December 2006. This means that until that date, only the King may remove a burgomaster from office⁷. This legal ambiguity shows that there is no convincing solution, but highlights a problem that needs further discussion.

Furthermore, the extent of the transfer of competence to the regions varies in the different parts of the state, because of the different relationships between regions, communities and provinces.

In Flanders, the Flemish Region and Flemish Community correspond to a very large extent. Both are under the leadership of the Flemish Government, and the Council of the Flemish Region is (with six additional representatives of the Flemish-speaking population of Brussels) at the same time the Council of the Community. Thus, supervision of the local

⁶ Cf. in particular Article 6 § 1 VIII of the law with its numerous specifications and exceptions, complicated by other laws; see the discussion in detail in J. Brassinne de La Buissière, *cit.*, p. 17-45.

⁷ Article 40 of the Special Law of 13 July 2001, cf. J. Brassinne de La Buissière, *cit.*, p. 31-33.

authorities in matters of the Community's powers, such as education, does not differ from the general supervision of local authorities in matters of the Region.

In Wallonia the Regional Government and the Francophone Community are clearly distinct. Both have their Council and their Government and, so far, separate powers. Accordingly, there is a general competence of the Region in respect of the local authorities and their supervision, but as far as the Communities are concerned – especially in the cultural matters mentioned in Article 127 of the Constitution and given practical form in Article 4 of the Law of 8 August 1980, such as education – it is their legislation that has to be implemented, and accordingly, they exercise their own right of control. Nevertheless, the Community may, with the consent of the Region, transfer powers to the Region (Article 138 of the Constitution).

Brussels-Capital forms a separate Region and has its own regional powers and structures, with a council and government in which the Flemish minority has a guaranteed representation. However, there is no division into provinces. Co-operation between municipalities may, in addition to the region, also take the form of inter-municipal organizations. With regard to the powers transferred to the Communities, part is exercised respectively by the Francophone and the Flemish Community, and part by the community committees of the Council of the Region, separated according to language and co-operating through a common committee (Articles 135, 136, 138, 166 of the Constitution).

The German-speaking Community, on the same level as the Flemish and the Francophone Community, is a part of the Walloon Region, with the result that the local authorities are supervised by this Region, except in respect of the specific Community powers. But here too, the Region may, with the consent of the Community, transfer powers to the latter (Article 139 of the Constitution). Such a transfer, in matters concerning protection of the landscape and monuments, and employment policies, is currently being discussed for the supervision of local authorities as well.

5. THE FUNCTION OF THE PROVINCES

The numerous public authorities at state level raise the question whether the provinces are still a necessary or reasonable administrative and political structure of the state⁸. On the one hand, it is true that in Brussels the provincial level is missing, and that in the German-speaking Community there is a justifiable trend towards concentrating the provincial functions in the Community. But in the other Regions and Communities as well, one may argue that they are the principal players between federal state and local self-government. Considering the size of the municipalities following the territorial reforms, making for efficient administration which may be supplemented by inter-communal cooperation, it would appear, according to this argument, unnecessary to have an additional level between the members of the federal system and the local administration that depends on the Regions.

The Constitution, however, mentions the provinces, even specifying their names and leaving to the legislature only a limited power of modification. This situation and the existence of most of the provinces has a long history⁹ and gives the basis for a second level of self-government at provincial in addition to local level, guaranteed by the Constitution. Furthermore, the laws, traditionally of the central state, but nowadays of the regions and communities as well, may be better implemented by a general administrative power, at the local level of the burgomasters as well as at the provincial level of the governors¹⁰. For the provincial level this is obvious from the fact that the (federal) Ministry of the Interior monthly assembles all the governors to co-ordinate the problems of administration. It may appear characteristic that the burgomaster, appointed in the above-mentioned way in a process

⁸ Cf. the case put forward by F. Doms, *La réforme des provinces en Wallonie*, CRISP no. 1774-1775, 2002; P. De Bruycker, *L'avenir des provinces dans la Belgique fédérale*, in: ID., *L'avenir des communes et provinces dans la Belgique fédérale*, Bruxelles 1997, p. 181 et seq.; M. Nihoul, *La province "à venir" en Région Wallonne*, Mouvement Communal 2001, p. 439 et seq.

⁹ The current law on the provinces dates back to 30 April 1836.

¹⁰ Cf. Article 124 of the law on the provinces, and Article 133 of the law on municipalities.

involving local legitimacy, checks on integrity and appointment by the (now regional) government, is sworn in by the governor of the province¹¹.

6. THE KEY PROBLEM OF THE APPOINTMENT OF BURGOMASTERS

Yet this compromise between opposite points of view raises the general problem of their relationship. In the competition between local democracy and efficiency of implementation of laws and local management, there may be a case for reviewing the traditional method of appointing burgomasters, and the shift from appointment by the King to the regional government (which is nearer and therefore more involved at local level) could enhance the arguments for local election, either by the local council, or by the local electors. This problem, of great importance throughout Europe, shall be discussed together with other reform proposals (below, part 3); but it is useful to see that it has one of its origins in the transfer of competence from the central state to the regions.

7. THE REORGANIZATION OF THE POLICE

Nevertheless, the new regulation governing the police through the (in accordance with Article 78 of the Constitution) federal law of 7 December 1998 restricts the role of local authorities in this field, because it provides (Article 3) for a police service on only two levels, federal and local, competent for the normal tasks of administrative and judicial police at local level. To that end, the law (Article 9) provides for policing zones (of which there are currently 196, whereas the number of municipalities is 589), mostly encompassing several municipalities (“multi-municipal zones” – *zones pluricommunales/meergemeentenzones*),

¹¹ S. Bollen, *Union des Villes et Communes de Wallonie asbl* (Ed.), La Commune, Namur 2000, p. 72.

with legal capacity and therefore distinguished from the municipalities and local authorities.

Certainly the local authorities may influence decisions on police matters, in particular, through the consultative council of burgomasters; every police zone has its own police council composed of elected members of the local councils and the burgomasters of the zone; and the burgomasters of the zone operate together as a “police board”.

The local police has to be financed by the local communities, although the police zones are subsidized by the federal Government. However the new regulations introduce a “para-municipal” organization at local level, in addition to the local authorities, which tries to find a compromise between the essential unity of the police (Article 4 of the law) and compliance with the principles of local government.

8. THE LOCAL FINANCES

The regionalization of local government means that additional importance must be attached to its financing. Nevertheless it seems that in this field the traditional and practical approach largely influences the current situation. As far as the social security system is concerned, revenue and expenditure are still unitary. Generally, the traditional unitary fiscal system, with a unitary organization of tax collection gives rise to income at central level, which has to be distributed. Therefore the Regions and Communities are financed by the federal state, and the local authorities obtain their revenue mainly from these sources. Regions and Communities (as far as they are competent) have to finance local authorities, and cover the expenses of the special services to be financed by them, such as education (Communities), and public works (Regions), while in the field of police and other security tasks the central state still finances the police zones. But this financing is not sufficient to cover all the local authorities’ expenses for the above-mentioned purposes. Accordingly, for example, a part of police costs has to be borne by the local authorities. There are many conflicts on account of this; recently, in the field of police financing, many local authorities stated they were unable to fund the police services, laid down in law, without additional aid

from the central state¹².

In addition, the Regions have a special fund (municipalities' fund, *fonds des communes, gemeentefonds*) for the financing of the local authorities' general expenses, which is distributed according to criteria, which take account of the situation of the individual local authorities. However this does not give much decision-making scope to the local authorities. In contrast, the regional governments try to make parts of the grants from the municipalities (and provincial) fund contingent on the fulfillment of certain conditions imposed by "contracts" between the regional governments and the local authorities, eg a certain staff structure or the acceptance or relinquishment of certain tasks. This method is very controversial, especially in respect of the European Charter of Local Self-Government¹³. In order to grant the local authorities more independent financing, the legislation seeks to enlarge their fiscal autonomy. To that end, local authorities may levy taxes (estimates, in addition to some State taxes), on income and on real estate. Here, the policies of the Regions seem to differ: while the Walloon government, in order to avoid too heavy charges, limits additional taxes, the Flemish government is more in favor of them, attempting thereby to make local authorities self-financing. In general terms, it could be held that the policy aspects of the financial autonomy of local authorities should be better protected, by the autonomy guaranteed in the Constitution and Article 9 of the European Charter of Local Self-Government.

9. THE MAIN LEGAL SOURCES

¹² Cf. the report in: *Trait d'Union. Union des Villes et Communes de Wallonie* no. 1, January 2003.

¹³ See below, part 2, no. 8, and the arguments of the Council of State in its Opinion No. L. 32.553/4 of 17 December 2001.

Before addressing these issues, it may be useful to mention the main legal sources on which this report is based:

- at constitutional level, the essential questions pertaining to local autonomy are regulated by the Constitution, especially Articles 41 and 162-166;

- supplementing the constitutional provisions (and thereby giving rise to the above-mentioned problems of constitutionality), the special law (cf. Article 4 § 3 of the Constitution) on institutional reforms of 8 August 1980, with many modifications, introduced in particular by the special law of 13 July, 2001, distributes the powers in the field of local authorities among the federal State, the Regions and the Communities;

- in practice, the relevant legislation in force still exists at federal level, especially the Law on the Provinces of 30 April 1836, with many modifications, and the new Law on Municipalities of 26 May 1989, which, in fact, contains the old law of 1836 with the insertion of numerous amendments, but following the Fifth State Reform in 2001, the responsibility for the composition, the organization, the competences and the activities of the municipal institutions were devolved to the Regions, as well as the responsibility for the provincial institutions. As a result, there are several differences between the municipal institutions in the Flemish Region, the Walloon Region and the Brussels-Capital Region. The Walloon Region has also further devolved part of its responsibilities to the German-speaking Community with regards to its 9 municipalities. The three Regions can amend or replace the existing legislation on the municipalities, most notably the New Municipal Law. In the Flemish Region the Municipal Decree of 15 July 2005 (*Gemeentedecreet*) applies¹⁴ and in the Walloon Region the Code of Local Democracy and Decentralization of 27 May 2004

¹⁴ See: K. De Ceuninck, H. Reynaert, *Flanders Heading Towards Its Own State Reform*, in «Croatian and Comparative Public Administration», 2011, 4, 1017-1039.

(*Code wallon de la démocratie locale et de la décentralisation*) applies¹⁵ and these two documents replace for a large part the Law of Municipalities of 1989. In the Brussels Region several provisions of the New Municipal Law have been modified by ordinance, such as the Ordinance of 17 July 2003 but no complete new text has been passed. The legal framework in the three Regions is still relatively similar, but that could change in the future;

- in accordance with the new distribution of powers, there have been several decrees in the Regions concerning individual problems, such as the decree on the supervision of municipalities, provinces and inter-municipal co-operation in Wallonia of 1 April 1999, and the decree on interurban co-operation in Flanders of 6 July 2001. Numerous other decrees have modified in detail the laws on the provinces and on the municipalities.

10. THE LOCAL AUTHORITIES IN THE ADMINISTRATIVE SYSTEM (ARTICLE 8 § 2 OF THE EUROPEAN CHARTER)

The background described above warrants an analysis of whether the new position and regulation of local authorities provides scope for the application of the European Charter of Local Self-Government. Before examining the individual rules and guarantees of this Charter, it is necessary first of all to look at the fundamental problem of whether the competence of the Regions for the local authorities, especially the power of legislation, supervision and appointment of the burgomasters, still allows for the delegation to the local authorities of the power to implement laws, as permitted by Article 4 § 2 and Article 8 § 2 of the European Charter. Furthermore, is it possible for such authorities to implement laws not only of the Regions, but also of the federal state and of the Communities? How and to what extent could a local authority, ruled by one entity, implement the law of other federated

¹⁵ See: A. Coenen, *Code wallon de la démocratie locale et de la décentralisation*, Bruxelles, 2005.

entities as well?

In principle this should be possible. The Constitution (Article 162 § 2 no. 3) provides for devolution to provincial and local authorities without limitation; therefore the powers to be devolved may be those of the federal state and of the Communities, as well as those of the Regions. In addition, the law on local authorities obliges the latter to implement the laws and decisions of the state (Article 133 of the Law on Municipalities). In principle, it may seem likely that this system functions under the conditions of regionalization of the local authorities as well. The power of the Regions in matters of local government, a characteristic of many federal states, may be harmonized with the power of other members of the federation in other fields.

But the crucial question is whether it will continue to be the case if the Regions regulate the local authorities, especially the burgomasters, in a different way. A political appointment or a direct election, perhaps combined with strong supervision could put the local executive under pressures that conflict with the federal state (and perhaps in certain cases with the Communities). Thus much depends on the character of regulation implemented by the now competent Regions. As long as they maintain a system of local authorities appropriate to the task, as part of a coherent and impartial administration on all levels, problems and conflicts may be resolved. Failing that, the co-ordination of powers between federal state, Communities and Regions would suffer, and the local authorities could become dysfunctional as a result. For eventualities of this kind, emphasis must be placed on the constitutional rule that presupposes functioning devolution on the one hand, and a general principle of federal loyalty (Article 143 of the Constitution) on the other. Regulations that do not take into consideration these points of view would be unconstitutional. It seems an important role of the Constitutional Court to insist on this principle.

Yet the Constitutional Court, from its first judgments, has interpreted the Special

Law of 8 August 1980 in the sense of “exclusive competence”¹⁶. Therefore one should take the view that the power to regulate the local authorities belongs exclusively to the regional legislature. In point of fact the very detailed distribution of powers regulated by the Law of 8 August 1980 would appear to recommend a specialized and exclusive interpretation of each clause. But it is a different problem if one regulation has an impact on other fields. In such cases a regulation regarding exclusively the holder of the power may have effects with regard to the exercise of another power and, in that way, impact on the exclusive character of that power. In such cases, the concept of exclusive power is unhelpful and can be misleading. A constitutional power has to be exercised so as to allow the use of other powers also granted by the Constitution. This is the situation taking place as regards the regulation of local authorities. These authorities, which are clearly subject to regional regulation, are in addition instruments of the Communities and of the central state. Therefore their regulation by the Region has to take into account not only their level of autonomy which has to be ensured, in line with the Constitution and the European Charter of Local Self-Government, but also the impact on the exercise of the powers of the Communities and the central state. The Constitutional Court exercises control over this. In that sense, the Constitutional Court and federal loyalty, regulated together in chapter V of the Constitution, are necessarily connected to allow the exercise of the powers of each part.

11. THE FULFILLMENT OF INTERNATIONAL OBLIGATIONS

A similar problem is raised by the fulfillment of Belgium’s international obligations in respect of the internal competence of the Regions (and also of the Communities). In such cases the federal state is responsible (at least with priority), but Regions, Communities and/or local authorities will have to act. The Belgian constitutional order has to ensure such

¹⁶ See the case-law from Judgment no. 7 of 20 December 1985 to Judgment no. 184 of 11 December 2002; with regard to the context and importance of this view, see M. Leroy, *De la Belgique unitaire à l’État fédéral*, Brussels 1996, p. 51.

activities. As a matter of fact, the Constitution contains rules to that end, such as Articles 34, 77 no. 5-7, 167-169, but here too, the problem of practice is important.

In this respect, the present report has to examine the rights and obligations based on international law that concern local authorities. Three observations seem relevant.

As mentioned in the introduction to this report, Belgium, as a classic state of local self-government, is one of the original signatory states to the European Charter of Local Self-Government, but it has not yet ratified it. In a more practical way, both federative Chambers (Chamber of Deputies and Senate), the Councils of the Walloon Region, Brussels Capital, the French and the German-speaking Communities and the *Commission communautaire française* have approved the Charter, whereas the Council of Flanders (for the Region as for the Community) has still not yet done so. However, the Flemish Government decided to submit the Charter to the Flemish Council for approval, so that this gap may soon be closed. But the single missing approval has put Belgium in a negative light and has deprived its local authorities, all over the country, of international legal protection, in contradiction to its tradition.

In neighboring sectors related to local self-government the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities has been ratified (6 April 1987), but it seems that, because an additional Protocol has not been ratified, application still poses problems, perhaps on account of difficulties concerning cross-border co-operation within Belgium, which will be discussed below (cf. no. 9). The European Convention for the Protection of National Minorities has been signed (31 July 2001), but neither approved nor ratified, the European Charter for Regional and Minority Languages has not even been signed, although paragraph 20 of Resolution 1301 (2002) of the Parliamentary Assembly of the Council of Europe, recommended the signature and ratification of both Conventions (and also of Protocol no. 12 to the European Convention on Human Rights).

In the same context, paragraph 23 of the aforementioned Resolution 1301 (2002), based on the report contained in Doc. 9536 of 5 September 2002, pointed out that the

judgment of the European Court of Human Rights of 23 July 1968, concerning the school system in the municipalities enjoying linguistic facilities in the Brussels periphery has not been adequately enforced.

In all these fields, the fulfillment of Belgium's international obligations is incomplete because of shortcomings at regional, community or local level.

12. THE SUPERVISION: PREVAILING “GENERAL INTEREST”? (ARTICLE 8 §2 OF THE EUROPEAN CHARTER)

The supervision carried out by the Regions and the Communities¹⁷ (as far as they have powers) could become problematic for the local authorities, because the governments of the Regions (and Communities) may have a substantial interest in decisions relating to individual questions: they too, as regional authorities, may lay claim to a constitutional position, conflicting with local self-government. In this way the federalization of Belgium raises the typical problem of the competition between federalism and self-government, and it may seem characteristic that in some specially critical questions like the language problem, the law still maintains some federal powers¹⁸. This problem is, in accordance with the terms of reference assigned by the CLRAE, outside the scope of this report, which addresses only local, and not regional self-government. But it has to be taken in consideration insofar as it may endanger local self-government.

¹⁷ For the delimitation, see Article 7 of the Special Law on Institutional Reforms, in the version of 13 July 2001, and the comments by J. Brassinne de La Buissière, quoted above, p. 33-36.

¹⁸ See the so called “Lois de pacification” of 9 August 1988, referred to in the later legislation as described by J. Brassinne de La Buissière, quoted above, p. 40.

In this respect, it has to be stated that the Belgian Constitution (Article 162 § 2 no. 6) provides for supervision of the local authorities not only in the event of violation of laws, but in the event of breaches of the “general interest” as well. This poses a problem with respect to Article 8 § 2 of the European Charter, which “normally” limits administrative supervision to “ensuring compliance with the law and with constitutional principles”. It seems that this problem is acknowledged by the Belgian authorities, because Article 8 § 2 does not figure among the paragraphs of the Charter by which Belgium shall be bound in the event of ratification of the Charter¹⁹. Nevertheless the fact that the Charter exists and has been signed by Belgium means that the Constitution should be interpreted in line with the Charter. In that sense it could be argued that the “general interest” of Article 162 § 2 no. 6 of the Constitution, having its origins in the Constitution of 1831 and given practical expression by the subsequent legislation on local authorities of that period, is connected with the model of a unitary state, superseded by the current federal structure: “general” would refer solely to the interests of the central state, and with the shift of supervision to the Regions, this measure of supervision would become obsolete. But such an interpretation would not correspond to the aim of Belgian federalism. In transferring powers to the Regions and Communities, the Constitution recognizes their role in pursuing the general interest as well. As entities legitimized in a democratic way, they are guarantors of a federal identity and loyalty (cf. Article 143 of the Constitution) together with the federal state, and they may – and have a right to – exercise supervision on local authorities in protecting the general interest.

But arguing in that way, one has to take into account that the same Constitution (Article 162 § 2 no. 1), which also guarantees election and thus democratic legitimacy at local (and provincial) level, does not restrict fulfillment of the general interest to the federal state, local or regional levels. To date, supervision in protecting the general interest does not

¹⁹ Cf. the list prepared by the Ministry of the Interior in the explanatory report to the draft bill approving the European Charter, p. 10; it is perhaps surprising that there is no reference to this list in the approving decisions of the Chambers of Parliament and the Councils.

appear to correspond to a concept of local democracy, and the definition given by Article 8 § 2 of the European Charter seems nearer to the model of a modern democratic government. One may – and should – ask whether the supervision to protect the general interest provided for in the Constitution should not be “normally” excluded. Accordingly, supervision should be limited to compliance with the law and constitutional principles, either through legal provisions or practical limitation.

As far as can be seen, there is no unanimity on such an interpretation in Belgian legal doctrine. On the one hand, it may be held that the text of the Constitution and the principles of parliamentary democracy oblige the supervision authorities to review pursuance of the general interest as well as legality; thus as in the current legislation (Article 264 of the New Law on Municipalities of 26 May 1989), the general interest dimension has to be regulated and applied in practice²⁰. On the other hand, it may be argued that Article 162 § 2 no. 6 refers merely to a power given to the supervision authority which, taking account of democracy at local level, does not have to be exercised; therefore a restrictive application in the implementing legislation (sometimes even now prescribing only a control of legality) as well as in practice would be possible. Obviously this second interpretation, which has influenced the Flemish draft insofar as it stipulates that a balance should be struck, corresponds better to the European Charter. Consequently, this could and should be preferred. It seems even more important to emphasize this point because neither does the text of the Belgian Constitution put a limit to the application of the general interest, nor does the Constitutional Court have the power to review legislation in this respect.

There is a special and practical aspect of this problem in the German-speaking Community, where the level of the whole Community with about 71,000 inhabitants seems very close to that of the nine single municipalities. The Minister-President of the Community

²⁰ Cf. the *Voorontwerp van Gemeentedecret* presented by the Flemish Government, Article 272, and the explanatory memorandum, providing, moreover, for a balance to be struck with the interests of the municipality (p. 124).

has described supervision more as a partnership, exercised in round-table meetings and avoiding the general interest as a factor in decisions, except perhaps in cases of conflicts between local authorities and their social aid centres (CPAS)²¹. This approach could become even more important if the German-speaking Community, as is currently being discussed, were to exercise general supervision of local authorities in its territory instead of the Walloon Region. Nevertheless the practical situation of the German-speaking Community is quite close to a local (or provincial) community.

It may be added that the danger resulting from an extended supervision in the event of a shift of this power to smaller political entities like the Regions and Communities was also mentioned, with regard to the treatment of minorities, in paragraph 12 of Resolution 1301 (2002), of the Parliamentary Assembly of the Council of Europe, based on the opinion of the European Commission for Democracy through Law (Venice Commission). Both arguments, independently of each other, demonstrate the importance of limiting the power of supervision. Nevertheless, it is essential that the rules protecting minorities be complied with. However, this is a legal question, which is binding for all entities of the Belgian federal state.

13. THE FOUNDATION, CONCEPT AND SCOPE OF LOCAL SELF-GOVERNMENT (ARTICLE 2 – 4 OF THE EUROPEAN CHARTER)

The field of competence of the provincial and local authorities is defined in Articles 41 § 1, 162 § 2 no. 2 of the Constitution (and given practical expression, in Article 117 of the Law on Municipalities) as “everything that is of provincial and municipal interest”. This

²¹ This is interesting especially because Article 264 of the Law on Municipalities, which makes reference to the general interest, is still valid for the German-speaking local authorities, while the Walloon decree on supervision of 1 April 1999, Article 13, also mentions the general interest.

definition, different from that given in Articles 3 § 1 and 4 § 1 of the European Charter, nevertheless seems to pursue the same aim and with good reason the draft of the Ministry of Interior mentions both paragraphs of the Charter amongst those which are binding upon Belgium²². This gives the right to the provincial and local authorities to define their interests, while the Constitution and legislation leave them, in conformity with the principle of subsidiarity, a substantial share of public activities, in sufficiently clear terms, especially in view of the long tradition and practice in Belgium.

In contrast, in recent legislation – especially in the new preliminary draft of a decree on the Walloon provinces – there seems to be a trend to exclude provincial activities in certain fields, which are declared not to be of provincial interest²³. As previously stated, the provincial and communal interest, being a general interest at this level, has to be defined by the provincial and local authorities. If the law does not regulate a certain activity, the local authorities must not be excluded. But the crucial problem in Belgium is the competing competence of provincial and local authorities in the same field and therefore the conflict between provincial and local interest. Does that mean that there has to be free competition between both levels? Are agreements necessary? Or may the legislation determine the interests of both levels? Even if one accepts the third solution, there has to remain “a substantial share of public affairs” (Article 3 § 1 European Charter) for each level. The question whether, under such circumstances, a legislative delimitation is in conformity with the Charter – as well as with Articles 41 § 1 and 162 § 2 no. 2 of the Constitution – seems to warrant further discussion.

²² Ministry of the Interior (cf. footnote 17).

²³ Cf. the Preliminary Draft Decree organizing the Walloon provinces, Article 33 § 1, which excludes certain fields from the provincial interest; for more on this trend, see F. Doms, *La réforme des provinces en Wallonie* (footnote 8), p. 62.

14. THE RESPONSIBILITY OF THE LOCAL EXECUTIVE ORGANS

Article 3 § 2 of the European Charter states that in the exercising of local self-government local councils “may possess executive organs responsible to them”, a principle discussed at considerable length last year by the CLRAE²⁴. Insisting on the political character of local democracy, the report maintains as a natural consequence that the councils should – insofar as there is no direct election by the citizens – have a determining influence on local executive organs. However, the report does not claim that only the direct election of executive organs is in conformity with the European Charter.

For Belgium, the summary report mentions the fact that, as is the case today in a small minority of European States, burgomasters are appointed by the central executive power – the King, or in practice the Minister of the Interior and, nowadays, the Government of the Region – and that there is therefore no immediate involvement of the local democratic power. It would appear that, according to the Ministry of Interior, Belgium will not be bound by Article 3 § 2 of the European Charter²⁵. Nevertheless it may be argued, as mentioned above, that the aldermen (*échevins*, *schepenen*) are elected by the council and that the appointment of the burgomaster is a formalized procedure in which in practice a majority of the council exerts considerable influence²⁶. Under the European Charter, the appointment of the burgomaster by the council is not a necessary element of the responsibility guaranteed in Article 3 § 2. Given that the possibilities of political supervision and the distribution of powers ensure there is substantial influence by the council, the Belgian solution may appear

²⁴ See the report by A. Knape of 29 April 2002, CPL (9) 2, based on the report by P. De Bruycker which represents a valuable Belgian contribution to the problem.

²⁵ See Ministry of the Interior (cf. footnote 20), p. 10.

²⁶ Report P. De Bruycker, quoted above, no. 57.

to be in conformity with the Charter, although there are arguments for change²⁷ that shall be discussed below.

One of the particular features of Belgium is that, as is the case for elections at state, regional and community level, voting in the provinces and municipalities is mandatory. Consequently Belgium does not suffer from the problems of abstentionism, but enjoys a participation of over 90% of the electors, perhaps sometimes in problematic zones a bit less; it seems that the penalties for not voting are, at least in practice, not too severe. As it is possible to vote in a way equating to an abstention, this solution raises no problems as regards the principle of free elections within the meaning of Article 3 § 2 of the European Charter. Nevertheless one may ask whether participatory democracy should be based more specifically on a genuine interest of the citizens.

Belgium also has provision for citizens' participation in the form of a referendum²⁸ (this time, however, not mandatory), as provided for in Article 3 § 2 of the European Charter. It takes place either on a proposal from the council, or on the initiative of a minimum number of citizens (Articles 318-329 of the New Law on Municipalities, Articles 140-1 – 140-12 Law on Provinces). As far as can be seen, the provincial referendums have little importance in practice; in the municipalities too, the importance attached to them is not significant. This may be accounted for by the quorum required, which is 20% in municipalities under 15,000 inhabitants, 3,000 in municipalities between 15,000 and 30,000 (30%?) inhabitants and 10% in larger municipalities; obviously it is difficult to reach such percentages. Furthermore, there is a list setting out issues (personal, most financial and some further questions) on which a referendum cannot be called. In addition, referendums cannot be held in the 16 months before municipal elections and 40 days before other elections; referendums

²⁷ Report P. De Bruycker, quoted above, no. 73 et seq. See also CLRAE Recommendation 113 (2002), in particular paragraphs 6-13 and Appendix 3.

²⁸ See S. Bollen, in: *La Commune* (cf. footnote 11), p. 103 et seq.

with low participation (under 20% - here the vote is not obligatory) are not taken into account. Given the complicated system of distribution of powers in Belgium, it seems unlikely that the referendum will become more important unless conditions are much facilitated.

15. THE LOCAL AUTHORITY BOUNDARIES (ARTICLE 5 OF THE EUROPEAN CHARTER)

Local authority boundaries, largely modified in the 1970s by special legislation, seem nowadays better protected. In application of the Special Law on Institutional Reforms of 8 August 1980, in the version of 13 July 2001 (Article 6 § 1 VIII, 2°), a “law” changing the boundaries of provinces or local communities (Article 7 of the Constitution) can be a decree of the Region²⁹, with the exception of certain municipalities situated in regions where the linguistic problems are especially delicate³⁰, where any boundary change can only be made by federal legislation. In such cases the governments of the Regions have to be consulted beforehand. In contrast, there is no mention of consultation of the local authorities concerned. However, it seems to be the practice and would be required by Article 5 of the European Charter. Nevertheless a legal clarification of this situation – possibly permitting a referendum – would be helpful. In the Walloon Region, the “Conseil supérieur des villes, communes et provinces de la Région wallonne” appears to be helpful as regards the consultation of local authorities – in accordance with Article 5, Article 4 § 6 and Article 9 § 6 of the European Charter.

²⁹ With regard to this problem, see above, part 1.

³⁰ See the details in J. Brassinne de La Buissière, quoted above, p. 46 et seq., and the remarks above, no. 3 and footnote 15.

16. THE FINANCIAL RESOURCES (ARTICLE 9 OF THE EUROPEAN CHARTER)

With regard to financial resources, there is an apparently significant contradiction between the traditional centralized system and the shift to the Regions, with trends towards the strengthening of the financial autonomy of the local authorities, but under difficult economic conditions (see above, part 1, no. 7). Belgium wishes to be bound by most of the paragraphs of Article 9 of the Charter, but not by paragraphs 2, 6 and 7. This is problematic especially for the relation between tasks and financing (Article 9 § 2), one of the basic paragraphs of the Charter according to Article 12 and linked with the general principle of Article 9 § 1 as well as with the constitutional (Article 162 § 2 no. 2) guarantee relating to all matters of provincial and local interest. Accordingly, the Council of State has insisted on sufficient financing of the constitutionally assigned tasks and has criticized a reduction of such financing by means of contracts, which attempt to stipulate the use to be made of the funding granted³¹. Clearly the legal responsibilities and powers of local authorities have little value if they do not have the appropriate funding. Obviously the problem of insufficient finance is a general one, but it seems that the inflexibility of the Belgian financial system aggravates the situation. However, the problem of financial relations between the Belgian Regions falls outside the scope of the present report.

Furthermore, paragraphs 6 and 7 of Article 9 of the Charter ask no more than other rules that have been fully accepted. So it is difficult to understand why Belgium will agree to providing a guarantee, as mentioned, for the consultation of local authorities in respect of planning procedures (Article 4 § 6) and boundary changes (Article 5), but not for redistributed resources (Article 9 § 6), and why the existing municipal funds cannot fulfill the function of general financing within the meaning of Article 9 § 7, at least provided that

³¹ See Council of State, Opinion L 32.553/4 of 17 December 2001 (p. 9, 10).

the system of contracts is not binding on the municipal funds – a method anyway unconstitutional according to the aforementioned opinion of the Council of State. In these points the shortfall between the guarantees required by the Charter and the constitutional and practical situation in Belgium does not seem irredeemable.

17. THE LOCAL AUTHORITIES RIGHT TO ASSOCIATE (ARTICLE 10 OF THE EUROPEAN CHARTER)

According to the Ministry of Interior, the right to associate (Article 10 of the European Charter) shall be recognized fully and without reserves. In fact, the Union of Cities and Municipalities of Belgium has made some very positive and effective contributions to the preparation of this report, and this is the place to thank them for their very valuable assistance.

However the right to associate includes not only collective organization for the common defence of interests, but also the co-operation of two or more local communities in the accomplishment of a common task. Such co-operation seems to have a long tradition in Belgium; it is guaranteed by Article 162 § 4 of the Constitution and regulated by a law of 22 December 1986. Especially for co-operation between (normally all) the 19 local authorities forming the Region of Brussels Capital, the possibility of co-operating in the form of special associations, the “inter-municipal associations” (*associations intercommunales/intercommunale maatschappijen*), is both essential and frequently occurs. The same is true for the other Regions. Following the transfer of competence in this field to the Regions, Flanders introduced a new, very detailed and innovative regulation contained in the Decree of 6 July 2001.

But here too, the shift of supervision power to the Regions creates problems. The new Flemish decree does not seem to take inter-regional associations into consideration, but does state that it immediately applies to cross-border co-operation. Such co-operation, although perhaps possible in theory, will therefore diminish, and may even become impossible in practice. Similar tendencies were reported from the Region of Brussels-Capital

with regard to co-operation with neighboring municipalities³². Its importance seems to be on the wane. For cross-border co-operation, Belgium has ratified the European Outline Convention³³. But inter-regional cross-border co-operation seems to raise greater difficulties. This is important because the Belgian regional borders separate Brussels (as Region) from its natural surroundings, as well as many local communities with a mixed population that is, thus, divided in two camps. One could ask whether a federal law based on Article 77 no. 10 of the Constitution would be helpful, but such a solution seems unlikely, and at the very least complicated. This does not appear to correspond to what is meant by local authorities' right to associate. Here too, the present report, although dealing with local self-government, cannot avoid reaching similar conclusions to those reached in Parliamentary Assembly Resolution 1301 (2002), especially nos. 17 and 21.

18. THE LEVEL OF THE FEDERAL STATE

Following the fundamental reforms no priority seems to be attached to further modifications at federal state level. The Special Law on Institutional Reforms of 8 August 1980, largely modified by the Special Law of 13 July 2001, has been only marginally amended in more recent legislative acts and no further major changes appear to be currently under discussion. The Constitution of 1994 would appear to be in a similar situation. Nevertheless, in the discussions during the preparation of this report, the possibility was mooted by political quarters of transforming the Senate, so as to enhance the representation

³² The Brussels inter-municipal water board (*Compagnie intercommunale Bruxelloise des eaux/Brussels Intercommunale Watermaatschappij*), is still in existence with articles of association dating from 6 June 1996, comprising the 19 municipalities of the Region of Brussels, 10 Flemish and 4 Walloon municipalities, although the regulations regarding supervision are complicated (Articles 35-37). Other inter-municipal associations are more and more limited by regional borders.

³³ See above, Introduction, with the problem concerning the additional protocols.

of the Regions and Communities, but granting it the exclusive power to approve acts of international law regarding the Regions or Communities, especially the transposition of European Union directives. In that respect regarding approval of the European Charter of Local Self-Government a simplification along the lines discussed could prove extremely useful. But its consequences on the federal system of Belgium are so fundamental that the whole issue goes beyond the scope of the present report.

Furthermore, after the regionalization of the local authorities' and administrative system, attention must be focused on the impact on the taxation and financial system. But these problems are also so complex and delicate (particularly as they are related to a financial adjustment which would seem to be a necessary consequence of the principle of federal loyalty [Article 143 of the Constitution]) that it is difficult to see if, when and how such reflections would be initiated as part of a broader discussion.

19. THE PROPOSALS IN THE REGIONS

However, implementation in regional and, perhaps in community legislation is a natural consequence of the reforms at central state level. If powers to legislate have been transferred to the Regions and Communities, it seems only natural that they be exercised. There is currently much discussion on this, but the results are still either specific to certain details³⁴, or vague. There are no draft general laws being discussed in the regional councils.

However, a first step in this direction can be seen in the draft of a new law in Flanders, presented by the Flemish Government, along with "Opinion No. 4/2002" of 18 October 2002 by the *Hoge Raad voor Binnenlands Bestuur*. The document was provided for

³⁴ In addition to the decrees mentioned in part 1 no. 8, it must be acknowledged that the legislation has undergone several significant technical amendments.

the preparation of the present report, although it has not yet been officially published. It is an extremely interesting, well prepared draft of nearly 300 articles with a detailed explanatory memorandum, and both the opinion and the remarks made by the *Raad van Beheer of the Vereniging van Vlaamse Steden en Gemeenten* (of 7 October 2002) show that the necessary discussion of this draft is under way.

Nevertheless it is too early and, as far as linguistic problems are concerned, too difficult to give a detailed opinion on the individual proposals of this draft. But it demonstrates the essential problem inherent in implementing, on the one hand, legislation specific to a given Region, and, on the other, legislation relating to the role of local authorities, and particularly of burgomasters, in implementing laws of not only the Region, but also the federal state and (although this is less problematic for Flanders) the Community. Accordingly legislation is needed which is at the same time appropriate to the Region and harmonized with the interests of the other partners of the Belgian federative system. The Constitution, setting out some of the principles of local self-government, guarantees the main guidelines. In addition to the principles of local democracy, there is the principle of the devolution of powers to the provincial and local authorities (Article 162 § 2 no. 3, in conformity with Article 4 § 1 sentence 2 and Article 8 § 2 sentence 2 of the European Charter). The regional legislation as such has to ensure that this task can be accomplished. This is the difficulty for the Regions – being but one of the players involved – in that field. As demonstrated above (part 2, nos. 3 and 9), an extended supervision regarding the “general interest” as well as difficulties for co-operation between local authorities across regional boundaries would endanger the compatibility of the legal orders in Belgium and local self-government. Furthermore, the very interesting proposals concerning direct participation of citizens in questions to be decided by the council may raise problems of local competence not only with regard to the Region, but also to the federal state.

20. THE APPOINTMENT OF BURGOMASTERS

One of the classic and most important arguments in this regard is the method of appointing burgomasters. In 2012 there has been a constitutional change regarding the elections of mayors and how litigations could be solved: this is a highly political topic and involves the Administrative Court in Belgium.

The constitutional change of 2012 has been reached to try to address the issue. It seems to be a crucial point for assessing the compliance with the European Charter.

Furthermore, as we have seen, the regulation in force to date in Belgium, even though compatible with the European Charter, is today a solution chosen only in an ever decreasing minority of European States and gives considerable influence to the central – now regional – head of the executive power. To date, the burgomasters appointed by central government have implemented regional laws as well, and this does not appear to have given rise to any problems. But in the context of regionalization, such a solution may create conflicts between the federal and the regional functions of the burgomaster. Clearly, therefore, it is time for a new solution. While the current right for the majority of the council to nominate a candidate seems a good point of departure, the issue of local election in the community needs to be discussed. The main difficulty is whether the power should be conferred to the council or to the citizens.

In this connection, a major contribution to the debate has come from the draft for Flanders which proposes, in its Article 60 et seq., direct election of the burgomaster (and substitute) by the citizens. This follows a European trend³⁵. The arguments in favor of it concern greater democratic legitimacy, involvement of citizens, and larger independence

³⁵ See the CLRAE-report CPL (9)2 by A. Knape and P. de Bruycker, no. 55 et seq. (see above, no. 25), and also CLRAE Recommendation 113 (2002), in particular paragraphs 6-13.

from the council; these are in line with reflections in many countries, and are well discussed in the explanatory memorandum³⁶.

At the risk of repeating some of these arguments, it nevertheless seems necessary to discuss some of the problems.

A directly elected burgomaster will consequently, from a democratic and popular point of view, take on greater importance in the local authority system. This may weaken the position of the council. Accordingly, it is perhaps necessary to strengthen the position of the council and possibly also (although they are not directly elected), the position of the aldermen (*schepenen*). In that sense, the proposal of a specially elected president of the council in addition to the burgomaster seems a convincing one.

The problem of objectivity and neutrality is also relevant for a directly-elected burgomaster, especially in his/her position between local council, regional and federal government. In accordance with current legislation, the swearing in of the burgomaster by the governor of the province underlines this point. In contrast, the draft provides for an oath to fulfill the duties falling under the regional government³⁷. The question may arise whether this impinges on fulfillment of federal duties.

In a responsible local government (cf. Article 3 § 2 of the European Charter and the discussion above, part 2, no. 5) there should be a means of correcting a wrong election. Accordingly, the draft, granting the burgomaster the important power to propose the aldermen (Article 45), provides that the council may pass a vote of no-confidence in the board of aldermen in a constructive way, by replacing the aldermen in post (Article 50). This

³⁶ See the explanatory memorandum to the draft, p. 8 et seq., 70 et seq., and the objections contained in the opinion of the R. van Beheer VVSG, p. 9 et seq.

³⁷ Art. 63 of the draft, cf. the formula and procedure in accordance with the existing Article 80 of the New Law on Municipalities, see above part 1 nos. 4, 5 and judgment no. 151 of the Court of Arbitration of 15 October 2002.

undoubtedly causes serious difficulties for the burgomaster³⁸ that do not concern him directly. As he has the most important role, the solution seems contradictory. On the other hand, it would be problematic if the council could dismiss a burgomaster who had been elected directly by the citizens. Perhaps a solution could be to treat a vote of no-confidence by the council (perhaps with a qualified majority) as a proposal for a citizens' vote to dismiss the burgomaster. A solution of this kind, certainly very difficult to operate and thus seldom applied, could be helpful, similar to the situation in several German *Länder*, in cases of extreme conflicts.

For the normal situation however, a different political affiliation of the burgomaster and the majority of the council, though creating problems, can and should be accepted, because both elections (of the burgomaster and of the council) are legitimized in a democratic way, and it may correspond to the political situation to have both tendencies represented in the local authorities: the "cohabitation" in the field of self-government is one possibility of political compromises. But if there is no remedy for cases of extreme tension, the danger of the use of disciplinary powers by the government, necessary for cases of poor fulfillment of duties, but not for other purposes, could be harmful for the idea of self-government. For such cases it is important that judicial protection, which on the whole is quite effective in Belgium, should prevent political decisions by applying disciplinary measures³⁹.

21. THE STATUTE OF THE PROVINCES

³⁸ This criticism from the R. van Beheer, quoted above, p. 9, is convincing.

³⁹ Cf. the guarantees contained in the law of 13 July 2001, which exclude disciplinary measures of the Regions in affairs of burgomasters until 2006, restricting them to the central state, see J. Brassinne de La Buissière, quoted above., p. 32-33.

Another fundamental problem resulting from regionalization is the future of the provinces. It seems that their continued existence, quite apart from the constitutional right of autonomy, could still be useful as regards the implementation of laws and as a common instrument of federal state, region and community. But the modified constitutional situation raises here, as well as in the field of local government, the problem of providing practical legal provisions, especially the problem of the position of the governors, similar to that of the burgomasters, and will require detailed discussion. As far as this is concerned, at provincial level, the more important role of implementing laws – of the federal state, the regions and the communities – seems to be an argument in favor of maintaining the appointment of the governor by the head of the (now regional) executive, however with guarantees regarding the neutrality of the person appointed.

Yet Brussels - not belonging to a province - is in a special situation, as too perhaps is the German speaking Community. Although, in conformity with Article 139 of the Constitution, several powers of the Walloon Region have been transferred to the German-speaking Community, it nevertheless remains part of the Walloon Region. In this situation the question arises whether the transfer of powers to the Community, until now justified by practical reasons, should be extended. Proposals may concern either additional powers of the Community – like the supervision of local authorities – or the assimilation to the position of a province or even a Region, but they may as well criticize the transfers, which have so far taken place.

The present report cannot give a definitive judgment on such reflections. Nevertheless the difference between Regions and Communities seems fundamental for the Belgian Constitution, and the small German-speaking minority – 71,000 inhabitants – seems very well protected by its status as a Community. It would, therefore, be difficult to identify sufficient reasons to call into question its existence as part of the Walloon Region. The fact that the supervision of German-speaking local authorities by a French-speaking administration is complicated, slow and inconvenient could create problems in relation to Article 8 § 2 of the European Charter. Some thought could be given to a first level of control – like the governor of the province in the case of other local authorities – in the German-speaking Community which, for that purpose, could be more or less treated like a provincial

(or perhaps a district) authority, while in critical cases, the competence of the Region would be maintained. The problem shows the rich range of solutions in the complex Belgian system.

22. THE POSITIVE ELEMENTS

In evaluating the situation of local government in Belgium in the light of the constitutional development to a federal state, the parallels and factors in favor of self-government are obvious and important, and one may see a connection between the liberal ideas of 1830 advocating the idea of self-government, with the current concept of federalism and its consequences for local self-government.

Above all, federalism, especially in the Belgian form, means regional autonomy – as well as the autonomy of the Communities – and is part of a policy in favor of self-government. This aspect of the Belgian example may be interesting for the Council of Europe's efforts to draft a European Charter of Regional Self-Government. The case of Belgium may appear as one of the typical cases where the parallelism between regional and local self-government is clearly visible.

In other terms, this parallel is a common expression of the principle of subsidiarity, guaranteed by the EC-Treaty (Article 5) and a factor in the growth of a united Europe which, by placing emphasis on smaller units, makes for public power of a similar nature at all levels, contextualizing state sovereignty, centralist bureaucracy and separatism.

In practice, this idea of devolution means that regulations can be drawn up at a level closest to those directly affected and the practical interests in question. In this respect, linguistic pluralism has enabled the citizens to maintain, guarantee and protect their own way of life. This shows how the difference between Regions and Communities helps offer a form of protection, which is more adapted to the actual and typical situation.

Finally it has to be emphasized that the very controversial, sometimes hostile and in any event complicated development has given rise to legally functioning solutions without

violence. The system of guarantees, though complicated, allows a peaceful co-existence, and in the case of conflicts the competent decision-making bodies, in particular the Constitutional Court, help find satisfactory solutions.

23. THE QUESTIONS IN DEBATE

On the other hand, monitoring local self-government in Belgium reveals several problematic areas. Phenomena like the non-implementation of certain legal rules nourish the suspicion that sometimes the principle of self-government may serve as a pretext for other interests, and a certain egoism in the defence of such interests sometimes disturbs the confidence that it is a strengthening of self-government itself that is being aimed at.

It must be acknowledged that there are classic shortcomings in fulfilling international obligations, and this is demonstrated by the European Charter of Local Self-Government: this international treaty signed by Belgium the 15 October 1985 has been ratified only even after 19 years. Consideration must be given either to an institutional change, or to genuine compliance with the principle of federal loyalty provided for in the Constitution (Article 143 of the Constitution).

Similar problems seem to arise concerning the application of certain federal laws. If the Regions, Communities and local authorities represent the interests of their linguistic group, then the application of federal laws, which try to ensure the free choice of language and the protection of local linguistic minorities, becomes difficult. There is a danger that in the light of the regionalization of the regulation and supervision of local government, problems of this kind could increase.

For similar reasons, and sustained by the possibility of supervision of local authorities to protect the general interest (Article 162 § 2 no. 6 of the Constitution), the supervision of local authorities by regional governments could increase. In the field of education, the substantive interest of the Community's supervision authorities could limit excessively the autonomy of schools at local level.

More generally, the Regions have a tendency to separate themselves from the other Regions and exert some influence on the local authorities to behave in the same way, especially *vis-à-vis* neighboring municipalities in other Regions. Practiced in this way, regional autonomy is not a parallel, but a limitation of local autonomy and in contradiction to the constitutional principle of federal loyalty.

The danger of such a development is underlined by Resolution 1301 (2002) of the Parliamentary Assembly of the Council of Europe. Although the present report does not want to repeat the statements, recommendations and suggestions of that Resolution, it has to be stated that a parallel can be drawn with a number of critical aspects from the quite different point of view of local self-government.

The aim of a this article is not necessarily to give fixed guidelines for the furthering of policy in a certain country, especially if the country in question is one with a political tradition and culture and a highly developed state of self-government such as Belgium. The present report has attempted to recommend for discussion and innovation several proposals that need to be reflected on in context; therefore they shall not be repeated here. Nevertheless for the present, after the completion of the procedure of ratification of the European Charter of Local Self-Government in 2004, and to recall the necessity of a real possibility of cross-border co-operation between local authorities in Belgium not only across the municipal and, it is to be hoped, national borders, but across regional and linguistic borders as well.