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Local and Regional Democracy in Netherlands

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EXPLANATORY MEMORANDUM

Introduction

1. In line with Committee of Ministers Resolution 2000 (1), outlining the principle of monitoring all member States of the Council of Europe and applicant countries, the Council of Europe's Congress of Local and Regional Authorities of Europe (CLRAE) has decided to draft a monitoring report on the situation of local and regional democracy in the Netherlands. This report continues the monitoring of the Rapporteurs Moreno Bucci, L (Italy) and Hans-Ulrich Stöckling, R (Switzerland), which resulted in the Explanatory Memorandum CG (6) 4, the Recommendation 55 (1999) and the Resolution 77 (1999), debated by the Congress and adopted on 16 June 1999.

2. Although, in the light of these past events, a new monitoring report conforms to the programme of the Congress, the Netherlands delegation gave an additional reason to the Congress. On 5 February 2004, Mr. Ralph Pans, Director of the Association of Netherlands Municipalities (*Vereniging van Nederlandse Gemeenten – VNG)* wrote to the President of the CLRAE asking for a discussion of current Dutch projects regarding local government, and in the meeting of the Institutional Committee of 23 April 2004, Mr. René Paas, Vice-Mayor of Groningen, and Mr. Henk Aalderink, member of the Executive of Gelderland, for the provinces, requested the preparation of a follow-up report.

3. Therefore the Institutional Committee of the Congress, at the above-mentioned meeting, decided to draft a follow-up information report on the Netherlands, nominating Ms. Kathryn Smith (United Kingdom, Chamber of Local Authorities) and Mr. Odd-Arild Kvaloy (Norway, Chamber of the Regions), members of the CLRAE, as rapporteurs, Prof. Dian Schefold (Germany), Vice-President of the Group of Independent Experts on the European Charter of Local Government, as expert. Mr. Ivan Volodine provided secretariat support for the mission.

4. The arrangement of the necessary meetings for a Fact-Finding Mission came across difficulties on the side of the Dutch partners as well as of the CLRAE. During the meeting of the Institutional Committee of 3 November 2004 the Dutch delegation lamented the delay of the Report, urgent in presence of legislative activities. The Fact-Finding Mission could finally take place with a full programme of working meetings (Appendix I) on 19-20 January 2005, based on a questionnaire (Appendix II) prepared before, and on the study of materials prepared by the VNG. As they were under pressure due to the imminent decisions, following the suggestions of the Secretariat of the Congress, the team decided to target the present report to the main issues of the current discussion in the Netherlands, despite the fact that this report would then take on the character of a monitoring report. Therefore the procedure described in the "Vade-mecum" for monitoring reports (CG/INST (7)31 rev 1 of 1 June 2001) had to be simplified. The team decided against a second visit, sending the draft of the Report to the Dutch partners and giving to them the possibility to make their remarks and objections. In this way the draft of the Report was prepared and sent to the Dutch partners on 4 March 2005. The Report was reviewed and completed by information on recent developments (Appendix IV - Press Release) and submitted to the Institutional Committee for the meeting of 15 April 2005. Comments on the report are presented in the Appendix III. They have been discussed and taken into account, but they have not modified the essential points and conclusions.

5. This rapid process was possible thanks to the VNG and especially its Secretary for the Netherlands delegation to the Congress, Ms. Elisabeth Roussel. Only with her help and thanks to the cooperation of the Association of the provinces (*Interprovincial Overleg – IPO*) with the Secretary for European affairs, Mr. Henk van Leeuwen, who prepared the working

meetings that allowed us to obtain the essential information in such a short time. The team would like to thank these persons and all the partners who gave information and contributed to a very fruitful discussion. The Congress delegation is especially indebted to the Ministers that personally gave information.

6. The Report is based on the fact that the Netherlands signed the European Charter of Local Self-Government on 7 January1988 and ratified it on 20 March 1991, however with several declarations regarding articles 7 § 2, 8 § 2, 9 § 5, 11. The importance of the ratification of the European Charter for Regional or Minority Languages, mentioned in the Report of 1999 (nr. 50-52), could not be studied with additional results.

Part 1: The context of the basic questions

1. The Kingdom of the Netherlands

7. The Kingdom of the Netherlands, with a surface area of 40.844 km² and a population of (as at 30 September 2004) 16.258.000 inhabitants, has a long tradition of self-government, based on the sovereignty of the provinces of the "Republic of the United Netherlands" and a large independence of the cities before the French Revolution. Although the 1815 Constitution has constituted a unitary State, the tradition of self-government always has remained dominant. The old Constitution as well as the re-publication of the Constitution made on 17 February 1983 (with further modifications) regulates, in Chapter 7, the "Provinces, municipalities, water boards and other public bodies" (Art. 123-136; Art. 123-132 concern the provinces and municipalities). Therefore self-government is a constitutional issue, and its major modifications presuppose the complicated procedure of revision of the Constitution which has to be first stated by Act of Parliament and then, after dissolution and re-election of the Lower House, considered at second reading and passed with at least two thirds of the votes in both Houses (Art. 137 Const.).

2. Regional and local government

8. Provinces and municipalities and their boundaries are regulated by Act of Parliament (Art. 123 Const.). At present, there are 12 provinces, with a surface area between 1420 and 5740 km² and a population between 361.000 and 3.452.000. The number of municipalities, around 1000 in 1945, has diminished to 467. Only 12 municipalities have less than 5000 inhabitants. There is, therefore, a good basis for an efficient local administration. Nevertheless the density of the population (over 360 per km²) raises the problems of entanglement in planning, ecology, economy and other policies and necessitates cooperation between the municipalities. The provinces are regulated by a Provinces Act (*Provinciewet*), the municipalities by a Municipalities Act (*Gemeentewet*). Both laws date back to the 19th century, but have undergone frequent modifications. The current version of the Provinces Act is from 1st January 2005, of the Municipalities Act from 5 February 2005.

3. The monitoring report 1999

9. Monitoring the developments of local and regional democracy in the Netherlands according to the criteria contained in the European Charter of Local Self-Government, the 1999 Report focussed on six points and mentioned additional points:
(1) the appointment of mayors (1., nr. 15-27);
(2) the management of large cities (2., nr. 28-30);
(3) intermediate authorities (3., nr. 31-34);
(4) supervising local authorities (4., nr. 35);
(5) Dutch reservations concerning the European Charter of Local Self-Government (5., nr. 36/37);
(6) local finances (6., nr. 41-46);
(7) besides these main points, the report mentioned the integration of foreign nationals (nr. 48/49), the role of minority languages (nr. 50/51) and planning (nr. 52).

10. It would have been useful to elaborate on all these and perhaps other problems. But given the limited time, the current Report focusses on two of the most discussed of the problems treated in the 1999 Report: the appointment of mayors (supra, 1) and local finance (supra, 6) which shall be discussed in Part 2 and 3 of this Report. The team is aware that these topics are related to other problems of local democracy and attempts to discuss them in this context, but focussing on the actual legislative discussion. Part 4 shall add some remarks on other problems mentioned and discussed during the fact-finding mission. Part 5 contains a Conclusion.

Part 2: Appointment and election of mayors

1. The existing legal situation

11. Until now, article 131 of the Constitution states that "The King's Commissioners and the mayors shall be appointed by Royal Decree." Besides the council elected by the citizens (article 125 § 1, 129 Const.) and, according to law, other residents (article 130 Const.), and the aldermen (*wethouders*) elected by the council (article 125 § 2 Const.), the local administration is therefore determined by an element of hierarchic appointment. This factor has an old tradition dating back to the Constitution of 1815. It was largely referred to and discussed in the 1999 monitoring report (nr. 15-27).

12. In detail, the Royal Decree is a concretisation of the principle stated in article 47 Const., recommended by the Minister of the Interior and Kingdom Relations (*Minister van Binnenlandse Zaken en Koninkrijksrelaties*). The details are regulated in the Municipalities Act, article 61 and following. The appointment is for six years, with a possibility of re-appointment (article 61a). Therefore mayors are not considered as civil servants and, once appointed, they do not depend on the instructions of the central government or the province, but they have, as part of the administration of the municipality together with the aldermen (article 125 § 2 Const.), a special political status. There is neither a special and legally regulated career, nor a rule that they have to be chosen between the inhabitants of the municipality for mayors, but they have usually carried out functions in municipalities, other administrations or political bodies, and often a mayor who has proved his worth in a small municipality may be appointed as mayor in a larger one. Obviously the choice of the

candidates and between them is a largely discretionary, political power of the organ competent for it.

13. Therefore the procedure of appointment of the mayors is of essential importance, and it has been largely discussed in the last decades. Accepting proposals discussed in the 1999 report, the Municipalities Act (article 61) now regulates a large participation of the council in the appointment procedure. The King's Commissioner (of the province) is to consult the council; the council may propose a consultative referendum on the candidates. Besides this, the council is to appoint among its members a confidential committee charged with assessing the candidates, in cooperation with the King's Commissioner. The confidential committee is to submit a report to the council and to the King's Commissioner. Based on this and, if the case may be, of the consultative referendum, the council is to give a recommendation of two candidates, with a ranking. In principle the Minister is to follow this recommendation, including the ranking. In case of "substantial grounds", departures from this are possible, but they have to be motivated (article 61 § 6). A similar, but normally simpler procedure is provided for reappointment (article 61a). In case of a "seriously impaired relationship … between the mayor and the council", the council can send a recommendation for dismissal through the King's Commissioner to the Minister (article 61b § 2). In such a case – such as a case of non-fulfilment of obligations – a dismissal of the mayor can be pronounced. Generally, in comparison with the 1999 situation, the influence of the council and the citizens, in the case of a consultative referendum, has been increased and is better regulated.

2. Dualisation and the position of mayors

14. This situation has to be seen in the context of the dualisation introduced by the Municipalities Act in the version of 7 March 2002. The development in this direction, discussed in 1999 (monitoring report, nr. 19, 25; recommendation, nr. 36) and influencing the practice[1] for a long time, tries to differentiate better between the council and the municipal executive, excluding in principle the aldermen from the mandate in the council (article 36b Municipalities Act) and concentrating the day-to-day administration in the municipal executive, while the powers of control, principal decisions and political representation of the council are enforced. For this purpose the council can, among other things, institute an audit office to control the administration (article 81a-81o, 182-185 Municipalities Act).

15. It seems quite controversial what impact this dualisation may have on the method of the appointment of mayors. On the one hand, the separation of functions on local level may be used as an argument for a better and independent legitimacy of the mayor; that is supposed in the 1999 Report (nr. 25) and seems to be a leading idea of the bill presented by the government (see below, 4). On the other hand, the current process of appointment may provide for such legitimacy. Furthermore, one may argue (in the sense of the position of the Labour Party) that dualisation of the power of control of the council is another strong argument in favour of an election not only of the aldermen, but of the mayor as well as by the council. Finally one may stress, like recently the "Leemhuis steering committee", the current problems of change which make it difficult to alter the method of appointment and the position of mayors at the same time.

[1] See Kortmann/ Bovend'Eert, Dutch Constitutional Law, The Hague etc. (Kluwer) 2000, p. 49 nr. 71, distinguishing general and day-to-day administration (*algemeen bestuur* and *dagelijks bestuur*).

3. Appointment and responsibility of mayors according the European Charter

16. Under the European Charter of Local Self-Government, the traditional and constitutionally regulated system of appointment of mayors raises problems. According to article 3 § 2 of the Charter, the councils as actors of local self-government shall "possess executive organs responsible to them". The 1999 Report stated that, according to the Charter, "mayors should emanate from their municipalities" and declares "the existence of parliamentary lobbyists responsible, within their own political party, for participating in the management of the mayors' appointment system, is contrary to democratic rules" (nr. 24). The participation of the councils in proposing the candidates is "a step in the right direction". But even in case of the duty to submit two names of candidates to the Minister of the Interior "councils do not have the power to appoint mayors" (nr. 22). Nevertheless the proposed changes which are now written in the Municipalities Act seem, according to the 1999 Report, to "ensure that mayors are answerable to their councils" (nr. 24) and that was underlined in our discussions and in the comments. Therefore one may argue that, according to the 1999 report, there was criticism against the traditional system, but recognising steps in the right direction and with an evaluation of the now realised innovations as compatible with the Charter. A similar position can be found in the Recommendation 55 (1999), nr. 22-35, 50a). However the Dutch delegation to the Congress had, in a Memorandum attached to the Report, argued in defence of the compatibility of the role of mayors and queen's commissioners with article 3 § 2 of the Charter. Therefore the situation was not unequivocal, and it appears to be a manifestation of this situation that the Resolution 77 (1999) on the Report instructs the Working Group of the Congress to examine the question, in the sense that "members or at least the chair of executive organs must always be elected" (nr. 5).

17. As a matter of fact the discussion has continued. In 2002 the Congress discussed, on the basis of a (5th) General Report on monitoring the implementation of the European Charter of Local Self-Government on "Relations between the public, the local assembly and the executive in local democracy (the institutional framework of local democracy)", with large comparative analysis, the application of article 3 § 2 of the Charter (CPL (9)2 Part II), and from the Report, presented by Mr. Anders Knape (Sweden)[2], resulted in a Recommendation 113 (2002) and a Resolution 139 (2002). The Report mentions the principle of responsibility above all as a power of control – until the dismissal of the mayor – of the council (nr. 68), but it does not exclude an appointment of mayors by the central government (nr. 70, 73, 74) if the control and the power of dismissal is effective. The Recommendation takes over these aspects (nr. 6, 11-15), though stating that there is a tendency in favour of elected mayors which may be supported (nr. 7-10). An appendix to the Recommendation underlines this tendency and states that a "procedure which fails to provide for election of the local executive no longer appears appropriate in the context of modern-day local democracy". Both aspects – diversity of procedures of appointment in conformity with the Charter, if the control of the council is sufficient, but a statement of the advantages of an elected mayor – are mentioned in the Resolution (nr. 5) as well. Nevertheless, according to these texts the solution of the actual Netherlands Municipal Act seems to be in conformity with the Charter.

18. A next step of the discussion may be seen in a monitoring report on Belgium which has a similar method of appointment of mayors. This report was prepared in the following year (CPL (10)2 Part II), and presented by Ms. Birgitta Halvarsson (Sweden). Here as well and in

[2] It may be seen as more than an accident that the expert concerned in the Netherlands Report 1999 and in the Knape-Report was Professor Philippe De Bruycker (Belgium), coming from a State where the position of mayors is similar to that in the Netherlands.

the Recommendation 132 (2003) and Resolution 156 (2003), the criteria elaborated by the Knape-Report are applied. Therefore an appointment of the mayor by the State government is not excluded if the responsibility is guaranteed in other ways (part II nr. 5 of the report).

19. Finally a Report regarding the advantages of direct election of mayors was prepared in 2004 (CPL (11) 2) by Mr. Ian Micaleff (Malta) and Mr. Guido Rhodio (Italy) with Mr. Henry Frendo (Malta) as expert[3]. This Report, based on a large comparative analysis, describes tendencies in direction of the directly elected local executive and discusses its problems and, above all, advantages. Towards the end (part 5), the possibility of a re-interpretation of article 3 § 2 of the Charter which "is beginning to acquire a life of its own" is mentioned, but not further developed. The report shows the tendencies and hence continues the above quoted reports. But as far as the conformity with the Charter is concerned, there is no new interpretation compared with the Knape-Report.

4. The current tendency to direct election of mayors

20. In view of these tendencies, criticisms and reflections, a re-examination of the existing solution of appointment of mayors is obvious. In the first period of the present government, in 2002, the considerations in that sense lead to a coalition agreement providing the direct election of mayors. For that purpose, a revision of the constitution cancelling the existing article 131 was started. Therefore, in the present legislature this revision may be completed. The House of Representatives has approved the bill, but on 22 March 2005 the Senate rejected it however, due to a lack of agreement about the procedure and time schedule for the introduction of a new method for electing mayors. Only if the bill were approved, would there no longer be an obligation of appointment of King's Commissioners and mayors by Royal Decree. On account of the Senate's decision, the Minister responsible for Governmental Reform has resigned. According to the new coalition agreement, it is now intended to modify article 131 of the constitution and to complete this modification in the next legislature.

21. In view of a new regulation, the present government plans to introduce the direct election of the mayors by the voters of each municipality. The importance of that project is underlined by the fact that the Ministry of the Interior (*Ministerie van Binnenlandse Zaken en Koninkrijksrelaties)* has been divided and a special Minister for Government Reform and Kingdom Relations has been appointed. Two bills have been prepared and submitted to the House of Representatives[4]. One bill (*Tweede Kamer der Staaten-General, Vergaderjaar 2004-2005, Wet verkiezing burgemeester, nr. 29865*) concerns the election of the mayor which shall be held in the first round at the same time as the election of the council (article 1 § 2 of this bill and article 61 Municipal Act in the version of the below mentioned bill); if there is no absolute majority, the second round between the two candidates with the highest amount of votes shall take place two weeks later (*Wet verkiezing burgemeester article 7.8 § 2).* Therefore the regular period of appointment of mayors is reduced from six to four years. Furthermore the bill regulates the election campaign, financing and integrity (chapter 10). – The second bill (*Tweede Kamer der Staaten-General, Vergaderjaar 2004-2005, Wet introductie gekozen burgemeester, nr. 29864*) contains changes in the municipal law

[3] See, to the same topic, Francis Delpérée/ Marc Joassart (eds.), Dossier sur l'élection du bourgmestre, Bruxelles 2002, with a good contribution on the problematic in the Netherlands by Willem Konijnenbelt, p. 171-192.
[4] See Ministerie van Binnenlandse Zaken en Koninkrijksrelaties (ed.), Introductie gekozen burgemester. Vorsel van Wet, Den Haag, November 2004 (English version: Ministry of the Interior and Kingdom Relations (ed.), the new mayor, Introduction of the elected mayor in the Netherlands (Summary of the legislative proposals, The Hague, January 2005)

consequent to the introduction of the directly elected mayor. The conditions of eligibility (Dutch nationality and eligibility to the council, certificate of good behaviour) are regulated (article 61 § 2). A dismissal shall be possible in a formalised procedure by a majority of two thirds of the council (article 63). The position of the mayor in the formation of the municipal executive – the election and dismissal of aldermen by the council and the division of portfolios – is enforced. The mayor has the authority over the municipal administration and the proposal of the town clerk (article 35, 42, 48, 49 and others). – Regarding the chair of the council, the question of a revision of article 125 § 3 of the constitution that guarantees the chair to the mayors (as well as to the King's Commissioners on provincial level) is in discussion and will probably be proposed by the government; nevertheless it could only be completed in the next legislature of the Parliament.

22. For the two present bills, their parliamentary discussion in both Houses was planned for the coming months, so that they could become Acts of Parliament in summer 2005 and could be applied to the next elections of local authorities, i.e. not only councils, but mayors as well, in spring 2006. Yet there are different positions and critics. A political party belonging to the opposition (Labour Party, PvdA) submitted a bill on 14 January 2005 (*Tweede Kamer der Staaten-General, Vergaderjaar 2004-2005, Wet door de raad gekozen burgemeester, nr.29958*) regarding an election of mayors by the councils. After the Senate's decision of 22 March 2005, the situation is open, and a final decision may be expected only after 2007.

5. Problems of the new system

23. Obviously the bills follow a tendency spread widely over Europe and recommended by the mentioned documents of the Congress. Though, as other models of directly elected mayors, the modification raises numerous problems currently in discussion in the Netherlands. There are opinions of the Council of State, of the Advisory Council on Public Administration, of the Leemhuis Steering Committee, of the IPO and the VNG and of other organisations, treating the problems raised by the bills and proposing criticisms and alternatives. A discussion of this kind is necessary, taking into account the importance of the intended innovation. Most of the problems can be resolved in different ways, and it is not the task of a monitoring report to give a definitive judgment on the possible solutions. Nevertheless some of the problems, existing in similar ways in other countries as well, shall be briefly mentioned.

a) A fundamental problem may be seen in the *relationship between the principle of dualisation* (supra, part II nr. 2) *and the position of a mayor directly elected by the voters*. As stated before, one can qualify this innovation as enforcement or as complication and additional difficulty for a dualistic system. Strengthening the position of an elected mayor can be seen – with the motivation of the bill – as a consequence of a dualistic system. But one could object that a directly legitimated mayor with additional powers may break the principle of collegiality in the municipal executive and the control by the council.

24. In this context the Advisory Council on Public Administration has described two fundamentally different models of elected mayors, the *autonomous* mayor inserted in the principles of collegiality with the aldermen and cooperation with the council, and the *independent* mayor with extended powers, only assisted by the aldermen and only under control and with certain principal powers of the council; the latter model, according to the Advisory Council, is incompatible with constitutional principles, especially the rule that mayors preside over the meetings of municipal councils (article 125 § 3 const.); hence it could be realised only after a revision of the constitution, not by simple Act of Parliament and not

for the elections to be held in 2006. Introducing elements of it in the bill now under discussion would mean creating an unworkable model.

25. This criticism is convincing as far as it establishes a contrast between the principles of collegial leadership by the council and personal leadership by a mayor. Both principles, in their pure form, are monistic. Even the coexistence of a council and a mayor means an element of dualisation. According to the recent developments, this element has been evaluated as a positive factor and therefore been strengthened. Furthermore it is convincing that this reinforcement in the direction of the "independent" mayor weakens the collegiality of the municipal executive and makes the control by the council more difficult. Within the limits of the European Charter of Local Self-Government (see below, nr. 6) and, if not revised, of the constitution, it is a political question as to how far the legislation will go: Whether the weight shall be put on the principles of collegiality and cooperation with the council and hence on a parallel legitimacy of mayor and aldermen, providing the election of the mayor by the council as well, or whether the emphasis should be put on a more independent position of the mayor, elected directly by the people and granted certain powers. Even the chair of the directly elected mayor in the council is not necessarily unworkable, as the example of several German Laender (like Bavaria and Baden-Württemberg) shows, although this solution is often criticised and not copied (see e.g. the solutions in North Rhine-Westphalia and Lower Saxony), and although it may be qualified contrary to Dutch traditions and political culture. At present legislation may choose amongst a large scale of solutions.

b) On the other hand, the opposition of the principles of collegial and personal leadership shows that an elective mayor can be based as well on the principles of *election by the council and by the people*. Both solutions have good reasons and conform to a system of good local governance. Both are, moreover, rooted in the actual Municipal Act which provides for the possibilities as well of a confidential committee of the council as of a consultative referendum. It is a political choice as to which alternative shall be developed into an election procedure: whether the shorter step to an election by the council may be preferred or the current trend – as the report on the directly elected local executive (CPL (11)2) has demonstrated – predominating to a directly elected mayor may be followed. In both cases, an elective procedure continues a long term development and helps to improve the transparency and responsibility of the decision in favour of the candidate who wins the competition. Nevertheless it must be recognised that the innovation is an important change not only of legal procedures, but of political and administrative culture. This point of view seems important for modalities of introduction to the new system (infra, f).

c) In the consequence of the system existing until now, all proposals seem to contain the possibility of the *dismissal of the mayor*, not only in case of violation of his duties (article 62 of the bill), but as well in case of a fundamental conflict in the functioning of the municipality (article 63 of the bill). A solution of this kind is obvious for the "autonomous" mayor (supra, a), especially if he has been elected by the council. However for a mayor elected by the people, one may ask whether he or she can be dismissed by the decision of the council. While other solutions provide either the necessity of a referendum (as in several German Laender) or an automatic dissolution of the council as well in case of dismissal (Italy), the bill, with certain guarantees of proceeding, allows a dismissal by decision of the council with a two thirds majority. Considering the problems risen by other possible solutions as well and the political culture of the Netherlands that do not know a dissolution of the council, one may understand this proposal; but it leaves unresolved grave conflicts if a majority of the council of less than two thirds has voted in favour of a dismissal.

d) These problems, unavoidable if the traditional procedure of appointment based on proposals, negotiations, confidential deliberations and examinations and finally a legally determined procedure of nomination is abandoned in favour of an open democratic concurrence, explain the *difficulties of the transition* to the election of mayors. There are certain powers of mayors exercised until now in cooperation with the central administration, especially the King's Commissioners that, under conditions of an elected mayor, could be exercised in a more autonomous way and therefore raising conflicts. It is therefore understandable that the provinces organisation (IPO) focuses on these problems.
- Situations of that kind are likely in the field of maintaining *public security and order* and the direction of police forces, largely attributed to mayors according the existing Dutch legislation. In these fields an intensive State's control is frequent. The more a mayor, legitimated by the local majority, stays away from the central authorities, the more these will exercise their powers of supervision. Given certain tendencies to centralise and to separate the police organisation from the local authorities, it may become more probable that such tendencies succeed. From the point of view of local autonomy that would be a disadvantage.
- Developments in that direction are more likely because the Municipalities Act, based on article 132 § 4 of the constitution, allows *supervision* not only in case of conflict with the law, but as well *in case of conflict with the public interest*. This rule, in contradiction with article 8 § 2 of the European Charter and thus reserved by a declaration of the Netherlands government on occasion of the ratification of the Charter (see above, Introduction), therefore discussed in the 1999 monitoring report (nr. 35, 37 and Recommendation 55 (1999) nr. 45, 50g), is not intended to conform to the Charter in the now discussed reform of the Municipal Act and of the constitution. One may fear and regret that the uncertainty of the impact of an election of mayors will not contribute to harmonise the Dutch legal order with the Charter in this point.
- Local authorities in the Netherlands need, as stated before (supra, part 1 nr. 2), an intense *inter-municipal cooperation,* and one may see in the model of the appointed mayor, normally coming from outside his municipality, a guarantee for the readiness to this activity. Therefore the solution of the elected mayor supposes a legal obligation in that sense which in case of violation may be enforced in the way of supervision (see article 170 § 1 b Municipal Act).

e) Reflecting on these problems of local authorities, one may be surprised that the question of *consequences for the provincial* – and regional – *level,* often reflected as well in the last decades, are not at all in the present discussion, although the organisation of provincial and local level is, according to the constitution and the law, parallel. Hence if the mayors are elected, the question arises as to what the consequences for the King's Commissioners are. The bill does not treat these problems, but as the abolition of article 131 of the constitution removes the constitutional rule of their appointment as well, a similar discussion seems consequent, and necessary if article 131 shall be modified. Otherwise the character of regional and local self-government could develop in different directions.

f) All these problems, contradictions and open questions are not arguments against the reform as such. Nevertheless they illustrate that the Netherlands are on the way to a very *complex and incisive innovation*, and that the difficulties must not be underestimated. Certainly one can not argue that the idea of an elected mayor is unprepared and precipitated, because the discussion has continued for decades, is in line with the Charter (infra, nr. 6) and with tendencies in most European countries. But the *transition seems to create many problems*, and the objections from many sides could perhaps be considered in allowing a smooth transition.

26. In this sense the rapporteurs were impressed by the fact that nearly all the concerned groups – the Association of Municipalities (VNG), the Society of Mayors (NGB), the Association of Aldermen, the Association of Town Clerks (VGS), the Association of Council

Clerks (VvG) – oppose an implementation of the proposals in 2006. Even those who will doubt some of the objections which qualify the proposed model as "hybrid" or "unworkable", will have to recognise that the simultaneous introduction of the new regulation encumbers the implementation with specific disadvantages. As, until now, every year the appointment of about one sixth of the mayors ends, a high percentage of mayors, appointed for six years, would be infringed in their position attributed by Royal Decree if the law brought their period of appointment to an earlier end. It is true that a similar limitation never can be excluded if the legal situation changes; the suppression of the possibility of re-appointment (article 61a Municipal Act) infringes expectations, too. Once the new regulation has to come into force, it seems convincing that the term of general elections of all the municipal councils is an appropriate date. But either the expiration of appointments could – and should – be prepared; for this an application of the new regulation beginning in 2010 would be a solution. Or the transition could be made step by step; then it could be considered, appointing from now on only substitutes for the mayors, to start after the modification of article 131 with the elections in the municipalities where the term of appointment of the mayor has expired, and to introduce the election of mayors in the other municipalities after the expiration of the appointed mayor or with the elections in 2010. One of these solutions seems now unavoidable after the Senate's decision of 22 March. Both solutions would enable the transition to be better prepared through continuing the revision of the constitution, particularly the question of the chair in the council (article 125 § 3), a new constitutional article regarding the election of mayors (instead of the cancelled article 131) and the supervision in case of conflict with the public interest (article 132 § 4); furthermore to discuss and regulate the future form of election or appointment of the King's Commissioners and, perhaps, to re-discuss some of the above-mentioned details of the new regulation contested in the public debate. In that way a soft transition could facilitate the implementation of the new order.

6. Direct election and the European Charter

27. Nevertheless the present report has to admit that these problems are not objections against the actual reform as such. After the long discussions, reported above (nr. 3), regarding the current system of appointment of mayors in the Netherlands and in countries with a comparable system of local self-government, especially the monitoring report of 1999 and the recommendations adopted by the CLRAE, having regard to the general debates on the responsibility of local executive organs in the sense of article 3 § 2 of the European Charter, as well as to the discussions on the advantages and disadvantages of the directly elected local executive in the light of the principles of the European Charter, it would be impossible to argue that the introduction of direct election of mayors contradicted the European Charter. On the contrary, the Congress has welcomed the introduction of directly elected mayors in other countries. That can not exclude a serious discussion of the details of the bill now presented to the Parliament of the Netherlands. But it has to be admitted that the principle of election of mayors is, if not imposed by the European Charter, in any case a solution in conformity with it, as agreed in the letter dated 13 April 2005 addressed to the Congress by the Minister for Government Reform and Kingdom Relations, Alexander Pechtold. As already stated under part 3 of this chapter, the Appendix to Recommendation 113 (2002) underlines this tendency and states that a "procedure which fails to provide for election of the local executive no longer appears appropriate in the context of modern-day local democracy". Even the mentioned points of view for the transition in the new system can not be directly based on the Charter. Certainly article 7 § 1 prescribes the free exercise of functions and could therefore limit the abbreviation of mandates, but only in case of "local elected representatives". The paragraph hence does not regard appointed officers. As it does not limit the responsibility of the local

executive organs in the sense of article 3 § 2 of the Charter and therefore their dismissal, it can not exclude a legally provided abbreviation of offices, although such ruling may appear politically problematic for the above mentioned reasons. Thus the present monitoring report has to be limited to the presentation of the arguments and to the conclusion that there is no violation of the Charter in case of the adoption of the bill submitted to the Parliament of the Netherlands.

Part 3: Local finance and the limitation of real estate tax

1. The present situation

28. The Municipal Act (supra, part 1 nr.2) contains a detailed title IV on local finance. This title gives, in accordance with its ruling, the municipalities the power to levy taxes according to by-laws issued by the municipalities. In this context the most important tax is that on immovable property (real estate tax, *onroerend zaak belasting, ozb,* article 220-220i Municipal Act). According to the statistics presented by the Central Bureau of Statistics (CBS), the amount of real estate tax was, in 2004, about 3,4 billion €[5]. That means that 83% of the local taxes result from the real estate tax; the other local taxes (see article 221-229d Municipal Act) have lower importance. But all the taxes of local authorities cover only 8,8% of the municipal income. From all the financial charges of citizens in the Netherlands, 61,5% are State taxes, 34,5% social security contributions and only 4% taxes to public bodies, of which 3,1% to municipalities, 0,5% to the provinces and 0,4% to the polder authorities. Therefore local authorities depend to a large extent on grants from the State.

29. Users of real estate as well as the owners are subject to the tax . There is no limitation of the tax rate which is to be established by the municipalities. The taxation of private and commercial buildings may be different. But the rate of the owner's tax must not exceed 5/4 of the user's taxrate, and certain real estate objects (like churches, agricultural land) are exempt.

30. For the purpose of the taxation, real estate has to be valuated. This valuation, taking place every four years, is a task of the local authorities. It determines the valuation for the State taxes and the polder taxes as well. Therefore it ensures an important function to the local authorities.

2. The statements of the 1999 report

31. In 1999, the monitoring report focussed on the situation of local finance as one of the important points (part 6, nr. 41-46, recommendation 55(1999), nr. 47, 50h, i). Based on figures that the then municipalities had 15%, provinces 10% of their income resulting from taxes, the report stated that they were "excessively dependent on central government grants", with a special emphasis on the fact that the major part of the grants was given for tasks administered in common by the State and the local authorities and therefore under State control. In this situation the report asked whether it was in line with article 9 of the European Charter. The question was raised regarding article 9 § 1, asking whether those were "adequate

[5] For 2004, the Report of De Commissie Gemeentelijk Belastinggebied, made by P.B. Boorsma/ C.A. de Kam/ L. van Leeuwen, Belasten op niveau. Meer fiscale armslag voor gemeenten, Den Haag 2004, p. 15, indicates 3.359 million € (1.875 from owners, 1.484 form users). For a general presentation in comparative view, see Dexia (ed.), Local Finance in the 15 countries of the European Union, 2nd ed., Paris 2002, p. 223, 233-237.

financial resources", and article 9 § 7, asking whether the condition that "as far as possible, grants to local authorities shall not be earmarked for the financing of specific projects" was fulfilled. Furthermore the reservation of the Netherlands regarding article 9 § 5 of the Charter was criticized.

3. The reform of the real estate tax

32. Since 2002 the government of the Netherlands has planned to reform the real estate tax. Until now no bill has been presented formally to the Parliament, but the intention is declared in the coalition agreement for the actual legislature. In line with it, in a letter dated 19 December 2003, the Minister of the Interior, in common with the Minister and the Secretary of State of Finances developed the idea of reform to the members of Parliament[6].

33. According to that project, the real estate tax of users of houses shall be abolished. The real estate tax for owners, thus no longer limited by the relation to the user's tax, and for commercial buildings shall be maximised, so that the power of municipalities to determine the rate is limited. The government proposes to increase the municipal fund as far as equalizing the loss for the municipalities by higher, freely disposable grants from this fund.

34. Originally the law should have come into application from 1 January 2005. Now the intention is to present the bill to the Parliament in the coming weeks and to get the Act of Parliament voted in 2005, so that the law may be enforced from 1 January 2006.

35. The discussion on the reform – one of the reasons for the present monitoring report – has been extremely lively. Besides the working meetings mentioned in Appendix 2, there was, before the presentation of the letter to the Parliament, an opinion of the Center of the Economy of Local Authorities of the University of Groningen (*Centrum voor Onderzoek van de Economie van de Lagere Overheden, COELO*) of September 2003; now there is an opinion of the National Council for Financial Relationship (*Raad voor de financiele verhoudingen, Rfv*) of 26 January 2004, various position papers of the VNG, one of 3 March 2004, of the IPO of 18 March 2004 and a large opinion of a Committee for Local Taxation (*Commissie Gemeentelijk Belastinggebied*) of 25 May 2004 (see above, footnote 5) that were considered and are discussed here. It seems that the Council of State has given an opinion as well, but as the bill has not yet been published, it has not been published either.

4. Arguments in favour of the reform

36. The government's proposal seems to be founded on the fact that there is a certain unwillingness to pay taxes, and especially noticeable taxes which have to be paid directly, not detained e.g. by the employer. This unwillingness may be increased by the fact that the value of property has increased, along with the amount of the taxes, an issue which has become sensitive.

[6] See the letter regarding „Hoofdlijnenbrief afschaffing OZB gebruikersheffing woningen en maximering van tarieven" of 19 December 2003, written by De Minister van Binnenlandse Zaken en Koninkrijksrelaties, De Staatssecretaris van Financien, De Minister van Financien, to De vorzitter van de Tweede Kamer der Staten-Generaal.

37. Considering the limited percentage of real estate tax for the municipal income, it may seem a simplification of administration, popular and convincing to abolish or to maximise this tax, in favour of a guarantee of local finance in less visible forms, i.e. through the municipal fund. As the governmental proposal says, this fund shall be increased to equalize the loss of municipalities, and its amount shall be guaranteed. In that way, a rational distribution shall become easier, while until now, hoping that a high value of real estate tax could be taken as an argument for a higher portion of participation in the municipal fund; several municipalities were tempted to raise real estate tax with the scope to get more from the municipal fund, anticipating the introduction of government measures.

38. If the government proposes to abolish the user's tax, whilst maintaining the owner's tax, it seems necessary that this tax be maximised, considering that the current limitation (maximum 5/4) would fall, with a view to avoiding that municipalities try to equalize their loss by increasing the owners tax.

5. Objections against the reform

39. However, for the municipalities, the abolition of the user's tax combined with the maximisation of the owner's tax involves a noticible reduction of their own financial resources. The by far most important local tax is reduced to not much more than half of the current sum[7], and local taxation, anyway very limited in the Netherlands, looses its importance, reduced to about 6% of the local authorities' income. Obviously, as all the advisory opinions on the question say, such a development limits the free exercise of autonomous powers of the municipalities. One has to fear that the number of the insolvent municipalities under special, conditioned aid of the State (the so called "article 12-municipalities") will increase.

40. Such a development heavily infringes upon the classical democratic connection between taxation and representation. The municipal citizen, if not owner, is no longer subject to local taxation. The owner of immovable property who remains a tax-payer may not always be resident of the municipality and therefore not involved in the decision on the real estate tax he or she has to pay. The financing will become, to a much greater extent, the task of the central State, but the municipal fund, decided by the central Parliament, shall be guaranteed, and the use of it shall be in the power of the local authorities. The entanglement of central and local powers, anyhow characteristic for the Netherlands administration[8], is in that way expanded even to the field of autonomous powers of local authorities, because financial resources are substituted by State's grants, certainly leaving more decision-making capacity to the municipalities if there is no conditioning, but nevertheless depending on a central level decision. At the same time the taxation burden imposed on citizens is not diminished, but simply shifted from local to central taxation. Furthermore in case of budget deficit EC-obligations may force the central State to reduce the municipal fund, in spite of previous guarantees.

7

Whilst until now the owner's tax on houses could not exceed 5/4 of the user's tax, the abolition of this tax means a reduction of 4/9 (however as a result a bit less on account of the remaining tax on commercial buildings), and the maximisation prevents a corresponding augmentation of the owner's tax.

8 The "*medbewind*", see Kortmann/ Bovend'Eert (above, footnote 1), p. 44 nr. 52-54. This point was underlined as well in the 1999 report, nr. 43.

41. Another problem is raised by the – already until now problematic – method of division of the municipal fund. If the grants shall substitute the resources coming from the user's tax, the existing inequalities of repartition continue; they are even aggravated by the higher amount of the then necessary grants. Therefore, as the IPO has stressed, the specific circumstances of individual municipalities should be taken into account. On the other hand a correction would have to avoid that – even unnecessary – high real estate taxes are taken as criterion for financial needs. Yet to modify this situation, it would not be necessary to abolish the user's tax, but it would be sufficient to determine the further financial needs of municipalities less in accordance to the rate of the real estate taxes.

42. Even if the user's tax is repealed, the necessity of valuation of real estate and thus a burden for the owners of immovable property remains, for the scopes of the owner's tax, the State's taxation and the polder tax. So far there is no exoneration of the citizens. There is no simplification of the administration that can be reached.

43. In spite of all these reasons, it has to be admitted that there are criticisms of the existing system of real estate taxation, and it could be useful to investigate alternative solutions. In this sense one could ask why real estate, being an object of local taxation, has to be imposed by the State as well. However, State taxation is theoretical, because the fiscal system of the Netherlands allows the deduction of so many expenses from the revenue resulting from real estate that there is practically no tax to be paid. Nevertheless this consideration, anyhow contested by the government shows that real estate is highly subsidised by the State's taxation policy. If this subsidy prejudices the local tax power, this tax power is discriminated against real estate property. One may ask whether such a policy is wanted. – Furthermore the above mentioned Rapport "*Belasten op niveau*" (p.21-45), like other studies of the last decades, largely discusses alternative possibilities as local taxes on income, on consumption of energy or on every citizen. But the report shows that they all raise problems, and there is no concrete alternative that could substitute real estate tax. Just in this context the Advisory Council on Financial Relationships has explained that a substitutive tax would have to be introduced immediately to guarantee local finance. Currently,a plan of this kind has not been prepared.

6. The impact of the European Charter of Local Self-Government

44. Based on these arguments the question arises whether the intended reform of real estate tax is in line with the principles of local self-government. This problem may be discussed as one of Dutch constitutional law taking notice of the detailed regulation of local self-government in chapter seven of the constitution, esp. articles 124 and 132. Furthermore there is the problem of compatibility with the European Charter of Local Self-Government.

45. Under this aspect, the 1999 report (nr. 44) discussed the then existing local finance system regarding article 9 § 1 European Charter. According to the report, "The question then arises as to whether Dutch local authorities have '*adequate* financial resources', as article 9 paragraph 1 stipulates." Furthermore, according to the report, "there are serious grounds for doubting whether the situation in the Netherlands is in compliance with article 9 paragraph 7 of the Charter, whereby 'as far as possible, grants to local authorities shall not be earmarked for the financing of specific projects'". Based on these statements, the recommendation 55 (1999), regretting the low amount of own resources, has stated that the dependence for "the remainder of resources being apportioned by the Municipalities Fund and the Provincial Fund which is not in conformity with the principles of Article 9 of the Charter" (nr. 47) and has recommended to the Government of the Netherlands, "in the spirit of **Article 9** of the

European Charter of Local Self-Government, the possibility of permanently and lastingly allocating a fixed percentage of public revenue to territorial authorities and furthermore their increasing their **own resources** significantly through additional taxes or other measures" (nr. 50i). From a more general point of view in the following year the 4th General Report on monitoring the implementation of the European Charter of Local Self-Government, presented by Mr. J.C. Frécon (France) (CPL (7)3 with Recommendation 79 (2000)) has confirmed and underlined these aspects (see esp. Recommendation 79 (2000) nr. 11 and Appendix 1 nr. 2a).

46. The recent developments and the facts stated during the mission of 19 and 20 January 2005 do not give any reason to modify these statements and recommendations. The problem of low own resources still exists. Nevertheless that does not answer the specific problem of the current reform of real estate tax, especially if, according to the government's proposal, the loss of taxation power is equalized by the growth of the municipal fund.

47. But – besides the problem whether a guarantee of the municipal fund is effective, especially under the possible EC-pressures, and therefore may be qualified as "permanently and lastingly allocating" in the sense of the quoted recommendation – a reduction of taxation power in favour of the municipal fund raises the problem not yet addressed in the 1999 report whether article 9 § 3 of the European Charter is observed. According to this paragraph, "Part at least of the financial resources of local authorities shall derive from local taxes". The Charter does not say which part, and therefore the government doubts a binding effect. But as a rule of public international law, its content must not be simply symbolic. The explanatory report of the Charter describes, in the sense of article 9 § 3, "The exercise of a political choice in weighing the benefit of services provided against the cost to the local taxpayer or the user is a fundamental duty of local elected representatives." To fulfil this function, the part of the financial resources resulting from taxation has to be substantial, of a certain importance for the fulfilment of local tasks. Therefore, substituting these sources of income by State grants is not in line with article 9 § 3.

48. According to this rule, a comparison at international level shows that, even now, the part of financial resources derived from local taxes is very low in the Netherlands. The above (footnote 5) quoted report (p. 16) mentions for the Netherlands a figure of 1,1% of GDP, while this percentage, e.g. for Denmark and Sweden, is over 15 %, for many other countries over 10 % and even for the State with the lowest rate, the United Kingdom, always 1,4%, i.e. over 20 % more than in the Netherlands. Without stating a general limit – which probably should be determined by other factors as well – it seems at least convincing that a rate of 1,1% is extreme, and that a further reduction can not be compliant with article 9 § 3 of the European Charter. Although there has to be a choice of the national legislation to modify the existing system, the mentioned pretensions, pronounced above all by the IPO and the Rfv, to compensate for a reduction of real estate tax by an additional tax power in other fields seems to be a minimum that has to be maintained. Therefore the abolition of the real estate tax paid by the users without compensation by another local tax seems to be a violation of article 9 § 3 of the European Charter.

49. This general result may be limited in its importance as far as the maximisation of the real estate tax is concerned. Certainly the present freedom of local authorities in the Netherlands to determine the rate of the real estate tax is a certain guarantee, but at such a low level that it is not sufficient to substitute a further taxation power. On the other hand one has to admit – and the European Charter supposes – that every tax power of local authorities is based on State legislation (see article 2 of the European Charter). Granting this power means limiting it at the same time, which the Dutch legislation, until now, does only for the relation between

users and owners real estate tax. If the proposal of the government goes further and provides for a maximisation of the owners tax, a similar rule as such finds parallels in most of the European States having limitation of local tax rates. Therefore the limitation as such can not be regarded in contradiction to article 9 § 3 of the Charter. But it is the low percentage of tax financing of local authorities tasks which does not permit a further reduction without violation of the Charter, and the evaluation of the facts stated in the Netherlands imposes this judgment.

50. Nevertheless such a judgment is not one pronounced by a court. According to the Netherlands' constitution (article 120), even courts have no power to review the constitutionality of Acts of Parliament. Indeed the constitution, open to the influence of public international law, declares "Statutory regulations in force within the Kingdom (…) not (…) applicable if such application is in conflict with provisions of treaties that are binding for all persons" (article 94), and one therefore could argue that the violation of article 9 § 3 of the European Charter as a treaty binding for the Netherlands should prevail and hinder the abolition of the user's real estate tax. But the present report has to stress that a judgment of this kind is reserved to the Netherlands' authorities, and that the government does not share the position of the report. The report can – and has to – state the violation of the Charter, but it is up to the government, Parliament and finally the courts in the Netherlands to decide on the consequences.

Part 4: Other problems

51. The weight of the mentioned problems, to be discussed in a short visit, did not permit elaboration on the discussion of further points. Nevertheless some remarks, as a consequence of the 1999 report and as the subject for further monitoring, seem possible.

1. Constitutional guarantee of local self-government and limits of supervision

52. As mentioned above, chapter 7 of the constitution of the Netherlands contains an impressive regulation and guarantee of local government, in general exemplary as a concretisation of article 2 of the European Charter. Nevertheless there are some critical points, besides the rule now in the procedure of revision of the constitution regarding the appointment of mayors and King's Commissioners (article 131), object of part 2 of this report, the supervision of provinces and municipalities in case not only of conflict with the law, but with the public interest as well (article 134 § 4). This paragraph, object of a reserve of the Netherlands on the occasion of the ratification of the European Charter, was discussed in the 1999 report (nr. 35 and recommendation 55 (1999), nr. 45, 50g), with the aim of its modification. The present report follows this line, although admitting that the election of mayors may complicate the situation for a transition period (supra, part 2 nr. 5d). The problem in question, together with the discussed reform of the chair of provincial councils and municipal councils (article 125 § 3 of the constitution) and a substitute for article 131 now to be repealed, illustrates that a general view of the necessary reforms of chapter 7 of the constitution seems highly desirable. Insofar the now intended modification of article 131 of the constitution is a step in the right direction, it is just the quality of guarantee of self-governments in the Netherlands that recommends being maintained in case of the now necessary modifications.

2. The other reservations concerning the Charter

53. As mentioned in the introduction, the Netherlands has, besides the just discussed reservation regarding article 8 § 2 of the Charter, made reservations regarding the articles 7 § 2, 9 § 5, 11 of the Charter. The 1999 report, nr. 35-37, and the recommendation 55 (1999), nr. 45, 50f-j, criticized these reservations and proposed to re-examine whether they are necessary. The new visit, especially in the light of the ratifications of the Charter by other signatory States over the last few years which, with very few exceptions, have taken place without reservations, did not bring about any new aspects in view of the necessity of the reservations.

3. The regional level

54. Although the current report is concerned with the developments of local and regional democracy in the Netherlands, it only deals with the local aspects, because both of the main issues, election of mayors and reform of the real estate tax, concern the municipalities, not directly the provinces. Nevertheless the meetings have demonstrated that the discussed innovations as well as their discussion itself are of high importance for the provinces as well. These innovations can not be seen without regard to the provincial level where the question of appointment of the King's commissioners is linked with the problem of the appointment of mayors and where the financial problems are similar, and the remarks of the IPO and their representatives have been extremely important and useful, because they contained relevant information for this report. Although the tendencies mentioned in the 1999 report regarding the structure of the provincial level could this time not be elaborated upon, the relevance of the provincial level has been proven as essential for the decentralized democracy in the Netherlands.

Part 5: Conclusion

1. Context and limits of the present report

55. For the comprehension of the present report it seems necessary to underline that, on account of its origin, it can not give a complete evaluation of local and regional self-government in the Netherlands. It focuses on current problems which, seen as isolated issues, do not characterise the Dutch culture of self-government in general. On the contrary, the Dutch local administration has developed its own solutions, often interesting and exemplary for other countries. Their description and evaluation have not been the aim of this report, since it is limited to two essential and current problems which, seen isolated, may appear to be phenomena of a crisis that, as a general fact, is not to be stated. Indeed, the problems may be discussed and resolved, improving a well working local and regional administration.

2. The election of mayors

56. The statements on the introduction of elected mayors, culminating in long term discussions, may appear as interferences in an old, traditionally legitimated system of royal appointment. It can neither be judged simply undemocratic, nor has it resisted to transformations in direction of an elective process. But it is just this oscillating character and this transformation between Royal appointment and democratic election which shows the

necessity of a better political legitimacy and gives the impression of a half step, leaving in secret essential parts of the appointment procedure and reserving the possibility of overruling democratic decisions. For which cases shall that be possible? The limitation and thus the character of exceptions from the democratic procedure are not clear. Therefore the consequence of the system asks for a democratic regulation, either of an election by the council, or by the citizens. Only a solution of this kind would be in accordance with a modern-day local democracy in the sense of Congress Recommendation 113 (2002).

57. Nevertheless it is incontestable that such a change heavily affects the system of administration, self-government and political culture of the Netherlands. That is why the present report, underlining the consequent character of the change, argues in favour of a prudent and moderate transition.

3. The real estate tax reform

58. With regard to local finance, the conflicts of interest are obvious and not a special Dutch problem. But the situation of the Netherlands is characterised, on the one hand, by the developed entanglement between the different tiers of government and between the local and regional communities, and on the other hand by a very small tax power of local (and regional) communities. In this situation any decrease of local tax power raises difficult problems. Under the European Charter of Local Self-Government, it is not only the amount of own resources and the freedom to exercise policy discretion of local authorities which is problematic, but the tax power which is at a very low level by European standards, as well. Hence reducing it by abolishing the user's real estate tax on users of dwellings would bring the Netherlands in conflict with obligations of public international law.

Appendix I

CONGRESS OF LOCAL AND REGIONAL AUTHORITIES OF THE COUNCIL OF EUROPE

Programme

19 – 20 January 2005

Tuesday, 18 January

Afternoon Arrival of participants and checking in at the hotel

Wednesday, 19 January

9:30 Meeting with Mr. Rik Buddenberg, mayor of Pijnacker-Nootdorp and chair of the Finance Committee of the VNG

Venue: VNG

10.30 Meeting with Mr Alexander TCHERNOFF, member of the Board of the Society of Mayors

Venue: VNG

11.30 Meeting with Mr. Veldhuijzen, alderman of Dordrecht and vice-chair of the Institutional Committee of the VNG

Venue: VNG

12:30 Lunch at VNG restaurant

13.45 – 14.45 Meeting with members of the Board of the National Council on Public Administration and the National Council on Financial Relationship

15:00 – 16.00 Meeting with Mr Gerrit ZALM, Minister of Finance and Mr Johan REMKES, Minister of Interior and Kingdom Relations

Venue: Ministry of Finance

16:30 Meeting with Ms Saskia Noorman-den-Uyl, Chair, and members of the Parliamentary Committee on Local/Regional Government

Venue: Parliament

18.00 Meeting with the Netherlands delegation to the Congress and dinner.(offered by VNG)

Thursday, 20 January

9:30 Meeting with Mr Jan FRANSSEN, Queen's Commissioner of Zuid-Holland, President of the Netherlands Association of Provinces (or a representative of IPO)

11.00 – 12.30 Meeting with Mr Thomas DE GRAAF, Minister for Government Reform and Kingdom Relations
Venue: Ministry of Interior and Kingdom Relations

12.30 – 14.30 Lunch, hosted by Mr. Leon van Halder, Director-General for Kingdom Relations and Governance
Venue: Ministry of the Interior and Kingdom Relations

Friday, 21 January

Departure from The Hague

Rapporteurs of the Congress of Local and Regional Authorities:

Ms Kathryn SMITH, member of the Chamber of Local Authorities (United Kingdom)
Mr Odd Arild KVALOY, member of the Chamber of the Regions (Norway)

Expert:

Professor Dian SCHEFOLD (Germany)

Appendix II

Monitoring Report on the Netherlands
Questionnaire

A. Introduction of the elected mayor

1. What is the actual situation the practical influence of the council / population on the election of the mayor?
2. What are in the actual situation the qualifications requested for the nomination of a mayor? Is there a professional career?
3. How do you see the compatibility of the actual system with article 3§2 of the European Charter on Local Self-Government?
4. What is the relation between dualisation of local government and a modification of the system of appointment of mayors?
5. How do you judge the separation between the functions of mayor and of the chair of the council?
6. Should the mayor, if any, be elected by the citizens or by the council?
7. What is the impact of an elected mayor on the forms and measures of supervision?
8. In case of election by the citizens: consequences for the responsibility to the council and the procedure of dismissal?
9. Position of the elected mayor and the repartition of competences:
   - in relation to the council
   - in relation to the aldermen
   - in relation to the town clerk
   - in relation to the administration staff of the municipality?
10. How long time is needed for the transition in a new system of election of mayors?

B. Abolition or reduction of real estate tax

11. What are the disadvantages of real estate tax, especially in confrontation with other taxes? Is there a property tax raised by the Central State?
12. What justifies the abolition of the tax paid by the occupant, maintaining a tax raised from the owner?
13. What other sources of income for municipalities where they have the right to determine the rate – art 9§3 European Charter exist or could be introduced?

14. What guarantess are possible to ensure a sufficient financing of municipalities through the Municipal Fund?

C. Other problems focussed by the Monitoring Report CG(6) 4 (1999), cf. Recommendation 55 (1999)

15. What are the developments in the management of large cities?
16. What is the state of regionalisation? Are the provinces appropriate for regionalisation?
17. Are there new developments regarding the measures of supervision (article 123§4 grw., cf. supra, nr 7)?
18. What is the state regarding the reservations made by the Netherlands when ratifying the European Charter?
19. Are there any new problems regarding the integration of foreign nationals (especially on the province level) and the minority languages?

Appendix III

Comments on the Draft Report

1. Letter from the Director General of Kingdom Relations and Governance addressed to Mr Ulrich Bohner, dated 31 March 2005

"We would like to thank you for the opportunity to respond to the draft report on the situation of local and regional democracy in the Netherlands. This is a joint response of the Ministry of Finance and the Ministry of the Interior and Kingdom Relations concerning the reform of the real estate tax. We would like to make observations on three points.

This first point concerns a passage which is found on page 15 regarding the State taxation on real estate. We would like you to consider deleting this passage (see passage beneath in bold italics). The draft text contains some fallacies on the Dutch state tax system. Since this passage does not go to the heart of the matter in the report, there would be no real need to hold on to it.

Pg 15 §43:

> In spite of all these reasons, it has to be admitted that there are criticisms of the existing system of real estate taxation, and it could be useful to investigate alternative solutions. ***In this sense one could ask why real estate, being an object of local taxation, has to be imposed by the State as well. However, State taxation is theoretical, because the fiscal system of the Netherlands allows the deduction of so many expenses from the revenue resulting from real estate that there is practically no tax to be paid. Nevertheless this consideration shows that real estate is highly subsidised by the State's taxation policy. If this subsidy prejudices the local tax power, this tax power is discriminated against real estate property. One may ask whether such a policy is wanted.***

The second point concerns the conclusion regarding the proposals of the Cabinet and public international law. On page 16 a line of reasoning is given why the Dutch reform of the real estate tax is not in line with article 9§3 of the Charter. The essence of this line of reasoning is to be found in the phrase in bold italics beneath. On page 18 (Conclusion) the report apparently refers to the passage. We would like you to underpin this statement: what sources do the rapporteurs have for their statement, where is this rule stated? Furthermore on page 18, the plural form "obligations" is used. It is not quite clear to which obligations the rapporteurs exactly refer to. It would be appreciated if these passages could be substantiated some more.

Page 16 §47:

> But – besides the problem whether a guarantee of the municipal fund is effective, especially under the possible EC-pressures, and therefore may be qualified as "permanently and lastingly allocating" in the sense of the quoted recommendation – a reduction of taxation power in favour of the municipal fund raises the problem not yet addressed in the 1999 report whether article 9 § 3 of the European Charter is observed. According to this paragraph, "Part at least of the financial resources of local authorities shall derive from local taxes". The Charter does not say which part. ***But as a rule of public international law***, its content must not be simply symbolic. The

> explanatory report of the Charter describes, in the sense of article 9 § 3, "The exercise of a political choice in weighing the benefit of services provided against the cost to the local taxpayer or the user is a fundamental duty of local elected representatives." To fulfil this function, the part of the financial resources resulting from taxation has to be substantial, of a certain importance for the fulfilment of local tasks. Therefore, substituting these sources of income by State grants is not in line with article 9 § 3.

Page 19 §58:

> Hence reducing it by abolishing the user's real estate tax on users of dwellings would bring the Netherlands ***in conflict with obligations of public international law.***

Finally we would like to point out that we were not in the position to inform you about the premises in the legislative proposals regarding the Municipal Act. These proposals will soon be sent to the Dutch Parliament so that the premises will be made public shortly. Some of your remarks, for instance concerning the number of the insolvent municipalities, can then be seen from a different perspective. This is of course not meant as critisicm at your address. It is just the result of the moment of monitoring. Furthermore we would like to point out that the exploration – which is carried out with memebers of the Association of Municipalities (VNG) and the Association of Provinces (IPO) – will lead to a discussion about the "tax power" of Municipalities and Provinces in April / May of this year. The proposal to abolish the real estate tax of users of houses is therefore not the only issue concerning the "tax power" of Municipalities and Provinces."

Yours sincerely,

Signed
LAM van HALDER

2. Letter addressed to Ulrich Bohner from Alexander Pechtold, Minister for Government Reform and Kingdom Relations (13 April 2005)

I have taken great interest in the draft report on the situation of Local and Regional Democracy in the Netherlands.

As you will know, it will not be possible to introduce the direct election of mayors in the Netherlands in 2006 due to the rejection by the Upper House of the Dutch Parliament of the constitutional amendment that this requires. As the new Minister for Administrative Renewal and Kingdom Relations, I concur, of course, with Your Chairman's statement in which he regrets this course of events. The Dutch government will again submit a proposal to amend the Constitution before Parliament so that the direct election of mayors can be introduced in 2010. The pending legislative proposals have not been withdrawn, but the concluding decision-making process on these can take place only once the new constitutional revision proposal has been accepted in two parliamentary rounds.

I should like to take this opportunity to respond to the draft report.

As the draft report indicates, the way in which mayors are appointed in the Netherlands has been the subject of discussion for many decades. Within the possibilities afforded by the constitutional provision that it is the Crown which appoints mayors, the manner of their appointment was made significantly more democratic in 2001. Municipal councils were given a right of recommendation and, should they so wish, they can hold a consultative referendum prior to this. Ultimately, the Crown follows the council's recommendation as a point of departure when making an appointment. At the time of the previous CLRAE report, this amendment to the manner of the mayor's appointment was still in the development phase (legislative proposal 25,444), and the CLRAE report viewed this development as a step in the right direction for the further democratisation of the manner of appointment. When seen in this light, the tenor of the draft report is somewhat disappointing in respect of the concrete legislative proposal now before Parliament for the introduction of directly elected mayors in the Netherlands. On the other hand, the report also mentions – albeit somewhat between the lines – that the objections raised do not stand in the way of the envisaged changes as such, and that they relate to problems that also arise in comparable ways in other countries.

In line with the draft report, I endorse the argument that the introduction of directly elected mayors is not in breach of the Charter regarding local autonomy. Given the strengthening of the municipal level of government, which in my opinion goes hand in hand with the introduction of directly elected mayors, the relationship with the Charter could be expressed more assertively than merely stating that it is not in breach of the Charter.

THE MINISTER FOR GOVERNMENT REFORM AND KINGDOM RELATIONS,

Alexander Pechtold

3. Letter from the Association of Netherland's Municipalities (VNG) addressed to Mr Ulrich Bohner on 9 March 2005

Dear Mr Bohner,

Thank you for sending us the preliminary draft report on the situation of Local and Regional Democracy in the Netherlands. We had a very interesting discussion with Ms Smith, Mr Kvaloy and Mr Schefold on 19 January 2005 and we are grateful for the time and the attention they contributed to the situation in the Netherlands.

The report deals mainly with two issues which are hot items in our government today: the introduction of the elected mayor and the reform of the real estate tax. Allow us to make a short comment to both items.

Your analysis and conclusions on the appointment and election of mayors have been received with great interest by our organisation.
We underline your conclusions concerning the actual position of the mayor, and agree that "the solution of the actual Netherlands Municipal Act seems to be in conformity with the Charter". As you state on page 5 of the report, the new provisions of the Municipal Act ensure that mayors are answerable to their councils, not only for their general policy, but especially for the by-laws and for the municipal budget. The mayor, in short, has no power of his own, but instead is entirely answerable to the municipal council for all his acts. We believe that the key role played by the municipal council in the actual nomination procedure of the mayor is reflected by your statement on page 3 where you state that "obviously the choice of the candidates and between them is a largely discretionary, political power of the organ competent for it".
We would like to stress that the function of mayor in the Netherlands is a heavy full-time job with a large scope of legal and political responsibilities, under full control of the council.

We are also very grateful for your description of the actual government plan to introduce a direct election of the mayor and your analysis of the problems of the new system. Since your visit in January the discussion has even become more intense, with the upcoming deliberation in the Senate, planned for 22 March, on deleting article 131 (which provides for appointment of the mayors by the Queen) from the Constitution. Following a threat by the Labour Party (PvdA) to block a positive vote if Government stays with his plans to introduce the directly elected mayor at once in 2006, the government coalition is now proposing a gradual introduction, whereby only part of the municipalities would elect its mayors in 2006.
These discussions have been largely exposed in the media, giving the citizens the opportunity to make up their minds on the government's reform. Recent polls indicate that public opinion is becoming more and more critical on the procedure as foreseen by the Government.

Our association is very critical towards this last change in the introduction procedure. Having two different kinds of mayors during four years will create a cluttered situation. As we already stated, we favour a simultaneous introduction in 2010, because, according to our opinion, this is the guaranty for a well-considered lawmaking and implementation procedure.

As to the reform of the real estate tax, we are pleased to see that the rapporteurs share our opinion, and the conclusions of the National Council on Financial Relationship, that the abolition of the real estate tax paid by the users of dwellings without compensation by another local tax is in violation of article 9 § 3 of the European Charter, and that it is even in conflict with the obligations of public international law. The rapporteurs demonstrate that 1,1 percent of the GDP of financial resources derived from local taxes is already extremely low in comparison with other countries, and that further decreases of this rate annihilates the effective tax capacity of local authorities, while such a tax capacity is a precondition for the functioning of local democracy.
This tax can only be abolished, according to our opinion, if it is replaced by another municipal tax..
We enclose a few technical remarks concerning figures and (the difficult!) Dutch spelling (see enclosure).

We hope that our comments contribute to further discussion on these issues and will be happy to inform you of the last developments at the April meeting of the Institutional Committee."

Yours sincerely,

ASSOCIATION OF NETHERLANDS MUNICIPALITIES

Ralph PANS
Director-General

4. Comments received from Mr Alexander Tchernoff, Mayor of De Bilt

"In comment of the monitoring report concerning the situation on local and regional democracy in The Netherlands, I would like to ask your attention for two points. Hopefully it is possible to insert this in de draft-report.

The first is that the report focuses very strongly on the appointment and election of the Dutch mayors. That is only one side of the mandate of the mayors. In the Municipalities act (article 180) is also stated that the mayor is answerable to his Council for his administration. This includes not only for the general policy of the mayor, but also his tasks in by-laws and for the municipal budget. Also for his responsibility for the public order! The mayor, in short, has no power of his own, but instead is entirely answerable to the municipal council for all his acts. In the past years several mayors were forced to resign on that base.

The second point concerns the description of local administration on page 5 in the report. Our Dutch system has a unique balance between council, executive board and the mayor, in which the council is the highest organ. This is even stated in our constitution. Recently the introduction of dualism has already caused some disturbances in this balance. The change towards a direct chosen mayor may furthermore influence this. The council on the one side and the mayor and the executive board on the other side will cause a complete break in a long lasting political tradition. In such a system for example the Dutch aldermen will have a very different position. They will become more technical managerial professionals than local political administrators. This break asks for mote consideration about the consequences on all elements of the Dutch local democracy. "

Alexander Tchernoff,
Mayor of De Bilt
Member of the Board of the Netherlands Society of Mayors

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Appendix IV

Mayoral elections in the Netherlands: Council of Europe Congress President regrets slow down of reform

Strasbourg, 24.03.2005 - Council of Europe Congress of Local and Regional Authorities President Giovanni Di Stasi today said he regretted the recent rejection by the Dutch Senate of a draft amendment to change constitutional provisions for the appointment of mayors which is presently carried out by the Queen.

Mr Di Stasi said he regretted the decision might delay a reform which the Congress would welcome. He stressed that a procedure which fails to provide for the election of local executives was no longer appropriate in modern-day local democracies and that the introduction of mayoral elections either directly by constituents or by the respective councils would align the Netherlands with the institutional practice of most member states of the Council of Europe.

Despite consensus over the need to reform the current system, the constitutional amendment was thrown out due to lack of agreement about the procedure and time schedule for the introduction of a new method for electing mayors. The decision has led to the resignation of Thom De Graaf, Dutch Deputy Prime Minister and Minister of Governmental Reform.

Election des maires aux Pays-Bas : le Président du Congrès du Conseil de l'Europe déplore le ralentissement de la réforme

Strasbourg, 24.03.2005 - Le Président du Congrès des Pouvoirs Locaux et Régionaux du Conseil de l'Europe, Giovanni di Stasi, a déploré aujourd'hui le rejet récent par le Sénat néerlandais du projet d'amendement destiné à modifier les dispositions constitutionnelles régissant la nomination des maires par la Reine.

M. di Stasi a regretté que cette décision retarde une réforme attendue par le Congrès. Il a souligné qu'une procédure qui ne permet pas l'élection des élus locaux n'était plus appropriée dans nos démocraties locales modernes et que l'introduction de l'élection des maires, soit de manière directe soit par les conseils municipaux, permettrait aux Pays-Bas de s'aligner sur les pratiques institutionnelles de la plupart des Etats membres du Conseil de l'Europe.

Malgré le consensus sur la nécessité de réformer le système actuel, l'amendement constitutionnel a été rejeté parce qu'un accord n'a pu être trouvé quant à la procédure et au calendrier de l'introduction d'une nouvelle méthode de désignation des maires. La décision a entraîné la démission de Thom De Graaf, Vice Premier Ministre et Ministre en charge de la réforme gouvernementale des Pays-Bas.