UNIVERSITÀ DEL PIEMONTE ORIENTALE

Dipartimento di Giurisprudenza, Scienze Politiche, Economiche e Sociali (DiGSPES)

Dottorato di Ricerca in
"Autonomie Locali, Servizi Pubblici e Diritti di Cittadinanza"

XXVII Ciclo
Coordinatore Scientifico: Prof. Renato Balduzzi

European Local Self-Government Chartered and Constitutionalised

Dottorando: Giovanni Boggero **Relatore: Prof. Jörg Luther**

Table of Contents

III. Domestic Law of Council of Europe Member States

§ 3. Concept and Design of Local Self-Government

I. The Charter's Concept of Local Self-Government

1. Legal Definition

1.1. *Government*: Substantial Share of Public Affairs
1.2. *Local Government*: Territorial Local Authorities
1.3. *Local Self-Government:* Own Responsibility and Democracy
1.3.1. Deliberative Bodies Have to, Executive Bodies Can be Elected
1.3.2. Universal Direct Suffrage
1.3.2.1. An Institutional Right to Direct Election in the Charter
1.3.2.2. An Individual Right to Direct Election in Protocol I ECHR
1.3.3. The Free Mandate of Local Elected Representatives
1.3.3.1. The Right to Compensation
1.3.3.2. The Regulation of Legal Incompatibilities
1.3.4. Citizens as Holders of other Limited Rights: Direct and Participatory Democracy
1.4. *Constitutional Local Self-Government:* Constitutional Guarantees

2. Conclusion: Institutional Arrangement of Neo-Corporatist Nature?

II. Institutional Design of Local Self-Government

1. The Principles and Rights on Allocation of Powers and Responsibilities
1.1. The Right to a Substantial Share of Basic Powers and Responsibilities Rooted in Law
1.2. The Right to Universal Jurisdiction of Local Authorities Closest to the Citizens
1.3. The Vertical Subsidiarity Principle as a Double Sided Coin: Decentralisation and Centralisation
1.4. The Principle of Full and Exclusive Powers and Responsibilities

2. The Duty to Consult as a Principle on Loyal Cooperation

3. A Limited Right to Territorial Integrity

4. Freedom of Organisation
4.1. The Power to Shape and Adapt Administrative Structures
4.2. The Power of Staff-Recruitment and Principles on Conditions of Service

5. The Right to a Limited Administrative Supervision
5.1. Supervisory Procedures Established by Means of Law
5.2. Administrative Supervision Confined to Legality
5.3. Administrative Supervision Pursuant to Proportionality

6. Rights and Principles for Adequate Financial Equipment
6.1. The Principle of Adequate Own Financial Resources
6.2. The Principle of Concomitant Financing: Mandatory Compensation for Additional Tasks
6.3. The Right to Financial Autonomy: Local Taxes and Tax-Rate Fixation
6.4. Principles of Diversified and Buoyant Local Finance Systems
6.5. The Duty of the State to Establish Reasonable Equalisation Procedures
6.6. The Right of Consultation for the Establishment of Equalisation Procedures
6.7. General Purpose Grants instead of Earmarked Grants
6.8. Taking Out Loans as a Residual Tool of Financing

7. The Right to Co-operation and Free Association
7.1. The Right to Inter-Municipal Co-operation

5. Administrative Supervision: Cooperation and Coercion
   5.1. Review of Legality as a Rule
   5.2. Review of Expediency for Mandatory Supervised and Delegated Responsibilities
   5.3. Proportionality as a Key Principle for Supervision

6. The Constitutional Rights and Principles for Adequate Financial Equipment
   6.1. The Limited Subjective Right of Local Authorities to Adequate Financial Equipment
   6.2. The German *Konnexitätsprinzip* at Federal and *Land* Level
      6.2.1. Federal Level
      6.2.2. *Land* Level
   6.3. The Institutional Right to Levy Own Taxes and Fix the Tax-Rate
      6.3.1. Maintenance of Property Taxes at Local Level Ensured by the Charter?
      6.3.2. The Limited Financial Autonomy of the Counties
   6.4. Diversification and Buoyancy in the German Local Finance System
   6.5. Fiscal Equalisation: The German *Finanzausgleich*
   6.6. The Duty to Consult Local Authorities on Financial Equalisation Schemes
   6.7. Restricting Earmarked Grants (*Zweckzuweisungen*) to Abide by the Charter?
   6.8. Constraints on Public Borrowing and Institutionalised "Conditionality"

7. The Right to Co-operation and Free Association
   7.1. Inter-Municipal Co-operation
      7.1.1. Co-operation on a Both Free and Compulsory Basis
      7.1.2. A Limited Subjective Right to Enter Interterritorial Co-operation Agreements
   7.2. Local Authorities' Freedom of Association: The German *Spitzenverbände*

8. Judicial Remedies for Local Authorities Beyond the Charter Minimum Standard

§ 4. Conclusion of the *Second Chapter*

Third Chapter – Italian Local Pluralism as a "Learning Model"

§ 1. A Brief History of Italian Local Autonomy

I. Medieval Communal Liberty as the Basis for a Narrative of *Autonomia Locale*
II. From the Edict on Municipalities and Provinces of the Kingdom of Sardinia (1847) to the Republican Constitution (1947)
III. Any Italian Contribution to the Drafting of the Charter?
IV. The Charter as a Tool Fuelling Legislative Adjustment

§ 2. The Charter as a *Norma Interposta* for the Constitutional Review of Legislation

I. Validity of Consent under International Law
II. Validity of Incorporation under Domestic Law
III. The Charter's Rank and Value in the Hierarchy of the Italian Sources of Law

§ 3. Concept and Design of Local Autonomy in the Light of the Charter

I. The Concept of *Autonomia Locale*
   1. Local Autonomy as a Fundamental Constitutional Principle
   2. Local Autonomy Implies Partially Uniform Representative Democracy
      2.1 Representative Bodies (*Consigli*) Have Substantial Decision-Making Powers
      2.2. No Mandatory Direct Election for Provinces and Metropolitan Cities
   3. Direct Democratic Participation Permitted by Law and Implemented by Local Charters
   4. The Status of Local Elected Representatives: The Case of Provincial and Metropolitan Councillors

II. Institutional Design of Local Autonomy

1. Principles on Allocation of Powers and Responsibilities
   1.1. An Intangible Nucleus of Functions Unsteadily Rooted in Legislation
   1.2. Universal Jurisdiction of Municipalities
   1.3. The Principles of Subsidiarity, Adequacy and Differentiation
   1.4. Full and Exclusive Powers and Responsibilities?

2. Consultation Through Ad-Hoc Platforms at State and Regional Level

3. Municipal, Provincial and Metropolitan Boundary Changes: a Different Degree of Protection of the Right to Territory
   2.1. Municipal Boundaries
   2.2. Provincial Boundaries
   2.3. Metropolitan Cities' Boundaries

4. Freedom of Organisation
   3.1. The Power of Self-Organisation and a Strong Normative Autonomy
   3.2. The Power of Staff-Recruitment and Principles on Conditions of Service: the Case of Municipal and Provincial Secretaries

5. Administrative Supervision: Cooperation rather than Coercion
   5.1. Supervision over Local Authorities' Acts: Internal Controls of Legality
   5.2. Supervision over Governing Bodies: External Controls of Expediency and Legality
      5.2.1. Dissolution of Governing Bodies
      5.2.2. Execution in Substitution by the State

6. Financial Equipment of Local Authorities is not yet Adequate
   6.1. The Adequacy of Local Authorities' Financial Resources
   6.2. Concomitant Financing as a Vague and Non-Justiciable Principle
   6.3. Local Authorities Enjoy a Limited Power to Raise Own Taxes and Fix their Rates
   6.4. Equalisation Before the “Equalisation Fund”
   6.5. Constitutional Constraints on Public Borrowing at the Grassroots

7. The Right to Co-operation and Free Association
   7.1. Inter-municipal Co-operation
      7.1.1. Co-operation on both a Free and Compulsory Basis
      7.1.2. A Limited Subjective Right to Enter Interterritorial Co-operation Agreements
   7.2. Local Authorities' Freedom of Association: The Italian *Associazioni degli Enti Locali*

8. Judicial Remedies For Ensuring Protection of Local Autonomy Below the Charter Minimum Standard

§ 4. Conclusion of the *Third Chapter*

Final Conclusions

A world of federative self-administration held
together by ties based on morals and conscience
is, per se, completely different from the world of
hierarchical, order-giving administration, dominated
by mechanical and machine-like ties.

Adolf Gasser, *Gemeindefreiheit als Rettung Europas*, Basel 1947,
174, translation by Robert Nef, Liberales Institut – Zürich.

Frankfurt, Bremen, Hamburg, Lübeck are large and brilliant
and their impact on the prosperity of Germany is incalculable.
Yet, would they remain what they are
if they were to lose their independence
and be incorporated as provincial cities into one great German Empire?
I have reason to doubt this

Johann Wolfgang Goethe, *Conversations of Goethe with Johann Peter Eckermann*, 1836,
translation by John Oxenford, London, 1850.

The communes are the nation;
they are the nation
in the innermost asylum of its liberty.
Carlo Cattaneo, *Sulla legge comunale e provinciale. Lettera prima,* Il Diritto, 7 June 1864
translation by Martin Thom, in *Republics, Nations, Tribes,* 1995.

Introduction

Almost thirty years after its signature in Strasbourg, the European Charter of Local Self-Government remains largely an unknown legal tool for lawyers, local elected representatives and local officials. Unlike the European Convention on Human Rights (ECHR) or the European Social Charter (ESC), little investigation has been carried out as to its historical legitimacy, to its value as a source of law both under international and domestic law, to the concept and design of local self-government underlying it and to the actual compliance with it in those member States which mostly contributed to its drafting. In the present work it will be brought to view that the Charter and the monitoring practice of the Congress of Local and Regional Authorities and of other Council of Europe bodies synthesize the concept of local self-government rooted in the common constitutional legal traditions of the old member States and have the purpose of harmonising minimum standards of local self-government across the so-called *Greater Europe*. This will be best showed with the analysis of the constitutional frameworks of Italy and Germany, which indeed overlap to a great extent with the concept and design of the Charter, but from which both countries can still receive useful reforming inputs.

In particular, the ***First Chapter*** will focus on the roots of both the terms “charter” and “local self-government”, claiming that the European Charter originates from a narrative of strong historical and moral legitimacy rooted in the Middle Ages (§ 1. I). A brief history of the origins of the Charter within the Council of Europe (§ 1. II), as well as a summary of the status of ratifications by its member States (§ 1. III) and of the success of the Charter along the past thirty years (§ 1. IV) will be also provided in the first Section. In the second Section, it will be addressed the question of the Charter's nature under public international and EU law and that of Congress of Local and Regional Authorities' recommendations, resolutions and reports (§ 2. I and II). Then, the reception of the Charter in the domestic legal orders of Council of Europe member States will be shortly examined (§ 2. III). In the third Section, starting with the definition of local self-government as a democratic institution (§ 3. I), a systematic reading of the Charter's provisions from Article 2 to Article 11 will be set out (§ 3. II). For each provision, it will be identified and isolated the principle or right underlying it and it will be assessed whether and if so how it has synthesized the common legal traditions of the signatory States. Further, on the basis of the Congress recommendations, resolutions and reports, it will be discussed to what extent each principle or right applies equally in the Council of Europe member States and in which areas its application varies according to a State's “margin of appreciation”, i.e. considering the different characteristics and traditions from country to

country (e.g.: form of State, size of local authorities, local government system, etc.) or even depending on financial, political or social circumstances. In particular, it will be showed what are the most recurrent shortcomings in the legal frameworks of Council of Europe member States and how compliance with the Charter can be achieved if it is construed as providing for self-executing or directly applicable principles or rights which can be enforced before domestic courts, if the interpretation of the Charter's provisions occured according to the doctrine of the "core" or "essential content" (*Kernbereich* or *Wesensgehalt*).

The ***Second*** and ***Third Chapter*** will concentrate on the local government systems of two Council of Europe and EU member States: Germany and Italy. The present selection might sound curious, since they are both "old Europe member States" with consolidated democratic institutions and a longstanding tradition of local self-government (§ 1). In this respect, it might however be useful to assess how and to what extent Italy and Germany contributed to the drafting of the Charter (§ 2) what rank it enjoys in their domestic orders (§ 3) and to what extent both aspects impact on the value of the Charter in the domestic system. The analysis of the single principles and rights of the Charter in the two legal orders (§ 4) will clarify to what extent they are already constitutionalised or only chartered. In this latter case, it will be verified to what extent chartered principles and rights might complement constitutional provisions. The two chapters will show that Germany, more than Italy, has originally shaped the Charter's concept and design of local self-government, but, even if to a different extent, the Charter treated as a "living instrument" can still nowadays breathe new life into both domestic legal orders. In particular, comparative remarks between the two countries will help in better assessing the degree of compliance of Germany and Italy with the Charter, showing common as well as different problems, which the monitoring practice of Council of Europe bodies might still contribute to solve.

First Chapter - The European Charter of Local Self-Government as a "Living Instrument"

This Chapter argues that the Charter is more alive than dead. Rather than being confined to a piece of paper or to an outdated cultural dimension, it still preserves its value. This will be shown by taking into account both its historical and moral legitimacy and its significant development through the monitoring practice by the Council of Europe Congress of Local and Regional Authorities.

§ 1. The Historical Legitimacy of the Charter

The Chapter is introduced by the following background Section, which will show that the European Charter of Local Self-Government was signed building on the ideal and moral narrative of medieval charters granting authority and rights to local governments (I). Then, the history of the Charter will be elucidated through its preparatory works and by considering the political and historical motivations which led to its signature within the Council of Europe (II). Finally, the Section will be concluded with an overview on the status of ratifications of the Charter (III) and of its success beyond the Council of Europe (IV).

I. The Roots of Chartered Rights of Local Authorities

Why is the European Charter of Local Self-Government called Charter? And what does local self-government mean? These are the questions the reader might inquiringly ask when approaching this legal document for the first time. In other words, why did its drafters choose precisely the terms "charter" and "self-government"? These questions are not idle. To the contrary, answers to them will help in contextualising the present work and in introducing the issue of the very content of the Charter, which will be examined in the following two Parts.

1. Charters as a Medieval Invention

As to the term "charter" (in French "charte"), international lawyers might find the question as to its meaning relatively fussy, since it is generally acknowledged that, by whatever designation (Covenant, Protocol, Convention, Declaration, Statute etc.), a treaty is binding under international

law not because the Contracting Parties attributed to it a certain name, but merely insofar as it is concluded between States or international organisations in written form and is governed by international law (Article 2, para. 1, lett. a) of the 1969 Vienna Convention on the Law of the Treaties). However, the nomenclature attributed to a treaty is not fortuitous, but has much to do with the aim and the objectives of the treaty itself. In particular, within the United Nations, the term "charter" «*is used for formal and solemn instruments, such as the treaty founding an international organisation*» (e.g. the Charter of the United Nations),[1] whereas of the 215 treaties adopted within the Council of Europe only three have been attributed the name "charter" and only one was signed prior to 1985, that is to say the European Social Charter (1961). That the European Social Charter exerted a certain influence on the structure of the European Charter is by no means under discussion (see *infra* Part II). Though, this nominal correlation does not ultimately answer the question why the term "charter" was considered as being suited not only for designating a treaty on human rights such as the Social Charter, but also one on local self-government.

This might be explained first with the nineteenth century conception of some scholars and politicians who conceived local self-governing entities as bearers of a fundamental right to govern themselves, that is to say a fundamental right of the local communities. This conception, whereby local entities ought to be seen as almost independent and sovereign, was also reflected in the European Charter of Municipal Liberties (1953), a political declaration launched after World War II by several mayors within the Council of European Municipalities (CEM), which proclaimed municipal self-government «*as the bulwark of personal liberties*» against the encroachments of the nation State. The conception of municipal liberties is however rooted in a much older history or, as the European Charter of Municipal Liberties itself quite explicitly points out, «*municipal rights are based on centuries-old traditions*».[2]

More specifically, they originate in the Middle Ages and approximately between the tenth and eleventh century, a time in which no Westphalian State existed yet, but in which municipal institutions already did. In particular, it deserves to be mentioned that, throughout England, since the early medieval period, charters had been granted by various monarchs or also by lords to

1

Definition of Key Terms Used in the UN Treaty Collection, to be found at www.treaties.un.org

2 European Charter of Municipal Liberties (1953), adopted at the General Assembly of the Council of European Municipalities, held in Versailles, from 16 to 18 October 1953, available at: www.ccre.org/docs

boroughs, counties, cities and townships. Granting of royal charters entailed a so-called "incorporation", that is to say a municipal body or corporation, traditionally composed of only a part of the residents (the burgesses and their heirs), was awarded a set of rights and privileges, including free customs, trade monopolies, immunity from military obligations etc., which are traditionally known as municipal liberties. From a rhetorical point of view, charters were mostly equipped with solemn preambles, making appeals to moral, religious or legal values.[3] One of the first charter of municipal liberties was the Charter granted to the city of London in 1067 by William the Conqueror, which upheld previous rights and immunities. Even the so-called Greater Charter of the Liberties (*Magna Carta Libertatum*), the famous pre-constitutional act issued in 1215 by the King John of England, confirmed *inter alia* the liberties and customs of London and of other towns.[4] The medieval practice of obtaining chartered privileges to afford new and preserve existing powers was indeed not confined to England, but extended to important areas of continental Europe, including France, the Flanders, parts of Germany and Italy (see *infra* second and third Chapters).[5]

Urban charters, even if initially not entirely territorial in nature, are hence widely considered as social contracts *ante litteram*, from which the modern contract theory of government later emerged.[6]

Though, "social contracts" could also be broken and lead to uprisings. This happened to be the case in particular in continental Europe, whereas in England they were more the result of agreement or purchase.[7] In fact, were towns experiencing difficulties in obtaining privileges, they often resorted to force against kings and lords, by creating alliances, leagues and sworn associations against them. Rather than full independence from the sovereign, medieval urban charters granted the exercise of own normative powers by communes without interferences from outside, but as part of the Empire to which they had to take the oath of fealty and to pay annnual and ad-hoc tributes and from which they were attentively supervised through *ad-hoc* officials.[8] In this respect, one could for example recall that, in 1183, after more than thirty years of conflicts with the Italian communal movement,

---

3 R.H. Bautier, *Caractères spécifiques des chartes médiévales,* in: R.H. Bautier (ed.), *Chartes, sceaux and chancelleries. Études de diplomatique et de sigillographie médiévales*, Paris, 1990, 81-96.

4 Greater Charter of the Liberties – Magna Carta Libertatum – Clause No. (13): «*The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs*»; available at: www.bl.uk/magna-carta/articles/magna-carta-english-translation In this respect see also the 1131 Charter granted to Henry I to the City of London.

5 D.M. Nicholas, *The Growth of the Medieval City: From Late Antiquity to the Early Fourteenth Century,* London: 1997*,* 141 and ff.; M. Ascheri, *Medioevo del potere – Le istituzioni laiche ed eccleasiastiche*, Bologna, 2005, 207 ff. For East Europe see: J.W. Sedlar, *East Central Europe in the Middle Ages, 1000-1500*, Vol. III, 1994, 109 ff.

6 H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition,* Cambridge, 1983, 393.

7 Cf. A. Ballard, *British Borough Charters 1042-1216*, Cambridge, 2010, cix.

8 The term supervision has however not to be understood in a modern way. Cf. on the history of the notion of supervision over local authorities: W. Kahl, *Die Staatsaufsicht. Entstehung, Wandel und Neubestimmung unter besonderer Berücksichtigung der Aufsicht über die Gemeinden*, Tübingen, 2000, 39-40.

the Holy Roman Emperor Frederick Barbarossa was compelled to reach a settlement, restoring the privileges (*regalia*) of the League of Lombard communes in the so-called Peace of Constance, which Haverkamp depicts as the "*magna carta libertatum*" of Northern Italian cities.[9]

2. Municipal Freedom as a Common European Postmodern Narrative

As one might already have understood, the term "charter" is historically bound up with the practice of self-governing polities in the Middle Ages. Municipal liberties and chartered rights went hand in hand in old England and in the Holy Roman Empire.[10] Town laws were part of the so-called *iura propria*, that is to say the medieval local customary laws, which opposed to the *ius commune,* the general law common to all citizens of the Empire, which helped in filling the normative gaps and remedy the deficiencies when customary provisions were either not given or not clear.

Yet, the heritage of medieval legal pluralism did not completely die out with the birth of the nation-State. At least since the nineteenth century, in fact, a number of historians, political thinkers as well as jurists throughout Europe started reviving it against etatist tendencies and they themselves, using modern political categories, established a semantical homology between "autonomy" and "liberty", aiming at exalting both the virtues of medieval communes as well as the ancient Greek democratic ideal of the *polis* against the rapacious and oppressive policies of contemporary "restaurationist" regimes. Idealized views of municipal government and ethical justifications for its existence represented also a strong ideological leverage in the elaboration of the European Charter of Local Self-Government. All legal experts which contributed to the Charter's drafting, in fact, originally came from countries (France, Germany, Italy, the UK, Switzerland and Belgium) which had experienced medieval municipalism and in which, in the XIX century, a public exaltation of this heritage had been made by a multitude of classical-liberal and anti-Jacobinists political philosophers and thinkers, including *inter alia* John Stuart Mill[11] and Pierre Joseph Proudhon[12], Friedrich Carl von Savigny[13] and Carlo Cattaneo[14].

In the works of all these authors, even if each to a different extent, it emerged the idea that the local power was a natural form of social organisation, in which communities could govern themselves

---

9 A. Haverkamp, *Der Konstanzer Frieden zwischen dem Kaiser und Lombardenbund,* in: H. Maurer (ed.), *Kommunale Bündnisse Oberitaliens und Oberdeutschlands im Vergleich*, Sigmaringen, 1987, 42.

10 On the relations between the medieval charters and the notion of "pouvoir municipal": J. Chapuisat, *Libertés locales et libertés publiques*, AJDA, 1982, 350.

11 J. S. Mill, *Considerations on Representative Government* - Chapter XV, 1865.

12 P. J. Proudhon, *Du Principe Fédératif et de la Nécessitè de Reconstituer le Parti de la Révolution*. Paris, 1863.

13 F.C. von Savigny, *Geschichte des Römischen Rechts im Mittealter*, Wiesbaden, 1834.

14 C. Cattaneo, *Sulla legge comunale e provinciale - Lettera prima*, in: Il Diritto, 7 giugno 1864.

through own representatives and ensure best protection of personal liberties. This is the time when highly evocative terms like "autonomia", "libertà comunale", "autogoverno", "Gemeindefreiheit", "Selbstregierung", "Autonomie", "Gemeindegewalt", "pouvoir municipal" and "self-government" started being used by historians and jurists. Yet, whereas in the early nineteenth century medieval local autonomy, in particular that of city-states ("città-Stato", "cité-Etats", "Stadtstaaten")[15], was exalted as a synonym for independence and as an early form of sovereignty, in the second half of the nineteenth century this binomial autonomy-sovereignty was progressively abandoned and evolved into the different idea of an own sphere of activity and a set of normative powers granted to constituent parts or organs of the State, which ought not to pretend to be sovereign. Hence, the word "autonomy" and all other various terms which linked local powers with freedom and liberties started being replaced with new and more neutral terms, including "auto-amministrazione", "autarchia", "Selbstverwaltung" and "décentralisation",[16] whilst there began to flourish organicist theories of local government, pursuant to which local communities are legal entities of corporative character and the State is an association composed of many sub-national corporations.[17]

The rediscovery of the glorious medieval past and the nineteenth century creation of both a classical liberal and, later on, of a corporatist narrative around it (so-called *Rechtfertigungsnarrative*)[18] is not irrelevant for the genesis of the European Charter of Local Self-Government. This is best shown by the circumstance that the famous quotation from Alexis de Tocqueville's *Democracy in America* (1835), whereby «*without local institutions a nation may give itself a free government; but it has not got the spirit of liberty»,*[19] was enshrined on top of the Draft Explanatory Memorandum of the Charter. In the light of this, one could argue that the Charter is a revival of a model of the past, to be considered both as an attempt by local authorities of exercising sovereignty, that is to say freedom from the State, but also as a recognition of a local corporatist power of decentralised entities by Council of Europe member States.

---

15 The term "city-State" was coined in the nineteenth century to describe the Greek *pòlis* and the Roman *civitas* and was then used to designate also medieval communes, even though in reality the two models cannot be superimposed. So: P. Costa, *cit.*, 742-743; P..P. Portinaro, *Il labirinto delle istituzioni nella storia europea*, Bologna, 2007, 84.

16 Critical on the German term "Autonomie" see for instance C. F. Gerber, *Über den Begriff der Autonomie*, in: Archiv für civilistische Praxis, XXXVII, 1854, 35-38.

17 So: O. von Gierke, *Rechtsgeschichte der deutschen Genossenschaft*, 1868; G. F. Puchta, *Cursus der Institutionen*, vol. I., Leipzig, 1853, 34.

18 On the today relevance of "justification narratives" for the establishment of a normative order see: A. Fahrmeir, *Rechtfertigungsnarrative. Zur Begründung normativer Ordnung durch Erzählungen*, Frankfurt am Main, 2013.

19 A. de Tocqueville, *Democracy in America*, 1835, as quoted by the Standing Conference of Local and Regional Authorities, CPL (16) 6, 21 September 1981. The quote begins as follows: «*The strength of free peoples resides in the local community Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it.»*

In fact, the Charter was originally understood as a legal act setting out the main prerogatives of local authorities, which had to be granted across Europe by nation States to their administrative component entities so as to preserve their loyalty to a united State, avoid future conflicts and accommodate secession sentiments. Hence, the choice of the term "charter" within the Council of Europe is anything but random. It was precisely aimed at fixing a set of powers for self-governing entities which, by accepting it through their national and supranational associations, implicitly gave up any desire of splitting off of their States (*Freiheit im Staat* and not *Freiheit vom Staat*).[20] Additionally, one might also argue that, from time to time, local authorities' powers need to be upheld or renewed, as it was the case with municipal liberties of communes in the Middle Ages which sought for their confirmation from new lords, bishops or kings. This might be considered being the task of the Congress of Local and Regional Authorities, a specialised agency of the Council of Europe: reminding sovereign States of their obligations engaged by granting the Charter to the local authorities of Europe.

3. Local Self-Government as *Autonomie Locale*

Once it has been clarified that the drafters of the Charter aimed at reviving the narrative of municipal freedom for a new purpose it remains to be clarified why exactly the term "self-government" has been chosen instead of other apparently suitable locutions, including "local government", "local self-determination", "local governance" and "local-autonomy". The answer seems easier as to the three former terms rather than as to the latter.

"Local government" merely implies a decentralised system of government and administration in a smaller area than the national one, but it does not say anything about how government action ought to be performed therein. Theoretically, a decentralised local government could be established for executing delegated tasks by the State. In this latter case, one would possibly speak of "autarchia", a neologism coined by the Italian administrative scholarship in the late ninenteenth century, whereby local entities existed as public authorities only insofar as they pursued the same interests as those of the State, that is to say insofar as they were organs of the State. This concept is however different from that of "self-government" which the Charter aimed at recognising, since it does not say anything about the very status of the public authorities, that is to say it does not imply neither normative powers nor organisational freedom nor local democracy.[21] "Local self-determination",

---

[20] So for instance one of the main inspirers of the Charter, the Swiss historian Adolf Gasser. Cf.: A. Gasser, *Staatlicher Großraum und autonome Kleinräume*, Basel, 1976, 150.

[21] See *inter alia*: S. Romano, *Decentramento amministrativo*, in: Enciclopedia giuridica italiana, Vol. IV, Napoli, 1897; G. Treves, *Autarchia, autogoverno, autonomia*, in: Rivista trimestrale di diritto pubblico, 1957, 286 and ff.; S.

viceversa, implies a right of the people living in a smaller area than the national one to choose their own political status without consulting others. Even if *latu sensu* one may consider it as a synonym for "local self-government", the word self-determination has a precise meaning under international law and is linked with the idea of popular sovereignty. In particular, whereas internal self-determination can be exercised by self-government or local government, external self-determination preludes to full independence, i.e. to secession and thus could not fit in with the purpose of the Charter of reconciling nation States with domestic pluralism.[22] Further, the Charter could not refer neither to the term "governance" for at least two reasons. First of all, at the beginning of the 80s of the last century the notion of governance and also that of multi-level governance (MLG) was still largely unknown among legal scholars; moreover, the term "governance" encompasses government but goes also beyond it, since it implies the interaction of different institutions and actors in the decision-making process. This was certainly not the aim of the Charter, which, unlike its Additional Protocol, did not aim at fostering societal, but merely institutional pluralism.

Yet, as for "local autonomy", a clear-cut separation from "local self-government" appears rather difficult, since both terms imply a certain degree of self-organisation by the citizens and subjection to own laws. "Local autonomy" was widely used in both the Preamble and in the Explanatory Memorandum attached to the Draft Charter of 1981 as well as in a previous resolution by the Standing Conference of Local Authorities of 1970, but has ultimately disappeared in the final text of the Charter and comes into view only in the Explanatory Report of the final text. Probably, uniformity reasons made the Contracting Parties opting for the term "self-government" in any paragraph of the English text of the Charter. Though, the French text, which is also authentic, translates "self-government" into "autonomie locale" so that one might contend that local self-government and local autonomy, at least for the purpose of the implementation of the treaty, ought to be regarded as synonyms (Article 33, para. 3 of the Vienna Convention on the Law of the Treaties of 1969).[23]

Though, if one really wants to distinguish between the two terms, hence explaining why the former

---

Cassese, *Autarchia*, in: Enciclopedia del Diritto IV, Milano, 1959, 324. On the evolution of the term after the entering into force of the Italian Constitution see: M.S. Giannini, *Corso di diritto amministrativo*, Vol. 1, Milano, 1965, 219.

22 Cf. K. Roepstorff, *The Politics of Self-Determination. Beyond Decolonisation Process,* London, 2013, 50 ff.

23 Treating "autonomy" and "self-government" as synonyms is a quite widespread convention. See: H.W. Fowler (ed.), *The Coincise Oxford Dictionary of Current English*, Oxford, 1960, 78. This is particular the case among international legal scholars. This convention might trace back to the prominent legal scholar Francis Lieber and to his book *On Civil Liberty and Self-Govenment*, London, 1853, 205, in which he refers first to autonomy or self-government as synonyms «*for independence upon other States, a non-colonial, a non-provincial state of things*», and then recognize them as having also «*a domestic meaning*» within the English context, as designing the relations between local communities and the central State. Cf. under international law: UN Declaration on the Rights of Indigenous People, General Assembly Resolution 61/295, 13 September 2007, Art. 4.

was preferred to the latter in the English text, one might argue that "autonomy" has a much stronger connotation and historical tradition than "self-government", since it is not immediately associated with the conduct of public affairs, but rather with private autonomy, which immediately reminds of the Kantian notion of the individual freedom to make own choices without being coerced into by others (*Autonomie des Willens*).[24] Since it is intimately connected with the ideas of both liberty and freedom, "autonomy" is much more an ambiguous term than the less demanding "self-government", which does not necessarily imply normative powers to be distinguished from those of the State.[25] Even if it is true that the former term might have perfectly fit in Switzerland ("Gemeindeautonomie"),[26] if used in both the English and French texts of the treaty, it may have been considered too restrictive for Germany and Austria[27] or it might have presumably led to specific claims by local authorities to be recognized as holders and not only bearers of fundamental rights[28] in those domestic legal orders, like France, in which the term was regarded with suspicion and thus often replaced with that of "pouvoir municipal"[29] and later on with that of "decentralisation".[30] The French Constitution has never used the term "autonomie locale*"* because French constitutional lawyers have traditionally perceived it as inspired by the rights of the individual and thus rejected it as a dangerous concept for the unity of the State.[31] To the contrary, "local self-government" might not only have fit in well in the United Kingdom, where the term

---

[24] See *inter alia*: L. Fonnesu, *Il ritorno dell'autonomia. Kant e la filosofia classica tedesca*, in: Quaderni Fiorentini XLIII (2014), 25 ff.

[25] On the ambiguity of the term "autonomy" see: J. Luther, *Alla ricerca di un concetto giuridico europeo di autonomia,* in: A.A., Scritti in onore di Antonio d'Atena, Milano, 2014, 1735 and ff. and also: P. Costa, '*Così lontano, così vicino'. Il Comune medievale e la sua autonomia*, Quaderni Fiorentini XLIII (2014), 689 and ff.

[26] On the Swiss term and the history of Swiss autonomy see: K. Meyer, *Gemeindeautonomie im Wandel*, St. Gallen, 2011, 9, 22, 77-79. Cf. also on the Charter: P. Hillard, *Das Ende der Schweiz?*, in: Schweizer Zeit, Nr. 10 (2004), available at: www.schweizerzeit.ch, who, probably on grounds of the ambiguity of the term "autonomy", appears to misunderstand the scope of the Charter, when he states that it «*gestattet es einer Volksgruppe, die auf einer geographisch klar abgegrenzten Fläche lebt, auch die vollständige Autonomie zu erreichen».* Cf also: B. Thürer, *Schweizerische Gemeindeautonomie und die Europäische Charta der kommunalen Selbstverwaltung, in:* F. Cagianaut / W. Geiger / Y. Hangartner / E. Höhn (eds.), *Aktuelle Probleme des Staats- und Verwaltungsrechts*, Festschrift für Otto Kaufmann zum 75. Geburtstag*,* Bern/Stuttgart, 1989, 231, whereby the German translation "Selbstverwaltung" does not fit well in the Swiss legal framework.

[27] In Germany, in fact, the term "Autonomie" denotes merely the own responsibility of local authorities while carrying out their tasks and, in particular, the right to approve by-laws (*Satzungen*). Cf. H-J. Wolff, O. Bachof, J. Stober, *Verwaltungsrecht II*, München, 1978, § 86, Rn. 78-79; E. Schmidt-Jortzig, *Kommunalrecht*, Stuttgart, 1982, Rn. 205; F. Ossenbühl, *Satzung*, in: J. Isensee and P. Kirchhof (eds.), HbStR Vol. III, § 66, Rn. 5.

[28] This misunderstanding has however not been fully avoided. See for instance: W. Leitermann, *Magna Charta der kommunalen Grundrechte*, Europa Kommunal, 1998, 203.

[29] Drawing on the system of the three branches of State power introduced by Montesquieu, girondinists leaders like Emmanuel Joseph Sieyès and Jacques Guillaume Thouret coined this expression for indicating the fourth branch of State power (Article 49 of the law on municipalities of December 14, 1789), thus suggesting the need of a vertical separation of powers between layers of government. Thanks to Benjamin Constant and Pierre Paul Nicholas Henrion de Pansey the notion was taken up again later on and ultimately influenced the 1831 Belgian Constitution, which explicitly mentions the "pouvoir communal et provincial" (Articles 31 and 108).

[30] See: L. Mannori, *Autonomia: fortuna di un lemma nel vocabolario delle libertà locali tra Francia e Italia*, in: Quaderni Fiorentini XLIII (2014), 85 and ff.

[31] So: L. Malo, *Autonomie Locale et Union Européenne*, Bruxelles, 2010, 9, quoting J. M. Pontier, *Autonomie locale, libre administration, décentralisation,* in: A.A., *En hommage à Francis Delpérée: itinéraires d'un constitutionnaliste* Bruxelles, 2007, 1224-5. It might be also for this apparently purely nominal reason that France ratified the Charter only in 2007.

traced back its historical roots,[32] but also in those countries, like Germany, Austria (but not France),[33] where the different terms "kommunale Selbstverwaltung" were in use, since it conveyed the idea of public authorities performing *government* action, being enshrined in the administrative structures of the State and not separated from and opposed to it.[34] If the English "self-government" had been translated into French with "libre administration" or "auto-administration", doubts would have arisen as to the meaning and the scope of the treaty in those Romanist countries, including Italy, in which the term "autonomy" ("autonomia") had become much more common in the field of constitutional law than that of "self-government" or "self-administration" ("autogoverno" or "auto-amministrazione").[35]

To conclude, a Charter which aimed to be applied equally across Europe should have referred to the terms in use in the widest number of countries as possible, but also to the terms which could mostly enhance reciprocal learning. This is why the treaty is called both "Charter of Local Self-Government" and "Charte de l'autonomie locale".

II. The Origins of the Charter within the Council of Europe

In Part I the historical and moral inspirations as well as the possible reasons behind the choice of the Charter's name have been outlined. Hereunder, the political and institutional context which led eleven Council of Europe member States (Austria, Belgium, Denmark, France, Germany, Greece, Italy, Liechtenstein, Luxembourg, Portugal, Spain) to sign the Charter on October 15, 1985 will be

---

32 The term had come into use at the beginning of the nineteenth century in the American colonies. Until the end of the eighteenth century "self-government" was a mere synonym for "self-control". Nowadays, official acts in the United Kingdom refer merely to "local government". Cf. Oxford English Dictionary, Vol. VIII, Part. 2. Cf. C. Himsworth, *Local Government in the United Kingdom*, in: A. M. Moreno (ed.), *Local Government in the member States of the European Union: A Comparative Legal Perspective*, Madrid, 2012, 663.

33 A. De Laubadere/ J.C. Venezia/ Y. Gaudemet, *Traité de droit administratif*, Vol. 1, 10th. ed., Paris, 1994, 108.

34 Cf. C. Panara, *The Contribution of Local Self-Government to Constitutionalism in the Member States and in the EU Multilayered System of Governance*, in: C. Panara and M. Varney (eds.), *Local Government in Europe*, London, 2013, 371. In Germany, the concept of "Selbstverwaltung" (see *infra* second Chapter) which also originates in the Charters (*Verbundbriefe*) of the Middle Ages has a political and legal meaning and was partly influenced by the English concept of "self-government" in the second half of the nineteenth century. Cf. P.J. Tettinger and K-A. Schwarz, *Art. 28*., in: H. von Mangoldt/F. Starck/C. Klein (eds.), *Grundgesetz Kommentar*, 2005, § 126 and: R. von Gneist, *Die heutige englische Communalverfassung und Communalverwaltung oder das System des Selfgovernment*, Berlin, 1871; B. Sordi, *Selfgovernment, Selbstverwaltung, Autarchia: Fondali Inglesi per Scenografie Continentali*: in Quaderni Fiorentini XLIII (2014), 135 and ff. On the differences between "Selbstverwaltung" and "Self-Government" see: H. Preuss, *Die Entwicklung der kommunalen Selbstverwaltung in Deutschland*, in: P. Laband (ed.), *Handbuch der Politik*, 1919, 266 ff.

35 In particular, see: G. Rolla, *L'autonomia delle comunità territoriali: profili costituzionali*, Milano, 2008, 38-39, noting that the term "autonomia" cannot be put on equal footing with "autogoverno" and "autoamministrazione". Cf. A. Di Gaspare, *Autogoverno*, in: Enciclopedia giuridica, 1988, 7 and L. Giovenco and A. Romano, *L'ordinamento comunale*, 10th ed., Milano, 1987, 7-12.

briefly examined.

1. A Tool for Municipal Federalism or for Federal Municipalism?

It is no chance that the initiative to draft an international agreement setting out legal standards for local self-government was taken within the framework of the Council of Europe and not elsewhere. Established in 1949, the CoE is the intergovernmental organisation which mostly contributed to the elaboration of treaties aimed at strengthening the ideas of democracy and of European unity. As part of this commitment, it is also the organisation which first envisaged a representative body connecting local governments to the supra-national level after World War II. At that time, in fact, the crisis of nation States secured municipalities more room for decision-making and co-operation so that in the international arena crossborder co-operation, inter-territorial twinnings and, more in general, local freedoms began flourishing, thus greatly contributing to reconciliation between nations.[36] In 1957, therefore, the Conference of Local Authorities of Europe was set up under the auspices of the CoE.[37] This advisory body was established with the task of addressing local government issues arising in the member States, mainly thanks to the efforts of the Council of European Municipalities (CEM) and of its President, the French under-secretary of State and mayor of Bordeaux, Jacques Chaban-Delmas.[38]

Since its foundation in 1951, the CEM endeavoured to achieve the recognition of local authorities' role beyond national borders within international organisations.[39] In particular, Chaban-Delmas and other European federalist thinkers, including Alexandre Marc, Umberto Serafini, Lucient Sergent and André Voisin, strived for the establishment of an assembly to be placed alongside the Parliament of a future European Federation, so as to achieve an even closer union of the peoples of Europe, as the Preamble of the Treaty of Rome (1957) stipulated. This chamber should have promoted and protected municipal autonomy not only at national level, but also within the new Federation, which many politicians at that time saw as imminent.

The activism of this group of continental federalists was very much influenced by the intellectual works of Adolf Gasser, a contemporary Swiss historian and CEM co-founder. Its most famous and

---

36 So already: D. Blumenwitz, *Zur Rechtsproblematik von Städtepartnerschaftsabkommen,* BayVBl, 1980, 193.

37 On the Conference activities since its establishment see: H-W. Rengeling, *Die Zusammensetzung der Standigen Konferenz der Gemeinden und Regionen des Europarates, insbesondere aus deutscher Sicht*, DVBl 1. Juni 1985, 600 ff.

38 F. Zucca, *The International Relations of Local Authorities*, Frankfurt am Main, 2012, 183-192 and J. Petaux, *Democracy and Human Rights for Europe: The Council of Europe's Contribution,* Strasbourg, 2009, 111-115.

39 Archives d'Etat de la République et Canton de Genève, Papiers Edgard Milhaud, c. DOC. EM., Procès-verbaux des six séances de la conférence constitutive du Conseil des communes d'Europe. Genève 28-30 Janvier 1951.

thought-provoking pamphlet, *The Freedom of Municipalities as Salvation for Europe* (1943),[40] was purported by them to be a cornerstone for building up a new federated Europe based on decentralisation. However, it has to be borne in mind that Gasser political and philosophical thought was fairly different from that declared by federalist thinkers. Whereas the former, drawing on the aforementioned work by Alexis de Tocqueville,[41] on the Swiss model, but also on the Althusian views of a federation of organic communities, believed more on independent States with federal or confederal structures equipped with a strong municipal layer of government enjoying extensive and constitutionally guaranteed autonomy, the latter were first and foremost engaged in lobbying for a bottom-up creation of a European Federation.[42]

This tension between competing objectives and in particular between municipal freedom and federalism was mirrored in the ambivalence of the activities promoted by CEM members and was ultimately reflected also in the European Charter of Local Self-Government which, unlike the European Charter of Municipal Liberties (1953), does not explicitly mention "municipalities" and does not refer to their inviolable "liberties" or to their being "a bulwark of personal liberties", but, even if it defines local authorities as the main foundations of any democratic regime, is rather conceived as a tool for regulating the functional allocation of powers and public responsibilities in a State full of cultural and institutional differences, as also a European Federation would have been. On the other hand, however, it is not a tool aimed at affecting «*the division of powers and responsibilities between the federal State and the federated States»,*[43] but at fostering decentralisation irrespective of the system of government at stake. As it will be showed with reference to the enshrinement of the principle of local self-government in the domestic Constitutions, to the principle of subsidiarity, to the right of inter-territorial co-operation between local authorities and to the financial relations between State and local authorities, the municipal and devolutionary approach of the Charter might nonetheless affect the federal or even the regional structure of a member State.

The Conference of Local Authorities of Europe, put alongside the Consultative Assembly (since 1974 Parliamentary Assembly or PACE) of the Council of Europe, was understood as being the first step towards the establishment of a territorial based second chamber at supranational level and also as a premise for a similar acknowledgement within the European Communities, where however the

---

40 A. Gasser, *Gemeindefreiheit als Rettung Europas. Grundlinien einer ethischen Geschichtsauffassung*, 2nd ed., Basel, 1947.

41 So F. Zucca, *cit*., 60-62.

42 So F. Zucca, *ibid*., 82. See in particular the quotation by Gasser, *ibid*., 205, whereby «*on no account should one be content with comprehensive federalism unless there is comprehensive and legally secure municipal autonomy*».

43 Explanatory Memorandum (so-called *Harmegnies Report*), CPL (16) 6, 21 September 1981.

CEM could exert less influence at least until the 80s.[44] The Conference, which became Standing Conference in 1962, was composed of 135 members – as many as the Consultative Assembly – and had the power to issue opinions, recommendations and resolutions before the Consultative Assembly could adopt decisions impacting on local autonomy and was accorded the task to ease the exchange of good practices among local authorities in Europe. As underlined in the literature,[45] it was the first time ever that the duty to consult local authorities before issuing a decision, albeit non-binding, was affirmed at supranational level.

2. The Rocky Path Towards the Charter's Signature

It is exactly within the framework of the Standing Conference that the proposal to set out a Charter fixing principles and rights of local self-government was launched. The very first attempts, shared with the Consultative Assembly, date back to 1961, 1962 and 1968.[46] All these proposals were rejected by the Committee of Ministers, since a number of member States did not want to be bound by international obligations concerning their administrative structures which were purported to be too heterogenous for being object of harmonising standards. Further, a reference to municipal freedoms and rights as well as the involvement of the ECtHR as the jurisdiction for conflicts between local authorities and member States make them fear both a loss of sovereignty and a radical change in the distribution of political powers at domestic level.[47]

The decisive initiative was taken between 1978 and 1981 by the Standing Conference, notably by its Committee on Local Structures and Finances, presided over by Lucien Harmegnies, former Belgian Minister of the Interior and mayor of Charleroi.[48] Harmegnies was advised by a small group of experts, made of

---

44 In June 1988 the EC Commission set up the first Consultative Council of Regional and Local Authorities. See: N. Parisi, *Article 263 EC*, in: F. Pocar, *Commentario breve ai trattati della Comunità e dell'Unione europea 2001*, 893.

45 F. Zucca, *cit*., 186.

46 See: Consultative Assembly of the Council of Europe, Recommendation No. 295 (1961) and Resolution No. 234 (1962); European Conference of Local Authorities, Recommendation No. 64 (1968), supported by the Consultative Assembly Resolution No. 410 (1969) and Recommendation No. 615 (1970).

47 The resolutions referred in fact to the «*rights and freedoms of local communities*» and thus appear to conceive local authorities as holders of fundamental rights *vis-à-vis* the State. See: Conference of Local Authorities, Resolution No. 64 (1968), *on principles of local autonomy* and the related debate after its adoption. In particular, Conference Member M. Weber (France) contended that no community «*nowadays can live for itself alone, taking no account of what goes around it*». See Council of Europe, Consultative Assembly, 21st Ordinary Session, 12-16 May 1969, Official Report of Debates, Vol. I, Sittings 1 to 7, 139 ff.. See also: B. Schaffarzik, *Handbuch der Europäischen Charta der kommunalen Selbstverwaltung,* Stuttgart, 2002, 26-30 and U. Bohner, *Entstehung und Bedeutung der EKC unter besonderer Berücksichtigung ihrer Rezeption in den Reformstaaten Mittel- und Osteuropas,* in: F.L. Knemeyer, *Kommunale Selbstverwaltung in Ost und West*, Baden-Baden, 2003, 22.

48 See: European Conference of Local and Regional Authorities, Resolution No. 126 (1981) *on principles of local self-government* and Explanatory Memorandum (so-called *Harmegnies Report*), CPL (16) 6, 21 September 1981. The Draft Charter followed a motion for a resolution on principles of local self-government adopted on 20-22 June 1978 by the Conference - CPL (13) 10. Cf. C. Hyltoft, *Die Arbeit des Europaratsauschusses für lokale Strukturen*, in: F.L. Knemeyer, *Die Europäische Charta der kommunalen Selbstverwaltung*, Baden-Baden, 1989, 49-55.

local representatives and administrative lawyers from Germany, Italy, France, Switzerland, United Kingdom and Belgium, who instituted the necessary proceedings (i.e. questionnaires, comparative reports, meetings with associations of local authorities etc.) so as to avoid the drafting of a document based too blatantly on a specific national model of local government.[49] This time the Committee of Ministers did not drop the project. This can be explained on many grounds. First of all, the drafters avoided any reference to the need of passing a new ECHR Protocol, they envisaged a more flexible system of supervision following the example of the European Social Charter (1961) and, finally, limited rhetorical proclamations to the liberties of municipalities inasmuch as possible, thus making clear that they conceived local self-government not as a fundamental right of local communities, but as a principle on allocation of powers and responsibilities within the State.[50] Further, since the early 1970s, after approval of territorial and functional reforms aimed at pooling together local authorities and redefining their administrative powers and responsibilities, many Council of Europe member States had ensured a turn towards more decentralisation of tasks and autonomy, in many cases to accommodate secession sentiments.[51] Together with this trend favorable to local governments in domestic law, one should however not overlook the factual circumstance that the Draft Charter which followed the resolution by the Conference was ultimately not rejected mainly because the Conference of European Ministers responsible for Local Government was charged with the task to deal with it and not the Committee of Ministers itself. Nonetheless, since a certain skepticism towards a binding international document remained present, in 1982 the same Conference of Ministers responsible for Local Government requested the Committee of Ministers to instruct its Steering Committee for Regional and Municipal Matters (CDRM) to review and amend the Draft Charter, taking into account national delegations amendment proposals. Since the adoption of a Charter had become almost inevitable, from that time on, the Committee attempted to be assigned with its authorship, by moulding it as it pleased and by finally presenting it as a document drawn up «*by a committee of governmental experts under the authority of the Steering Committee for Regional and Municipal Matters on the basis of a draft proposed by the Standing Conference of Local and Regional Authorities of Europe».* After approximately one and a half years of tough negotiations, the substantive committments of the Charter had been slightly watered down and the enforcement mechanisms radically weakened. The Charter was agreed upon by the Commitee of Ministers of the Council of Europe on June 27, 1985, it was officially signed in Strasbourg on

---

[49] See: A. Galette, *The Draft European Charter of Local Self Governement Submitted by The Conference of Local and Regional Authorities of Europe,* in: German Yearbook of International Law (GYIL), Vol. 25, 1982, 309-335.

[50] P. Akkermans, *The European Charter of Local Self-Government*, in: Institut du Federalisme Fribourg Suisse (ed.), *The Territorial Distribution of Power in Europe*, Fribourg, 1990, 276.

[51] So: B. Schaffarzik, *Kommunale Selbstverwaltung im europäischen Mehrebenensystem*, in: T. Mann and G. Püttner (eds.), *Handbuch der kommunalen Wissenschaft und Praxis*, Berlin, 2007, 274; D. Thürer, *cit*., 222. Decentralisation occurred not necessarily to make secession superfluous in the periphery, but mainly for partisan political calculations. Cf. J. Sorens, *The Partisan Logic of Decentralisation in Europe*, Regional and Federal Studies Vol. (19) Issue 2, 2009. On decentralisation efforts between 1970 and 1980 see: Y. Meny, *Introduction*, in Id. (ed), *Dix ans de regionalisation en Europe. Bilan et perspectives 1970-1980*, Paris, 1982, 5 and ff.

October 15, 1985 and, pursuant to its Article 15, para. 2, it entered into force in the international legal order on September 1, 1988, after ratification by the fourth signatory State, i.e. the Principality of Liechtenstein.

3. The Additional Protocol to the Charter

The Charter was further supplemented in 2009 with an Additional Protocol, the so-called Utrecht Protocol, which entered into force in 2012 and has been ratified until now by twelve member States, i.e. Armenia, Cyprus, Estonia, Finland, Hungary, Lithuania, Montenegro, the Netherlands, Norway, Slovenia, Sweden and Ukraine.

Originally, the intent of the Congress of Local and Regional Authorities of the Council of Europe was to prepare a new binding agreement,[52] aimed at clarifying the meaning of many Charter's guarantees and in particular at doing away with abstract provisions and the linguistic generality of the treaty, by taking into account the standard-setting achievements and interpretative experience of the Committee of Ministers, the so-called Venice Commission and the Congress. However, the majority of the member States rejected the draft, by maintaining that an Additional Protocol could not amend existing treaty provisions. It would in fact have been hardly acceptable and very much confusing to have two sets of standards in force at the same time, one based on the Charter and another based on the Protocol.[53] Thus, the final Protocol contains provisions limited merely to a specific aspect (and not to others, e.g. municipal property) which was purported not to have been sufficiently underlined by the Charter, but merely by its Preamble, notably the substantive citizens' right to participate in the affairs of a local authority. In reality, it seems that the very reason why the draft project was abandoned is that it would have left a less wide "margin of appreciation" to the Contracting Parties in the interpretation of the Charter.

As pointed out by Posner and Goldsmith with reference to human rights law, if treaty law «*becomes clearer and more specific the likely outcome would not be greater compliance but rather more violations and perhaps withdrawal from the treaties as well*»[54]. Thus, the dropping of the project might not be considered as a complete failure for the Council of Europe, since, as it will be shown, the Draft Protocol contributed to clarify the meaning of many Charter's provisions, which can, at least, be voluntarily taken up by the member States for ensuring correct abidance by the treaty.

---

52 See: Congress of Local and Regional Authorities, Recommendation No. 228 (2007) *on a Draft Additional Protocol to the European Charter of Local Self-Government,* 20 November 2007.

53 CDLR, *Meeting of the Committee of Experts on Local and Regional Government Institutions*, LR-GI (2008) 6, 29 May 2008.

54 J. L. Goldsmith and E. A. Posner, *The Limits of International Law*, 2005, 134.

4. The Abandoned Projects to Supplement the Charter

4.1 The European Charter on Local and Regional Finances

Shortly after the signature of the Charter, the Standing Conference issued Resolution No. 175 (1986)[55] on local finance, which invited the Council of Europe member States to comply with Article 9 of the Charter in the first place, but also contributed to its very first interpretation with a specific assessment of its implementation. This resolution was followed by the subsequent drafting of a specific European Charter of Local and Regional Finances (1986), which should have supplemented the concise guarantees set out in the European Charter of Local Self-Government.[56]

The new Charter, approved by the 7th Conference of European Ministers responsible for Local Government in Salzburg on 8-10 October 1986, was composed of nine Articles and had a similar structure as the European Charter. In particular, the additional Charter aimed at enshrining all main financial principles laid down in prior resolutions of the Standing Conference which could not find a place in the European Charter of Local Self-Government the year before. The Council of Europe, in fact, had been dealing with the matter of allocation of financial resources between different layers of government at least since Resolution No. 64 (1968) on principles of local autonomy,[57] which laid down the antecedents of Charter Article 9, para. 1 and 2. Principles on allocation of financial resources were further clarified and supplemented by other principles following the adoption of Resolution No. 105 (1979)[58], on the apportionment of public resources between the States and local and regional authorities and its evolution. This resolution was inspired by the economic and monetary crisis of the 70s, which «*exacerbated the financial difficulties of local and regional authorities»* and threatened their fiscal autonomy. To react to this «*steady increase in the financial burdens»,* the Standing Conference of Local and Regional Authorities called upon national governments to ensure that: **a)** financial resources for local and regional authorities be of *«buoyant and flexible nature»;* **b)** part of these resources should «*derive from taxes that can be localised on*

---

55 Explanatory Report by F. Picardi - CPL 21 (6) – 1986.

56 So also: O. Maier, *Die Ergänzung der Europäischen Kommunalcharta durch eine 'Europäische Charta der kommunalen und regionalen Finanzen'* in: F.L. Knemeyer, *Die Europäische Charta der kommunalen Selbstverwaltung. Entstehung und Bedeutung. Länderberichte und Analysen,* Baden-Baden, 1989, 205, cit.: «*Der Entwurf der Europäischen Charta der kommunalen und regionalen Finanzen versteht sich als Weiterentwicklung des Inhalts des EKC, insbesondere dessen Artikel 9. In dieser Bestimmung konnten nur Grundprinzipien eines kommunalen Finanzsystems angesprochen werden*».

57 The risolution was dopted by the European Conference of Local Authorities and approved by the Parliamentary Assembly by means of Resolution No. 410 (1969). Further, with Recommendation No. 516 (1970), the Parliamentary Assembly called up the Committee of Ministers to adopt it in the form of recommendation to the member States.

58 Explanatory Report by L. Sergent - CPL (14) 2 – 1979.

their territory and of which they have the power to determine the rate»; **c)** local authorities do not rely excessively on property taxes or on taxes «*whose tax-base is valued approximately and requires periodic reassessment»*; **d)** local authorities can have a share of «*general and progressive taxes, and particularly income tax»;* **e)** that specific grants *be replaced by block grants which are not earmarked for the financing of specific projects or services*; **f)** local authorities have a say in the allocation of financial resources.

Finally, the Standing Conference asked the Council of Europe's Steering Committee for Regional and Municipal Matters to draw up guidelines for «*a system of resource transfers between central government and regional and local authorities which is designed to correct the injustices arising from the unequal distribution of potential sources of taxation»*. It is no accident that the aforementioned principles can now be found in Article 9. In fact, § 10 of Resolution No. 105 (1979) stipulated that the principles set out in it should have been taken into account when drawing up the principles of local self-government[59] and the committee of experts, while drawing the principles of local self-government, maintained that the subject should have been analysed in the light of Resolution No. 105 and of its attached report.

Supplementary principles on municipal credit can be derived from Resolution No. 153 (1984)[60] on borrowing by local and regional authorities in Europe. Therein, the Conference recommended that local authorities «*should borrow only for the purpose of financing capital investment or rescheduling debt»* and that they «*can only benefit from an active market in foreign loans* (…) *provided that the risks of fluctuating exchange rates can be kept to a minimum».* The first five paragraphs of Article 2 of the Draft Charter were almost identical with the first five paragraphs of Article 9 of the Charter of Local Self-Government. Yet, the Draft Charter on Local and Regional Finance developed further the notions of fiscal equalisation between layers of government, direct financial transfers to local authorities, administrative oversight over local authorities for financial issues, local authorities' budget autonomy and local authorities' legal protection for violations of financial autonomy. Though, the Draft Charter was never opened for signature by the member States and the project to approve it in form of a new convention was eventually abandoned after the entry into force of the European Charter of Local Self-Government on September 1st, 1988. Along the last ten years only the Council of European Municipalities and Regions (CEMR) tried to revive

---

[59] See Draft Explanatory Memorandum – CPL (16) 6, 25: «*As its provisions are closely modelled on the principles contained in thè Conference's Resolution 105 (1979); which was based on the excellent-report on -"The apportionment of public resources between the State and local and regional authorities and its evolution" presented to the 14th Session by Mr Sergent, it is necessary only to make a general reference to 'the explanations so ably formulated there and to add a few supplementary considerations*».

[60] Report by D. Colin - CPL (19) 4 – 1984.

this old project, by calling on central governments for the adoption of a so-called European Charter on Local Finances Decentralisation.[61]

4.2. The European Charter of Regional Self-Government

A similar outcome had the Congress' project of drawing up a European Charter of Regional Self-Government, which was first brought forward in the 1970s, whereas the Standing Conference issued a preliminary report on regionalisation in Europe in 1980.[62] According to Article 13, the European Charter of Local Self-Government can be applied also to regional authorities upon explicit declaration of each State (see *infra* § 3.I). However, the Charter was thought in the first place as a tool applying to basic units of local government and possibly also to intermediate local authorities, but not to regions, since «*experience had shown that there is still no clear consensus as to the meaning of the term "region" and that some countries have no institutions that obviously correspond to it*».[63] Between 1997 and 2009 new efforts were made for finding a compromise on common principles of regional self-government, but eventually the negotiators did not succeed and the Draft Charter drawn up by the Congress was adopted by the Committee of Ministers as a mere soft law document with so-called "para-law" function,[64] that is to say as a Reference Framework on Regional Democracy,[65] which nonetheless is nowadays extensively used by the Congress within the framework of its monitoring practice. In 2012, with the "Declaration of Innsbruck", the evolution towards a monitoring practice distinguishing between local and regional authorities was welcome by many European regions themselves.[66]

III. The Status of Ratifications within the Council of Europe

---

61 See: Council of European Municipalities and Regions, *Local finances seminar: Europe's local government demands better financing,* 6 July 2005, in www.ccre.org

62 Report by A. Galette, *Regional Institutions and Regionalisation in Europe*, 10-12 June 1980, CPL (15) 5. See in Germany the discussion fuelled by Schnur in the 1970s. R. Schnur, *Regionalkreise? Grundsätzliche Bemerkungen zur Schaffung von sogenannten Regionalkreisen, insbesondere in Nordrhein-Westfalen,* Köln, 1971.

63 See: European Conference of Local and Regional Authorities, Resolution No. 126 (1981) *on principles of local self-government* and Explanatory Memorandum (so-called *Harmegnies Report*), CPL (16) 6, 21 September 1981, 16.

64 For the classifications of soft-law: D. Thürer, *The Role of Soft Law in the Actual Process of European Integration*, in: O. Jacot-Guillarmod (ed.), *L'avenir du libre-échange en Europe: vers un espace économique européen?,* 1990, 133.

65 On the history of the Reference Framework see *inter alia*: J. Luther, *Costituzionalismo e regionalismo europeo*, in: Le Regioni n. 6/2007, 933-958; A. Gamper, *Von der Charta der lokalen zur Charta der regionalen Selbstverwaltung?*, in: E. Albers and C. Zwilling (eds.), *Gemeinden im Europäischen Mehrebenensystem: Herausforderungen im 21. Jahrhundert*, Bd. 26, Baden-Baden, 2014, 184 ff.

66 See: Declaration of the International Conference on "Regions with legislative powers in the European Union and in the Council of Europe – future challenges and strategic goals", 1 June 2012, Innsbruck, Austria, to be found at the following address: www.coe.int

The historical contextualisation cannot avoid to take briefly into consideration the reception of the Charter in the domestic orders of Council of Europe member States. As of 2014, the Charter has been signed and ratified by all Council of Europe member States, whereas, already as of 2007, all EU member States have signed and ratified it. This outcome has been achieved only through concerted action with the member States on the part of the Congress of Local and Regional Authorities, the advisory body of the Council of Europe which replaced the Standing Conference in 1992 and was vested with the power to ensure compliance with the Charter.

In fact, even if a "European consensus" was found on the content of the Charter's provisions in 1985, not all member States which took part in the negotiations promptly signed and ratified the treaty. To the contrary, for the United Kingdom, Ireland, Belgium, Switzerland and France the costs temporarily outweighed the benefits. The ratification of the Charter would have in fact demanded major changes to their domestic legislation on local government, if not even to their constitutional framework. Both political and constitutional questions – in particular in the United Kingdom and in Belgium[67] – might also explain the initial defection of these member States. Only after the legal uncertainty was sorted out – either because their constitutional framework or their legislation on local government had changed over time[68] or because they realized that the interpretation of the Charter's principles carried out by the Congress experts allowed for sufficient flexibility[69] – they decided to ratify it, in 1998 (United Kingdom), 2001 (Ireland), 2004 (Belgium), 2005 (Switzerland) and 2007 (France), respectively. Different concerns were at play in three so-called "micro-States", i.e. Andorra, Monaco and San Marino, which were the very last Council of Europe member States

---

67 C. Himsworth, *cit*., in: A. M. Moreno (ed.), *cit*., 668, noting that the White Paper which accompanied ratification in 1998 affirmed that the Charter's principles were already reflected in the UK system. As for Belgium, which was one of the initial signatory States of the Charter, it has not ratified it until 2004. Here, the problem was the very complicated procedure for ratification involving all seven regions and communities. In fact, the Council of Flanders refused until 2003 to approve the Charter. As it will be explained hereunder, this is mainly due to their non compliance with ther Charter. Cf. Congress of Local and Regional Authorities, *Report on Local Democracy in Belgium*, CPL (10) 2 Part II, 20 May 2003.

68 In the case of Ireland, it signed the treaty in 1997 but it ratified it in 2001, because the *«Irish government wants the 2000 reform bill adopted by Parliament before ratification is proposed»*, cit. Congress of Local and Regional Authorities, *Report on Local Democracy in Ireland*, CPL 8 (4) Part II, 31 May 2001.

69 In the case of France, a negative opinion issued by the *Conseil d'Etat* on 5 December 1991, when it was asked to approve authorisation of ratification of the Charter, is sometimes given as the reason for this situation. The Conseil d'Etat expressed the view that «*as this is an area which fundamentally and durably affects the institutions of the Republic, the powers of parliament should not be limited through international undertakings except with the very greatest prudence and for vital reasons»*. Cf. Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in France*, CG (7) 7, Part II, 25 May 2000. In the case of Switzerland, the very specific federal structure of the State raised questions on its compatibility with the Charter. Cf. Congress of Local and Regional Authorities, *Report on Regional Democracy in Switzerland*, CPR (18) 2, 17 March 2010 and, in particular, D. Thürer, *Schweizerische Gemeindeautonomie und die Europäische Charta der kommunalen Selbstverwaltung*, in: F. Cagianut / W. Geiger / Y. Hangartner / E. Höhn (eds.), *Aktuelle Probleme des Staats- und Verwaltungsrechts*. Festschrift für Otto K. Kaufmann zum 75. Geburtstag, Bern und Stuttgart, 1989, 228-229, who contended that no guarantee of local self-government existed under the Swiss Federal Constitution and the Charter's provisions, Article 2 in particular, would have altered the constitutional order. See now: R. Kägi-Diener, *Art. 50*, in: B. Ehrenzeller, P. Mastronardi, R. J. Schweizer, K. A. Vallender (eds.), *Die schweizerische Bundesverfassung*: *Kommentar*, 2008, Rn. 5.

to sign and ratify the Charter, in 2011, 2013 and 2014 respectively. Being themselves basic units of government, issues of decentralisation or problems related to the allocation of public responsibilites were initially deemed not to be as relevant as in "macro-States". Nonetheless, ratification of the Charter by them did not entail any particular legal obligation to reform their local government systems either.

Another major challenge for a wider acceptance of the Charter across Europe was its implementation in the so-called new democracies of Central and Eastern Europe, that is to say in those member States which joined the Council of Europe all along the 1990s, immediately after gaining their independence from the collapsed Soviet Union. Being in a transition from communism to liberal democracy, the very foundations of the democratic system needed to be rebuilt and for this purpose these States needed help and a framework of reference which they could best obtain within an international organisation such as the Council of Europe.[70] The failure to ratify the Charter, which in the meantime had become a mandatory commitment for all States which were willing to apply for membership of the Council of Europe,[71] could have been viewed by signatory member States as an evidence of unreliability in their efforts to establish a truly new democratic legal order. Therefore, starting with Estonia and Hungary in 1994,[72] all Central and East Europe member States signed and rapidly ratified the Charter, in many cases even modelling their constitutional framework on local self-government upon its provisions. Though, as explained by Hertzog,[73] this process was and still partly is disseminated of cultural and political obstacles, since countries dominated by centralism for a long time were and still are not entirely familiar with many Western legal notions, including for instance those of "authorities established under public law" and "local autonomy" itself. As it will become clearer in the analysis carried out in Section 3, this asymmetry between Western and Eastern Europe makes difficult to speak of a truly completed harmonisation of minimum standards of local self-government across the Continent.[74]

IV. The Success Beyond Council of Europe Borders

---

70 This appears to be true also nowadays.

71 On the statutory character of the Charter see: F. Benoît-Rohmer - H. Klebes, *Council of Europe Law. Towards a pan-European legal area,* Strasbourg, 2005, 32-33.

72 The list includes: Estonia (1994), Hungary (1994), Bulgaria (1995), Ukraine (1996), Latvia (1996), Slovenia (1996), Croatia (1997), Moldova (1997), the former Yugoslav Republic of Macedonia (1997), Romania (1998), Lithuania (1999), Czech Republic (1999), Albania (2000), Slovakia (2000), Bosnia and Herzegovina (2002), Azerbaijan (2002), Armenia (2002) Georgia (2004), Serbia (2007), Montenegro (2007).

73 Cf. R. Hertzog, *Le difficile établissement d'une démocratie locale en Europe de l'Est: quelques problèmes d'application de la Charte européenne de l'autonomie locale*, in: A.A., *Libertés, justice, tolérance. Mélanges en hommage au Doyen Gérard Cohen-Jonathan,* Bruxelles, 2004, 959-980.

74 A. Vetter, *Die Europäische Charta der kommunalen Selbstverwaltung und ihre politische Bedeutung*, in: O. Gabriel, P-C. Müller Graf, O.C. Steger (eds.), *Kommunale Aufgaben im Europäischen Binnenmarkt,* Baden-Baden, 2010, 133.

Finally, it ought to be remembered that, even if it had been opened for signature only for Council of Europe member States (Article 15, para. 1), the Charter appeared to provide for, albeit limited, normative guidance in non-European legal traditions and, in particular, within the framework of other international organisations, specifically at the European Union and United Nations level. This might be explained *prima facie* with the potential universality of certain standards of the Charter and with their prompt adaptability to changing legal cultures.[75]

As for the EU, the Charter has not been formally enshrined in primary law yet nor has the EU acceded to it (see *infra* § 2. II). Nonetheless, it has had a highly political relevance at least since the establishment of the Committee of the Regions (CoR), whose advisory opinions often make reference to the Charter's principles and in particular to the subsidiarity principle as enshrined in Article 4, para. 3 (see *infra* § 3.II.1.3). More recently, the Charter was taken as a foundation for approving the so-called Charter for Multi-Level Governance in Europe (2014), which has the mere value of a *soft law* document setting out the principles which must guide the relationships, i.e. allocation of powers and responsibilities between different layers of government under both EU and domestic law.

At UN level, in 1998, the Centre for Human Settlements (UN-Habitat) together with the World Association of Cities and Local Authorities Coordination (WACLAC, now UCLG) and Council of Europe experts launched the proposition of drafting a World Charter of Local Self-Government, building on the example of the European Charter.[76] On grounds of the difficulties encountered in the negotiations to find common definitions of the concept of self-government, the Draft World Charter was ultimately adopted in a 2007 meeting in Nairobi as UN-Habitat guidelines on decentralisation and the strengthening of local authorities, but it is not as a binding treaty.[77] Also within the framework of the African Union, a Charter on the Values and Principles of Decentralisation, Local Governance and Local Development was proposed and recently adopted on June 27, 2014 at the twenty-third ordinary session of the Assembly.[78]

---

75 C. Himsworth, *Treaty-Making for Standards of Local Government: The European Charter of Local Self-Government and its Possible Application Beyond Europe,* University of Edinburgh, School of Law, Working Papers, 2011 (Edinburgh Law School Working Papers; No. 2011/24), 15-16.

76 U.N. Center for Human Settlements (HABITAT) and World Association of Cities and Lo-cal Authorities Coordination (WACLAC), Towards a World Charter of Local Self-Government: The Origins, Aims and Proposed Preparation Process for the World Charter (1998), to be found at the following address: www.gdrc.org/u-gov/charter.html. Cf. also: M.W. Schneider, *Die Vorbildfunktion der EKC für eine Weltcharta der kommunalen Selbstverwaltung*, in: F.L. Knemeyer, *Kommunale Selbstverwaltung in Ost und West*, Baden-Baden, 2003, 119 and ff.

77 UN-Habitat, International Guidelines on Decentralisation and the Strengthening of Local Authorities, 2007, to be found at the following address: www.cities-localgovernments.org

78 African Union – *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development*, adopted by the twenty-third ordinary session of the Assembly, held in Malabo, Equatorial Guinea, 27 June 2014, to be found at the following address: www.au.int

Finally, as for the normative guidance of the Charter in other legal traditions, it can be mentioned that the Charter has been deemed to inspire standard setting on local government in Council of Europe bordering countries (both in Asia and in the Mediterranean countries of North-Africa) as well as in Latin America,[79] through the contact groups and the assistance activities implemented by the Congress of Local and Regional Authorities of the Council of Europe,[80] whereas various legal studies take into account the Charter as a potential reference framework for assessing the situation of local self-government in single extra-EU-countries.[81]

§ 2. The Charter as a Source of International, EU and Domestic Law

In this Section it will be examined first what is the status of the Charter under both public international law and EU law as well as what role does the Charter play under Council of Europe law (I.). Further, it will be addressed the issue of how the Congress monitoring practice works and whether its recommendations and resolutions are soft or hard law (II) and, finally, it will be answered the question whether and, if so, to what extent Charter's provisions are self-executing in the domestic law of the Council of Europe member States (III).

I. Regional Treaty Law

The Charter is an international agreement which commits Council of Europe member States to principles and rights of local self-government below which none of them must fall and whose aim is harmonisation (but not uniformation) of their local administrative systems.[82] The questions to be preliminarly dealt with before understanding what these standards are and to what extent they are abided by the member States are: (1) the international binding force of the treaty, (2) the aims and the standards of interpretation according to which it should be construed, and (3) how monitoring

---

79 See: Ibero-American Charter of Local Self-Government, adopted by the Ibero-American Organization of Intermunicipal Cooperation at its meeting in Caracas on 22 November 1990, which explicitly refers to the European Charter of Local Self-Government; Baseline Text for a "Framework Agreement on Local Self-Government within the MERCOSUR", approved by the 12th Congress of Latin-American Parliaments in Cuzco on 28 November 2001.

80 See: Parliamentary Assembly, Recommendation No. 1770 (2006), *on the promotion of local self-government along Council of Europe borders.*

81 See for instance: B.E. Dollery, J. Garcea, E. C. Le Sage (eds.), *Local Government Reform: A Comparative Analysis of Advanced Anglo-American Countries*, Cheltenham/Northampton, 2008, 187; M.A. Villagràn Abarzuà, *Verfassungsrechtliche Grundlagen der Gemeindeverwaltung in Chile*, Frankfurt am Main, 2010; H. Scholler, *Rechtsreform und Rechtstransfer in der Mongolei*, Münster, 2010, 40.

82 H. Heberlein, *Die Europäische Charta der kommunalen Selbstverwaltung*, in: J. Ipsen and H-W. Rengeling (eds.), *Gemeinden und Kreise in einem vereinten Europa*, 1999, 57; G. Engel, *Struktur und Umsetzung der EKC*, in: F.L. Knemeyer (ed.), *cit*., 1990, 43; F.L. Knemeyer, *Die Europäische Charta der kommunalen Selbstverwaltung*, DÖV, Vol. (23), 1988, 1001; J. Kaltenborn, *Der Schutz der kommunalen Selbstverwaltung im Recht der Europäischen Union*, Baden-Baden, 1996, 57. See also the Explanatory Report attached to the Charter: «*The purpose of the European Charter of Local Self-Government is to make good the lack of common European standards for measuring and safeguarding the rights of local authorities».*

mechanisms work

1. Undertakings *à la Carte* (Articles 1 and 12)

Some legal scholars hold that the Charter is just a political declaration of principles, a mere *pledge*[83] without any meaningful legal substance.[84] On the contrary, it is and has to be considered a *contract,* aimed at solving specific co-operation or co-ordination problems between sovereign States[85, notably at strengthening European integration and democracy from the grassroots.86

The question of the legal nature of the Charter was left open by the experts of the Conference of Local and Regional Authorities and was ultimately dealt with by the Conference of Ministers responsible for Local Government in Rome on November 6-8, 1984. Therein «*the Ministers, with regard to the legal form which the Charter should take*, *express themselves in the following manner: twelve in favour of a Convention, six in favour of a Recommendation»*.[87] In other words, the Ministers rejected the initial proposal of making the Charter an uncompelling declaration and conveying it the value of a soft law declaration. Yet, the Charter is not only formally, but also substantially to be considered as a binding treaty. It is in fact a multilateral international agreement, i.e. there is mutual consent on a list of obligations by the Contracting Parties which entered into a negotiation with their counterparts and it binds only States and not, as it was the case of the aforementioned European Charter of Local Liberties (1953), subnational authorities or their representatives. Moreover, the Charter is explicitly subject to international law and not to the law of

---

83 The terms *pledges* and *contracts* were first used by: K. Raustiala, *Form and Substance in International Agreements*, (99) American Journal of International Law, 2005, 581.

84 So, for instance: V. Parisio, *La Carta Europea delle Autonomie Locali e il Disegno di Legge Delega per la "Carta delle Autonomi Locali" italiana: mera coincidenza nominale o convergenza sostanziale?*, in: Il Foro amministrativo, 2007, 3612 ff..

85 That this should be the aim of a treaty is generally recognized by international lawyers. See for all: D.B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford, 2012, 17.

86 See the reasoning by V. Parisio, *Europa delle autonomie locali e principio di sussidiarietà*: *la Carta europea delle autonomie locali*, in *Il Foro Amministrativo*, 1995, 2126, noting that: «*there cannot be real integration of States as subjects of international law, if in their territorial subdivisions there is no sort of elements which make for their democratic organisation*» (translation by the author). As for Article 10 of the Charter, in particular, one could say it was aimed at improving and developing cooperation between units of different States which considered they would have achieved mutual gains in terms of regional, urban and rural development, environmental protection, discharge of public facilities and services. So for instance: A. Oddenino and P. Silvestri, *Autonomie locali e istituzioni sovranazionali*, in: S. Sicardi (ed.), *Le autonomie territoriali e funzionali nella provincia di Cuneo in prospettiva trasfrontaliera (alla luce del principio di sussidiarietà)*, Napoli, 2011, 128 and I. Grassi, *Il ruolo europeo delle autonomie locali,* in: Le leggi civili commentate, 1992, 1186-1187. According to J.F. Akandji-Kombé and G. Marcou, *Report on the Impact of the Lisbon Treaty on the European Charter of Local Self-Government*, CDLR (2011) 51, 3 October 2011, Article 10 gives rise to mutual obligations and can be subject to a condition of reciprocity.

87 See: Conclusions of Council of Europe Conference of Ministers Responsible for Local Government, held in Rome on 6-8 November 1984, Council of Europe, MCL-6 (84) 6, 6-8 November 1984, in www.coe.int/archives.

one of the signatory States.[88] In fact, even if signed within the framework of an international regional organisation, notably the Council of Europe, the treaty is concluded in written form among States, as provided by Article 2, para. 1 in combination with Article 5 of the Vienna Convention on the Law of the Treaties (1969), and the interpretation of its terms thus cannot but follow the general rules of international law as codified in the Convention itself (see *infra*). That the treaty is governed by international law is made clear also by Article 1 of the Charter, whereby: «*The Parties undertake to consider themselves bound by the following articles in the manner and to the extent prescribed in Article 12 of this Charter».* The unusual expression "undertake to consider themselves bound" appears *prima facie* superfluous, since international agreements are *per se* to be considered binding upon the Parties according to the principle *pacta sunt servanda*, as enshrined in Article 26 of the Vienna Convention on the Law of the Treaties (1969), insofar as they are in force and they are valid.[89] However, this formulation is not redundant at all, but it echoes that of the European Social Charter (1961), which displayed a so-called *à la carte* system of obligations. In other words, the Parties ought not to regard themselves as *tout court* bound by the treaty's provisions, but only insofar as designed by the so-called "flexibility clause" of Article 12. In fact, since the Committee of Ministers had previously stressed that the existing differences between local government systems of the member States precluded the adoption of a convention laying down common standards of local self-government, the Charter was designed to provide enough flexibility, by leaving the Parties free to select at least twenty out of the thirty paragraphs of Part I (Articles 2-11), «*including at least ten from a nucleus of fourteen basic principles»*. For this purpose, the Parties, when depositing their instrument of ratification, had explicitly to declare by what obligations they undertook themselves to be bound by (so-called "contracting-in") or, alternatively, they could enter reservations with reference to specific obligations they did not want themselves to be bound by (so-called "contracting-out"), even if only to the extent as allowed by Article 12. In other words, reservations limiting the scope of application of the Charter beyond what Article 12 sets out, would have been prohibited pursuant to Article 19, lett. c) of the Vienna Convention on the Law of the Treaties (1969), i.e. the reservation would have been incompatible with the object and purpose of the treaty.[90] Further, at any time, the Parties can notify the Secretary General of the Council of Europe to consider themselves bound by other paragraphs which they previously did not accept. To the contrary, they cannot enter reservations after depositing the instrument of ratification. If however willing not to be any longer bound by certain obligations, the Parties can, after five years from its

---

88 Cf. B. Weiss, *Einführung und Umsetzung der EKC in Deutschland: insbesondere in Bayern und Nordrhein-Westfalen,* Frankfurt am Main, 1996, 23; I. Grassi, *cit*., 1180.

89 See: J. Salmon, *Article 26*, in: O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of the Treaties* – A Commentary, Vol. I, 676, whereby: «*the rule of the obligatory character of the treay to the parties is a well established norm of general international law*».

90 So also: B. Schaffarzik, *cit*., 111.

entering into force, denounce «*any paragraph of Part I of the Charter accepted by it provided that the Party remains bound by the number and type of paragraphs stipulated in Article 12, paragraph 1»,* that is to say insofar as they still commit to the nucleus of ten principles (Article 17, para. 2), or can even denounce the treaty as a whole (Article 17, para. 1).

In a report issued in 2011, the Congress assessed the current situation regarding reservations to the Charter by the member States, by considering it from both the point of view of the States and from the point of view of each Charter's provision. Among the States which entered reservations to the most provisions one shall remember Turkey, Serbia, Georgia, the Czech Republic, Switzerland and Liechtenstein, whereas the provisions which were most object of reservation are those regarding financial compensation of local representatives (Article 7, para. 2), the conditions of service of local staff (Article 6, para. 2), administrative supervision of legality (Article 8, para. 2), consultation within the framework of allocation of financial resources (Article 9, para. 6) and co-operation of local authorities with their counterparts abroad (Article 10, para. 3). To sum up, eighty three reservations (6 percent of the total) were counted with a general trends towards withdrawal of reservations by many Contracting Parties.[91] Though, the Congress also outlined the apparent contradiction whereby the reservations system, on one hand, sets out a hard core of fourteen fundamental principles but, on the other hand, it allows for entering reservations to at least four of them.[92] In this respect, the report does not grasp another problem which relates also to the European Social Charter and, in the EU, to the Treaty of Amsterdam, that is to say whether the interpretation of the treaty can vary depending on what paragraphs each Contracting Party has accepted.[93] In particular, the Contracting Parties can consider themselves bound by Article 2, which requires the "principle of local self-government" being embedded in domestic law and where practicable in the Constitution, but then they freely opt out other relevant provisions which contribute to the definition of the same principle and in particular Article 3. In doing so, yet, the Contracting Parties would not fully comply with Article 2. This shows that Article 12, para. 1 of the Charter was drafted in a poor way, since it should have required that, whenever a State commits to Article 2, it should at least be obliged to commit also to Article 3, which gives a first definition of what local self-government is and to other provisions which the Contracting Parties might have considered essential for the definition of the principle (e.g. Article 4, para. 1, 2, 3 and 4 or Article 9, para. 1).

---

91 See, for instance, the declarations contained in a note verbale from the Permanent Representation to the Council of Europe of Bulgaria (2012) and from the Minister of Foreign Affairs of the Republic of Azerbaijan (2013), to be found at the following address: www.conventions.coe.int

92 Congress of Local and Regional Authorities, *Reservations and Declarations to the European Charter of Local Self-Government,* CPL (21) 5, 28 September 2011.

93 So also: B. Weiss, *cit*., 86-88. Yet, B. Schaffarzik, *cit*., 278 and again 286 appears to overlook this aspect.

Nonetheless, it can be affirmed that the present design of the system of reservations is certainly problematic, but the establishment of the Congress, that is to say of an advisory body charged *inter alia* with the task of ensuring uniform compliance with the treaty by the Contracting Parties allows to construe each provision in the light of the overall treaty and not only of the part of the treaty by which the Parties are explicitly bound. In particular, it deserves to be mentioned that, according to many monitoring reports, several reservations could be easily lifted by those member States already complying with the provision they have opted out.

2. Standards of Interpretation of the Charter

As previously mentioned, the Charter is an international treaty which ought to be construed pursuant to the general rules laid down in the Vienna Convention on the Law of the Treaties.[94] Further, as allowed by Article 5 of the same Convention, the Charter can be construed in the light of the aims laid down in the 1949 Statute of the Council of Europe. Additionally, the flexible but limited nucleus of principles and rights of local self-government is relevant for the Charter's interpretation insofar as it introduces the questions of whether the doctrines of the "margin of appreciation" and of the "core", both used by the European Court of Human Rights (ECtHR), can be applied also for interpreting the Charter's provisions.

2.1. The Vienna Convention on the Law of the Treaties

According to Article 31, para. 1 of the Convention, the Charter shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (systematic and teleological interpretation). The context includes the text, the preamble[95] and annexes of the treaty, such as the Additional Protocol to the Charter. Yet, the explanatory report attached to the Charter does not come under Article 31, para. 2, lett. a) of the Vienna Convention, since it is not a legally binding agreement on the interpretation of the text. Though, as it itself stipulates, it «*may facilitate the understanding of its provisions*» and could be used as a supplementary mean of interpretation pursuant to Article 32.[96] Together with the context there shall be taken into account any subsequent agreement between the parties, in particular those drawn up within the framework of the same specialised agency (e.g. the Convention on the

---

94 So also: B. Schaffarzik, *cit*., 62 and K. Meyer, *cit*., 86.

95 The Preamble of a treaty does not create any legal committment. It merely serves as a context for the treaty's interpretation. Cf. H. D. Treviranus, *Preamble*, in: R. Bernhardt (ed.), EPIL, Vol. 3, 1997, 1098. Cf. also ECHR, Judgment of 21 February 1975, Golder, Serie A, no. 18, paras. 29 ff.

96 So: R. K. Gardiner, *Treaty Interpretation*, Oxford, 2008, xcvi-xcvii.

Participation of Foreigners in Public Life at Local Level of 1992, the European Charter for Regional or Minority Languages of 1992, the European Landscape Convention of 2000 or the Council of Europe Reference Framework for Regional Democracy of 2009) and subsequent practice regarding the interpretation of the treaty or application of its provisions (e.g. reports, recommendations and resolutions by the Parliamentary Assembly, the Committee of Ministers and the Congress of Local and Regional Authorities or opinions by the so-called Venice Commission), as well as any relevant rules of international law applicable in the relations between the parties.

Article 31, para. 4 of the Vienna Convention stipulates that a special meaning shall be given to a term if it is established that the parties so intended. Alike the ECHR, the terms used in the Charter shall indeed be regarded as having an autonomous meaning and cannot be made equivalent to the definition of the terms given to them under domestic law.[97] Further, pursuant to Article 32, recourse can be made to supplementary means of interpretation, such as the preparatory works of the Charter and the circumstances of its conclusion, in order to support the meaning resulting from the initial interpretation based upon Article 31 or when the term to be interpreted is still ambiguous or obscure or the interpretation pursuant to Article 31 leads to an absurd or unreasonable outcome.[98] This does not of course rule out that relevant rules of the organisation can also be taken into account for the purpose of the interpration of the Charter.

Finally, it should be borne in mind that, pursuant to Article 33 of the Convention,[99] if the treaty has been authenticated in two or more languages is equally authoritative in each language, unless the treaty provides that a particular text shall prevail. In the present case, as mentioned above, both the English and the French texts are authentic.

2.2. The Statute of the Council of Europe

As mentioned above, the Charter was adopted as a binding treaty for solving specific coordination and co-operation problems between member States. In particular, it aimed at enhancing the efforts towards a more complete European integration based on municipal federalism. But the aims of the Charter cannot be fully understood if its provisions are not read in the light of the general aims of

---

97 J-M. Sorel and V. Boré Eveno, *Article 31 Convention of 1969*, in: O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of the Treaties*, Oxford, 2011, 804 and ff.

98 Y. Le Bouthillier, *Article 32 Convention of 1969*, in: O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of the Treaties*, Oxford, 2011, 841 and ff.

99 A. Papaux and R. Samson, *Article 33 Convention of 1969*, in: O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of the Treaties*, Oxford, 2011, 866 and ff.

the Council of Europe.[100] In other words, local self-government or local autonomy were deemed to deserve enhancement through the adoption of a common European yardstick because this institution was best suited to sustain and promote those ideals and values which constitute a common heritage of the European peoples. In particular, as both the Preamble and Article 1, lett. a) and b) of the Statute of the Council of Europe recall, the ideals and values pursued by the Council should be the source of individual freedom, political liberty and the rule of law and should contribute to a greater unity and to economic and social progress, as well as to maintan and further realise human rights. Local self-government ought thus to be construed within this set of themes, that is to say it should be conceived as an institution through which citizens' political participation can best be fostered, the development of human society promoted and economic and social progress enhanced. All these aims are not difficult to reconcile with local self-government, provided that a non-corporatist conception of the Charter prevails (see *infra* § 3.I.2.), that is to say local self-government has to be understood as a right of territorial public authorities, which ought to allow citizens to participate in the conduct of public affairs through different mechanisms complementing the traditional representative democratic ones, which ought to comply with the international standards on human rights law and which ought to be an incubator of economic growth and social inclusion.

In this respect, therefore, it might be said that a particular relevance for the Charter's construction assume the aforementioned Additional Protocol, the case-law of the ECtHR assessing violations of the ECHR by local and regional authorities,[101] recommendations and resolutions of Council of Europe bodies on the implementation of the ECHR and of the ESC at a decentralised level[102] as well as economic theories emphasizing the advantages for the citizens maximized by institutional competition between different tiers of government but also between local authorities themselves (so-called "fiscal federalism").[103] An interpretation of the guarantees of local self-government departing from the consideration of the aforementioned values would infringe upon the Statute of the Council of Europe.

---

100 So briefly also B. Schaffarzik, *cit*., 46-47.

101 See for instance: European Committee for Local and Regional Democracy, *Selected Judgments of the European Court of Human Rights concerning local and regional authorities*, CDLR(2013)12, 1 March 2013.

102 See *inter alia*: European Committee on Local and Regional Democracy (CDLR), *Draft report and Policy proposals to strengthen awareness raising of the human-rights dimension of local and regional governance*, October 2013; Council of Europe Conference of Ministers responsible for Local and Regional Government, *Human Rights at Local Level*, 17th Session, Kyiv (Ukraine) 3-4 November 2011 – MCL17(2011)11, 7-9; Congress of Local and Regional Authorities of the Council of Europe, *The links between local and regional democracy and human rights,* 2007 – CG(14)6REP. Statement by the Commissioner for Human Rights, Thomas Hammarberg, at the 20th Session of the Congress of Local and Regional Authorities, *Bringing human rights home: human rights action at the local level,* CommDH/Speech(2011)3. On the role of the Congress in this respect see: A. Kiefer, *Human Rights: Local and Regional Authorities in Action,* in: W. Benedek et al. (eds.), in: European Yearbook on Human Rights, 2011.

103 These theories were formulated by economists like Mursgrave, Oates and Tiebout, all mentioned in a 2000 Council of Europe report on the effects on the financial autonomy of local and regional authorities set at European level on national public debt. See: R. Musgrave, *Theory of Fiscal Federalism*, in: Public Finance, 24 (4) (1969), 521-532; W.E. Oates, *Fiscal Federalism*, New York, 1972; C.M. Tiebout, *An economic theory of fiscal decentralisation in public finance needs, sources and utilisation*, Princeton, 1961.

2.3. The "Margin of Appreciation" and the "Core Area" Doctrines

Traditionally, the margin of appreciation indicates the measure of discretion used by member States in applying the standards of the European Convention on Human Rights (ECHR).[104] Since some paragraphs of the Charter have to be regarded as a compulsory nucleus and some other not, one could argue that with reference to them the Contracting Parties will be accorded a margin of appreciation narrower than it is the case for all other provisions. In fact, even if the "flexibility clause" of Article 12 already gives enough leeway to the Contracting Parties for taking into account practical impediments or constitutional specificities by making a declaration or entering a reservation, the Charter as a whole can nonetheless be construed as building on the margin of appreciation doctrine, as applied to the ECHR by the ECtHR and, to a certain extent, to the ESC by the Committee[105] as well as beyond Council of Europe borders by other international courts and tribunals,[106] since legislative reservation clauses enshrined in several provisions of the Charter and other expressions pointing at the exercise of discretion at national level do reveal that the Contracting Parties are to a certain extent allowed to determine when and how a certain rule or a certain principle shall apply in their domestic legal orders.[107] The application of the margin of appreciation doctrine appears to be even more justified if one takes into account Article 5 of the Vienna Convention on the Law of the Treaties of 1969, whereby relevant rules of the organisation in the framework of which the treaty was adopted can also be used for its interpretation. The exact extent of the margin of appreciation of the member States will be assessed while taking into account the Congress monitoring practice in a provision-by-provision analysis in Section § 3, Parts I and II.

A general limitation to the latitude allowed to the Contracting Parties in ensuring observance of the Charter's provisions exists and can be inspired by the notion of the core of principles and rights or minimum core obligations. This doctrine, which was developed within the context of German constitutional theory[108] and which circulated to other legal orders, including Spain, Switzerland and

---

104 The doctrine was developed by the Strasbourg Court starting in 1976 with the case *Handyside v. United Kingdom* (Application No. 5493/72). The literature on this doctrine is voluminous. In English see: Y. Arai (ed.), *The Margin of Appreciation Doctrine and the Principle of Proportionality*, Antwerpen-Oxford-New York, 2001.

105 See: H. Cullen, *The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights*, in: Human Rights Law Review*,* 2009, 69 ff.

106 The use by international courts or tribunals of a general margin of appreciation doctrine is showed by: Y. Shany, *Toward a General Margin of Appreciation Doctrine in International Law*, in: EJIL 16 (2005), 907–940.

107 B. Schaffarzik, *cit*., 278; C. Himsworth, *Treaty-Making*, *cit*., 8; D. Schefold, *Problems of Local Self-Government in the Netherlands: a study elaborated by the Council of Europe*, in: www.issirfa.cnr.it, 2006.

108 Cf. Article 19, para. 2 of the German Basic Law. See: The leading case in this field is BVerfGE 40, 237 (248) in 1976. The classification of this judicialdoctrine as *Wesentlichkeitstheorie* (theory of essentiality) can be attributed to T. Oppermann, *Nach welchen rechtlichen Grundsätzen sind das öffentliche Schulwesen und die Stellung der an ihm Beteiligten zu ordnen?*, in *51. Deutschen Juristentag*, C, 1976, 48. R. Alexy, *A Theory of Constitutional Rights,* Oxford,

Portugal, and which is applied also in the framework of the ECHR (so-called "very essence"),[109] implies that limitations to fundamental rights introduced by law must not restrict or reduce them to such an extent that their very essence (*Wesensgehalt*) is impaired. Alternatively, core rights could also refer to the idea that some rights - rather than aspects thereof - are more important than others and ought thus to be balanced between each other.

The application of this doctrine to the subject matter of local self-government might *prima facie* not seem appropriate, since local self-government was not explicitly proclaimed as a fundamental right by the Charter. To the contrary, as seen above, many of the initial references to local autonomy as "the bulwark of personal liberties" or to local autonomy as a fundamental right were eventually set aside in the final text. Nonetheless, one might still argue that, first of all, there is an evident analogy between the Charter and human rights treaties adopted within the framework of the Council of Europe, which can be summed up as follows: the Charter owes its name to the historical precedents of the chartered rights of European medieval towns and the initiative to draw up the Charter was taken for the reasons and objectives outlined above. Without these initial motives, no Charter would have been adopted within the framework of the Council of Europe.[110]

Further, also under German law (see *infra* second Chapter), the right to local self-administration is no longer considered as a fundamental right, yet the Federal Constitutional Court has recognized that legislative reservation clauses cannot encroach upon the "core area" (*Kernbereich*) of powers and responsibilities of local authorities.[111] Similar reasonings are common among legal scholars and in the case-law in Austria, France, Portugal, Spain, Switzerland and Italy.[112] Additionally, as mentioned, the Charter also distinguishes between a nucleus or core of basic principles and/or rights

---

2002, 267 ff.; P. Häberle, *Die Wesensgehaltsgarantie des Art. 19 II – zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt*, 3rd ed., 1983, 31 ff., 51 ff.

109 ECHR, *Belgian Linguistic Case (merits),* 23 July 1968, Series A. No. 6, 32, § 5. Cf. Y, Arai, *cit*., 37 and ff; E. Klein, *Der Schutz der Grund- und Menschenrechte durch den EGMR*, in: D. Merten and H.J. Papier (eds.), *Handbuch der Grundrechte in Deutschland und in Europa,* Vol. 6, 2010, 606.

110 The Congress still attempts to juxtapose the two treaties by affirming that «*alongside the European Convention on Human Rights dealing with the rights and fundamental freedoms of human beings, the Charter is currently the only binding European legal instrument which sets out the rights and freedoms of local authorities in Europe».* Cf. Recommendation No. 18 (1996) *on guiding principles for the action of the Congress when preparing reports on Local and Regional Democracy in member States and applicant States,* § 4 lett. b) and, previously, see also: Standing Conference of Local and Regional Authorities of Europe, Opinion No. 15 (1962).

111 On the so-called "borrowings from the constitutional theory of fundamental rights" see: BVerfGE 56, 298 (312) and cf.: J. Ipsen, *Schutzbereich der Selbstverwaltungsgarantie und Einwirkungsmöglichkeiten des Gesetzgebers*, in ZG (1994), 194 and ff.

112 Cf. T. Groppi, *La garanzia dell'autonomia costituzionale degli enti locali: un'analisi comparata*, in: Le Regioni 1998, 1029. Cf. in Switzerland: U. Häfelin/G. Müller/F. Uhlmann, *Allgemeines Verwaltungsrecht*, 6th ed., Zürich/St. Gallen, 2010, Rz. 1384 and ff., 1395; Spanish Constitutional Tribunal, SSTC 32/1981, dated July 28th, and 240/2006, dated July 20th, in which local self-government is regarded as an "institutional guarantee", whose "core area" cannot be encroached upon. For Austria: P. Pernthaler, *Die verfassungsrechtlichen Schranken der Selbstverwaltung in Österreich*, Wien, 1967, 17. For Italy, see *infra* third Chapter.

and a peripheral or edge area of principles and/or rights. If a hierarchy among rights or principles of the Charter exists, one cannot see why the "core area" doctrine could not be applied also to each right or principle embedded in the Charter.[113] Finally, it should be mentioned that Article 2 of the Charter requires that «*the principle of local self-government shall be recognised in domestic legislation, and where practicable in the Constitution*». In view of its importance to the organisation of the State and for the legal protection of the activities carried out by local authorities, enshrined in Article 11, a factual guarantee of local self-government by the central government was deemed not to be sufficient by the drafters of the Charter. Instead, the signatory States agreed that the "principle" should have been formally enshrined in the domestic legal order, either in an act of Parliament or in the Constitution (see *infra* § 3), so as to prevent that its essential content could be encroached upon by mere government by-laws. Even if only enshrined in primary law, i.e. in a statute, in fact, this does not mean that the principle of local self-government can be derogated from by another statute establishing, for instance, that the State is a unitary one, which does away with local autonomy. If one holds that the Charter has a legal meaning and not just a political one, one must also be ready to recognize that the very essence of local self-government should be abided by in any case so as that no Contracting Party which has enshrined the principle in its domestic law can organise its structure ignoring local self-government, a minimum core of which shall always be ensured.[114] What amounts to the core can be derived by means of interpretation from the following Articles from 3 to 11. So, the Contracting Parties have the power to extend or restrict the core either by ratifying the Charter as a whole or only certain provisions as laid down in Article 12, para. 1. Hence, for the purpose of the present work, the core doctrine will be applied while interpreting the concept and the institutional design of the Charter.[115]

3. Sources of Monitoring Mechanisms

A last focus shall be dedicated to pointing out how the international enforcement machinery of the Charter works and what sources of international law are opinions, recommendations and resolutions, issued by the Committee of Ministers of the Council of Europe on behalf of the

---

113 So also T. I. Schmidt, *Sind die EG und die EU an die Europäische Charta der kommunalen Selbstverwaltung gebunden?,* in EuR (2003), 936 ff, noting that each guarantee of the Charter has its own core.

114 Cf. T. Groppi, *La garanzia dell'autonomia costituzionale degli enti locali: un'analisi comparata*, in: Le Regioni n. 5/1998, 1025. This could also be deemed true in those legal orders where a recognition of local self-government lacks at both constitutional and ordinary level, such as in the Netherlands, where the principle is deemed to be rooted in tradition and where the Constitution simply recognizes the powers of local authorities that existed before the constitutional State was founded (Article 124). However, without an explicit recognition, the core of local autonomy is something even more vague and indistinct. So also: Congress of Local and Regional Authorities, *Local and Regional Democracy in the Netherlands*, CG (26) 7, 26 March 2014, § 48-53.

115 So also: B. Schaffarzik, *cit.,* 347; D. Thürer, *cit*., 230 and most recently: I. Stirn, *Lokale und regionale Selbstverwaltung in Europa*, Karlsruhe, 2013, 161; F. Merloni, *Prospects for strengthening the role of the European Charter of Local Self-Government*, in: CoE, *The European Charter of Local Self-Government - 20th anniversary*, Strasbourg, 2005, 52; M. W. Schneider, *cit.*, 301-2. *Contra* see: H. Heberlein, *cit*., 58.

Congress of Local and Regional Authorities.

3.1. The "Weak" Monitoring Mechanism of the Charter (Article 14)

The Charter lacks an international enforcement machinery akin to that provided for by the European Convention on Human Rights, which allows for individual complaints before the Strasbourg Court (Articles 33 and 34 ECHR) or by the European Social Charter, which enables a committee of independent experts to scrutinize reports regularly submitted by the member States (Article 24 ESC, as revised by 1991 Protocol amending the Charter) and also to adjudicate upon collective complaints lodged by organisations entitled to do so (Protocol amending the Charter signed in 1995).

As the only one "monitoring" prescription, Article 14 of the European Charter of Local Self-Goverment creates the mere obligation upon the Contracting Parties to inform the Secretary General of the Council of Europe about «*all relevant information concerning legislative provisions and other measures taken by it for the purposes of complying with the terms of this Charter*». No immediate legal consequences are explicitly bound with the possible violation of this obligation, so that the mechanism appears to have in practice no binding force.[116] Theoretically, a member State could complain about another State non-compliance with the obligation to provide information before the Council of Europe, since the Charter provides for obligations to be complied with by States. However, this monitoring procedure led by State action appears to be highly uneffective. Until now, no signatory State has ever respected Article 14. Peer pressure in fact cannot be an effective tool to ensure compliance with the Charter's provisions, since there is only a very weak self-interest on the part of the single Contracting Parties to ensure that local authorities in other signatory States enjoy a high-degree of self-government *vis-à-vis* their own State.[117]

The reason why the Contracting Parties agreed on a rather weak monitoring machinery different from that provided by the ESC lies in the «*appreciable differences in character*» existing between the two treaties. The Social Charter provides for a series of subjective economic and social rights of individuals, whereas local self-government concerns mainly relations between central government and other public authorities established building on the principle of territorial decentralisation.

---

116 So also: B. Schaffarzik, *cit.*, 113-116; M.W. Schneider, *cit.*, 344; J. Tornos, *Improving control for the implementation of the European Charter of Local Self-Government*, in: Conference on the European Charter of Local Self-Government, Barcelona 23-25 January 1992, 181.

117 Cf. B. Schaffarzik, *cit.*, 118. Cf. E. Posner and J. Goldsmith, *cit.*, 110 and 120: «*Beyond enforcement mechanisms internal to the treaty, states do not coerce other states into complying with the modern multilateral human rights treaties. States do occasionally coerce other states to improve their human rights practices, but this enforcement is episodic and correlates with the coercing state's strategic interest.* (…) *While it is clear that states (and citizens in states) often take an interest in the well-being of persons in other states, especially conationals or coethnics, this interest has historically been weaker than the state's interest in local economic or security matters.*»

Since the Charter affects the structure and organisation of the State itself, a far-reaching supervision system threatened to display the Council of Europe's intention of imposing alien models on the member States, thus altering the distribution of political powers within their domestic constitutional orders. In this respect, the Memorandum to the Draft Charter attempted to reassure Council of Europe member States that no such intent existed, since the Charter was meant to provide an additional common means of safeguarding a blessing that was yet part of the legal traditions of many Council of Europe member States and not due to be artificially created or imposed by adopting the Charter.

Originally, the Draft Charter provided that the Contracting Parties should have sent to the Secretary General, «*at five-yearly intervals, reports on the application of such provisions of the Charter as they have accepted, as well as on the situation with regard to those provisions by which they are not bound. These reports shall be communicated to the Conference of Local and Regional Authorities of Europe for an opinion*». During negotiations on the treaty, the Committee on Local Structures and Finance of the Standing Conference reinforced its original proposal as follows: reports submitted by each State to the Secretary General should have been examined by the Steering Committee for Regional and Municipal Matters (CDRM), which should have then submitted its conclusions to the Committee of Ministers. Further, the Secretary General should have transmitted copies of the reports and conclusions to the Parliamentary Assembly and the Standing Conference for their opinions. After receipt of the opinions, the Committee of Ministers should have determined, by a two-thirds majority, in accordance with Article 20, lett. (d) of the Statute of the Council of Europe, whether each Party had complied with the undertakings which it accepted under the Charter. If the Committee of Ministers had considered that a Party had not fulfilled the undertakings, it should had invited that Party to take necessary measures to ensure they would have been fulfilled and, ultimately, in case of reitarated non-compliance, it might have suspended or expulsed the member State from the organisation (Articles 8-9 of the Statute of the Council of Europe). None of the aforementioned provisions were accepted into the final text of the Charter as revised by the Steering Committee for Regional and Municipal Matters (CDRM). The obligation to transmit reports to the Secretary General was replaced by the mere obligation upon the State to inform the Secretary General, without mentioning the extent to which information should have been provided. Certainly, since it was not expressly mentioned, information should not concern commitments that every Contracting Party has not accepted, but it is yet not clear when and how often exactly the State should deliver information to the Secretary General.

3.2. The “Strong” Monitoring Mechanism of the Congress

The relative ambiguity of the Charter was then construed as disclosing a free mandate for the Standing Conference (and later for the Congress of Local and Regional Authorities) and the Committee of Ministers to develop a practice of monitoring on the application of the Charter in the Contracting Parties within the limits of the mandate of the Council of Europe. As the Explanatory Report to the Charter recalls, in fact, an institutionalised system of control analogous to that of the European Social Charter was eventually dispensed, «*given that the presence within the Council of Europe of the Congress with direct access to the Committee of Ministers would ensure adequate political control of compliance by the parties with the requirements of the Charter*».

3.2.1. Legal Basis in Council of Europe Law

The legal basis for the monitoring activities of the Congress cannot be found by simply referring to Article 15, lett. b), sentence 2 of the Statute of the Council of Europe of 5 May 1949, which reads as follows: «*In appropriate cases, the conclusions of the Committee of Ministers may take the form of recommendations to the governments of members, and the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations».* On this basis, in fact, no systematic monitoring mechanism can really be established. Committee of Ministers' recommendations constitute only a mere possibility and member States' governments do not have any legal obligation to reply to these recommendations by issuing a report.[118] The circumstance that no explicit norm on monitoring the implementation of Council of Europe treaties can be found in its Statute does not mean that this power cannot be derived from the so-called "implied powers" that every international organisation enjoys under international law.

The theory of implied powers was developed by the International Court of Justice (ICJ) with reference to the UN-Charter[119] and is now generally accepted as a corollary of Article 31 read in conjunction with Article 5 of the Vienna Convention on the Law of the Treaties (1969),[120] whereby a treaty should be interpreted in the light of its object and purpose. This means that any international organisation is allowed to carry out certain activities which are not expressly provided for by the treaty regulating its functioning, but which are indispensable for the fulfillment of its purposes and duties. In the case of the Council of Europe, it comes to the question of what kind of "implied powers" it relies upon, i.e. whether or not it enjoys the power to establish a monitoring mechanism

---

118 *Ibidem*, 120. *Contra*: K. Carstens, *Das Recht des Europarats*, Berlin, 1956, 86.

119 ICJ, *Reparation for Injuries*, (n. 39), 182 – 1949 e ICJ, *Certain Expenses*, (n. 44), 168 – 1962.

120 O. Dörr, *Article 31 – Interpretation of Treaties,* in: O. Dörr and C. Schmalenbach (eds.), *Vienna Convention on the Law of the Treaties: A Commentary,* Berlin/Heidelberg, 2012, 545-548.

to assess compliance of the Charter by its member States.

First and foremost, it might be argued that Article 3, para. 2 and Article 8 of the Statute of the Council of Europe constitute the basis for the Council to establish a monitoring procedure on the Contracting Parties' compliance with the treaty law they have ratified, including the Charter. In fact, Article 3, para. 2 stipulates that the member States of the Council of Europe «*ought to collaborate sincerely and effectively in the realisation of the aim of the Council*». If any member State seriously violates Article 3 it may be suspended «*from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine*». These provisions imply that the Council of Europe is assigned with the power to supervise member States' compliance with the international commitments they have made.[121]

A different question is whether the Council is competent to monitor the implementation of the Charter's provisions. This can be confirmed, provided that the enhancement of democratic institutions is one of the core businesses of its mandate. Following to the Charter and to a widespread opinion among scholars, local self-government is one of the main foundations of any democratic regime (*see* Preamble of the Charter), it contributes to the definition of the "rule of law"[122] and to the realisation of democracy at local level.[123] Nor one could argue that monitoring activities cannot take place, because local self-government pertains to the so-called *domaine reservé* of the member States. In fact, at least since the Charter was signed, this subject matter has no longer been a typical internal affair of a member State but has gained a global dimension.[124]

Finally, it must be assessed what kind of monitoring procedure does the theory of "implied powers" allow. In this respect, it might be borne in mind that the theory of implied powers cannot justify an obligation on the part of the States to prepare and submit reports to the Council. In fact, the aforementioned theory construes extensively only the rights of the international organisations,

---

121 B. Schaffarzik, *cit.*, 126; J. Malenovsky, *Suivi des engagements des Etats membres du Conseil de l'Europe par son Assemblee Parlamentaire. Une course difficile entre droit et politique*, in: Annuaire français de droit international, 43 (1997), 637; D. Thürer, *cit.*, 225-226; J. Tornos, *cit*., 1993, 180 ff..

122 K. Sobota, *Das Prinzip Rechtsstaat*, Tübingen, 1997, who identified more than one hundred characteristics of the principle of the rule of law, including "local self-government" (§ 53).

123 Strong normative justifications for local autonomy as local democracy are expressed by: D: Hill, *Democratic Theory and Local Government* London, 1974; G. Stoker, *Introduction: Normative Theories of Local Government and Local Democracy* in: D. King and G. Stoker (eds.) *Rethinking Local Democracy,* 1996.

124 Some authors hold even that there is a general trend towards "city empowerment" against State authorities under international law and that cities are increasingly shaping globalisation processes without and instead of States: G. E. Frug and D. J. Barron, *International Local Government Law*, The Urban Lawyer 38 (2006); Y. Blank, *Localism in the New Global Order*, Harvard International Law Journal, Vol. 47- No. 1, 2006.

without implying that the Contracting Parties could be burdened by further positive obligations to do anything they have not been required by the treaty they have signed. In other words, the Council of Europe cannot coerce the member States into reporting on their compliance with treaty's provisions if this power is not explicitly mentioned in binding documents.[125] Instead, the Council may, for example, accept to review Charter's compliance on the basis of complaints made by single local authorities or national associations of local authorities. In this respect, it might be raised the objection whereby a direct involvement of subnational entities at supranational level affects the sovereignty of the member States even more than if they were under the obligation to submit regular reports to the Council. However, this objection falls short since Council of Europe bodies are not under the obligation to react to these complaints issuing a binding decision. The legal acts they issue are mainly of soft nature (see *infra* 3.2.3), so as that no automatic obligation to comply with them on the part of the Contracting Parties arises. A further doubt could emerge with reference to the admissibility of complaints by authorities which, following to some authors, do not directly enjoy subjective rights from the Charter. However, even if this objection cannot deemed to be entirely true, monitoring mechanisms under international law should not necessarily ensure the protection of the rights of those who complain about their alleged violations. On the contrary, monitoring mechanisms operate in a systematic way and have rather a preventive function.[126] That a direct contact between local authorities and the Council of Europe is legitimate and does neither contradict its Statute nor the member States' sovereignty is confirmed by the fact that among the different bodies of the Council exists the Congress of Local and Regional Authorities, which provides local and regional authorities with an institutionalised contact.

Even before the Congress foundation by means of Statutory Resolution (1994) 3 of the Committee of Ministers, the Standing Conference of Local and Regional Authorities of Europe had adopted two important resolutions in order to set up a monitoring mechanism on Charter's compliance, i.e. Resolutions No. 223 (1991) and No. 233 (1992).[127] In the absence of an intergovernmental system for monitoring the implementation of the Charter, the Congress was allowed to supervise the application of the Charter in the member States upon both the Committee of Ministers' and the

---

125 Cf. § 14 of the Final Declaration of the Barcelona Conference on the Charter (23-25 January 1992) – Annex to Resolution No. 233 (1992), which unsuccesfully attempted to establish a system of State reporting.

126 B. Schaffarzik, *cit.,* 128-129. Cf. also G. De Beco, *The Role of European Human Rights Monitoring Mechanisms*, in: G. De Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of Europe*, Strasbourg, 2012, 1-13.

127 The former Standing Conference Resolutions No. 223 (1991) and No. 233 (1992) called for a comprehensive system of monitoring and asked the Committee of Ministers and in particular its Steering Committee on Local and Regional Authorities (CDLR) to deliver an opinion on this request. On the same occasion, the Standing Conference also gave a mandate to its Committee on Structures, Finance and Management to carry out itself a follow-up on the application of selected articles of the Charter in the member States. For this purpose, the so-called Working Group responsible for monitoring the implementation of the European Charter of Local Self-Government was set up in 1991.

Parliamentary Assembly's understanding. In fact, the main problem faced by the Council of Europe at that time was to establish an effective tool to find out whether domestic provisions contradict the principles of the Charter. From the very beginning, however, the Committee of Ministers left open whether the Congress monitoring mechanisms should include only monitoring *ex officio* or also monitoring upon request or complaint of the member States or even of national associations of local authorities. In fact, Article 2, para. 1, lett. b) of Statutory Resolution (1994) 3 stipulated merely that the Congress shall be a consultative body the aims of which should be to «*submit proposals to the Committee of Ministers in order to promote local and regional self-government»*. Likewise, Article 2, para. 3 of Statutory Resolution (2000) 1 of the Committee of Ministers stipulated further that «*the Congress shall prepare on a regular basis country-by-country reports on the situation of local and regional democracy in all member states and in states which have applied to join the Council of Europe, and shall ensure, in particular, that the principles of the European Charter of Local Self-Government are implemented».* The aforementioned sources can be extensively construed so as to include both monitoring *ex officio* and upon request or complaint. In fact, they either allow the Congress to "submit proposals" or to "prepare reports on a regular basis", without mentioning how and on the part of whom the monitoring procedures should be activated. The first provisions thereon can be found in the "administrative law" of the Congress itself and in particular in Resolution No. 3 (1994) and in Resolution No. 34 (1996), adopted respectively in the 1st and in the 3rd Plenary Session of the Congress. Whereas § 9 of Resolution No. 3 (1994) stipulates that the Congress has introduced a system of monitoring which consists in the selection each year of different articles of the Charter on which specific reports should be prepared, § 13 of the same Resolution entrusts local authorities, through their associations or national delegations to the Congress, «*to refer to the Congress problems relating to the implementation of the Charter in thei countries»*. The two different kinds of monitoring were more clearly distinguished in § 10 of Resolution No. 34 (1996), which explicitly mentioned the permanent *ex officio* monitoring of the application of the Charter's provision in all Contracting Parties and the monitoring procedure carried out at request of local and regional authorities acting through their representative associations or their Congress delegations. The principles which should govern the different monitoring procedures were further laid down in Resolution No. 31 (1996).

3.2.1.1. Monitoring *Ex Officio*

As for the monitoring procedure *ex officio*, activated upon initiative of the Bureau of the Congress,[128] one should distinguish between country-related reports and general reports on the

[128] As explained by Article 9 of the Charter of the Congress, as appended to Committee of Ministers' Statutory

application of selected articles of the Charter in Council of Europe member States. As for the former, one should recall that the Congress takes into account the entirety of the provisions even if it expressly acknowledges that «*a member state could not be criticised for not complying with provisions by which it is not bound*». As for the latter, they were typical of the very beginning of Congress monitoring activities and has become over time rarer and rarer, even though they normally provide useful insights for comparing the progressive advancement of all Council of Europe member States in complying with the Charter's principles. Country-related reports constitute the bulk of all monitoring reports approved by the Congress. In particular, the Bureau of the Congress decides to organise a monitoring to update a report on the situation of local authorities every five years or if particular situations concerning territorial authorities of the member States require clarification. The task to draw up a report is entrusted by the so-called Monitoring Committee of the Congress to two co-rapporteurs, assisted by one or more independent experts, normally a constitutional or an administrative lawyer, and in collaboration with the Secretariat of the Congress. Each report, together with the attached draft recommendation and if necessary with a draft resolution, has to be brought before the two Chambers of the Congress for examination and adoption. Amendments by Congress members can be tabled only to draft texts and not to explanatory memoranda or reports. Adoption occurs by a majority vote and members of the country concerned with the monitoring procedure are also allowed to vote, a fact which sometimes might endanger the neutrality of the recommendations (see *infra* in the second Chapter § 3.II.7.3.2.)

More recently, Resolution No. 307 (2010) has refined the monitoring system of the Congress and institutionalised the practice of the so-called monitoring visits or missions in the Council of Europe member States, as well as that of post-monitoring or follow-up missions. The delegation is composed of two co-rapporteurs, one for regional and one for local questions, which should not be nationals of the country to be monitored and of a legal expert. They are expected to meet with ministers responsible for local and regional authorities, members of Parliament, local and regional elected representatives, officials of the competent authorities and also associations representing local and regional authorities and representatives of civil society. Unlike what noted by Schaffarzik, a fact-finding mission is crucial to come to know local and regional self-government issues which are politically sensitive, to better understand what the problems linked to the application of the Charter are, to reinforce the Congress' visibility and authority in the member States and, in particular, to ensure that the establishment of constructive dialogue entails future compliance with Congress recommendations or resolutions.[129]

Resolution 2011 (2), is composed of the Bureaux of the two Chambers of the Congress plus the President of the Congress and is «*responsible, in the period between the sessions of the Statutory Forum and the Congress, for ensuring the continuity of the Congress's work*».

[129] Cf.: B. Schaffarzik, *cit.*, 123-124.

Every time the Congress draws a report and issues a recommendation or resolution, it should take into account previous recommendations or resolutions addressed to the country visited. This last requirement appear to aim to establish a sort of "case-law" of the Congress, which should be consistent with its precedents, i.e. with the principles or rules set out in previous monitoring reports.[130] A possible departure from a strict adherence to the precedent is offered by the Congress recommendation, where it states that the «*report shall also take into consideration the political context in which the monitoring visit took place».* The report should in fact be drafted by the co-rapporteurs, which have a political legitimation, in collaboration with the legal consultant and with the administrative personnel of the Secretariat. Once validated by the co-rapporteurs and before adoption, national authorities should be able to express their comments on the report. Here the Congress attempts to follow a sort of "cross-examination principle", yet without mentioning whether and how comments by national delegations will be taken into account. It appears that they are not, since the co-rapporteurs may only decide to publish them in an annex to the their report. The report is normally composed of at least four parts. To a certain extent it might resemble to a judgment, since it provides first for factual and then for legal arguments and it ends with a sort of ruling which will form part of the final recommendation.[131] However, it cannot be said that country-related monitoring reports are aimed at protecting rights of single local and regional authorities against one member State. Reports are both political and legal opinions which attempt to proactively evaluate the conformity of domestic law with the Charter.[132]

3.2.1.2. Monitoring Upon Request

As for monitoring upon request, Resolution No. 31 (1996) distinguished between three different kinds of request: (a) that of local and regional authorities through their representative associations or national delegations at the Congress; (b) that from the Working Group (now Monitoring Committee) responsible for monitoring the implementation of the European Charter of Local Self-Government, in the light of the findings of the Committee of Independent Experts working under its aegis; (c) that from the Committee of Ministers and/or the Parliamentary Assembly in connection with their procedures relating to compliance with the commitments accepted by member States of the Council of Europe.

---

130 So also: M.W. Schneider, *cit.*, 356 and G. Engel, *cit.*, 56.

131 See: M.W. Schneider, *cit.*, 354.

132 So: D. Schefold, *Der Schutz der Kommunalen Selbstverwaltung durch den Europarat,* in: Breitenmoser S., B. Ehrenzeller, M. Sassòli, W. Stoffel, B. Wagner Pfeifer (eds.)*, Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber,* Baden-Baden, 2007,1068.

In the first case, as mentioned by Resolution No. 34 (1996), the Working Group of the Congress responsible for monitoring was authorised to receive the complaints and where necessary to investigate on them. Requests are normally addressed to the Congress in writing (either in one of the official languages of the Council - English and French – or in one of the working languages – Italian, German or Russian), accompanied with all relevant documentation related to the issue. In particular, they should include a description of the problem and the provisions of the Charter which are allegedly violated by domestic law. In particular, if the complaint is lodged directly by local and regional authorities, the Committee of Ministers requires that they have to demonstrate a real interest which has been infringed upon by the law as well as that all internal remedies have been exhausted. If the complaint is proved to be acceptable and well founded, the Working Group (and then the Institutional Committee) addressed a recommendation to the Congress Bureau to take further action. The Bureau can then either decide to start the preparation of a monitoring report focused on the country concerned, or, in the most heavy and urgent cases, decide to prepare a immediate specific report. In all cases of monitoring upon request, the Bureau of the Congress should establish *«the facts through an initial fact-finding mission performed by at least two members of the Congress».* There, a *«constructive dialogue with both the national authorities and the territorial authorities of the member state concerned»* should be possible. If the mission shows that the facts justify more in depth-action and upon favourable opinion of the Working Group, the Bureau can establish an ad-hoc Working Group instructed to draw up a detailed report which also has to be submitted to a plenary session of the Congress or to the Standing Committee. Before the report is finally adopted, the relevant national authorities should be given an opportunity to make their views known. Since Resolution No. 307 (2010) does no longer mention monitoring procedures upon request, one could argue that it has been implicitly set aside. However, the opposite is true: since no explicit amendment of Resolutions No. 31 and 34 (1996) has taken place so far, one could still refer to it. Resolution No. 307 (2010) itself refers to its Resolution 31 (1996) and stipulates that the Bureau shall decide to organise monitoring in one or more given countries, (1) either because of a particular situation requiring clarification regarding application of the Charter or (2) in order to update a report on the situation of local and/or regional democracy, thus implicitly referring also to monitoring on request.[133]

In the past twenty years only few complaints were lodged before the Congress by national delegations or by local and regional authorities of the Contracting Parties, the majority of which

[133] Since the former Working Group and the Institutional Committee were abolished following to the Congress reform, the newly created Monitoring Committee has now to deal with any complaint lodged by national delegations or by local and regional authorities. In fact, the Committee is not only responsible for monitoring the application of the Charter by drafting regular report on a country-by-country basis, but also for monitoring «*specific questions related to local and regional democracy in the member states»*. In the practice, however, complaints are addressed directly to the President or to the Secretary General of the Congress.

were drafted in the 1990s. One can in particular recall the very first case of the Romanian associations of local authorities complaining about a wave of removals from office, suspensions and resignations of mayors and local councillors by the government, after the entry into force of Act No. 69 (1991) on local public administration. With the view of investigating into the real situation, in 1994 an *ad-hoc* Working Group was set up by the Congress Bureau and a fact-finding mission was organised. At the same time, the Working Group also made a comprehensive assessment of the situation of local and regional democracy in Romania.[134] The contribution of the Congress appeared to be significant, since the Romanian authorities ceased the aforementioned practice.[135] Other complaints by Romanian local authorities associations were lodged before the Congress in 2009 and again gave rise to a monitoring visit to Romania in 2010. In 1998, the Dutch delegation to the Congress invited it to draw up a report on local and regional democracy in the Netherlands. One of the reasons supporting this request was the establishment of special organisational arrangements between the municipal and provincial levels to deal with problems relating to the management of large cities, and in particular Rotterdam. However, before the Congress could even start dealing with the issue, the plan was abandoned by the national government.[136] Again in 2005, following a request from the Dutch delegation, the Congress decided to draw up a report on the appointment of mayors and of the state of local finances in the Netherlands.[137] In one single case, a complaint was deemed not to be acceptable by the Congress. It involved the municipality (*Giunta di Castello*) of Acquaviva in San Marino, which in 1996 complained against a decision of the central government (*Congresso di Stato*) to authorise the establishment of a concrete factory on its territory. Since San Marino was not yet a Contracting Party to the Charter at the time, even if already member of the Council of Europe, the complaint was dismissed.[138] More recently, in 2007, a letter to the Congress by the President of the South East Anatholia Union of Municipalities raised concerns about the conditions of mayors and local elected officials removed from office in Turkey, in particular in the municipality of Sur, where the council was dissolved.[139] A previous monitoring visit of similar

---

134 Congress of Local and Regional Authorities, Recommendation No. 12 (1995) and Resolution No. 18 (1995) *on local democracy in Romania,* 31 May 1995.

135 So also: B. Schaffarzik, *cit.*, 136-137; B. Weiss, *Die völkerrechtliche Pflicht*, *cit*., 909-910.

136 Congress of Local and Regional Authorities, Recommendation No. 55 (1999), *on local and regional democracy in the Netherlands*, 16 June 1999. Another issue related to the question whether members having a sit in the Congress could be local officials appointed by central government, as mayors and queen's commissioners in the Netherlands.

137 Congress of Local and Regional Authorities, *State of local finances in the Netherlands*, 9 November 2005.

138 This decision appears to be highly questionable. In fact, it must be borne in mind that the Congress has always affirmed its purpose to monitor the situation of local democracy also in Council of member states which were not Parties to the Charter. Cf. e.g.: Committee of Ministers' Statutory Resolution (2000) 1, Article 2, para. 3. In the present case, however, the municipalities of San Marino could not demonstrate to have a real legal interest, since they could not lawfully refer to any Charter provision. Cf. also: B. Schaffarzik, *cit.*, 136 and A. Delcamp, *La Charte europeenne de l'autonomie locale et son systeme de control*, in: Annuaire des collectivités locales, Vol. 19, 1999, 163-164; G. Engel, *cit.,* 53.

139 Congress of Local and Regional Authorities, *Local democracy in Turkey situation in Sur/Diyarbakir (South-East Anatolia, Tutkey),* 18 September 2007.

nature was carried out by a Congress delegation in 2001 upon complaint lodged, quise surprisingly, by the World Federation of United Cities (now UCLG).[140] In 2007, the Belgian delegation to the Congress drew attention to the persistent refusal by the Flemish Ministry of the Interior to appoint mayors in three municipalities, despite having been democratically elected. The Bureau decided to undertake a fact-finding mission in 2008, according to § 8 of Congress Resolution No. 31 (1996), in order to check whether, *inter alia*, the non-appointment caused a disruption in the management of public affairs; the non-appointment decision in relation to the faults reproached to the mayors constituted a violation of the proportionality principle; an excessive supervision over local authorities was carried out by the Flemish Authorities.[141] Finally, in 2013, the National Association of Local Authorities of Georgia (NALAG) alerted the Congress that pressure was being made on opposition members in local government and on their administrative staff to either resign their posts or change their party affiliation. The Congress Bureau decided thus to send a fact-finding mission to Georgia to evaluate whether the situation presented any violations of the Charter, in particular of Articles 3 and 7.[142]

The modest number of complaints lodged before the Congress might be explained, on the one hand, with the preventive effects of country-related reports which normally cover all sensitive issues and, on the other hand, with the use by local authorities of the existing domestic legal remedies.[143] Moreover, as stressed by Schefold,[144] it must be pointed out that not every local authorities' association of every Council of Europe member State is aware of the monitoring procedure on request made available by the Congress. In general, it might be said that monitoring on request is a procedure which mixes up elements typical of legal opinions and of judicial or quasi-judicial mechanisms and contributes thus to the formation of a Congress "case-law". In fact, it aims both at offering advice on a specific matter of law and, like a ruling, at protecting local or regional authorities rights against unlawful statutory provisions of the member States. In this respect, it is not misplaced the comment by Merloni who speaks of a "political judge" in the application of the Charter, even if one has to remember that monitoring on request does not only concern the matter submitted by the parties to the proceedings, but might also involve other issues relevant for the general State's compliance with the Charter.

---

140 Congress of Local and Regional Authorities, Follow up to Recommendation 29 (1997) - *Information Report on Local and Regional Democracy in Turkey*, 22 November 2001.

141 Congress of Local and Regional Authorities, *Local democracy in Belgium: non-appointment by the Flemish authorities of three mayors,* CPL (15) 8 REP, 31 October 2008.

142 Congress of Local and Regional Authorities, *Fact-finding mission to Georgia*, CG (24) 11, 18 March 2013.

143 So, for example: J. Woelk, *Transformation Bottom-Up? Local Government Reforms in the Western Balkans compared,* CAST Working Papers, 2005. According to Schneider, also financial and organisational constraints of the Congress precluded monitoring on request becoming a real alternative to monitoring *ex officio*. Cf. M.W. Schneider, *op. cit.*, 354.

144 D. Schefold, *cit.,* 1070, advocating a clearer Congress regulation of the monitoring procedure on request.

3.2.2. Legal Nature of Recommendations and Resolutions

The monitoring procedure ends with a recommendation which «*shall be sent as appropriate to the Parliamentary Assembly and or to the Committee of Minister*s»*,* whereas resolutions or other acts which do not entail their possible action «*shall be transmitted to them for their information»* (Article 2, para. 3 of Statutory Resolution (1994) 3).[145] Resolutions and recommendations should always be forwarded together with a corresponding Explanatory Report (Article 2, para. 3 of Statutory Resolution (2011) 2).[146] The Parliamentary Assembly or the Committee of Ministers are under the duty to consider and deal with Congress recommendations. In particular, according to Article 15 of the Statute of the Council of Europe, the Committee of Ministers has to scrutiny whether the recommendation is ill-founded or not and whether the recommended measures by the Congress are suitable or not for the member State concerned.[147] In this respect, no intervention by the ECtHR may even be imagined. The Court itself made it clear in *Olaru and others vs. Moldova*, where it stated that judging upon the violation of the principle of concomitant financing laid down in Article 9, para. 2 of the Charter would have gone «*beyond the Court's function*. (...) *The Committee of Ministers is better placed and equipped to monitor the necessary measures to be adopted by Moldova in this respect».*[148] Whenever the Committee acknowledges that a violation of the Charter has occurred, it can call on the member State to comply with its obligations through the adoption of a decision or a recommendation which is not conditional upon the recommendation issued by the Congress. The fact that the Committee of Ministers enjoys a last word in the monitoring procedure conveys the idea that the monitoring procedure has rather a political than a judicial or quasi-judicial nature. This is in any case true, if one considers that the Congress is also a politically motivated body, although endowed with a specific know-how and technical expertise on local self-government themes. In particular, it should be borne in mind that Congress reports are undertaken under the co-operation of legal experts – generally university lecturers and researchers with recognised knowledge of local or regional self-government – chosen within the so-called Group of Independent Experts (GIE) on the European Charter of Local Self-Government, who themselves write the reports thus ensuring their legal correctness. This however does not make the

---

145 F. Merloni, *cit*., 2005, 52-53.

146 Recommendations are adressed to the member States, whereas resolutions «*are aimed at all local authorities, and are sent to the Assembly and Committee of Ministers for information*». Statutory resolutions «*might be defined as texts that the Committee adopts to adjust or supplement the original Statute».* Cf. F. Benoît-Rohmer and H. Klebes, *cit*.*,* Strasbourg, 2005, 30 e 75-76.

147 For a certain period of time, the Congress sought the opinion of the Steering Committee of Local and Regional Democracy (CDLR) before submitting a recommendation to the Committee of Ministers and instructed its Bureau in conjunction with the Working Group to consult the CDLR on the best way of implementing this procedure.

148 ECtHR, *Case of Olaru and Others v. Moldova,* (Applications Nos. 476/07, 22539/05, 17911/08 and 13136/07), 28 July 2009, §§ 32-44-57.

expert a monocratic quasi-judicial body, but rather a tool for mitigating the political motivations underlying recommendations or resolutions.[149] As for the legal nature of recommendations or resolutions, one might say that they constitute soft law, since they are of non-coercive nature, that is to say they are not legally binding upon the member States. In the present case, with the term soft law one has in particular to understand non-binding rules clarifying the content of effective legal rules (so-called "post-law" function) or representing promises that in turn create expectations about what constitutes compliant behaviour (so-called "pre-law" and "para-law" functions). Rules which neither provide for the former nor for the latter are generally to be considered as political rules.1 The monitoring practice of the Congress can be read along the lines of such definition. There are in fact recommendations and resolutions aimed merely at providing a gloss on the Charter's provisions, recommendations and resolutions which express merely a political suggestion and, finally, recommandations and resolutions which one might say be willing to anticipate or to substitute binding international law in the future. The existence of this latter category appears to be confirmed by the aborted project of amending, i.e. supplementing the Charter, contained in Recommendation No. 228 (2007). This recommendation summarised all previous interpretational achievements of the Congress monitoring practice as a first step towards the adoption of a new treaty. In 2009, however, this resolution was not adopted as a new treaty, because a binding document was considered not to be appropriate for the subject matter at hand. In other words, the costs for violating the new treaty were deemed to be higher than the benefits deriving from solving possible co-operation problems in local government matters between member States. Further, clarification and harmonisation of standards for local autonomy at European level was not up in the political agenda at that time. In particular, at EU level, both the unratified Treaty establishing a Constitution for Europe (2004) and the Lisbon Treaty (2009) did not ultimately mention the Charter as a source of international law the EU should have complied with. To the contrary, EU primary law reaffirmed the principle whereby the member States had the sole competence as regards to the organisation of their local government systems. This leads to the questions analysed in the next Part.

[149] The Group held its first meeting in 1993, but was formally set up in 2001 following a decision of the Institutional Committee of the Congress. Rules on tasks and functions of the Group can nowadays be found in the Revised Statute of the Group of Independent Experts on the European Charter of Local Self-Government, adopted on 16 September 2011. In particular, the Secretary General of the Congress appoints one full member and a substitute for each member State.

II. The Charter's Provisions as General Principles of EU Law?

Before assessing what is the rank of the Charter in the hierarchy of the sources of law of Council of Europe member States it might be yet useful to check whether and, if so, to what extent the Charter or some of its provisions are part of the so-called *acquis communautaire.* First of all, it has to be borne in mind that, unlike other international treaties concluded within the framework of the Council of Europe, the Charter finds no mention in the EU treaties. In other words, unlike for the ECHR and the ESC, no primary law source ever stipulated that the EU recognizes local self-government as guaranteed by the European Charter of Local Self-Government. Nor were some of the Charter's principles explicitly defined as general principles of EU Law in its rulings by the Court of Justice of the European Union (CJEU). Yet, only a number of opinions by the Committee of the Regions (CoR) refers explicitly to the Charter as a source binding upon both the EU and its member States.[150]

In this respect, it has though first of all to be recalled that the European Union is based upon the principle of "institutional autonomy" of its member States.[151] This principle postulates that the EU cannot set the rules which regulate the execution of EU law at domestic level, but that the member States themselves are endowed with the duty of execution and with the duty of ensuring compliance with EU law in their domestic orders, by arranging apportionment of powers between public authorities as they see fit.[152] Therefore, solely the member States can be held responsible before the CJEU and not their domestic entities to which powers may have been delegated.

The principle of institutional autonomy of the member States can be derived from the combined reading of Article 4, para. 2 and Article 5 TEU as well as from the nature of the Union itself. The Union has to respect the member States' national identities, inclusive of their regional and local self-government and enjoys therefore no competence in the subject matter related to the scope of responsibilities and the organisation of local and regional authorities (so-called "blindness" or

150

See in particular: CoR, *Opinion on Devolution in the European Union and the place for local and regional self-government in EU policy making and delivery*, 2013/C139/08, 11-12 April 2013. In the past see also: CoR, *Opinion on Devolution in the European Union and the place of local and regional self-government in the draft Constitutional Treaty*, C 2006/C31/1, 6-7 July 2005.

151 So also: G. Marcou and J.F. Akandji-Kombè, *cit.*, 8-16.

152 CJEU, 25 May 1982, *Commission v. Netherlands*, case 96/81; CJEU, 27 September 1979, *Eridania*, case 230/78. EU European Council – Summit of Birmingham, 16 October 1992.

"Blindheit" towards local and regional autonomy). Each member State will be free to determine how its local government system should be arranged and the Union cannot pass measures which directly impinge upon this power. However, one has to bear in mind that local and regional authorities, as they are subject to national law, they are also subject to EU substantive law,[153] which has been increasingly affecting their scope of powers and responsibilities along the years, in particular through the implementation of directives on public procurement or through the attribution of cohesion and structural funds.[154]

Also the drafters of the Charter were aware of this trend towards increasing supranational law, i.e. EU law affecting the scope of local and regional administrative functions. Therefore, the Explanatory Report acknowledged that, even if the ad-hoc delegation of powers and responsibilities shall be considered as the exception to the rule whereby local authorities should be vested with own powers and responsibilities by means of statute, implementation of EU law might require the use of delegated powers. Furthermore, *«an exception applies in the case of member states of the European Community insofar as Community Regulations (which under Article 189 of the Treaty of Rome are directly applicable) may stipulate application of a specific measure at a given level of administration».* This does not mean, though, that the obligations arising from EU law can override those from the Charter. Pursuant to Article 351 TFEU, the member States are in fact required to ensure that the application of EU law in their domestic order is compatible with other treaties concluded before their accession to the European Union. In other words, it rests upon the member States (and possibly also upon the Committee of Ministers of the Council of Europe) and not upon the EU to honour the undertakings deriving from the Charter, also within the functioning of the European Union.

According to the dominant opinion, then, the European Union itself cannot accept the obligations arising from the Charter and look after their compliance whenever passing legislation possibly affecting local and regional authorities' interests. In fact, the EU does not enjoy the jurisdiction to become Contracting Party of the Charter, since its object – the adjustment of the status of local authorities within the territorial organisation of the State – does not pertain to the area of competence laid down in the Treaties.[155] Further, Article 15, para. 1 of the Charter makes clear that

---

153 See on that: L. Malo, *cit*., 493 and ff.

154 So for instance: Q. Camerlengo, *Articolo 118*, in: R. Bifulco, A. Celotto, M. Olivetti (eds.) *Commentario alla Costituzione*, 2006, 2355. See also in the past: W. Hoppe and A. Schink (eds), *Kommunale Selbstverwaltung und europäische Integration*, Köln, 1990.

155 T. I. Schmidt, *Sind die EG und die EU* (…)*, cit.*, 946-947 contends yet that, human rights treaties alike, the ratification of the Charter by the EU does not imply that the EU should also be vested with the power to regulate local government issues. In fact, the Charter does not contain a mandate to regulate local government, but embodies rather guarantees of local self-government by which the EU could be bound. In other words, the adoption of the Charter by the

the Charter shall be open for signature by the member States of the Council of Europe and not by other international organisations.[156] As long as draft EU regulations and directives appear to affect local and regional authorities' interests, it is thus for each member State to discharge their duty of consultation pursuant to Article 4, para. 6 of the Charter and not for the EU. Within the European Union, pursuant to Article 13, para. 4 TEU and Article 300, para. 1 and Article 300, para. 7, para. 1 TFEU, the Committee of the Regions (CoR) is endowed with the right of being consulted before the Council and the Commission take decisions on different matters, in particular when cross-border co-operation is at stake. But this right of regions (and to a lesser extent of municipalities) to participate in framing EU policies does not necessarily imply the recognition of a principle or a right of local or regional self-government under EU law.

Further, it has been contended that Article 4, para. 2 TFEU does not neither recognise local and regional self-government as *per se* part of the national identities of the member States. To the contrary, Article 4, para. 2 TFEU stipulates that local and regional self-government shall be respected by the EU, insofar as, according to domestic constitutional law, they contribute to define the national identity of the State.[157] Many scholars deny the existence of a common understanding of local self-government within the EU, because, even if the Charter has been ratified by all twenty-eight EU member States, the local government systems still present major differences among each other[158] and ratification on *à la Carte* basis could not ensure that the nucleus of local self-government is the same for all EU member States.[159]

However, one could argue that, even starting from the premise that the national identities inherent to the local and regional government system vary greatly from member State to member State, the Charter is the only yardstick setting out the minimum common standards which could be deemed being general principles of EU law and which should be as such complied with by EU bodies passing new legislation. In fact, as it will be showed by examining each Charter's provision, since the treaty was ratified by all twenty-eight EU member States, the bulk of its principles might be considered as being part of the common constitutional identities of the EU member States pursuant to Article 6, para. 2 TFEU.[160]

EU would constitute a limitation to the exercise of its own powers.

156 So also: H. Heberlein, *Maastricht II - Einstieg in das "Europa der Kommunen"?*, BayVBl, 1996, 3.

157 A. von Bogdandy and S. Schill, *Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag*, ZaöRV 70 (2010), 713; A. Puttler, *Art. 4 EUV*, in: C. Calliess and M. Ruffert (eds.), *EUV/AEUV Kommentar*, 4th ed., 2011, Rn. 18-19; E. Cloots, *National Identity in EU Law*, 2015, 152. So also, in the past: T. I. Schmidt, *cit.*, 2005, 93

158 H. Heberlein, *Die Kommunale Selbstverwaltung im Vertrag von Lissabon – ein Mehrwert für die Kommunen,* BayVBl, No. 7/2014, 194.

159 T. I. Schmidt, *cit*., 945.

160 So: A. Gamper, *cit*., 179, quoting P. Häberle, *Europäische Verfassungslehre*, Baden-Baden, 2011, but also: P.

This might be said to be confirmed *inter alia* by new Article 5, para. 3 TFEU itself, which encompasses a notion of subsidiarity which is very close to that provided by the Charter in Article 4, para. 3, whereby in areas which do not fall within the areas of its competence, the Union has to weigh up whether the same objectives cannot be better achieved at a level closest to the citizens.[161] Hence, one could say that, at least partially, local self-government underpins the principle of subsidiarity.[162] In this respect, since 2009, Protocol No. 2 to the Lisbon Treaty provides for an enforcement machinery, *inter alia* endowing the CoR with the right to bring suit against EU legislative acts, asking the ECJ whether or not they comply with the subsidiarity principle.[163] The EU should therefore look after the observance of the Charter's principles while passing own legislation as long as it is deemed to affect local and regional authorities' prerogatives. Until now, though, the ECJ has demonstrated a rather cautious approach towards such evolution.[164]

Even if they refuse this interpretation *de iure condito*, Akandji-Kombè and Marcou hold at least *de iure condendo* that, by means of a sort of Memorandum of Understanding between the EU and the CoE, *«the Charter could be used as a basis for prior evaluation of planned regulations or directives of the Parliament or the Council of the European Union from the angle of their possible impact on the principles of local self-government».* It appears however not really sensible to vest the Congress of the power of monitoring legal acts of another international organisation. It should in fact be the EU itself through its own bodies, e.g. the Committee of the Regions, to ensure that its acts do not impinge upon the common constitutional principles on local government. The application of the Charter's principles by EU bodies, including the CJEU, might however result in an interpretation of

---

Häberle, *Kommunale Selbstverwaltung unter dem Stern des Gemeineuropäischen Verfassungsrechts,* JöR (2010), Bd. 58, 309 and ff. See also: K. Meyer, *Gemeindeautonomie*, *cit*., 77; D. Schefold, *Der Schutz*, *cit*., 1064; J. Luther, *Alla ricerca*, *cit*., 1733-1734; G. Marcou, *L'autonomie des collectivités locales en Europe: fondements, formes et limites,* in: Caisse des Depôts et Consignations, *Quel avenir pour l'autonomie des collectivites territoriales?*, 1999, 34. In the past see already: A. Martini and W. Müller, *Der Schutz der kommunalen Selbstverwaltung in der europäischen Integration durch nationales Verfassungsrecht und gemeinschaftsrechtliche allgemeine Rechtsgrundsätze*, BayVBl 1993, 166-169 and N. Belloubet-Frier, *Vers un modèl européen d'administration locale?,* in: *Revue française d'administration publique* 1/ 2007 (n° 121-122), 5-5, whereby a general trend towards convergence of local government models can be assessed. So also with reference to Article 10 of the Charter: B. Klein, *Kommunale Kooperationen Zwischen Innerstaatlichem Organisationsakt und Markt,* Osnabrück, 2012, 116-117.

161 So: F. Schoch, *Besonderes Verwaltungsrecht*, 15th ed., 2013, 36; L. Malo, *cit*., 153.

162 So also: G. De Burca, *Legal Principles as an Instrument of Differentiation: The Principles of Proportionality and Subsidiarity,* in: B. De Witte, D. Hanf, E. Vos (eds.), *The Many Faces of Differentiation in EU Law*, Oxford, 2001, 144.

163 However, it must be borne in mind that the early warning system established under Protocol No. 2 to the Lisbon Treaty vests in the national parliaments and indirectly in sub-national parliaments, but not at all in local authorities, the right of consultation, i.e. the power to submit opinions on draft documents issued by the European Commission. Cf. H. Heberlein, *cit*., 195. On the novelties brought about by the Treaty of Lisbon and by its Protocol No. 2 and on the role of the Committee of the Regions (CoR) in subsidiarity monitoring see: A. Cygan, *Regional Governance, Subsidiarity and Accountability within EU's Multilevel Polity*, in European Public Law, 19, no. 1 (2013), 161-188.

164 Cf..: W. Vandebruwaene, *What Scope for Subnational Autonomy: the Issue of the Legal Enforcement of the Principle of Subsidiarity,* Perspectives on Federalism, Vol. 6, No. 2, 2014, 55 and ff.

the "identity clause" contrary to that of the Council of Europe.[165]

III. Domestic Law of Council of Europe Member States

Before examining in depth how each provision of the Charter shall be construed and how it has been interpreted over the years by both the Congress and the Contracting Parties, it should be first assessed the various degrees of reception of the Charter in the Council of Europe member States. In this respect, a recent report issued by the Congress on the incorporation of the treaty in the member States will help in drawing the most complete picture as possible.[166]

In its 2011 report, in fact, the Congress distinguishes between those countries in which the reception of the Charter has only binding effects under international law and its provisions are therefore non directly applicable as a source of internal law. In this latter category one has further to distinguish among those countries in which the ratification has not brought about any reception of the Charter in the domestic legal order (Georgia, Iceland, Malta, Norway, Slovakia and the United Kingdom) and countries in which reception has to be considered as predominantly formal (Austria, Azerbaijan, Cyprus, Denmark, Finland, Germany, Ireland, Italy, Liechtenstein, Montenegro, the Netherlands, Romania, Sweden and Turkey), in the sense that through the act of ratification the Charter has also become part of domestic law, yet it is traditionally considered as not being directly applicable as a source of international law and as a piece of domestic law. This has to be linked with different reasons and in particular with the content of the Charter which is deemed by several domestic courts to be merely programmatic and not committing the member States to a positive behaviour (see *infra* third Chapter for the case of Italy).

Other countries, mostly from Central and Eastern Europe, regard the Charter as being directly applicable in their domestic order (Armenia, Belgium, Bulgaria, Croatia, the Czech Republic, Estonia, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Portugal, the Russian Federation, Serbia, Slovenia, Spain, Switzerland, 'the former Yugoslav Republic of Macedonia' and Ukraine), that is to say all administrative authorities are under the obligation to apply it, since it is considered as being part of domestic law. Among them it should however be distinguished among those countries in which Charter's provisions take precedence over domestic ones, on the basis of clauses establishing the precedence of international treaties (Armenia, Croatia,

---

[165] So already: B. Schaffarzik, *cit*., 638-639.

[166] Congress of Local and Regional Authorities, *The European Charter of Local Self-Government in Domestic Law*, CPL (21) 2, 28 September 2011.

Estonia, France, Greece, Latvia, Lithuania, Poland, Portugal, the Russian Federation, Serbia, Slovenia, Spain, Switzerland and 'the former Yugoslav Republic of Macedonia) or countries in which the Charter enjoys the same rank as the Constitution (Czech Republic, Luxembourg and Ukraine) or of an ordinary law (Belgium, Bulgaria, Germany).

The most important categorisation is however that among member States in which the legal provisions of the Charter are directly applicable and can be relied upon in courts and member States in which, even if the provisions are partly or entirely considered as directly applicable, cannot be relied upon before courts. According to the Congress, only in a minority of twelve countries (Belgium, France, Estonia, Greece, Hungary, Latvia, Lithuania, Luxembourg, the Russian Federation, Serbia, Slovenia and Switzerland)[167], that is to say approximately 25 percent of the Council of Europe member States, the provisions of the Charter can also be invoked by local authorities before national courts. Additionally, in Bulgaria, the Czech Republic, Poland, Spain, Switzerland, Ukraine, Germany and Italy,[168] one might argue that the provisions of the Charter might also be used as a yardstick for interpretation even of constitutional provisions on local self-government enshrined.

It is commonly known that self-executiveness means that a treaty provision contains rules creating obligations and allowing for no discretionary powers by the Contracting Party. The relevant consequence of self-executing treaty provisions is that rights can be invoked and duties imposed in complaints before domestic courts, without any additional national legislation or internal act being necessary.[169] Conversely, rules which are not clear, precise and unconditional, recommending, but not committing the State to a precise behaviour, merely indicating a certain vague principle without giving it the force of law are considered to be non self-executing and, albeit binding under international law, they require further implementation by the legislature. Nonetheless, even if non self-executing, domestic courts can still resort to the very same provisions by construing national law in conformity to international law. Criteria for assessing the self-executiveness of a treaty provision are indeed very controversial. Though clear in theory, a distinction between self-executing and non self-executing provisions leaves a wide room of interpretation to every State. This is the reason why Contracting Parties to the same treaty often hold different views about the self-executiveness of the Charter in their domestic law. It is in fact up to domestic courts and not to

---

167 As for Latvia and Lithuania see also: I. Vilka, *Local Government in Latvia*, 367-368; D. Saparniene and A. Lazauskiene, *Local Government in Lithuania*, in: A-M. Moreno (ed.), *cit*., 392-393.

168 See: Decision of the Bulgarian Constitutional Court, no. 12/1999 of 24 August 1999; Judgement of the Czech Constitutional Court, February 5, 2003, Pl-US 34/02; Ruling of the Polish Constitutional Court, February 18, 2003, K 24/02. In Ukraine, the Charter has been used as a reference texts in some eighteen judgments by the Constitutional Court. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Ukraine*, CG (25) 8, § 36-38. For Germany and Italy see *infra* the second and third Chapter, respectively.

169 See: A. Cassese, *International Law*, 2nd ed., 2005, 227; A. Nollkaemper, *National Courts and the International Rule of Law*, Oxford, 2011, 117 ff.

international courts or monitoring bodies of international organisations to recognize a treaty provision as self-executing.[170] It is thus quite common for domestic courts to declare provisions as being non self-executing to shield national legal systems from radical changes.

In the case of the Charter, it cannot be objectively argued that all provisions are directly applicable. Many of them require a legislative intervention, besides the act of incorporation, for being invoked before national courts (e.g.: Article 3, para. 2, sentence 2 or Article 5, sentence 2). Others, even if theoretically requiring implementation, are principles or rules having as such the force of law, which courts can thus apply notwithstanding the inaction of the legislative branch (e.g.: Article 4, para. 3 and 4). Hereunder, it should be merely stressed that the Charter is in principle complete and does not need any additional implementation acts under domestic law. In fact, the Charter is a treaty which entails provisions aimed at preventing violation of local self-government principles and rights by the State. It has namely a classical liberal nature, since the bulk of its provisions is complied with insofar as the State omits approving specific acts violating local self-government and not insofar as the State is proactive and approves legal acts aimed at protecting local self-government.[171] In particular, the Charter confers upon local authorities different rights which appear to be enforceable as such (e.g. Article 4, para. 2 or Article 10). The same could be argued for those guarantees which do not explicitly entail rights, but convey the idea that local authorities should in principle enjoy a certain degree of autonomy (for instance, Art. 4, para. 4 and Art. 6, para. 1) or for those objective provisions from which one can subsume a subjective right for local authorities which is compatible with the other rights explictly foreseen by the Charter (see for instance, Art. 8, para. 2, sentence 1).

The legislature's power to restrict local authorities' rights by means of statute stays in no contradiction with the self-executiveness of the Charter. In fact, as already mentioned, the Charter recognizes a certain “margin of appreciation” to all Contracting Parties in the adaptation of international obligations to the different local government systems set up in each domestic order. More generally, interference with or restriction of rights and principles are allowed whenever based on a “public interest”, but in any case not beyond their core. Though, a national legislature might still rectrict the scope of the Charter's guarantees on the basis of the vague wording of some provisions. In some cases, in fact, the binding character of the Charter's provisions is allegedly weakened by formulations such as “normally”, “generally”, “insofar as possible”, “should”, “shall”

---

170 T. Buergenthal, *Self-Executing and Non Self-Executing Treaties in National and International Law,* 235 Recueil des Cours (1992) 317.

171 As for those few provisions (Art. 9, para. 1 and para. 2) which call for a positive action on the part of the State and are therefore not self-executing, one still can say they nevertheless contain single norms which are directly applicable. In fact, the aforementioned provisions set out the principle of adequateness of financial means for local authorities and the principle of free disposition of financial resources by local authorities.

"in preference", "where appropriate" and "possibly".[172]

A closer examination of these terms leads to the conclusion that: a) discretionary powers cannot be seen as unlimited, so that local authorities rights and principles cannot be undermined simply by virtue of statutory provisions. The exercise of political discretion by the legislature should be carried out with due observance of the limits set to it and local authorities should in any case be able to file a complaint insofar as they assume their rights have been violated; b) only very few provisions empower the legislature to use its discretionary power. According to Schaffarzik,[173] in particular, only four provisions entail legislature's discretionary powers: Article 4, para. 3, sent. 1, Article 5, Article 7, para. 2 and Article 9, para. 1. As for Article 4, para. 3, sent. 1, this provision envisages a discretionary power, only insofar as the legislature can decide that public responsibilites might be carried out by authorities which are not closest to the citizens. However, this discretionary power by the legislature is limited in sentence 2, whereby their allocation to another authority should weigh up the extent and the nature of the task and requirements of efficiency and economy. As for Article 5, the norm whereby consultation prior to boundary changes is a local authorities right does not entail any discretion on the part of the decision maker; only the second part of the sentence envisages a discretionary power. In fact, the provision on referendums is not a mandatory one. As for Article 7, para. 2, a legislature's discretionary power is envisaged only concerning compensation for loss of earnings or remuneration for work done and corresponding social welfare protection. As for Article 9, para. 1, local authorities' entitlement to adequate financial resources within national economic policy cannot be understood as being non binding. In fact, according to the teleological argument of the *effet utile,* national economic policy cannot represent a tool for depriving local authorities of their resources, but only to limit them until a certain extent which can, again, be checked out before a court. In general, it might be said that all aforementioned provisions provide for principles rather than for rules, since they have different weights in different cases, i.e. they are norms that require that something be realized to the greatest extent possible given factual and legal possibilities.[174]

Also the alleged absence of clarity in the Charter's provisions has lead to deny its direct applicability. In fact, insofar as it is not clear what the very meaning of a rule is, it might be difficult for the organs of the State to apply it without resorting to an implementing act. Yet, the mere fact that treaty's provisions attain a high-level of abstraction and that they need to be interpreted speaks not in favor of a lack of clarity. Abstraction is needed to reach consensus among the Contracting Parties and tough interpretation efforts by courts do not automatically lead to the conclusion that

---

172 So B. Weiss, *cit.*, 94. So also: H. Siedentopf, *Europäische Gemeinschaft und kommunale Betätigung*, DÖV, 1988, 988 and ff.

173 B. Schaffarzik, *cit.*, 284-286.

174 R. Alexy, *A Theory of Constitutional Rights*, Oxford, 2002, 47, 50 and ff.

implementing legislation in the domestic order is needed. Provisions of treaties are often written in very general terms because «*political consensus is easier to reach the vaguer the provisions under negotiation are. Hence, their specification is left to legal experts responsible for monitoring adherence to a treaty*».[175] As Schaffarzik points out, a benchmark for assessing the precision of the norms can be found in domestic law and in particular in the constitutional framework on local self-government, which correspond, at least as for their content, to the Charter's provisions. The degree of abstraction is rather similar, so that one cannot argue that the Charter's provisions cast too many doubt on their own meaning.

Alike, the reasoning whereby it is not clear to what kind of local authorities the Charter applies is flawed (see *infra* Section § 3). As provided for by Article 13, the Charter applies to all local authorities, unless a Contracting Party decides differently by opting out some local authorities. Finally, according to Weiss,[176] the non self-executing character of the Charter's norms stems from the frequent use of the expression "shall be" in the English version, which allegedly confers no binding character to the Charter's provisions. This view cannot be shared, because, as the French version ("*doit*") clarifies, this wording entails a declaratory provision, but does not imply that the legislature must act to accomplish the purpose expressed by the norm.[177]

To conclude, the question on whether the Charter's provisions have to be considered as directly applicable and reliable upon before domestic courts or not rests within the Contracting Parties. However, hereabove it has been advocated that the Charter sets out principles and rules, which mostly do not need further implementation by means of law, whereas the few legislature's discretionary powers envisaged by the Charter's legislative reservation clauses are not an obstacle to their direct applicability. On the contrary, also the limitations set to the States' discretionary powers which can be derived from the Charter itself are to be considered as self-executing.

§ 3. Concept and Design of Local Self-Government

In the following Section it will be assessed what concept and design of local self-government did the Charter set out, how and to what extent this concept and this design differ from, and thus supplement, those in force in some Council of Europe member States. For this purpose, the authoritative interpretation of the Charter's

---

175 So: K. Tuori, *On Legal Hybrids and Perspectivism,* in: M. Maduro, K. Tuori and S. Sankari (eds.), *Transnational Law: Rethinking European Law and Legal Thinking*, Cambridge, 2014*,* 19.

176 So B. Weiss, *cit.*, 96-97.

177 So also: B. Schaffarzik, *cit.*, 258. On the interpretative problems related to the use of the term "shall" in constitutional provisions see: F. P. Grad and R. F. Williams, *State Constitutions for the Twenty-First Century. Drafting State Constitutions, Revisions and Amendments,* New York, 2006, 53-54.

provisions carried out by the Congress of Local and Regional Authorities and by other Council of Europe bodies, including the Committee of Ministers and the Venice Commission, will be used.

I. The Charter's Concept of Local Self-Government

In Part I it will be clarified what the Charter exactly understands under the term "local self-government". For this purpose, the legal definition of the concept, as laid down in Article 3, para. 1 and 2 of the Charter will be deconstructed in its four component elements, that is to say "government" (1.1), "local government" (1.2), "local self-government" (1.3.) and "constitutional local self-government" (1.4.). The conclusion will show that the Charter provides for an institutional guarantee of local self-government, akin to the German model (2.).

1. Legal Definition

1.1. *Government:* Substantial Share of Public Affairs

Article 3.1. *Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.*

The Charter does not refer to "State affairs", but to "public affairs", thus meaning that local authorities are not primarily decentralised entities of the State exercising delegated duties, but, on equal footing with other public authorities, can manage and regulate any kind of affairs, which have to be specified by means of law pursuant to Article 4, para. 1 or which can be carried out pursuant to the universal jurisdiction principle (Article 4, para. 2).

Yet, under these public affairs can thus in principle fall also issues related to subject matters including, for instance, foreign and defense policy, as it happens most frequently for the constituent entities in federal and regional States, even if the Explanatory Report recalls that «*it is accepted that countries will wish to reserve certain functions, such as national defence, for central government*».[178] This wording was deliberately chosen upon suggestion of one of the legal experts who contributed to the Charter's drafting and notably the German administrative lawyer Joachim Burmeister, who advocated at that time a rather extensive intepretation of the German constitutional locution "affairs of the local community" by underlining that the corresponding Basic Law

[178] On the foreign-policy-making of federated States and regions in Europe see *inter alia*: N. Skoutaris, *Comparing the Subnational Constitutional Space of the European Sub-State Entities in the Area of Foreign Affairs,* Perspectives on Federalism, Vol. 4, No. 2, 2012.

provision (Article 28, para. 2 BL) did not speak of "local affairs of the community".[179]

As recognized in the Explanatory Memorandum to the Draft Charter, «*to assign to local authorities only "local affairs", if by that is meant only matters which do not have wider implications, would be to risk relegating them to the margins of modern public administration*». This is a fairly relevant distinction with those public affairs dealt with by merely decentralised entities of the State or by functionally autonomous entities (including universities, chambers of commerce, but also ethnic or linguistic minority groups), since the former traditionally carry out only delegated tasks by the State, whereas the latter are assigned with a limited and rather specific amount of subject matters.

Hence, local authorities exercise administrative functions they can carry out more effectively and efficiently than any central authority and not necessarily those responsibilities linked to situations of local concern. Therefore, the Charter avoids distinguishing between local affairs and supra-local affairs and also between local authorities of lower level and local authorities of higher level. According to the "functional" understanding of local self-government, neither can a local authority *a priori* be assigned with a specific list of public responsibilities, nor can it *a priori* be excluded from regulating and managing certain public affairs. In other words the Charter does not understand local self-government as «*a sphere of free activity on the part of society marked off from, and in anthesis to, the legitimate sphere of the State*»[180] and, therefore, it does not distinguish between State responsibilities and local authorities responsibilities, but only provides for general principles on allocation of responsibilities between different levels of government, the most pivotal of which is the subsidiarity principle (Article 4, para. 3).

Finally, Article 3, para. 1 should be construed as setting out that, even after conferral of public functions to higher level authorities, local authorities should still be able to manage and regulate a substantial share of affairs, i.e. a broad range of administrative functions - under which do not fall so-called delegated tasks by the State.[181] This provision is coherent with the aforementioned "core area" doctrine, whereby local authorities enjoy an intangible sphere or nucleus of basic responsibilities which cannot be encroached upon by statute. Following to Schaffarzik's reasoning, one has thus to refer the legislative reservation clause laid down in Article 3, para. 1 only to the

---

179 C. Tomuschat, C. Schmidt, R. Blumel, R. Grawert (eds.), *Der Verfassungsstaat im Geflecht der internationalen Beziehungen. Gemeinden und Kreise vor den öffentlichen Aufgaben der Gegenwart, Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Basel vom 5. bis 8. Oktober 1977,* Berlin, 1978, 363-364. So also: A. Galette, *The Draft European Charter, cit.*, 322, quoting himself: A. Galette, *Kommentar zur schleswig-holsteinischen Gemeindeordnung*, Wiesbaden, 1982.

180 Explanatory Memorandum (so-called *Harmegnies Report*) to the Draft Charter, CPL (16) 6, 3.

181 See: B. Schaffarzik, *cit.*, 350.

locution “own responsibility” and not to “substantial share”: a statute might in fact be authorised to restrict, but not to undermine local authorities' bundle of tasks, by conferring some functions upon to other public authorities (Article 4, para. 2 and 3) or reduce local authorities' responsibility, by entrusting it to central or regional authorities. The substantial share of local responsibilities shall in any case be safeguarded otherwise one cannot say local self-government exists.[182]

1.2. *Local Government*: Territorial Local Authorities

Article 13 *The principles of local self-government contained in the present Charter apply to all the categories of local authorities existing within the territory of the Party. However, each Party may, when depositing its instrument of ratification, acceptance or approval, specify the categories of local or regional authorities to which it intends to confine the scope of the Charter or which it intends to exclude from its scope. It may also include further categories of local or regional authorities within the scope of the Charter by subsequent notification to the Secretary General of the Council of Europe.*

The Charter points out that local self-government is not a right of individuals but a right exercised by local authorities (Article 3, para. 2). Local authorities are public authorities, that is to say bodies enjoying legal personality created or recognised by the State for carrying out public tasks. Yet, the Charter does not explicitly mention to what categories of subnational authorities it applies. Instead, it leaves the Contracting Parties free to choose them while depositing their instrument of ratification (Article 13, sentence 2). If the Parties do not specify them, the rule is that the Charter applies to all local authorities existing on the territory of the State (Article 13, sentence 1).

Following to the general principles on the interpretation of international agreements, however, the word “local authorities” should be acknowledged an autonomous meaning, independent from its definition in domestic law.[183] Article 3, para. 1 stipulates that local authorities are public authorities which manage and regulate a substantial share of public affairs, both under their own responsibility and in the interests of the local population. This means that, unless a State has opted out Article 3, para. 1, the Charter applies in the first place to all “territorial authorities”.[184] As the Explanatory Report to a previous Council of Europe treaty, that is to say the Outline Convention on Transfrontier Co-operation (1980), points out, «*“territorial” has a geographical connotation, denoting powers*

---

182 See in this respect: Congress of Local and Regional Authorities, Recommendation No. 305 (2011), *Local Democracy in Malta*, § 9-10 lett. a);

183 P. Akkermans, *cit*., 277-278, instead, taking into consideration Article 13, para. 1 alone, construes the term „local authority“ only on the basis of the domestic law of the member States.

184 For the theory setting out four criteria to assess the territoriality of local authorities see: BVerfGE 52, 95; NJW 1979, 1815; DVBl 1980, 52 and E. Pappermann, *Der Status der Gemeinden und Kreise als Gebietskorperschaften,* in: G. Püttner (ed.), HKWP, vol. I, 1981, 300.

covering a smaller area than that of the State». Territorial authority is a much more precise term than local authority, because its authority can be claimed over a specific area in which a certain community resides, whereas non-territorial local authorities (including health, education and welfare bodies, water boards, public records offices, chambers of commerce etc.) can only claim a functional authority. In other words, only territorial authorities exercise a jurisdiction representing a local community or, to use the words of the Charter, "in the interests of a local population", whereas non-territorial local authorities are normally entrusted by territorial authorities, including the State, with the task to deliver certain specific functions in their own interests. Hence, one should argue that also public inter-municipal institutions are not covered by Article 3, para. 1, because, being so to say "a sum" of territorial authorities, they afford specific protection only under Article 10 of the Charter.[185]

The notion of territorial authorities includes different categories of public authorities, both at local and regional level. In this respect, Article 13 of the Charter appears to be partly contradictory since it first refers to the local authorities as encompassing also regional ones (sentence 1), but then it distinguishes between local and regional level (sentence 2).[186] Nonetheless, the following interpretation should be followed. If a member State does not explicitly declare to what authorities the Charter applies, then it applies to all territorial authorities existing within its jurisdiction, no matter if they are local or regional (Article 13, sentence 1). Instead, while depositing the instrument of ratification, the Contracting Parties can specify to which categories of local and regional authorities, either territorial or not, the Charter applies or does not apply (Article 13, sentence 2).[187] Even if it is true that the partial confusion of the local and regional level could have been prevented by allowing the application of the Charter to territorial regional authorities only upon explicit declaration by the State,[188] one has also to start from the premise that both terms are very ambiguous. In fact, what it is often considered as regional in one country, it is considered as local in another. For example, in unitary states organised on a decentralised basis – including among others the Czech Republic, Denmark, Finland, France, Hungary, Iceland, Portugal, Serbia, Sweden,

---

185 So also: B. Weiss, *cit*., 105; I. Richter, *Zweckverbandsrecht im Freistaat Sachsen*, Berlin, 2012, 144; M. W. Schneider, *Kommunaler Einfluss in Europa,* Frankfurt am Main, 2004, 293 and ff.; T. F. Giupponi, *Verso un diritto europeo degli enti locali?*, in www.forumcostituzionale.it, 2005, who speaks of „enti rappresentativi delle collettività territoriali". In the practice, see: Congress of Local and Regional Authorities, *Reservations and Declarations to the European Charter of Local Self-Government*, CPL (21) 5, § 36 ff.. *Contra*: B. Schaffarzik, *cit*., 111 e 291, who, though using the German term *Gebietskörperschaft* (territorial authority), contends that, whenever a reservation or declaration of a State is lacking, the Charter's scope is extended to any kind of local authorities and not only to territorial authorities.

186 So also: A. Gamper, *cit*., 180 and ff.

187 In particular, Denmark confined the application of the Charter to the *Kommuner*; France confined it not only to the *Communes*, but extended it to the *Départements*, the *Régions* and to the so-called *Collectivités d'outre-mer* but not to the *Établissements publics de coopération intercommunale;* Ireland restricted it to *Counties, Cities* e *Towns*; the Netherlands to *Provincies* and *Gemeenten;* Sweden to the *Landskap* and *Kommuner*.

188 So also: A. Gamper, *cit*., 183-184.

Turkey, Ukraine - second tier local authorities are often labelled as regional authorities, whereas in other unitary states such as Bulgaria, Estonia and Malta regions are only decentralised part of the State structure; in federal States, such as Austria, Belgium, Germany and Switzerland, regional authorities are the member states of the federation and in "regional states", such as Italy, Poland, Spain and the United Kingdom,[189] they represent the autonomous regions, communities or devolved territories with own legislative powers, to which local authorities are hierarchically subject. In this latter case, one would think, the Charter should not apply to them. However, this is in principle not the case. Belgium, Germany, Spain, Switzerland and the United Kingdom confined the scope of the Charter respectively to the *Provinces* and to the *Commune*; to *Gemeinden, Kreise* and *Verbandsgemeinden* to *Municipios* and *Diputaciónes provinciales;* to *Einwohnergemeinden* and to *Counties*, *Districts, Boroughs of London* and to the *Council* of the Scilly Islands, thus excluding their federated States, autonomous communities, Cantons and devolved territories.[190] Austria and Italy, on the contrary, decided to apply the Charter also to their federated States and regions, respectively. The same could be said for Poland and its *voivodeships*.

Even if theoretically permitted under the Charter itself, this choice is highly debatable, since some of its provisions mentioning regional authorities as counterparts of local authorities such as Article 4, para. 4 and Article 5 reveal that the treaty is intended to apply first and foremost to public territorial authorities with a truly local dimension and not to those higher level authorities from which local authorities are delegated powers and/or are being supervised. To these latter authorities, nonetheless, the Congress of Local and Regional Authorities has been increasingly applying the provisions of the aforementioned Reference Framework for Regional Democracy, which, even if constituting no binding convention, was meant to «*transcend the scope of Article 13 of the European Charter of Local Self-Government in order to help governments strike the best possible balance in the apportionment of powers and responsibilities among different tiers of government*».[191]

1.3. *Local Self-Government*: Own Responsibility and Democracy

Article 3.2.1 *This right shall be exercised by councils or assemblies of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them*

---

189 On the debate concerning the nature of the system of government in the United Kingdom see: M. Suksi, *Sub-State Governance through Territorial Autonomy,* Heidelberg-Dordrecht-London-New York, 2011, 109-123.

190 The United Kingdom, however, also excluded the application of the Charter to local councils in Northern Ireland.

191 Council of Europe, *Reference Framework for Regional Democracy*, MCL-16[2009]11, 3 November 2009, in www.coe.int/congress See lastly: Congress of Local and Regional Authorities, *Local and Regional Democracy in Poland*, CG (28) 12, 25 March 2015, § 21 and 102; Congress of Local and Regional Authorities, *Local and Regional Democracy in Greece*, CG (28) 8, 25 March 2015, §§239-240.

The right and the ability to regulate and manage public affairs has to occur in the "own responsibility" of public territorial authorities themselves. In other words, local self-government implies that public authorities cannot be «*limited to merely acting as agents of the State or higher authorities»,* otherwise being autonomy turned into heteronomy.[192] The requirement of the "own responsibility" is a corollary of the ability to manage and regulate public affairs, since one cannot speak of local self-government if other public authorities are directly or indirectly in charge for them. External intervention has thus to be regarded as the exception to the rule, whereby territorial authorities are themselves responsible for their activities.

"Own responsibility" goes hand in hand with "accountability" to the local population or community, from which territorial authorities ought to receive their legitimation. The Preamble to the Charter, in fact, stipulates that the safeguard and the enhancement of local self-government in Europe entails the existence of local authorities endowed with democratically constituted decision-making bodies. Even if rooted in Tocqueville's and Mill's political thought as well as in the political practice of the XIX century, the idea whereby local democracy and local self-government go hand in hand has not been always dominant across Europe.[193] In the early decades of the XX century, in fact, the increasing politicisation of local authorities was seen as highly dangerous for the unity of the State, in particular in the totalitarian ones. In the 1930s, the German legal scholar Ernst Forsthoff contended that democracy and self-administration were «*irreconcilable opposites»*.[194] The legal and cultural framework changed after World War II, when political pluralism within the State was no longer seen by central government elites as endangering the unity of the State so that, again, the normative argument whereby local self-government cannot be thought without local democracy could be reaffirmed.[195]

In the light of the principle spelled out in the Preamble, Article 3, para. 2, sentence 1 of the Charter makes clear that the right to local self-government «*shall be exercised by councils or assemblies of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them*»[196]. In other words, territorial administrative

---

192 B. Schaffarzik, *cit.*, 330 and ff.; B. Weiss, *cit.*, 106; A. Galette, *Europäische Aspekte der Kommunalen Selbstverwaltung,* in: A. von Mutius (ed.), *Festschrift für von Unruh,* Heidelberg, 1983, 1096.

193 On the evolution in the relationship between local self-government and local democracy in recent times see: L. Pratchett, *Local Autonomy, Local Democracy and the 'New Localism',* in: Political Studies, Vol. 52 (2004), 358-375.

194 E. Forsthoff, *Krise der Gemeindeverwaltung im heutigen Staat,* Berlin, 1932, 57.

195 Yet, some authors tried to question this assumption in recent times: Cf. L. Pratchett, *Towards a Separation of Local Autonomy and Local Democracy*, in: ECPR Workshop, Grenoble 6-11 April 2001. In the past see also: W. Loschelder, *Kommunale Selbstverwaltungsgarantie und gemeindliche Gebietsgestaltung*, 1976, 120.

196 The wording of Article 3, para. 2 has been accordingly redrafted following to a proposal of amendment tabled

units of a State would not enjoy real autonomy if their councils or assemblies were not elected, but, for instance, led and managed by State appointed officials.

Yet, no explicit mention is made by the Charter as to what citizens exactly should be given the right to vote, that is to say whether only nationals or also foreign residents could stand in for election and enjoy the right to vote. Article 3 only prescribes that local councillors should be elected on the basis of universal suffrage, which, according to Council of Europe standards,[197] means that all human beings should be granted the right to vote. But this right may indeed be subject to conditions, especially with reference to nationality, varying and depending on the domestic legal order, since voting rights are theoretically considered as attributes of national sovereignty.[198] In general, in fact, it might be argued that restrictions imposed for elections at national level should also apply at local level, i.e. that local councils should «*possess the same democratic legitimation as the authorities at national level*»[199]. However, since at least two decades, there have been increasing efforts by legal scholars and also by a certain political class to disentangle the concept of national citizenship from that of local citizenship,[200] the most prominent example thereof being Council Directive 93/109/EC of 6 December 1993, laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.[201]

The Council of Europe has gone even further than the European Union, by committing the member States to grant voting rights to foreign country nationals in local elections irrespective of mutual recognition. Apart from the soft-law of the Parliamentary Assembly and the Congress,[202] it was the European Convention on the Participation of Foreigners in Public Life at Local Level (1992) that

---

by two Germans, Otto Maier and Peter Michael Mombaur, on occasion of the debate on the Draft Charter on 28 October 1981 within the Conference of Local Authorities. Cf. Council of Europe, 16th Session (27-29 October 1981), CPL (16) 6, Amendment No. 2, in www.coe.int/archives

197 Code of Good Practices in Electoral Matters, Guidelines and Explanatory Report - Adopted by the Venice Commission at its 52nd Session (Venice, 18-19 October 2002), in www.venice.coe.int.

198 On the historical development of the concept of citizenship see: D. Kostakopoulou, *The Future Governance of Citizenship,* Oxford, 2008, 12 and ff.

199 See: Draft Explanatory Memorandum to the Draft Charter (*Harmegnies-Report*), CPL (16) 6, 17.

200 Cf. for instance: R. Bauböck, *The Three Levels of Citizenship within the European Union,* in: German Law Journal, Vol. 15 No. 5, 2014, 752, noting that «*as municipalities have devolved autonomy and democratic elections for local governments, they also have their own citizens*».

201 Yet, the definition of the notion of "municipal" election has been left to the member States, so that the a non-harmonised implementation of the right to vote at local level prevails. See in this respect the study requested by the European Parliament's Committee on Constitutional Affairs: "Franchise and Electoral Participation of Third Country Citizens Residing in the EU and of EU citizens residing in Third Countries", April 2013, to be found at the following address: www.europarl.europa.eu. On the tensions arising because of this fragmented legal framework see: F. Fabbrini, *Fundamental Rights in Europe*, Oxford, 2014, 108-9 and D. Kochenov, *Free Movement and Participation in the Parliamentary Elections in the member States of Nationality: an Ignored Link?*, in: Maastricht Journal of European and Comparative Law, 2009, 197.

202 Parliamentary Assembly, Recommendation No. 1625 (2003), *on policies for integration of immigrants in Council of Europe member States*; Congress of Local and Regional Authorities, Recommendation No. 76 (2000), *on the participation of foreign residents in local public life*.

required the member States to enfranchise foreign residents in local elections regardless of their nationality. Thus, if one combines Article 3, para. 2 of the Charter with Article 6 – Chapter C of the aforementioned Convention, one could infer that the right to vote and the right to stand in for election for local assemblies or councils should be granted to every foreign resident, having been lawful and habitual resident in the concerned country's territory for the five years preceding elections.[203] This is the case only for those member States which have ratified both treaties and namely: Albania, Denmark, Finland, Iceland, Italy, the Netherlands, Norway and Sweden.[204]

As for the four other electoral principles mentioned by Article 3, para. 2, according to the Venice Commission, «*although conventional in nature*», they all amount to «*common principles of the European constitutional heritage and form the basis of any genuinely democratic society*» and «*must be scrupolously respected by all European States*». In other words, the aforementioned minimum electoral standards are legal principles of conventional nature, to be found mainly in international treaties such as the International Covenant on Civil and Political Rights (Article 25 lett. b)) and the First Additional Protocol to the European Convention on Human Rights (Article 3), adopted in 1952.[205] Recognised and developed by the case-law of the ECtHR, those standards might be nowadays deemed to constitute at least regional customary international law.[206]

1.3.1. Deliberative Bodies Have To, Executive Bodies Can Be Elected.

In order to further assess the Charter's conception of local democracy, it has now to be clarified what is the political body which requires to be elected pursuant to the aforementioned standards.

With the term "council" or "assembly", one should understand the deliberative body of a local authority, which has to be opposed to the executive. According to Article 31 of the Vienna Convention on the Law of Treaties (1969), the distinction between the two bodies should be made following to the provision's autonomous meaning, i.e. following to its object and purpose and not pursuant to a national understanding of the terms.[207] Thus, under the Charter, it has to be considered

---

203 Cf. F. Fabbrini, *cit.,* 105, who however does not mention the European Charter of Local Self-Government.

204 To date, Belgium, Denmark, Estonia, Finland, Iceland, Ireland, Lithuania, Luxembourg (only to vote but not to stand), the Netherlands, Norway, Slovakia and Sweden grant this right to all their foreign residents which reside in the country for a certain time, whereas Albania and Italy do not comply with the international obligations, because they entered a reservation concerning Chapter C of the Convention. For Italy see *infra* third Chapter.

205 On the interpretation of Article 3 Protocol I ECHR see *inter alia*: P. Leach, *Taking a Case to the European Court of Human Rights,* 3rd ed, Oxford, 2011, 431 and S.L. Anthony, *Autonomy and the Council of Europe – with special reference to the application of Article 3 of the First Protocol of the European Convention on Human Rights*, in: M. Suksi (ed.), *Autonomy: Applications and Implications*, 317-342.

206 C. Pippan, *Die Förderung der Menschenrechte und der Demokratie als Aufgabe der Entwicklungszusammenarbeit der EG*, Frankfurt am Main, 2002, 346; P. Macklem, *Militant Democracy, Legal Pluralism and the Paradox of Self-Determination*, International Journal of Constitutional Law, 4(3), 2006, 516.

207 Nevertheless, following to Vanneste, in finding the autonomous meaning of the Convention's provisions, the ECtHR, in most cases, usually looks for a "common denominator" among member States, whereas the Inter-American

a council or assembly the body of a territorial authority charged with the task to approve the main decisions related to the right of local self-government (i.e. approval of the budget and local taxes, adoption of by-laws and regulations, deliberation on spatial plans) and to exercise effective supervision over the executive. The deliberative body has not necessarily to be a collegiate body and the executive does not have to be a monocratic one.[208]

As a rule, yet, the latter organ should be responsible to the former. In this respect, it should be assessed whether the responsibility of the executive towards the deliberative body should result in the election of the former by the latter or whether it might be allowed for the former to be elected directly by the people or, further, whether the former should be dismissable by the latter.

Preliminarly, it has to be pointed out that the Charter does not clearly decide for either a "monistic model", typical of the United Kingdom and Sweden, whereby all powers traditionally rest within the elected body or a "dualistic model", invented in France and adopted across Germany, where decision-making powers are assigned to the elected body, while a separated body is endowed with the task of exercising direction and control over the local administration.[209] However, the Charter stipulates that, when existing, irrespective of the system of election or appointment, executive organs should be responsible to the deliberative body or, to use the terms of the Explanatory Memorandum, must be *subordinate* to deliberative bodies.[210]

Responsibility and subordination are here to be understood as a synonym for accountability, because they indicate the acknowledgement and assumption of responsibilities by public officials for their actions and results towards the assembly or council. This does not imply that the executive body should always be dismissable, but that local representatives should enjoy the means to effective scrutinize and supervise the executive's activities. Dismissal by the council should be considered as a last resort measure. A supervision by the council takes place whenever the deliberative body is vested with powers, which cannot be delegated to the executive, among others:

Court of Human Rights looks for guidance in international instruments. In the present case, the second method should be preferred, since it seems very unlikely to find out a common denominator in the terms "council" or "assembly" without resorting to the subsequent practice of the Council of Europe. In fact, councils and assemblies in different member States carry out either deliberative or executive functions. Cf. F. Vanneste, *General International Law Before Human Rights Courts*, Oxford, 2010, 239-240.

208 So: B. Weiss, *cit*., 161.

209 The aforementioned distinction is laid down *inter alia* in: H. Wollmann, *Reforming Local Leadership and Local Democracy: The Cases of England, Sweden, Germany and France in Comparative Perspective,* in: Local Government Studies, 34:2, London, 2008, 280-281.

210 France considers that the provisions of Article 3, para. 2, must be interpreted as giving to the States *the possibility* to make the executive organ accountable before the deliberative body of a territorial authority. In other words, France interpreted the expression "may possess" not only as referred to the establishment of executive organs, but also to the nature of its relationship with the deliberative body. In fact, the principle of the Charter finds application only in New Caledonia, French Polynesia and Corsica. See: P. Williams-Riquier, *La charte européenne de l'autonomie locale: un instrument juridique international pour la décentralisation,* in: Revue Française d'Administration Publique, n. 1/2007 (121-122), 191-202.

budget approval, local taxes approval, adoption of by-laws, regulations and spatial plans.[211]

Pursuant to Article 3, para. 2 of the Charter, executive organs may also not exist. Though, whenever existing, it comes to the question of whether they should be elected or appointed. Even if no common standard hereon apparently existed among the original Contracting Parties to the treaty, the Congress developed its own interpretation on the issue building on comparative observations.

In 1999, while monitoring local and regional democracy in the Netherlands, the Congress admitted it was «*not sure as to whether the current system* [of appointment] *in the Netherlands corresponds with the letter and spirit of the European Charter of Local Self-Government».* Therefore, with Resolution No. 77 (1999), the Congress instructed its Working Group responsible for following up to the Charter «*in order to establish whether, according to Article 3, members or at least the chair of executive organs must always be elected, whether by the council or, where appropriate, and given the last sentence of paragraph 2 of Article 3, directly by the population.».* Nevertheless, already in the framework of the report on the Netherlands, the Congress stressed that: *«A mayor who is appointed by the Queen and can only be formally dismissed by her cannot be considered to be "directly responsible" to the municipal council».* With Recommendation No. 113 (2002), building on the report on relations between the public, the local assembly and the executive in local democracy,[212] it welcomed «*the trends in the member states' legislation and practice, which show that election of the local executive is becoming increasingly common»* and considered «*that election of the local executive is the most appropriate procedure»*. These considerations had indirect effects also in the Netherlands, where a coalition agreement provided for the direct election of mayors. To that purpose a revision of the Dutch Constitution setting aside Article 131 was started. With Recommendation No. 113 (2002), the Congress also stressed that political deadlocks can be averted if the elections for the two organs are elected simultaneously. The system of appointment by government was however not fully excluded, insofar as a system of dismissal was enshrined into law.

The same view was confirmed by the Congress in 2003 while monitoring local and regional democracy in Belgium. In the Recommendation No. 131 (2003), it pointed out that «*direct election of the "burgomasters", either by the municipal council or directly by the electorate, is a better solution and one opted for in many European countries».* Nevertheless, the system in force in Belgium was deemed to be *«compatible with the Charter insofar as practice has shown that the*

---

211 So also: Recommendation Rec(2004)1 of the Committee of Ministers to member states on financial and budgetary management at local and regional levels, Appendix - § 5.

212 Congress of Local and Regional Authorities, Recommendation No. 112 (2003), *on relations between the public, the local assembly and the executive in local democracy (the institutional framework of local democracy),* Application of Article 3, paragraph 2 of the European Charter of Local Self-Government on the basis of the 5th general report on monitoring of the implementation of the Charter – CPL (9) 2 Part II E.

municipal council exerts considerable influence in their appointment and supervision process»[213]. However, even if in the Walloon Region and in the Flemish Region the adoption of a motion of no-confidence has been allowed, the municipal council cannot force the executive body to resign without priorly informing the Flemish or Walloon government and attempting reconciliation.[214]

With Recommendation No. 151 (2004),[215] taking into consideration and analysing the experience of the Council of Europe member States, the Congress slightly modified its case-law by listing all advantages and disadvantages of a direct election of the executive organ, but without taking a clear position on the issue. Among the former should mentioned: a greater political legitimacy of the local government system, a much more clear separation of the powers of the two bodies, making them independent from each other, the improvement of the identification by the people in the local institutions, the enhancement of stability and rapidity of administrative procedures. On the other hand, direct elections can bring about deadlocks if the two organs represent different political views. This disadvantage can be set aside by simultaneously holding elections for both; direct election may further produce an excessive concentration of powers and a risk of populism.

With the adoption of Recommendation No. 157 (2004), *on local and regional democracy in Georgia*, the Congress stressed that the appointment of the mayors of Poti and Tbilisi by the President was not to be justified and infringed upon Article 3, para. 2 of the Charter. After the Judgment by the Georgian Constitutional Court, on 16 February 2005, the laws on local self-government and on the capital city were amended by Parliament so that the mayor can now be elected by the council from among its members.[216] The direct election of the mayor by the people was eventually introduced in 2009.[217]

In 2005, the Congress, while reviewing on the reform projects concerning local government issued by the Dutch government,[218] underlined again that the executive should emanate from the municipalities and that therefore the *«participation of the councils in proposing the candidates»* was «*a step in the right direction».* Apart from that, the further reasoning of the Congress became less straightforward. In fact, it acknowledged that the system of appointment raises problems under the

---

213 Congress of Local and Regional Authorities, Recommendation No. 131 (2003), *Local Democracy in Belgium*, § 10 lett. a) II. The same might be said with reference to Luxembourg. See: Recommendation No. 172 (2005), *Local Democracy in Luxembourg*, § 8 lett. a) III. However, unlike in Belgium, in Luxemburg the law provides for a vote of no confidence if the budget is rejected, so that the executive is somehow responsible to the deliberative body.

214 Cf. A. De Becker, *Local Government in Belgium*: *A Catch 22 Between Autonomy and Hierarchy* and C. Panara, *Conclusions*, in: C. Panara and M. Varney (eds.), *cit.*, 2012, 47 and 398.

215 Congress of Local and Regional Authorities, Recommendation 151 (2004), *on advantages and disadvantages of directly elected local executive in the light of the principles of the European Charter of Local Self-Government* - CPL (11) 2 Part II.

216 See Report attached to the Recommendation No. 205 (2006) *on the local elections in Georgia observed on 5 October 2006*.

217 See: Recommendation No. 291 (2010), *on municipal elections in Georgia*, CG (19) 8, 30 September 2010, § 5.

218 Congress of Local and Regional Authorities, *Local and Regional Democracy in the Netherlands*, CG (12) 16 Part II.

Charter. Though, it also stressed that a mayor directly elected by the voters «*may break the principle of collegiality in the municipal executive and the control by the council*»[219].

In any case, the choice between putting more weight on the principle of collegiality or whether putting more emphasis on a more independent position of the mayor is left to the appreciation of each member State. The same goes for an election of the mayor by the council or by the people. As for the dismissal of the mayor, the Congress welcomed the possibility to dismiss the mayor by the council with a two thirds majority in case of violation of his duties and in case of a conflict in the functioning of the municipality, but expressed skepticism as to whether a mayor elected by the people can be dismissed by means of a resolution of the council; a more coherent solution would be to affirm that, as it happens in Italy and Austria, a vote of no confidence by the council dismisses the executive but also determines new elections (so-called principle of *simul stabunt, simul cadent*).[220]

Hence, it might be said that all solutions – direct or indirect election and in exceptional cases even the appointment of the executive organ – are legitimate under Article 3, para. 2 of the Charter. Its silence reflects indeed the wide variety of solutions of European local government law and thus respect for the member States's sovereignty. However, in case of direct election of the mayor, it must be ensured that a system of "checks and balances" between the deliberative and the executive body is established. This view was confirmed in the Appendix II of the Draft Explanatory Report to the Additional Protocol to the European Charter of Local Self-Government, adopted by the Congress in the form of Recommendation No. 228 (2007). Therein one may read that «*the law must provide the council or assembly with a minimum number of control mechanisms. Furthermore, the council or assembly must have the deciding say in matters of prime importance to the local authority, which should include the budget».*

Direct election is yet not the most common solution in use in Council of Europe member States. Among States in which mayors are directly elected one should recall: Albania, Bulgaria, Cyprus, Greece, Hungary, Italy, Macedonia, Portugal, Romania, Slovenia, Turkey and Ukraine. The practice is all but straight, since in many other countries (Austria, Germany, Norway, Russia and the UK) election is direct depending on different circumstances, in particular depending on the legislation of

---

219 See also: Congress of Local and Regional Authorities, Recommendation No. 352 (2014), *Local and Regional Democracy in the Netherlands*, CG (26) 7, 26 March 2014, § 26-30, cit.: «*The council's recommendation is sent to the minister. The minister decides on the proposal but, in principle, the council's recommendation is always accepted by the minister who can only deviate from this recommendation on reasoned and meaningful grounds».*

220 Cf. Venice Commission, Opinion No. 543 (2009), *Comments on the Draft Constitutional Law on Changes and Amendments to the Constitution of Georgia – Chapter VII Local Self-Government*, by Mr. Jorgen Steen Sorensen, CDL (2010) 010, cit. «*In municipalities where the Mayor is directly elected, responsibility ending in dismissal procedures would be very questionable».*

the federated State. A mixed system applies also in the Czech Republic, Estonia, Iceland and Spain, where only in tiny local communities mayors are directly elected. Otherwise in most countries, mostly Scandinavian or Central and Eastern European, election is generally indirect (Belgium, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Spain and Sweden).

To conclude, the municipal form of government underlying the Charter is not as hard as a parliamentary democracy, in which there exists a confidence-relationship between the deliberative and the executive organ. Here, whereas the deliberative body has to be directly elected, no confidence between the deliberative and the executive should necessarily exist for ensuring compliance with the Charter. However, the deliberative body should either be vested with prevailing powers which can limit the executive's action or with the power to dismiss it.

1.3.2. Universal Direct Suffrage

1.3.2.1. An Institutional Right to Direct Election in the Charter

As it should have become clear while examining the relationship between the deliberative and the executive bodies, one of the aforementioned five electoral principles is of paramount importance for better defininig the notion of local self-government: the directness of voting for local councils or assemblies.[221]

Directness means that citizens cast ballots for the people or for the party they want to see elected. No direct suffrage can be assessed when elected councillors in turn elect new deliberative bodies. Article 3, para. 2 of the Charter stipulates that councils or assemblies of territorial authorities to which the treaty applies pursuant to Article 13 in combination with Article 3, para. 1, i.e. deliberative bodies, should be directly elected. This is also what the Code of Good Practices on Electoral Matters by the so-called Venice Commission recommends. Thus, unless member States have opted out or made a declaration about Article 3, para. 2 (this is the case of Spain, Belgium and Liechtenstein)[222], no other exception can be assessed from the Charter, nor it can be derived from the Explanatory Report. Only deliberative bodies of unions or federations of local authorities, i.e. of non-territorial authorities can be indirectly elected, but, as a rule, democracy in territorial authorities

---

[221] The other four principles are at least formally accepted. See: *Conference on the Occasion of the 10th Anniversary of the European Charter of Local Self-Government,* 17-18 April 1996.

[222] Belgium and Liechtenstein, however, opted-out Article 3, para. 2, second sentence, related to the position of the executive towards the deliberative body.

has to do with direct election by the citizens.[223] This rule has been confirmed over time by the "case-law" of the Congress.

The case of Spain is particularly interesting in this respect. Spain in fact declared that it «*does not consider itself bound by paragraph 2 of Article 3 of the Charter to the extent that the system of direct suffrage foreseen therein should be implemented in all local authorities falling within the scope of the Charter».* In other words, albeit being Article 3, para. 2 in force in the Spanish legal order,[224] its applicability is subject to the margin of appreciation of the State, which decided to apply it only to certain local authorities falling within the scope of the Charter. Among the latter, Spain included its municipalities (so-called *municipios*) and its provinces (so-called *diputaciones*), but it ruled out that Article 3, para. 2 could apply to provinces, being their councils elected indirectly between and by municipal councillors (Articles 204-206 *Ley Organica* No. 5/1985).[225] While reviewing the fulfillment of Spanish committments in 2002, and again in 2013, the Congress found that, even after removal of such declaration, indirect election of the provincial council would conform with the Charter,[226] since the Spanish provinces do not amount to fully autonomous local authorities, but arise from the grouping of municipalities (Article 141, para. 1 of the Spanish Constitution) and do not enjoy own powers, but only those powers which are delegated to them by the municipalities. Provinces' primary task is to provide technical assistance to municipalities and coordinate provision of public services in their jurisdictions, without having own resources.[227] Thus, they do not carry out public affairs under their own responsibility and in the interest of a "provincial community", as required by Article 3, para. 1. As the Congress stressed «*the situation would have been different if the provinces had been assigned own powers distinct from those of the municipalities».*[228] In other words, one could say that Spain extended the scope of the Charter's application to non-territorial authorities, but ruled out for them the principle of direct election. Since the Congress considered that, even after withdrawal of reservation, Spain would still comply with

---

223 According to Vandelli this rule is too rigid. Cf. L. Vandelli, *The general principles of the European Charter of Local Self-Government and their implementation in Italy*, in: Conference on the European Charter of Local Self-Government: Barcelona, 23-25 gennaio 1992, 73, *cit*.: «*The general rule that election should take place by direct, equal, universal suffrage at all levels of government does not appear to be essential to local democracy*».

224 So also: L. Parejo, *Implementation of the European Charter of Local Self-Government in the Spanish legal system,* in: Conference on the European Charter of Local Self-Government: Barcelona, 23-25 January 1992, 51.

225 The same goes for the councils of the so-called *Comarcas*, supra-municipal authorities or districts existing only in certain regions, to which, however, the Charter does not apply.

226 Only the provincial council in the Basque Country - Vizcaya, Guipozcoa and Alava (so-called *Territorios Historicos*) - is elected with universal and direct suffrage. Cf. Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Spain*, CG (24) 6 Final, 20 March 2013, para. 4.1.3 §§ 86-90, cit.: «*The indirect election of their deliberative bodies is acceptable and not to be considered contrary to the principle of direct election laid down in Article 3, paragraph 2 of the Charter».* So also: L. Parejo, *cit*., 51.

227 See also Act No. 27/2013 *de Racionalización y Sostenibilidad de la Administración Local*, which enhanced the role of the provinces as authorities charged with the task of coordination. Cf. R.J. Asensio, *La posición institucional de las Diputaciones provinciales a partir de la Ley de Racionalización y Sostenibilidad de la Administración Local*, Diario de Derecho Municipal, 13 January 2014.

228 Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Spain*, CG (9) 22 Part II, 14 November 2002, § 53.

the Charter, one might conclude that a Contracting Party does not necessarily have to enter a reservation in this regard, but it may apply the Charter to its non-territorial local authorities, enjoying a wide margin of appreciation as to the application of the standard of direct election. The question will thus be distinguishing on a case by case analysis territorial from non-territorial authorities. The "case-law" of the Congress has attempted to bring order.

In 1995, while monitoring on the situation of local and regional democracy in Romania, the Congress had already stressed that: *«As to the provisions regarding county councils (Judets), legislative revision should provide for the direct election of the council in accordance with Article 3 (2) of the European Charter of Local Self-Government».*[229] In fact, the so-called *Judeţe* or counties, even if endowed with the task of coordinating municipal activities, were territorial authorities which, pursuant to Articles 120 and 121 of the Romanian Constitution, carried out their own administrative functions as set out by the law and disposed of a system of local taxes.[230] After the entering into force of Act No. 215/2001, Romania has finally complied with its international obligations, by granting the county councils to be directly elected by the people.

In 2004, while reviewing the Russian Federal Act No. 131/2003 on local government, the Congress adopted a less clear interpretation. The law, in fact, left the federal entities (Субъекты Российской Федерации) the power to decide whether the districts' (Район) deliberative organs should be elected by direct or indirect suffrage. In the first case, underlined the Congress, «*a) direct election of organs confer*[s] *autonomous authority compared with the organs of communes in the raion»*; nel secondo caso, «*b) indirect election of organs by the representative organs of the communes* [...] *has the effect of conferring derived authority.* [...] *as in the case of the Spanish Diputacion provincial, what we have is more akin to inter-commune co-operation».* To conclude, «*the widespread establishment of new communes guarantees respect for the principle of direct election, while having a second tier with indirect election is not an obstacle to local democracy».*[231] The report by the Congress avoids to take into account the administrative functions with which the districts are endowed, as if the territorial or non-territorial nature of a local authority could be assessed only from the choice of a direct or indirect election. If it were so, it would be up to the Contracting Parties to comply with the guarantee laid down in Article 3, para. 2 of the Charter, by discretionally applying it to some local authorities and not to others. It would have been more in line with the

---

229 Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Romania*, CG (2) 5 Part II, 30 May 1995, II Proposals.

230 Pursuant to the Judgment No. 822/2008 by the Romanian Constitutional Court, the counties, like the municipalities, have to be considered as local authorities endowed with own self-government rights. Cf. S. Tanasescu, *Local Government in Romania*, in: A.M. Moreno (ed.), *Local Government in the member States of the European Union. A Comparative Perspective*, Madrid, 2012, 540.

231 Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in the Russian Federation*, CG (11) 5 Part II, 25 May 2004, § 112-113.

meaning of that provision to allow for indirect election if the districts had not been assigned with own powers and responsibilities.

In 1998, while examining the situation of local and regional democracy in Latvia, the Congress took a stance also on the reforms of the *rajons*, underlying that, in the framework of a reform aimed at pooling together these entities to create new regions, the suspension of the right to vote by universal direct suffrage the members of the district councils and the establishment of an indirect election system for the new district councils, even if failing to comply with Article 3, para. 2, first sentence of the Charter, «*it may be regarded as a temporary compromise which is acceptable in the light of the situation existing hitherto».* In the recommendation appended to the report, the Congress has in any case recommended the Latvian authorities to ensure that «*as soon as the reforms mentioned are complete, regional authorities' representatives are once again elected directly by the people».*[232] These remarks might appear more political than legal and might sound understandable in view of a progressive integration of the Latvian legal order in the European one.[233] However, these remarks risk to flaw the consistency of the aforementioned rule. On the other hand, one could mention what the Latvian Constitutional Court observed in 2008, that is to say that: «*The district council, established for the period of implementing the reform, shall be regarded as a form of collaboration of parish and city local governments aimed at fulfilment of certain functions rather than as a lawful independent self-government*».[234] Since the authority concerned might be considered as an authority delivering specific administrative functions in the form of intermunicipal cooperation, it might be argued that indirect election conformed with Article 3, para. 2 of the Charter.

As for Finland, mentioned by some scholars to show that Article 3, para 2 of the Charter does not impose any obligation to organise universal and direct elections for all local authorities to which the Charter applies,[235] it should be remembered that Article 121, para. 3 of the Finnish Constitution, whereby «*provisions on self-government in administrative areas larger than a municipality are laid down by an Act»,* it refers in the first place to regional authorities of non-territorial nature, the so-called *maakunnat* (among which only the Kainuu region has a council directly elected by the people), which carry out predominantly administrative functions in the interest of the municipalities

---

232 Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Latvia*, CG (5) 5, 28 May 1998, § 4.3.

233 On the "double-standard" used by the Congress with reference to Central and East Europe member States compared to old Europe member States see also: F. Merloni, *La tutela internazionale dell'autonomia degli enti territoriali. La Carta europea dell'autonomia locale del Consiglio d'Europa*, in: Scritti in onore di Giuseppe Palma, Torino, 2012, 14.

234 Constitutional Court of the Republic of Latvia, Case 2007-21-01, 16 April 2008*,* § 13.

235 So, for instance, Augusto Barbera, Stefano Ceccanti, Carlo Fusaro and Vincenzo Lippolis in their opinions on the conformity with the Italian Constitution of the draft local government reform (Delrio Law), to be found at the following address: http://www.affariregionali.it/media/125524/delrio_parere_sugli_aspetti_giuridi_dell_appello_upi.pdf

by which they are also funded. On the basis of the aforementioned reasoning, the Charter should not apply to them, since Finland has not explicitly declared to extend to them the scope of the Charter. Yet, even if the *maakunnat* cannot be considered as public territorial authorities following to the Charter,[236] the Congress, in 1999, while monitoring on the situation of local and regional democracy in Finland, stipulated that: «*On the basis of Article 13 of the ECLSG, its provisions apply to the so-called Finnish regions».* The very same Congress, however, in the recommendation attached to the report, admitted that *maakunnat* are not territorial authorities, but that, in the future, «*the territorial identity of these regional entities may be strengthened and the responsibilities of their decision-making bodies may grow, in which case the citizens should be able to choose their representatives directly, in accordance with Article 3, paragraph 2 of the European Charter of Local Self-Government*».[237] In any case, regardless of the question of the applicability of the Charter to the *maakunnat*, since they are intermunicipal entities, the election of the deliberative organ of the *maakunnat* might legitimately occur by indirect suffrage.

More recently, in 2013, in the already mentioned report on the situation of local democracy in Spain, the Congress specified that «*if, instead of mere municipal responsibilities, the diputaciones should be given its own (neither municipal nor regional) competences, as is the case in several European countries (Italy, Germany and France) where the second tier of government exercises the so-called "area-wide" responsibilities, not attributable either to the "municipios" or to the regional level* [...] *the direct election of a local authority with its own competences should be the solution more in line with the Charter*». Finally, again in 2013, with reference to a reform proposal of the Italian provinces (see *infra* third Chapter), the Congress confirmed that «*the plans for indirect elections would almost certainly have entailed a Charter violation. The provinces are local authorities for Charter purposes and Article 3 requires that councils be directly elected».*[238] No mention is however made by the Congress of the so-called Austrian districts (*Bezirke*) and independent cities (*Statutarstädte*), to which however the Charter does not apply, since they cannot be considered as territorial authorities according to Austrian law.[239] Thus, the fact that their deliberative bodies are not directly elected cannot be said being in contradiction with the Charter.[240]

---

236 In Finland there is no autonomous second tier of local government. Cf. G. Seele, *Die übergemeindliche Kommunalverwaltung in Europa § 37,* in: T. Mann e G. Püttner (eds.), *cit.*, 1058 e sgg. e T. Modeen, *Länderbericht Nordische Staaten,* in: F.L. Knemeyer, *Die Europäische Charta der kommunalen Selbstverwaltung*, Baden-Baden, 1989, 175.

237 Congress of Local and Regional Authorities, *Regional Democracy in Finland*, CPR (6) 2 rev., 17 June 1999.

238 Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CG (24) 8, 19 March 2013, § 38.

239 Cf. Oberster Gerichtshof (OGH) 7 May 1992 - 7 Ob 536/92 and also A. Gamper, *Local Government in Austria*, in: A-M. Moreno (ed.), *cit*., 25.

240 Nonetheless, there are authors advocating a democratisation of these administrative authorities. See e.g.: B. Wieser, *Zur Demokratisierung der Bezirksverwaltung in Österreich,* International and Comparative Law Review, 2008.

Notwithstanding the use of rather political and sometimes diplomatic arguments, the "case-law" of the Congress shows that the election by universal and direct suffrage of the deliberative organ of a local authority is mandatory only insofar as the authority in question is a territorial authority. The distinction between territorial authorities and inter-municipal authorities can be made on the following basis: territorial authorities carry out own responsibilities in the interest of the local community and not in the interest and upon instruction of other public authorities and they further enjoy the power to raise own taxes and are not financed by other local authorities.[241]

A second and separate question which deserves to be considered is whether Article 3, para. 2 sets out an individual right of citizens to pretend from a Contracting Party that the deliberative bodies of a local authority be directly elected or whether this provision entails only a so-called institutional right, which binds the High Contracting Parties to comply with the obligation to organise free local elections by direct ballot, but which does not confer upon a citizen the right to rely on this right before a national court.

As for the nature of the right embodied by Article 3, para. 2, sentence 1 of the Charter one could first of all argue that, if a statute imposes an indirect election system at local level, territorial authorities themselves could bring a complaint before a court (Article 11) for the violation of the right to local self-government. In other words, the provision of Article 3 would entail a fundamental right of local authorities to be managed by democratically constituted bodies, a right the violation of which would impair also on the right to local self-government. This presupposes that local authorities should be holders of fundamental rights *vis-à-vis* the State. In the majority of Council of Europe member States local authorities can however not be holders of fundamental political rights, but only duty-bearers. Nonetheless, the electoral guarantee might be construed as a litigation on behalf of the citizens (so-called indirect standing), building for instance on the model of § 184 of the St. Paul's Constitution of 1849 (*Paulskirchenverfassung*), whereby «*every municipality enjoyed the right to the election of its representatives and heads.as a fundamental right of its constitution*»[242].

---

241 According to the Congress, the power to raise taxes is deemed to be corollary of the territorial nature of a public authority. In particular, with reference to Germany (see *infra*), the Congress recommended the *Länder* to endow the *Landkreise* or *Kreise*, currently financed by mandatory contributions of municipalities (so-called *Umlagen*), with auotnomous taxing rights. Cf. Congress of Local and Regional Authorities, *Report on the situation of local finances in the Federal Republic of Germany,* CPL (6) 3, 20 May 1999, § 12 C) 3 and also Congress of Local and Regional Authorities, *Local and Regional Democracy in Belgium*, CG (27) 7, § 242.

242 Nowadays, local authorities cannot be holders of fundamental rights on behalf of citizens. Cf. BVerfGE 61, 82, 103 and H. Bethge, § 91, in: T. Maunz, B. Bleibtreu, F. Klein, G. Ulsamer, *Bundesverfassungsgerichtsgesetz – Loseblatt Kommentar*, 2015, Rn. 8 and 18.

Drawing on the Explanatory Report to Additional Protocol to the European Charter of Local Self-Government it seems more sensible to interpret the provision of Article 3, para. 2, first sentence as entailing an institutional right, which cannot be enforced by citizens in court. Article 1.4.1 of the Protocol stipulates in fact that «*each Party shall recognise by law the right of nationals of the party to participate, as voters or candidates, in the election of members of the council or assembly of the local authority in which they reside».* The Explanatory Report, even if cannot be considered as an authentic interpretation of the Protocol, sets out that: «*Article 3 paragraph 2 of the Charter provides for the democratic election of local councils, but is not cast as an individual right».* This interpretation does not contradict the "case-law" of the Congress. Since 1998,[243] in fact, the Congress has been repeating that, among others, Article 3, para. 2, sentence 1 of the Charter is directly applicable in the legal orders of the member States. This does not mean that the provisions clashing with them are automatically superseded, but only that it entails a principle which does not need any additional legislation to be implemented in the domestic legal order. Nor it does imply that the provision can directly be relied before national courts.

The most relevant difference between Article 3, para. 2, sentence 1 of the Charter and Article 1.4.1 of the Additional Protocol lies in the fact that the latter entails an individual right to vote and to stand in for election which is not directly applicable and which is not complemented by all the electoral principles which the High Contracting Parties have to comply with while implementing the Charter. In other words, the principles whereby members of local assemblies should be elected by secret ballot on the basis of direct, equal, universal suffrage can be derived only from Article 3, para. 2, sentence 1 of the Charter and not from the Additional Protocol, which, though, one could argue it already presupposes them.[244] To conclude, the citizens cannot bring to national courts of the member States their right to direct election, as laid down by Article 3, para. 2, sentence 1 of the Charter, since it is merely an institutional and not an individual right, whereas territorial authorities themselves can lodge a complaint before a national court for violation of Article 3, para. 2, sentence 1, insofar as the national Constitution allows them to defend political rights on behalf of the citizens.

1.3.2.2. An Individual Right to Direct Election in Protocol I ECHR

---

243 Congress of Local and Regional Authorities, Recommendation No. 39 (1998) *on the incorporation of the European charter of local self-government into the legal systems of ratifying countries and on the legal protection of local self-government* e, ancora, Recommendation No. 314 (2011), *Reservations and declarations to the European Charter of Local Self-Government*.

244 Un protocollo addizionale non può infatti contenere o emendare norme già contenute nel trattato cui si propone di essere aggiunto, ma può al massimo individuare nuovi diritti o estendere garanzie. In proposito si veda: Committee of Ministers, *Interim reply to Recommendation 228 (2007) of the Congress of Local and Regional Authorities of the Council of Europe,* 11 February 2009.

Article 3 *The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.*

The difference existing between an individual and an institutional right is however a very subtle one and it might be overcome in the future. So happened for instance with Article 3 Protocol I ECHR, which reads «*The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*». For a long time it was interpreted, first by the Commission and then by the Court, as an institutional right and only recently gave rise to a real individual political right.[245] In this respect, it should be checked, whether the citizens could bring a complaintfor a violation of Article 3 Protocol I ECHR, a provision from which the Strasbourg Court, even if not explicitly mentioned, derived the right to direct election.[246] The Court, however, ruled that the principles contained in or derived from Article 3 of the First Protocol govern only elections for political organs exercising legislative powers and cannot be applied to all layers of government, including local government..[247] In fact, so the Court, «*the word "legislature" has to be interpreted in the light of the constitutional structure of the State in question. The power to make regulations and by-laws which is conferred on the local authorities in many countries is to be distinguished from legislative power, which is referred to in Article 3 of Protocol No. 1, even though legislative power may not be restricted to the national parliament alone*».[248]

To declare its own jurisdiction for questions related to the elections in sub-national authorities exercising no legislative power would lead to increased litigation before itself and it would also violate Article 14 of the Charter,[249] which deliberately avoided to provide for a jurisdictional monitoring mechanism to ensure compliance with the Charter. That this is true shows the

---

245 Cfr L. Trucco, *La democrazia elettorale tra margine di apprezzamento degli stati e tutela dei diritti individuali*, in: M. Cartabia (ed.), *Dieci casi sui diritti in Europa*, Bologna, 2011, 241-244.

246 See: ECHR, *Matthews v. United Kingdom*, 18 February 1999, Application No. 24833/94, § 64.

247 This interpretation entails some discretion by the Court, since it could have further restricted the scope of application by pointing out that national parliaments might have the power to repeal or affect the laws promulgated by territorial assemblies. Così anche: S.L. Anthony, *Autonomy and the Council of Europe – with special reference to the applitcation of Article 3 of the First Protocol of the European Convention on Human Rights*, in: M. Suksi (ed.), *Autonomy: Applications and Implications*, The Hague, 1998, 330 e H-M. Ten Napel, *The European Court of Human Rights and Political Rights: The Need for More Guidance*, in European Constitutional Law Review, Vol. 5 (2009), 469-470 e 472.

248 ECHR, Third Section, *Case of Vito Sante Santoro v. Italy*, Decision as to the Admissability of the Application No. 36681/1997, 16 January 2003. On the interpretation which has to occur on the basis of the constitutional structure of the State see already: *Cherepkov v. Russia* (dec.), No. 51501/99, ECHR 2000-I. Other cases involve: *Mathieu-Mohin and Clerfayt v. Belgium*, Judgment of 2 March 1987, Series A No. 113, 23, §53; see also *Matthews v. the United Kingdom* [GC], No. 24833/94, §§ 40-54, ECHR 1999-I, on the application of Article 3 of Protocol No. 1 to the European Parliament; and X v. Austria, no. 7008/75, Commission Decision of 12 July 1976, Decisions and Reports (DR) 6, 120-21, on the application of Article 3 of Protocol No. 1 to regional Parliaments (*Landtage*) in Austria.

249 So also: B. Schaffarzik, *cit.*, 119.

establishment of a particular kind of observation of local elections by the Congress of Local and Regional Authorities of the Council of Europe.[250] Though, one has to admit that the Court's qualification of "legislature" contradicts the complementarity of different Council of Europe bodies in promoting the right to vote. In fact, the ECtHR avoided to take into account what the Code of Good Practices on Electoral Matters stipulates. The Code has been used on many occasions by the Court to clarify the content of Article 3 Protocol I ECHR.[251] As mentioned, the Code stipulates: «*The following must be elected by direct suffrage: at least one chamber of the national parliament; sub-national legislative bodies; local councils».* The Explanatory Report appended to the Code explains: «*Here, local assemblies include all infra-national deliberative bodies».*[252] Moreover, the very fact that the Congress established a procedure to observe local elections does not preclude a jurisdiction by the Court, as the observation of national elections by the Parliamentary Assembly does not preclude the jurisdiction by the Court. In particular, this might be possible if we distinguish Article 3, para. 2, first sentence of the Charter from Article 3 Protocol I ECHR: the first entails only an institutional right, whereas the second an individual right. Thus, the only judicial protection which can be granted to citizens of countries in which the right to direct election at local level is not enshrined in national legislation would be to construe extensively the scope of Article 3 Protocol I ECHR, for instance construing the *rule-making power* of territorial authorities recognized by the Constitutions of the Contracting Parties as extending to the law in a material sense and thus including also by-laws and regulations issued by other subnational authorities recognized by the Constitution.[253] This might be possible by considering as "legislature" also local councils, a correlation which is not entirely bizarre since it has been put forward by many scholars who pretend it to be like a mini legislative Parliament, even if not fully fledged, rather than entrenched in the executive power, whose members are granted a free mandate like members of Parliament.[254]

---

250 See: Committee of Ministers, Statutory Resolution No. 6 (2007); Congress of Local and Regional Authorities, Resolution 274 (2008) e 306 (2010)

251 As underlined by V. Berger, *The Code of Good Practices in Electoral Matters in the Case-Law of the European Court of Human Rights*, Conference on "The European Electoral Heritage: Ten Years of Code of Good Practices in Electoral Matters", Tirana, Albania, 2-3 July 2012, in www.venice.coe.int, cit.: «*in the Court's case-law, the Code is quoted in some twenty cases».* See *inter alia*: ECHR, *Hirst v. United Kingdom (No. 2)*, Application No. 74025/01, 6 October 2005; ECHR, *Petkov and Others v. Bulgaria,* Application No. 77568/01, 11 June 2009; ECHR, *Republican Party of Russia v. Russia*, Application No. 12976/07, 12 April 2011.

252 Venice Commission, *Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report*, CDL-AD (2002) 23 rev., in www.venice.coe.int

253 So recently also: J. G. Roca, *From States' International Committment to Organise Free Elections to the Citizens' Right to Vote and Stand for Election (Art. 3 P1 ECHR)*, in: J. G. Roca and P. Santolaya (eds.), *Europe of Rights: A Compendium on the European Convention on Human Rights*, Leiden, 2012, 590-591, who however superimposes and does not distinguish between the guarantees laid down in Article 3, para. 2, sentence 1 of the Charter and Article 3, Protocol I ECHR. It should further be noted, as did J.B. Auby, *Mega-Cities, Glocalisation and the Law of the Future*, in: FICHL Publication Series No. 11 (2011), 210, that territorial entities often «*possess some regulatory - even legislative - competences, and therefore take decisions particularly sensitive in terms of democracy and respect of the rule of law».*

254 In particular, in Germany, see: H. Faber, *Art. 28*, in: E. Denninger (ed.), *Grundgesetz Kommentar*, v. II, 3rd ed., Neuwied, 2002, Rn. 21-25; W. Frotscher, *Stadtparlament und Stadtregierung: BVerfGE zugunsten des*

Such a reconsideration by the Strasbourg Court, however, would have serious implications for Council of Europe law and, more in general, for international law. In fact, since Article 3 Protocol I ECHR provides for a guarantee against suspension or unmotivated abolition of the legislature (Article 15 ECHR),[255] the application of Article 3 Protocol I ECHR to subnational authorities might have as an indirect consequence the recognition for their deliberative bodies of a limited right against their suspension or suppression, i.e. a right to their continued existence which would greatly curtail the margin of appreciation of the member States with regard to the organisation of their domestic administrative structures.

1.3.3 The Free Mandate of Local Elected Representatives

Article 7.1. *The conditions of office of local elected representatives shall provide for free exercise of their functions.*

A Charter's provision which is structurally linked to Article 3, para. 2, sentence 1 is Article 7, para. 1, setting out the free exercise of functions by local elected representatives. This guarantee does not address authorities, but individuals and mainly the members of local authorities' deliberative bodies, whose free mandate results from their election by the people, whereas it does not address the members of the executives, since the latter are not necessarily directly elected, but ought to be responsible to the deliberative body. In contrast to imperative mandate, in the case of free mandate no instructions may be given to the councillors, who have no legal duties towards the people and cannot be made accountable before them.

In general, this kind of guarantee is of constitutional nature and typical of MPs, but it is also regarded as a natural corollary of the democratic character and the political autonomy of local authorities' deliberative bodies, even if formally pertaining to the executive power and not to the legislative. If local officials were not subject to their conscience, but bound by order and instructions of higher level authorities, national parties or if they could be held criminally liable for their statements or for their voting in the council meetings, local authorities would no longer be autonomous and local representatives of deliberative bodies would therefore result as being appointed and not elected as Article 3, para. 2 of the Charter stipulates. Hence, local representatives must first and foremost be under the democratic control of the voters, which enjoy the power to confirm or dismiss them at fixed intervals.[256] In the first place, thus, Article 7, para. 1 «*aims at*

---

repräsentativ-demokratischen Prinzips auf kommunaler Ebene, ZParl, 7 (1976), 499; Y. Ott, *Der Parlamentscharakter der Gemeindevertretung,* Baden-Baden, 1994, 86 ff., 214, 279 ff.. Cf. BVerfGE 21, 54 (62); 32, 346 (361).

255 So also: S.L. Anthony, *cit.*, 336-337.

256 So also: M.W. Schneider, *cit.*, 314 and Congress of Local and Regional Authorities, Recommendation No. 49

ensuring (...) that elected representatives may not be prevented by the action of a third party from carrying out their functions». In other words, it legally shelters local elected representatives from any interference by higher level public authorities and in particular it protects them from shortening of their office, i.e. from suspension or removal. As for appointed or indirectly elected local executives, removal or dismissal by the State is not explicitly excluded or deemed incompatible with local self-government, but is considered as "highly problematic" by the Congress, which reviewed many such cases in Central and Eastern Europe countries.[257] In any case, the sole fact that Article 7, para. 1 limits the shortening of mandates by means of authoritative act of government does not mean that suspension and/or removal of local elected councillors and dissolution of local authorities' councils are *per se* illegitimate under the Charter, but only that they have to be regarded as *extrema ratio*.

Though, the Charter is silent on the limits set to the State for abbreviating local representatives' mandate. They can however be subsumed by reading Article 7 in conjunction with Article 8 (see *infra*), which rules out *ad hoc* supervisory procedures over local authorities (para. 1), makes supervision on the expediency an exception (para. 2) and provides for a method of supervision based on the principle of proportionality (para. 3). The Congress developed an interpretative doctrine, whereby dissolution of councils, provisional suspension or removal of local elected

---

(1998), Appendix – Proposals with a view of developing local and regional government reforms in the United Kingdom, *cit*. § 42: «*In a democracy, the ultimate sanction should always be the expression of the voter, at all relevant levels.»* and Committee of Ministers, Recommendation (98) 12, *on supervision on local authorities' action,* which recognised «*the essential role of political supervision by citizens and to foster the implementation of this supervision, through, inter alia, the use of the instruments of direct democracy considered appropriate».*

[257] Although neither with Recommendation No. 55 (1999) *on local and regional democracy in the Netherlands*, nor with Recommendation No. 302 (2011) *on local and regional democracy in Austria*, the Congress considered dismissal of Dutch mayors and Queen's or King's commissioners by the government or of the Austrian mayors by the *Land* or by the Federation (Article 119, para. 4 of the Constitution) in breach of the Charter, with adoption of Recommendation No. 179 (2005) *on local and regional democracy in Moldova*, the Congress pointed out that «*the dimissal of the mayor of Comrat by the Gagauz's People Assembly without any specification of the reasons is in breach of Articles 7.1, 8.1 and 8.3 of the European Charter of Local Self-Government (...) and is incompatible with the constitutional and legislative provisions of the Republic of Moldova, which lay down a procedure for dismissing mayors by means of a local referendum held at the instigation of the municipal council or the citizens concerned; in the case in question, the dismissal would appear to constitute a disproportionate measure».* As for the situation in the Russian Federation, the Congress stressed that the *«dismissal of mayors by the local council, at the initiative of the regional governor, contradicts the fundamental principle of the independence of local self-government. The creation of "a new institution of out-of-court dismissal" in parallel with the existing mechanism of "removal from office only by court decision" increases the dependence of mayors on the political party in power».* Cf. Recommendation No. 297 (2010) § 5 lett. a). In Ukraine a similar situation was assessed: «*The rapporteurs are concerned about the allegations made to them relating to cases in which mayors had been dismissed, cases considered to be arbitrary, based on application of the Law against corruption. Whether or not such allegations are justified, since such dismissals have not been followed by elections, the office of mayor of the authorities concerned has remained vacant for a very long time (and sometimes for years)».* Cf. Recommendation No. 348 (2013), § 6 lett. b). The same was assessed in Montenegro where a Law of 2003 (reflecting provision in Article 117 of the Constitution) provided for the «*dismissal by the Government of Councils and/or Mayors/Presidents in specified circumstances i.e. when they have failed to perform their duties for a period longer than six months.»* CPL (19) 4 - § 38. Dismissal of the executive organ by the people, as provided for by the law of the *Länder* in Germany, by Article 170 of the Polish Constitution and in general by many legal orders of Central and Eastern Europe complies with the Charter. The same could be said with reference to system of impeachment enshrined in Hungarian law, whereby the council can request the court to suspend the mayor from office (Art. 70.1 Local Government Act 2011). See: C. Panara, *cit*., in: C. Panara and M. Varney (eds.), *cit*., 399.

representatives is mainly to be «*used to resolve manifest malfunctioning or in very exceptional circumstance»*, as it is the case in most Council of Europe member States. More precisely, «*they must be measures of last resort, only to be applied in the event of repeated and established violations of the constitution or other legislation enacted by their Parliament or in prolonged circumstances that make it impossible for them to carry out their functions*».[258] In such exceptional cases, even a temporary substitution by State authorities, preferably not judicial ones, might occur.[259] Further, for any kind of abbreviation of mandate, the Congress requires the member States to ensure: the legality of the procedures, the application of the proportionality principle, the prior justification and duly information on the proposed measure, the guarantee of judicial redress.[260]

As for the letter requirement, building on the experience of some member States in which suspension, dismissal or dissolution occured on the basis of arbitrary procedures (Romania)[261], the Congress pointed out that, as it is for instance the case in France,[262] *«it is for a judicial authority or an independent administrative authority to establish first»* that the local authority is unable to function at all or has breached the Constitution or the law. Local authorities' acts can be suspended only in case of blatant repeated offences by supervisory authorities and only «*until a final decision has been reached by the competent judicial authority*». This means that it should be ultimately up to an administrative court and not to a supervisory authority or to a higher political organ (including the Parliament) to decide whether the act should be suspended or not or whether the council should be dissolved or not; this is however very often the case (e.g.: Hungary, but also Italy).[263] Political bodies of a local authority or elected representatives should thus be granted at least the right to appeal the decision to a court and could not be barred from standing for election merely on grounds

---

258 Recommendation No. 20 (1996), § 3 lett. d).

259 Cfr. Recommendation No. 227 (2008), on the Draft Additional Protocol to the European Charter of Local Self-Government Article 13 (*Power of Substitution*) and, prior to it, see: Delcamp Report, on monitoring the implementation of the European Charter of Local Self-Government, Part III.II lett. C), noting that substitution is common in Germany, Austria, Belgium, France, Italy, Luxembourg, the Netherlands and Turkey.

260 Report on monitoring the implementation of the European Charter of Local Self-Government CPL (7) 3 Part II and see also: Recommendation No. 20 (1996). This interpretation has been later confirmed in the Draft Additional Protocol to the Charter, adopted Recommendation No. 228 (2007), whereby «*a local authority body may be dissolved by a higher level authority only on an exceptional basis, that is to say, where it is unable to function at all or where there have been serious or repeated breaches of the Constitution or the law.* (…) *In accordance with the principle of the free exercise of their functions under Article 7.1 of the Charter, this paragraph rules out any form of administrative supervision of the individual action of local elected representatives which is not motivated by the possibility of a breach of the constitution or the law. The obligation to respect the principle of proportionality is made explicit*».

261 The very first recommendation by the Congress specifically involved the case of mayors suspension or removal and councils dissolution by the prefect in Romania. The Congress recommended the Romanian Government to suspend and review the application of some provision of Act no. 69 of 28 November 1991. Cf. Congress of Local and Regional Authorities, Recommendation No. 12 (1995), *on Local and Regional Democracy in Romania*, § 11, 31 May 1995.

262 See: *Code général des Collectivités territoriales,* Article L.2121-5.

263 In Hungary the government can request for the Constitutional Court's opinion before submitting the question of dissolution to the Parliament. Ultimately, it is up to the Parliament to decide. Cf. Article 35, para. 5 Hungarian Constitution and Art. 34 of the Act on the Constitutional Court.

they have been suspended or removed by a supervisory authority.[264]

1.3.3.1. The Right to Compensation

Article 7.2. *They shall allow for appropriate financial compensation for expenses incurred in the exercise of the office in question as well as, where appropriate, compensation for loss of earnings or remuneration for work done and corresponding social welfare protection.*

A pre-condition to freely exercise the local office is also financial independence. Article 7, para. 2 aims thus at ensuring «*that some categories of persons may not be prevented by purely material considerations from standing for office».* In this way the Charter also enhances the right to stand for election.[265] As the Explanatory Report to the Draft Charter pointed out: «*The task of a local councillor has become increasingly complex and time-consuming, and it is only reasonable that the attainment of an electoral mandate should not result in undue financial or professional sacrifices».* Thus, every Contracting Party must grant appropriate financial compensation, which means at least partial reimbursement for expenses incurred and the time spent during the exercise of functions (e.g. for equipment and training costs, as it is provided for local employees according to Article 6, para. 2)[266] and, where appropriate, i.e. whenever councillors are elected to full-time responsibilities, also by granting compensation for loss of earnings or remuneration for work done. In the latter case, a social welfare protection should also be ensured.[267] The Explanatory Report adds that: «*In the spirit of this article, it would also be reasonable to expect provision to be made for the reintegration of those taking on a full-time post into normal working life at the end of their term of office».* This prescription of social nature was however not seriously taken into account by the case-law of the Congress, but mentioned by part of the literature on the Charter, whereby the guarantee of compensation and remuneration also implies that local councillors who were previously employed should be granted a leave of absence,[268] which further implies that they should enjoy a right of reintegration after leaving the public office.

---

264 So also: Venice Commission, Opinion No. 559 (2009) o*n the Draft Law on additions to the Law on the status of municipalities of the Republic of Azerbaijan,* 11-12 December 2009, CDL-AD(2009)049, in www.venice.coe.int, noting that failing to attend municipal sessions cannot be regarded as a proportional measure for temporary suspension in compliance with Article 7 and 8 of the Charter.

265 See for example: Congress of Local and Regional Authorities, *Local and Regional Democracy in the United Kingdom*, CG (26) 10 – 4.5.1. - §§ 133-137.

266 So explicitly: *Budgetary Procedures and Budget Management At Local Authority Level,* Strasbourg, 2002, 36-37.

267 So: B. Weiss, *cit*., 179. *Contra*: B. Schaffarzik, *cit.*, 498 e M. W. Schneider, *cit.,* 315, holding that social protection should be granted not only for those who have full-time responsibilities and receive a remuneration, but also for those who receive compensation for loss of earnings. The Explanatory Report, however, considers that in particular full-tim politicians should be granted social protection.

268 So: B. Weiss, *cit.*, 178.

Albeit no member State entered a reservation to Article 7, para. 1, reservations were made by as much as fourteen Council of Europe member States with reference to Article 7, para. 2 (Armenia, Austria, Azerbaijan, Bulgaria, Cyprus, France, Greece, Liechtenstein, Montenegro, the Netherlands, Czech Republic, Romania, Serbia and Switzerland), so that one might argue they are indirectly allowed to adopt legislation limiting the freedom of exercise of functions.[269] As pointed out by the Delcamp Report, paragraph 2 is the one that has been the subject of the greatest number of reservations. This shows that, irrespective of the system of government, «*the spirit of local democracy in Europe is traditionally rather different from the exercise of other public offices»* at other levels of government. A total lack of compensation undermines the freedom of council members to exercise their mandate. In the specific case of the Netherlands, the reservation cannot be lifted because, according to the Dutch Council of State, the provision «*prevents central government from allowing local authorities themselves to determine the financial status of local elected members. This interpretation»* - commented the Congress in 1999 - *«is open to dispute. What is important is that local members' status satisfies the financial requirements in Article 7 paragraph 2 of the Charter; how this should be achieved is not specified».* As pointed out elsewhere by the Congress: *«The central authority has a role in promoting fair remuneration, but the local authority should retain considerable flexibility».* In other words, Article 7, para. 2 is not self-executing and can thus be implemented by the Contracting Parties so as to ensure significant leeway to local authorities in its adaptation. This is in particular the case in Sweden, Finland and the United Kingdom, as well as in Slovakia and Spain.

1.3.3.2. The Regulation of Legal Incompatibilities

Article 7.3. *Any functions and activities which are deemed incompatible with the holding of local elective office shall be determined by statute or fundamental legal principles.*

Another guarantee which ensures the free exercise of the mandate is laid down in Article 7, para. 3 which foresees that local elected representatives, if they carry out other activities which are deemed to be incompatible with public office, can be restricted in their freedom to work or to be assigned with other public functions only by means of statute. No stipulation as to what activities and what public functions should be regarded as incompatible with a local public office was made. The present legal provision is thus as such not self-executing, since it requires detailed regulation under

[269] Congress of Local and Regional Authorities, *Reservations and Declarations to the European Charter of Local Self-Government,* CPL (21) 5 - § 64.

domestic law.

The practice of the member States varies as to how limitations to the mandate should look like, whereas the Charter only mentions the so-called incompatibility. The term must hence be construed as an autonomous term and not in the light of some contitutional traditions. Hence, under "rules of incompatibility"[270] one should generally understand any rule which prevents a public official to simultaneously hold or take up multiple offices or public or private positions which can hinder him from performing efficiently his functions. Thereunder, one can subsume all rules which aim at preventing conflicts of interests while carrying out public functions,[271] but cannot be subsumed ineligibility, which prevents certain people from running in the elections. The difference is well-known in the law of the Council of Europe.[272]

According to the Explanatory Report, any limitations to the mandate of local elected representatives «*should only be based on objective legal criteria and not on ad hoc decisions»* (for example, adopted by the council). *«Normally this means that cases of incompatibility will be laid down by statute».* However, as the Explanatory Report clarifies, «*cases have been noted of firmly entrenched, non-written legal principles, which seem to provide adequate guarantees»*. According to the Code of Conduct for local elected representatives, however, *«reasons and procedures for disqualification of a person as a candidate for office and removal of a local elected official from office should be strictly and clearly regulated. Such action should either be taken by a judicial body or subject to review by the courts».* The rationale behind this kind of restrictions lies in the principles of representative democracy and in the vertical separation of powers: if local self-government constitutes a tier of government, separated from others, local representatives cannot be at the same time members of bodies representing other layers or powers. Notwithstanding its importance for ensuring the real exercise of a free mandate and, more in general, for strengthening local democracy, the Congress rarely took position on this issue in its country reports, not even with reference to those member States, including Turkey, which entered a reservation on this provision.

1.3.4. Citizens as Holders of Other Limited Rights: Direct and Participatory Democracy

Article 3.2.2. *This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute.*

---

270 See *inter alia*: Congress of Local and Regional Authorities, Opinion No. 19 (2003) on the *Handbook of Good Practice in Public Ethics at Local Level* prepared by the Steering Committee on Local and Regional Democracy, where "incompatibility" is also used as a general category.

271 M. W. Schneider, *cit*., 315-316.

272 Recently see: Study No. 646/2011, *Report on Democracy, Limitation of Mandates and Incompatibility of Political Functions*, adopted by the Venice Commission at its 93rd Plenary Session, 14-15 December 2012, www.venice.coe.int

On the basis of the practice in the Council of Europe member States, the Charter regards representative democracy as being the most suited system for ensuring and reinforcing local self-government throughout Europe.[273] That is why the Congress considers that «*direct democracy in its purest form, that is a meeting of the population to manage local affairs, is more often than not ruled out by both the size of the population and the complexity of the matters being dealt with*».[274] Yet, soft law issued by Council of Europe bodies attempts to address questions as to the scope and the limits of direct democracy tools. One of the first documents on the matter is the report on local referendums prepared by the Steering Committee on Local and Regional Authorities for the 10th Conference of European Ministers responsible for Local Government, which was followed by Resolution No. 2, adopted by the Conference on September 15th, 1993.

Herein, one can detect further scepticism towards direct democracy. Local referendums might certainly «*encourage or revive individual interest in the satisfactory administration of matters of public concern»,* foster participation in local public life of foreigners and minorities, but are regarded first and foremost as tools that «*can limit and modify the actions of a regime of representative democracy».* In fact, as the Steering Committee recalls, «*some issues do not lend themselves to a popular vote*», whereas *«excessive recourse to referendums can hinder the efficient management of the municipality in the medium or long term»* and it might «*result in a decrease in the accountability of the local representatives at elections, since although they must account for their management of the local authority as a whole, they cannot be held responsible for the consequences of decisions taken by referendum».* These views were reiterated in the Recommendation No. R (96) 2 of the Committee of Ministers to the member States on referendums and popular initiatives at local level, adopted on 15 February 1996. In particular, the Committee of Ministers stressed that «*representative democracy must remain the basis of local democracy, without detracting from the system of direct democracy which in cases where it is part of the country's institutional tradition may, as appropriate, replace or coexist with it*».

The aforementioned considerations are also useful to explain why direct democracy is barely mentioned in the Charter. Reference is made in the Preamble, which acknowledges «*that the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member States of the Council of Europe».*[275] This statement echoes Article 3, para. 2

---

273 B. Weiss, *cit.*, 159.

274 Congress of Local and Regional Authorities, Recommendation No. 113 (2002) *on relations between the public, the local assembly and the executive in local democracy (the institutional framework of local democracy)*. Appendix § 1 lett. b).

275 Back in 1978, with Resolution No. 101 *on participation of the individual in local public life*, the Conference of Local and Regional Authorities of Europe recommended decentralisation to the sub-municipal level as a primary tool to obtain more participation. More in details, it recommended neighbourhood councils and other forms of citizens involvement to make semi-autonomous agencies providing public services accountable, public hearings for planning

sentence 2 of the Charter, which recognizes that representative democracy should *«in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute»* and finally in Article 5, which explicitly provides for a right to, at least consultative, referendum relating to changes of local authorities' boundaries. However, these provisions confirm that allowance for mechanisms of direct democracy are rather the exception than the rule and were included in the final text of the treaty because the Council of Europe could not ignore at all the Swiss experience. If the Charter should work as a minimum standard of common principles for local government, the possibility to call and hold referendums must be at least mentioned, so the reasoning.[276] In fact, Article 3, para. 2 envisages a norm that is not self-executing in the legal orders of the Contracting Parties, which are under the mere obligation to "possibly amend" their statutes and introduce any kind of popular referendum they wish, optional or compulsory, decision-making or consultative. In particular, this provision is not self-executing upon local authorities themselves, since it is addressed to the legislatures of the Contracting Parties. Calling and holding a referendum is thus not corollary of the freedom of organisation of local authorities (Article 6, para. 1), unless the member States so determine in their own laws (Italy, see *infra* third Chapter). Nonetheless, one has to recall that, pursuant to the aforementioned Recommendation No. R (96) 2, local authorities should be granted the right to make provisions for referendums or popular initiatives in their own by-laws, specifying what kind of referendum they provide for and on what matters they allow for it. As for Article 5, a consultative referendum for boundary changes might be optional or compulsory, depending on how the member State implements this provision in the domestic legal order. Hence, this choice has to be made according to each constitutional tradition.

In general, if permitted by the law, calling and holding referendums on matters which fall within the sphere of competence of local authorities[277] is not regarded as unlawful by Council of Europe bodies, nor it can be said being incompatible with the Charter, which expressly recognizes this possibility. Nonetheless, the Council is very cautious as for that kind of referendums which might delegitimise local elected representatives. Local referendums «*could be useful complements to representative democratic procedures»*[278], but cannot replace them. To ensure the proper use of this

---

decisions, action groups and local referendums.

[276] So also: M. W. Schneider, *cit.*, 296. See Explanatory Report to the Draft CPL (16) 6, 17 cit.: *«Allowance is also made for the possibility of direct democracy as practised most notably by the assemblies of citizens in- many Swiss cantons».*

[277] Local referendums which pretend to bring about a secession from a member State without its consent are thus neither covered by the Charter, nor object of any soft regulation by Council of Europe bodies. For the recent case of Crimea and Sebastopol see: Venice Commission, Opinion No. 762/2014 on *whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 constitution is compatible with constitutional principles,* in www.venice.coe.int, 21 March 2014.

[278] Congress of Local and Regional Authorities, Opinion No. 2 (1995), CPL (2) 3 - § 7.

tool, in fact, both the Congress and the Committee of Ministers called for its institutionalisation by means of statute.

Some doubts may be raised by the practice of some member States (among them, one can mention Moldova, Romania, Poland and some German *Länder*) to use referendums to dismiss local elected mayors. The Congress recalled in one of its recommendations that «*supervision of local authorities is first and foremost confined to the voters and for the local assemblies*». Therefore a combination of the following two elements - direct democracy and "supervision" of local authorities exercised by the voters - cannot be deemed to be incompatible with the Charter's spirit, whereby the basic institutions representing the general interests of the citizens should be the local authorities. On the contrary, in this case, direct democracy merely helps restoring the functioning of representative democracy, but does not replace it. Finally, for electoral principles and general standards or criteria for calling and holding local referendums one can refer to the so-called Code of Good Practice on Referendums, adopted by the Venice Commission in 2007 and yet approved by the Parliamentary Assembly and by the Congress of Local and Regional Authorities in 2003.[279]

A growing interest by the Council of Europe can be observed also in the field of so-called participatory democracy, defined by the Additional Protocol as the «*right to seek to determine or to influence the exercise of a local authority's powers and responsibilities*».[280] Notwithstanding the fact that representative democracy «*remains the most egalitarian form of democracy»,* both the Committee of Ministers and the Congress of Local and Regional Authorities recognize that, whilst electoral turnout in local and regional elections declines, a wide range of new forms of citizens participation emerge. Group participation in local public affairs by non-elected groups may be beneficial and member State should enable local and regional authorities to employ instruments that foster this kind of participation, even if they require a legislative framework, «*so as not to threaten the democratic legitimacy of decisions taken»* and in order «*to channel that participation in appropriate manner*». In particular, member States should ensure that non-elected groups do not exert «*unfair influence on local authority decision making*».[281]

That said, local and regional authorities are under the obligation to provide adequate information and to promote dialogue about their activities and their impact, in particular for those citizens affected by local measures. The active role designed for participatory democracy instruments by Council of Europe law range from general *«advisory and information functions»,* the filing of

---

279 See: Code of Good Practice «*It should be made clear that the guidelines apply to all referendums – national, regional and local – regardless of the nature of the question they concern (constitutional, legislative or other). Each reference to Parliament also applies to regional or local assemblies*». General Remarks - § 5.

280 For an overview on the concept of participatory democracy see *inter alia*: C. Pateman, *Participation and Democratic Theory,* Cambridge, 1970; U. Allegretti, *Democrazia Partecipativa. Esperienze e Prospettive in Italia e in Europa*, Firenze, 2010.

281 Congress of Local and Regional Authorities, Recommendation No. 182 (2005)

petitions, proposals and complaints, consultation on draft and proposals, co-optation of citizens to decision making bodies through consultative institutions or their involvement in management, the right of access to meetings and to the official information of a local authority (which has been included in 2008 in the Council of Europe Convention on the Access to Official Documents, not yet entered into force)[282] and even to the discharge of *«delegated executive powers».* Yet, no exhaustive list of participatory instruments has ever been made. Instead, the Committee of Ministers stressed the importance to «*avoid overly rigid solutions»* and merely recommended the member States to enable the involvement in participatory processes of those categories which «*remain on the sidelines of local public life»,* in particular foreigners, younger and elderly people as well as women.[283]

In 2009, the core of these recommendations was transposed into a binding treaty, i.e. into the Additional Protocol to the European Charter of Local Self-Government, entered into force in 2012, which is entirely devoted to «*supplement the Charter with provisions guaranteeing the right to participate in the affairs of a local authority»*. In fact, since the Preamble of the Charter generally recognizes the aforementioned right of citizens to participate in the conduct of public affairs, but does neither define it nor it contains any provision on the topic, several member States agreed to draw up and open for signature a new text whose purpose was not to upgrade participatory rights to the level of representative rights, but to extend the scope of the international obligation on local government including specific individual rights at local level. Domestic law should then provide for the scope and the limits of this right, insofar as the Protocol contains provisions which are not self-executing, but require the Contracting Parties to «*guarantee»* or «*take the necessary measures»* to implement the right to participate or to access. In particular, the Contracting Parties should empower local authorities to enable, promote and facilitate the exercise of the right to participate, ensure the establishment of consultative processes, procedures for access to official documents held by local authorities, mechanisms for responding to complaints and suggestions by the citizens. The Additional Protocol does not preclude the involvement of foreign residents in these procedures, to the contrary, participatory rights (except for the right to vote) should equally granted to them (Article 1, para. 4.1), in accordance with the 1992 Convention on the Participation of Foreigners in Public Life at Local Level. The term "citizen" laid down in Article 3, para. 2, sentence 2 of the Charter has thus to be extensively construed in the light of the Additional Protocol as encompassing

---

282 See also: Conference of Local and Regional Authorities Recommendation No. 18 and 19 (1981), *on access to information held by local authorities.*

283 Recommendation No. 19 (2001) of the Committee of Ministers to member States *on the participation of citizens in local public life* - Appendix II - Steps and measures to encourage and reinforce citizens' participation in local public life.

both nationals and foreign residents.[284]

To sum up, it can be said that with the adoption of the Additional Protocol to the Charter the concept of local self-government of the Council of Europe has slightly changed. Local self-government remains a right exercised by public territorial authorities, but, insofar as possible, it should be complemented with the recognition of individual rights of nationals and foreign residents, both of direct and participatory nature.

1.4. *Constitutional Local Self-Government*: Constitutional Guarantees

Article 2 *The principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution.*

The last but not least striking feature for the definition of local self-government under the Charter is its enshrinement in either constitutional or ordinary law in the domestic sources of law of the Contracting Parties (Article 2). The legal entrenchment of the principle of local self-government aims at safeguarding it from governmental or parliamentary attempts to suppress or eliminate local government as a tier of government as such or make it dependent upon higher level authorities.[285]

The choice between the aforementioned two forms of legal enshrinement ought not to be considered as a political and thus as a discretional one, as one may infer from the wording of the text, but has to be read according to a rule-exception relationship. In fact, the Charter requires that, "where practicable" or – as the French version stipulates, *autànt que possible* – Council of Europe member States recognize the "principle" of local self-government directly in their Constitutions as one of the principles on which the State has to be grounded. As such, it should not be considered as sufficient the mere enshrinement in the Constitution of a Chapter or Section on the territorial organisation of the State without the explicit recognition of the principle of local self-government. Article 2 was in fact drafted having in mind *inter alia* Article 5 of the Italian Constitution (IC), which even happened to be quoted in the Explanatory Memorandum to the Draft Charter of 1981. This can be best noted from the use of the term "recognizes": the member States are not expected to establish themselves local autonomy, which is rather acknowledged to exist in its own right.

If this is true for all old Europe member States, more doubts arise as to the Central and Eastern Europe countries, where local self-government was literally established or created and then recognized by the State. In any case, as the preparatory works of the Charter clarify, the rule-

---

[284] See: Explanatory Report to the Additional Protocol to the Charter, Article 1 - Paragraph 4.1.

[285] So: B. Schaffarzik, *cit*., 85; K. Meyer, *cit*., 87. Cf. also: Draft Explanatory Memorandum (*Harmegnies Report*), CPL (16) 6, 21 September 1981, 12.

exception relationship provided by the treaty has to be linked with the circumstance whereby many Council of Europe member States either could not amend so easily their own Constitutions (e.g.: Switzerland and Norway[286]) or they did not have a codified Constitution (the United Kingdom). Though, this does not mean that the substance of the original draft, which required that «*the principle of local self-government shall be recognized in constitutional law»* was weakened.[287] This is confirmed by the Explanatory Report to the Charter: «*It was recognised that* – so the Explanatory Report – *in those countries in which the procedure for amending the Constitution required assent by a special majority of the legislature or the assent of the whole population expressed in a referendum, it might not be possible to give a commitment to enshrine the principle of local self-government in the Constitution. It was also recognised that countries not having a written constitution but a constitution to be found in various documents and sources might encounter specific difficulties or even be unable to make that commitment».* This clarification, however, also allows for a use of the "margin of appreciation" by the State which might potentially undermine the very purpose of the obligation, i.e. to enshrine the "principle" of local self-government in the Constitution. In fact, in almost every country the procedure for amending the Constitution requires assent by a special majority of the legislature. Thus, the *'practicability'* of the amendment should be assessed not against mere political calculations, but on grounds of real technical obstacles.[288]

A specific consideration should be attached to the fact that, in federal countries, local government is normally regulated by federated States rather than by the Federation.[289] The fact that federated States did not ratify the Charter does not allow them not to comply with this provision.[290] In fact, as it normally happens in federal States, the law of federated States is bound to comply with the federal Constitution so as that it suffices that the Federation enshrines the "principle" in its Constitution to bind also its constituent subjects or parts. Yet, if it is true that federal Constitutions

---

286 Norway ratified the Charter on 26 May 1989. The Norwegian Constitution of 1814 contains no provision relating to either local or regional self-government. The Constitution has not been amended in this regard and the Local Government Act of 25 September 1992 (Act No. 107) contains no binding general provisions on the legal protection of local and regional self-government. Cf. Congress of Local and Regional Authorities, *Report on Regional Democracy in Norway*, CPR (10) 6, 31 October 2003 and see *infra* on compliance by Norway with Article 11. No constitutional amendment has been adopted up to now, even if there plans to do so, as showed by Congress of Local and Regional Authorities, *Local and Regional Democracy in Norway*, CG (28) 5, 27 March 2015, § 70.

287 M. W. Schneider, *cit*., 291-292; B. Schaffarzik, *cit*., 85-87; B. Weiss, *cit*., 101-103; P. Blair, *Vorbereitung der Charta im Rahmen des Europarats und gegenwärtiger Stand der Unterzeichnung und Ratifikation*, in: F.L. Knemeyer, *cit*., 1990, 42-43.

288 B. Schaffarzik, *Handbuch*, *cit*., 87.

289 T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law*, Cheltenham, 2011, 377. This rule appears to apply in particular outside the borders of the Council of Europe (Australia, Canada and the United States). Cf. J. Kincaid, *Comparative Observations*, in: J. Kincaid and G.A. Tarr (eds), *Constitutional Origins, Structure and Change in Federal Countries – A Global Dialogue on Federalism,* Vol. 1, Baskerville, 2005, 438-439.

290 See: Congress of Local and Regional Authorities, Draft Additional Protocol, Recommendation No. 228 (2007), Article 2: «*The protection awarded by the Charter and this additional protocol to local self-government applies likewise to authorities of regions and federated states as with regard to state authorities».*

traditionally leave the details of local government to the discretion of regional governments,[291] Article 2 of the Charter appears to partially reverse this tradition and fix the flaws deriving from it, since it requires that also the Federation recognizes local self-government and local authorities, thus possibly influencing how subnational constitutions will regulate it. For this reason, the Charter matters not only for constitutionalism, but also for subnational constitutionalism.[292]

Nowadays, the lack of a constitutional guarantee of local self-government in a European federal Constitution can be traced only in the Federation of Bosnia & Herzegovina, where local government is the only responsibility of its Entities.[293] In the 1980s, a similar issue raised some concerns in Switzerland, where the enshrinement of the principle of local self-government in the Federal Constitution (*Bundesverfassung*) had been denied for a long time on grounds of the particular relationships between the Confederation and the Cantons: the principle was in fact enshrined "only" in the cantonal Constitutions (*Kantonsverfassungen*). For these reasons, Switzerland waited to ratify the Charter, which expressly requires the enshrinement in the Constitution of the signing State, until Article 50 of the Federal Constitution was amended as follows: «*(1) The autonomy of Local Communities is guaranteed according to cantonal law; (2) In its activity, the Federation takes into account possible consequences for Local Communities; (3) In doing so, it takes into account the special situation of cities, agglomerations and mountain regions».* The guarantee enshrined in the federal Constitution appears to be as open as it is the case for other Constitutions of non-federal States, such as the Danish (Article 82), Finnish (Article 120), Swedish (Section 8.5) or Portuguese (Article 239), but it suffices in order to comply with the Charter.

3. *Conclusion* – Institutional Arrangement of Neo-Corporatist Nature?

The Charter designates local self-government as the right and the ability of territorial public

---

[291] Originally, the enshrinement of a guarantee for local self-government in the federal Constitution was considered as an "anomaly", because local authorities are subdivisions of the federated States and not of the Federation. See in particular in Austria: H. Kelsen, G. Fröhlich, A. Merkl, *Die Bundesverfassung vom 1. Oktober 1920,* Wien, 1922, 228.

[292] An example thereof might be the constitutional order of the Russian Federation. The federal guarantee of local self-government, which was enshrined in the Federal Constitution in compliance with the Charter, is a formidable instrument for influencing subnational constitutionalism. Indeed, on grounds of a strong federal guarantee, at the level of the Entities there is no much room for differentiation. Cf. R. Will and E. Gricenko, *Der verfassungsgerichtliche Rechtsschutz kommunaler Subjekte in Russland: Prozessuale Aspekte aus rechtsvergleichender Sicht,* in: Jahrbuch für Ostrecht, Vol. 54 (2013), 11 and ff.

[293] Congress of Local and Regional Authorities, *Local and Regional Democracy in Bosnia and Herzegovina*, CG (22) 12, 20 March 2012. Cf. also: Venice Commission, Opinion No. 308/2004, *on the constitutional situation in Bosnia and Herzegovina*, CDL (2005) 021, 22 February 2005, § 82 and in literature see: J. Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, Padova, 2008. This was implicitly confirmed by a 2009 amendment of the Constitution of Bosnia & Herzegovina, which added a new Article VI (4) on the so-called Brĉko District.

authorities to perform a substantial share of public affairs having local implications, without external assistance under their own responsibility and in the interest of a local population, within the limits of the law and as part of the State structures. The right can be defended before courts and has to be exercised by deliberative bodies which ought to be directly elected by the population itself and to which executive bodies should be accountable.

From the definition, it is possible to conclude that the Charter aims at safeguarding local self-government as an institution (*institutionelle Garantie*).[294] In fact, the treaty does not aim at setting out a subjective guarantee of existence for individual local authorities,[295] but maintains that, being it the main foundation of any democratic regime and due to its vital contribution to democracy, effective administration and decentralisation of power, local self-government as such shall be safeguarded by the State, thus requiring for it special constitutional protection (Article 2).[296] Hence, rather than as a fundamental right of local communities *vis-à-vis* the State, local self-government is conceived in terms of a principle for structuring the organisation of the State, that is to say as a principle for allocation or division of powers between tiers of government.

First in *Constitutional Theory* (1928) and then in *Liberty Rights and Institutional Guarantees of the Reich Constitution* (1931),[297] the legal scholar Carl Schmitt drawed the aforementioned distinction which is still nowadays considered at the basis of the German understanding of the right to local self-administration.[298] In particular, according to its organicist conception of the State, liberty rights and constitutional safeguards should be distinguished. Those guarantees represent a safer safeguard for individual freedom than liberty rights. The latter have to be subordinate to the former and only within the former could the latter prosper and be strengthened. Constitutional safeguards are made up of two different kinds: institutional guarantees and guarantees of institution. As Schmitt put it, «*the institutional guarantee exists only inside the State and is not based on the idea of a sphere of liberty that is in principle unlimited. Instead it involves a legally recognised institution which is always something defined and limited».* Whereas institutional guarantees are public law safeguards,

---

294 So: B. Schaffarzik, *cit.*, 344-349. *Contra*: J. Nazarek, *Kommunale Selbstverwaltung und Europäische Integration*, Leipzig, 2001, 32 and G.C. von Unruh, *Regionalismus in Europa – Realität und Probleme*, BayVbl, 1993, 11.

295 See in this respect the ruling by the Constitutional Court of the German *Land* Saxony-Anhalt LVerfGE Judg. 21 April 2009, LVG 12/08, whereby «*die Charta begründet keine subjektive Rechtsgarantie zu Gunsten einzelner Gemeinden»* (with reference to Article 5 of the Charter).

296 Pursuant to Meyer, there is no need to bring the institutional guarantee into this discourse. It suffices to define it as a constitutive basic principle (*konstitutives Grundprinzip*) of the State. Cf. K. Meyer, *cit*., 183 and ff.

297 Cf. M. Croce and A. Salvatore, *The Legal Theory of Carl Schmitt*, 2013, 25-27. So already: C. Schmitt, *Constitutional Theory*, 1928, translated and edited by J. Seitzer (2008), 208-209.

298 K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol. 1, München, 1977, 409; M. Burgi, *Kommunalrecht*, 4th ed., München, 2012, 49. Critical towards the clarification potential of this notion is: W. Schmidt, *Die "Institutionelle Garantie" der kommunalen Selbstverwaltung und das Grundgesetz*, in: G. Frank and H-W. Langrehr (eds.) *Die Gemeinde - FS für Heiko Faber*, Tübingen, 2007, 33-34. See also *infra* second Chapter.

guarantees of institution (e.g.: property) are private law safeguards. The task of institutional guarantees is not only to protect the functioning of already existing institutions, i.e. a set of organisational forms, against statutory provisions aimed at undermining or suppressing them, but also to shape and arrange them by means of law. The notion of institutional guarantee was eventually enshrined into Article 127 of the Weimar Constitution (1919), setting out «*the right of local authorities to self-administration within the limits of the law».* The right of local self-administration was guaranteed by Reich constitutional law so that the institution of local self-administration could not be eliminated, but all statutes which destroy it or deprive of its essential content or core should be deemed as unconstitutional under the Constitution.[299]

The similarities with the understanding of local self-government under the Charter appear evident. As Heiko Faber explained,[300] the aim of the new theory elaborated by Schmitt was to protect local self-administration from the legislature but at the same time to overcome the solution based on the parallel with fundamental human rights. The same could be said with reference to the Charter's project. As mentioned above, the treaty is a compromise between the original text drafted by the Conference which still treated self-government to a certain extent as a fundamental right of local communities *vis-à-vis* the State and the final text approved by the Committee for Regional and Municipal Matters, which conceives it as a principle on allocation of powers within the State structure to be guaranteed at constitutional level. The very many legislative reservation clauses contained in the final text further imply that local self-government is not a spontaneous institution which grows from the bottom-up, but the legislature of each member State has to shape it.[301] The concept of institutional guarantee was not unknown among the non-German legal experts which drafted the Charter.[302] This notion had in fact spread from Germany to Portugal, Spain, Italy, Austria, Switzerland and Greece, that is to say mainly to those countries which were among the initial signatory States.[303] As it will be shown in Part II and also in the second Chapter, the German idea whereby local self-government should be treated as an institutional guarantee is confirmed by the interpretation of many Charter's provisions.

---

299 So the State High Court of the German Empire, Judg. 10 December 1929 - RGZ 126, Annex 22.

300 H. Faber, *Art. 28*, *cit*., Rn. 5.

301 See in this respect: BVerfGE 1, 167 (174); 76, 107 (119); 79, 127 (143), whereby the guarantee of the institution requires a legislative arrangement and shape.

302 See: J. Burmeister, *Verfassungstheoretische Neukonzeption der kommunalen Selbstverwaltungsgarantie*, 1977, 65 and 105 and A. Galette, *cit*., GYIL, 1982, 320.

303 So also B. Schaffarzik, *cit*., 346, quoting, *inter alia*, D. Thürer, *cit*., 230; H. Neuhofer, *Territoriale Selbstverwaltung*, Wien, 1979, 425; P. Oberndorfer, *Die Kommunalverfassung in Österreich*, in: HKWP I, Vol. 5, 1981, 539; C. Pielow, *Autonomia Local in Spanien und Kommunale Selbstverwaltung in Deutschland*, München, 1993, 91 and ff.; C. Samara, *Die verfassungsrechtliche Stellung der griechischen kommunalen Selbstverwaltung im Rahmen der europäischen Integration*, Konstanz, 1995, 21. Cf. also Congress of Local and Regional Authorities, *Local and Regional Democracy in Portugal*, CG (22) 11, § 40 whereby Article 3, para. 1, like Article 235 of the Portuguese Constitution, provides for an institutional guarantee of local autonomy.

All Council of Europe member States have converged towards the idea that local self-government should amount to a right of local authorities to *regulate* and *manage* a substantial share of public affairs *under their own responsibility* in the interest of a local population.[304] Yet, in some Central and Eastern Europe country (e.g.: Croatia, the former Yugoslav Republic of Macedonia, Serbia) local self-government is regarded as an individual right of citizens rather than a right to be exercised first and foremost by democratically legitimised public territorial authorities. As the Venice Commission recalled back in 2008, however, a right to local self-government for individuals «*is not a right which the European Charter of Local Self-Government seeks to guarantee* (...). *The focus of the Charter is instead on the autonomy of organs of local self-government».* Thus, if some countries seek to create both forms of right (or, at least, to supplement the autonomy of the entities endowing local citizens with specific rights aimed at protecting public interests), which is not to be considered *per se* as a disadvantage, it should be borne in mind that «*local self-government for individuals should never be capable of being construed as undermining the autonomy of local authorities»*[305].

Both the Charter and the monitoring practice by Council of Europe bodies confirm therefore that local self-government is regarded from a rather organicist or communitarian perspective. Pursuant to the federalism of multiple layers by Johannes Althusius, as rediscovered by Otto von Gierke,[306] one could in fact say that, according to the understanding of Council of Europe bodies, the people is not regarded as an association of individuals, but rather as a corporation of other bodies which are in turn composed of other corporate bodies. The State is made of municipalities, provinces and regions, that is to say of entities of corporate character. As such, their "chartered rights" have yet little to do with freedom and liberty of individual citizens. Unlike the charters aimed at restraining power and destroying the monopoly of the Crown, the Charter of the Council of Europe is a tool to establish powers and monopoly of public authorities on a certain piece of land. In this respect, a quote in point might be drawn from Edmund Burke's speech of 1783 when he distinguished the "chartered rights of men" of the Magna Carta from the "chartered rights of the East India Company". Whereas the natural rights of mankind are sacred things, political power and commercial monopoly are not the rights of men. «*These chartered rights do at least suspend the natural rights of mankind at large and in their very frame and constitution are liable to fall into*

304 Except for the Principality of Monaco, which entered a reservation to Article 3, since the State constitutes only one municipality. The Slovak Republic, though, in 2000 committed to Article 3, para. 2 and only seven years later in 2007 also to Article 3, para. 1 since, for a long time, local authorities in the country were deemed not to regulate a substantial share of public affairs. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Slovakia*, CG (8) 5 Part II, 30 May 2001. Declarations to be found at the following adress: www.conventions.coe.int

305 Venice Commission, *Opinion on the Draft Amendments to the Constitution of the Republic of Srpska - No. 476/2008,* 13-14 June 2008, CDL-AD (2008) 016.

306 Cf. O. von Gierke, *Giovanni Althusius e lo sviluppo storico delle teorie politiche giusnaturalistiche*, Torino, 1974, (1880), 38.

direct violation of them».[307] Alike, the chartered rights of local authorities which will be analysed hereunder might be, but are not, by definition, the bulwark of personal liberties, as the Charter of Municipal Liberties apodictically maintained back in 1953 and cannot be deemed to be, as such, «*essential to safeguarding the rights, and liberties of the citizen»,* as the Preamble to the Draft Charter stipulated.

To the contrary, if obtusely defended without consideration of the rights of the individuals, they might be as oppressive as those exercised by central authorities.[308] Along these lines, some years ago, the Italian classical liberal political philosopher Dario Antiseri pointed out that the (vertical) subsidiarity principle, without consideration for participation of the citizens in the exercise of public affairs, was no guarantee of freedom or liberty at all, but rather the establishment of an etatist model on a smaller scale, whereby those services which are not carried out by one public authority are carried out by another public authority.[309] Being the Charter overwhelmingly silent on the right of the individuals within local government, one has therefore to read its provisions in light of the aims of the Council of Europe as laid down in its Statute and in combination with the obligations of the European Convention on Human Rights (ECHR) and of the European Social Charter (ESC) inasmuch as possible.

II. Institutional Design of Local Self-Government

Hereunder it will be focused on the bundle of principles and rights which eventually constitutes the right to local self-government and which can be relied upon by local authorities. Instead of the terms "principles" and "rights", it will often be used the term "guarantee". As mentioned, in fact, local self-government is conceived as an institutional guarantee which ought to be protected at constitutional level. The principles and rights which contribute to outline this guarantee are themselves guarantees which might be considered as having constitutional nature and which can be relied upon before court. In particular, it will be distinguished between provisions entailing norms of principle and provisions entailing norms recognising powers which can be enforced as rights before a court. In this respect, great differences in the overall conception of local self-government will emerge in the Council of Europe member States, since the Contracting Parties have opted out many provisions from Article 4 to Article 11. Thus, the "core area" of local self-government

---

307 E. Burke, *Speech on Mr. Fox's East India Bill,* December 1, 1783, in: P. Marshall (ed.), *The Writings and Speeches of Edmund Burke*, Vol. 5, Oxford, 2000, 403 and ff.

308 So also *inter alia*: F. Staderini, *Diritto degli Enti Locali*, Padova, 1997, 30.

309 D. Antiseri, *Mercato, sussidiarietà e Europa nella tradizione del cattolicesimo liberale*, prolusione tenuta all'inaugurazione della S.S.A.I., Roma 20 febbraio 2003, 56.

remains differentiated and fluid.[310]

1. The Principles and Rights on Allocation of Powers and Responsibilities

Before clarifying on what basis powers and responsibilities should be allocated between the different layers of government pursuant to the Charter, it ought preliminarly to be made clear what one has to understand under the terms "power" and "responsibility" and to what extent can the word "function" be used to replace the former or the latter. As pointed out in a Council of Europe report by the French public lawyer Gérard Marcou in 2007, in fact, the terms used in the Charter are all but self-evident. The French text uses the term "compétence" for both powers and responsibilities (Article 4, para. 1, Article 9, para. 1 and 2) or only for powers (Article 4, para. 4), which though are also designated as only "pouvoirs" (Article 4, para. 5). Likewise, in the English version of the Explanatory Report "responsibilities" is used instead of "powers" in Article 4, para. 4. Both in French and English a certain symmetry in the confused matrix of words might henceforth be assessed. Nonetheless, the contradictions in the official translation are evident.

This is the reason why, on the basis of both texts, it might be suggested the following interpretation of the terms at stake. The term "power" denotes the ability deriving from a legal authorisation enabling a subject to act with a specific purpose or on a specific subject-matter, which it might be defined "function" or "responsibility". The circumstance whereby the term "responsibility" or "function" might be used instead of "power" has to be related to the fact that «*a power is of importance only in terms of the subject matter to which it applies, and for local authorities, which by definition do not have "competence to decide questions of competence", being assigned powers presupposes simultaneously being assigned functions*».[311]

1.1. The Right to a Substantial Share of Basic Powers and Responsibilities Rooted in Law

Article 4.1. *The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute. However, this provision shall not prevent the attribution to local authorities of powers and responsibilities for specific purposes in accordance with the law.*

Once identified what the very concept of local self-government under the Charter is, it has yet to be clarified how the substantial share of public affairs under Article 3, para. 1 can be defined and to

310 So: D. Thürer, *cit*., 225.

311 CDLR, *Local authority competences in Europe*, 2007, I.A).

what extent it can be restricted. As the Congress recalled back in 2002,[312] the ability to regulate and manage a substantial share of public affairs exists only insofar as «*territorial authorities are entitled to exercise their own specific powers in the fields of most direct concern to their communities. This right should be given concrete expression by allocating a minimum number of basic responsibilities to such authorities»,* as provided by Article 4, para. 1 of the Charter.[313] Hence, the very core of the public affairs which cannot be dealt with by higher level authorities match with the assignment of so-called basic powers and responsibilities. Being powers and responsibilities under the Charter exercised by territorial authorities, they should be of most direct concern for the local population, that is to say inherent to its welfare and cannot amount to mere delegated tasks, that is to say duties from the State.

Yet, the Charter does not clarify on what basis shall basic powers and responsibilities be attributed to local authorities, that is to say whether one shall refer to history or experience or whether a functional approach focusing on the size and structure of the local authorities shall prevail and to what extent shall the legislature be given discretion in shaping these functions. Likewise, as noted in the Explanatory Report to the Charter, it was neither possible nor appropriate *«to attempt, to enumerate exhaustively the powers and responsibilities which should appertain to local government throughout Europe.* (…) [T]*his article lays down the general principles on which the responsibilities of local authorities a*st as for some norms of principle which shall regulate the allocation of powers and responsibilities.[314] If, for instance, only Germany, Greece and Austria had decided to sign a treaty, a common ground as for the kind of affairs local authorities should have been assigned with might have been found (i.e. those pertaining to the "local community"), but since the parties which negotiated the treaty were even more than the eleven Council of Europe member States who first signed the Charter in 1985, the only rational choice was to lay down a sequence of norms of principle which could guide the domestic legislatures to distribute public powers and responsibilities taking into account all public affairs.

The second starting premise is about the procedure as to how local government responsibilities

---

312 Congress of Local and Regional Authorities, Opinion No. 16 (2002), *on the White Paper of the European Commission on European Governance,* § 21.

313 So also: B. Weiss, *cit*., 123-124.

314 This does not mean that a core of municipal competence cannot be assessed from a comparative perspective. The CDLR attempted to identify it in 2007 by comparing a limited number of countries (Germany, Spain, France, Italy, Hungary, Portugal, United Kingdom, Sweden), mostly pertaining to the group of so-called old Europe member States. Though varying in scope, the core includes: town-planning functions (planning, land use permits, spatial planning operations), the award of social welfare benefits and the management of social institutions for particular sections of the population (especially the elderly), roads and public transport (depending on the size of the authority), the construction and maintenance of school buildings, now supplemented in all countries by educational support activities (*kindergarten*), and economic development. Cf. CDLR, *Local authority competences in Europe*, 2007 and CDLR, *The relationship between central and local authorities*, 2007.

should be assigned to local authorities. Conferral of basic powers and responsibilities[315] should not occur on an *ad-hoc* basis by means of government by-laws or decrees, but through constitutional prescription or, when this is considered to be too burdensome for constitutional standards,[316] by means of statute. This concern reflects a common sense of the domestic legal orders of many Contracting Parties, whereby local government powers and responsibilities should be *«rooted in legislation»,* otherwise being the very core of local self-government at risk. In fact, insofar as the central or regional government is allowed to assign and transfer away powers and responsibilities to and from local authorities without any involvement of the legislature, local self-government as an institution has to be considered only formally guaranteed. This provision can thus be considered in the first place as a clarification on what sources of law should allocate local government powers and responsibilities and therefore an explanation of what has to be understood under the expression "within the limits of the law" used thereinafter.

Further, this provision stipulates a first principle on allocation of powers and responsibilities. In fact, as said, even the legislature cannot deprive local authorities of their basic powers and responsibilities to the extent that these, together with those attributed to local authorities by the State according to Article 4, para. 1, sentence 2, no longer represent a substantial share of the public affairs. In other words, Article 4, para. 1 in combination with Article 3, para. 1 sets out a limitation to the power of the State to transfer basic powers and responsibilities away from local authorities. Since they are called "basic" one should hence assume that they contribute at shaping the identity of the territorial authority at hand and, since they ought to be "rooted", they may be historically conditioned, they shall enjoy a certain stability and ought not to be changed too often. Courts ought thus to appreciate what makes for their identity before adjudicating against or in favor of their transfer to other authorities. No concrete standards in this respect are provided by the Congress itself, even if one could say that not only historical powers and responsibilities make for the identity of a territorial authority, nor one could argue that a mere quantitative approach, whereby a territorial authority should be assigned with at least two basic powers and responsibilities, may suffice.

---

315 Under the basic powers and responsibilities mentioned in Art. 4, para. 1 do not necessarily fall the basic powers responsibilities identified by the Charter. Cf. Schaffarzik, *cit.*, 101-102 and M. W. Schneider, *cit*., 296.

316 As pointed out by both M. W. Schneider, *cit.*, 297-298 and B. Schaffarzik, *cit.*, 91, listing local authorities basic powers and responsibilities in the national Constitution would make it too long and soon out of date. See however e.g.: Croatian, Macedonian and Serbian Constitutions (Article 135 of the Croatian Constitution and Article 115 of the Former Yugoslav Republic of Macedonia Constitution; Article 190 of the Serbian Constitution). Cf. also at subnational level: Article 83 of the Bavarian Constitution.

1.2. The Right to Universal Jurisdiction of Local Authorities Closest to the Citizens

Article 4.2. *Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority.*

Article 4, para. 2 of the Charter envisages the right of local authorities to be proactive and to be treated by every Contracting Party as having a general jurisdiction, i.e. as enjoying the power to handle any matter, that is to say any kind of public affairs as set out by Article 3, para. 1 not necessarily regarding problems arising out of the local community[317] so as «*to promote the general welfare of their inhabitants»*, unless the same power has already been assigned to other authorities, either local or central or regional. This definition matches the so-called "general competence" or "universal jurisdiction" principle,[318] whereby the scope of local self-government has to be defined in a negative way, as does for instance Article 163 of the Polish Constitution, whereby «*local self-government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities»,*[319] and not according to a positive paradigm, i.e. the so-called "ultra-vires principle", common in many Council of Europe member States, including Turkey, the United Kingdom and Ireland,[320] whereby local authorities are enabled to discharge only the administrative

---

317 See: Harmegnies-Report, CPL (16) 6, 17 and proposals for amendment submitted by Spain and by Germany during negotiations in RM-SL (83) 26 rev. So also: B. Schaffarzik, *cit.*, 329; B. Weiss, *cit*., 124; C. Hyltoft, *Die Arbeit des Europarats-Ausschusses für lokale Strukturen*, in: F. L. Knemeyer , *cit*., 1990, 50; H. Heberlein, *cit*., 58; L. Malo, *cit*., 13. *Contra:* B. Hien, *Die gerichtliche Interpretation der kommunalen Selbstverwaltung*, BayVBl, 1993, 35.

318 Because of the non-compatibility with its constitutional legal order (Article 118, para. 2 BV), the Federal Republic of Austria made a reservation so as to exclude the application of the general competence principle in its domestic legal system. See the Declaration contained in the instrument of ratification, deposited by Austria on 23 September 1987 - Or. Engl./Fr./Germ. Cf. also §§ 82 and 85 of the Explanatory Memorandum attached to Recommendation No. 302 (2011) on *Local and Regional Democracy in Austria* by the Congress of Local and Regional Authorities of the Council of Europe. Cf. E. Kotzmann, *Zweiter Länderbericht Österreich*, in: F.L. Knemeyer (ed.), *cit*., 1989, 71.

319 So also: Article 41, para. 1 and Article 162, para. 1 of the Belgian Constitution; Article 31, para. 1 of the Hungarian Constitution; Article 102, para. 1 of the Greek Constitution; Article 118, para. 1 of the Italian Constitution; Article 124 of the Dutch Constitution.

320 A. Galette, *The Draft European Charter of Local Self-Government*, *cit*., 322; M. Burgi, *Federal Republic of Germany*, in: N. Steytler (ed.), *Local Government and Metropolitan Regions in Federal Systems,* 141. At present, however, Section 1 of the UK Localism Act (2011) provides that "a local authority has the power to do anything that individuals generally may do", so that now local authorities in the UK have at least formally increased scope for decision-making. As for Ireland, in 2001, the Congress noted that «*the rigorous ultra vires (excessive power) doctrine applied in Ireland to local government until 1991 has been restricted and the state control over local government was reduced in 1994».* Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Turkey*, CG (17) 10, 10 August 2009, § 26.

functions assigned to them by statute. This right aims at granting local governments flexible powers so as that they can promptly react to the needs of the local population without having to justify it according to specific legal provisions, thus enabling local authorities to "invent" new tasks besides those already attributed to them by law or by other local authorities (in German so-called *Aufgabenfindungsrecht*).

According to Weiss, Schneider and Galette,[321] the universal jurisdiction principle operates as a residual principle, i.e. only insofar as the Constitution or statutes have already assigned the basic responsibilities to local authorities.[322] In this respect, the Explanatory Report to the Charter sets forth that: «*In addition to the responsibilities assigned by legislation to specific levels of authority, other needs or possibilities for action by public bodies may present themselves».* This appears to mean that local self-government exists only insofar as public responsibilities have already been assigned to local authorities by means of legislation. This interpretation seems to radically exclude a conception of local self-government as an institution pre-existing the State, though Article 2 of the Charter alludes to the very opposite idea, by requiring the principle of local self-government being *recognized* and not being established in the domestic legal orders. Is the interpretation of Article 4, para. 2 flawed or does it contradict Article 2?

As the Draft Explanatory Report pointed out, «*even if the potential field of action is nowadays more limited, the principle of the general residual power remains important (...)* [as] *must be regarded as both inherent in the concept of local self-government itself and essential to avoid any stifling of the initiative of local authorities by their confinement to pre-determined functions»*.[323] In other words, the Founding Fathers of the Charter started from the premise that almost all public affairs were at that time already assigned to different public authorities and that a universal jurisdiction principle remained a rather theoretical notion. Though, legally speaking, this does not say anything about what is the general rule and what is the exception to the rule.[324] According to the dominant view on Article 4, para. 2, local authorities are, as a rule, charged only with the tasks they have been conferred upon by statute and, insofar as a competence of other authorities does not exist, they also retain the power to take initiative. This dual nature of local authorities' activities is reflected in the domestic legal orders of many old Europe member States. Though, as the Congress suggested, «*to avoid controversy, this general definition of responsibility should be statutorily - or, better still, constitutionally - recognised».* Hence, whenever it is not clear whether a power or an administrative

321 A. Galette, *cit*., 1096; B. Weiss, *cit.*, 125 ff.; M. W. Schneider, *cit.*, 299-300.
322 So also: L. Malo, *cit.*, 14.
323 See Draft Explanatory Memorandum, *Harmegnies Report*, CPL (16) 6, 17-18.
324 So also, for instance: Congress of Local and Regional Authorities, *4th General Report on Political Monitoring of the Implementation of the European Charter of Local Self-Government*, CPL (7) 3, 20 April 2000.

function pertains to a local authority or to a central or a regional authority, the present provision serves as a presumption in favor of local authorities' jurisdiction, since every conferral of responsibilities to central or regional authorities must be clearly envisaged by statute.[325] However, a general responsibility in its own right does not exist without reference to the Constitution or the law, that is to say if responsibilities have not already been assigned.[326]

Yet, the Charter does not specify what category of local authorities should retain universal jurisdiction. It can nevertheless be assumed that it must be the authority which is closest to the citizens (Article 4, para. 3). Otherwise, if all local authorities enjoyed universal jurisdiction, this would inevitably lead to conflicts[327] and to overlapping responsibilities, a circumstance that the Charter aims at preventing (Article 4, para. 4). Thus, it might be assumed that municipalities enjoy the right to take initiatives on any matter, wheras other (intermediate) local authorities might enjoy a more restricted scope of decision-making laid out by legislation. This is what happens, for instance, in the relationship between the German municipalities (*Gemeinden*) and the German counties (*Landkreise* or *Kreise*), following to Article 28, para. 2, sentence 1 and 2 BL. The same could be said with reference to Poland, where *gminas* enjoy a general competence, whereas *powiats* and *voivodships* implement only those tasks that have been clearly defined for them by law. Yet, Charter Article 4, para. 2 remains open also to other solutions, whereby different territorial authorities concurringly enjoy a general competence.

1.3. The Vertical Subsidiarity Principle as a Double Sided Coin: Decentralisation and Centralisation

Article 4.3. *Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.*

Article 4, para 3 entails a principle on apportionment of powers which stipulates how basic and attributed powers and responsibilities (Article 4, para. 1) should be conferred upon to local authorities by central or regional authorities. The legislature has namely to ensure that, in preference, administrative functions are discharged, as the Explanatory Report points out, by «*the most local level of government*», that is to say by "municipalities" or "communes" in most cases (Article 4, para. 2).[328] Conferral or attribution of functions to central or regional authorities remains

---

325 So also: B. Weiss, *cit.*, 125.

326 Congress of Local and Regional Authorities, *4th Report*, *cit*., § B) 1, 20 April 2000.

327 In Sweden, though, for instance, the general competence principle benefits all local authorities. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Sweden*, CG (12) 7, 1 June 2005, § 34.

328 The Congress established a very strong link between the general competence principle and the subsidiarity

an exception to the general rule, which identifies "municipalities" or "communes" as those public authorities presumptively charged with the task of carrying out public affairs. In other words, as the Explanatory Report suggests, «*this paragraph articulates the general principle that the exercise of public responsibilities should be decentralised».* More precisely, the Charter established first a biunivocal relationship between devolution and subsidiarity.[329] As the Congress pointed out, in fact, «*the principle of subsidiarity entails also full devolution of administrative powers to the authorities that are closest to the citizen»*[330]*,* pursuant to the teaching of the French federalist thinker Alexandre Marc.[331]

But, according to the Charter, vertical subsidiarity should not be understood only as a devolutionary tool, but also as a tool permitting (re)-centralization of responsibilities from municipalities to authorities of higher level, both regional or central (Article 4, para. 3, sentence 2).[332] In particular, a Contracting Party is allowed to avert or reverse decentralisation only insofar as «*local authorities* [...] *can accomplish limited tasks, because of their nature and size»*;[333] a centralisation of functions is further allowed «*for overriding considerations of efficiency and economy»*, that is when lower authorities cannot handle a task effectively.[334] However, for taking away public functions from lower authorities it is not sufficient that the central or regional authority might be able to discharge the same function more effectively and efficiently than a local authority, but it must be strictly *necessary* to entrust it with the task.[335]

No reference is made by the Charter to the power of conferring administrative functions upon to other authorities in consideration of their supra-local nature. In fact, the final version of the present

---

principle. The legislature should list a minimum of powers and proceeds on the principle of general competence, which has the advantage of complying as far as possible with the subsidiarity principle. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Ukraine*, CG (25) 8, 31 October 2013.

329 This relationship is all but incontrovertible, as showed by J. Chaplin, *Subsidiarity and Social Pluralism*, in: M. Evans and A. Zimmermann (eds.), *Global Perspectives on Subsidiarity*, 2014, 65 ff., noting that subsidiarity is not a synonym for a general norm of decentralisation, but is a synonym for "non-absorption", that is to say incorporation and subordination to the State.

330 Congress of Local and Regional Authorities, Resolution No. 97 (2000) on *the financial resources of local authorities in relation to their responsibilities: a litmus test for subsidiarity based on the 4th general report on political monitoring of the implementation of the European Charter of local self-government (Application of Article 3, paragraph 1, Article 4, paragraphs 1 to 5 and Article 9 of the Charter).*

331 So F. Luchaire, *Reflexions sur la subsidiarité* in: *L'Europe en formation: Hommage à Alexandre Marc*, nn. 319-320 2000-2001, 201-210, as mentioned by L. Malo, *cit*., 127.

332 It not only implies that the higher tier can have no more than a subsidiary (or secondary) role, but also contains the idea that the higher tier (or administrative bodies in general) exist to help the citizens or the "lower"-level authorities to perform their functions.

333 S. Bartole, *Riflessioni conclusive sul principio di sussidiarietà*, in: A. Rinella, L. Coen, R. Scarciglia (eds.), *Sussidiarietà e ordinamenti costituzionali. Esperienze a confronto*, Padova, 1999, 239, who contends that the Charter puts its emphasis on the nature or size of the tasks, rather than on the level of government closest to the citizens.

334 So also: Committee of Ministers, Recommendation No. 95 (19), *on the implementation of the principle of subsidiarity*, 12 October 1995,

335 B. Schaffarzik, *cit.*, 338. *Contra*: M. W. Schneider, *cit.*, 305 and L. Bielzer, *Perzeption, Grenzen und Chancen des Subsidiaritätsprinzip im Prozess der Europäischen Einigung*, Münster, 2003, 169-170, holding that the original provision has been weakened to the extent that the presumption in favour of the level of government closest to the citizens can no longer be advocated.

provision differs greatly from the one of the Draft Charter (Article 3, para. 3, sentence 2),[336] whereby the same principle on allocation of responsibilities was applied to the relationship between municipalities and local authorities of higher level and was eventually set aside on because it assumed a hierarchical and not a multi-level approach to the local government system.[337] Thus, under the term "another authority" one should understand only a "central or regional authority", as the following Article 4, para. 4 clarifies, to which the Charter does not apply. However, even if it is true that the final version of the Charter's provision differs from that of the Draft, one has to keep in mind that the negotiators set aside the principle whereby higher level local authorities could be ascribed with a task «*insofar as this is made necessary by the extent of it*», i.e. merely in consideration of the supra-local nature of the task. As noted by Schneider,[338] the possibility to confer to intermediate level authorities functions which «*require to be treated within a larger territorial area*» is still covered by the final provision of the Charter. However, the latter can not be the only reason, but it must be supplemented with the objective to effectively perform local government responsibilities to promote the welfare of the citizens. Further, the principle laid down in the final text of Article 4, para. 3 is more general than that of the Draft Charter; if it covers the relationship between local authorities and central or regional authorities, it is not clear why it should not cover also the special relationship among different layers within the local government system.[339]

Additionally, unlike in the Draft Charter, the present provision does not explicitly foresee that all legislative measures conferring powers to other authorities should follow "only" the aforementioned criteria, so that different standards can be used by national legislatures to (re)-centralise functions.[340] This means that the subsidiarity principle under the Charter serves as a rather weak limitation to the legislative power, because it offers local authorities a guarantee only when those criteria laid down in Article 4, para. 3 are not correctly applied, that is to say only when it is not strictly necessary, with reference to the size or nature of the task and due to efficiency or economy reasons, that a higher level authority takes over a public function carried out by a lower local authority.[341]

Nevertheless, the enshrinement of the principle of subsidiarity in the Charter shows that it should not be regarded as just a political, moral or religious principle, but that it has its own legal meaning.

---

336 Draft Article 3, para. 3, sentence 2 read as follows: «*Local authorities shall have a general residual right to act on their own initiative with regard to any matter not expressly assigned to any other authonty nor specifically excluded from the competence of local government*».

337 United Kingdom – Draft Charter. So also B. Schaffarzik, *cit.*, 338.

338 M. W. Schneider, *cit.*, 304-305.

339 B. Weiss, *cit.*, 120 and 125 and A. Galette, *cit.*, 1096; M..W. Schneider keeps it open, *cit*., 305.

340 B. Schaffarzik, *cit.*, 339; H. Heberlein, *cit*., 58.

341 B. Schaffarzik, *cit.*, 344 and B. Weiss, *cit.*, 121.

The principle, in fact, binds the Contracting Parties to decentralise powers and responsibilities to the level of government which is closest to the citizens, insofar as this level is equipped to discharge administrative functions in a more efficient way. If understood so, the principle can be deemed to be self-executing in the domestic legal orders, i.e. it can be applied in a legal dispute without any prior legislative implementation act being necessary. In particular, in those legal orders which still lack such a constitutional guarantee, it might contribute, if directly applied by national courts, in preventing further centralization of public powers.[342] Until now, only Serbia opted out Article 4, para. 3 of the Charter,[343] but, according to the Congress, many more Council of Europe member States still not fully comply with the principle so as that apportionment of powers and responsibilities does not follow any previous subsidiarity test. This is not only the case of new Central and Eastern Europe democracies, such as Ukraine, Lithuania or Bosnia and Herzegovina,[344] but also of old Europe member States, including France, the UK, Ireland, Spain and Sweden.[345] In general, it might be assessed a common trend throughout Europe whereby devolution or decentralisation of prerogatives occurs on a cyclical basis whenever central governments are willing to reorganise their administrative structures according to efficiency purposes, whereas, because of

---

342 B. Schaffarzik, *cit*., 336 and B. Weiss, *cit*., 122.

343 In Serbia, «*while appearing to provide for the principle of subsidiarity, the last paragraph of Article 177 of the Constitution tellingly declares "What matters shall be of republic, provincial or local interest shall be specified by the Law". However, the Constitution lists the original competences of local authorities, legal reasoning allowing for the deduction that remaining competences belong with central government».* Congress of Local and Regional Authorities, *Local and Regional Democracy in Serbia,* CG (21) 4, § 18.

344 In Ukraine «*The allocation of powers between state and local authorities does not follow a general principle such as the subsidiarity principle».* Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Ukraine*, CG (25) 8, § 71; in Lithuania, albeit formally recognized in the Law on Public Administration, ««*it was not followed at the time when administrative functions were taken from the counties and re-distributed».* Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Lithuania*, CPL (22) 3, §§ 70-71; in Bosnia and Herzegovina, «*even where the prescriptive framework is explicit, decisions cannot be taken by the "authorities which are closest to the citizen" (as provided for in Article 4 para. 3) because of the other intermediate decision-making levels (including the Cantons)».* Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Bosnia and Herzegovina*, CG (22) 12, §§ 70-71.

345 According to the Congress, in France *«the principle of subsidiarity is not acknowledged as such by the law».* Congress of Local and Regional Authorities, *Local and Regional Democracy in France,* CG (7) 7. See also: L. Guillod, *Le principe de subsidiaritè en droit communautaire and en droit constitutionnel,* Petites Affiches, 19 avril 2007 n° 79, according to whom, even after 2003 constitutional reform, when allocating responsibilities, the French legislature is not bound by Article 72 al. 2 of the Constitution to carry out a subsidiarity test. Cf. Conseil Constitutionnel, *Décision 2005-516 DC*, 7 Juillet 2005, whereby the choice of the legislature to allocate responsibilities to the State can be questioned only if it is *manifest* that the same functions can be better carried out at local level. In the UK, there is no mention of this principle in the centre-local government concordat, even if a number of legislative measures could be said to embrace it. Cf. M. Varney, *Local Government in England: Localism Delivered?*, in: C. Panara and M. Varney (eds.), *Local Government in Europe*, 2013, 353. The situation appears similar in Ireland where *«the principle of subsidiarity is not properly reflected and guaranteed in the legislation».* Cf. Congress of Local and Regional Authorities, *Local Democracy in Ireland*, CPL (25) 5, 31 October 2013. In Spain *«this principle is clearly upheld in national law as a guiding principle for state and regional legislation assigning powers to local authorities, but it is not reflected in the same way in the statutes of the comunidades autónomas».* Congress of Local and Regional Authorities, *Local and Regional Democracy in Spain,* CG (24) 6, §§ 107-108. In Sweden, «*the principle of proportionality is clearly not understood as a general principle that local tasks should be performed at local level (in the sense of a principle of subsidiarity). It is interpreted as meaning that tasks should be performed at the most appropriate level and the decision of what constitutes the most appropriate level is taken at the State level».* Congress of Local and Regional Authorities, *Local and Regional Democracy in Sweden,* CG (26) 12, §§ 38-39.

its alleged elusive character,[346] the principle of subsidiarity is enshrined only in few national Constitutions (e.g. Article 118 of the Italian Constitution and Article 15 of the Polish Constitution) and rarely can be enforced by local authorities before a domestic court. In fact, many Contracting Parties, apart from those with a federal system of government (Austria, Belgium, Germany), still oppose the idea that the role of the central government can be considered secondary or auxiliary. The concept of subsidiarity emerging from the Charter, even if formally enshrined in domestic law, has thus not yet become a European common principle on apportionment of powers justiciable before national or international courts, being still up to the central government to decide whether a power should be allocated at local, regional or central level.[347] It is no coincidence that subsidiarity under EU law (see Article 5, para. 3 TEU), has not yet developed into a principle allowing territorial authorities of the member States to question the legitimacy of EU laws, but still merely serves at determining whether the EU or the member States retain jurisdiction over a certain matter.[348]

The principle of subsidiarity is however strictly linked to the issue of untouchable local government powers and responsibilities, forming a so called hard core of local autonomy. In other words, if the principle of subsidiarity is disregarded in a certain legal order, it will be also difficult to find a recognition of an essential and irreducibile set of core powers and responsibilities. The Charter attempts at combining the core of local government responsibilities and subisidiarity together, thus preventing that allocation of responsibilities occurs merely on the basis of legislature discretion.

1.4. The Principle of Full and Exclusive Powers and Responsibilities

Article 4.4. *Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law.*

Article 4.5. *Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions.*

Article 4, para. 4 specifies the content of Article 4, para. 1 and para. 2 pointing out how powers of

---

346 Following to some scholars, since the early 1970s the principle of subsidiarity has begun to be included among the criteria used by many old Europe member States for deliberative the allocation of responsibilities between the local and the central government. B. Schaffarzik, cit., 334; B. Weiss, *cit.*, 119 ff; M. W. Schneider, *cit*., 303 ff.; H. Heberlein, *cit.*, 58; F. L. Knemeyer, *Die Europäische Charta, cit.,* 1988, 1001.

347 So also: C. Panara, *The contribution of local self government to constitutionalism in the member states and in the EU multilayered system of governance*, in: C. Panara and M. Varney (eds.), *cit*., 382.

348 So: L. Malo, *cit*., 144-149 and J. Barroche, *La subsidiarité française: existe-t-elle?*, in www.droitconstitutionnel.fr, September 2008, 8. That the subsidiarity principle of the Charter should be distinguished from the same principle under EU law is contended also by B. Weiss, *cit*., 118-119.

local authorities shall interact with the powers of other public authorities.

In this respect, one has preliminarly to clarify that Article 4, para. 4 concerns powers and not explicitly functions or responsibilities so that one could argue that the present provision does not generally preclude the exercise of shared functions with respect to single powers, but only of shared powers in respect of a specific function. However, the French text of the Charter generally refers to "compétences" and the English version of the Explanatory Report explicitly states that the provision was meant to avert the risk of «*overlapping responsibilities*» between local authorities and central or regional authorities.[349] The extensive interpretation whereby the term "powers" has to be understood as concerning also "functions" or "responsibilities" and not only "powers" *stricto sensu* is not isolated, but supported by the Congress monitoring practice itself.[350]

Further, one has to recall that under the term "given powers" fall different kinds of powers and responsibilities, depending on the local government model in use at domestic level.[351] The Charter, in fact, does neither embrace a dual task model nor a uniform task model. It provides for principles and rules to be applied in both systems. In the *uniform task model* (typical of the United Kingdom, of Scandinavian countries and of certain German *Länder*) all powers, once given to local authorities, are exercised by them under their own responsibility and subject to supervision of legality, whereas in the *dual task model* (typical of France, Italy, Austria and of other German *Länder*) it has to be distinguished between own or genuine local powers and delegated powers by the State. Delegated powers pertain to a central o regional authority in their own right but are fulfilled by local authorities under a more comprehensive supervision.[352] Whereas Article 4, para. 5 of the Charter clearly applies only to the latter model, Article 4, para. 4 applies to both. This means that Article 4, para. 4 might have a different meaning depending on the local government system in which it applies.

In fact, the present provision appears to conform to a rather rigid separation of powers doctrine, aimed at limiting patterns in which both powers and responsibilities or functions are splittered among different tiers of government *«for the sake of avoiding a progressive dilution of the same responsibility»* and for preventing a progressive hollowing-out of local authorities' functions in

---

349 See: Harmegnies-Report (1981), *cit*., 19.

350 See *inter alia:* Congress of Local and Regional Authorities, *Local and Regional Democracy in Germany*, CG (22) 7, 14 March 2012, § 58 and ff.; Congress of Local and Regional Authorities, *Local and Regional Democracy in Armenia*, CG (26) 2, 26 March 2014, § 104; Congress of Local and Regional Authorities, *Local and Regional Democracy in Poland*, CG (9) 21, 14 November 2002, § 62

351 See the different interpretations by B. Weiss, *cit*., 129 and 150, holding that this provision applies only to attributed and delegated tasks. By contrast, B. Schaffarzik, *cit.*, 341 and M. W. Schneider, *cit.,* 306-307 hold that this provision applies only to own and attributed powers.

352 Cf. S. Kuhlmann and H. Wollmann, *Introduction to Comparative Public Administration. Administrative Systems in Europe and Reforms,* 2014, 22-23.

favor of central or regional authorities.[353] The term "full and exclusive" under international law is commonly associated with the terms "authority", "jurisdiction" and "sovereignty". It implies in fact separation and independence. Henceforth, as a principle, local authorities should not be endowed with fragmented powers and functions, that is to say shared or concomitant with those of other authorities, but preferably with "blocs of responsibilities" not limited and subject to detailed conditions.[354] This principle applies not only to own and attributed tasks, but also to delegated ones and has two main legal implications: for every single function assigned to local authorities, there should be at least one clear and definite power enabling the local authority to exercise it; secondly, the bulk of all responsibilities assigned to local authorities ought not to be split among many different public authorities, but have to be imputable to one only.[355]

Before being amended, the corresponding Draft Charter Article contained a further provision, whereby «*In so far as a central or regional authority is empowered by the constitution or by statute to intervene in matters for which responsibility is shared with local authorities, the latter must retain the right to take initiatives and make decisions».* As pointed out by Germany, Article 4, para. 4 seemed thus to be suited rather for a system based on a dual task model only. Further, this provision might have done more harm than good, since it could have legitimised what it aimed to limit, that is to say "overlapping responsibilities".[356] This sentence was thus ultimately set aside. The exercise of discretion[357] while carrying out delegated tasks has been nonetheless granted through Article 4, para. 5. Further, Article 4, para. 4 produces its legal effects also in a uniform task model, where shared and concomitant responsibilities are less frequent, but yet existing. This is in particular the case of the German powers whose exercise is subject to special instruction (so-called *Weisungsaufgaben*). However, unlike in a dual task model, in a uniform task model this provision requires also that local authorities are not set too many detailed conditions, that is to say enjoy enough discretion when exercising all their responsibilities, in particular mandatory ones.[358]

As noted by some authors, however, this provision appears to be not only rigid and contrary to a

---

353 Hence, the critical remarks made by the British delegation during negotiations, that is to say that Article 4, para. 4 provided for allowing «*sweeping prohibitions on the right of central government to influence local action»*.

354 See in the practice: Congress of Local and Regional Authorities, *Local and Regional Democracy in Croatia*, CG (14) 21, 16 October 2007, § 44-48. So also: Committee of Ministers, Recommendation No. 95 (19), *on the implementation of the principle of subsidiarity*, 12 October 1995, lett. b). Most recently also: J. Smith, *Local government in England: do we comply with the European Charter of Local Self-Government?, in* www.local.gov.uk, 18

355 *Contra:* B. Schaffarzik, *cit.*, 342, whereby the guarantee of Article 4, para. 4 does not refer to the whole sphere of powers, but only to single powers.

356 Council of Europe, *Information provided by the Delegation of the Federal Republic of Germany*, RM-SL 83 (5) and *Alternatives and Suggestions to the Draft European Charter*, RM-SL (84) 2.

357 The right word should be "autonomy" rather than "discretion", since the latter term relates to a specific use of powers by public authorities, whereas the Charter meant to indicate the sphere of freedom left to local authorities after the delegation of tasks by the State.

358 Congress of Local and Regional Authorities, *Local and Regional Democracy in Germany*, 14 March 2012, CG (22) 7, § 123.

modern vision of multi-level governance, but far too idealistic. In fact, without the concomitant responsibility of another public authority, mainly a State authority, local authorities are often unable to financially cover the tasks they ought to fulfill.[359] Article 4, para. 4, sentence 2 further regulates the exception whereby local authorities' responsibilities can be «*limited*» as provided for by the law, that is to say shared with other public authorities; by no means, in fact, can the law «*undermine*» the powers and functions' integrity, otherwise being the rationale of the provision completely set aside.[360] Thus, Article 4, para. 4, sentence 2 provides for a so-called "prohibition against undermining" (*Aushöhlungsverbot*)[361] the fullness and exclusivity of both single administrative powers as well as of the bulk of local government tasks within the sphere of powers of a certain category of local authorities. This is a further limitation set to the legislature power to restrict local self-government, aimed at upholding the "core area" of their own responsibilities against acts by the legislature or by the government which might reduce local self-government to a shadow.[362]

2. The Duty to Consult as a Principle on Loyal Cooperation

Article 4.6. *Local authorities shall be consulted, insofar as possible, in due time and in an appropriate way in the planning and decision-making processes for all matters which concern them directly.*

Article 4, para. 6 of the Charter provides for a duty of higher level authorities to consult with local authorities. This provision aims at minimizing possible violations of their substantive rights by entrusting them with a procedural guarantee to participate in the planning or in the decision-making process.[363] Consultation is meant at preventing a judicial complaint later on, but it does not restrict this right. This is acknowledged also by the Congress when referring to Article 11 of the Charter,

---

359 M. W. Schneider, *cit.*, 307; B. Weiss, *cit.,* 150; Congress of Local and Regional Authorities, Report *on monitoring the implementation of the European Charter of Local Self-Government*, CG (1) 3 Part II and Appendix, 31 May-4 June 1994.

360 So also: B. Schaffarzik, *cit.*, 343; D. Thürer, *cit*., 232; P. Blair, P. Blair, *Vorbereitung der Charta im Rahmen des Europarats und gegenwärtiger Stand der Unterzeichnung und Ratifikation*, in: F.L. Knemeyer, *Die Europäische Charta der kommunalen Selbstverwaltung*, 1989, 45.

361 B. Schaffarzik, *cit*., 349-350.

362 B. Schaffarzik, *cit*., 345; M.W. Schneider, *cit*., 308.

363 According to B. Schaffarzik, *cit.*, 437 and 444-445, Article 4, para. 6 does not provide for a procedural but rather for a substantive guarantee of special nature. Since no interference has yet taken place, so Schaffarzik, powers and responsibilities of local authorities are still intact so as that participation serves the purpose to avoid limitations to the right of local self-government *"insofar as possible"*.

whereby «*local authorities should have right of complaint or petition that is clearly defined, preferably in the constitution, if they believe that necessary consultations have not been properly conducted, and a right to redress if it is established that procedures were not properly followed».*[364]

In particular, higher level authorities have the duty to consult local authorities when their interests are directly affected by statutes or by-laws which seek to restrict their powers or responsibilities as well as by any financial measure, in particular those falling under the scope of financial equalisation mechanisms (see *infra* Article 9, para. 6). In other words, the final legal act which will be adopted by a central or regional authority should be of binding character[365] and should directly touch upon interests which fall under the domain of local authorities. The Charter does not mention specific interests whose affection requires consultation, but the Congress of Local and Regional Authorities generally indicates some subject matters which require consultation in the legal orders of Council of Europe member States, i.e. economic and financial affairs, spatial planning, environmental issues, EU affairs, local development, education and culture.[366]

As for delegated functions by central or regional authorities, following to Schaffarzik, local authorities' interests can only rarely be jeopardized - maybe as for their organisational powers - but in general the responsibility for these functions lies at central or regional level and not at local level. Thus, no local government interest can be deemed to be affected.[367] Based upon this understanding, quite rightly no consultation takes place in Croatia, Georgia, Greece, Turkey and Ukraine, when delegated tasks ought to be redistributed among different layers of government. In this respect, however, the Congress appears to be of a different opinion, since it states that: *«Delegation of a responsibility from state level to the local authorities presupposes a law that necessarily affects the local authorities».* The reasoning behind this interpretation is as follows: since delegation of responsibilities must be accompanied by the transfer of the necessary resources, local government is certainly affected by conferral of more or less responsibilities and consultation ought to be granted.

Thus, as ultimately even Schaffarzik acknowledges, the requirement of a direct impact on local authorities must be interpreted with flexibility, which is to say that consultation should be possible also for those local authorities whose responsibilities are *de facto* affected by matters which formally have to be coped with by a local authority nextby. In fact, the Explanatory Report attached to the Charter puts forward that consultation takes place not only for matters coming within the

---

364 Congress of Local and Regional Authorities, *Strategy on the right of local authorities to be consulted by other levels of government* Resolution nr. 368 (2014) -§ 12.

365 This provision does not necessarily apply to the relationship between different local authorities, since an international treaty does not per se produce third party effects (*pacta tertiis nec nocent nec prosunt*).

366 Congress of Local and Regional Authorities, 6th General Report on Implementation of the European Charter of Local Self-Government (Articles 4.6, 5, 9.6 and 10) "Consultation of Local Authorities" - CPL (12) 5 III. 1 Right to Consultation, § 29.

367 So also: B. Schaffarzik, *cit.*, 436.

scope of local authorities, but also for «*matters which are outside their scope but by which they are particularly affected*». This view stems from the Draft Article of the Charter that, before being amended, explicitly provided for a right to «*an effective share in the study, planning and decision-making processes for all matters exceeding the scope of a local authority but which have particular local implications*». The Congress offers a more extensive interpretation than Schaffarzik and narrower than the Draft Charter, since it considers that local government is directly concerned «*when the implementation of a government policy, or, in formal sense, of any legislation directly affects its legal status, tasks and functions (duties and powers), economic or financial situation*»[368].

As for the nature of this guarantee, one has first to observe that this Charter provision contains a principle, rather than a rule, since consultation shall be ensured "insofar as possible", which means that the member States shall grant local authorities with consultation to the greatest extent possible, given the factual and legal possibilities. Hence, depending on the kind of principles competing with the principle of consultation on a case-by case analysis, consultation will either prevail or be outweighed. Therefore, unlike Schaffarzik,[369] it cannot be said that Article 4, para. 6 was aimed at establishing that consultation shall, as a rule and at any cost, grant local authorities the right to "negotiate" in the planning and decision-making process. On the contrary, since local self-government under the Charter has been conceived along the lines of German self-administration, in certain cases a mere right to be heard might be deemed to be sufficient to comply with this provision (see *infra* second Chapter). Thus, consultation does not necessarily imply a broader guarantee for local authorities than a mere hearing, but, depending on the case, it entails a full range of different tools, the choice upon which has been left by the Charter to the legislator.[370]

The right to be heard covers the possibility for local authorities to explain their reasons without the real chance to exercise any influence.[371] The same goes for the right to give a statement or to submit observations, which can be only a part of the consultation procedure and, as such, might rather fall under the scope of Article 4, para. 2 of the Charter.[372] The highest degree of consultation entails the will on the part of the State to seek information or advice from someone, in particular from an expert or a professional, typically before undertaking a course of action and to achieve an

---

368 Congress of Local and Regional Authorities, *The right of local authorities to be consulted*, CG (23) 11, § 7.

369 B. Schaffarzik, *cit*., 434 and ff.

370 In the context of human rights law, however, the "duty to consult" with aboriginal peoples in decisions affecting them appears to entail a duty to negotiate. According to the Human Rights Committee of the United Nations, under international law the character of the consultation procedure is shaped by the nature of the right or interest at stake. It shall not be regarded as a veto power, but as a mean for achieving agreement or consent. *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, James Anaya, UN-Doc. A/HRC/12/34 (15 July 2009).

371 See B. Schaffarzik, *cit.*, 439. See also: Congress of Local and Regional Authorities, *6th General Report on* Implementation of the European Charter of Local Self-Government (Articles 4.6, 5, 9.6 and 10) "Consultation of Local Authorities" - CPL (12) 5 Part II.1. Right of Consultation, Par. 9.

372 *Ibid*., 454.

agreement with him.

It remains to be seen what criteria national legislatures have to follow before outlining what forms of consultation should be used and in which cases. According to Schaffarzik,[373] no differentiation in consulting local authorities can ever take place on the basis of the degree of State's interference into self-government rights. In case of abstract and general rules which potentially touch upon many or even all local authorities, a consultation of all local authorities will not take place and will be restricted to part of them. This specific aspect is however taken into consideration by the other expression laid down in Article 4, para. 6, i.e. "in an appropriate way". As clarified by the Explanatory Report, "insofar as possible" means that «*exceptional circumstances may override the consultation requirement particularly in cases of urgency*». Thus, in principle, only urgency allows member States to exercise their discretion as regards consultation,[374] but not the kind of State interference in local government matters. Yet, urgency is a rather broad concept which therefore ensures a wide margin of discretion to national authorities.

A limitation to the right of local authorities' to influence the decision making process is to be found, so to say, *in re ipsa*. Consultation, in fact, cannot amount to a right of co-decision, provided that the Charter allows for State interference into local self-government by means of statute (Article 3, para. 1 and Article 4, para. 2 and 4) and that, as mentioned, this possibility was explicitly ruled out during negotiations, otherwise being local authorities upgraded into a second or a third tier of government, a circumstance which might impinge on the constititutional structure of many member States, in particular federal ones.

The same can be said for the election of local representatives in, where existing, one of the Houses of Parliament, which represents a form of political influence that «*lies somewhere between "consultation" and "lobbying"»,* a consent or a mutual agreement between local authorities and the State. This would mean that the former enjoyed a veto power, which is certainly not the aim of Article 4, para. 6 of the Charter. The State must retain the final decision, but prior to it should be open to discussion and recognize local authorities as equal partners. As the Congress recalls echoing the principle of loyal co-operation, «*in the spirit of the Charter, a real partnership must be based on trust*». This kind of joint discussion can entail a dispute and an effort to come to a compromise in order to reconcile divergent views on a specific matter. Local authorities should be able to make proposals and submit claims or complaints. As said, the State can ultimately decide to adopt a

---

373 *Ibid.*, 443.

374 So also: M. W. Schneider, *cit.*, 309 and B. Weiss, *cit.*, 157. So also: Congress of Local and Regional Authorities, *The right of local authorities to be consulted by other levels of government* – CG (23) 11 – *Explanatory Memorandum* – I a) Par. 11. See however: Congress of Local and Regional Authorities, *Local Democracy in Estonia*, CPL (19) 5, 7 October 2010, §§ 70-73.

different measure,[375] but it ought to strive for achieving a consensus with local authorities. As the Congress recalls, during consultation, «*the parties seek information, advice or opinion of each other about particular topics*.» This way of proceeding matches the concept of "negotiation". A break-up of the consultation is in fact possible only insofar as there is no longer chance of achieving an agreement.[376] That this interpretation is correct shows also Recommendation No. 171 (2005) of the Congress of Local and Regional Authorities, which notes that in the member States the consultation procedure «*is almost always a mechanism for the exchange of information and views between the representatives of central government and local authorities and rarely takes the form of genuine political negotiation*». Therefore, the Congress called on the member States «*to develop the consultation process into a system of negotiation between the government and national associations of local authorities».*

At the same time, the Congress recognizes however that consultation «*in its weakest form, it consists of the legitimate expectation of local authorities to receive information about a plan or intention of the central government to take a measure or action»*. In 2012, the Congress took notice that: «*There is little sign that central-local government consultation constitutes genuine political negotiation, as the 2005 report recommended»*[377]. In other words, it appears that consultation mechanism follows infomal rather than organised procedures and that an alleged margin of appreciation allows the Contracting Parties to provide a degree of consultation which might be different from legal order to legal order, being the minimum standard required by the Congress a mere hearing before parliamentary committees. In any case, central or regional authorities should always provide local authorities with clear and detailed information about proposed measures well before the consultation procedure begins.[378]

As for the timing of consultation, it should start as soon as possible and in any case at a stage when local authorities still have «*a genuine opportunity to exert an influence on decisions and planning»* and should occur on a regular and systematic basis. As for the Charter requirement to conduct the consultation "in an appropriate way", the Explanatory Report offers the following clarification: «*Such consultation should take place directly with the authority or authorities concerned or indirectly through the medium of their associations where several authorities are concerned».*

---

375 So also Congress, *ibid*. Effects of Consultation – Par. 41 «*Even if the consultation process is carefully regulated in a country, there is no guarantee that local interests will prevail in the proposed legislation or policy decisions. This follows from the nature of consultation which represents a special kind of procedure, a framework for coordination, without any guarantee on an agreement being reached between the negotiating parties.»*

376 B. Schaffarzik, *cit.*, 450-451.

377 Congress of Local and Regional Authorities, *6th General Report on Implementation of the European Charter of Local Self-Government (Articles 4.6, 5, 9.6 and 10) "Consultation of Local Authorities"* - CPL (12) 5 III.2. Methods of Consultation, § 85.

378 Resolution No. 368 (2014), *Strategy on the right of local authorities to be consulted by other levels of government,* 25 March 2014, § 9.

Under associations, it is to be meant a specialised organisation officially deputed at representing the interests of all or of some local authorities at regional or national level, within which every local authority can freely exert its influence (see *infra* 7.2).[379] It has therefore to be *apriori* excluded the possibility for municipalities or communes to be represented by higher level or intermediate local authorities. Preference is given neither to the former form of consultation nor to the latter. Though, it would barely be appropriate to consult local authorities through their national or regional associations for cases involving only single municipalities or for cases in which the specific characteristics of single municipalities require their participation.[380]

Further, it has to be emphasized that Article 4, para. 6 does not provide for a legislative reservation clause which commits the legislature to regulate and restrict the consultation procedure, which should thus remain as flexible as possible.[381] The implementation of the treaty's provision is thus possible, but the provision as such has to be considered as self-executing. In this respect, the 2005 Congress recommendation appears to be more flexible than Schaffarzik's reasoning, since it merely notes that «*in the majority of states, the mechanisms for consulting local authorities are based on legal procedures or on customary practice that is well established*». In 2012, the Congress observed again that the right of local authorities (or their associations) to be consulted in the member States is often institutionalised by law, but did not put into question the legal framework of consultation.

In most new Central and East Europe democracies, however, consultation is based on informal political agreements or on customs (Albania, Bulgaria, Croatia, Czech Republic, Slovenia)[382]. Even where consultation is formally recognized as a principle by the law, as it is the case in particular in federal States, procedure is often regulated by custom. The absence of any reference to national law in the Charter can thus be construed not as a ban on legislation *tout court*, but as a ban on those pieces of legislation which might restrict the right of local authorities to be consulted under the degree provided for by the Charter, i.e. to make impossible for local authorities not only to negotiate, but even to be heard.

Finally, the Charter does not provide for any specific legal consequence for the legal acts adopted without consultation. However, the Congress recalls that in many member States if planning or decision making process occurs without consultation, local authorities have the right to seek redress

---

379 B. Schaffarzik, *cit*. 458.

380 *Ibid*., 456-457. So also Congress of Local and Regional Authorities, *6th General Report on Implementation of the European Charter of Local Self-Government (Articles 4.6, 5, 9.6 and 10) "Consultation of Local Authorities"* - CPL (12) 5 III.2. Methods of Consultation - Par. 40.

381 *Ibid*., 459-460.

382 Nonetheless, the practice is also often in contrast with the Charter, since there are many important issues for which local authorities are not consulted at all. Congres of Local and Regional Authorities, *Local and Regional Democracy in Croatia*, CG(14)21, 16 October 2007, § 56. Cf. also S. W. Burger, *Local and Regional Autonomy in the European context: the impact of the Council of Europe and the European Union on the sub-state structure of Slovenia and Croatia*, University of Graz, Univ., Dipl.-Arb., 2013, 80.

and the final act has to be considered null and void. It notes though that *«it is doubtful whether a procedural error can lead to the annulment of the final action»,* thus deferring to the margin of appreciation of the member States whether the infringement of consultation rights should result in nullity and avoidance.[383] It might be here added that if consultation is not respected by a member State, it also violates binding international law. This latter aspect is however not taken into account by the Congress, which considers that «*the lack of recognition of the right to consultation may bring local authorities and their associations into a difficult situation, because they will have no legal basis to claim regular consultation».*[384] Quite curiously however the Congress speaks of "lack of implementation" of the Charter, while it should be clear that the provision of Article 4 para. 6 does not provide merely for criteria of consultation, but is as such self-executing and could be directly relied upon before national courts. In this respect, the Congress appears to carry out a rather weak form of monitoring, requiring the member States to implement the provision in their domestic orders, if practicable even in the Constitution, according to a broad margin of appreciation.[385]

3. A Limited Right to Territorial Integrity

Article 5 *Changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute.*

The State retains the ultimate power to change local authorities' boundaries by means of its authoritative decisions, but it cannot legitimately do that without the prior consultation of their citizens. This is the rule laid down in Article 5 of the Charter. Local boundaries' changes deserve a specific guarantee due to the importance of borders settlement for exercising the right to local self-government and in particular for local democracy. This is the reason why the Charter requires in the first place a consultation of "communities" and not merely of "authorities", whereas the latter can be consulted instead of communities insofar as they are truly territorial, that is to say representative of their communities pursuant to Article 3, para. 2.

As the Congress points out, «*the requirement of prior consultation with the respective local*

---

383 Congress of Local and Regional Authorities, *6th General Report on Implementation of the European Charter of Local Self-Government (Articles 4.6, 5, 9.6 and 10) "Consultation of Local Authorities"* - CPL (12) 5 - III.2. Methods of consultation § 33 and VII.1. Appraisal of Charter implementation § 76; Congress of Local and Regional Authorities, I. f) Effects of Consultation – § 46.

384 *Ibid*., IV. Key issues and problems of central-local consultations - § 66.

385 See most recently: Conclusions of the 6th General Report - § 87 and also Recommendation nr. 328 (2012) § 4; Congress of Local and Regional Authorities, Resolution No. 368 (2014) § 2.

authority is a general principle in Council of Europe member states»,[386] in many cases even enshrined in the Constitution. The member States might further enshrine into law the power to call and hold a binding (France, Hungary, Switzerland, Turkey and in some Italian regions)[387] or a consultative referendum before adopting the final decision.[388] The referendum is further optional in many countries (Austria – in some *Länder*, Belgium, Czech Republic, Greece, Luxemburg, Malta, Norway, the Netherlands, Portugal and Sweden) and mandatory in others (Armenia, Azerbaijan, Bulgaria, Cyprus, Croatia, Estonia, Finland, France, Georgia, in some German *Länder*, Hungary, Italy, the United Kingdom, Serbia, Slovenia, Switzerland, and Turkey). It might be argued that, on average, optional referendum is a striking feature of rather small old Europe member States, whereas the obligation to hold a referendum is rather common in more unitary old Europe countries and in new Central and Eastern Europe democracies, which seem to have taken into account this Charter provision as a reference.

Whereas the first period of Article 5 is deemed to be self-executing, since it provides for an obligation addressed to all Contracting Parties which is sufficiently precise without any need for measures implementing it, the second period provides for a legal procedure which might be taken into account by the Contracting Parties, but no violation of the Charter can be assessed if no provision on referendums is enacted. However, if any statutory provisions on consultative referendums on administrative boundary changes exists under domestic law, then the decision-maker must first resort to it before making resort to other forms of consultation. As the Explanatory Report points out, in fact, only «*where statutory provisions do not make recourse to a referendum mandatory, other forms of consultation may be exercised».*

Yet, consultation must neither entail a local authorities' veto-power for boundary changes nor a right

---

[386] In Poland this is true for *gminas*, *powiats* and the city of Warsaw (Acts 8 March 1990 and 15 March 2002). Georgia, which entered a reservation on Article 5, this principle constituted an exception for a long time together with Belgium. Finally, new Chapter VII of the Georgian Constitution entered into force in January 2011 made consultation with self-government units mandatory prior to decision-making on local government boundaries (Article 101, para. 3). As for Belgium, in the Wallon Region *the "Conseil supérieur des villes, communes et provinces de la Région wallonne" appears to be helpful as regards the consultation of local authorities,* whereas in the Flemish Region, 2005 Municipal Decree required a previous consultation of the municipalities concerned. Consultative referendum is optional. As for Greece, even if it did not consider itself bound by Article 5, it might be said that it complies with. In fact, at least since the so-called *Kapodistrias Program* (Act No. 2539/1997), compulsory mergers of municipalities were accomplished upon consultation of the local authorities involved. Further, local referendums may also be held at the request of one third of citizens in relation to mergers of municipalities or communes, or at the request of one third of voters within a local administrative division with a view to attaching it to a different municipality or commune. This has however not happened yet. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Greece*, CG (28) 8, 25 March 2015, § 229.

[387] More recently, according to the Congress, Hungary did not comply with the requirement to consult the local populations and proceeded to mergers without their involvement. Congress of Local and Regional Authorities, *Local and Regional Democracy in Hungary,* CG (25) 7, § 121.

[388] Armenia, which also entered a reservation on Article 5, the Constitution provides for the right of the local populations to be consulted by means of binding referendum (Article 110), before mergers are carried out, but in practice the Congress had not been able to ascertain if boundary-change reforms were approved in compliance with this principle. Cf. Congress of Local and Regional Authorities, *Local Democracy in Armenia*, CPL (26) 2, 26 March 2011. The same goes for Serbia (Article 188 of the Constitution), Italy (Article 133, para. 2 of the Constitution).

of co-decision or consent, which is essential only for altering international boundaries of sovereign States, but should in general provide for an appropriate participation in the administrative procedure of every single local authority interested by the future changes. Unlike Schaffarzik, it should be argued that also national or regional associations of local authorities can be consulted whenever States' plans to change boundaries, i.e. to establish, reorganise, merge or dissolve local authorities, involve a greater number of them at national or regional level.[389] Another question is whether local authorities which are not directly affected by the merger might have a right of consultation. Even if Article 5 only refers to local authorities concerned by territorial reforms, one might refer to Article 4, para. 6 and allow consultation if they assert to be directly touched upon in their interests.[390]

A question which also deserves to be answered is whether Article 5 does recognize a subjective right to existence of local authorities within the existing boundaries. Provided that an institutional guarantee for at least one category of local authorities shall be ensured, it has here to be clarified in how far single local authorities can avert a dissolution. A guarantee of existence would protect single local authorities' territory not only against their dissolution or absorption, but also against any State intervention upon their territory insofar as it has the effect to disrupt their correct functioning and ultimately endangers their existence. Such a guarantee cannot be deemed to contradict the aforementioned absence of a veto power of local authorities, insofar as the right to a continued existence of individual local authorities is not to be considered absolute, but only relative. In other words, domestic borders are not regarded as being permanent boundaries as the ones of the States under international law, but they should not be established or altered according to mere discretionary powers by the legislature or by the central government.[391] As Schaffarzik points out, even if not explicitly mentioned, the procedural safeguard of local authorities to participate in the procedure to change local boundaries implies a limited substantive right to uphold their territorial integrity against dissolution[392] Albeit being merely autonomous and not sovereign public authorities, local authorities enjoy nonetheless a limited subjective right to their territorial integrity. This right is fully compatible with the institutional guarantee of local self-government described above. If in fact each local authority exercises its jurisdiction over a specific territorial area for the

---

389 So also: Congress of Local and Regional Authorities, *6th General Report on implementation of the European Charter of Local Self-Government (Articles 4.6, 5, 9.6, 10) "Consultation of Local Authorities"*, CPL 12 (5) Part II IV-IV. 1, 31 May 2005, § 46. More recently, the Congress has expressed a totally different view which raises the question of the consistency of its "case-law". See: Congress of Local and Regional Authorities, *The right of local authorities to be consulted by other levels of government*, CG (23) 11, 7 February 2013, § 55.

390 The Congress seems to answer in the affirmative too. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Finland*, CG (21) 13, Explanatory Memorandum, 18 October, 2011, § 47.

391 A different question is whether in a State there could be areas without territorial local authorities. This is in the majority of the countries of the Council of Europe rather an exception. In the light of the Charter, one could argue that since local authorities are tha main foundations of a democratic regime, they should be in any sense at the very bottom of the State, so that its territory could not be "local authorities free".

392 *Contra*: B. Weiss, *op. cit.*, 167; M.W. Schneider, *cit.*, 311 and M. N. Shaw, *Peoples, Territorialism and Boundaries,* in (3) European Journal of International Law, 1997, 490.

welfare of the citizens living within its boundaries (*quidquid est in territorio, etiam est de territorio*), this implies that the Charter protects its existence, at least to the extent that it is involved in the procedure aimed at its dissolution. It would otherwise be contradictory to ensure local self-government without endowing single local authorities with any subjective right. That this interpretation is correct shows also Article 9, para. 1 and 2 (see *infra*) envisaging the right of every local authority to be equipped with adequate financial means. The purpose is to ensure the existence of single local authorities by providing them with all financial resources necessary to fulfill their tasks. This provision cannot be read isolately, but it only makes sense if a general guarantee, albeit limited, to existence of local authorities is enshrined in the Charter. Even if Draft Charter Article 4 was originally recorded "Protection of existing local authorities" and had been changed into "Protection of local authorities boundaries" upon express request of the Republic of Ireland, the provision itself was not significantly amended. Moreover, the Explanatory Report to the Draft Charter clearly pointed out that «*the constitutional guarantee of local self-government implies the right to protection against attempts by central government, contrary to the legitimate wishes and interests of the population, to alter the local government structure by a major amputation of territory or by dissolution or abolition through sub-division, merger or absorption».* This statement was anticipated by a Report in the Meeting of Experts on the principle of self-government held in Strasbourg on 9-10 October 1980. The "Founding Fathers" of the Charter, in fact, conceived the right to territory as a «*constitutional guarantee of local communities' right to exist*».

Territorial boundaries of local authorities are established and modified only by means of statute. Insofar as domestic legislation does not prohibit them, proactive proposals for boundaries' reorganisation by local authorities can be said to be caught by Article 4, para. 2 (universal jurisdiction). Even if no such a system based on the own initiative of local authorities exists, the legislature is not allowed to alter administrative borders as it sees fit, but, according to the "core area" doctrine, it is itself bound to comply with the following limitations. In particular, the provision prohibits the government to pool together local authorities without negotiating with the local communities the borders' settlement as well as every adjustment which puts at risk the further existence of the local authorities arising out of the territorial reorganisation. On the contrary, an alteration of local boundaries which aims at increasing local authorities efficiency, i.e. at reducing the excessive fragmentation of local authorities and/or their weak financial base cannot in principle be deemed in contrast with the Charter.[393] Though, amalgamation cannot lead to the creation of new

[393] According to the Report on the Draft Charter «*it is also uncertain whether the agreement of the local authorities concerned would in all conscience be desirable. [...] On the basis of experience in the U.S.A. and Canada, [...] the inhabitants of suburban local authorities preferring to have the advantages of urban life without the financial burdens of providing, for poorer inner-city-districts have commonly blocked all attempts to introduce effective local government units in growing metropolitan areas.».*

authorities which leave out of consideration the social cohesion and the identity of local communities, which is often rooted within the existing boundaries of local authorities.[394]

4. Freedom of Organisation

4.1. The Power to Shape and Adapt Administrative Structures

Article 6.1. *Without prejudice to more general statutory provisions, local authorities shall be able to determine their own internal administrative structures in order to adapt them to local needs and ensure effective management*

The guarantee of freedom of organisation laid down in Article 6, para. 1 has to be linked to Article 3, para 1. In fact, if local authorities are empowered to both "manage" and "regulate" a substantial share of public affairs in their own responsibility, they are by definition also vested with the power to adapt their administrative structures in order to discharge the very same affairs as they see fit, otherwise being self-government just a word on paper. Through own management and own regulations i.e. by-laws, in fact, local authorities shall be able to adapt their administrative structures to the scope of powers and responsibilities they are charged with.[395]

It has yet to be seen whether the power to organise the internal administrative structures relates to all kind of administrative functions carried out by local authorities or only to some of them, i.e. only to basic or attributed powers or also to delegated ones. In this respect, it might be worth remembering that Article 4, para. 5 of the Charter provides for a parallel guarantee which reads as follows: «*Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions».* According to Schaffarzik and Schneider,[396] Article 6, para. 1 covers all different kinds of responsibilities and Article 4, para. 5 has thus a mere declaratory nature. The Explanatory Report is fairly clear in stating that local authorities «*should, when possible, be allowed to take account of*

---

394 In this respect, a special limit upon the legislature is given by Article 16 of the Framework Convention for the Protection of the National Minorities, which stipulates that the Contracting Parties *«shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention».* Among these measures the Explanatory Report includes also the redrawing of administrative frontiers. Quite similar is the norm contained in Article 7 n. 1 lett. b) of the European Charter for Regional or Minority Languages which binds the Contracting Parties to respect «*the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question.»* As the Explanatory Report points out the Charter *«does condemn practices which devise territorial divisions so as to render the use or survival of a language more difficult or to fragment a language community among a number of administrative or territorial units».*

395 B. Weiss, *cit*., 172.

396 B. Schaffarzik, *cit*., 468-469 and M. W. Schneider, *cit*., 312.

local circumstances in exercising delegated powers». In other words, the general rule that local authorities are vested with the right to organise their administrative structures within the framework of statutory provisions setting out «*for basic institutional uniformity*» applies to basic and attributed functions and, insofar as possible, also in cases in which local authorities seek to adapt delegated functions to local conditions and ensure their effective management. However, provided that the Charter explicitly mentions delegated functions, there should be a difference between freedom of organisation in exercising own or attributed responsibilities and freedom of organisation in carrying out delegated tasks. Except for the legislative reservation clause, which can implicitly be assessed in Article 4, para. 5 from the expression "insofar as possible", the Explanatory Report recalls that «*it is recognised that in respect of certain functions, for example the issue of identity papers, the need for uniform regulations may leave no scope for local discretion*». This means that the legislative reservation clause which allows for restricting freedom of organisation of local authorities when delegated functions are concerned can be much more far reaching than for cases concerning the adaptation to local circumstances in carrying out basic or attributed functions.

The possible limitation of this freedom by means of statute, as set out in Article 6, para. 1, allows the legislature only to lay down out requirements «*concerning, for example, the establishment of certain committees or the creation of certain administrative posts*», as purported by the United Kingdom during negotiations.[397] However acceptable they might be, the Explanatory Report recalls that «*these requirements should not be so widespread as to impose a rigid organisational structure*». Flexibility and reasonableness are the best criteria to understand that legislative powers to restrict the freedom of organisation of local authorities are in turn limited by the application of the proportionality principle.[398] A further limitation for the legislature is the mandatory compliance with a so-called "core area" of freedom of organisation: organisational powers cannot be restricted to the extent that local authorities' responsibility for arranging the organisation of the administratives structures no longer exists. That the original intent of the Charter was to restrict the legislative power so as to ensure the essential content of freedom of organisation is confirmed by the same Explanatory Report to the Draft Charter when it stipulates that the aim of the treaty provision is to «*preserve the organisational freedom*» against «*the tendency of central authorities to specify in ever greater detail the administrative organisation and procedure to be adopted by local authorities for the implementation of particular responsibilities*».

---

397 According to the United Kingdom delegation: «*There remain a limited number of specific requirements requiring certain committees to be established eg education committees, children's committees and it is considered appropriate that parliament should still be able to impose such requirements in allocating functions to local authorities*». Cf. Council of Europe, RM-SL (83) 26 rev., 16.

398 B. Schaffarzik, *cit.*, 468.

Hence, the Charter appeared to provide for a very generous guarantee which did not represent a common standard of Council of Europe member States at the time of its adoption. As the Explanatory Report of the Draft Charter recalled, in fact: «*In many European countries the general structure is rigidly laid down and there is very little scope for a local authority to vary it to contrast in the United States there is much more diversity and scope for experiment and innovation».* In this respect, the Charter was thus partially innovative and did not merely take into account the existing common legal framework of the signatory States.

Yet, the Charter does not clearly specify what has to be understood under "administrative structures" of local authorities. This term might imply that local authorities enjoy the power to pass by-laws and internal rules of procedure for the council or for the assembly as well as by-laws regulating the committees which can be freely established by them, as well as fixing the allocation of tasks among decentralised administrative units, the internal communication between them and the way according to which administrative services ought to be organised. Thus, the Charter admits what is a commonly acknowledged administrative feature of every European State, i.e. that, unlike States, local authorities do not enjoy a full "organisational sovereignty", but, as public authorities vested with autonomy, enjoy a sphere of organisational freedom whose scope extends only to their internal administrative structures insofar as this is necessary for carrying out their responsibilities. That the freedom of organisation should be treated differently than those powers and responsibilities conferred upon local authorities according to Article 4, para. 1, that is to say as a mere "auxiliary power", is made clear by the fact that Article 6 is not directly embedded in Article 4 and, furthermore, is also one of those Charter's provisions which are not included in the nucleus of basic principles laid down in Article 12.

This means that local authorities should tolerate a greater degree of interference in their internal organisation and are not allowed to determine "external structures", i.e. all issues relating to their "general constitution" (including the kind and number of political bodies, the type of administrative functions to be carried out or the electoral system). As mentioned by the Exlanatory Report, this latter aspect is not object of any thorough provision by the Charter, apart from Article 3, para. 2 (see *supra* I) which alludes to a division of powers between a deliberative and an executive organ. However, one has to take into account that the legislature might abuse of its power to regulate governmental aspects of local authorities' organisation encroaching upon the internal organisation. In this respect, therefore, the Congress recommended the member States to «*reduce to the strict minimum rules which, under the guise of better management or reflecting governments' own financial difficulties, tend to restrict local authorities' freedom under the Charter "to determine*

their own internal administrative structures».[399]

As for the Council of Europe practice on this provision, it should be first noted that Armenia, Serbia and Turkey have opted out Article 6, para. 1, but the last reports on these countries by the Congress have quite surprisingly failed to monitor this aspect, dedicating more attention to their compliance with Article 6, para. 2. In general, it might be argued that the Congress has not yet thoroughly reviewed this dimension of local autonomy, neither on a country-by-country basis nor from a comparative perspective with so-called general reports. However, it should be stressed here the striking importance of Article 6, para. 1 in the context of local self-government, because in those countries in which the organisational forms is set down by central or regional authorities, regulatory powers of local authorities are weak and normative autonomy is in principle nonexistent or in pratice subdued by the State,[400] there could be no own responsibility of local authorities pursuant to Article 3, para. 1 of the Charter.

4.2. The Power of Staff-Recruitment and Principles on Conditions of Service

Article 6.2. *The conditions of service of local government employees shall be such as to permit the recruitment of high-quality staff on the basis of merit and competence; to this end adequate training opportunities, remuneration and career prospects shall be provided.*

The conditions of service of local government employees is an aspect inherent to the internal organisation of local authorities and thus falls under the scope of their freedom of organisation set out in Article 6, para. 1.[401] Article 6, para. 2 does not provide for a different principle on internal organisation of administrative structures, but sets out a list of standards, i.e. principles which should be followed while recruiting local government employees: staff must be high-quality, that is to say recruited on the basis of merit and competence; high-quality staff can be recruited only if adequate training opportunities, remuneration and career prospects are ensured. As the Explanatory Report adds, local authorities should be «*able to recruit and maintain a staff whose quality corresponds to* [their] *responsibilities».*

---

399 Congress of Local and Regional Authorities, Recommendation No. 20 (1996), *on monitoring the implementation of the European Charter of Local Self-Government.*

400 See for instance: Congress of Local and Regional Authorities, *Local and Regional Democracy in Greece*, CG (28) 8, 25 March 2015, § 127, whereby Greek local authorities lack normative autonomy. The same could be said with referece to Poland. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Poland*, CG (28) 12, 25 March 2015, § 42, whereby municipalities do not have "autonomous" or independent regulatory powers, due the so-called "administrative" nature of their autonomy; Congress of Local and Regional Authorities, *Local and Regional Democracy in Azerbaijan*, CG (23) 12, § 67.

401 B. Schaffarzik, *cit*., 496; M. W. Schneider, *cit.*, 313.

Apart from the implied rule whereby local authorities must not be restricted in their freedom to recruit their staff themselves,[402] all standards enshrined in Article 6, para. 2 cannot be said to be self-executing in the domestic legal orders of the Contracting Parties, but require detailed legislative implementation. In this respect, the first question arising from this provision is: implementation by whom? Unlike Schaffarzik,[403] who holds that the obligations of paragraph 2, as it is the case of paragraph 1, are addressed to the legislatures of the member States, it seems that this provision leaves to each Contracting Party the choice as to what should be the source of law regulating the conditions of service. That this interpretation is correct can be easily explained from a comparative perspective[404]. In several domestic legal orders, including Belgium, Cyprus, Iceland, Liechtenstein and the Netherlands, in fact, regulation of the issue pertains to local authorities themselves,[405] whereas in other countries it is not up to national/federal or regional law to determine the status of local goverment personnel, but rather to collective public agreements. Thus, it is perfectly clear that the Charter could not impose upon a minority of countries the tradition of other domestic legal orders.[406]

Besides the competence for implementation under domestic law, this Charter provision poses an implicit financial burden upon the Contracting Parties so as to prevent that staff policy is conditioned by financial constraints or undermined by spending cuts.[407] Aware of this constraint,

---

402 See also: Conference of Local and Regional Authorities of Europe, Resolution No. 233 (1992), *on the implementation of the European Charter of Local Self-Government,* § 7.

403 B. Schaffarzik, *cit.*, 496.

404 See: Congress of Local and Regional Authorities, *Report on monitoring the implementation of the European Charter of local self-government - CPL (3) 7 Part,* 5 July 1996.

405 In the case of the Netherlands, Article 125 of the Act on Civil Servants (*Ambtenarenwet*) delegates to local authorities the power to regulate the status of all civil servants appointed by the local authorities, at least insofar as this has not already been regulated by Act of Parliament. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in the Netherlands*, CG (26) 7, 26 March 2014, § 83. This is the case also in Liechtenstein, where «*municipalities lay down salary levels, organise training for their staff and take their own decisions on any dismissals».* Cf. Congress of Local and Regional Authorities, *Local Democracy in Liechtenstein*, CPL (13) 3, 19 March 2013, § 41.

406 During negotiations, the Swiss delegation made clear that «*municipalities alone are responsible for the status of their staff».* See RM-SL (83) 26 rev., 17 - *Summary of Proposals for Amendment and Secretariat Proposals Following the Committee of Experts on Local and Regional Structures Meeting of 25-26 April 1983*. In the light of this, it appears misplaced the comment made by the Congress with reference to the Czech Republic, which did not opt in Article 6, para. 2 because, considering «*the wide discretion enjoyed by local and regional authorities in (...) deciding about the staff needed to fulfill the different tasks»*, central government intervention «*may be considered as an interference in the autonomy of local and regional authorities».* This statement does not make much sense, since Article 6 para. 2 was conceived exactly as a provision embodying standards which can be implemented by local authorities themselves.

407 B. Schaffarzik, *cit*., 496. That this interpretation is correct shows *a contrario* the declaration contained in the instrument of ratification deposited by the Netherlands, «*the Government of the Kingdom of the Netherlands takes the view that, in the framework of the Charter, only Article 9 of the Charter has any bearing on the financial resources of local authorities. This means that local authorities may not take any financial claims on central government based on the provisions of Article 6, paragraph 2, of the Charter».* That Article 9, para. 2 and Article 6, para. 2 should be read in combination is confirmed by the: Congress of Local and Regional Authorities, *Local and Regional Democracy in the former Yugoslav Republic of Macedonia*, CPL (7) 8, 24 May 2000, § 60.

eight countries have opted out Article 6, para. 2, i.e. Armenia, Georgia, Liechtenstein, Montenegro, Czech Republic, Serbia, Switzerland and the Netherlands. Following to the Congress, «*the main motivation for the reservation would seem to lie in the desire to avoid excessive financial commitments.* (…) *The States are concerned that they will have to introduce minimum wages for local authority staff».*[408] However, this latter concern is not really justified. The Charter aims at ensuring that equal remuneration and training opportunities for civil servants at local level exist for all local authorities including for small entities with lower administrative capacities.[409] This is indeed a kind of "absolute obligation" which requires the member States to make particular financial efforts so as to allow adequate financial equipment also in this respect (Article 9), but it does by no means imply that institutional competition among local authorities naturally results in worse remuneration and training opportunities for civil servants so as that minimum wages should be introduced later on, nor that a reduction of the number of units or restrictions to pay rises shall not be imposed.[410]

A different question relating to the implementation of this provision refers to the definition of the extent to which the freedom of recruitment by local authorities can be restricted by central government intervention (this is in particular the case in Central or Eastern Europe countries) or by parliamentary statute. Two particular questions arose within the context of the Council of Europe monitoring practice: **a)** Does the appointment or dismissal of local government employees by higher-level authorities conform with the Charter?; **b)** Does supervision of expediency on local authorities by-laws concerning the status of the staff conform with the Charter?

Both questions and in general all questions referring to the limitation of local authorities' power of recruitment should be answered in light of other provisions of the Charter, since Article 6, para. 2 does not say anything about local authorities' power in this respect, but merely that recruitment is inherent to local authorities' organisational freedom. Thus, as for question *sub a)*, one should argue that appointment or dismissal of local government employees by State authorities is not in accordance with the right to local self-government (Article 3, para. 1), insofar as it precludes local

---

408 Congress of Local and Regional Authorities, *Reservations and Declarations to the European Charter of Local Self-Government,* CPL (21) 5 - § 64. This is in particular the case of Armenia. Congress of Local and Regional Authorities, *Local Democracy in Armenia*, CPL (26) 2, 26 March 2014, §§ 111-114.

409 M. W. Schneider, *cit.*, 314 and B. Weiss, *cit.*, 174.

410 On this point, see the situation in Portugal, where the economic adjustment programme in 2010 obliged the State and the local administrations to reduce their staffing complement in 2011 and 2012 at an annual rate of 2 percent. The Congress declared that this target appears to be abstract and that the «*reform should not interfere with local autonomy by defining the number of managerial staff but instead should leave it to the local authorities to decide how best to organise local administration».* Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Portugal,* CG (22) 11, 29 March 2012. As acknowledged by the Congress itself, the number and distribution of types of job can be imposed by legislation.

authorities to freely organise their administrative structures and consequently to carry out functions under their own responsibility (Article 6, para. 1). The question was raised in particular in the 1990s, when the Congress drew attention to the existence, in local or regional administrations of several countries (Spain, Italy, France, Greece, Hungary, the Netherlands and Romania), of civil servants with the status of State civil servants, paid by central government and thus not responsible to local elected authorities. This represented and still represents a problem, insofar as these civil servants perform supervisory duties (see *infra* the case of Italy in the third Chapter). This leads us to the second question *sub b)*, i.e. whether central or regional authorities can exercise expediency supervision on regulations issued by local authorities which relate to the status of their personnel. This is in particular the case in the few countries where local authorities themselves regulate the issue. There, the regulations adopted must be often submitted to the central power or its representatives for approval. The answer to the question should therefore be that, insofar as approval concerns decisions affecting the internal organisation of local authorities, including the modalities of staff recruitment, the central government should not be in the position to veto them or strike them down.

5. The Right to a Limited Administrative Supervision

Article 8 of the Charter deals with "administrative supervision" over local authorities. The term "administrative supervision" should not necessarily be construed as an activity carried out by administrative authorities and taking the form of an administrative act, but, as the 6th General Report on the Charter recalled, should be interpreted in the broadest sense and applied to all those activities concerning the administrative life of municipalities or other local authoritities, including the removal of mayors or the dissolution of councils, even if these acts are a necessary and automatic consequence of courts decisions or judgments. Under the Charter it has thus not been distinguished between "supervision over activities" and "supervision over bodies", a distinction which is however common in many member States, including Germany and Italy.

The provision of Article 8 embodies a necessary complement to Article 7 of the Charter, but also aims at supplementing Article 3, para. 1. In fact, it might be said that supervision restricts the power of local authorities to manage and regulate public affairs in their own responsibility. Local government in Europe should thus always be understood within the legal order of the State and in a constant relationship with higher level authorities, either central or regional, which historically enjoy the power - though a limited one - to exercise administrative supervision over the activities of local authorities. The assumption is that, in principle, local authorities carry out their functions

independently, but not really separately from the activities of the central or regional government.[411] Thus, whereas constraints on State powers' on local authorities should be clearly set out to prevent local authorities from being dispossessed of their responsibilities, local authorities cannot pretend to act as if they were sovereign, but should be bound, irrespective of the federal, regional or unitary system of government, to co-operate with central and regional authorities and public agencies, which have the right to oversee their activities.[412]

5.1. Supervisory Procedures Established By Means of Law

Article 8.1 *Any administrative supervision of local authorities may only be exercised according to such procedures andin such cases as are provided for by the constitution or by statute.*

In particular, Article 8, para. 1 deals with vertical or external administrative supervision on local authorities by other layers of government.[413] As the Explanatory Report recalls, «*is not concerned with enabling individuals to bring court actions against local authorities* [or] *with the appointment and activities of an ombudsman or other official body having an investigatory role*». Nor is Article 8 concerned with internal supervision mechanisms, even if, drawing on a co-operative model, «*administrative supervision by higher-level authorities of the financial management of local authorities shall normally be limited to the implementation and effective functioning of internal control».*[414] Hence, external supervision presupposes internal supervision, but it does not imply any other form of supervision, as those brought forward by individual citizens.

In particular, under the term "external supervision" the Explanatory Report appears to include: «*practices as requirements of prior authorisation to act or of confirmation for acts to take effect, power to annul a local authority's decisions, accounting controls etc.»* and, more in general, «*all procedures by which the central State as a whole (...) seeks to ensure that the local and regional authorities exercise their responsibilities properly in accordance with the rule of law, whether legal*

---

411 Cf. also: Venice Commission, *Opinion on the Draft Amendments to the Constitution of the Republic of Srpska - No. 476/2008,* 13-14 June 2008 - CDL-AD (2008) 016.

412 See: Council of Europe, *Objections by the United Kingdom delegation to Draft Article 7* – RM-SL (83) 26 rev., 22 bis.

413 As pointed out in the report on monitoring the implementation of the European Charter of Local Self-Government (so-called *Del Camp Report*), those drafting the Charter considered first the authorities of the executive, even if supervision is often responsibility of other bodies, in particular external authorities. Supervision must generally be entrusted to those authorities which are closest to the citizens, i.e. to the deconcentrated authorities of the State and preferably not to courts. See on that point Recommendation 98 (12) of the Committee of Ministers. When external audits are vested with the power to control, *they should be carried out by bodies provided for and regulated by national or regional law that are genuinely independent of the central or regional government*; (…) *external auditing and "best value" practices should not be used as means of pressure for policy ends*. The Congress attempts thus to apply the same standards to external audits. Resolution No. 223 (2006) *on the new forms of control over local authorities*, § 9.

414 See e.g.: Recommendation No. 228 (2007), *Draft Additional Protocol to the European Charter of Local Self-Government*, Article 12, 20 November 2007.

or financial responsibilities are involved», but also «*all the means by which the central government may guide or influence the decisions taken by local authorities*».[415] This implies that the term "supervision" under international law covers both prior and subsequent supervisory measures and, more in general, a broad range of auditory instruments, including possible sanctions inflicted by the very same supervisory authorities, such as the power to annul or suspend legal acts.[416] The Congress regards however as closest to the spirit of the Charter the practice whereby supervisory bodies cannot at the same time possess the right to control and that to take action against local authorities, but should preferably refer the case to the competent courts if any illegality has been assessed. At least, action should be preceded by preliminary dialogue with the local authorities involved and by a formal request of rectification. This position was first expressed by the Congress in 1995 while reviewing a Romanian statute on dismissal of mayors and dissolution of local councils. On that occasion, it recommended to amend the law which vested the prefects with the discretional power to assess violations of the law by local authorities and to dissolve the council or dismiss the mayor without referring the question to a court.[417]

Article 8, para. 1 stipulates that *any* kind of administrative supervision of local authorities cannot be exercised if not explicitly laid down into law, i.e. in a statute or in a constitutional provision. A legislative or constitutional basis should exist for both supervision on legality and on expediency, whereas *ad hoc* procedures should be ruled out. Unlike Schaffarzik, whereby the power of limiting local authorities' activities through supervision laid down in Article 8, para. 1 refers only to supervision on own or conferred administrative functions, but not to supervision on delegated functions, since the latter is *per se* under the discretion of the executive and can hardly be laid down in legislative provisions,[418] it should be argued that Article 8, para. 1 is a general rule which applies to "any" kind of supervision. Otherwise, also within the framework of delegated functions, a State would enjoy the power to act on the basis of *ad-hoc* procedures, a circumstance which could limit or even remove discretion by local authorities in adapting the exercise of these functions to local conditions, as provided for by Article 4, para. 5.

Hence, a legal basis also for supervision of expediency by central or regional authorities should be given, i.e. acts subject to supervision should be clearly enumerated in statutory provisions.[419] Even without Article 8, para. 1, this principle could have been subsumed as existing from other Charter

---

415 Congress of Local and Regional Authorities, on monitoring the implementation of the European Charter of Local Self-Government, CPL (3) 7 Part II, Appendix.

416 So: Committee of Ministers, Recommendation 98 (12) *on supervision on local authorities' action*.

417 Congress of Local and Regional Authorities, Recommendation No. 12 (1995), on *Local Democracy in Romania*.

418 B. Schaffarzik, c*it.*, 502. *Contra*: B. Weiss, *cit.,* 186 e M. W. Schneider, *cit.*, 317.

419 So also: Committee of Ministers, Recommendation No. 98 (12), *on supervision of local authorities' action*, adopted on 18 September 1998.

norms setting out conditions for limiting the right to local self-government by means of law (Article 3, para. 1 read in conjunction with Article 4, para. 2 and Article 6, para. 1). Hence, Article 8, para. 1 is deemed to have merely a declaratory nature. The enshrinement of this norm into the Charter was backed by local authorities' representatives referring to a widespread practice of the Council of Europe member States when negotiations took place. At the time, in fact, in several domestic legal orders, the government, and not the parliament, was allowed to interfere with the affairs of local authorities for the purpose of supervision without any limitation prescribed by law. As the Draft Explanatory Memorandum explained: «*The number of matters which may be subject to specific forms of control is almost endless (...). The danger is obvious: supervision can become a vehicle for a process of tacit recentralisation of decision-making*».[420]

5.2. Administrative Supervision Confined to Legality

Article 8.2. *Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities.*

Article 8, para. 2 further clarifies that, as a general rule, supervision on local authorities should be «*confined to the question of the legality of local authority action*» and only exceptionally, for tasks delegated but not for those conferred upon to local authorities[421] by higher level authorities, might concern the expediency of local authorities' activities, i.e. it may entail the examination of the merits of the act, including the content, the people concerned and the timing.

The line between the two forms of supervision might be clear in theory, but it is very subtle in the practice. In general, as pointed out by Delcamp, it might be said that controls confined to compliance with the law do not authorise the supervisory authority «*to substitute its own appreciation for that of the local authority*».[422] Even when delegated functions are concerned, i.e. when a central or regional authority bears responsibility for their discharge, higher level authorities cannot undermine the freedom of local authorities to administer their own structures; in other words, supervisory measures «*must not tend to erode the substance of the power of decision belonging to the local authorities*» (Article 4, para. 5 and Article 6, para. 1 of the Charter) or, as pointed out in the Draft Charter, local authorities cannot be «*dispossessed of the responsibilities*

---

420 Explanatory Report to the Draft Charter (*Harmegnies Report*), CPL (16) 6, *cit*., 23.

421 See Amendment proposal by the Swiss delegation during negotiations, which considered that: «*The state (canton) which confers tasks on the municipalities must be able to supervise their implementation*».

422 Congress of Local and Regional Authorities, *Report on monitoring the implementation of the European Charter of Local Self-Government*, CPL (3) 7 Part II.A, 5 July 1996.

which are assigned to them by the constitution or by statute». It would in fact be contradictory to recognise first that administrative functions should be performed pursuant to the subsidiarity principle (Article 4, para. 3) and then provide for broader supervisory powers regarding the expediency of local activities.

Article 8, para. 2 is deemed to be self-executing, since it establishes a clear rule committing the member States to confine administrative supervision to legality.[423] However, the term "normally" enshrined in paragraph 1 could make the provision as such not directly effective in the domestic legal orders. In fact, this adverb implies that the member States enjoy a certain margin of appreciation as regards situations in which supervisory powers can be exercised also as to the expediency. In this respect, the Explanatory Report recalls that supervision of expediency of delegated functions, allowed by paragraph 2, is «*one particular but not the sole exception».* The Explanatory Memorandum to the Draft Charter gave some specific examples as to other forms of "tutelage", in particular it mentioned "coercive control" or "control by substitution", which indeed has been considered legitimate under the Charter insofar as it is exceptional, limited to cases of malfunctioning of local authorities and statutorily provided.[424] Furthermore, the Explanatory Memorandum also added that «*control on the level of local authority borrowing or certain other aspects of local finance* (...) *as part of overall regulation of the national economy*» should not be considered as contrary to local self-government.[425] At that time, the delegation of the Republic of Ireland suggested to supplement control powers aiming at compliance with law, by adding two very specific forms of control, the first to supervise over the «*achievement of financial objectives»* and the second to supervise over the *«setting of standards and uniform procedures».* In the end, only the amendment by Germany concerning supervision and control over delegated functions was taken into consideration and passed, but "financial tutelage" cannot *per se* be said to be ruled out by the Charter (e.g.: Article 9, para. 8). On the contrary, as concluded by the Delcamp Report, it «*cannot be considered in itself as an infringement of the principle that any supervision of expediency is prohibited»*, but *«it would not be inappropriate here* (…) *to state in the commentary on Article 8 that the control of expediency may continue only on an exceptional basis and when strictly necessary in order to reduce local public deficits».* In this respect, it should be remembered that Austria,[426] Greece[427], the Netherlands[428], Belgium[429], Switzerland[430] and Montenegro[431] made a

---

423 So also: B. Schaffarzik, *cit.*, 284-285; B. Weiss, *cit.*, 187; M.W Schneider, *cit.*, 318 and see also the so-called *Del Camp Report* on monitoring the implementation of the European Charter of Local Self-Government, CPL (3) 7 Part II.

424 *Ibid*. Del Camp Report, Part III.II lett. B).

425 *Harmegnies Report*, Explanatory Memorandum to the Draft Charter, CPL (16) 6, 22-23.

426 Congress of Local and Regional Authorities, *Local and Regional Democracy in Austria*, CG (20) 8, 3 Marh 2011, III § 10.

427 Congress of Local and Regional Authorities, *Regional Democracy in Greece*, CPR (15) 2 REP, 7 April 2008, V § 54.

reservation with reference to Article 8, para. 2 because in their domestic legal orders supervision of local authorities generally go beyond the notion of the supervision of lawfulness. Though, other States in which supervision of expediency also exists, like Luxemburg,[432] Turkey,[433] Ireland,[434] and Cyprus[435], declared to consider themselves bound also from Article 8, para. 2. It might be hence argued that many Council of Europe member States, irrespective of their system of government or legal tradition, regard supervision as implying a review, even if exceptional, on the pursuance of a general or public interest by local authorities. According to the Congress, however, «*supervision in protecting the general interest does not 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*»,[436] so that it seems that no margin of appreciation can be recognized to member States in the application of Article 8. Though, as the Delcamp Report already noted back in 1996, the countries which retain supervisory powers of that nature are in a minority and the general trend is to remove or at least restrict them to legality (for the case of Italy, see *infra* third Chapter).

To conclude, supervision of expediency according to the Charter must be confined to delegated functions and, in situations of deep crisis, to financial issues. This view is confirmed by the Congress, but also by recommendations of the Committee of Ministers[437] and, more importantly, by the case-law on the Charter of some national courts.[438]

---

428 Congress of Local and Regional Authorities, *Local and Regional Democracy in The Netherlands*, CG (12) 16 Part II (2005) § 25 lett. d). But see also the previous Report which dates back to 1999, CG (6) 4 Part II, 4 – 35, *cit*., whereby «*it has to be pointed out that although the power to intervene on grounds of public interest exists, this provision is effectively never applied».*

429 Congress of Local and Regional Authorities, *Local and Regional Democracy in Belgium*, CPL (10) 2 Part II – 3, 11 April 2003.

430 It is no chance that Switzerland opted out also Article 4, para. 4. Yet, no assessment has been made by the Congress with reference to the problems related to the Cantons supervision on Swiss municipalities. In any case, it might be said that in certain Cantons the law assigns them expediency supervisory powers, whereby they can set aside local decision on grounds of non conformity with the general interest. However, regional differences between the German and the French speaking communities are visible.

431 Congress of Local and Regional Authorities, *Local and Regional Democracy in Montenegro*, CPL (19) 4, 5 May 2010. Even if Montenegro is not bound by para. 2 and 3, its Law on Administrative Supervision (2009) is deemed to comply with the Charter.

432 Congress of Local and Regional Authorities, *Local Democracy in Luxemburg*, CPL (12) 6 Part II, 2 June 2005.

433 Congress of Local and Regional Authorities, *Local and Regional Democracy in Turkey*, CG (20) 6, 1 March 2011, § 29.

434 Congress of Local and Regional Authorities, *Local Democracy in Ireland,* CPL (25) 5, 31 October 2013, § 138 and ff..

435 Congress of Local and Regional Authorities, *Local Democracy in Cyprus,* CPL (8) 3 Part II - § 32 and CPL (12) 8 Part II – Cf. Recommendation No. 96 (2001) lett. f).

436 Congress of Local and Regional Authorities, *Local Democracy in Belgium,* CPL (10) 2 Part II – 20 May 2003. See also: Recommendation No. 38 (1998) *on the situation of local and regional self-government in the Republic of Moldova*, § 7.2.1.

437 Committee of Ministers, Recommendation No. (98) 12, *on supervision of local authorities' action*, adopted on 18 September 1998.

438 See for instance the judgments by the Administrative Court of Luxembourg, delivered on October 29, 1988 N10762C and on December 11th, 2001 N13407C, cited in J.M. Goerens, *Local Government in Luxembourg*, in: A.M. Moreno (ed.), *cit.*, 429.

5.3. Administrative Supervision Pursuant to Proportionality

Article 8.3 *Administrative supervision of local authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect.*

Further, pursuant to Article 8, para. 3, decisions adopted by supervisory authorities should be guided by the principle of proportionality, a general principle of public international law[439] which might be interpreted so as that supervisory measures must «*affect local autonomy the least whilst at the same time achieving the desired result»,* as the Explanatory Report stipulates. As for its concrete application, the case-law of the Congress has ascertained that measures by government authorities against acts considered to be unlawful should be preferred to sanctions against elected bodies.[440] But also sanctions should undergo a scrutiny of proportionality. In particular, suspension of local councillors or mayors should be taken into consideration only in cases of blatant repeated offences or at the express request of the judicial authorities in the context of a criminal investigation. As previously mentioned (see *supra*), before resorting to suspension or dissolution, supervisory authorities could exercise their power to act in substitution, but only after issuing a prior notice of remedy.[441] Dismissal of local representatives, both elected and appointed, should be considered as a matter of last resort and occur only after the delivery of a judgment.[442] The proportionality principle applies also to the choice between prior and subsequent supervision. In fact, since prior supervision entails the risk to cross over to supervision of expediency, the Congress has made from the outset *ex post* administrative controls the rule.[443] Furthermore, as recommended by the Committee of Ministers, member States should set out in statutory provisions the time limits granted to supervisory authorities to perform a *priori* supervision.[444] In particular, «*the increase in number of acts subject to government approval»*, which is a common, though declining, form of prior supervision in many Council of Europe member States, «*is scarcely compatible with Article 8 paragraph 3, which calls for supervision to be in proportion to the importance of the interests*

---

439 On proportionality as a general principle of international law see *inter alia*: M. Newton and L. May, *Proportionality in International Law*, Oxford, 2014; T.M. Franck, *Proportionality in International Law*, Law & Ethics of Human Rights, Vol. 4, Issue 2, 2010, 231–242.

440 Congress of Local and Regional Authorities, *Local Democracy in Romania*, CG (2) 5 Part II.

441 So also: Venice Commission, Opinion No. 559/2009, *on the Draft Law on Additions to the Law on the Status of the Municipalities of the Republic of Azerbaijan,* CDL-AD (2009) 049, § 17 and ff.. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Serbia*, CG (21) 4, 18 October 2011, §§ 43-44. Serbia, however, is one of the two States together with Montenegro which opted out Article 8, para. 3.

442 Congress of Local and Regional Authorities, *Local Democracy in Romania*, CG (2) 5 Part II and *Local Democracy in Turkey - The Sur Municipality Case*, §§ 9-11. See also: Committee of Ministers, Recommendation No. 98 (12), on supervision of local authorities' action.

443 See: *Ibid*. *Delcamp Report*, Appendix, Part II. In its Recommendation No. 98 (12) the Committee of Ministers recommended the member States to reduce *a priori* administrative controls.

444 Committee of Ministers, Recommendation No. 98 (12), *cit*., III-ii.

which it is intended to protect. (…) *Submitting relatively modest acts to prior supervision seems to indicate disproportion between the strictness of the supervision and the public interests likely to be affected».*[445] That is why the Congress recommended that prior supervision has to be considered the exception and should have been allowed only over those local authorities declared of being in serious financial troubles.[446]

Finally, the Explanatory Report to the Charter recalls that, even if the treaty does not provide for detailed provisions «*on the conditions and manner of intervention in specific situations»,* local authorities should be entrusted with particular legal protection «*against the improper exercise of supervision and control»* at central or regional level. Legal protection is *per se* guaranted in Article 11 of the Charter, but it should be especially granted to local authorities' organs for cases in which vertical supervision by higher level authorities takes place. In order to make the right of appeal effective, as recalled the Congress in its country-report on Romania, councillors and mayors should be notified on the grounds of suspension or dismissal and on the availability of appeal procedures and time limits for bringing a complaint. These requirements are also well-established case-law of the ECtHR, which has been applying the proportionality principle also in the field of administrative law since long time.[447]

6. Rights and Principles for Adequate Financial Equipment

Article 9 contains the longest legal provision of the Charter - it is composed of eight paragraphs – which is also the provision which underwent the most amendment proposals by national delegations during negotiations on the Draft Charter. There is no doubt that articulating minimum common standards on financial autonomy of local authorities was highly controversial, even more than when a suitable compromise had to be found on the definition of local self-government or on the kind of judicial protection to be granted to local authorities.[448] In fact, rules on the apportionment of financial resources between different levels of government deeply affect the internal structure and the functions of the State as well as the budgetary authority of the Parliament and are therefore deemed to restrict more evidently its sovereign powers. Nonetheless, as previously mentioned (see *supra* § 1.II.3), local finance was also the subject matter which had undergone lots of proposals of

---

445 Congress of Local and Regional Authorities, *Local Democracy in Luxemburg*, CPL (12) 6 Part II - V lett. b). See also: Recommendation No. 172 (2005), 7 a) VI.

446 Recommendation No. 228 (2007), *cit*., Article 12, para. 1.

447 Cf. S. Mirate, *The ECtHR Case-Law as a Tool for Harmonization of Domestic Administrative Law in Europe*, Review of European Administrative Law, Vol. 5 – No. 2, 2012, 47 ff.

448 So also the Draft Explanatory Memorandum (so-called Harmegnies Report) – CPL (16) 6, 25.

resolutions and recommendations by the Standing Conference to the member States. Even if not as detailed as many provisions enshrined in the abovementioned Draft European Charter of Local and Regional Finance (1986), Article 9 envisages basic principles on allocation of financial resources which could not be totally excluded by the scope of the Charter, because the principle of local self-government enshrined in Article 3, para. 1 would have remained largely illusory if not backed up with the necessary financial guarantees.[449]

Hereunder, it will be focused on all eight provisions of Article 9 and, in particular, it will be answered the questions how much financial resources for local authorities is inadequate (6.1.); to what extent the principle of concomitance shall be complied with by member States (6.2.); whether local authorities should be given the power to raise taxes and fix their rate (6.3.); how the local finance system should be structured (6.4.); to what extent can the State equalise financial resources among different or the same layers of government (6.5.); what kind of right of consultation shall apply in financial matters (6.6.); why general purpose grants should be preferred to block grants (6.7.) and to what extent can local authorities borrow from capital markets (6.8.).

6.1. The Principle of Adequate Own Financial Resources

Article 9.1. *Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.*

Article 9, para. 1 recognizes the principle of fiscal decentralisation or, to be more precise, of fiscal equivalence,[450] since it requires that local authorities should not be «*deprived of their freedom to determine expenditure priorities»,* insofar as their own financial resources are concerned. These resources should be "adequate" and might be shortened only for reasons related to the sustainability of national economic policy. The right to dispose of own financial means and, in particular, the right to use them for financing local expenditures, within the limits of the law, is a corollary of the local self-government principle laid down in Article 3, para. 1, whereby it does not suffice to assign local authorities with public responsibilities, but national legislation must also provide the means that allow them to carry out these responsibilities effectively. Article 9, para. 1 therefore requires that

---

[449] As the Explanatory Report points out: «*The legal authority to perform certain functions is meaningless if local authorities are deprived of the financial resources to carry them out.*». See also: B. Weiss, *cit.,* 195 and M. W. Schneider, *cit.*, 319.

[450] Recommendation Rec(2005)1 of the Committee of Ministers to member States *on the financial resources of local and regional authorities*, Appendix – § 2.5 *«to the greatest extent possible, each local authority should finance, from its own resources, the expenditure it decides on (fiscal equivalence at the local authority level)».*

local authorities can levy own revenues[451] and that local councils determine how to spend them under their responsibility, i.e. without instructions, veto power or approval by central or regional authorities. In a sense, thus, it is also a corollary of the principle laid down in Article 8 whereby expediency controls in the own sphere of competence of local authorities are prohibited. Finally, if expenditures can be determined at the level which is closest to the citizens it might be said it is also a provision in accordance with the subsidiarity principle laid down in Article 4, para. 3: the government and its ministries are not better suited to assess the level of service needed at local level than democratically elected local representatives.[452]

It is not clear from the outset whether under the term "financial resources of their own" are covered also financial transfers or only those revenues which are raised autonomously or derive from independent decisions taken by the local authorities themselves. The second interpretation is to be preferred.[453] In particular, pursuant to the French version of the Charter's text, a clear distinction has to be made between *ressources propres* (Article 9, para. 1) and *ressources financières* tout court (Article 9, para. 2). How this distinction should work can be resumed as follows: "financial resources of their own" are those revenues which are immediately at local authorities' disposal without being filtered through discretion of government bureaucracy. This does not mean, however, that the term has to be interpreted as a category including only taxes and charges collected by local authorities which constitute, as stipulated by Article 9, para. 3, only a particular type of local authorities' own financial resources. The expression "financial resources of their own" does neither mean that every Contracting Party should implement a system of separated finances whereby revenues are run by each single layer of government and reject a system whereby yields of a single tax are shared between levels of government.[454] Even in a "solidarity" system, local authorities can be entrusted with own financial resources, that is revenues from taxes having a local nature which are not immediately levied by them but flow to them in a fixed amount which cannot be discretionally altered by the State.[455] Thus, the term "financial resources of their own" simply means that revenues should not be earmarked for a particular purpose (e.g. goods or services), as financial transfers and contributions or fees normally are.[456] Unlike financial transfers, contributions

---

451 So: P. Akkermans, *cit.*, 296. See also: Czech Constitutional Court, 13 August 2002 (Pl. US 1/02) and 9 July 2003 (Pl. US 5/03), quoted in C. Panara, *cit*., 391.

452 So also: B. Weiss, *cit.*, 197 and M. W. Schneider, *cit.*, 322-323.

453 So also CDLR, *Limitations of local taxation, financial equalisation and methods for calculating general grants*, Council of Europe, Strasbourg, 1998, 7 and ff.

454 However, it must be borne in mind that according to the Draft Charter of Local and Regional Finance a system of separated finances had to be preferred.

455 B. Schaffarzik, *cit.*, 512.

456 So also: Recommendation Rec(2005)1 of the Committee of Ministers to member states on the financial resources of local and regional authorities, Appendix - § 1 lett. a), whereby «*an authority's"own resources" are resources of which it can vary the level, possibly within a predetermined range. These resources may, for example, be*

and fees are at immediate disposal of local authorities, but they are sums charged for specific services which, in general, cannot be freely used by local authorities for financing any sort of expenditure and are thus no financial resources of their own according to the Charter.[457] Finally, special levies charged by higher level local authorities from lower level local authorities, including the so-called *Kreisumlage* in Germany, are normally covered by the definition of "own financial resources", since they must not be allocated following to specific purposes.[458]

The requirement of "adequacy" concerns only the relationship of quantitative nature between the amount of own financial revenues of local authorities and the total sum of financial resources attributed to them, not a relationship of qualitative nature between local responsibilities and their financial equipment, which is object of the rule laid down in Article 9, para. 2 of the Charter. In other words, Article 9, para. 2 of the Charter embodies the general principle of adequate financial equipment whereby all financial resources attributed to local authorities should be commensurate with the responsibilities they have to carry out. Instead, Article 9, para. 1 constitutes a guarantee of special nature which relates only to the amount of own financial revenues which local authorities should be endowed with.[459] This kind of financial equipment must ensure that local authorities enjoy a higher degree of autonomy and a certain revenue security, otherwise «*if local authorities' finances come from other sources rather than directly from the citizens, their elected representatives can more easily shirk their responsibility for making sound use of these resources*».[460] No precise quantitative rule could however yet be deduced from Article 9, para. 1. One might argue that its determination pertains to the margin of appreciation of every member State, which should be free to adjust it depending on the size and tasks of local authorities and its overall fiscal and financial situation. Hence, it cannot be said whether this provision entails an institutional or a subjective right of local authorities. Yet, it appears more likely that Article 9, para. 1 regards financial equipment of local authorities from an institutional perspective, that is to say focusing on a certain share of resources for a category of local authorities. As pointed out by the Steering Committee on Local and Regional Democracy, «*it is difficult to indicate the share that these resources should reach.*

---

fiscal or non-fiscal, exclusive or shared, etc.».

457 *Contra* see: Delcamp Report, § 3.1.1, *cit.*: «*Resources that fall within this definition are first of all fees, i.e. revenue proceeding from paying services performed to benefit the local population or taxes that may be related to authorisations or to local development».*

458 *Ibid*., 514-515. However, according to Schaffarzik, proceeds from disposal of assets; revenues from invested assets and credit do not fall under own financial resources. Own resources further include taxes on the profits of local enterprises, payments by enterprises to local land-owners and income generated by the privatisation of local enterprises or by property management. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Ukraine*, CG (25) 8, 29 October 2013, § 129.

459 So the dominant opinion: M. W. Schneider, *cit.*, 322 and B. Schaffarzik, *cit.*, 505 and 510. B. Weiss, *cit.,* 196; B. Weiss, *Die völkerrechtliche Pflicht zur aufgabenadequaten Finanzausstattung der Kommunen*, in DÖV (2000), Heft 21, 909.

460 Congress of Local and Regional Authorities, Recommendation No. 79 (2000), Appendix § 2 lett. b) ii.

Certainly, when own resources are not less than grants (general and specific grants) it may be considered that financial autonomy has a solid base».[461] As the Committee of Ministers confirms, the following benchmarks should be used in order to estimate the degree of adequacy «*the ratio between the local authorities' tax revenue level and the total tax revenue for the country*; *the ratio between the local tax revenue and the total local revenue; the weight of tax revenue compared to the weight of grants (both general and specific) from the state and other public authorities»*. This is implicitly confirmed by the Congress in its 2000 report, when it highlighted that «*local authorities can boast a proportion of own resources equal to or greater than 50% of their total financial resources in only 8 Council of Europe member states»*[462]. In this respect violations of Article 9, para. 1 were assessed in monitoring the situation in the Netherlands and in the Russian Federation. As for the Netherlands, back in 1999, the Congress found that «*the municipalities' own resources amount to barely 15% of receipts, and that the figure seems lower still for the provinces, the remainder of resources being apportioned by the Municipalities Fund and the Provinces Fund which is not in conformity with the principles of Article 9 of the Charter»*[463]. The situation has not evolved much since then, as two last Congress reports pointed out: Dutch municipalities still mainly rely on central government funds. In the Russian Federation, «*municipalities' share of their own resources in total budgets is between 30 to 50 percent, of which 10 to 20 percent comes from local taxes, mainly property tax. The remaining part comes from federal and regional transfers»*[464]. Though, the aforementioned benchmark has not been regularly used by the Congress for assessing the situation in every member State.[465] This was acknowledged by the Congress itself in its 2014 report on adequate financial resources for local authorities in the member States.[466]

As for the limit which can legitimately be set to local authoritites' financial autonomy on grounds of national economic policy, no reference is to be found in the Charter and in its Explanatory Report. However, the Draft Explanatory Memorandum set out that «*directives as to which sectors should be allowed to expand»* are «*contrary to the principle of local self-government».* In other words, limitations to local self-government by the State are allowed insofar as they abide by the essential

---

461 CDLR, *Limitations of Local Taxation, Financial Equalisation and Methods fo Calculating General Grants*, 55.

462 Congress of Local and Regional Authorities, Recommendation No. 79 (2000), Appendix § 2 lett. i).

463 Congress of Local and Regional Authorities, *Local and Regional Democracy in the Netherlands*, 1999, § 44.

464 Congress of Local and Regional Authorities, *Local and Regional Democracy in the Russian Federation*, CG (19) 11, 11 October 2010.

465 Cf. *inter alia* Congress of Local and Regional Authorities, *Local Democracy in Ireland*, CPL (8) 4, and *Local and Regional Democracy in the United Kingdom*, CG (5) 7, 28 May 1998, § 2.5 and CG (26) 10, 4 March 2014; *Local and Regional Democracy in Portugal*, CG (22) 11, 29 October 2012, § 32; *Local and Regional Democracy in Bulgaria*, CG (21) 14, § 183.

466 According to the Congress, shares of local revenues in local government budget fall in the middle of the scale in Croatia 11-12%, Latvia 14-15%, Republic Srpska in Bosnia & Herzegovina 20%, Poland 45% and Spain 48%, Albania (50%), whereas are particularly high in Sweden (82%). Congress of Local and Regional Authorities, *Adequate financial resources for local authorities,* CPL (27) Final, 16 October 2014.

core of the principle of local self-government.[467] In fact, as mentioned above, the Charter acknowledges an intangible sphere of competence for local authorities which cannot be affected by the State without violating the principle of local self-government. In this sphere the right to determine local expenditures without instructions and without being imposed upon policy preferences should also be included. This right is however limited to expenditures financed through own revenues.[468] Restrictions established by way of law on grounds of national economic policy conform with the Charter when it comes to determine the adequate amount of own financial resources which local authorities should be entitled to. *A fortiori*, restrictions should also be possible whenever the government has to determine the overall amount of financial resources entitled to local authorities pursuant to Article 9, para. 2.[469] Thus, central/federal or regional authorities are entrusted with the power to both restrict the right of local authorities to levy own revenues and to receive financial transfers. As pointed out by the Committee of Ministers, restrictions should be «*clear, objective and quantifiable»,* but first and foremost *«proportionate to the desired aim and free of any punitive nature»* and, finally, they should «*be short-term and lifted once they have achieved their aim»*. In particular, building on the principle of proportionality, the Committee of Ministers asked the member States to avert measures setting general and rigid caps on spending or taxation rates, *«if other, softer, measures such as incentives and flexible limitations (which vary in time and take account of the situation and of the average spending and taxation rates for a certain type of community) could be used».*[470]

6.2. The Principle of Concomitant Financing: Mandatory Compensation for Additional Tasks

Article 9.2. *Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law.*

Unlike in para. 1, the general guarantee of adequate financial equipment for local authorities set out in Article 9, para. 2 relates to all kind of responsibilities to be discharged by local authorities.[471] The provision's rationale is not only to prevent that central or regional authorities deliberately avert

---

467 So also Recommendation Rec(2004)1 of the Committee of Ministers to member states on financial and budgetary management at local and regional levels, whereby «*measures to restrict the financial autonomy of a local or regional authority or to limit or reduce the amount of funding transferred to it (...) should not be excessive or threaten the principle of local autonomy»* (§ 8).

468 B. Schaffarzik., *cit.*, 511.

469 *Ibid*., 506.

470 Recommendation Rec(2004)1 of the Committee of Ministers to member states on financial and budgetary management at local and regional levels, Appendix 1 - § 16.

471 *Contra* see: B. Schaffarzik, *cit.*, 506-507.

enabling local authorities to levy own revenues, a provision which is already implied by Article 9, para. 1, but rather to prevent that new tasks are conferred upon or delegated to local authorities without providing them with the obligatory minimum of financial resources.[472] How these resources should be provided to them, whether by way of own levies or through financial transfers, it is a completely different question, which is addressed by other provisions of Article 9.

The stipulation whereby the overall financial equipment of local authorities should be "commensurate" with public responsibilities requires further clarification. Whereas in Article 9, para. 1 the relationship between own financial resources and the total amount of resources should be "adequate" (*suffisantes* in French, which can also be translated with the adjective "sufficient" in English), the Charter uses another term to indicate the relationship which should exist between public responsibilities and the financial equipment necessary to carry them out, i.e. "commensurate" or *proportionnées* in French, which can be rendered with the adjective and synonym "proportionate" in English. The Explanatory Report to the Charter, however, uses again the adjective "adequate", so that it appears that no substantial difference exists as to the meaning of the two different adjectives.[473] Though, the expression laid down in Article 9, para. 2 echoes that of Draft Article 8, para. 2 which explicitly envisaged that «*the allocation of resources to local authorities shall be in proportion to the tasks assumed by them».* This first sentence was supplemented by a second sentence which was eventually cancelled before the adoption of the Charter final text upon request by Ireland, United Kingdom, Germany and Sweden, whereby «*any transfer of new responsibilities shall be accompanied by an allocation of the financial resources required for their fulfillment»*. The second sentence completed the first so as to provide that no proportionality could be assessed whenever the necessary financial means were not transferred while conferring new responsibilities upon to local authorities.[474] Germany maintained that the second sentence seemed to be «*redundant since this requirement has in principle already been included in sentence 1».* But it also contended that, insofar as it «*would impose a distinct financial cover for new tasks, it would be incompatible with the German constitutional right with regard to finances. In virtue of this right, the Federation and the Länder as well as the local authorities, within the framework of their current receipts, have equally the right to the financial coverage of their necessary expenses.* (…) *An obligation distinct of financial cover would consequently cause the financial structures to be incoherent and render incalculable the charges for each of the tasks».* In other words, according to the Federal Republic of Germany, the Draft Charter provision appeared to impose two different kinds of financial guarantees for local

472 B. Weiss, *cit.*, 197.
473 So also Recommendation No. 90 (2001), § 6, which defines it as the principle of adequacy.
474 So-called *Harmegnies-Report* - CPL (16) 6, 26-27.

authorities, the first one requiring that all resources entitled to local authorities being proportional to the tasks (compulsory and non-compulsory) they have to carry out; the second one requiring that all delegated tasks by the State being fully covered by financial transfers. Whereas the first guarantee was deemed to be relatively vague, entailing no clear obligation upon the Contracting Parties, the second guarantee, however, would have implied a stringent concomitance between tasks and the costs to cover them. Provided that no exception was stipulated, this link could have forced both the German *Länder* and the *Federation* to increasing transfers to local authorities. As laid down in the 1984 Explanatory Report to the first Draft of the Charter by the Steering Committee (CDRM): «*The stipulation of such a direct link between tasks and financial resources was, however, felt inappropriate in view of cases where local authorities themselves requested the transfer of the task or had unlimited possibilities of raising the finance locally».* In other words, a strict automatism was rejected by the Contracting Parties as being too harsh.[475] Thus, a more flexible concept of proportionality should have prevailed: designed as a strict rule by the drafters, concomitant financing should have become a principle in the intention of the member States.[476]

Nonetheless, the Explanatory Report to the Charter final text, with reference to Article 9, para. 2, maintained that «*this relationship* [of adequacy] *is particularly strong for functions which have been specifically assigned to it».* As mentioned, paragraph 2 serves precisely the purpose to prevent that delegation of tasks becomes a means to pass the financial buck to local authorities. However, it must be borne in mind that, unlike in the Draft Charter, Article 9, para. 2 does not envisage an automatic mechanism imposing transfers for any increased administrative costs, but rather a guarantee of qualititative nature requiring resources being proportionate or sufficient to fulfill all sort of tasks, including delegated, compulsory and also voluntary ones.[477] Hence, not any transfer of new responsibilities should be accompanied by additional resources, if the relationship between administrative functions to be carried out and financial equipment is deemed to be proportionate, i.e. if the central/federal or regional government shows that no further resources need to be transferred or taxes levied for the fulfillment of public affairs by local authorities. In fact, proportionality cannot imply that local expenditures could grow ceaselessly and that they can be unlimitedly covered by central/federal or regional authorities; national economic policy constraints

---

475 As the Draft Explanatory Report pointed out, the guarantee was to be understood in a very strict way: «*Whenever specific tasks are assigned to local authorities, allowance must automatically be made not only for the cost inherent in the task itself but also for any increased administrative costs and consequent running costs. Above all, the delegation of administrative tasks must not be allowed to become a means of passing the financial bucket»*

476 So also: C. Hyltoft, *Europarats-Ausschuss*, in F.L. Knemeyer (ed.), *cit.*, 51; F.L. Cranshaw, *Insolvenz und Finanzrechtliche Perspektiven der Insolvenz von juristischen Personen des Öffentlichen Rechts insbesondere Kommunen*, Berlin, 2007, 63.

477 That financal resources should be adequate to carry out also voluntary tasks is a corollary of the universal jurisdiction principle laid down in Article 4, para. 2. A restrictive interpretation is offered by P. Akkermans, *cit*., 295.

constitute a limitation which aim at preventing this to happen.[478]

Article 9, para. 2 has been interpreted by the Congress of Local and Regional Authorities as embodying a principle of concomitant financing, whereby for any new responsibility transferred or delegated to local authorities there should be appropriate compensation by the State.[479] Even those authors which deny that such a principle exists under the Charter acknowledge that the Charter assume that local authorities' spending powers should match the responsibilities and not viceversa; therefore it must be at least prohibited to any central/federal or regional authority to shape the scope of administrative public functions which local authorities have to discharge on the basis of the financial equipment they have decided to provide them with.[480] This measure would entail not only a breach of Article 9, para. 2 but also of Article 8, para. 2, because supervision of local authorities' spending powers amounting to prior review or approval of local authorities decisions would constitute a control of expediency prohibited under the Charter and would make them merely implementing national policies preventing to exercise their own responsibilities.[481] Violations of the principle of concomitance were over time assessed in many member States, irrespective of the system of government, e.g. in Spain,[482] Lithuania,[483] the Czech Republic,[484] Ukraine,[485] Azerbaijan,[486] Italy,[487] Bosnia and Herzegovina,[488] Albania.[489] but one could say that, in particular, a lack of consideration for this principle has been assessed in new Central and Eastern Europe countries, including Moldova, Croatia[490] and Azerbaijan, whereas only Poland has explicitly embedded this principle into its national Constitution (Article 167, para. 4).[491].

---

478 So also: B. Schaffarzik, *cit.*, 508-509 and 518; M. W. Schneider, *cit.*, 321-322. *Contra* see: P. Akkermans, *cit.*, 296, who holds that the second pararaph represents the principle of "cash down".

479 So also on Article 9, para. 2 of the Charter the Venice Commission, *Final Opinion on the Draft Constitutional on Amendments and Changes to the Constitution of Georgia*, Opinion No. 543/2009, CDL-AD(2010)028, 15 October 2010, «*the transfer of relevant financial resources should be compulsory not only in case of delegation of competences, but also in case of transfer of competences*».

480 M. W. Schneider, *cit*., 320-323 and B. Schaffarzik, *cit*., 510.

481 Resolution No. 71 (1998), § 7 lett. d) vii; Recommendation No. 79 (2000), § 2 lett. a) viii; Recommendation No. 90 (2001), § 9.5.

482 Congress of Local and Regional Authorities, *Local and Regional Democracy in Spain*, CG (9) 22, 14 November 2002

483 Congress of Local and Regional Authorities, *Local Democracy in Lithuania*, CPL (22) 3, 21 March 2012.

484 Congress of Local and Regional Authorities, *Local and Regional Democracy in the Czech Republic,* CG (22) 6, 28 February 2012.

485 Congress of Local and Regional Authorities, *Local and Regional Democracy in Ukraine*, CG (25) 8, 31 October 2013.

486 Congress of Local and Regional Authorities, *Local Democracy in Azerbaijan*, CG (23) 12, 26 February 2013.

487 Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CPL (4) 4 Part II, 2 June 1997.

488 Congress of Local and Regional Authorities, *Local and Regional Democracy in Bosnia and Herzegovina,* CG (22) 12, 21 March 2012, § 84.

489 Congress of Local and Regional Authorities, *Local Democracy in Albania*, CG (25) 11, 31 October 2013.

490 Since the constitutional revision adopted in 2000, Art 138 of the Croatian Constitution provides however that «*revenues of local and territorial (regional) authorities shall be proportional to their powers as envisaged by the Constitution and law*».

491 Congress of Local and Regional Authorities, *Local and Regional Democracy in Poland*, CG (9) 21, 14

As mentioned, at least since 1998 Report on Local Authorities Financial Resources in Relation to their Responsibilities[492], the Congress construes Article 9, para. 2 as explicitly declaring the so-called principle of concomitant financing or connectivity principle whereby, «*in order to maintain a balance between responsibilities and the requisite resources for fulfilling these, each new transfer of responsibility should be accompanied by a corresponding means of funding*».[493] The principle was reaffirmed by the Congress also in respect of regional authorities, to which, as mentioned, the Charter might apply.[494] Also the Committee of Ministers recommended the member States in 2000 to ensure that *«local authorities' resources and their allocation must be consistent with the need to carry out their responsibilities effectively»* and, in 2005, even reinforced this statement by adding that «*where local authorities act as agents of a higher administrative level, the principal government must share the costs of these programmes (connectivity principle)*»[495]. Under "means of funding" one should understand *«the transfer of a new tax resource, the provision of a new transfer resource, the assignment of new staff or the transfer of physical facilities»,* whereas *«compensation by allowing local governments to raise new local taxes or increase existing local taxes»* as well as by using earmarked grants should be avoided. A necessary precondition to ensure appropriate compensation is clarity about the responsibilities assigned by law to the different layers of government, in particular in federal States. Since the principle was ascertained not to be clearly set out in federal or regional legislation of the member States, the Congress recommended its enshrinement into constitutional law or at least pleaded for its incorporation into law and consequently for making it enforceable before national courts.[496]

The principle of concomitant financing received further precisation in the Draft Additional Protocol to the European Charter of Local Self-Government, eventually abandoned but adopted in the form of a recommendation by the Congress. In particular, financial resources to carry out public

---

November 2002, § 49.

[492] Resolution No. 71 (1998), *on monitoring of the application of the European Charter of Local Self-Government*, Report CPL (5) 4 Part II E, § 3.2.1, which sets forth «*the necessary balance between the transfer of competencies from central or regional governmentand the corresponding financial transfers».*

[493] Recommendation No. 79 (2000), *on the financial resources of local authorities in relation to their responsibilities: a litmus test for subsidiarity*. Appendix 1 - § 3 lett. e). So also: Recommendation No. 90 (2001), *on financial relations between state, regional and local authorities in federal states,*

[494] Resolution No. 265 (2008), *Regional public finance policies,* § 2 lett. g).

[495] Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, Appendix – § 2.12.

[496] Recommendation No. 90 (2001), § 11.5 and Article 5, para. 1 of the Draft Additional Protocol to the Charter, adopted with Recommendation No. 228 (2007). The principle is constitutionally acknowledged in Armenia, Austria, France, Georgia, Greece, Hungary, Poland, Serbia, Spain, Slovenia, Sweden, Turkey and Germany at *Land* level (see *infra*). In Latvia e Lithuania it is acknowledged by legislation, whereas in the United Kingdom, Ireland, Norway and Portugal there is no legislative reference to the principle, but the political practice to take into consideration the new burdens for local authorities is not unknown.

functions should be «*foreseeable*» in order to enable local authorities to plan changes to their budget over a given period,[497] but also «*sufficient*» in order to ensure that they could discharge effectively their responsibilities, under which the Draft Explanatory Report included both local authorities' "own responsibilities" (compulsory and voluntary) and those delegated to them by higher-level authorities. The Draft Additional Protocol stipulated further that one of the bases for assessing the right quantitative amount of resources should be the amount of resources *«which the higher-level authority allocated to the discharge of those responsibilities»* before their conferral upon local authorities.[498] If the competence is a new one, «*compensation should be based on estimates of the expected net cost of the new competence»*[499]. According to Draft Article 5, para. 2, the principle of concomitant financing applies, not only when higher-level authorities decide to confer additional responsibilities to local authorities, but also when they reduce or eliminate local taxes or decrease the tax base. In this case, revenue losses should be offset with adequate replacement resources.[500] The extent of compensation efforts by higher-level authorities has been further precised by the Committee of Ministers in 2005 as follows: «*Full funding is appropriate where the mandating government can control the administration of the programme; where this is not true, local authorities could be required to share some costs in order to contain their volume and to support the targeting and the effective administration of the programme».* Finally, in 2011, the Committee of Ministers issued another recommendation on the funding by higher-level authorities of new competences for local authorities, in which it recalled that every decision by higher level local authorities imposing or eventually resulting in additional net costs for local authorities should be compensated. If costs arise from decisions taken at supranational level, compensation should be given by those higher level authorities (mostly by the State, but in some cases also by regions or federated States) which have taken part in the negotiation on a certain decision or treaty. But, if these new competences are introduced at request of local authorities, they should be funded by the latter. No compensation has to occur whenever higher local authorities «*reduce grants, cap on local tax rates, or share of tax sharing revenues in order to reduce spending by local authorities for macro-economic policy reasons»* and also for services funded from user charges.

---

497 The same prescription can be found in Recommendation Rec(2004)1 of the Committee of Ministers to member states *on financial and budgetary management at local and regional levels*.

498 The same interpretation was followed while monitoring local democracy in the former Yugoslav Republic of Macedonia. See: Recommendation No. 217 (2007), § 7 lett. h).

499 Recommendation CM/Rec(2011)11 of the Committee of Ministers to member states *on the funding by higher-level authorities of new competences for local authorities.*

500 Recommendation No. 79 (2000) and also Recommendation Rec(2004)1 of the Committee of Ministers to member states *on financial and budgetary management at local and regional levels*, Appendix, § 3.

6.3. The Right to Financial Autonomy: Local Taxes and Tax-Rate Fixation

Article 9.3. *Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate.*

Article 9, para. 3 specificies the content of paragraph 1, since it requires that at least part of the financial resources of local authorities derives from local taxes and charges of which they can determine the rate.[501] The scope of financial autonomy is here further enlarged, since the Contracting Parties are not only under the obligation to provide local authorities with adequate or sufficient own revenues, but it has also to ensure that local authorities could fix the rate of local taxes and charges. No provision concerns as to how individual local authorities should set a single tax rate or a set of tax rates rising with incomes.[502] This does not necessarily imply that local authorities must enjoy a right to autonomously establish new taxes in previously untaxed areas (what in Germany is called *Steuerfindungsrecht*), but only that «*rates should reflect a local political choice, whereas the tax base should be assessed objectively and uniformly based on the law*».[503] Whereas paragraph 1 explicitly entrusts local elected representatives with the power to control expenditures, paragraph 3 clarifies that they also enjoy a limited power to control revenues, which is complementary to the former, because it enables local authorities to adapt the scope of their tasks according to their needs, i.e. to engage in new voluntary tasks «*to the extent to which the members of their local communities are prepared to accept the tax burden*» or to promote a favourable climate for firms who intend to invest within the local authorities' boundaries. Thus, the Charter can be said to allow for institutional competition, i.e. tax competition both between tiers of government

---

501 B. Schaffarzik, *cit.*, 515; M.W. Schneider, *cit.*, 324; B. Weiss, *cit.,* 197-198.

502 Some considerations on the matter are offered in the Council of Europe Report on Local Finance in Europe (1997), 50, cit.: *The objection to a single rate, x percent of taxable income, is that the local component of an income tax will not be very progressive; it will secure progressiveness only because people below a certain income level may be exempt. On the other hand, allowing local authorities to set a variety of rates would be to allow them to play a significant part in redistribution which, for reasons outlined earlier,is an activity that should be primarily performed by the central government; also, it could result in high income citizens facing a very high marginal tax rate when central and local rates are added together.*

503 See also: Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, Appendix – 2. General principles § 4 and Local Taxation guidelines § 18. However, in at least two recommendations, regarding Austria (2011) and Portugal (2003), the Congress, in relation to Article 9, para. 3, lamented that local authorities could not themselves introduce new taxes. Again recently: «*In a strict sense, mandatory taxes are not local taxes, as their choice or imposition is not based on the local governments' own decisions, and they have no any influence on them».* Congress of Local and Regional Authorities, *Adequate Financial Resources for Local Authorities,*CPL (27) Final, 16 October 2014, § 28.

and between local authorities themselves.[504] As the Explanatory Report recalls: «*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».*

As previously mentioned, this power to control the own revenues can be limited by means of law. Restrictions to the power of taxation and free rates-setting «*must however not prevent the effective functioning of the process of local accountability»*. Without any discretion to determine the rate of the own revenues, in fact, local elected representatives would be accountable for decisions on which they could not exert influence, since their judgement would be replaced by that of the central government. This is however often the case in several Council of Europe member States, such as Greece, Malta, Turkey, Ukraine, Portugal, Moldova, Armenia, Azerbaijan, Slovakia, the former Yugoslav Republic of Macedonia and the Czech Republic.[505] That is why, as noted by the Congress in 2007, «*shared taxes, if levied entirely by other authorities which also determine their rate, cannot be regarded as "own resources" of local authorities».* On the contrary, as pointed out in 1997 Council of Europe Report on local finance in Europe, «*the central government may see the shared tax revenues as part of its own revenues which it is giving away, and in this case it may want as many controls as it would want with grants».* In particular, accountability would be severely undermined if higher-level authorities could establish restrictions on local authorities' expenditures and their ability to borrow and, in turn, local authorities would not even have the right to modify the tax rates of own local taxes or charges.[506] In a word, the right to impose local taxes and determine their rate is a corollary of the general principle of local self-government set out in Article 3, para. 1 and can therefore be said to pertain to the essential core of local self-government.[507] Limitations by higher-level authorities are certainly possible, since Article 9, para. 3 itself provides for a legal reservation. Moreover, as the Congress recalls, «*complete freedom for councils to determine the rates of local taxes appears to be relatively rare».*[508] In particular, national or regional legislatures are normally entrusted with the power to establish formal and material conditions to local authorities for imposing taxes and to determine their rates such as the obligation to undergo the approval by supervisory authorities or imposing reasonable brackets or upper and lower ceilings

---

504 Recommendation Rec(2000)14 of the Committee of Ministers to member states on local taxation, financial equalisation and grants to local authorities, Appendix - Guidelines concerning local taxation, § 2 lett. b), cit.: «*the difference in tax rate between the various local authorities should not be too great unless it is justified by such factors as a different level of services».*

505 A distinction should be made for capital cities which depend largely on their own resources on grounds of their special status in many countries, irrespective of the system of government.

506 This happened to be the case of Scotland during negotiations on the Charter. Cf. so-called *Harmegnies-Report,* CPL (16) 6, 26.

507 So B. Schaffarzik, *cit*., 516, but also Congress Recommendation No. 79 (2000) § 2 lett. b) vi, cit. «*there can be no real self-government unless local authorities can set their own tax rates.»*

508 Recommendation No. 79 (2000), CPL (7) 3 Part II - 6.4.4 The right to determine the amount of tax: voting rates.

inside which rates should be fixed; the Congress also acknowledges that rates can *«be set by act of parliament after annual negotiations involving the different tiers of authority».* In general, the legislature can restrict the right to impose local taxes and to determine their rates only insofar as local authorities still retain adequate financial resources of their own[509] and in particular insofar as own taxes of which local authorities can determine yet *«account for a substantial proportion of their revenues»*.[510] In 1998, in its fourth report on political monitoring on the implementation of the Charter in the member States, the Congress assessed «*the limited proportion of revenue raised by genuine local taxation for which local authorities can set the rates».* In few member States local authorities' fiscal power can be deemed to be the real basis of their financial independence, whereas in the most local authorities survive by means of financial transfers.

Apart from the four Council of Europe member States which made an explicit reservation with reference to Article 9, para. 3, notably Malta, Liechtenstein, the Czech Republic and Germany (limited to the counties, see *infra* second Chapter), many other States have been violating this provision several times. In particular, one has to mention the case of the Netherlands, where major violations of Article 9, para. 3 read in conjunction with Article 9, para. 1 were assessed in 1999, 2005 and again in 2014. In the Dutch local government system, in fact, *«although municipalities do levy some taxes, they are mainly funded by a central government-run program».*[511] The same was ascertained while monitoring Greece, where «*the prefectures do not have resources of their own; all their major revenues are transferred in some way by several ministries».*[512] Austria, where municipalities have only a limited discretion, since they are «*not allowed to set the rates or introduce new taxes, as the list of taxes, the tax bases and most of the tax rates are determined either by the Land or by federal law*»;[513] in Ireland, where *«the scale of local taxes and the power of local authorities to determine the rates are very limited*»;[514] in Armenia, where «*local communities are obliged to collect both property and land taxes, and their rate is set by law. Community councils have solely been granted authority to determine the rate of the hotel tax»[515]* and in Scotland, where

---

509 M. W. Schneider, *cit*., 324.

510 Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, Appendix – Local taxation guidelines § 27. Again in Recommendation No. 228 (2007), Draft Additional Protocol to the European Charter of Local Self-Government – Article 7, para. 1. So also B. Schaffarzik, *cit.*, 517. Cf. Recommendation No. 127 (2003), *Local and Regional Democracy in Portugal*, CG(10)5, §§ 37-68-94.

511 Congress of Local and Regional Authorities, Recommendation No. 352 (2014), *Local and Regional Democracy in the Netherlands*, § 5-6 lett. f).

512 Congress of Local and Regional Authorities, Recommendation No. 247 (2008), *Regional Democracy in Greece*, § 8 lett. c).

513 Congress of Local and Regional Authorities, Recommendation No. 302 (2011), *Local and Regional Democracy in Austria*, CG (20) 8, § 133.

514 Congress of Local and Regional Authorities, Recommendation No. 342 (2013), *Local Democracy in Ireland*, § 6-7 lett. f).

515 Congress of Local and Regional Authorities,Recommendation No. 351 (2014), *Local Democracy in Armenia*,

the central government «*fixes levels of non-domestic rates and has frozen the council tax, leaving almost no room for autonomous fiscal capacity*».[516] In Sweden, finally, though local authorities enjoy considerable financial autonomy, the national legislature, between 1991 and 1993, «*has been able to control local finance by deciding to temporarily freeze local taxes, by manipulating the tax bases, or by temporarily blocking tax*».[517]

To conclude, there seems to be great variety as to the extent to which setting of tax rates concentrates on taxes which account for a substantial proportion of local authorities revenues. It might be said that only in a minority of member States (e.g.: Albania, Belgium, Denmark, Finland, France, Georgia and Poland) Article 9, para. 3 is really abided by,[518] whereas in the majority of them local authorities have no right to freely determine tax rates or only to fix them on taxes or charges having a symbolic impact on their budgets. This might be justified in some cases due to the small size of a country, in particular in the case of micro-states, where centralized taxing powers and the absence of fiscal federalism do not negatively affect the structure of a State which is per se already decentralised (e.g. Lithuania)[519]. Though, the Congress seems not to fully share this argument. In the case of Malta, for example, it stressed «*the importance of local taxation for the development of responsible local self-government*» and thus «*strongly recommended that Maltese authorities further consider the possibility of introducing a system of local taxes*».[520]

6.4. Principles of Diversified and Buoyant Local Finance Systems

Article 9.4. *The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace as far as practically possible with the real evolution of the cost of carrying out their tasks.*

---

§ 6 lett. i).

516 Congress of Local and Regional Authorities, Recommendation No. 353 (2014), *Local and Regional Democracy in the United Kingdom*, CG(26)10 - § 204.

517 Congress of Local and Regional Authorities, Recommendation No. 163 (2005), *Local Democracy in Sweden,* CG (12) 7 and also Committee on Local and Regional Democracy (CDLR), *Local authority competences in Europe*, 2007, 133.

518 Congress of Local and Regional Authorities, *Local and Regional Democracy in Belgium*, CG (27) 7, 15 October 2014, § 189; Congress of Local and Regional Authorities,*Local and Regional Democracy in Denmark*, CG (25) 12, 31 October 2013, § 106; Congress of Local and Regional Authorities, *Local and Regional Democracy in Finland*, CG (21) 13, 18 October 2011, §§ 64-83; Congress of Local and Regional Authorities, *Local and Regional Democracy in Georgia*, CG (24) 10, 19 March 2013, § 144; Congress of Local and Regional Authorities, *Local and Regional Democracy in France*, CG (7) 7, 25 May 2000; Congress of Local and Regional Authorities, *Local and Regional Democracy in Albania*, CG (25) 11, § 163; Congress of Local and Regional Authorities, *Local and Regional Democracy in Poland*, CG (9) 21, 14 November 2002, § 48. In the latter case, however, only *gminas* (but not *powiats* and *voivodships*) have own taxes of which they can determine the rate

519 Congress of Local and Regional Authorities, *Local and Regional Democracy in Lithuania*, CPL (22) 3, 21 March 2012.

520 Recommendation No. 305 (2011), *Local Democracy in Malta*, CPL(20) 3, 1 March 2011.

Article 9, para. 4 concerns as to how local government financial systems should be put in place by the member States. The Charter does not want to impose any ideal or standardised local taxation system, but takes care mainly of local and regional[521] authorities' financial autonomy. The key standards enshrined in this provision are "diversification" and "buoyancy". They both aim at preventing that local authorities rely on single financial revenues which would not allow them, in any macro-economic context, to levy or receive an adequate amount of resources.[522] As pointed out in the first impact assessment concerning the implementation of Article 9 in the member States (1986), «*there [were] few countries where this condition is complied with*»[523]. The Contracting Parties are in fact not merely under the obligation to periodically adapt local authorities sources of revenues or to provide local authorities themselves with the necessary tools enabling them to keep pace with increasing costs and expenditures. The latter obligation is in fact already object of regulation in paragraphs 1 and 3. Paragraph 4 on the contrary requires that local authorities are endowed with dynamic sources of revenue, which should be *per se* responsive *«to the effects of inflation and other economic factors*» and thus ensure that local authorities could cope with their expenditures «*as far as practically possible»,* a locution which implies that this provision shall be regarded as a principle.[524] In this respect, however, the Explanatory Report reminds that «*it is recognised than even in the case of relatively dynamic sources of revenue there can be no automatic link between cost and resource movements»,* otherwise being the tax burden not commensurate with the taxpayers' ability to pay.[525]

Draft Charter Article 8, para. 4 was even more precise when it stipulated that «*local authorities' shall be entitled to levy, or to receive a guaranteed share of taxes* - transfers are not covered by this provision[526] - *that are of a sufficiently general, buoyant and flexible nature to enable them to keep pace with the real evolution of their expenditure. Their resources must not be overdepending on taxes on property or other specific assets».* In the final text, property taxes are no longer explicitly mentioned, but the Explanatory Report, along these lines, stresses that «*excessive reliance on taxes or sources»* which are relative unresponsive to inflation and/or economics downturn *«can bring local authorities into difficulties since the costs of providing services are directly influenced by the*

---

521 The same principle is enshrined in § B.11.4 of the *Declaration on core concepts and common principles of regional self-government* endorsed in Helsinki on 27/28 June 2002 and has been assessed by the Congress to be violated with reference to the aforementioned Greek Prefectures, whose resources were for a long time included in the ministries' budgets and transferred periodically to them.

522 See also: Recommendation Rec(2000)14 of the Committee of Ministers to member states on local taxation, financial equalisation and grants to local authorities – Appendix § 1 lett. b).

523 Appendix to Resolution No. 175 (1986) on Local Finance.

524 B. Schaffarzik, *cit.*, 519.

525 Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, § 3 lett. b) § 25. B. Weiss, *cit*., 198.

526 B. Schaffarzik, *cit.*, 518.

evolution of economic factors». In other words, even if any reference to property taxes was removed following to the critical remarks made by the United Kingdom delegation,[527] income taxes or sales and value added taxes should be preferred to real estate or assets taxes and to trade taxes, which are deemed to be unfair ad unflexible, since their tax base has to be kept continuosly up-to-date and they take account only of a part of the individuals taxing capacity.

In its monitoring activities the Congress devoted great attention to the shortcomings produced by a too strong reliance on property taxes, but stressed also advantages and disadvantages of other solutions. In particular, drawing on the experience assessed in Council of Europe member States, back in 1998, the Congress underlined the limitations of this form of taxation (difficulty to calculate its base of assessment, non-buoyancy related to the impossibility to tax land over a certain threshold, blindness with reference to the social situation of the landowner or of the tenants), but in the end, «*despite the criticisms that may be laid against it, remains the most natural of local taxes».* Nonetheless, property taxes cannot meet the necessities of local self-government by itself and have to be supplemented by other sources of revenue, such as a tax on business activities, which, even if it «*has a particularly high yield it also leads to considerable inequality of resources between local authorities, above all when it is raised by authorities that are small in scope».*[528] As for the right to receive a share of the income tax, the Congress outlined its advantages and namely, among them, simplicity (the basis of assessment is normally the same as that applied by the central government) and equity (adjustement for inflation is possible); however, it also has its drawbacks, in particular the fact that its tax base is limited by the options set at another tier of government. Following to Article 9 para. 3, local authorities can only vary tax rates,[529] but not autonomously determine the tax base, since it generally requires technical knowledge not available at local level. This is however the case for revenues of minor importance or so-called "pocket-money revenues". Sometimes, further discretion might be left to local councils when it comes to determine parties exempt from the tax or deductions.[530]

To sum up, the studies conducted by the Council of Europe show that «*local and regional authorities have greater financial autonomy in countries where they receive a share of revenues from income tax and levy all revenues raised in tax on land and buildings».* Hence, this is also the benchmark against which the Congress shall measure the conformity to Article 9, para. 4, which

---

527 RM-SL (83) 26 rev, *cit*., 27: «*It is not thought desirable to endorse statements on the extent to which local authority resources should rely on property taxes or other assets.».* See also: A. Galette, GYIL 25 (1982), 331, P. Blair, *Die Gestaltung der kommunalen Selbstverwaltung in den europäischen Staaten,* DÖV, 1988, 1008.

528 So also: B. Schaffarzik, *cit.*, 519.

529 Article 9, para. 4 should thus be read in conjunction with para. 3 in the sense that in order to keep pace with the evolution of the costs local authorities should be able to vary the rates of those taxes which ensure the buoyancy of the system. So also: B. Schaffarzik, *cit.*, 520. This link has been established also in several recommendations by the Congress. Cf. Recommendation No. 126 (2003), *Local and Regional Democracy in Azerbaijan*, § 8.2 lett. e) vi.

530 CDLR, *Limitations of local taxation* (cit.), 15.

however is mentioned very seldom in country-by-country reports issued by the Congress. A new requirement concerning the structure of local taxation systems was due to be established through adoption of the Additional Protocol to the European Charter of Local Self-Government. In the draft text of the Protocol, in fact, Article 7, para. 2 stipulated that «*the local taxation system shall ensure reasonable stability and continuity of public services».* The same requirement was expressed in 2005 in a recommendation of the Committee of Ministers to the member States which stipulated that «*local taxation should be reasonably stable so as to make for continuity and foreseeability in public services, and have a certain degree of flexibility, so that tax revenue can be adjusted to changing budget costs».*[531]

6.5. The Duty of the State to Establish Reasonable Equalisation Procedures

Article 9.5. *The protection of financially weaker local authorities calls for the institution of financial equalisation procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility*.

Article 9, para. 5 goes beyond the scope of the aforementioned provisions and sets forth that, after the Contracting Parties have implemented all measures attempting to ensure that local authorities are put in the position to levy or receive enough financial equipment to discharge their own tasks, they must also set up financial equalisation procedures in order to compensate inevitable side effects of unequal distribution of potential sources of revenues, thus providing citizens with the supply of services of similar level for similar taxation levels. Typically, different local authorities have different expenditures and different capacities to raise revenue for reasons lying beyond their direct control. Hence, equalisation mechanisms ought to be set up by the States to offset these imbalances and aid financially weaker local authorities.[532]

A different aim had, on the contrary, the above mentioned Draft European Charter of Local and Regional Finance, which conceived equalisation procedures as a normal tool within a wider cooperative financial system duly to involve permanently all layers of government. In other words, as pointed out by Weiss,[533] unlike the Draft Charter of Local and Regional Finance, the Charter starts from the premise that resources are allocated unequally and that vertical equalisation can

---

531 Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, § 29.

532 Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, § 37 and Congress of Local and Regional Authorities, Recommendation No. 228 (2007), Draft Additional Protocol to the European Charter of Local Self-Government, Article 8 para. 1.

533 B. Weiss, *cit.*, 215.

serve as a corrective and possibly only as a transitory tool,[534] whereas it does not require Contracting Parties to establish a permanent and extensive "transfer union" system between and within tiers of government.

Yet, equalisation procedures can be activated only insofar as local authorities have already exhausted all indispensable levers to raise adequate financial revenues or to collect taxes more efficiently.[535] Equalisation cannot serve the purpose to replace revenue sources which should be levied making maximum use of fiscal capacity. To put it in another way, those items that are within the scope of decision and the fiscal management of local authorities should not be taken into consideration for equalisation, among others cost differences stemming from adaptation of services to local preferences or differences in rates of taxation.[536] In this respect, the Congress found, though, that in the domestic legal orders of several member States «*the development in transfers stems from the difficulty in finding new tax resources which are sufficiently well distributed to be transferred*».[537] Hence, a certain degree of confusion can often arise in the tasks of funding local budgets, compensating them for transferred responsibilities and ensuring financial equalisation.

The first question arising from the provision of the Charter is on the basis of which criteria higher level authorities (central/federal or regional authorities) can calculate whether there has been or not an equitable distribution of resources, i.e. whether some local authorities are financially weak? Both the Charter and the Explanatory Report are silent on that point. One year after the adoption of the Charter, however, the Appendix to Conference Resolution No. 175 (1986) pointed out that the Contracting Parties had «*to establish more objective criteria which take account of the real tax base and specific needs of the less prosperous municipalities»,* that is criteria to objectively determine the fiscal capacity (i.e. the ability to generate revenue) and the financial needs of local authorities (i.e. the resources required to execute public tasks).[538] The Charter makes, in fact, explicit reference to both the "potential sources" and the "financial burden", which match with two different kinds of equalization, revenue equalization and needs equalization, the combination of which is often referred to "need-capacity-gap". Yet, this does not say anything about whether equalization should be horizontal, i.e. involving a redistribution of local taxes revenues or vertical, i.e. effected through

---

534 B. Schaffarzik, *cit.*, 521.

535 *Ibid*. 522.

536 B. Dafflon, *Proper Resources and Autonomy in Budget Management,* in: Venice Commission, *Conference on Democracy and Decentralisation: Strengthening democratic institution through participation*, St. Gallen, Switzerland, 3-4 May 2010- CDL-UD (2010) 032, in www.venice.coe.int Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, § 39; Congress of Local and Regional Authorities, Recommendation No. 228 (2007), *cit.*, Article 8, para. 2.

537 Congress of Local and Regional Authorities, Resolution No. 71 (1998), *The financial resources of local authorities in relation to their responsibilities*, CPL (5) 4.

538 The lack of objective criteria in the legal orders of the member States was criticized again by the Congress with the adoption of Recommendation No. 79 (2000), *The financial resources of local authorities in relation to their responsibilities: a litmus test for subsidiarity*, § 2 v.

transfers by central or regional government;[539] Equalization of the expenditures is normally vertical, whereas revenue equalization can be both vertical and horizontal, since it is well possible that high-capacity local authorities and not higher-level authorities contribute to redistribute resources to low-capacity local authorities in order to reinforce their deficient revenue base.[540] As recommended by the Congress, *«the solidarity measures should be implemented by an appropriate combination of vertical and horizontal equalisation»,* i.e. the legal provision of the Charter applies to both forms of equalization. The balance which should be struck between the two types of equalisation remains within the discretionary powers of the member States.[541] The Committee of Ministers of the Council of Europe conversely recommended that vertical equalization should be preferred to horizontal equalization mainly for political reasons: «*equalization by means of grants is less likely to create ill-feeling between local communities»*, whereas resource sharing arrangements between authorities of the same level might be considered only when «*local fiscal capacity varies so greatly that the decided level of equalisation of resources cannot be achieved solely by means of government grants».*[542] The Committee of Ministers further pledged for equalisation systems operating immediately at subnational level, e.g. at regional level and not only at national level, since the former can be set up by means of agreement between local authorities, i.e. following to the principle of subsidiarity.

From a comparative perspective, the guarantee of equalisation for local authorities is embedded in the Constitution or in constitutional law in federal States, including Germany, Switzerland and Austria, but also in Italy, where 2001 constitutional reform also paved the way for equalising mechanisms within the context of a "fiscal federalist" framework (see *infra* third Chapter). In the former two countries, this happens at subnational level, that is to say in the so-called *Länder*- and *Kantonsverfassungen*, whereas in Austria the general principles on equalisation are set by the Fiscal Constitutional Law (*Finanzverfassungsgesetz*). No mention of equalisation schemes in favour of local authorities is made in the Constitutions of unitary States or more decentralised ones, no matter whether the State is a old Europe one or a new Central and Eastern Europe country. Violations of

---

539 B. Dafflon, *Fiscal Capacity Equalization in Horizontal Fiscal Equalization Programs*, in: R. Boadway and A. Shah (eds.), *Intergovernmental Fiscal Transfers. Principles and Practice*, 2007, 368 ff. See also: B. Weiss, *op. cit.*, 216. See also: Congress of Local and Regional Authorities, Final Declaration adopted on 7 October 2000 of the International Conference on Financial Relations between State, Regional and Local Authorities in Federal States: Moscow (Russian Federation), 5-7 October 2000, § 11.11 cit.*: «The solidarity measures should be implemented by an appropriate combination of vertical and horizontal equalisation.».*

540 Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, § 4 lett. c) Equalisation of financial capacity - § 52.

541 Draft Article 8 para. 5 explicitly foresaw the establishment of a system of both vertical and horizontal equalisation. Since member States like Sweden performed equalisation only through national grants, they did not find appropriate that the Charter could decide what kind of system the member States should adopt. See: RM-SL (83) 26 rev, 28.

542 Recommendation Rec(2000)14 of the Committee of Ministers to member states *on local taxation, financial equalisation and grants to local authorities*, § 2 lett. b).

Article 9, para. 5, sentence 1 were assessed by the Congress in particular in the latter where, unlike in Scandinavian countries, no real system of equalisation has yet been put in place. This is the case in particular of Azerbaijan,[543] Armenia[544], Hungary,[545] Ukraine,[546] Moldova[547] and Czech Republic[548]. However, single violations of Article 9, para. 5, which is as such programmatic in nature and not self-executing, are to be found also in old Europe member States, such as Spain[549], whereas reservations to this provision were made not only by non-compliant States, such as Azerbaijan and the Czech Republic, but also by Andorra due to its tiny dimensions and by the Netherlands, because of the restrictions imposed by national legislation on financially assisted municipalities' freedom of action as well as by Switzerland, because it considered that «*equalisation must not become an end in itself but remain a policy instrument; furthermore it is much healthier if the municipalities can rely on their own resources*».[550]

Both the Congress and the Committee of Ministers stated that, only by setting clear, foreseeable and objective criteria or indicators to determine potential revenues and spending needs by means of law, the Contracting Parties will avoid to keep funding wasteful local authorities.[551] Among the mostly used indicators for estimating local authorities' revenues and needs one should recall the demographic trend, high population density, topography when it comes to determine the spending needs and the differences in economic development, central vs. peripheral position, availability of natural resources when it turns to determine the revenue capacity.[552] Two studies and the attached guidelines developed by the Council of Europe in 1999 and in 2001 contributed to shed light on the issue of the methods for estimating the revenues and the spending needs.[553] As to the latter, the

---

543 Congress of Local and Regional Authorities, Recommendation No. 326 (2012), *Local and Regional Democracy in Azerbaijan*, CG (23) 12, § 105.

544 Congress of Local and Regional Authorities, Recommendation No. 351 (2014), *Local Democracy in Armenia*, CG (26) 2, § 73-77.

545 Congress of Local and Regional Authorities, *Local and Regional Democracy in Hungary,* CG (25) 7, 31 October 2013, § 160.

546 Congress of Local and Regional Authorities, *Local and Regional Democracy in Ukraine*, CG (25) 8, 31 October 2013, § 135-141.

547 Congress of Local and Regional Authorities, *Local and Regional Democracy in Moldova*, CG (22) 10, 13 March 2012, § 104 and 109.

548 Congress of Local and Regional Authorities, *Local and Regional Democracy in the Czech Republic*, CG (22) 6, 8 March 2012, § 85-86.

549 Congress of Local and Regional Authorities, Recommendation No. 336 (2013), *Local and Regional Democracy in Spain*, CG (24) 6, § 94 and 106.

550 Council of Europe, *Summary of proposals for amendments and Secretariat proposals following the RM-SL Meeting of 25-26 April 1983*, RM-SL (83) 26 rev, 28-29. On fiscal federalism in Switzerland see: G. Biaggini, *Il federalismo fiscale in Svizzera*, in: J. Woelk (ed.), *Federalismo fiscale tra differenziazione e solidarietà*, EURAC, Bolzano, 2010.

551 M. W. Schneider, *cit.*, 326.

552 Recommendation Rec(2000)14 of the Committee of Ministers to member states on local taxation, financial equalisation and grants to local authorities, § 2 lett. a); Congress of Local and Regional Authorities, Recommendation No. 228 (2007), *cit*., Article 8, para. 3.

553 CDLR, *Limitations of local taxation, financial equalisation and methods for calculating general grants* (Local and Regional Authorities in Europe No. 65) (1999); CDLR, *Methods for estimating local authorities' spending needs and methods for estimating revenue* (Local and Regional Authorities in Europe No. 74) (2001).

Steering Committee recommended to use entitlement criteria that are neutral in relation to local authorities' choices. In particular, demographic criteria should be supplemented by social indicators, such as number of school children in rural areas or in urban areas, number of social housing units, number of rented homes, number of inhabitans without vocational education, number of foreigners from third party countries etc.. Too many criteria, often introduced under political pressure, could overcomplicate the whole procedure. However, it might prove true that if local authorities are responsible for varied tasks, the calculation cannot be anything but complicated. The member States should thus concentrate on a reasonable number of indicators, in particular on those deemed to be effective in smoothing out the imbalances. As for the former, equalising grants are distributed on the basis of the average income base of local authorities: local authorities with lower income basis are eligible. If local authorities are allowed to levy different income sources, the calculation is much more complicated: the member States should thus distinguish between own resources, shared taxes, fees and charges.[554]

Yet, Article 9, paragraph 5, sentence 2 also sets a limit to equalisation procedures. In fact, they can be regarded as prejudicial to local self-government insofar as they are used as means of curtailing the policy-making discretion of local authorities.[555] In particular, equalisation policies, which involve general purpose grants, cannot be aimed at preventing local authorities concerned to act autonomously within their own sphere of responsibility.[556] In other words, according financial assistance to local authorities', in particular through earmarked grants, cannot imply higher-level authorities acquiring influence over decisions within local authorities' own sphere of competence. This specific prohibition, however, is laid down in Article 9, para. 7, sentence 2, which explicitly stipulates «*that the provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction».* Thus, Article 9, para. 5, sentence 2 of the Charter provides for a limitation of different nature, namely the prohibition to level out all financial differences existing between local authorities;[557] in fact, as pointed out by the Congress commenting on how equalisation policies should be designed in the member States, «*it would be a mistake to bring in equalisation schemes that discouraged wealthier local authorities from making additional tax-raising efforts they saw as merely raising finance for transfer to other authorities*»[558]. Further, too much equalisation could disrupt competition and the optimal allocation

554 CDLR, *Limitations of local taxation* (cit.), 43 ff and CDLR, *Methods for estimating* (cit.), 19-26.

555 Draft Explanatory Memorandum, CPL (16) 6.

556 The Congress repeatedly regarded Article 9, para. 5, sentence 2 as a limitation set to the legislature. Recommendation No. 349 (2013), *Local Democracy in Albania*, CG (25) 11, § 184; Recommendation No. 326 (2012), *Local Democracy in Azerbaijan*, CG (23) 12, § 166; Recommendation No. 163 (2005), *Local and Regional Democracy in Sweden*, I § 14 lett. d).

557 So B. Schaffarzik, *cit.*, 523 and M. W. Schneider, *cit.*, 327; B. Weiss, c*it.*, 216.

558 Recommendation No. 79 (2000), *The financial resources of local authorities in relation to their responsibilities: a litmus test for subsidiarity,* § 2 viii.

of the factors of production, thus making it economically unsustainable and contradictory with the aim to ensure stability.[559] In sum, it would deprive certain local authorities of their right to local self-government in favour of those authorities receiving the transfers.[560]

This ban on levelling out local authorities financial conditions is intertwined with another issue of paramount importance in many national jurisdictions, that is to say the relationship between equalization procedures and local authorities' bail-out by higher-level authorities, which is discussed only in a Recommendation issued by the Committee of Ministers in 2005, but not directly by the Congress of Local and Regional Authorities. In particular, according to the Committee of Ministers, «*the mechanisms adopted to equalise among jurisdictions should be based on standardised (not actual) levels of revenues and expenditures*. *The standardisation* (…) *acts as a safeguard against implicit financial bail-outs that would otherwise eliminate the local authorities' (and their officials') accountability and result in wasted public resources. It also avoids moral hazard by local authorities because it precludes the manipulation of distribution criteria by recipient governments*».[561] This statement is fully consistent with what the Committee of Ministers recommended to the member States the year before, in 2004, when it pledged for the establishment of procedures «*enabling the local or regional authority to handle a localised and short-term financial crisis without requesting assistance from the next highest level of authority or the state. Such procedures could be established, for example, under a bankruptcy and insolvency code for local and regional authorities*»[562]. Thus, one can easily argue that, even if only equalisation mechanisms find explicit acknowledgement in hard law, i.e. in the Charter and even if the Committee of Ministers soft law does not altogether exclude financial assistance when financial distress is caused by factors truly outside the control of subnational administrators (such programmes exist, for instance, in Greece and Germany), insolvency of local authorities does not contradict the principle of adequate financing laid down in Article 9, para. 1 and thus is certainly not to be considered as prohibited under Council of Europe law.[563]

Problems can however emerge in this respect as for Contracting Parties' compliance with

---

559 CDLR, Limitations of local taxation, financial equalisation and methods for calculating general grants (Local and Regional Authorities in Europe No. 65) (1999), 51.

560 On this point see the case of the Netherlands, where Article 12 of the law that describes intergovernmental financial relations ('*Financiële Verhoudingswet'*) provides for a sort of safety net for municipalities that have an unbalanced budget. On moral hazard effects induced by this system see: M. Allers and E. Merkus, *Soft Budget Constraint but No Moral Hazard? The Dutch Local Government Bailout Puzzle,* University of Groningen – Centre for Research on Local Government Economics (COELO), October 2013.

561 Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, § 46.

562 Recommendation Rec(2004)1 of the Committee of Ministers to member states *on financial and budgetary management at local and regional levels*, § 37. More recently: Recommendation CM/Rec(2011)11 of the Committee of Ministers to member states *on the funding by higher-level authorities of new competences for local authorities*.

563 *Contra*: F.L. Cranshaw, *Insolvenz- und finanzrechtliche Perspektiven der Insolvenz von juristischen Personen des Öffentlichen Rechts, insbesondere Kommunen*, Berlin, 2007, 62-64, § 77 lett. g).

fundamental rights. In fact, as pointed out in its case-law by the ECtHR (see, in particular, the two rulings *De Luca and Pennino vs. Italy*)[564], insolvency alike procedures for local authorities might bring about violations of protection of property or of the right of access to a court, laid down respectively in Article 1 of the Protocol No. 1 ECHR and in Article 6, para. 1 ECHR. In particular, the Court found that, unlike for sovereign States, the insolvency of a municipality, which is still considered as a State body or organ under international law, cannot justify the impossibility to honour in full the debts which had already been acknowledged by a national court final judgement. Further, a ban on enforcement proceedings, even if pursuing the legitimate aim to ensure the equal treament of creditors, cannot be deemed to be proportional, when the length of the procedures before the administrative supervising authority entrusted with the power to manage the municipalities' finances, is beyond the applicants' control. Hence, the right to a trial within a reasonable time applies also to administrative authorities entrusted with the powers to supervise local authorities and therefore one could argue it supplements the principle of proportionality, as laid down in Article 8, para. 3 of the Charter, because it requires supervisory authorities to handle issues submitted before them according to Article 6 ECHR.

6.6. The Right of Consultation for the Establishment of Equalisation Procedures

Article 9.6. *Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them.*

The standard-setting for regulating the equalisation procedures should not occur unilaterally, but preferably in close consultation with local authorities, pursuant to Article 9, para. 6 of the Charter, which requires «*local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them»*. According to many legal scholars, Article 9, para. 6 appears to have merely declaratory nature, since the right to consultation for any matters which concern them directly, hence also those concerning the apportionment of financial revenues, is already set out in Article 4, para. 6.[565] Unlike Schaffarzik,[566] however, here it should be argued that, even if this provision has its roots in the aforementioned principle of loyal co-operation, the degree of consultation required by Article 9, para. 6 is different, i.e. higher from that required in

---

564 On the ruling see: M. Iannella, *I rapporti tra lo Stato e le autonomie nella procedura di dissesto alla luce delle sentenza della Corte EDU Pennino e De Luca*, DPCE 2014 - III, 1112 and ff.; M. De Nes, *La Corte EDU entra nel merito della procedura di dissesto finanziario degli enti locali italiani. I casi di Pennino e De Luca,* in: DPCE online 2013-4 and G. Boggero, *Lo Stato ha l'obbligo di onorare i debiti propri e dei propri organi riconosciuti con sentenza definitiva,* in OPAL n. 3 – 12/2013, to be found at the following address: www.polis.unipmn.it

565 So: Congress of Local and Regional Authorities, Recommendation No. 171 (2005), CPL (12) 5, § 53, cit.: «*Since local authorities have the right to be consulted in legislative and decision-making processes concerning matters affecting them they must necessarily also be consulted on the financial resources allocated to them.»*

566 B. Schaffarzik, *cit.*, 529-530.

Article 4, para. 6, otherwise this consultation requirement would not have been explicitly mentioned by Article 9. Whereas in Article 4, para. 6 consultation is a principle and has to be ensured "insofar as possible", in Article 9, para. 6 consultation is a rule, since the latter expression finds no mention.[567] Hence, while establishing equalisation procedures, local authorities (either individually or through their associations), shall always be involved.

The different wording can be best explained with the preparatory works of the Charter. Originally, in fact, Article 9, para. 6, i.e. Draft Article 8, para. 7 stipulated that local authorities should have the «*right to participate, in an appropriate manner, in framing the rules governing the general apportionment of redistributed resources shall be expressly recognised».* The Draft set forth that local authorities could have had the right to co-decision in framing the rules, a circumstance which clashed with the constitutional identity of some Council of Europe member States, in particular with that of Germany (see *infra* second Chapter). The right of co-decision was transformed into a right of consultation, which however ensures that local authorities take part in the elaboration ("framing") of the rules on allocation of resources to be redistributed to them and therefore does not only imply a formal hearing during the law-making process but a real participation to the rules elaboration,[568] which is typical of legal orders such as Norway, Portugal and the United Kingdom. For various reasons, which have mostly to do with their little consideration of the right of consultation as such, five member States of the Council of Europe, notably Azerbaijan, Georgia, Belgium, the Czech Republic and Turkey, have not removed their reservation on this provision yet.

6.7. General Purpose Grants Instead of Earmarked Grants

Article 9.7. *As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction.*

Article 9, para. 7 advocates a qualitative standard, whereby block grants or general purpose

---

[567] See Congress of Local and Regional Authorities, *Local and Regional Democracy in Austria*, CG (20) 8, 3 March 2011, recommending Austria «*to strengthen the role of municipalities in the preparation of the Financial Equalisation Law, by introducing a legally binding consultation of the Austrian Association of Cities and Towns and the Austrian Association of Municipalities during the negotiation process*». However, the Congress itself contends that «*This provision of principle does not lay down any specific mode of consultation on financial matters»,* but it *«leaves States a maximum leeway for deciding on the "appropriate manner" in which consultation should be organised»*. Cf. Congress of Local and Regional Authorities, *Reservations and Declarations to the European Charter of Local Self-Government*, CPL (21) 5, 28 September 2011, § 25.

[568] *Contra* Congress of Local and Regional Authorities, Recommendation No. 314 (2011), *Reservations and declarations to the European Charter of Local Self-Government,* § 25, cit.: «*This provision of principle does not lay down any specific mode of consultation on financial matters. It is an application of the general principle set out in Article 4 para. 6, which is particularly important because of the vital importance of financial resources for the protection of local self-government: the provision leaves States a maximum leeway for deciding on the "appropriate manner" in which consultation should be organised».* So also: M. W. Schneider, *cit.,* 327 and B. Weiss, *cit.*, 216.

transfers should be preferred to grants earmarked for specific projects or linked to the fulfillment of specific functions, since the former, being unconditional, ensure more freedom of action to local authorities and prevent higher level authorities to acquire influence over their responsibilities[569] or national politicians to use them for strengthening their own political positions.[570] Further, specific intergovernmental grants are rarely based on objective criteria and are not very predictable. This does not mean, however, that earmarked grants impinge *tout court* upon local authorities' power to exercise own discretion with regard to their expenditure priorities, otherwise they would have been completely banned by the Charter. As the Explanatory Report underlines: «*It would be unrealistic to expect all specific project grants to be replaced by general grants, particularly for major capital investments»,* since they often relate to current expenditure.

The Congress and the Committee of Ministers tried to restrict recourse to these grants to a limited list of cases, among them: the discharge of delegated functions[571], the internalisation of spillover effects generated by the supply of certain local public services.[572] A shift towards earmarked grants can be rarely assessed in Council of Europe member States, whereas the majority appears to have sought to reduce the rate of grants tied to a specific objective.[573] However, according to the Explanatory Report, «*a higher ratio or project-specific grants to more general grants may be considered reasonable where grants as a whole represent a relatively insignificant proportion of total revenue».* Skeptical on the compatibility of this interpretation with the Charter are authors like Schaffarzik and Schneider. The former[574] holds that grants cannot represent an unsignificant portion of all local authorities' revenues. However, the Charter does not foresee that transfers should represent a significant amount of all local authorities resources. There might in fact be local authorities which do not receive general grants, having an income base above average or whose level of own resources is deemed to be commensurate with local authorities responsibilities; the latter considers[575] that Article 9, para. 7 provides for a principle which only concerns specific purpose grants' relationship with general purpose grants and not their relationship with other local authorities' sources of revenues. However, a systematic interpretation of the Charter enables to

---

569 So also: A. Shah (ed.), *The Practice of Fiscal Federalism: Comparative Perspectives*, 2007, 25.

570 Congress of Local and Regional Authorities, *Report on financial relations between State, regional and local authorities in federal states* – Conclusions of the Moscow International Conference (5-7 October 2000) - CG (8) 7 Part II. About the economic rationale of the Charter's rule see: J. Kim, *General Grants vs. Earmarked Grants: Does Practice Meet Theory?*, Korea Institute of Public Finance – Working Papers, 2009.

571 Congress of Local and Regional Authorities, Recommendation No. 228 (2007), *Draft Additional Protocol to the European Charter of Local Self-Government*, Article 9, para. 1.

572 Congress of Local and Regional Authorities, Recommendation No. 228 (2007), *ibid*.; Recommendation Rec(2005)1 of the Committee of Ministers to member states on the financial resources of local and regional authorities, § 2.11. See also: CDLR, *Local Finance in Europe*, 52.

573 Congress of Local and Regional Authorities, Recommendation No. 163 (2005), *Local and Regional Democracy in Sweden*, CG (12) 7 - § 37-43.

574 B. Schaffarzik, *cit.*, 527.

575 M.W. Schneider, *cit.*, 328.

argue that whenever local authorities' transfers are already quite a few, specific purposes grants should not be judged so severely insofar as they do not undermine the right to local self-government, i.e. impair the stability of local budgets.[576]

As a principle, however, general purpose transfers should also quantitatively outweigh grants for specific purposes. No percentage relationship is given by Article 9, para. 7, but one could argue that at least more than 50 percent of all transfers should be at free disposal of local authorities.[577] In fact, the present provision aims at preventing grants for specific purposes to the payment of which different conditions are attached as well as other strings by the State which unduly or abusively remove local authorities' discretion.[578] Discretion is violated not merely when higher level authorities transferring resources to local authorities interfere with their allocation, but insofar as the essential core of local self-government is affected by measures which are disproportionate to the aim pursued.[579] Grants for special purposes seldom allow local authorities to fully finance these purposes. Very often they entail additional costs (such as staff, maintenance or operational costs) which local authorities have to bear themselves. In other cases, grants are delivered for co-financement of projects,[580] but the degree of own contributions by local authorities should always be set taking into account the financial capacity of the authorities concerned.[581]

6.8. Taking Out Loans as a Residual Tool of Financing

Article 9.8. *For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law.*

Article 9, para. 8 strengthens local authorities' financial autonomy by acknowledging the right to have access to the national capital market within the limits set by statute. In other words, local authorities are in principle free to borrow under their own responsibility, which is a corollary of the principle of local self-government, laid out in Article 3, para. 1. Therefore, as clarified by the Committee of Ministers, «*the central authority should not offer guarantees for loans raised by local*

576 P. Blair, *cit*., DÖV, 1988, 1002.
577 B. Schaffarzik, *cit.*, 525-526.
578 Draft Article 8, para. 8, sentence 2 strictly prohibited any interference with local authorities' discretion. Since it was deemed not to be realistic by many national delegations, this provision was eventually set aside. See: RM-SL (83) 26 rev., 31.
579 B. Schaffarzik, *cit.*, 528-529.
580 Congress of Local and Regional Authorities, *Local and Regional Democracy in Poland,* CG (9) 21, § 50.
581 See: Congress of Local and Regional Authorities, Recommendation No. 228 (2007), Article 9, para. 3 and Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, § 67.

authorities, save in exceptional circumstances»[582].

Following to the Explanatory Report, access appears to be restricted to loan finance for capital investment only and not for funding current expenditures,[583] whereas procedures and conditions for access have to be laid down by legislation, being by-laws not stable and predictable enough to ensure the actual enjoyment of the right. Further specific limitations, which are not explicitly mentioned by paragraph 8, but which can be systematically inferred from Article 9, might be the constraints set by the national economic policy, *sub specie* budgetary policy.[584] The Committee of Ministers provided some examples of constraints on account of national economic policy; in particular, it recommended to prohibit «*speculative investment by local and regional authorities. [...] If the local or regional authority wishes to invest on the equity market, such investment should be managed professionally»,* a conditional requirement which is however far from clear. In any case, «*any financing techniques which have the object or the effect of concealing the level of debt of the local or regional authority should be prohibited. All financing techniques should be subject to conditions that ensure or restore the transparency of the financial situation or limit the risks involved».*[585] It seems evident the Committee of Ministers' bid to prevent or bring to an end a quite widespread phenomenon among local authorities throughout Europe in the past years, whereby local governments which invested in derivatives experienced severe losses.

From an historical point of view, it must be borne in mind that the present provision was not included in the original Draft Charter submitted by the Committee of Experts in 1981 but was introduced as Draft Article 8, para. 9 later on, more precisely in November 1983, upon proposal of the Conference of Local and Regional Authorities and in particular on wish of the Dutch delegation. The provision originally stipulated that «*for the purpose of borrowing for capital investment, local authorities shall have free access to national capital markets and, subject to the requirements of national economic policy, also to international capital markets*». In 1984 the Secretariat of the Conference proposed to delete the second sentence relating to the access of local authorities to international capital markets upon request of the German delegation and, as the Explanatory Report to the final text of the Charter underlines, the sources of finance were made dependent «*on the structure of each country's capital markets».*

---

582 Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, § 76. So also: Recommendation Rec(2004)1 of the Committee of Ministers to member states *on financial and budgetary management at local and regional levels*, § 34.

583 So also: Congress of Local and Regional Authorities, *The financial resources of local authorities in relation to their responsibilities,* CPL (5) 4, § 3.2.2.2.; Recommendation Rec(2004)1 of the Committee of Ministers to member states on financial and budgetary management at local and regional levels, § 24 and Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of local and regional authorities*, § 73-74.

584 So also: M.W. Schneider, *cit.*, 329-330; B. Weiss, *cit*., 221 and Recommendation Rec(2005)1 of the Committee of Ministers to member states on the financial resources of local and regional authorities, § 75.

585 Recommendation Rec(2004)1 of the Committee of Ministers to member states *on financial and budgetary management at local and regional levels*.

Therefore, one could now argue that this kind of access is not regarded as a minimum standard under the Charter. Yet, pursuant to Resolution No. 153 (1984), adopted one year before the adoption of the Charter, the Conference asked the governments of the member States to «*help local and regional authorities to take advantage of foreign loans whose terms are favourable».*[586] However, in a report approved unanimously in its 19th Session (16-18 October 1984), the Standing Conference recommended local and regional authorities «*to give preference to specialised institutions of a decentralised character - such as savings banks - in which the local authorities themselves may have a say in decision-making».* Finally, the Conference pledged for «*the practice whereby the European Community, through the New Community Instrument, and the European Investment Bank obtain funds on the international capital markets and make loans available to European local and regional authorities».*That means, the Conference wished that borrowing by local and regional authorities took place via savings banks or indirectly through funds made available by the European Community. For borrowing on international financial markets local and regional authorities would have needed to rely «*on central credit institutions dominated by the State*». Local authorities' direct "access to international capital markets" was thus considered by a majority of member States not as a right to be protected as part of a common European constitutional local government law.

Reservations to this Charter provision were made by relatively small countries, i.e. Andorra,[587] Liechtenstein and Latvia. As for Liechtenstein, municipalities are deemed to be able to cover their expenses without resorting to borrowing.[588] In Latvia, on the contrary, the Congress found that, since the mid 1990s, the central government reduced the access of local authorities to financial markets so that they could borrow only through the Treasury Department and not under their own responsibility in a medium-term that does not exceed three years.[589] Quite the same problem was assessed by the Congress in relation to Denmark, one of the first signatory States, which however did not enter any reservation with reference to Article 9, para. 8. In particular, Danish State administrative authorities exercise strict oversight by monitoring «*local authority investments to ensure that local budgets are consistent with national needs and requirements»*, whereas the so-

---

586 Conference of Local and Regional Authorities of Europe (CLRAE), Resolution No. 153 (1984), *on borrowing by local and regional authorities in Europe,* which aimed in particular at establishing a European Fund to be used to provide both direct financing for capital investment to individual local or regional authorities or local authorities acting jointly and also global loans to financial institutions for on-lending to smaller authorities.

587 The Principality of Andorra ratified the Charter on 23 March 2011 and it entered into force on 1 July 2011. The Congress never issued reports and recommendations on the situation of local democracy in the Principality.

588 Congress of Local and Regional Authorities, *Local Democracy in Liechtenstein*, CPL (13) 3, 2 June 2006, § 50-53.

589 Congress of Local and Regional Authorities, *Local and Regional Democracy in Latvia*, CG (5) 5, 28 May 1998, § 3.2 and again Congress of Local and Regional Authorities, Recommendation No 317 (2011), *Local and Regional Democracy in Latvia*, CG (21) 16, 18 October 2011, § 110 ff. The situation has improved along the years since Latvian local authorities had to implement EU investment projects. The total annual limit for borrowing has been relaxed and given some flexibility.

called Danish regions are altogether not allowed to borrow on the national capital market.[590] Further, also in Austria, Hungary, Slovenia, Croatia and Ireland borrowing requires government approval, whereas in Armenia and Georgia local authorities as a whole are completely banned to borrow on financial markets.[591]

To sum up, the Congress monitoring practice shows that public borrowing in most Council of Europe countries is allowed for investment purposes, that local governments take out loans increasingly by public agencies established exactly for the purpose of issuing bonds in their interests rather than from commercial banks and finally that in lots of countries, both in old Europe member States and in Central and Eastern Europe countries, local authorities are either radically banned from taking out loans in the capital markets or approval by the government is always required before resorting to public borrowing.

7. The Right to Free Co-operation and Association

A specific guarantee as to how local authorities can cooperate with each other, thus modifying their organisation, is enshrined in Article 10, para. 1 and 3 of the Charter. Article 10, para. 2 embodies another guarantee concerning local authorities' organisation, that is to say the general right of local authorities to associate. Originally, Draft Article 9, para. 1 was entitled "local authorities rights to associate". The German delegation proposed to replace the verb "associate" with the verb "co-operate" (corresponding to the German "*zusammenarbeiten"*), since the former would have been understood under German law as merely ensuring the right of local authorities to establish regional or federal organisations representing their interests at higher levels of government. In reality, Draft Article 9, para. 1 aimed at covering both aspects and namely the right for local authorities to co-operate with each other on a functional basis and the right of local authorities to form national or regional associations to represent their interests at higher level and thus was amended accordingly.[592]

---

590 Congress of Local and Regional Authorities, *Local and Regional Democracy in Denmark*, CG (25) 12, 29 October 2013, § 38.

591 Congress of Local and Regional Authorities, *Adequate financial resources to local authorities*, CPL (27) Final, 16 October 2014 § 99; *Local and Regional Democracy in Austria*, CG (20) 8, 3 March 2011, § 134.

592 The British delegation delivered a similar comment on Draft Article 9: «*These two paragraphs should be reformulated simply to clarify the two types of "association" in which local authorities may engage. The first type of association is that between two or more authorities in order to carry out functions in partnership. The second type of association is that between groups of similar local authorities, which may combine to promote their common interests, either at the national or international level. The original draft runs the risk of confusing these two quite different forms of action»* cit. Standing Conference of Local and Regional Authorities, RM-SL (83) 26 rev, 33.

7.1. The Right to Inter-Municipal Cooperation

The Charter lays down a guarantee of a particular form of organisation involving many local authorities, which is to say inter-municipal co-operation (IMC), that, despite its name, may also be exercised by other local authorities, including second-tier local authorities. This guarantee are laid down in Article 10, para. 1 and 3 of the Charter and can be considered corollary of the freedom of organisation laid down in Article 6, para. 1.

7.1.1. The Right to Cooperation and the Limits Set to be Coerced into it

Article 10.1. *Local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.*

Article 10, para. 1 takes into account only cooperation arrangements which allow local authorities, within the limits of their responsibilities, including delegated ones, to provide assistance to each other by delivering together public services which are beyond the capacity of a single local authority and, more generally, as the Explanatory Report reminds, to seek «*greater efficiency through joint projects*», notwithstanding the fact that local authorities involved might be part of different regional or federal units of the State.[593] This provision does not deal with vertical or intergovernmental cooperation mechanisms between different tiers of government which might be rather said to be covered by Article 10, para. 2. By contrast, unlike Schaffarzik,[594] it can be argued that this right covers also the right to carry out certain public tasks in place and in favour of other local authorities, since the expression "within their responsibilities" has to be construed as indicating local government responsibilities as of the whole institution and not as of a single local authority. Instead, the guarantee of Article 10 neither covers co-operation forms between local authorities and other public or private authorities,[595] nor co-operation schemes which result in the establishment of a new community-based organisation.[596]

Inter-municipal co-operation builds on subsidiarity, i.e. it enables local authorities to «*avoid the*

---

[593] See Congress of Local and Regional Authorities, *Local and Regional Democracy in Austria*, CG (20) 8, 3 March 2011, § 140, noting that in Austria there are «*growing claims for increasing the flexibility of this tool, allowing the establishment of municipality associations across different Länder and for various purposes».* The same could be said with reference to another federal State, like Belgium. See: Congress of Local and Regional Authorities, *Local and Regional Democracy in Belgium*, CPL (10) 2, 20 May 2003.

[594] B. Schaffarzik, *cit.*, 481.

[595] T. I. Schmidt, *Kommunale Kooperation*, Tübingen, 2005, 95. As also the Explanatory Report clarifies, paragraph 1 only «*covers co-operation between local authorities on a functional basis».*

[596] B. Schaffarzik, *cit.*, 473, who refers, for example, to the case of *Verbandsgemeinden* in Germany (see *infra* second Chapter).

need to transfer functions to higher levels of government» and it is normally of non-compulsory nature, that is to say it also includes the right of local authorities not to co-operate with each other, which however triggers the risk of a transfer away of functions to higher level authorities by means of statute.[597] The most basic forms of co-operation are exchanges of information, consultation protocols or private and public binding agreements between local authorities to provide mutual assistance (Article 10, para. 1, first alternative), whereas the most advanced form encompassed by the Charter is the establishment of a new legal entity under either private or public law, that is to say consortia or federations of local authorities (Article 10, para. 1, second alternative), which might provide for a joint management of services and, in particular, offer «*a solution to the problem of relations between an urban agglomeration and suburban communities»* (typical for instance of France, Spain, Portugal, Germany, United Kingdom).[598] Derogating from Article 6, para. 1, the former are not explicitly subject to legal constraints and can thus be rooted in tradition (Denmark) or largely established on a case-by-case decision by partner local authorities[599], whereas the latter may be set up by means of statute. The difference between the two aforementioned alternatives is more formal than substantial, provided that for simple agreements or protocols of consultation between local authorities a legal basis may indeed be set out by central or regional authorities, pursuant to Article 3, para. 1.[600] As pointed out by the Congress in its 7th General Report on the Charter, it can be observed a general rule whereby *«in countries with considerable regulation of inter-municipal co-operation* (e.g. France, Portugal, Italy, Greece) *municipalities' freedom is restricted, whereas in countries with little regulation of inter-municipal co-operation municipalities appear to enjoy a greater degree of autonomy»*[601]. In some countries, though, regulation is minimal because of a lack of political concern (Romania, Armenia).[602]

In particular, a statute might not only provide grants for the formation of consortia between local authorities, but even coerce local authorities into co-operation on grounds of their prolonged non-cooperation and can even establish an association or a federation of local authorities (Article 10, para. 2). Co-operation can be imposed in many countries parties to the treaty, irrespective of their federal (Germany, Austria, Switzerland), regional (Spain, Italy, Portugal) or unitary system of government (Greece, Denmark, Slovakia, Latvia, Sweden, Turkey). As it is the case with mergers of local authorities, forcing local authorities into co-operation affects their freedom of organisation,

---

597 M. W. Schneider, *cit.*, 331; B. Weiss, *cit.*, 222; B. Schaffarzik, *cit.*, 479.

598 CPL (16) 6 - Explanatory Report to the Draft Charter (so-called *Harmegnies Report*), Article 9, 29.

599 However, in Slovakia, Portugal, Italy, Finland and Hungary IMC is only formal and regulated by legislation.

600 T. I. Schmidt, *cit.*, 97 and B. Klein, *Kommunale Kooperationen zwischen innerstaatlichem Organisationsakt und Markt*, Osnabrück, 2012, 116. *Contra*: B. Schaffarzik, *cit*., 473 and 479.

601 Congress of Local and Regional Authorities, *7th General Report on the Application of the Charter – The Institutional Framework of Intermunicipal Co-operation*, 30 May 2007, § 32.

602 As for Romania, see Law No. 215/2011 – Sections 11 to 16; As for Armenia, see Law on Local Self-Government - Chapters 78-80.

laid down in Article 6, para. 1.[603] Pursuant to the "core area" doctrine, hence, legislation coercing into co-operation must always comply with the principle of consultation (Article 4, para. 6)[604], with the core of freedom of organisation (Article 6, para. 1)[605] and with the proportionality principle.[606] Under the Charter, the principle of subsidiarity (Article 4, para. 3) should be taken into account only insofar as legislation aims at transferring functions from local authorities to central or regional authorities, but not in the case in which the law establishes consortia or federations of local authorities. In fact, as mentioned, the Charter does not deal with the relationship between local authorities themselves, even if, by analogy, Article 4, para. 3 could be extensively read so.[607] Finally, it must be borne in mind that the Explanatory Memorandum to the Draft Charter pointed out that coerced intermunicipal co-operation is legitimate, even if «*the lack of direct democratic legitimation and of administrative transparency set limits to the proliferation and expansion of such association*».[608] Since Draft Article 9 has not been amended during negotiations on the treaty and it perfectly matches with the wording of Charter Article 10, the aforementioned comment might be considered as an argument inherent to the original intent, setting democratic limits to the mandatory establishment of consortia or federations of local authorities by means of statute. This means that the legislature should preserve a minimum of democratic standards even when it comes to the establishment of consortia or federations which are not local authorities under Article 3 of the Charter, for example by ensuring a fair representation of each constituency (as it is the case for example in France)[609] and of political minorities, in the deliberative body of the new entity, by requiring to publicise their meetings, or by giving a right of petition, referendum or access to information. As acknowledged by the Congress, in fact, a common feature of inter-municipal co-operation throughout Europe is that deliberative bodies of consortia or federations of authorities are

---

603 However, the Congress established a political principle of so-called preference towards IMC, instead of mergers or privatizations, both viewed as anthitetical to local self-government and to the "local traditions of the population". Following to this reasoning, the right to local self-government should protect local authorities against privatization measures too. Congress of Local and Regional Authorities, *Recommendation No. 221 (2007), The institutional framework of intermunicipal co-operation*, 30 May 2007, § 5.

604 Congress of Local and Regional Authorities, *Recommendation No. 221 (2007), The institutional framework of intermunicipal co-operation*, 30 May 2007, § 11 lett. a) ix-x.

605 A violation of Article 6, para. 1 was assessed by the Congress with reference to the Hungarian Cardinal Act on local government of December 2011, whereby all municipalities below the threshold of 2000 inhabitants will have to group their administrative services together in a "district" or "micro-region" in 2013. Cfr. Congress of Local and Regional Authorities, *Local and Regional Democracy in Hungary*, CG (25) 7, 29 October 2013, § 124.

606 B. Schaffarzik, *cit.*, 482.

607 The issue is overlooked by Padula in his comment on coerced intermunicipal co-operation under Italian law. See *infra* Part III, Chapter 5 and cf. C. Padula, *Un principio di scarso valore? La Carta europea dell'autonomia locale e le recenti riforme degli enti locali,* in www.gruppodipisa.it, June 2014.

608 CPL (16) 6- Explanatory Report to the Draft Charter, Article 9, 29. Cf. Congress of Local and Regional Authorities, Recommendation No. 221 (2007), *The institutional framework of intermunicipal co-operation*, 30 May 2007, §§ 9-10.

609 See: A. Boyer, *La cooperation intercommunale en France,* in: Le Istituzioni del Federalismo, Vol. 3 (2012), 595, who stressed «*the mode de désignation au suffrage universel indirect avec une représentation égalitaire des communes*».

indirectly elected.[610]

The principles on intermunicipal co-operation may be deemed to be self-executing in the domestic legal orders of the Contracting Parties, since they are sufficiently precise to constitute the basis for a complaint before a national court, i.e. they are enforceable without any need of further legislative implementation.[611]

From a comparative perspective, inter-municipal cooperation can be said to be particularly developed either in those countries in which the size of municipalities is relatively small, or where there is no strong intermediate local government level or, further, where highly complex public services have to be delivered at a lower cost and financial resources are inadequate or natural features make it impossible for a local authority alone to carry out certain functions. Resorting to intermunicipal cooperation is also widespread as an alternative (and not as a combination with) to mergers of local authorities. In general, according to the Congress monitoring practice, it might be argued that inter-municipal co-operation has not really taken roots in Central and Eastern Europe countries, where a centralistic and hierarchical administrative culture still prevails. As for agreements covered by Article 10, para. 1, first alternative, the Congress found out that almost in every country, local authorities enjoy enough autonomy to decide whether and, if so, with which counterparts enter an agreement. As for agreements establishing consortia, however, the report found out that in a few countries (Bulgaria, Latvia), local authorities can co-operate under private law, but cannot set up a new legal entity. In general, it might be said that in a rather heterogenous group of countries (Bulgaria, Cyprus, Georgia, Lithuania, Czech Republic, Slovenia, United Kingdom)[612], co-operation tends to be more flexible, i.e. is based on mutual and voluntary agreements between local authorities, responsibilities exercised jointly are limited and no corporate integration between local authorities takes place, whereas in a second group of countries (France, Spain and Portugal) inter-municipal action is very integrated, i.e. performed by a body centralising many functions and with wide decision-making powers, subject to State supervision. National (or regional) legislation normally provides for several types of co-operation structures, generally leaving up to local authorities to decide which one applies, it lays down conditions and requirements for setting up consortia as well as their key functions, but rarely involves the local populations into the procedure of establishment (apart from the case of Switzerland). Only in a few cases, local authorities have to notify these agreements to the higher levels of government for approval or for registration (France, Luxembourg, United Kingdom, Turkey). Further, the areas of

---

610 Congress of Local and Regional Authorities, Recommendation No. 221 (2007), *The institutional framework of intermunicipal co-operation*, 30 May 2007, §§ 11 lett. b) iv-v.

611 *Contra*: T.I. Schmidt, *cit*., 94-100.

612 In this respect, apart from the United Kingdom, no much attention is given by the Congress to how IMC really works in country-related reports, which focus rather on the right to association, laid down in Article 10, para. 2..

co-operation are very similar in all countries considered, ranging from water supply and waste to transportation and economic promotion. Finally, inter-municipal cooperation bodies are normally not entitled to raise own taxes (France is an exception), but are very often financed through contributions of their members as well as by State or regional grants.

7.1.2. The Right to Enter Interterritorial Cooperation Agreements

Article 10.3. *Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States.*

Following to Article 10, para. 3 inter-municipal co-operation does not necessarily have to fit within the boundaries of the State, but shall be permitted also between local authorities of different countries, not necessarily in a transfrontier context and not necessarily between local authorities of member States of the Council of Europe. Co-operation arrangements envisaged by paragraph 3 can however not amount to the establishment of transnational federations or consortia of territorial authorities. As Schmidt points out, paragraph 3 allows local authorities to "co-operate", but does not explicitly mentions the power to institutionalize this co-operation through the creation of consortia, as enshrined in Article 10, para. 1, second alternative, thus being the only type of cooperation covered the one provided by Article 10, para. 1, first alternative.[613] That paragraph 3 is a specification of Article 10, para. 1, first alternative is further confirmed by the fact that co-operation arrangements of this sort might (but must not!) take place within the framework of the law. In other words, the domestic legal order might allow for direct co-operation with territorial authorities of other States without a prior set of legal rules by higher level authorities. Hence, Article 10, para. 3 provides for a general guarantee on international cooperation ranging from cross-border cooperation to development or decentralised cooperation, including town partnerships or twinnings and any other sort of concerted action between local authorities of different countries.

As the Explanatory Report recalls: «*The provisions of the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (21 May 1980, ETS No. 106) are particularly relevant in this respect».*[614] This international treaty, largely non-self-

---

613 T. I. Schmidt, *cit*., 102. The international treaty dealing with the setting up of co-operation bodies endowed with mandatory legal personality (Euro-regional co-operation grouping - ECG) is in fact 2009 Protocol No. 3 to the Outline Convention on Transfrontier Co-operation, entered into force in 2013. However, only Cyprus, France, Germany, Slovenia, Switzerland and Ukraine have ratified it sofar.

614 The Madrid Convention fostered the conclusion of a rather limited amount of multilateral treaties on crossborder co-operation in the years therefter, including the "Benelux Convention" between the Netherlands, Belgium and Luxembourg (1986) and the "Isselburg-Anholt Agreement" between Germany and the Netherlands (1991). On the vagueness of these provisions see: N. Levrat, *The European Grouping of Territorial Cooperation*, Study carried out for

executing,[615] was aimed at facilitating and fostering a particular kind of inter-territorial cooperation, that is to say cross-border cooperation, in the member States of the Council of Europe and provided local and regional authorities with the instruments, as well as with five appropriate models for cooperation (so-called "umbrella agreements"). The establishment of a link between the Charter and the Outline Convention is quite significant for a further reason: those member States which have ratified both treaties, i.e. thirty-eight countries,[616] are allowed to set limitations to crossborder activities of local authorities, as permitted by Article 10, para. 3, only insofar as they ensure compliance with the principles laid down in the Outline Convention.[617]

The Outline Convention, though, did not recognize a right of territorial authorities to conclude agreements or arrangements of co-operation. It can be argued that this happen to be first the case with the approval of the Charter, which supplemented the Outline Convention by recognizing a subjective right of inter-territorial cooperation,[618] not restricted to cross-border areas,[619] even if limited to those local authorities to which the Charter applies pursuant to Article 13.[620] A right to interterritorial cooperation does not make local authorities a full subject of international law with legal capacity, but allows them to conclude agreements under international law within the responsibilities carried out in the domestic legal order.[621] This view is of course very controversial and it was even more controversial at the time of negotiations on the Charter. Unlike constituent parts of federal States (the Austrian and the German *Länder,* the Swiss Cantons, the Belgian Regions), other territorial authorities were deemed not to enjoy at all the treaty making power for regulating public local affairs under international law.[622] Nowadays, one might say that things have sligthly changed, since many sub-national units, in particular those enjoying a special status of

---

the Committee of the Regions, CoR No. 117 (2007), in: www.cor.europa.eu 30-31.

615 So, for instance: N. Ronzitti, *I rapporti transfrontalieri delle regioni*, in: Le Regioni, n. 4/1989, 998-999; M. Frigo, *Dalla Convenzione di Madrid all'Euroregione: prove di integrazione transfrontaliera*, in: L. Daniele (ed.), *cit*., 2005, 698 ff.; M.R. Allegri, *Cooperazione transnazionale tra enti substatali: dalla Convenzione di Madrid al GECT*, in: Le Regioni, n. 2/2009, 207-256.

616 San Marino, Serbia, Malta, the former Yugoslav Republic of Macedonia, United Kingdom, Iceland, Estonia and Andorra have not ratified the Outline Convention yet.

617 This found explicit acknowledgement in the Draft Charter Article 9, para. 3, which stipulated as follows: «*Local authorities shall also be entitled to associate with their counterparts in other countries, as provided for in particular by the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities».*

618 For crossborder co-operation this is now reaffirmed in Art. 1, para. 1 of the Additional Protocol to the Outline Convention of 1995, entered into force on December 1st, 1998 and for inter-territorial co-operation in Art. 2, para. 1 of the Protocol No. 2 to the Outline Convention of 1998, entered into force on February 1st, 2001. San Marino, Italy, Liechtenstein, Serbia, Malta, Poland, Spain, the former Yugoslav Republic of Macedonia, Turkey, United Kingdom, Iceland, Estonia, Croatia, the Czech Republic, Denmark, Finland, Greece, Hungary, Ireland and the Principality of Andorra have not ratified none of them yet.

619 A right to cross-border cooperation for local authorities is also contained in Art. 1, para.1 of the Additional Protocol to the Outline Convention of 1995, but, as showed by Art. 3, it was not self-executing. See: B. Schaffarzik, *cit.*, 475-476; K. Kettwig, *cit*., 86; H. Heberlein, *Grenznachbarschaftliche Zusammenarbeit auf kommunaler Basis*, DÖV, 1996, 107 ff.; M. Kotzur, *Grenznachbarschaftliche Zusammenarbeit in Europa,* Berlin, 2004, 461-462.

620 *Contra* see: N. Levrat, *cit*., CoR No. 117 (2007), in: www.cor.europa.eu 30 and ff.

621 T. I. Schmidt, *op. cit.*, 102.

622 See for instance: M. Bothe, *Rechtsprobleme grenzüberschreitender Planung*, AöR 102 (1977), 68-74.

autonomy,[623] have been accorded powers to conclude agreements, understandings and treaties by domestic law.[624] The question is, though, to what extent one can argue that these agreements are lawful under international law. The dominant position among international legal scholars is that a treaty making capacity of local and regional authorities exists under international law only upon authorization or consent of the State, since it is the only subject bearing ultimately responsibility for their actions under international law.[625] A second requirement is the willingness by potential treaty partners to accept the substate actor as a treaty partner.[626] Thus, provided that international law deduces from domestic law general rules governing agreements between subnational authorities of different States, it comes to the question whether international treaty law, i.e. the Charter, went beyond this practice, setting out a general right to enter international agreements for local authorities.

The answer is no. First of all, the Charter does not provide for a general right in this respect, but only for a right to entering interterritorial cooperation agreements falling within their exclusive competence and which cannot result in the establishment of a consortium with legal capacity. Secondly, the Charter did not lay down a self-executing provision,[627] but only a provision which has to be implemented under domestic law. Nevertheless, this means that, once the Charter has been incorporated into domestic law, a member State will be bound to entitle local authorites with the right to enter agreements directly and in their own name for co-operation in interterritorial matters.[628] Article 10, para. 3 thus contributed to complement the domestic legal orders of those

---

623 This is the case, for instance, of the Farøer Islands and Greenland, endowed by Denmark with the treaty making capacity. Both units are not local authorities under the meaning of Article 3, para. 1 of the Charter. See Declaration by Denmark contained in the instrument of acceptance deposited on 3 February 1988 and further Declaration on 12 October 2007.

624 Some national Constitutions recognize a limited authority to sub-national units to conclude agreements with other States or sub-State entities. This is particular the case of federated States in federal States. In Europe this group includes Germany, Belgium, Switzerland and Austria, but also States comprising Regions or Communities (Italy, Spain). Cf. U. Leonardy, *Treating-Making Powers and Foreign Relations of Federated States*, in: B. Coppieters, D. Darchiashvili and N. Akaba (eds.), *Federal Practice - Exploring Alternatives for Georgia and Abkhazia*, Brussels (VUB University Press) 2000, 151-168.

625 M. Kotzur, *cit*., 467-468; D.B. Hollis, *Why State Consent Still Matters: Non-State Actors, Treaties and the Changing Sources of International Law*, 23 Berkeley Journal of International Law 137 (2005), 146-147; I. Seidl-Hohenfeldern – T. Stein, *Völkerrecht*, 10. ed., 2000, Rn. 234.

626 Agreements of this nature are agreements under international law, insofar as a State accepts the offer to engage in treaty-making with sub-units of another State. Nevertheless, the former often requests the latter to provide guarantees for the fulfillment of the treaty by its sub-unit. So: C. Tomuschat, *Component Territorial Units of States under International Law,* in: L. Daniele (ed.), *Regioni e Autonomie territoriali nel diritto internazionale ed europeo*, Napoli, 2005, 48 and 55; D.B. Hollis, *cit*., 152 and ff..

627 U. Beyerlin, *Rechtsprobleme der lokalen grenzüberschreitenden Zusammenarbeit*, Berlin/Heidelberg, 1988, 136 and 223; K. Kettwig, *Rechtsgrundlagen dezentraler grenzüberschreitender Zusammenarbeit im deutsch-polnischen und deutsch-tschechischen Grenzraum*, Frankfurt am Main, 1994, 88 and 107; J. Wohlfarth, *Neue Gesetze zur kommunalen grenzuberschreitenden Zusammenarbeit in Frankreich und im Saarland*, NvwZ 1994, 1074; S. Raich, *Grenzüberschreitende und interregionale Zusammenarbeit in einem Europa der Regionen,* Baden-Baden, 1994, 39. *Contra*: B. Schaffarzik, *cit*., 474 and F. Paul, *Partnerschaften*, 121 ff. and Congress of Local and Regional Authorities, *Reservations and Declarations to the European Charter of Local Self-Government*, 18 October 2011.

628 Since 2006 in the European Union subnational entities can also establish so-called EGTC (European Grouping of Territorial Co-operation). See: D. Strazzari, *Harmonizing Trends vs Domestic Regulatory Frameworks: Looking for the*

countries in which local authorities' right to enter agreements had not been recognized yet.

It remains to be seen, from a comparative perspective, where compliance with this provision has been ensured and where has not occured yet. According to the Committee of Local and Regional Democracy of the Council of Europe (CDLR), which published a study on intermunicipal co-operation in 2007, transnational co-operation is frequently not institutionalised, whereas only in old Europe member States, including Belgium, France, Spain, Austria, Portugal, Luxembourg, Sweden and the Netherlands, legislation laid down more integrated models and even treaties forming the basis for administrative agreements were signed. In other countries, legislation does not allow for interterritorial cooperation arrangements setting up new legal entities, but only for twinnings or more simple schemes of decentralised co-operation (Czech Republic, Bulgaria, Slovakia, Norway).[629] Finally, five countries (Georgia, Liechtenstein, Armenia, Azerbaijan, Turkey) opted out Article 10, para. 3 apparently on grounds of difficult diplomatic relations with their neighbouring States. As a conclusion, it might be said that, with reference to transfrontier and inter-territorial co-operation, one can still perceive the cleavage existing between old Europe member States and Central and Eastern Europe countries, even if relevant progress has been recently made also in some regions of the Baltic States and across the borders of Romania, Poland and Ukraine.[630]

7.2. Association as a Freedom under the Charter but not under the ECHR

Article 10.2 *The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State.*

Article 10, para. 2 of the Charter deals with a guarantee which, only in a broad sense, can be said to supplement the guarantees laid down in Article 10, para. 1 and 3 and that should be rather viewed as a corollary of the legal personality of local authorities.

In fact, paragraph 2 is primarily concerned with local authorities' establishment of, accession to or continued membership in national or subnational associations engaged into activities aimed at protecting and promoting their rights towards central or regional authorities and, if necessary, even before courts (sentence 1).[631] This means that local authorities could bring lawsuits against their

---

European Law on Cross-Border Cooperation, European Journal of Legal Studies 4 (2011), 151-203.

629 CDLR, *Good Practices in Inter-municipal Co-operation in Europe. The situation in 2007*, § 2.1.2.

630 As pointed out by Scott back in 2005, old Europe member States appears to develop crossborder cooperation for the sake of removing barriers and sorting out problems affecting the population of border regions, whereas new Central and East Europe democracies followed a top-down approach, strenghening crossborder co-operation for avoiding regional marginalization. Cf. J. Scott, *Transnational Regionalism; Strategic Geopolitics, and European Integration: The Case of the Baltic Sea Region*, in: H. Nicol and I. Townsend-Gault (eds.), *Holding the Line: Borders in a Global World*, Vancouver, 2005.

631 A combined reading of Articles 10 and 11 of the Charter allowed the Congress to recommend Lithuanian

unmotivated exclusion from national or subnational associations by the State, as well as against the unmotivated dissolution of the association itself. Further, paragraph 2 deals with associations established at international level to which local authorites should be allowed to freely apply for membership (sentence 2). Finally, Article 10, para. 2 also protects the negative right to free association, whereby local authorities should be free to decide not to become member of any national or subnational association representing their interests.

Article 10, para. 2 does not address the question of the private legal nature of local authorities' associations, but it appears from a systematic reading of the Charter that it implicitly recognizes that national associations of local authorities can be established according to the most different legal patterns, the only important thing being their true capability to represent local authorities' common interests at regional or national level.

Even if not explicitly mentioned in Article 10, para. 2, sentence 2, associations established at international level - such as the International Union of Local Authorities (IULA) now United Cities Local Governments (UCLG), the Council of European Municipalities and Regions (CEMR), which has represented IULA's, then UCLG's European section since 1991, the Conference of Eastern European Partnership of Local and Regional Authorities (CORLEAP) etc. - should be expected to pursue the same goal of promotion and protection of common interests, otherwise it would be difficult to understand what kind of international associations they could belong to; as the Explanatory Report to the Charter clarifies, in fact, «*it is normal that the right to belong to associations at the national level be accompanied by a parallel right to belong to international associations*».[632] It can however be theoretically imagined that local authorities could belong to international associations having different purposes from that of promoting or protecting local self-government.[633] Several international associations of local authorites, in fact, aim only in a very broad sense at ensuring protection for their members' self-government rights. Rarely they engage in confrontations with national governments or international organisations because of specific violations of local self-government, whereas they are very often engaged in carrying out projects of development co-operation or in seeking idealistic goals, such as the friendship among the nations or the European unity. Many Council of Europe member States fear that some of these international activities might impair on competences reserved to national authorities (such as foreign and defense policy) and, more generally, might contradict the general interest under domestic law. That is probably why, during negotiations on the Charter, the Swiss delegation stated that «*this right could*

---

authorities to give the National Association of Local Authorities appropriate standing before national courts. Cf. Congress of Local and Regional Authorities, *Local Democracy in Lithuania*, Recommendation No. 321 (2012), CPL (22) 3, § 6 lett. c

632 So also: B. Schaffarzik, *cit*., 548 and B. Weiss, *cit.*, 223.

633 So, for example, M. W. Schneider, *cit*., 331.

not be guaranteed by Switzerland. A municipality may not join an association whose activities endanger public order».[634] However, these concerns were not shared by the majority of other countries, irrespective of their federal (Germany, Belgium, Austria) or unitary (Greece, Poland) system of government. Not caught by this guarantee are quite understandably internal bodies of international organisations, including the Committee of the Regions of the European Union (CoR) or the Congress of Local and Regional Authorities of the Council of Europe itself, both charged with the task, *inter alia*, to promote and protect local authorities interests', since they cannot be qualified as public or private associations.[635]

Even if not immediately aimed at enhancing the powers and responsibilities of local authorities, the right to establish a national or regional association, often allows local authorities to participate in the legislative process at national or regional level or, more in general, to be part of intergovernmental cooperation schemes. This is implied by the Explanatory Report where it states that «*the right to belong to associations of this type does not however imply central government recognition of any individual association as a valid interlocutor»* and it was even more clearly set out in the Explanatory Memorandum to the Draft Charter: «*The role of national associations of local authorities in negotiating with governments on behalf of their members is crucial to ensuring that governments are not in a position of "divide et impera"*»[636]. As the Congress further recognized, even if they do not have to, «*participatory rights of local government associations may extend to the legislative process of the national parliament*»[637].

Finally, it must be borne in mind that, even if the principle according to which local authorities enjoy the right to belong to an association may be regarded as self-executing,[638] «*Article 10.2 leaves to individual member states the choice of means, legislative or otherwise, whereby the principle is given effect»,* that is to say the member States are not prevented to take additional measures, for instance requiring a certain degree of representativity to acknowledge associations as official representative bodies. As assessed by the Congress, however, additional measures shall not impinge on the core of the right of freedom of association itself. In Armenia, for example, local authorities do not enjoy at all the right to belong to international associations, whereas in Azerbaijan local

634 Conference of Local and Regional Authorities of Europe, RM-SL (83) 26 rev, 32.

635 B. Schaffarzik, *cit.*, 548 and M. W. Schneider, *cit.*, 332.

636 Draft Explanatory Memorandum, *Harmegnies-Report*, CPL (16) 6,29.

637 In some Council of Europe member States local authorities themselves have the power to initiate the legislative process. This is, for instance, the case for the so-called Parishes of the Principality of Andorra (Article 58 of the Constitution), but also for Constituent Entities or Federal Subjects within the Russian Federation. As set out by Article 104 of the Russian Constitution, the right of legislative initiative shall belong to the President of the Russian Federation, the Council of Federation, members of the Council of Federation, deputies of the State Duma, the Government of the Russian Federation, and also legislative (representative) bodies of constituent entities of the Russian Federation, among which one shall also count the federal cities of Moscow, Saint Petersburg and Sevastopol.

638 So also: Congress of Local and Regional Authorities, *Reservations and declarations to the European Charter of Local Self-Government,* IV § 25 CPL(21)5, 28 September 2011.

authorities are not even allowed to set up national associations representing their interests. Moreover, a small number of countries which have had problems of co-operation with their neighbours, i.e. Croatia, Georgia[639], Greece[640], Liechtenstein and Turkey[641], entered a reservation on Charter Article 10, para. 2 when depositing the instrument of ratification.[642]

In 1998, with specific reference to Croatia, the Congress considered that «s*ome provisions of Section 11 of the Local Administration and Autonomy Act was contrary to the spirit of Article 10 the European Charter of Local Self-Government, […] since they make it impossible in practice to set up a legally recognised association of local authorities if it is composed of fewer than half of the municipalities and towns».* Such a high threshold was considered to discriminate in particular against larger cities, thus impinging on the core of the right of freedom of association. As noted by Burger, Article 115, para. 3 of the Austrian Constitution, however, explicitly provides for a representation of local authorities' interest only by two specific associations, the *Österreichische Gemeindebund* and the *Österreichische Städtebund*. Without constitutional amendment it does not appear possible to set up any other form of official representation of local government interests. In this respect, though, the Congress did not issue any special recommendation.[643] Finally, in its 2007 report on Croatia, the Congress found that, even if the legal threshold was too high, there were several associations of local authorities in Croatia so as that local government interests could be deemed to be effectively represented. One might therefore say the "case-law" of the Congress has changed over time: freedom of association is now considered to be ensured when local authorities' associations are numerically enough for satisfactorily representing their members at national or regional level, even if the threshold for their establishment might be considered as too high.[644]

---

639 Yet, Georgia complies with Article 10, para. 2 of the Charter: «*Local authorities units have the right to establish non-commercial legal entities for the coordination of their activities (…) Non-commercial legal entities are authorised to consult with bodies of the State authorities on behalf of self-governing units, as well as to participate in the process of preliminary discussions and consultations of draft laws in relation with local self-government (…) The National Association of Local Authorities of Georgia, NALAG, was established on the basis of the Organic law. It unites all local self-government units and is actively involved in consultations with governmental organs»,* cit. Congress of Local and Regional Authorities, *Local and regional democracy in Georgia*, §§ 151-152 – CG (24) 10, 19 March 2013.

640 Also Greece complies with Article 10, para. 2 of the Charter, since «*the law provides that associations may be set up to promote co-operation and the representation of local authorities at national and regional level.»,* cit. Congress of Local and Regional Authorities, *Regional democracy in Greece*, § 67 – CPR(15)2REP, 6 May 2008.

641 Following to Law No. 5779 (2008), also Turkey has been complying with Article 10, para. 2 of the Charter. In fact, the law «*provides the statutory basis for the formation of the Union of Turkish Municipalities. This is evidently a flourishing organisation, with all 2947 municipalities as its members, whose aims and activities include the representation and defence of the interests of its members, the scrutiny of laws before and during the parliamentary process, and the training of municipality staff.», cit*. Congress of Local and Regional Authorities, *Local and regional democracy in Turkey*, § 37 – CG (20) 6, 1 March 2011.

642 Congress of Local and Regional Authorities, *Reservations and declarations to the European Charter of Local Self-Government,* IV § 25 CPL(21)5 – 28 September 2011.

643 S. W. Burger, *cit*., 78-79.

644 The same could be said with reference to Slovenia. Cf. Decision of the Constitutional Court of the Republic of Slovenia, U-I-186/00, 21 September 2000, published in UL 100/2000 and Congress of Local and Regional Authorities, Recommendation No. 89 (2001), *on the state of local and regional democracy in Slovenia*, § 4 lett. b). Unlike Croatia, however, the threshold was abolished by the legislature following to the Court's judgement. The outcome was the

In 1998 the Congress further cast doubts as to whether the formerly mentioned «*provision of Croatian law is compatible with Article 11 of the European Convention on Human Rights*»,[645] which protects the freedom of assembly and association. In this respect, however, it must be borne in mind that under Article 34 ECHR the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights of the Convention. Pursuant to the Charter, local authorities are the lowest administrative tier of the State and are considered as integrated within its structures. As such they cannot pretend to be institutions holding fundamental rights *vis-à-vis* the State.[646] Pursuant to the case-law of the Strasbourg Court, yet, also public associations can lodge a complaint based on Article 11 ECHR, but only insofar as they fulfill private objectives.[647] In the present case, local authorities associations are not composed of private individuals and pursue an aim which is at large a general public interest, namely the protection of local self-government. Even if established under private law and even if not vested with neither administrative nor regulatory making powers and not even subject to State control and influence over their aims and organisation, local authorities associations cannot be considered as private-law associations within the meaning of Article 11 ECHR. Instead, one might argue that associations of local authorities can invoke the violation of Article 10, para. 3 of the Charter before national courts.

8. The Right to a Judicial Remedy

Article 11 *Local authorities shall have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of local self-government as are enshrined in the constitution or domestic legislation.*

The Charter adheres to a general common law maxim whereby there is no right without a judicial remedy (*ubi jus, ibi remedium*).[648] Whereas it is true that legal protection alone is not enough, if the guarantee of local self-government is designed as an "empty box" in constitutional or statutory

---

creation of another association, the Association of Urban Municipalities of Slovenia, which currently has a membership of 11 urban municipalities. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Slovenia*, CG (21) 12, 18 October 2011, § 111.

645 See: Congress of Local and Regional Authorities, Recommendation No. 46 (1998) *on the state of local and regional democracy in Croatia*, § 6.11 and the attached Explanatory Memorandum, B § 4 - CG (5) 4 Part II. See also: Committee of Ministers, *Croatia: commitments accepted when becoming a member of the Council of Europe Programmes of assistance and co operation*, CM/Inf(98)18rev2.

646 Cf. ECHR, *Herrmann v. Germany*, 26 Juny 2012, Application No. 9300/07.

647 Cf. ECHR, *Chassagnou and Others v. France*, 29 April 1999, Applications No. 25088/94, 28331/95, 28443/95; ECHR, *Sigurdur A Sigurjonsson v. Iceland,* 30 June 1993, Application No. 16130/90; ECHR, *Affaire Schneider v. Luxembourg,*10 July 2007, Application No. 2113/04.

648 W. Blackstone, *Commentaries on the Laws of England*, ed. with introductions by S.N. Katz., Chicago, 1979, 23.

provisions, by the same token it is true that even if the guarantee of local self-government is clearly defined, without any judicial remedy risks to becoming a blank paper.[649] Since no international court or tribunal was set up to adjudicate upon the Charter's violation, there is no doubt that this provision was aimed at ensuring legal protection of local self-government at domestic level. As known, most rights arising under international law cannot be vindicated by the right holder before an international tribunal unless explicitly foreseen. The aforementioned maxim exists under international law only insofar as it provides for an obligation of the State to grant reparation for the breach. In the present case, international treaty law accords rights to local authorities, local elected representatives and local citizens and provides for a right for local authorities only and not for local elected representatives or citizens to compulsory dispute resolution before a national court.[650]

In this respect, many authors argue that the very fact that judicial protection under Article 11 is afforded only with respect of those powers and responsibilities entrenched in the Constitution or in legislation rules out the Charter's direct enforceability in domestic law. In fact, no obligation of granting the Charter constitutional or ordinary rank in the sources of law exists. Thus, the guarantees established by the Charter cannot themselves be immediately justiciable before the national courts of the Contracting Parties, only those established under domestic law can.[651] Though, it may be also argued that in those legal orders in which the Charter has constitutional rank or in which it was transposed into national legislation and is directly applicable, its guarantees can also be deemed to be enforceable before domestic courts (see *supra* § 2. III).[652]

As part of the legal scolarship holds,[653] Article 11 has not to be regarded as providing for a self-executing norm in the domestic legal orders of the Contracting Parties, since it necessarily requires prior implementation at domestic level. So, even if it clearly stipulates that local authorities should be entitled with a judicial remedy for an effective protection of their rights, it cannot as such be directly invoked before national courts without a prior legislative act under domestic law setting out out modalities and limits of making recourse to it.[654] In fact, granting such a right to local authorities might entail a mandatory constitutional amendment which, in turn, may also bring about a change of the form of government of a member State. Hence, it cannot be that a domestic court,

---

649 See: G. Rolla, *L'autonomia costituzionale delle comunità territoriali. Tendenze e problemi*, in: T. Groppi (ed.), *Principio di autonomia e forma dello Stato*, Torino, 1998, 17 and ff.

650 Here, it can be thus assumed that local authorities are given indirect standing for defending the rights of local communities (Article 5) and of local elected representatives (Article 7), whereas Article 3, para. 2, sentence 1 has to be construed as an institutional right (see supra § 3.I). To the contrary, proceedings initiated as *actio popularis* (popular complaint) are not envisaged (yet neither prohibited) by the Charter.

651 B. Schaffarzik, *cit.*, 551, M.W. Schneider, *cit.*, 333 and C. Himsworth, *Treaty-Making*, *cit*., 6.

652 So also: Congress of Local and Regional Authorities, Recommendation No. 39 (1998) § 7 lett. j); A. Delcamp, *The European Charter of Local Self-Government and its Application. Drafting, Principles, Implementation*, in: Council of Europe, *North/South Local Democracy: The European Charter of Local Self-Government in Action*, Studies and Texts no. 54, Strasbourg, 1997, 17; B. Schaffarzik, *cit.,* 551; I. Grassi, *cit*., 1181-1182; F. Merloni, *cit*., 10 and 17-20.

653 B. Weiss, *cit.*, 226-227.

654 So M.W. Schneider, *cit.*, 330 ff. and B. Weiss, *cit*., 228.

drawing on a provision of an international treaty, allows for such an alteration of the constitutional structures, unless this is explicitly provided by formal constitutional amendment passed by Parliament.[655]

The term "judicial remedy" does not convey any clear idea about the nature of the protection which should be granted to local authorities under domestic law. The term has thus to be construed as requiring each Contracting Party to ensure that local authorities can resort to specific means by which the violation of the rights and principles of local self-government can be vindicated.[656] More precisely, the Explanatory Report to the Charter states that by recourse to a judicial remedy is meant access by a local authority to either *«a properly constituted court of law»* - that is to say a civil law tribunal, but most appropriately, an administrative court and, possibly, where existing, also a constitutional court - or «*an equivalent, independent, statutory body having the power to rule and advise on the ruling respectively, as to whether any action, omission, decision or other administrative act is in accordance with the law».*

In this latter respect, as mentioned with reference to Article 8, supervisory authorities and, more in general State authorities or agencies, should in principle not be empowered with judicial review. This is however often the case when it comes to adjudicate on disputes between local authorities. However, «*the mere fact that the state administration may be neutral (impartial) in a dispute between two local authorities does not transform it into a court or other judicial body (the guarantee of independence is clearly not satisfied)».* The compatibility with the Charter of a judicial remedy different from the typical recourse to a court is assured by the Explanatory Report itself which refers to the legal framework of specific countries where, if a State decision is based on a manifestly incorrect application of the law, «*although administrative decisions are not subject to an ordinary appeal to a court, it is possible to have recourse to an extraordinary remedy called an application for reopening of proceedings»*.

Such judicial remedy implies that local authorities should be put in the condition not only to initiate and be party to a legal proceedings, that is to say to sue and be sued, but also to appeal administrative decisions by State supervisory authorities, a power that did not conform with the tradition of local government existing in some Scandinavian countries, in particular that of Denmark[657], Norway and Sweden[658], whose national delegations during negotiations on the treaty

---

655 So however: Congress of Local and Regional Authorities, Recommendation No. 39 (1998) § 7 lett. b) and, pursuant to his conclusions, so also: B. Schaffarzik, *cit.*, 551-552.

656 This happens to be easier in those domestic legal orders in which local self-government is conceived as a subjective right. Cf. T. Groppi, *cit*., 1035-1036.

657 In Denmark the situation has positively developed so that nowadays «*legal protection of local self-government is generally guaranteed. However, compared with the number of cases where there is a disagreement, it is rare for a*

had unsuccessfully submitted proposals of amendment.[659] They all stated that in their own legal orders local authorities did not have a right of recourse to a special judicial remedy for protection of local self-government rights, but merely a general right to take court action, which is a logical corollary of their legal personality. This right, however, was regarded as being no sufficient guarantee for the purpose of the Charter and the Secretariat proposal to change the Draft Article by including the right to a judicial remedy and the right to take court action as alternatives was eventually rejected. As in fact the Draft Explanatory Memorandum originally reasoned: «*It does not seem possible to ask local authorities in other countries to forgo the inclusion in the Charter of this ultimate safeguard, which in fact gives the principles of local self-government their true force».* The existence of a judicial remedy aims in fact at protecting local authorities when their specific right to local self-government is infringed upon by other State organs, i.e. at any time public authorities of the State adopt decisions allegedly infringing upon local authorities' rights. The mere right to take court action, which is a corollary of the legal personality of local authorities, without the right to appeal decisions by State authorities would have constituted no adequate tool to ensure that the right of local self-government as such is indeed protected.

Even if the observations of the Scandinavian countries were not really taken into account during negotiations on the Draft Charter, Norway, which ratified the Charter on May 26, 1989 without making any reservations or declarations, did not grant local authorities with the right to appeal State administrative decisions requesting a re-examination of a matter.[660] Therefore, in 2006, upon request of the Norwegian delegation, the Congress of Local and Regional Authorities was asked to deliver an opinion on the compliance of Norway with Article 11 of the Charter. Congress Recommendation No. 203 (2006) urged Norway «*to bring its legislation and judicial practice into compliance with Article 11 of the European Charter of Local Self-Government by guaranteeing, in*

---

municipality to bring legal proceedings to enforce its rights vis-à-vis the State». Congress of Local and Regional Authorities, *Local and Regional Democracy in Denmark*, CG (25) 12, 29-31 October 2013, § 130. As confirmed by Greve, «*the Supreme Court's timidity means that local self-government is only protected by the courts in extreme cases, for example when the legislature were to abolish local self-government*». Cf. E. Greve, *Local Government in Denmark*, in A-M. Moreno (ed.), *cit.*, 2012, 153-154.

658 As for Sweden, in 2005 the Congress pointed out that «*there should be a system of redress, referred to in the Constitution, to which local authorities could refer breaches of the principle».* The proposal to establish a Constitutional Court was dismissed, but the parallel proposal to create a parliamentary committee to which local authorities could submit their opinions on legislative proposals which impose an obligation on municipalities or county councils was adopted. In any case, local authorities can turn to the Supreme Administrative Court, when «*they consider that the funding principle has not been adhered to by laws attributing tasks to the local level». See:* Congress of Local and Regional Authorities, Local and Regional Democracy in Sweden, CG(12)7, 31 May-1 June 2005 and CG(26)12, 25-27 March 2014.

659 Conference of Local and Regional Authorities of Europe, RM-SL (83) 26 rev, 35.

660 Congress of Local and Regional Authorities, *Report on the Incorporation of the European Charter of Local Self-Government in the Legal System of Ratifying Countries and Legal Protection of Local Self-Government*, CPL (4) 7 Part II, cit.: «*Attention should be drawn to the 23 April 1993 Judgement of the Supreme Court of Norway in which the local authorities were denied the right to appeal to the courts a decision taken in an administrative review by a state authority in a field which could be viewed as concerning local self-government*».

the domestic legal system, local authorities the right, and the full exercise of that right, to judicial remedies against decisions taken by the state administration».[661] In particular, in the Norwegian domestic legal order, in which the right of local self-government is not directly enshrined in the Constitution, when the State administration acts as a body ruling on an administrative appeal in the exercise of its official powers of supervision over a local authority's decision, a local authority is deemed not to enjoy "own powers" and thus Article 11 does not apply. This interpretation, which was originally supported also by the United Kingdom at the time of the negotiations on the Charter[662], cannot be shared. Article 11 does not refer to a specific type of powers and responsibilities, but to all rights and principles mentioned in the Charter, i.e. own, delegated and shared (see: Article 2 and Article 4, para. 1). As the Congress clarifies, «*the expression "their powers" can under no circumstances be interpreted as restricting the scope of this article solely to the local authorities' own (exclusive) powers. If this were so, in all other situations, local authorities would be deprived of any judicial protection».*[663] Moreover, the Norwegian argument is flawed also because it is deeply illogical: if one question related to local government falls outside the scope of local authorities whenever is subject to review by supervisory authorities, this would mean that local authorities will ultimately have no power at all.

Article 11 should further be read in conjunction together with Article 8. As mentioned above, the Explanatory Report to the Charter stipulates that there should be a judicial remedy against improper exercise of supervision and control by the State. Hence, the Charter attempts at undermining the general principle of administrative law of certain countries whereby «*a lower-level (subordinate) administrative authority may never take judicial action against a higher-tier (hierarchically superior) administrative authority».* This is for instance the case in Norway, where State administration has the last word whenever it is charged with the task to interpret the scope of local authorities' powers and responsibilities. As said, however, the Charter rules out that relationships between local and central authorities shall be understood in a rigid hierarchical way. No margin of appreciation on the part of the Contracting Parties should exist in this respect. The margin of appreciation involves in fact only the procedural arrangements which can be chosen in order to enable local authorities exercising their right to a judicial remedy and not the question whether local authorities should enjoy a real and effective remedy against State administrative decisions. The Norwegian argument whereby no appeal on the part of local authorities can be ensured, otherwise

---

661 Congress of Local and Regional Authorities, Recommendation No. 203 (2006), on compliance of Norwegian legislation with Article 11 of the European Charter of Local Self-Government.

662 Conference of Local and Regional Authorities of Europe, RM-SL (83) 26 rev., 35. The United Kingdom amendment read as follows: «*Local authorities shall have the right of recourse to a judicial remedy in respect of matters where their independence of action has been granted by statute».*

663 Congress of Local and Regional Authorities, Report on Compliance of Norwegian Legislation with Article 11 of the European Charter of Local Self-Government, 13-15 November 2006, § 22.

this would entail a lack of efficiency in the administration and cause a violation of human rights (in particular of the right to be heard in a reasonable time) was rejected by the Congress, which underlined that local self-government is itself a fundamental component of a democratic State, i.e. it is an institutionally guaranteed and thus cannot be entirely outweighed by compliance with human rights, but ought to be balanced with them in the establishment of administrative procedures.

Hence, a restrictive interpretation of Article 11, as favoured by both Norway and the United Kingdom, cannot be deemed to conform with the Charter, which provides for a right of local authorities to initiate legal proceedings as well as to appeal administrative decisions issued by State authorities, in particular by those who carry out supervisory powers either *ex* officio or on referral by individuals or other third parties.[664] At the same time, it can be stated that the Charter does not require the Contracting Parties to provide local authorities with a right to two instances or with a right against unappropriate exercise of jurisdiction by national courts[665]. In sum, a right to a judicial remedy should be granted to local authorities against acts issued by the executive power. Within the framework of judicial review on administrative acts, it might be possible to refer a matter on the constitutionality of a norm (so-called review "incidenter"), although this is not required as a minimum standard neither by the Charter, nor by the Convention.

Limitations to the right to legal protection are certainly possible, since it is not acceptable to interpret the Charter's silence as the will of the Contracting Parties to put under judicial review any kind of official State act.[666] Yet, they must be considered exceptional. In general, the Congress has not developed own criteria to judge upon the legitimacy of these limitations, but explicitly referred to the case-law of the ECtHR on Articles 6 (right to a fair trial) and 13 (right to an effective remedy) ECHR. In general, thus, restrictions cannot concern the very essence of the right to a judicial remedy and they should not be disproportionate.[667] As Schaffarzik recalls,[668] exceptions are allowed when it comes to provide local authorities with the appropriate means to appeal against statutory provisions. In this respect, as it is also the case for Article 13 ECHR, the Charter does not explicitly bind the Contracting Parties to establish specific procedures which allow for a direct access of local authorities to a Supreme or Constitutional Court in order to defend their sphere of autonomy. However, since the Charter envisages restrictions to the right of local self-government by means of statute, it might happen that the legislature violates the limits set to its power. Alleged violations of

---

664 On Norway's unfulfillment of international obligations see also the recent work by S. Stokstad, *Kommunalt selvstyre – kompetansefordelingen mellom Stortinget, statsforvaltningen og kommunene*, University of Oslo – Faculty of Law, 2012. In English see also: *Norwegian municipalities lacking legal safeguards*, University of Oslo – Faculty of Oslo, 11 December 2012, in www.jus.uio.no

665 B. Schaffarzik, *cit.,* 553-554; M.W. Schneider, *cit.*, 334.

666 So also: B. Schaffarzik, *cit.*, 552. *Contra*: M. W. Schneider, *cit.*, 335.

667 Congress of Local and Regional Authorities, *Report on Compliance of Norwegian Legislation*, *cit*., §§ 21 and 28.

668 B. Schaffarzik, *cit.*, 553. So also: B. Weiss, c*it.*, 227.

this nature should therefore also be appealable before a constitutional court, *a fortiori* if the principle of local self-government has been enshrined into the Constitution.

The argument by Schaffarzik whereby Article 2 of the Charter merely allows and does not oblige the Contracting Parties to constitutionalize the principle of local self-government so that the legislature can derogate from it according to the *lex posterior* principle without incurring in any violation, is flawed on two grounds. First of all, Article 2 of the Charter has to be read pursuant to its original intent. As mentioned above (see *supra* § 3.I), the mere possibility to recognize the principle of local self-government by means of statute was allowed in order to take into account the specificity of some legal orders, such as that of the United Kingdom, which does not have a codified Constitution or for which an amendment of the Constitution would have been almost impossible. The expression "where practicable" provides hence for a relationship of rule and exception, whereby the first best should be the enshrinement in the Constitution. Secondly, even if the basic responsibilities of local authorities are laid down in statutory provisions, as allowed by Article 4, para. 1, this does not mean that a subsequent law could derogate from them on the basis of the *lex-posterior* principle. According to the core doctrine, in fact, the essential content of local self-government is a limitation to the legislative power and ought to be protected.

This is the reason why the Congress has over time attempted to interpret Article 11 in combination with Articles 2 and 4, para. 1, thus recommending to implement judicial remedies enabling local authorities to lodge direct constitutional complaints against parliamentary legislation[669] or, at least, legal tools allowing local authorities to preventively influence parliamentary draft decisions allegedly impinging on their rights.[670] From a comparative perspective, one should recall that direct access is granted in many countries, irrespective of their systems of government, but evidently not in those countries where no Constitutional Court exists (Denmark, Finland, Greece, Iceland, Ireland, Norway, the Netherlands,[671] Sweden and the United Kingdom), whereas indirect access to the Court, upon certain conditions, is ensured in Azerbaijan, Bulgaria, France, Italy, Lithuania,

---

669 This interpretation has been followed by the Spanish *Tribunal constitucional* in its Ruling which dates back July 20, 2006 (STC 240/2006) and by the Spanish literature. Cf. *inter alia*: J. Garcìa Roca, *Sobre la posibilidad de configurar una acciòn para la defensa de la autonomia local por sus propios titulares ante el Tribunal constitucional: es factible un conflicto local e indirecto contra leyes?,* in: Aa.Vv., *La defensa de la autonomia local ante el Tribunal constitucional,* Madrid, 1997, 24 and J.M. Castellà Andreu, *La relevancia del tribunal constitucional en la configuraciòn del Estado autonòmico español,* in: E. Bettinelli and F. Rigano (eds.), *La riforma del titolo V della Costituzione e la giurisprudenza costituzionale,* Quaderni del Gruppo di Pisa, Torino, 2004, 583.

670 Congress of Local and Regional Authorities, *Local Democracy in Sweden,* CG (26) 12, 26 March 2014. In particular, Sweden gave the Council of Legislation (*Lagradet*) the mandate to submit opinions on legislative proposals which impose an obligation on municipalities or county councils (Chapter 8 of the Instrument of Government, sections 20-22). Further, local authorities can turn to the Supreme Administrative Court if and when they consider that the funding principle has not been adhered to by laws attributing tasks to the local level.

671 Congress of Local and Regional Authorities, *Local and Regional Democracy in the Netherlands,* CG (26) 7, 26 March 2014, where there is no specific "*locus standi*" for local authorities in the administrative court system, where they could use local autonomy as a legal argument to challenge a measure, decision or regulation approved by the central government.

Luxembourg, Portugal and Romania. Finally, in Georgia, Turkey, Ukraine, Moldova and in the former Yugoslav Republic of Macedonia there is neither a direct, nor an indirect access to the Court.[672] Direct access to the Constitutional Court for violations of the constitutional guarantees of local self-government, however partial it can be, is on the other hand ensured in Albania, Armenia, Austria,[673] Belgium, Bosnia & Herzegovina, the Czech Republic, Croatia, Germany, Latvia, Montenegro, Poland, Serbia, Spain, Switzerland. A specific mention deserves the case of Hungary, where the Congress recently found that Article 11 of the Charter is not complied with, since local authorities are no longer endowed with the constitutional right to lodge complaints before the Constitutional Court. Only Article 5 of the Local Government Law (2011) allows the application by local authorities to the Constitutional Court in case of conflict with another authority concerning their respective responsibilities (*competence conflict*).[674]

§ 4. Conclusion of the *First Chapter*

In this first Chapter it has been attempted to explain what aim did the Charter mean to achieve when it was signed in the 1980s and why it was adopted as an international treaty within the Council of Europe. The historical background helped to grasp the constant tension existing between local self-government as a modern legal principle for structuring the organisation of the State and local self-government as a fundamental right of local communities or populations *vis-à-vis* the State. The Charter came into being at the crossroad between these two sometimes overlapping conceptions of local self-government: on the one hand, the old municipal freedoms and liberties of local communities ideologically opposed to the sovereign powers of the State, on the other hand, the allocation of administrative functions at different layers of government pursuant to different rationals of political economy. The concept of local self-government expressed by the Charter is located someway in the middle and matches with the Schmittian theory of the "institutional guarantee", that is to say a guarantee enshrined in the Constitution aimed at protecting primarily local self-government as such (and not individual local authorities' existence) from unduly interventions by the legislature. In particular, the concept of institutional guarantee is bound up with the idea of "core area", typical of the theory of fundamental rights, whereby local self-government

672 Cf. T. Groppi, *cit.*, in: Le Regioni 1998, 1023 and ff..

673 Congress of Local and Regional Authorities, *Local and Regional Democracy in Austria,* CG (20) 8, 3 March 2011, § 7 lett. k), which requested Austria «*to reconsider the restrictions on the extent of the Charter articles by which Austria is bound with a view to lifting some or all of them. This could be the case for Article 11 of the Charter, which is respected in practice in Austria*».

674 Congress of Local and Regional Authorities, *Local and Regional Democracy in Hungary,* CG (25) 7, 31 October 2013, § 170-173. A similar pattern applies also in Slovenia and Bulgaria.

cannot be restricted to the extent that its essential content is impinged upon.

The core of European local government law is neither the Charter itself nor is fixed in precise legal provisions of the Charter, but it is quite fluid, since both the system of ratification *à la Carte* and the margin of appreciation doctrine allow for differentiated solutions driven by different *raison d'état* under domestic law. Nonetheless, almost all Council of Europe member States ratified those provisions which provide for a legal definition of the concept of local self-government (Article 3, para. 1 and 2 and Article 4, para. 1). Further, like under German law, which construes local self-government as a bundle of powers or *Hoheiten,* for each guarantee of local self-government enshrined from Article 4 to Article 11, the Congress has identified its essential content. Hence, one cannot argue that each guarantee of the Chater is in itself a minimum standard, but rather that each provision has an essential content which ought not to be curtailed. In the last thirty years compliance with these guarantees has been ensured by Council of Europe member States to a different degree, depending on different factors, the most striking of which are the openness to international law of the domestic system (friendly or unfriendly), the internal systems of government (federal or unitary States), the traditions of local government (Western vs. Eastern and Northern vs. Southern Europe) and the size of municipalities (Northern vs. Southern Europe).

In particular, it can be argued that the principle of general competence or universal jurisdiction of local authorities (mainly of municipalities) is dominant throughout Europe and, even where the *ultra-vires* principle applies, it might be assessed a certain trend towards recognition of universal jurisdiction. The basic powers and responsibilities are traditionally rooted into law more than in the Constitution. As for the (vertical) subsidiarity principle, viceversa, it can hardly be considered as a general principle on allocation of powers and responsibilities of the so-called *Greater Europe* yet: only few States, in particular those with a federal structure or those leaning towards a federal form of government, recognise it as a principle enforceable before a national court by local authorities. As to the integrity of administrative functions carried out by local authorities, it seems to be typical of continental Europe and in particular of those systems based on a rigid separation of responsibilities, but unknown elsewhere, in particular in the United Kingdom where the practice of hollowing-out is quite widespread, in particular after the Localism Act (2011) entered into force.

Among the procedural guarantees aimed at protecting local authorities' scope of powers and responsibilities, it should be remembered the duty of the State to consult local authorities in due time and in an appropriate way when their interests are affected by measures to be adopted by higher level public authorities. This principle, ensuing from the notion of loyal co-operation, is not only widespread throughout all domestic legal orders (even if its implementation is ensured to a different extent), but is also recognised at the level of international organisations, including the

Council of Europe and the European Union. The duty to consult, though, rarely amounts to a right of participation or to co-decision, is scarcely institutionalised in Central and Eastern Europe and is traditionally put on equal footing with the right to be heard. The requirement of prior consultation of the local populations before altering local authorities' boundaries is also a general principle of Council of Europe member States, which apply it either engaging the people through binding or consultative referendums or, most often, by hearing the local authorities affected by the change or their associations. Alike, the power of local authorities to shape and adapt their administrative structures, including entering into co-operation agreements with their counterparts for the discharge of administrative functions, is generally recognised in the member States, even if the normative power to issue rules of general nature without being previously allowed to do so by the State remains an exception to the rule, whereby local authorities are traditionally endowed with limited regulatory powers of administrative nature for the discharge of responsibilities attributed to them.

Duties implying a financial contribution for the member State, such as the duty to ensure that local authorities are able to recruit and mantain a staff whose quality corresponds to their responsibilities and the duty to grant local representatives with a fair remuneration, are contained in those provisions which were mostly opted out by member States. Further, as to administrative supervision, one might assess a trend towards compliance with the rule whereby supervision should be confined to questions of legality, being expediency controls rather the exception to the rule. Finally, Council of Europe member States recognize in principle that without adequate financial resources local authorities cannot exercise their right to local self-government. Though, no shared legal standard exists as to the amount of own resources local authorities should dispose of. Alike, the principle of concomitant financing, which requires mandatory compensation for new tasks, is vaguely recognised in Western Europe (mostly in federal or regional States) and almost unknown in Eastern Europe. Further, shared tax revenues, a high dependence on transfers and a limited power to fix rates of shared or of genuine local taxes are the average rule in most countries irrespective of the system of government. Equalisation procedures are typical of federal States and quite common also in Scandinavian countries, whereas they lack in Central and Eastern Europe countries. As for the practice of borrowing money from financial markets, in most Council of Europe member States taking out loans is permitted normally for investment purposes only, but local authorities rarely enjoy completely free access to national capital markets, more often they rely on *ad hoc* public agencies. Last, almost all Council of Europe acknowledge a right to a judicial remedy for local authorities, mostly of administrative nature, but not in the terms required by the Charter, whereby local authorities should be in the condition to defend their right of local self-government, by initiating legal proceedings and by appealing courts' rulings, as well as by lodging a complaint before a constitutional court, where existing.

The essential content of each guarantee of the Charter, however, is not fixed once and forever. The Charter has been treated as a "living instrument" of regional international law. This expression reminds of that used by the Strasbourg Court with reference to the European Convention on Human Rights. In a famous ruling (*Tyrer v. United Kingdom* - 1978) the Court in fact described the Convention as «*a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it, the Court cannot but be influenced by the developments and commonly accepted standards»* in the member States.[675] Even if the Charter was rather thought as a tool for listing a definite set of standards, in its monitoring activities, the Congress of Local and Regional Authorities has been taking into consideration present day standards common or shared between Council of Europe member States, rather than inquiring the original intent of some Charter's provisions. This approach was confirmed by the Congress itself on occasion of the 20th anniversary from the adoption of the Charter. In Resolution No. 195 (2005), in fact, the Congress defined its authoritative interpretation «*an ongoing process»* which «*must aim to meet the challenges linked to developing local self-government».* This recognition implies that there is no fixed nucleus of guarantees of local self-government. The content of the guarantees of local self-government as laid down in the Charter will continue to evolve and the Congress ought to take these evolutions into consideration insofar as they represent a counterweight to the appeal of a State to its margin of appreciation[676] or when it comes to interpret vague or obscure provisions of the Charter.

In a considerable number of general reports the Congress indeed referred to the present standards shared by the member States of the Council of Europe (e.g.: the relationship between the deliberative and executive body; the dissolution of local councils and the dismissal of the mayor), yet it can be doubted that the Council of Europe has grasped all relevant evolutions in European local government law or that it has made clear what evolution towards either differentiation or convergence each guarantee of local self-government embedded in the Charter has been undergoing in the last thirty years. This has mainly to do with the circumstance that the Congress monitoring activity has been to a great extent confined to a country-by-case activity, whereas a real "case-law" as well as a general practice of transnational and comparative reports on single issues or provisions have become less frequent in the past five years. Hence, if the practice to treat the Charter as a living instrument should be preserved, country by country reports have to follow a less mechanical and repetitive approach; to the contrary, the assessments of the Congress ought to contain also comparative remarks pointing out whether the standards followed by the country under monitoring

---

675 On the ECHR and the living instrument argument see: G. Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in: G. Follesdal, A. Ulfstein and B. Peters (eds.) *Constituting Europe: the European Court of Human Rights in a National, European and Global Context,*Cambridge, 2013, 106-141.

676 So also B. Schaffarzik, *cit*., 324-325.

match or not with the standards adopted in other countries, i.e. with the European common standard reached at that point.

Another question is whether the Congress monitoring activities have brought about changes in the domestic legal orders of the member States. Except for the fact that many Constitutions in Central and Eastern Europe were written with the help of the Council of Europe experts, including those of the Congress, it is extremely difficult to prove whether soft law has caused a corresponding change in the domestic law of the member States, i.e. whether is efficient or not. As the literature on monitoring mechanisms of international organisations points out,[677] to prove a causal relationship between soft law and domestic reforms does not either make sense. Soft law is in fact based on different premises than hard law. It aims at persuading the Contracting Parties to a treaty through dialogue and co-operation and not at enforcing treaty's provisions through judicial or para-judicial action. Once national authorities of the member States are persuaded of a certain interpretation or solution, they will resort to Congress soft law for construing domestic local government law accordingly.[678] An interpretation of the Charter based on the Congress soft law might thus result in judicial authorities of the member States setting aside domestic provisions deemed to be in contradiction with the Charter or in the inapplicability of domestic law in a specific case or even, depending on how it was incorporated in the internal legal order, to a referral to the Constitutional Court, where existing, to determine whether a violation of the Charter has occurred. This development depends of course on the credibility and on the visibility of the solutions proposed by the Congress.

The monitoring practice of the Congress has been mixing up elements of harmonisation, consideration for territorial differences and exchange of "good practices" between member States. In other words, on certain topics it appears that the Congress aims at imposing a certain interpretation of the Charter (e.g.: administrative supervision shall as a rule be limited to the lawfulness; executive bodies cannot be accountable before State organs; local authorities shall have a judicial remedy against decisions by supervisory authorities), whereas on others it favours a more flexible compromise on compliance with the treaty obligations (e.g.: indirect election is allowed for transitional periods and freedom of association is respected when the number of associations is considered to be enough for representing local authoritie's interests) so that it appears not always

---

677 Cf. V. A. Leary, *Lessons from the Experience of the International Labour Organisation*, in P. Alston (ed.), *The United Nations and Human Rights. A Critical Appraisal*, Oxford, 1992, 595; G. De Beco, *A Comparative Analysis of European Human Rights Monitoring Mechanisms*, in: G. De Beco (ed.), *cit.*, 181, whereby «*it is impossibile to attribute improvements in the human rights situation of the member States to one or more of the European human rights monitoring mechanisms*».

678 So also: D. Schefold, *cit.*, 1071-1073. In the literature there is already some evidence that central authorities of some member States, in particular of Central and Eastern Europe countries, explicitly endorse monitoring reports by the Congress. Cf. S. W. Burger, *cit*., 82.

easy to state whether a violation of the Charter has occured or not. In general, it might be said that the interpretation of the Charter by the Congress is consistent, in the sense that precedents, even if not explicitly mentioned, are normally taken into account, but sometimes politically oriented interpretations risk to flaw the soundness of the legal reasoning of reports. This is however an inevitable aspect of a monitoring procedure that, unlike the collective complaint procedure for the European Social Charter (ESC), combines political and legal reasoning. Even if the technical and legal expertise of lawyers within the Group of Independent Experts (GIE) is expected to ensure the legal correctness and consistency of the Congress reports, reports often end up being politically selective, given the complexity of the national interests at stake. Nevertheless, one cannot deny that the monitoring activities of the Congress have greatly contributed to strenghtening the idea of a common European local government law[679] and in particular, on the one hand, to clarify and specify the content of the Charter's provisions, thus achieving a certain stability as to their actual meaning and, to the other hand, to re-interpret the Charter's provisions in the light of the new problems, especially of financial nature, which local authorities across Europe have been facing in the past ten years.

The "ageing" of the Charter has been counterbalanced by many recommendations of the Congress which have inferred from it new principles or adapted the old ones to new circumstances. Back in 2007, a revision of the Charter was (unsuccessfully) put up on the agenda. An Additional Protocol adopted with Congress recommendation was meant to be the basis for a new text aimed at fixing and precising in treaty law all the main principles inferred from the Charter over time by Congress "case-law".[680]

Prima facie, in fact, the Charter does not take into account issues which deserve to be mentioned, that is to say whether and if so to what extent local authorities have the right to a name and to a own badge or emblem (so-called personality rights), whether they shall present a balanced budget and whether they can file for bankruptcy, to what extent local authorities shall be entitled to acquire and make use of their property and estate, to what extent and how public services shall be delivered by local authorities, what principles shall govern the relationship between local authorities of different levels, what rights could local citizens claim against local authorities, the manner in which local authorities will be represented at the centre and, conversely, what duties shall be imposed upon them, on which conditions could local authorities' be held responsible instead of their States under

---

679 So already in 2001 M. Kotzur, *Föderalisierung, Regionalisierung und Kommunalisierung als Strukturprinzipien des europäischen Verfassungsraumes,* in: P. Häberle (ed.), *Jahrbuch des Öffentlichen Rechts der Gegenwart*, 2002, 271.

680 The original idea by the Group of Independent Experts (GIE) was to use the enhanced and updated Charter as an additional soft-law document by which the Congress should have checked member States abidance. See in this respect: F. Merloni, *cit.*, 51-52.

international law.

However, a closer look at the questions issued hereabove shows that an answer can be given in the light of the Charter itself. In fact, the right to a name and to a own badge or emblem can be derived from the legal personality of local authorities, whereas the procedure for changing names of local authorities shall follow the procedure laid down in Article 5 for the modifications of their boundaries. This practice, supported by comparative legal evidence in the member States which first signed the Charter, can be best explained by referring to the fact that both the change of borders and of names impinge on the identity of the local authority. As for the balanced budget rule, it is true that the Charter lacks a specific rule in this respect, but the national economic policy clause appears to allow it. The same could be said for bankruptcy, even if the requirement to provide local authorities with adequate financial equipment might also be construed as an implied prohibition to allow them to file for bankruptcy as private companies do. As to municipal property, a specific report by the Congress[681] as well as the Draft Additional Protocol[682] have showed that its protection can be justified in light of Charter's principles and in particular of the principle of own revenues read together with the general definition of local self-government. As for local public services, the Charter lays down a provision which might be interpreted as requiring that internal administrative structures of local authorities shall always be used so as to meet local needs and ensure effective management of certain administrative functions, thus implying that not all local utilities can be privatised. As for the relationship between local authorities of different nature, the principle of subsidiarity even if applying only to the relations between local authorities and higher local authorities can be reasonably deemed to have a third-party-effect (so-called *Drittwirkung*). Inter-governmental relationships between local authorities and the State can be said to be covered by the Charter's provisions on consultation and cooperation, whereas the rights of local citizens to participate in the conduct of public affairs received further attention in the Additional Protocol and can be best combined with the fundamental rights and freedoms laid down in the European Convention on Human Rights and with the European Social Charter.

In spite of its alleged linguistic generality and vagueness, if read together with its monitoring practice and with other Council of Europe treaties, the system of the Charter ought therefore to be regarded as a complete reference framework for both designing a new local government system

---

681 Congress of Local and Regional Authorities, Recommendation No. 132 (2003), *on municipal property in the light of the principles of the Charter*.

682 See Article 6 Draft Additional Protocol, whereby: «1) *Local authorities shall be entitled to acquire and utilise property, including the right to transfer ownership or management thereof to intermunicipal co-operation structures, public services or other bodies, in the exercise of their responsibilities in the public interest and within the limits of the law;* 2) *So far as permitted by the law, compulsory purchase of local government assets shall be carried out solely for the benefit of the public and in exchange for fair compensation».*

from the start and for measuring the degree of local autonomy across Europe, in particular in a time in which austerity measures as well as progressive European integration appear to restrict it to the extent to even endanger its existence.

Second Chapter

The German Local Self-Administration as a "Leading Model"

§ 1. A Brief History of German Local Self-Administration

I. Medieval Town Law as the Basis for a Narrative of *Selbstverwaltung*

At the beginning of the first Chapter it has been mentioned that, between the eleventh and the twelfth century, many European towns obtained from sovereigns, lords and religious rulers so-called charters endowing them with special rights and liberties. The Holy Roman Empire and, later on, the Holy Roman Empire of the German Nation were no exception to this phenomenon. To the contrary, within the Empire, one might have discovered the first traces of that municipal freedom which influenced the concept of local self-administration many centuries thereafter.[683] As the German administrative lawyer Franz Mayer vividly pointed out: *«The institution of self-administration has evolved historically»,* it did not come out of the blue in the twentieth century.[684]

The medieval town was the place where local government law first flourished (*Stadtrecht*).[685] In particular, the first town privileges granting autonomy were given by regional rulers (*Landesherren*) when Germans began establishing towns in the today area of North-Rhine Westphalia and Lower-Saxony. For instance, the town law of Soest (*Soester Stadtrecht*) developed between 1130 and 1150, serving as a model for more than sixty other towns, including Münster and Bielefeld. Privileges of different nature were contained in charters, which regulated the internal autonomy of the town, addressing constitutional and administrative questions as well as problems concerning private, criminal and procedural law. In modern terms, one could say that medieval towns performed their

683

To be more precise, handbooks on German local government law often refer to the theory by Friedrich von Savigny whereby municipal liberties of the Middle Ages roots back to the Roman Empire. Cf. M. Burgi, *cit*., 20 and for an overview on this theory: E. Mayer*, Italienische Verfassungsgeschichte von der Gotenzeit bis zur Zunftherrschaft,* Leipzig, 1909 and F. von Savigny, *Geschichte des Römischen Rechts im Mittealter*, Heidelberg, 1834.

684 F. Mayer, *Allgemeines Verwaltungsrecht*, 4th. ed., 1977, 62. Cf also: J.C. Pielow, *Grundstrukturen öffentlicher Versorgung,* Tübingen, 2001, 250.

685 U. Eisenhardt, *Deutsche Rechtsgeschichte*, 5th. ed., München, 2008, 53-56.

tasks according to a sort of general competence principle or universal jurisdiction.[686]

But the town laws developed greatly starting from the twelfth and thirteenth century when the so-called colonisation eastward (*Ostsiedlung*) began and new towns were founded. In general, the charters or town laws were modelled on the example of Cologne in the western part of Germany, of Lübeck in the northern part, of Magdeburg in the eastern part and either of Nuremberg or Vienna in the southern part. Whereas some German towns were endowed with a limited amount of privileges, others acquired a fully-fledged autonomy (e.g. the so-called Hanseatic cities). In particular, one has to bear in mind the "free imperial cities", that is to say cities which managed to free from the regional rulers and to gain considerable autonomy. Though it did not attain the formal status of free imperial city until 1475, one has to recall the example of Cologne where its political structure was established in 1396, when 22 corporations (*Gaffeln*), comprised of craft and merchant guilds, overthrew the patrician rule and drafted a new city-constitution (*Verbundbrief*). The corporations elected representatives to the council, and two mayors were elected for a staggered term. This "constitutional" process marked a very important step towards the development of local autonomy in a modern sense. Yet, even free cities were never totally independent, but rather united in leagues and alliances and subject to the Emperor. Princes and free cities were partners with equal rights before the Emperor. And town law was not the only law to be complied with by citizens and inhabitants of the cities, but a part of the overall legal system. At least since 1232, when the "Statute in Favour of the Princes" (*Statutum in Favorem Principum*) was adopted and the territorial princes gained more power, the town laws developed along a truly confederal structure, a feature that might be compared with the today's municipal codes of the federated States within Germany.

Impressed by the degree of autonomy and co-operative association of many of these self-governing communities and influenced by the narrative of municipal freedom developed in the nineteenth century, some legal scholars argued that local government law of nowadays would still be a sort of medieval law integrated in the modern State.[687] Starting in the fifteenth century, town laws were increasingly modified with elements of Roman and Canon law (so-called "legal reformations" or *Stadtrechtsreformationen*) and ultimately, with the end of the Thirty Years' War (1618-1648), towns and cities began loosing power and ended up being deprived of their rights by absolutist regimes. With the end of the Holy Roman Empire of the German Nation in 1806, all of the 51 imperial free cities were integrated by the princes into their territory, whereas only Frankfurt, Bremen, Hamburg, Lübeck survived and became themselves "city-states".

---

686 K. Waechter, *Kommunalrecht*, 2nd. ed., Berlin, 1995, Rn. 43-44.

687 H. Scholler and S. Bross, *Grundzüge des Kommunalrechts in der Bundesrepublik Deutschland*, Heidelberg, 1976.

II. From the Prussian Municipal Code (1808) to the German Basic Law (1949)

A revival of the idea of municipal freedom began in the very same years within the Prussian legal order. In fact, as generally acknowledged in the literature,[688] the very origins of the contemporary conception of German local self-administration root back in the Prussian Municipal Code of November 19, 1808 (*Preußische Städteordnung*) as revised on March 17, 1831, which was adopted by the King Friedrich Wilhelm III as part of a broader package of State reforms inspired by the Prussian Chancellor, Karl August von Hardenberg and by the Prussian Secretary of State, the Baron Friedrich vom Stein. The aim of this code was to reverse a widespread attitude against municipal autonomy typical of absolutism and, relying on the liberal ideas of the French physicist Jacques Turgot and drawing on the French municipal legislation of 1789 as well as on the English model of *self-government*,[689] to increase popular participation in the conduct of public local affairs, in particular strengthening the control of local affairs by the growing *bourgeoisie* (*Bürgertum*).

Pursuant to the principle of universal jurisdicition, municipalities (*Gemeinden*) were recognized as legal entities autonomous from the central State, endowed with the right to take care of all local affairs in the own name and under their own responsibility (§ 108 SO).[690] Municipalities were governed by a representative assembly (*Stadtverordnetenversammlung*) and by an executive body (*Magistrat*). The latter was elected by the former, whereas the former was elected by the people. As of 1831, every Prussian inhabitant - and not only citizens - enjoying a minimum of property, could stand in for election. The assembly, in which also honorary representatives (*Ehrenamtliche Mitglieder*) were due to participate, was given «*unrestricted power to decide on all matters of the commonwealth of the municipality»* and councillors held a free mandate. This right, however, could not be put on equal footing with the medieval "urban sovereignty" (*Stadthoheit*), since, for instance, both control over criminal and civil jurisdiction as well as over police was allocated away from municipalities and conferred upon the State, which however could delegate the police service to the

---

688 At the beginning of the last century some authors contended that the very roots of the modern concept of *Selbstverwaltung* ought not to be searched in the Prussian Municipal Code, but rather in previous legal documents, including the general state laws for the Prussian states of 1794. See: G. von Schmoller, *Deutsches Städtewesen in älterer Zeit,* Leipzig/Berlin, 1922, 231 and ff. and F. Steinbach and E. Becker, *Geschichtliche Grundlagen der kommunalen Selbstverwaltung in Deutschland*, Bonn, 1932, 73 and ff.

689 For an in-depth analysis of Stein political and philosophical thought see: D. Schwab, *Die Selbstverwaltungsidee des Freiherrn vom Stein und ihre geistigen Grundlagen*, Frankfurt, 1971.

690 According to von Unruh the term "Selbstverwaltung" was used first by vom Stein himself. Cf. G-C. von Unruh, *Die kommunale Selbstverwaltung im Grundgesetz und ihr genetisches Modell*, Berlin, 1973, 395 ff. *Contra*: H. Heffter, *Die deutsche Selbstverwaltung im 19. Jahrhundert - Geschichte der Ideen und Institutionen,* 2nd ed., Stuttgart, 1969, 84 and ff. Formally, the term was first used in the Prussian municipal code of 1850 (§ 6). But see also Article 5 of the annex regulations to the Ancient Municipal Constitution of the free city of Frankfurt (1816).

town. In this respect, the traditional division between own and delegated responsibilites of municipalities followed the French girondinist model of *pouvoir municipal* and is still common nowadays. The same might be said with reference to the current use of the term of *Gemeindehoheiten*, which refers to the main powers which contribute to the definition of the guarantee of local self-administration under German constitutional law.

Though, even if returned with many powers they lost under absolutism, municipalities under the Prussian Empire were set many limits by means of law, they were mandatorily required by the central government to provide a number of public services, to record State taxes and they were generally considered as units of the State or their lower branches, which underwent strict supervision by the central government.[691] Finally, counties (*Kreise*) were first recognised as autonomous entities within the State machinery with enactment of the Prussian County Code of 1874. In general terms, as it is the case of the Italian provinces, their status as local authorities is in fact much younger than that of municipalities. Even if their origins might be traced in the Middle Ages and in particular in the so-called *Vogteien* (bailiwicks) controlled by territorial lords and princes (*Landesherren*),[692] they were established as local authorities in most German States in the nineteenth century modelled on the Prussian scheme. They were conceived as administrative units for ensuring popular participation also in rural areas smaller than regions. They gained more powers and responsibilities first after the World War II.[693]

The Prussian Municipal Code was rapidly imitated by other enlighted reformers in the neighbouring States within the German Confederation (*Deutscher Bund*), including Baden, Nassau and Württemberg, thus ushering a multitude of different municipal regulations which became the distinctive mark of German subnational constitutionalism. Every effort to overcome this normative differentiation and build up a unified local government code failed. In particular, in the nineteenth century, the forms of local government were modelled on either monocratic or collegial political bodies, whereas rural and urban local authorities were object of either different or uniform regulations depending on the legal order.[694] Analogous municipal regulations were approved also beyond the German borders in the Netherlands (1824), in Belgium (1830), in France (1831), in many Swiss Cantons, as well as in the Scandinavian countries all along the nineteenth century. The

---

691 U. Eisenhardt, *cit*., 292-295; M. Burgi, *cit*., 21; O. Goennenwein, *Gemeinderecht*, Tübingen, 1963, Rn. 12 ff.

692 On the origins of the counties in the German domestic legal order see *inter alia*: F-A. Baumann, *Die allgemeine untere staatliche Verwaltungsbehörde im Landkreis*, Berlin, 1967, 11 ff.

693 So: K. Waechter, *cit*., Rn. 170.

694 G-C. von Unruh, *Ursprung und Entwicklung der kommunalen Selbstverwaltung im frühkonstitutionellen Zeitalter*, in: G. Püttner and T. Mann (eds.), *Handbuch der kommunalen Wissenschaft und Praxis,* Bd. I, Berlino, 2007, 69.

idea of self-administration as a sort of individual liberty of municipalities (*Gemeindefreiheit*) which ought to be defended *vis-à-vis* the State, yet always within it,[695] was exalted by classical liberal élites during the March Revolution (1848).[696] In the nineteenth century, in fact, whereas the state and its beuraucracy remained in the hands of semi-authoritarian rulers, the local level was left to the entrepreneurial and property-owning *bourgeoisie* which contributed to developing a narrative of municipal freedom building on the old medieval traditions of the town-laws as well as on the ancient ideal of the autonomy of the Greek *polis*. In 1849, the St. Paul's Church Constitution (so-called *Paulskirchenverfassung*), a draft constitutional text which never entered into force, contained a remarkable provision (§ 184) which first defined local self-administration as a fundamental right of municipalities and not as a mere principle on structuring the organisation of the State. This categorisation entailed a non-negligible legal implication, that is to say, alike individuals (§ 126, lett. g), also municipalities could have lodged a complaint for vindicating a violation of their rights before the *Reichsgericht*.[697]

Whereas the Constitution of the German Empire of 1871 (*Reichsverfassung*) did not even mention the right to local self-administration, in 1919, the Weimar Constitution conceived the new Republic as a decentralised unitary State and recognised in Article 127 the right to local self-administration of both municipalities and joint local authorities within the limits of the law. This provision, which happened to be located in the second section of the second chapter of the Constitution, entitled "fundamental rights and fundamental duties of Germans", was construed as an "institutional guarantee" and could not be defended like a fundamental right before the Constitutional Court (see *infra*). The *Länder* were further assigned with the competence to regulate local government so that the various municipal codes of the past survived. Concomitanly, electoral suffrage at local level was acknowledged to all male and female citizens (Article 17, para. 2 WRV). Local self-administration was finally bound up with local democracy even more tight than it was the case pursuant to the Prussian Municipal Code of 1850, where plutocratic restrictions to the universality of vote remained present and where honorary offices were a distinguishing mark. Across the nineteenth and twentieth century, in fact, municipalities had rapidly gained new powers and were given additional responsibilities by the State, in particular in the city planning and social field, subject-matters which the dominant *bourgeoisie* refrained to deal with until the State imposed upon municipalities specific

---

695 German theorists of local self-administration never conceived it beyond the categories of the State. Cf. F. Rugge, *Metamorfosi di una nozione costituzionale nella Germania contemporanea,* in: P. Schera (ed.), *Le autonomie e l'Europa. Profili storici e comparati*, Bologna, 1993.

696 P.A. Pfizer, *Autonomie*, in: K. Von Rotteck and K. Welcker (eds.), *Staatslexikon*, Bd. 5, Leipzig, 1864, 476 and ff.

697 See in this respect also § 21 of the the so-called liberal contitution for the Kingdom of Bavaria of May 26, 1818 (*Verfassungsurkunde für das Königreich Bayern*), whereby: «*Jeder einzelne Staatsbürger, so wie jede Gemeinde kann Beschwerden über Verletzung der constitutionellen Rechte an die Stände-Versammlung».*

tasks for addressing welfare and economic issues.[698] In this period, also, the concept of local self-administration evolved and its classical liberal connotation progressively waned. In particular, the integration of decentralised local self-government into the state so as to overcome the division between state and society[699] lost its political and conceptual importance. From a fundamental right, local self-administration became a form of indirect State administration (*mittelbare Staatsverwaltung*) exercised by State administrative units, a concept which is still used nowadays for designating it and which roots back to the conceptions of Paul Laband and Otto von Gierke, which regarded the term autonomy as not suited for the role played by municipalities, since they did not enjoy normative powers (*Selbstgesetzgebungsrecht*).

In the wake of the financial and economic crisis of the 1920s, local authorities began loosing many of their powers. In particular, a fiscal reform deprived them of their taxing powers, that is to say the surtax on the income tax: local authorities had to cope with reduced revenues and with a wide scope of costly responsibilities. Conflicts with the central government due to budgetary problems led the Prussian government to eventually put local authorities under the administration of external commissioners in January 1933. Local self-administration had become a discredited institution, which again deserved to be conceived as an unpolitical form of State administration. After the seizure of power by Adolf Hilter in March 1933, the municipalities were subdued in the wake of the so-called *Gleichschaltung* or synchronisation with the dictatorial *Führer* principle. A unified German municipal code (DGO) was enacted as of 1935,[700] whereby no free election of local authorities' deliberative bodies ought to take place. The mayor was appointed by the State and supported by a provincial governor (so-called *Gauleiter*), who was charged with the task to appoint the members of the municipal council. Even if the Preamble explicitly claimed the code was aimed at restoring good administration and citizenship participation at local level in the spirit of von Stein reforms, the very application of the code departed from the concept of self-government as it had developed until then. To use the expression by Köttgen, local authorities became cells of the totalitarian movement State.[701] After the collapse of Nazi Germany at the end of the World War II, following to the Western Allies' idea of reinstalling decentralised structures from bottom up in the occupied zones (*Besatzungszonen*), local authorities were the first to be restored according to the democratic principle, even before the new *Länder*.[702] In fact, the local institutions which were the

---

698 W. Hofmann, *Die Entwicklung der kommunalen Selbstverwaltung 1848-1918*, in: G. Püttner (ed.), *Handbuch der kommunalen Wissenschaft und Praxis,* Bd. I, Berlin, 1981, 79.

699 This was the nineteenth century conception of Rudolf von Gneist. See: G. Schmidt-Eichstädt, *Staatsverwaltung und Selbstverwaltung bei Rudolf von Gneist,* Die Verwaltung, vol. 3 (1975), 345-362.

700 See: J. Noakes, *Die kommunale Selbstverwaltung im Dritten Reich*, in: A.M. Birke and M. Brechtken (eds.), *Kommunale Selbstverwaltung/Local Self-Government*, 1996, 65 and ff.

701 A. Köttgen, *Sicherung der gemeindlichen Selbstverwaltung,* Münster, 1960, 195.

702 The constitutional roots of the concept of local self-administration may be found in the Preliminary Report of

only administrative units still intact resumed their activities immediately after the armistice and played a crucial role in coping with the unprecedented destruction and misery in the aftermath of the war. The first municipal codes were enacted by the English, French and US military governments of the three occupied zones.[703]

III. The Charter and the Fundamental Contribution of Germany to its Drafting

In the first thirty years since the foundation of the Federal Republic of Germany in 1949, the major issue with which local authorities and in particular municipalities had to deal with was their modest size and the connected structural inefficiency in delivering public services. Most of the boundaries, in fact, dated back to the nineteenth century. Between the 1960s and 1970s,[704] all German *Länder* carried out significant territorial reforms aimed at replacing the outadted boundaried with rationally planned ones.[705] Municipalities were reduced from 24.000 to 8.400; of the existing 425 counties in 1967 only 237 were left ten years later, and towns without county were reduced from 135 to 87. The average population of the municipalities increased from approximately 2500 to 7200 inhabitants and that of the counties from 60.000 to approximately 170.000 inhabitants[706]. From the early 1990s until the beginning of the new century and even later on at the beginning og the twenty-first century, territorial reforms took place also in the so-called *neue Bundesländer*, i.e. the five *Länder* created after the reunification in October 1990. With the 1994 enactment of municipal codes in each new *Land*, the small local authorities of the former centralistic regime of East Germany were little by little turned into autonomous administrative units and the number of municipalities was rapidly reduced.

The aim of these "two waves" of territorial reforms was to enhance administrative efficiency and improve the performance of local government: many municipalities, in particular rural ones, were in fact too small to carry out additional functions, in particular those related to the delivery of public services (*Daseinsvorsorge*). Solutions based on inter-municipal cooperation or spontaneous association of local authorities had mostly failed. Moreover, coordination mechanisms between

---

the US Special Advising Committee for Decentralisation, 23 March 1945, whereby "a minimum of central government is necessary, but federalism and local self-government should be encouraged to a maximum in order to destroy the military potential of Germany and promote democracy", quoted in H. Dreier, *Article 28*, in: H. Dreier (ed.), *Grundgesetz-Kommentar*, 2006, Rn. 19-20.

703 C. Engeli, *Neuanfänge der Selbstverwaltung nach 1945*, in: G. Püttner (ed.), *cit*., 1981, 114.

704 Rhineland-Palatinate (1965-1974), Northern-Rhine-Westphalia (1967-1975), Saar (1970), Schleswig-Holstein (1965-1979), Hesse (1966-1979), Lower-Saxony (1965-1974), Baden-Württemberg (1967-1972), Bavaria (1969-1978).

705 On territorial reforms in Germany see: H. Wollmann, *The Two Waves of Territorial Reforms of Local Government in Germany,* in: J. Meligrana (ed), *Redrawing Local Government Boundaries. An International Study of Politics*, Procedures and Decisions, Vancouver, 2004, 106-129.

706 Figures to be found in: H-F. Mattenklodt, *Territoriale Gliederung – Gemeinden und Kreise vor und nach der Gebietsreform*, in: G. Püttner (ed.), *Handbuch der kommunalen Wissenschaft und Praxis*, Bd. I, Berlin, 1981, 154 ff.

bigger towns and their hinterland were highly ineffective. The adjustement of local authorities' size through fusion, incorporation, dissolution went in some *Länder* hand in hand with functional reforms redesigning the scope of responsibilities of local authorities.[707] At the end of the 1970s, after approval of territorial and functional reforms and within the framework of an increasing europeanisation of public affairs, a new turn towards more decentralisation of powers and more participation of local authorities in decisions at higher level became the priority of the federal associations of local authorities. The Charter was thus seen as a crucial tool for achieving these objectives and for consolidating at federal level minimum guarantees for local self-administration which could prevent its violation.[708]

In spite of that, however, there is widespread agreement among the most prominent German legal scholars[709] that the European Charter of Local-Self Government has never played a concrete role within the German legal system. The moderate enthusiasm of those days can be best explained by the fact that the Federal Republic of Germany did play a major role in shaping most of the provisions of the Charter. In particular, a "first rough Charter" was drafted on behalf of the Standing Conference by seven independent legal advisors, two of which were of German nationality, the administrative lawyer Professor Joachim Burmeister and a local official from Schleswig-Holstein with longstanding experience within the Council of Europe, Alfons Galette.[710] During the negotiations on the Draft Charter, the German delegation to the Standing Conference of Local and Regional Authorities greatly contributed to its amendment. This contribution is mainly to be attributed to local authorities' civil servants. In fact, the delegation was composed of 22 members, including city-managers, county-managers and civil servants of the Berlin Senate, though (quite ironically!) no directly elected representative was part of it[711].

In particular, on March 21, 1983 the German delegation clarified to the Steering Committee for

---

707 Cf. H. Köstering, *Das Verhältnis zwischen Gemeinde- und Kreisaufgaben einschließlich der Funktionalreform,* in: G. Püttner (ed.), *cit.*, Bd. III, 1981, 60 and H.F. Mattenklodt, *cit.*, 160-165.

708 F.L. Knemeyer, *Die Europäische Charta der kommunalen Selbstverwaltung*, DÖV, 1988, 997; H-J. Stargardt, *Gemeindepartnerschaften und Europacharta der kommunalen Selbstverwaltung führten die Völker Europas zusammen*, DVP, 1990, 202.

709 I. Stirn, *Lokale und regionale Selbstverwaltung in Europa*, Karlsruhe, 2013, 167; P. J. Tettinger, W. Erbguth, T. Mann (eds.), *Besonderes Verwaltungsrecht,* 11th ed.., 2012, 15; M. Burgi, *cit*., 30; K. Stern, *Kommunale Selbstverwaltung in europäischer Perspektive,* NdSVBl 1/2010, 4-5; H-J. Blanke, *Die kommunale Selbstverwaltung im Zuge fortschreitender Integration*, DVBl 1993, 819 and 830; A. Faber, *Die Zukunft kommunaler Selbstverwaltung und der Gedanke der Subsidiarität in den Europäischen Gemeinschaften*, DVBl, 1991, 1128-1129; H. Siedentopf, *Verwaltungsgerichtsbarkeit – Umweltschutz- Kommunale Selbstverwaltung*, Speyer, 1991, 229.

710 See: Committee on Local Structures and Finance, Report of the Meeting of Experts on "*The principles of local self-government"* held in Strasbourg on 9-10 October 1980 and Basic Elements for Drawing Up a Preliminary Draft Charter. CPL/Loc 15 (3).

711 Cf. A. Galette, *cit*., GYIL, 1982, 1079.

Regional and Municipal Matters its official position on the Draft Charter[712]. Remarks made by Germany on that occasion can first of all be considered as a good indication for identifying the common standards shared by the different German local government systems at that time. Further, amendment proposals by the German delegation related to those draft provisions with which domestic law would have not complied with. In other words, if these draft provisions were passed, they would have constituted standards of local self-government more far reaching than those set out in Article 28, para. 2 of the Basic Law. All remarks and amendment proposals by the delegation help thus understanding to what extent the Charter was a "German creature".

Here one might already anticipate that, with the approval of the final text by the Conference of Ministers responsible for Local Government in November 1984, the Charter had been partially modified according to the amendments of the German delegation, henceforth mostly reflecting the federal constitutional minimum standard of local-self administration.[713] In general, the institution of local self-government under the Charter reflected the German traditional division between, on the one hand, the guarantees relating to the scope of responsibilities (*Aufgabenbestand*), laid down in Article 4 and, on the other hand, the single powers of local authorities (*Gemeindehoheiten*), to be derived from the guarantees of own responsibility (*Eigenverantwortlichkeit*), laid down in Articles 5, 6, 9 and 10.

In particular, the finalised version of the Charter recognised local self-government not as a fundamental right of local communities but as an institutional right to be exercised by local authorities endowed with democratic standards and which had to be acknowledged by the Constitution (Article 2). Administrative supervision by the State was to be ensured not only for legitimacy but also for expediency purposes (Article 8, para. 2). As for municipalities, local self-government was to be understood according to the general competence principle and as for other local authorities according to the *ultra-vires* principle (Article 3, para. 1 and Art. 4, para. 2). Only statutes and not mere by-laws could set limits to the scope of local self-government (Articles 3 and 4). General statutory provisions, which should not necessarily be exceptional, could legitimately restrict organisational autonomy (Article 6, para. 1). Matching with German constitutional standards were also those provisions establishing the right of local communities to be consulted before enactment of a territorial reform (Article 5), providing for horizontal and vertical equalisation schemes and establishing specific legal remedies for local authorities (Art. 9, para. 5 and Article 11)

712 Council of Europe, *Summary of Proposals for Amendment and Secretariat Proposals Following the Committee of Experts on Local and Regional Structures Meeting of 25-26 April 1983,* RM-SL 83 (5).

713 So also: F. L. Knemeyer, *Kommunale Selbstverwaltung in Europa – die Schutzfunktion des Europarates*, BayVbl, 2000, 451.

Inter-municipal co-operation was recognised not as such, but within the framework of the law, a circumstance which enabled the State to coerce local authorities to cooperate (Article 10, para. 1). Draft provisions entailing a possible form of mixed administration (*Mischverwaltung*) and, more in general, overlapping responsibilities were set aside. However, delegated functions by higher layers of government could have been carried out by local authorities with a certain degree of discretion in their adaptation to local conditions (Article 4, para. 5). A formal participation (*Mitwirkung*) of local authorities in the drafting of financial legislation was eventually set aside. Local authorities could only promote their interests at national level by means of their associations (Article 10, para. 2) or upon institutionalised consultation (Article 9, para. 6). The same could be said for the obligation on the part of the State to entitle all local councillors with a remuneration and a social welfare protection, which was scaled down as an obligation to be respected only "where appropriate" in order to safeguard the status of so-called volunteer or honorary councillors (*Ehrenamtliche Mitglieder*) (Article 7, para. 2). Finally, Germany prevailed also in the debate on the type of monitoring procedure to be set up in order to ensure the Charter's compliance. Article 14, in fact, did not entail any system mutuated from the one used for the European Social Charter (ESC).

The finalised version of the Charter, however, even if inspired to a great extent by the German conception of local self-administration, embodied also provisions which could have immediately supplemented the German constitutional framework, in particular in financial matters. The Charter in fact explicitly recognised local authorities' right to dispose of adequate financial means for fulfilling their tasks (Article 9, para. 1). Furthermore, a quite clear principle of concomitant financing was enshrined in the Charter in times were both the Federation and the *Länder* were not strictly bound by it (Article 9, para. 2 and para 4). Moreover, local authorities were at the time not fully participating in the revenues of federal and *Länder* taxes, they could fix the tax rate of the trade tax but not of the income tax, whereas counties in particular did not have any significant own revenue source. Finally, according to the Charter, specific grants (*Zweckzuweisungen*) should have been considered the exception and not the rule when it came to setting up horizontal schemes of equalisation.

Starting from these premises, one could therefore only partially contend that the Charter's provisions perfectly overlapped with the ones to be derived from the German Basic Law and from the *Länder* Constitutions (*Landesverfassungen*), as the federal government and the governments of Rhineland-Palatinate, Baden-Württemberg, Bavaria, Hesse and Lower-Saxony maintained[714]. Only the government of North-Rhine Westphalia recognised that the Charter's obligations were to a great

[714] *Landesregierung* Rheinland-Pfalz, in: LT-Drucks, 11/64, 2 and *Bundesregierung*, BT-Drucks. 10/6086, 1.

extent but not completely fulfilled by *Land* constitutional law and therefore not exactly overlapping with the constitutional guarantees laid down in the North-Rhine Westfalian Constitution. Thus, even without taking into account the evolutive interpretation of Council of Europe bodies, one cannot speak of a mere "declaratory treaty" (*Parallelvertrag*). In particular, the very fact that, upon signature, the Federal Republic made some reservations to the Charter, restricting the personal scope of its application to municipalities (*Gemeinden*) and counties (*Landkreise*) as well as to so-called townships (*Verbandsgemeinden*) in Rhineland-Palatinate and declaring that Article 9, para. 3 would have not applied to counties and municipal communities, shows quite the opposite and namely that the Charter brought about both some major and minor innovations for the German legal order.

IV. Any Charter's Contribution to Local Government Reforms in Germany?

Unlike the case of Italy, whereby it was rather the Charter which fuelled legislative adjustments in the Italian local government system along the 1990s, in Germany one could argue quite the opposite. In fact, the Charter was not taken seriously into account by jurists and political *élites*, in spite of the fact that federal constitutional reforms passed in 1994 and 1997 (see *infra* § 3.II.6.1) represented a convergence towards the Charter's principles on financial autonomy. The same could be said also with reference to the allocation of powers between municipalities and counties, which now follows the subsidiarity principle (see *infra* § 3.II.1.3). Further, the Charter contained other innovative provisions which were over the course of the years implemented in the domestic order in the *Länder* Constitutions, such as a fully-fledged principle on concomitant financing (see *infra* § 3.II.6.2.) and a general right of local authorities to lodge a complaint before the *Land* Constitutional Court for a violation of the right to local self-administration (see *infra* § 3.II.8).

Yet, widespread skepsis towards the Charter could be assessed also among local governments which probably feared that its success could have brought about further harmonisation between the different local government systems existing in the *Länder*. Indeed, as a federal statute, the Charter appears to constitute a piece of federal framework legislation on local government pursuant to Article 75 BL (*Bundesrahmenkompetenz*), whose legitimacy had always been rejected by the majority of legal scholars[715] as well as by the case-law of the Federal Constitutional Court, but not for instance by one of the drafters of the Charter, Professor Joachim Burmeister.[716] These fears by local governments in the Federal Republic can be said to be partly justified since the Charter was

---

715 See: 49. Deutscher Juristentag, 19.-22. September 1972 (Düsseldorf), *Gutachten G. Püttner,* 52.

716 J. Burmeister, *Selbstverwaltungsgarantie und wirtschaftliche Betätigung*, in: G. Püttner (ed.), HWKP, vol. 5, 1982, 26-27.

used as a prominent model to draft the so-called *Kommunalverfassung* on May 17, 1990, that is to say the last municipal and county code for the whole territory of the Democratic Republic of Germany, which was no Contracting Party to the treaty.[717] This code was seen as an essential tool within the context of German reunification and was aimed at enabling convergence of the local government structures of East Germany towards the ones of West Germany.[718] Since a unified West German local government did not exist, i.e. there existed only eleven different municipal and county codes, the Charter was regarded as the most suited legal document for synthesizing principles and rules existing in all West German *Länder* at that time. The *Kommunalverfassung* was enshrined in the legislation of the newly born East German *Länder* and progressively replaced by their municipal and county codes. Yet, being the principles and rules of the Charter more deeply rooted in the constitutional history of East Germany, it can be said to be no chance that the only Constitutional or State Courts which have made explicit reference to the Charter so far have been courts of the new *Länder.* In the old *Länder*, on the contrary, the fear towards harmonisation prevailed. In fact, as recalled by Steingardt,[719] the adoption of the *Kommunalverfassung* in East Germany relaunched also in West Germany a debate among jurists on a new conception of local self-administration and in particular on the opportunity to uniform the different systems of local government. The Charter was thus perceived as a potential threat to German federal differentiation rather as a useful tool for extending the guarantees of local authorities throughout the country.

§ 2. The Charter as a Federal Statute Requiring "Friendly Interpretation"

---

717 M. Burgi, *cit*., 28; O. N. Bretzinger, *Die Kommunalverfassung der DDR*, Baden-Baden, 1994, 152-153, quoting S. Petzold, *Entstehungsgeschichte und wesentliche Erwägungen bei der Ausarbeitung des Entwurfs für eine vorläufige* Kommunalverfassung in der DDR, in: F-L. Knemeyer (ed.), *Aufbau der kommunalen Selbstverwaltung in der DDR*, Baden-Baden, 1990, 73. Skeptical however C. Hauschild, DDR: V*om sozialistischen Einheitsstaat in die föderale und kommunale Demokratie*, in: PVS (1991), 225-226, who holds that, unlike in post-Soviet States, in the last days of the DDR the Charter represented only an ideal point of reference.

718 Deutscher Bundestag, *Protokolle der Volkskammer der Deutschen Demokratischen Republik* - 10. Wahlperiode (5 April – 2 October 1990), Berlin, 2000, 147.

719 H.J. Stargardt, *Gemeindepartnerschaften und Europacharta der kommunalen Selbstverwaltung führten die Völker zusammen*, DVP, 1990, 206.

In this Section, it will be argued that the Charter is an international treaty which fulfills the conditions to be effective in the German legal order (I.), is also legally effective in the domestic order due to the adoption of a suitable act of transformation (II.) and has the rank of a federal statute which cannot be derogated from by the legislature but ought to be interpreted in conformity with international law (III.).

I. Validity of Consent under International Law

In order to assess whether and to what extent the Charter could produce effects in the internal legal order of the Federal Republic of Germany, one has to check first if two prior conditions are met: a) the treaty must be introducible in the domestic legal order (*Einführbarkeit*); b) the treaty must be binding for Germany under international law (*Völkerrechtliche Wirksamkeit*).

As for the first condition (a), the question has to be strictly separated from whether the Charter's provisions are self-executing or not. Here it has only to be examined whether the obligations deriving from the Charter can be referred to legal relationships of the domestic legal order or not. This has to be answered in the affirmative, since the Charter regulates the relationship of subnational authorities with other public authorities of the State, i.e. a purely internal legal matter. As for the second condition (b), the question is whether Germany bound itself to respect the Charter's obligation under international law. Even if Germany ratified the Charter and deposited the instrument of ratification, it has yet briefly to be checked out whether this ratification binds Germany under international law and, in particular, whether the power to ratify the Charter was a power assigned to the Federation or to the *Länder.*

According to Article 46 of the Vienna Convention on the Law of the Treaties «*a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance».* In the present case, Article 32, para. 3 of the Basic Law empowers the *Länder* with the consent of the Federal Government to conclude treaties insofar as they enjoy internal power to legislate on the matter. In this respect, one might *prima facie* argue the violation was "manifest" and concerned a rule of "fundamental importance", i.e. the rules on division of competences between the Federation and the *Länder*. However, as even conceded by some *Länder* (so-called *norddeutsche Auffassung*), Article 32, para. 3 BL does not exclude that also the Federation can concurrently conclude treaties in matters related to the *Länder* legislative competence. In fact, Article 32, para. 1 BL gives the

Federation the ultimate responsibility for the conduct of foreign relations.[720] This view was strengthened by the so-called 1957 Lindau Agreement (*Lindauer Abkommen*) between the German *Länder* and the Federation, which allows the Federation to act on behalf of the *Länder* in international matters upon their consent. In 1988 the dominant opinion was that the Federation enjoyed the power to conclude treaties in matters reserved to the exclusive legislative competence of the *Länder.*[721] Thus, no "manifest violation" of an internal rule as provided for Article 46 of the Vienna Convention of the Law of the Treaties could be assessed and the Charter is hence to be considered regularly binding under international law for Germany.

II. Validity of Incorporation under Domestic Law

In order to be binding for all organs of the Federal Republic, an international treaty has normally to be incorporated into the internal legal order by virtue of a special incorporation act (*Zustimmungsgesetz* or *Vertragsgesetz*). In the present case, one has first to show whether such incorporation act was necessary, to what extent it formally and materially conformed with the Basic Law and then whether the Federation or the *Länder* on the basis of what constitutional provision had the jurisdiction to introduce the European Charter of Local Self-Government in the domestic legal system (so-called *Vertragsschlusskompetenz*).

1. The Necessity of a Federal Statute Incorporating the Treaty

According to the dominant opinion and to the Federal Ministry of the Interior[722], the Charter was ratified on the basis of Article 59, para. 2, sentence 1, alternative 2 BL, because it is a treaty that «*relates to subject of Federal legislation».* Federal legislation is here to be understood as relating to the legislation of the Federal Republic of Germany as a whole and not specifically to the legislation enacted by the Federation.[723] Thus, Article 59, para. 2, sentence 1, alternative 2 BL applies insofar as a piece of legislation is deemed to be necessary for enforcing the treaty. If no statute is considered to be necessary, the treaty is concluded with a simplified procedure by the Federal Government itself without ratification, but this solely the case of so-called executive agreements (*Verwaltungsabkommen*). In the present case, to the contrary, almost all guarantees set out in the

---

720 R. Streinz, *Art. 32*, in M. Sachs (ed.), *GG-Kommentar*, 2nd ed., München, 1998, § 42.

721 C. Calliess, *Auswärtige Gewalt*, in: J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts*, Vol. 4, 2006, § 83; R. Streinz, *cit*., in: M. Sachs, *cit*., §§ 31-42.

722 Bundesminister des Innern, Schreiben an die Ständige Vertragskommission der *Länder* vom 19. Marz 1986; B. Weiss, *cit*., 38; W. Leitermann, *EKC in Kraft*, in Der Städtetag 10/1988, 679; B. Schaffarzik, *cit*., 165.

723 M. Schweitzer, *Staatsrecht III*, 7th ed., Heidelberg, 2000, 171; M. Zuleeg, *Abschluss und Rechtswirkung volkerrechtlicher Verträge in der Bundesrepublik Deutschland*, JA, 1983, 2; B. Schaffarzik, *cit*., 168.

Charter allow or exceptionally require legal implementation so that one can conclude that the Charter was a treaty which had to be subject to legislative consent prior to ratification. The statute incorporating the treaty into the domestic order was passed by the German *Bundestag* on January 22, 1987.

As for the review of formal constitutionality of the incorporation act, it cannot be said that the German federal legislature was not allowed to approve the treaty by virtue of federal statute because the agreement related to issues falling under the jurisdiction of the *Länder*. In fact, Article 59, para. 2 BL is not inherent to the division of legislative powers between the Federation and the *Länder* - which is rather a question to be answered pursuant to Article 70 and ff. BL - but only sets out the conditions for a federal statute for being addressed to the President as authorisation for ratification, a circumstance that, as mentioned, might be justified with the Federation's general responsibility for the conclusion of treaties as provided for by Article 32, para. 1 BL.[724] Whenever the *Länder* are deemed to retain jurisdiction to incorporate the obligations in the internal legal order, the federal statute will not be aimed at incorporating the international obligations, but only at empowering the President of the Republic for ratification of the treaty.[725]

Further, it has to be understood whether also the *Bundesrat* should have given its legislative consent to the statute. In the case at hand, the Federal Government forwarded the draft federal statute of incorporation to the *Bundesrat*, which raised no objection. The law approving the treaty was hence adopted by the *Bundestag* without consent by the *Bundesrat* following to Article 78, para. 2 BL. According to a minority opinion[726], approval by the *Bundesrat* is to be accorded whenever a law approving a treaty involves subject matters assigned to the legislative competence of the *Länder*. Following to Article 50 BL, the German *Länder* participate through the *Bundesrat* in the legislation of the Federation, but the *Bundesrat* does not *per se* enjoy constitutional powers related to *Länder* matters. A federal statute approving a treaty which deals with issues that, under domestic law, are regulated by the *Länder* shall be therefore treated as every other federal statute: the *Bundesrat* will enjoy the right to participate only insofar as explicitly foreseen by the Basic Law. The *Länder* can nevertheless assert in advance their specific interests in the framework of the procedure set out in the aforementioned Lindau Agreement.

---

724 So R. Streinz, *cit*., in, M. Sachs, *cit*., Rn. 42. I. Pernice, *Art. 59*, in: H. Dreier (ed.), *cit*., Fn. 34.

725 T. Maunz, *Art. 59*, in: Maunz/Dürig (ed.), *GG-Kommentar*, Rn. 22; W. Rudolf, *Völkerrecht und deutsches Recht*, 1967, 205; R. Geiger, *Grundgesetz und Völkerrecht*, 4th. ed., 2009, 121.

726 H-J. Friehe, *Kleines Problemkompendium zum Thema Kulturabkommen des Bundes*, JA 1983, 122; A. Galette, *cit*., GYIL, 1982, 335; B. Weiss, *cit*., 39; H. von Mangoldt/F. Starck/C. Klein (eds.), *Art. 59,* Anm. IV 5 a; T. Maunz, *Art. 59*, in: T. Maunz and G. Dürig (eds.), *GG-Kommentar*, 2009, Rn. 19.

As for the review on the material constitutionality of the incorporation act, Article 28, para. 2 BL is not an obstacle to more robust guarantees for local self-administration (*kommunale Selbstverwaltung*), since it merely sets out a federal minimum standard which may be completed or supplemented by concurrent legal provisions. If any treaty provision falls under the minimum core set out by the Constitution this does not imply that the constitutional guarantee should be amended accordingly or that the treaty's provisions are anti-constitutional, but, since the latter also set out a minimum standard, it applies the principle of the most favourable condition.[727]

2. The Competence of the Federation to Implement the Treaty

Once it has been ascertained that the federal statute was formally and materially in conformity with the Basic Law, it has further to be examined whether either the Federation or the *Länder* had the jurisdiction to implement the Charter in the domestic order (*Vertragsschlusskompetenz),* that is to say whether the Federation or the *Länder* had the legislative power in the specific subject matter regulated by the treaty.[728] Many scholars, building on the case-law of the FCC, assumed that the subject matter of the Charter, that is to say "local government law" (*Kommunalrecht*), fell undoubtedly under the exclusive residual jurisdiction of the *Länder* pursuant to Article 70, para. 1 BL, whereby the *Länder* have the right to legislate insofar as the Basic Law does not confer legislative power upon the Federation.[729] In their official statements before the enactment of the Charter, also the governments of North-Rhine Westphalia and Rhineland-Palatinate qualified local self-administration respectively as falling "in principle" or "mainly" under the exclusive legislative power of the *Länder*.

However, the jurisdiction ought to be assessed on the basis of what the Basic Law really foresees. As noted by a minority of scholars in the 1960s and 1970s[730], Article 70, para. 1 BL only sets out a residual competence of the *Länder* but does not grant them with the legislative power on local self-administration matters, since many aspects related to local self-administration continued to fall explicitly under the legislative competence of the Federation (*see:* in particular at that time Article 74, lett. a) BL, Article 75, n. 1 BL, Article 84, para. 1, sentence 2, Article 85, para. 1, sentence 2 BL.

---

727 B. Schaffarzik, *cit*., 173-174.

728 H. von Mangoldt/F. Starck/C. Klein (eds.), *Art. 59*, Anm IV 7 c); M. Schweitzer, *Staatsrecht III*, Rn. 452 ff.

729 BVerfGE 77, 288 (299); 22, 180 (210); H. Klüber, *Rahmengesetzgebung des Bundes für das Gemeindewesen?*, DÖV, 1972, 473; H. Maurer, *Kommunalrecht*, in: H. Maurer and R. Hendler (eds.), *Baden-Württembergisches Staats- und Verwaltungsrecht*, Frankfurt am Main, 1990, 177; B. Weiss, *cit*., 46; K. Stern, *Auswärtige Gewalt und Lindauer Abkommen,* in: J. Ipsen et al. (eds), *Verfassungsrecht im Wandel*, Köln, 1995, 258; M. von Schwanenflügel, *Entwicklungszusammenarbeit als Aufgabe der Gemeinden und Kreise*, Berlin, 1993, 143.

730 H. von Hausen, *Die Zuständigkeit des Bundesgesetzgebers aus Art. 84 und 85 GG*, DÖV, 1960, 441 ff.; J. Burmeister, *cit.*, 1977, 54-55; B. Schaffarzik, *cit*., 184-185.

Article 106, para. 5, sentences 2 and 3 BL), so that one cannot speak of a *apriori* exclusive jurisdiction of the *Länder*. Other authors[731] attempted to justify the alleged *apriori* jurisdiction of the *Länder* on the basis of their general administrative organisational power (*Organisationsgewalt*) which extends to local authorities, since they are, constitutionally speaking, their subdivisions. This view has some consistency, even if one can not argue that, therefore, the Federation enjoys no constitutional power to constrain *Länder* organisational power.[732] Quite the opposite, even if only exceptionally, the Federation is allowed to restrict this power, as provided for by the aforementioned constitutional provisions. Yet, the guarantees laid down in the Charter are mainly of constitutional character and could thus be caught by the legislative power of the *Länder* with reference to their organisation. However, no Charter provision could be approved by the *Länder* on grounds of their organisational power, since each provision relates rather to the power of organisation which rests within of the local authorities themselves, according to Article 28, para. 2 BL. Even Article 8 of the Charter, which sets out the principle whereby administrative supervision of local authorities shall be in principle limited to legality, cannot be said to relate to the organisational powers of the *Länder,* since it is a constitutional principle which can be derived directly from federal constitutional law and can no longer be laid down (but at most only declaratorily repeated) by the constitutional law of each *Land*.

Thus, if the competence of the *Länder* cannot be assessed, it comes yet to the question as to why the Charter's ratification underwent the procedure involving the *Länder* set out in the Lindau Agreement. According to Schaffarzik, one has to keep in mind that this procedure might in general be activated insofar as some *Länder* assume that their legislative powers are affected (as here it was the case with North-Rhine Westphalia and Rhineland-Palatinate). That must however not correspond to the actual constitutional legal framework. On many occasions, the procedure was activated for treaties in respect of which no exclusive legislative power of the *Länder* was given.[733] Even provided that the *Länder* enjoyed exclusive legislative power to implement the Charter in their domestic orders, their statement of agreement (*Einverständniserklärung*) in the framework of the Lindau Agreement appears as highly problematic and cannot lead to the conclusion that the *Länder* incorporated the Charter's provisions in their domestic orders. In fact, even in the *Länder* which gave no legislative consent to ratification, it cannot be said that the Charter was properly enacted, since, as already mentioned, the legislative consent is a prominent condition for the incorporation of

---

731 E. Schmidt-Jortzig, *Kommunalrecht*, *cit*., 443.

732 E. Schmidt-Jortzig, *cit*., Rn. 110 and 443; C. Meis, *Verfassungsrechtliche Beziehungen zwischen Bund und Gemeinden*, Baden-Baden, 1989, 40; B. Schaffarzik, *cit*., 187-188.

733 B. Schaffarzik, *cit*., 192-193. *Contra* see*:* K. Waechter, *cit*., Rn 10.

a treaty in the German domestic legal order, including that of the *Länder*[734] In the present case, only two *Länder* governments allowed regional legislature bodies (*Landtage*) participating in the decision over the Charter, i.e. North-Rhine Westphalia and Rhineland-Palatinate and only in the former one could say that the Charter was properly incorporated with official publication in the *Land* Official Bulletin of Laws and Decrees. All the other German *Länder* considered a statute plainly not necessary, since the Charter was regarded as a mere "declaratory treaty" (*Parallelvertrag*). The *Landtag* of Rhineland-Palatinate gave its consent, but it did not publish its resolution in the *Land* Official Bulletin of Laws and Decrees. Thus, one could say that only North-Rhine Westphalia has properly incorporated the Charter in its domestic order[735].

Hereabove, it has been ascertained that the German *Länder* had no legislative power to incorporate the treaty in the domestic legal order. It remains to be seen in how far the Federation enjoyed this jurisdiction. As mentioned, the Charter's provisions entail guarantees of constitutional nature and not substantive and detailed rules relating to the organisation of a local government system. No explicit legislative power of the Federation relating to the content of the Charter can be found in the Basic Law to justify its right to incorporate the Charter's obligations in the German legal order. However, one could argue that the Federation enjoyed implicit jurisdiction to implement the Charter[736], that is a jurisdiction by virtue of the nature of the matter (*kraft Natur der Sache*): the Federation must enjoy the jurisdiction, because otherwise the Charter's provisions would have enjoyed the rank of *Länder* statutes and the Federation would have not been bound by it under both international and domestic law.[737] However, this reasoning cannot help in establishing a federal jurisdiction. In fact, this view is not consistent with the German constitutional framework. As pointed out by Schaffarzik, the Federation would be anyway bound by it, since the duty to loyal co-operation between the Federation and the *Länder* (*Pflicht zur Bundestreue*) may also imply that the Federation complies with *Land* legislation, whereas the Federation is always responsible for its component units under international law.

The legislative power to implement the Charter, if not explicitly foreseen in the Basic Law, shall be

---

734 *Contra:* C. Hirsch, *Kulturhoheit und Auswärtige Gewalt*, Berlin, 1968, 172; F. Regehr, *Die völkerrechtliche Vertragspraxis in der Bundesrepublik,* Berlin, 1974, 168, whereby it suffices that the *Länder* issued their statement of agreement in the framework of the Lindau Agreement.

735 Cf. B. Schaffarzik, *cit*., 177-180.

736 Pursuant to B. Schaffarzik, *cit*., 196-197, an argument *a posteriori* which bases on an implicit federal competence relates to the legal problems that otherwise would emerge as for the Charter's effectivity in the so-called new German *Länder*, since international treaties concluded by West-Germany applied after reunification on the territory of the new *Länder* only insofar as they were incorporated in the domestic legal system as federal laws. Further, the federal competence must be recognised as the only possible way to ensuring the conformity of State action with international law, otherwise the *Länder* could have prevented the incorporation of international obligations in their legal orders and therefore entailing the international responsibility of the Federal Republic.

737 A. Galette, *cit*., GYIL, 1982, 329 and 333.

implicitly deduced from specific constitutional provisions and cannot be derived pursuant to another sort of systematic legal reasoning[738]. In the present case, provided that both Article 23, para. 1, sentence 2 BL and Article 24, para. 1 BL can easily be found inapplicable,[739] it might therefore be argued that the provisions on which the federal jurisdiction can be based upon are to be found in Article 28, para. 2 BL itself, which establishes a federal minimum core of guarantees for local self-administration to be effective in the Federal Republic as a whole, that is both in relation to federal and to *Länder* laws. The Federation has a prominent responsibility to guarantee local self-administration on its territory[740]. Though, a federal guarantee does not automatically entail a federal competence to adopt federal statutes. This power can however be detected in Article 28, para. 2, sentence 3 BL itself, since the right to local self-administration must be guaranteed «*within the limits prescribed by the laws*».[741] The constitutional provision establishes therefore a direct relationship between the Federation and local authorities.[742] Typical examples of federal, though exceptional, interferences into local self-government might follow through statutes adopted pursuant to Article 84, para. 1, sentence 2 and 85, para. 1, sentence 2 BL, that is to say in cases of execution of federal laws through the *Länder.* This is also confirmed by the fact that local authorities are allowed to seek judicial redress against federal laws impinging upon their right to self-administration, as provided for by Article 93, para. 1, n. 4 lett. b) BL read in conjunction with § 91, sentence 1 BVerfGG. Thus, if the set of basic principles laid down in the Constitution is supplemented or completed by an international treaty it deserves at least a federal law or even a constitutional amendment to make it nationwide effective. In the present case, the Charter does not essentially alter the minimum core of guarantees set out by the Basic Law, but, as it will be shown, it partially contributes to its extension, thus also potentially providing for harmonisation of the different local government systems of the *Länder*, as the short East-German experience of the *Kommunalverfassung* in the early 1990s showed.

---

738 R. Stettner, *Grundfragen einer Kompetenzlehre*, Berlin, 1983.

739 Art. 23, para. 1, sentence 2 BL provides only for the incorporation of EU primary law. The Charter may have bound the European Community insofar as containing general principles of law. This however did not mean that general principles of EC law could automatically flow into the domestic legal order through the incorporation of primary law. Even if this was the case, the Charter could be part of the internal legal order only as for the implementation of EC law in the domestic order. As for Art. 24, para. 1 BL, one has to argue that the Charter did not entail a transfer of sovereign powers to any international organisation. In fact, the mere obligation for each party to the treaty to forward to the Secretary General of the Council of Europe all relevant information concerning legislative provisions and other measures taken by it for the purposes of complying with the terms of the Charter, as provided by Art. 14 of the Charter cannot amount to a transfer of sovereign powers to the Council of Europe, since no binding power was linked to the right of the Secretary General to obtain information. Cf. B. Schaffarzik, *cit*., 156-165 and T. I. Schmidt, *Kommunale Kooperation*, *cit*., 86-87.

740 Moreover, this federal guarantee enshrined in Art. 28, para. 2 BL provides the legal basis for the federal legislative power in other local government matters (Art. 104 lett.a), para. 4; Art. 106, para. 5, lett. a), para. 6, n. 1 and 2, para. 7 and 8 BL).

741 B. Schaffarzik, *cit*., 204-205; E. Schmidt-Jortzig, *cit*., Rn. 457.

742 G. Seele, *Rahmengesetzgebung des Bundes für das Gemeindewesen?*, DÖV, 1972, 475; W. Thieme, *Die Gliederung der deutschen Verwaltung*, in G. Puttner (ed.) HKWP, Vol. 1, 1981, 137; B. Schaffarzik, *cit*., 205.

The jurisdiction of the Federation might also be assessed on the basis of Article 28, para. 3 BL, whereby «*the Federation shall guarantee that the constitutional order of the Länder conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article».* It needs however to be understood if this power of the Federation to guarantee the constitutional order in the *Länder* entails also a legislative power. According to the dominant opinion[743], the power of the Federation in this respect cannot be qualified as a legislative one. On the contrary, it is generally believed that this power is limited to cases of coercive measures opposite the *Länder* whenever they do not abide by their obligations (Article 37 BL) or to cases of internal emergencies, i.e when a *Land* is unable or unwilling to combat a specific danger (Article 91 BL) or, finally, to cases in which the Federation brings a complaint before the Constitutional Court (Article 93, para. 1, n. 2, 3 or 4 BL). According to a minority opinion[744], however, one cannot restrict the meaning of Article 28, para. 3 BL to the aforementioned cases, since the provision itself is very generic and, following to a proportionality test, represents a much less invasive instrument to guarantee the constitutional order. The latter interpretation has to be followed, otherwise having Article 28, para. 3 BL no independent meaning. Moreover, the aforementioned local authorities' right to lodge a complaint before the FCC was enshrined in the Federal Law on the FCC (BVerfGG), which admits that Article 28, para. 3 BL allowed the Federation to pass legislation for ensuring compliance with the right to local self-administration.[745] In the present case, one could further argue that the Federation enjoys legislative power pursuant to Article 28, para. 2 and 3 BL because the Charter's provisions are aimed at complementing the federal guarantee, that is to say at precising the minimum standard or guarantee (*Mindestgarantie*) laid down in the Basic Law.

Finally, it should be briefly checked whether single legislative powers of the *Länder* may lead to rule out the federal jurisdiction to incorporate the Charter[746]. The *Länder* in fact enjoy own legislative powers with reference to local taxes on consumption and expenditures (Article 105, para. 2 lett. a) BL) and to the determination of the percentage of the *Land* share of total revenue from joint taxes which accrue to municipalities and joint-local authorities and to whether and to what extent revenue from *Land* taxes shall accrue to municipalities or joint local authorities (Article 106, para. 7 BL). These *Länder* powers might be affected by some financial provisions of the Charter on

---

743 A. Köttgen, *cit*., 17; T. Maunz, *Art. 28*, in T. Maunz and G. Dürig (eds.), *GG-Kommentar*, Rn. 86; H. Bethge, *Die Grundrechtssicherung im föderativen Bereich*, AöR 110, 177 and 202; K. Stern, *Art. 28*, in: R. Dolzer and K. Vogel and K. Graßhof (eds.), *Bonner GG-Kommentar*, 1964, Rn. 201.

744 J. Burmeister, *cit*., 140; E. Pappermann, *Bundesrahmenkompetenz zur Vereinheitlichung des Kommunalrechts*, in: DVBl, 1972, 652; B. Schaffarzik, *cit*., 210; G. Schmidt-Eichstädt, *Bundesgesetze und Gemeinden*, Stuttgart, 1981, 102.

745 *Contra*: T.I. Schmidt, *Kommunale Kooperation, cit.,* 89-90.

746 A. Galette, *cit*., GYIL, 1982, 333.

financial equalisation (Article 9, para. 5 and 7) and thus keep out the legislative competence power of the Federation. However, the principle whereby local authorities shall be given adequate financial resources can be derived from Article 28, para. 2 BL too, since no regulation of local affairs in the own responsibility of local authorities is ever possible without financial autonomy. A *Land* power to legislate on local government matters can though be derived also from the same Article 28, para. 2 and 3 BL, which allows for further guarantees to be established at *Land* level beyond the federal one. However, no exclusive legislative power of the *Länder* in this subject matter might be assessed.

To conclude, it has been showed that no exclusive legislative power can be assessed on the part of the *Länder* and that the Federation enjoyed the legislative competence to implement the Charter in the domestic legal order according pursuant to Article 28, para. 2 and 3 BL.[747] It remains to be seen whether the same procedure will be followed by Germany as soon as it will sign and ratify the Additional Protocol to the Charter.

III. The Charter's Rank and Value in the Hierarchy of the German Sources of Law

Once answered the question of whether the Charter has become legally binding in the domestic legal system, it then comes to the question as to what rank it has in the hierarchy of the German sources of law. The Charter does not itself bind the member States to be granted a specific rank within the system of the domestic sources of law.

In Germany, no matter if one follows the doctrine of execution (*Vollzugslehre*) or the doctrine of transformation (*Transformationslehre*), international treaties are incorporated into German law by means of a so-called act of consent and they enjoy the same rank as this act, in the present case the rank of a federal statute (*Bundesgesetz*). The statute incorporating the treaty cannot provide the Charter with a higher rank (i.e. the constitutional rank) which itself does not enjoy.[748] This seems however to imply that in the domestic legal order the treaty's provisions can be derogated from subsequent federal laws pursuant to the *lex posterior* principle. Many scholars hold that it should be distinguished between the type of act used for incorporating the treaty in the domestic order and its

---

747 So also: Congress of Local and Regional Authorities of Europe, *The incorporation of the European Charter of Local Self-Government in the Legal System of Ratifying Countries*, CPL (4) 7, 2 February 1998, 14. J. Hofmann, *Verankerung der Grundvoraussetzung kommunaler und regionaler Selbstverwaltung in einer Europäischen Verfassung*, in: F-L. Knemeyer, *cit*., 1989, 212; O. Seewald, *Kommunalrecht*, in: U. Steiner (ed.), *Besonderes Verwaltungsrecht*, 6th ed., Heidelberg, 1999, Rn 11; M-B. Nagler, *Die Einwirkung sekundären EWG-Rechts auf die gemeindliche Selbstverwaltung nach Art. 28 II 1 des Grundgesetzes für die Bundesrepublik Deutschland,* 1992, 110. *Contra:* T. I. Schmidt, *Kommunale Kooperation*, *cit*., 92.

748 So for instance: G. Dürig, *Art. 1*, in: T. Maunz and G. Dürig (eds.), *cit*., Rn. 58.

rank. Even if enacted by means of federal law, treaty's provisions might enjoy constitutional or even over-constitutional rank, thus preventing from their derogation by subsequent statutes. It should be therefore briefly checked out whether this is also the case with the Charter's provisions.

This question seems to be appropriate, since, for instance, international legal provisions incorporated pursuant to Article 23, para. 1, sentence 2 or Article 24, para. 1 BL enjoy constitutional rank, whereas customary international law incorporated pursuant to Article 25, para. 2 BL has priority over German laws and ranks between federal statutes and the Basic Law. The same could be said for treaties enshrined in the domestic order pursuant to Article 59, para. 2 BL. That might also be a viable solution in order to provide the Charter with the most effective protection, thus preventing from its derogation pursuant to the *lex posterior* principle. As mentioned, the Charter's provisions enjoy a substantive proximity with the principles laid down in Article 28, para. 2 BL, so that one might assert that, as regards at least to the substance, they contain principles which belong to constitutional law[749]. And it does not seem to be of any relevance that the Charter was adopted with the majority set out in Article 42, para. 2 BL, that is to say without approving a constitutional amendment, since the Charter is not aimed at amending the Basic Law, but only at enjoying the same rank in the sources of law due to its specific content and purpose. However, if the Charter is able to supplement the Constitution and if its standards cannot be traced in the Basic Law itself, the principle of the integrity of the Constitution (Article 79, para. 1, sentence 1 BL) would require a formal amendment of the Basic Law by the incorporation act, to be passed by a federal statute carried by the two thirds of the members of the *Bundestag* and of the *Bundesrat* (Article 79, para. 2 BL). Viceversa, only provisions deriving from international organisations to which the Federal Republic of Germany has transferred sovereign powers according to Article 24, para. 1 BL or pursuant to Article 23, para. 1, sentence 3 BL can in principle enjoy priority over the Basic Law without constitutional amendment, even if the legislative incorporation act is a federal statute[750].

Yet, even if the Charter does not rank as high as the Basic Law, it must be borne in mind that it might nonetheless contribute to both extend and specify the scope of the guarantee of local self-administration. In fact, a collision of provisions between the Basic Law and the Charter can barely be assessed: a Charter principle, even if enshrined in a statute ranking lower than the Constitution, is allowed to expand the scope of local self-government guarantees replacing the constitutional standard set out in the Basic Law when it is directly applicable and if it is more favourable to local self-administration, since Article 28, para. 2 BL sets out a minimum, but not a maximum standard,

749 B. Schaffarzik, *cit*., 228; D. Thürer, in: *FS, cit.,* 226.
750 So: B. Schaffarzik, *cit*., 230-231.

which can be extended also by means of a federal statute, like the Charter, having no constitutional rank. However, this implies admitting a federal framework legislation (*Rahmengesetzgebung des Bundes*) on local government issues. Further, according to the *lex posterior* principle, the Charter can also directly provide local authorities with further guarantees than those set out in laws enacted before its entry into force, which thus supplement the scope of the constitutional provision of Article 28, para. 2 BL. The same could be said for *Länder* statutes and *Länder* Constitutions over which the Charter can take precedence according to the *lex superior* principle laid down in Article 31 BL (*Bundesrecht bricht Landesrecht*), insofar as it provides for more far reaching guarantees for local authorities than those provided for them at the time of its enactment.[751]

As for the specification of the scope of the right to local self-administration through the Charter one has to keep in mind what the German case-law of the Federal Constitutional Court (FCC) decided upon the implementation of the ECHR in the domestic order. The formal implementation of the ECHR in Germany was achieved in 1952 by means of federal statute, enacted pursuant to Article 59, para. 2 BL and therefore also the Convention does not enjoy constitutional rank, but applies as an ordinary federal statute (*Bundesgesetz*). Though, notwithstanding the question of its rank in the hierarchy of the sources of law, all domestic laws including the Basic Law have to be interpreted in the light of the ECHR and taking into account the case-law of the European Court of Human Rights. In fact, the Convention creates a European *ordre public* based on the fundamental values of the rule of law and especially human rights. Hence, ECHR rights and freedoms must be protected in the domestic legal system, i.e. it must not be allowed to national law to take precedence over treaty law, otherwise being the purpose of the rights and freedoms defeated. As the Federal Constitutional Court pointed out, albeit the provisions of the Convention do not enjoy constitutional rank[752], all State organs are therefore bound to interpret the law in accordance with the principles and rules resulting from the ECHR.[753] The principle of constitutional interpretation conform to international

---

751 Cf. BVerfGE 36, 142 and see: B. Schaffarzik, *cit*., 238-239 and again 302, which appears to be contradictory at some point where he first states that the Charter might replace or take precedence over the guarantees of local self-government set out at *Land* level and then that they cannot, even if they have the same content or if they supplement them, because an international treaty cannot interfere so deeply in the Bund-*Länder* structure and because Article 28, para. 2 BL implicitly allows for the establishment of constitutional guarantees for local self-government at *Land* level. If the Basic Law itself does not rule out constitutional provisions with the same content at *Land* level, *a fortiori* the Charter cannot replace them.

752 *Contra*: A. Bleckmann, *Verfassungsrang der Europäischen Menschenrechtskonvention?*, 21 EGZ, 149, 153 (1994); F. Hofmeister, *Die Europäische Menschenrechtskonvention als Grundrechtsverfassung und ihre Bedeutung in Deutschland* 40 Der Staat, 367; G. Ress, *Menschenrechtskonvention und Vertragsstaaten. Die Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte im innerstaatlichen Recht und vor innerstaatlichen Gerichten, in: I. Maier (ed.), Europäischer Menschenrechtsschutz - Schranken und Wirkungen, Verhandlungen des 35. Internationalen Kolloquiums über die Europäische Menschenrechtskonvention,* Heidelberg, 1982, 272 and 274. These authors are persuaded that the Strasbourg system for the protection of human rights should be considered as a supranational organisation pursuant to Article 24, para. 1 BL the decisions of which might therefore take precedence over federal law.

753 BVerfGE 74, 358 (370); BVerfGE 82, 106 (114); BVerfGE 111, 307 (316 n.) (so-called *Görgülü* case);

law (*völkerrechtskonforme Auslegung*) is in fact a corollary of the so-called German openness towards international law (*Völkerrechtsfreundlichkeit),* whereby the entire German legal order has the objective of fulfilling obligations imposed on the Federal Republic by international law.[754] In other words, the *lex posterior* principle cannot be applied to the detriment of conventional provisions. Hence, as spelled out in the famous *Görgülu* case (2004), the Federal Constitutional Court will be «*competent to prevent and remove, if possible, violations of international law that consist in the incorrect application or non-observance by German courts of international–law obligations and may given rise to an international–law responsibility on the part of Germany… In this, the Federal Constitutional Court is indirectly in the service of enforcing international law and in this way reduces the risk of failing to comply with international law».*[755]

The Charter can be deemed to represent a similar treaty as the Convention. In fact, as already mentioned, it contains principles and rules of constitutional nature and, as the so-called "fourth pillar" of the Council of Europe legal system, it aims at establishing a European *ordre public* grounded on local self-government and on local democracy, both concepts which, as recalled by the Preamble, plays a fundamental role in a democratic regime. Alike, the FCC should be in principle competent to prevent and remove violations of the Charter under domestic law, even if Charter's provisions do not rank as high as constitutional law, but rather on the basis of the principle of interpretation of domestic law in conformity with international law. Thus, constitutional interpretation conforming to international law starts from the premise that domestic law shall be applied in the first place and that international legal provisions covering the same subject matters help in complementing and supplementing internal legal provisions. It does not consist of direct application of international law taking precedence over national law.[756] Until now, however, no ruling by the FCC has ever taken into account the Charter's principles for complementing the guarantee of local self-administration and this is also because applicants to the Court never referred to the Charter as a standard for constitutional review.

As for the legal effects of the Charter on German laws adopted after its entry into force, one has to distinguish between different sources of law. The Charter takes precedence over *Länder* statutes and over federal decrees but can be derogated from by constitutional amendments of Article 28, para. 1 BL and further federal statutes which restrict local self-administration powers and responsibilities.

BVerfGE 120, 180 (200) (so-called *Caroline von Hannover* case). Cf. C. Tomuschat, *ECHR Judgments and the Federal Constitutional Court*, in German Law Journal, Vol. 11 n. 5, 2010, 518.

754 BVerfGE 6, 309, (362); 31, 58, (75); 111, 307, (317 ff.);

755 BVerfGE 111, 307, (so-called *Görgülü* case).

756 B. Schaffarzik, *cit*., 304 and ff..

To avoid this outcome, one has to rely again on the principle of the interpretation of domestic law in conformity with international law, which applies also to the statutes entered into force after the treaty's enactment.[757] If no interpretation of national law in conformity with international law is possible, then a constitutional amendment will take precedence over Charter's provisions pursuant to the *lex superior* principle, even if the latter are *lex specialis*. The *lex specialis* principle applies only if a federal statute enacted after the entry into force of the Charter regulates general local government matters and not specific matters, which remain covered by the Charter' scope. In general, it should however be doubted that the Charter might entail special rules derogating from those having general nature approved by a federal statute.

Hence, one has to admit that not even the principle of openness towards international law can ensure full compliance of German federal law entered into force after the Charter. The Federal Republic of Germany remains however under the obligation of international law to respect and apply the Charter's rules. The other Contracting Parties, through the Committee of Ministers of the Council of Europe, could call on Germany to comply with its international obligations. The same can do German local authorities, filing a complaint before the Congress of Local and Regional Authorities of the Council of Europe when they believe that their rights have been infringed upon and the Charter allegedly violated. No remedy is however given in the domestic order for similar cases of potential violation of the Charter.

To sum up, it has been held that the Charter was correctly incorporated into the German domestic legal order by means of a federal statute (*Bundesgesetz*). Though, such federal statute cannot rank as a mere federal law, since it would be otherwise derogable from by statutes approved later on, but, in spite of its constitutional nature, it neither can rank as constitutional law, because the Basic Law was not amended pursuant to Article 79, para. 1 and 2 BL. Therefore, one can only argue, building on the German case-law on the ECHR, that the Charter enjoys the rank of a federal statute with the legislature's power to derogate from its rules according to the *lex posterior* principle only in cases in which an interpretation of domestic law in conformity with international law is not possible according to the Basic Law. The Charter takes precedence over *Länder* Constitutions in case of a collision of norms and over *Länder* statutes as well as over federal regulations or decrees insofar as it concerns issues regulated by *Land* law. The *Länder* are bound to comply with the Charter for at least two reasons: first, they consented to its incorporation within the framework of the Lindau Agreement; secondly, they are constitutionally obliged to comply with the treaties ratified by the

---

757 BVerfGE, 74, 358 (370).

Federation, on the basis of loyal co-operation (*Bundestreue*).[758] As it is the case for the ECHR, the FCC and the Constitutional or State Courts of the *Länder* should be able to assess a violation of the Charter in the framework of the constitutional review procedures on the validity of a law (*Normenkontrollverfahren*).

§ 4. Concept and Design of Local Self-Administration in the Light of the Charter

In this Section, it will be attempted to investigate on how the provisions of the Charter interact with the German constitutional principles and rules on local self-administration at federal and *Land* level. In Part I, it will be outlined what is the concept of local self-administration and to what extent it corresponds to the concept laid down in the Charter, whereas in Part II the main features of the right to local self-administration under German law will be analysed in the light of the Charter's provisions, trying to assess whether the latter provides for a more advanced degree of protection.

I. The Concept of *Kommunale Selbstverwaltung*

1. The "Institutional Guarantee" and a Limited Subjective Right to Local Self-Administration

Germany is a Federation in which the federated States (*Länder*) enjoy constituent powers on grounds of the federal principle (Article 20, para. 3 BL) and of their autonomous statehood (*Eigenstaatlichkeit*). Nonetheless, this statehood and the constituent powers which derive from it are limited by the federal Basic Law. In fact, the constitutional orders of the German *Länder* ought to ensure a minimum of homogeneity within the federal State, i.e., pursuant to Article 28, para. 1 BL, they shall be based on the common principles of republican, democratic and social State and on the rule of law (*Rechtsstaatlichkeit*) and they shall ensure that in each county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections.

Though, since local authorities are component parts of the *Länder*, their Constitutions provide for different constitutional guarantees for local self-administration.[759] Different are also the municipal

---

[758] See: BVerfGE 6, 309 (328, 361); 12, 205 (254 ff).

[759] Articles 71-76 Baden Württemberg Constitution; Articles 10-12 and 83 Bavarian Constitution; Article 4, para. 2 and 50-61 Berlin Constitution; Article 97-99 Brandenburg Constitution; Article 137 lett. f) Hesse Constituion; Article 72-75 Mecklenburg-Western Pomerania Constitution; Articles 57-58 Lower Saxony Constitution; Article 1, 78, 79 North-Rhine Westphalian Constitution; Articles 49-50 Rhineland-Palatinian Constitution; Articles 117-123 Saarland Constitution; Articles 82, 84 and 89 Saxonian Constitution; Articles 2, para. 3, 87 and 89 Saxonian-Anhalt Constitution; Articles 46-49 Schleswig-Holstein Constitution. In the city-State of Hamburg State and local activities are not separated from each other (Article 1 of the Hamburg Constitution). The *Land* Bremen is a special case. It is divided into two

and county codes (*Gemeinde- und Lankreisordnungen*) a characteristic which is peculiar of German federalism since its early history (see *supra* § 1.I and 1.II.). The legislative power of the *Länder* to regulate local government matters gives rise to remarkable institutional differences between their respective local government systems and it also rightly excludes that the Charter could apply to them, even though they themselves have their own representation within the Congress of Local and Regional Authorities of the Council of Europe since 1994.[760] Albeit differentiation across Germany is fostered by subnational constitutionalism, the degree of protection afforded by *Länder* Constitutions ought not to be lower but can also be higher than that provided by a minimum standard (*Mindestgarantie*) laid down in the Basic Law (Article 28, para. 2 BL), which thus is directly binding upon both the Federation and *Länder* State authorities (*Durchgriffsnorm*), but with which also binds local authorities in the relations with each other to comply with it. Pursuant to Article 28, para. 3 BL, the Federation is then assigned with the duty to ensure that the constitutional order of the *Länder* conforms with the legal provisions of para. 2. With reference to Article 2 of the Charter, requiring the principle of self-government being recognised preferably in the Constitution, Germany might be said to "overcomply" with it since it would have been sufficient if recognition was ensured by the federal Constitution.

The minimum standard of Article 28, para. 2 BL defines local self-administration as the right of municipalities (*Gemeinden*) to regulate all affairs of the local community on their own responsibility within the limits prescribed by the laws. According to the current dominant opinion, which follows the theoretical systematisation by Stern, Article 28, para. 2, sentence 1 BL provides for an objective institutional guarantee (*Objektive Rechtsinstitutionsgarantie*)[761], which protects the essential content or core area of local self-administration (*Kernbereich*), i.e. all those powers and responsibilities that cannot be removed by the State[762] without changing the status and the structure of the institution. The theory of the core reminds of the theory of the essential content (*Wesensgehalt*) which applies to fundamental rights and was backed also by the Federal

---

municipalities: Bremen and Bremerhaven. Together they make for a joint local authority (*Gemeindeverband*). Each thereof regulates allocation of powers and responsibilities and its internal organisation, whereas no municipal code exists (Article 143-149 of the Constitution of the Free Hanseatic City of Bremen).

760 On the opportunity to extend the representation of the Conference to *Länder* representatives see already in the 1980s the contribution by H.W. Rengeling, *Die Zusammensetzung der Standigen Konferenz der Gemeinden und Regionen des Europarates, insbesondere aus deutscher Sicht*, DVBl, 1985.

761 BVerfGE 76, 107 (119); M. Nierhaus, *Art. 28*, in M. Sachs: *Grundgesetz Kommentar*, 2003, Rn. 44.

762 According to the dominant opinion, Art. 28, para. 2 BL represents an institutional guarantee for local authorities only against the State and not against the society (i.e. against privatisation efforts): G. Dürig, *Die Geltung der Grundrechte für den Staatsfiskus und sonstige Fiskalate*, BayVBl, 1959, 203; D. Jesch, *Gesetz und Verwaltung — Rechtsstellung und Rechtsschutz der Gemeinden bei der Wahrnehmung „staatlicher" Aufgaben,* DÖV, 1960, 740. *Contra*: K. Stern, *Der rechtliche Standort der Gemeindewirtschaft*, AfK 1964, 93; P. Lerche, *Verfassungsfragen um Sozialhilfe und Jugendwohlfahrt (Rechtsgutachten),* 1963, 109-117, J. Isensee, *Subsidiaritätsprinzip und Verfassungsrecht*, Berlin, 1968, 249-250. So however most recently: BVerwGE, NVwZ 2009, 1307.

Constitutional Court.[763]

Within the limits of their functions designated by a law, also joint local authorities (*Gemeindeverbände*) shall have the right to local self-administration according to the laws (Article 28, para. 2, sentence 2 BL). This means that they also enjoy an objective institutional guarantee, even if to a lower degree, since their sphere of action has, from the outset, to be laid down by law. Further, both municipalities and counties enjoy also an institutional guarantee of continued legal existence (*institutionelle Rechtssubjektsgarantie*),[764] whereby municipalities are considered as an administrative subdivision which cannot be abolished and replaced by non-self-governing public authorities but will have to remain at the very bottom of the administrative structure of the State and whereby joint local authorities cannot be abolished by means of ordinary statute. In this respect, it should be clarified that not all joint local authorities enjoy an institutional guarantee against abolition, but only counties do. In fact, the Basic Law mentions them in the homogeneity clause of Article 28, para. 1, sentence 2 as those authorities whose assemblies ought to be directly elected by the people and counties are the only category of joint local authorities which ought to exist all over the territory of the Federal Republic.[765] Other joint local authorities, which are present only in single legal orders of the *Länder*, enjoy at federal level no institutional guarantee against their dissolution, but only the objective institutional guarantee protecting the core of their powers and responsibilities.[766]

Even if a limited subjective right of individual local authorities against the State is granted by the Basic Law, the right to local self-administration is to be regarded as a principle for structuring the organisation of the State (*staatsorganisatorisches Aufbauprinzip*) and not as a fundamental right of local communities within the meaning of Article 19, para. 2 BL, as it happened to be the case under the aforementioned St. Paul's Church Constitution (§ 184) or as a right entirely comparable with that enshrined in the Weimar Constitution (Article 127), pursuant to which the guarantee of local self-administration was located in the section dedicated to fundamental rights. Now settled, the debate on the very nature of the guarantee was still ongoing in the 1950s, when the Federal Constitutional Court delivered one of its first rulings on Article 28, para. 2 BL binding it up with the

---

763 BVerfGE 11, 266 (274); 22, 180 (205); 50, 195 (202), 79, 127 (143); NWVerfGH, DVBl, 1983, 214.

764 BVerfGE 50, 50; NdSStGH, DVBl 1974, 520; R. Granderath, *Praxis des Bundesverfassungsgerichts*, DÖV 1973, 334; T. Maunz, *Art. 28*, in: T. Maunz and G. Dürig (eds.), *cit*., Rn. 45 and ff..

765 M. Burgi, *cit*., 307-308.

766 So: BverfGE 52, 95 ff.; NdS-StGH, DVBl 1981, 215; OVG Rh-Pf, NvwZ 1988, 1145; L. Tepe, *Verfassungsrechtliche Vorgaben für Zuständigkeitsverlagerungen zwischen Gemeindeverbandsebenen*, Stuttgart, 2009, 51-53; J. Oebbecke, *Gemeindeverbandsrecht Nordrhein-Westfalen*, Köln, 1984, Rn. 21 and 33; H. Dreier, *Art. 28*, *cit*., Rn. 174; T. Maunz, *Art. 28, cit.,* Rn. 45; H. Pagenkopf, *cit.*, 62 ff.; M. Burgi, *cit.*, 307-308; E. Schmidt-Aßmann/P. Badura, *Besonderes Verwaltungsrecht*, 13. Aufl. (2005), 110; P. J. Tettinger/K.A. Schwarz, *cit*., Rn. 240; M. Nierhaus, *Art. 28, cit,* Rn. 79. *Contra*: K. Stern, *Art. 28*, *cit*., Rn. 166; O. Goennenwein, *cit.*, 384; K. Waechter, *cit.,* Rn. 171.

former constitutional guarantee of the Weimar Constitution. This link with the past conception has been eventually smoothed out by its subsequent case-law.[767] In fact, local authorities are, individually considered, creatures of the State and do not enjoy any absolute subjective *vis-à-vis* the State against their abolition, but only a limited one (*beschränkte individuelle Rechtssubjektsgarantie*), whereby they can be dissolved by the State only upon compliance with certain conditions, e.g. upon appropriate consultation before passing territorial reforms. Only the institution "municipality" and the institution "county" retain a guarantee against their abolition, which is however not even covered by the eternity clause of Article 79, para. 3 BL (*Ewigkeitsgarantie*) which defines *«the division of the Federation into Länder, their participation on principle in the legislative process and the principles laid down in Articles 1 and 20»* as unmodifiable, being them core elements of the German Constitution. Thus, in theory, the guarantee of local self-administration could be set aside by means of constitutional amendment;[768] however, such a constitutional amendment would be in violation of binding international law, that is to say of Charter Article 2, and thus entail the international responsibility of Germany.

As to the very concept of local self-administration, one might argue that under the Basic Law it does no longer enjoy a both political and legal dimension as it enjoyed in the past. Until the early 1960s the German literature was in fact accustomed to distinguish between the civil or political concept of local self-administration (*Selbstverwaltung im politischen Sinne*)[769] and the legal concept of local self-administration (*Selbstverwaltung im juristischen Sinne*). The former starts from the premise that State and society are divided and self-administration as the right of the citizens to «*take their fate in their own hands*», i.e. to actively participate in the administration of the local community holding honorary or voluntary offices (*Ehrenamt*), serves the purpose to overcome this separation. This understanding which roots back in the nineteenth century concept of local self-administration as laid down in the Prussian Municipal Code and in the ideas of the English

---

[767] BVerfGE 1, 167, 173, but then constant case-law: BVerfGE, 48, 64, 79; 58, 177, 189; 76, 107, 119; 79, 127, 143.

[768] H. Dreier, *Art. 28*, cit., Rn. 33; W. Frenz, *Kommunale Selbstverwaltung und europäische Integration*, in: M. Hoffmann and other (eds.) *Kommunale Selbstverwaltung im Spiegel von Verfassungsrecht und Verwaltungsrecht,* 1995, 16 and ff.; F. Schoch, *Zur Situation der kommunalen Selbstverwaltung nach der Rastede-Entscheidung des Bundesverfassungsgerichts,* VerwArch 81 (1990), 51; A. Faber, *Die Zukunft kommunaler Selbstverwaltung und der Gedanke der Subsidiarität in der Europäischen Gemeinschaften,* in: DVBl., 1991, 1131 and ff.; H. Siedentopf, *Europäische Gemeinschaft und kommunale Beteiligung,* in: DÖV, 1988, 984. This view can be said it was confirmed in a 1998 judgment by the FCC, which allowed for a constitutional amendment of Article 28, para. 1, sentence 2 BL introducing the right to vote in municipal elections for EU foreign nationals (BVerfGE 83, 37, 59). In fact, even if Article 20, para. 2 BL assigns only German people with the right to vote, assemblies of local authorities are considered to be part of the executive power and not of the legislature, so that a constitutional amendment does not infringe upon Article 20, para. 2 BL and Article 79, para. 3 BL. *Contra* in the past see: K. Stern, *cit*., BK, Rn. 75; A. von Mutius, *Ein Sieg für die gemeindliche Selbstverwaltung*, in: Städte und Gemeindebund, 1989, 304; A. Martini and W. Müller, *cit*., 1989, 162.

[769] Difference first outlined by H. J. Wolff, *Verwaltungsrecht II*, 1962, § 84. See also: R. Hendler, *Selbstverwaltung als Ordnungsprinzip,* 1984, 271.

selfgovernment as put forward by Rudolf von Gneist can be traced also in fairly old judgments by both the Federal and the *Länder* Constitutional Courts[770], in different municipal codes (e.g. § 1, para. 1 and 2 GO Baden Württemberg) as well as in Article 11, para. 2 of the Bavarian Constitution and in Article 3, para. 2 of the *Land* Constitution of Mecklenburg-Western Pomerania. It is no chance that this concept of a self-administration from the bottom up (*von unten nach oben*) emerges in the 1980s in the Preamble of the Charter, which prosaically proclaims «*the right of citizens to participate in the conduct of public affairs»*. In fact, one of the legal experts who drafted the Charter, the administrative lawyer Joachim Burmeister, was still convinced that the concept of local self-administration as a spontaneous institution for overcoming the separation between State and society was still up to date even after the enactment of the Basic Law.[771]

Nowadays, local authorities under the Charter are regarded as the «*main foundations of a democratic regime»,* that is to say component units of the State and therefore part of its administrative structures. As it is traditionally held, local authorities are a "piece of State" (*Stück Staat*), specifically the first level of administration of the State which is called "indirect" (*mittelbare Staatsverwaltung*), because it is decentralised and the single entities enjoy own legal personality. Following to the legal concept, thus, local self-administration is not a right of local communities, but of administrative units created or recognised by the State (as set out in Article 11, para. 2 Bavarian Constitution) and endowed by it to carry out a certain amount of public responsibilities subject to the supervision of the State.[772]

2. Local Self-Administration Implies Multiform Representative Democracy

The added value of local authorities lies however not only in their structural functionality as decentralised administrative entities of the State, but rather in their being a branch of public administration where democratic participation can most effectively be exercised.[773] In fact, the Basic Law defines Germany as a democratic State, in which State authority is derived through elections and other votes (Article 20, para. 2 BL). This is true not only at federal level (Article 38 BL), but also in the internal legal orders of the *Länder*, which ought to conform with the principle

---

770 BVerfGE, 11, 266, 275; Verfassungsgerichtshof Rheinland-Pfalz, (Rh-Pf Verwaltungsblatt, 1948, 221); Bayerischer Verfassungsgerichtshof (VGHE 2. 143 ff. (163)). Cf. also: H. Peters, *Lehrbuch der Verwaltung*, Berlin-Göttingen-Heidelberg, 1949, 292 and W. Scheuner, *Neubestimmung der kommunalen Selbstverwaltung,* AfK, 1973, 1 ff. Most recently see also: LVerfGE M-V 9-17/06 and the comment thereon bu H-G. Henneke and. K. Ritgen: *Aktivierung bürgerschaftlicher Selbst-Verwaltung in Städten, Kreisen und Gemeinden - zur Bedeutung der Lehren des Freiherrn vom Stein für die kommunale Selbstverwaltung der Gegenwart,* DVBl 2007, 1253-1266.

771 J. Burmeister, *cit*., 4. See also more recently: F. Hufen, *Die Zukunft der kommunalen Selbstverwaltung,* in: M.E. Geis and D. Lorenz (eds.), *FS Maurer*, 2001, 1176.

772 H. Pagenkopf, *Kommunalrecht*, Vol. I, 2nd ed., Berlin, 1975, 43-44.

773 H. Dreier, *Art. 28*, in: *cit*., Rn. 79. So also: BVerfGE 79, 127 (150).

of democratic State, governed by the rule of law (Article 28, para. 1, sentence 1 BL). Thus, assemblies (*Volksvertretungen*) at *Land*, county and municipal level shall be represented by a body chosen in general, direct, free, equal, and secret elections by the people (Article 28, para. 1, sentence 2 BL). In other words, the Basic Law provides for a system of so-called "layered democracy" (*gestufte Demokratie*), typical of federal States, in which no unique *volonté generale* of the people exists, but is fragmented among different tiers of government.

The normative necessity established between local self-administration and democracy under the Basic Law might be said to be also an historical necessity, since, as seen above, the very first forms of democratic participation in modern Germany can be traced at local level in old Prussia. However, as many German legal scholars pointed out along the years, one can doubt whether this link between local self-administration and democracy is also a conceptual necessity. In fact, being local self-administration considered as part of the State administration, one could easily imagine it as well-functioning even without any democratic legitimacy, as it is the case for other types of self-administration. In particular, it has been contended that local self-administration requires technical or professional decisions rather than political ones.[774]

But even the reasoning about the normative and in particular constitutional necessity does not go as far as the Charter does. Even if it is true that Article 28, para. 1, sentence 2 mandates that local self-administration is exercised by representative bodies, it yet lies within the choice of the constituent power whether to provide or not for a democratic administration. In other words, the guarantee of a democratic local self-administration under German constitutional law stays in no necessary relation with the guarantee of Article 20, para. 2 BL and, in theory, it could be set aside by the constituent power.[775] Again, only Charter Article 3 provides for an international legal obligation, whereby local self-government cannot be separated from democratic participation, which is binding also upon the constitutional power. Hence, thanks to the Charter, it is not only true that local self-administration cannot be dismantled by the constituent power, but also its democratic nature cannot be set aside by Germany without incurring into its international responsibility.

Notwithstanding the different value of the two provisions, one might find remarkable similarities between Article 3, para. 2, sentence 1 of the Charter and Article 28, para. 1, sentence BL. First of

---

774 See in particular: G. Püttner, *Der Streit um das Verhältnis von Demokratie und Selbstverwaltung*, § 25, in: G. Püttner (ed.), HKWP, Vol. 2, 1982, 3-10; E. Forsthoff, *Krise der Gemeindeverwaltung im heutigen Staat,* Berlin, 1932, 57 and H.H. Klein, *Demokratie und Selbstverwaltung*, in: FS Forsthoff, 1972, 165 and ff.

775 So: W. Frenz, *cit.*, in: M. Hoffmann and others (eds.), *cit*., 17; E. Schmidt-Aßmann, *Kommunale Selbstverwaltung nach Rastede*, in: FS H. Sendler, 124; K. Stern, *Europäische Union und Kommunale Selbstverwaltung*, FS Friauf, Heidelberg, 1996, 82.

all, neither the Charter nor the Basic Law provide for a specific electoral system, but only for electoral principles. Preparatory works show that it is by no means that the Charter provision echoes the electoral principles of the German Basic Law thus binding together local self-government and representative democracy. The original draft Charter provision was in fact amended by two German members of the Standing Conference of Local and Regional Authorities, Otto Maier and Peter Michael Mombaur, the latter of whom was a lawyer and at that time President of the Federal Association of German Cities and Towns.[776] The original provision drafted by the group of legal experts stipulated in fact that the right to local self-government «*shall be exercised by councils or assemblies composed of members elected by direct universal suffrage»,* whereas the two aforementioned members of the Conference amended the provision tailoring it according to the German Basic Law, that is to say by adding that councils or assemblies should be composed of «*freely elected by secret ballot on the basis of direct, equal, universal suffrage».* When depositing the instrument of ratification, the Federal Republic, coherently with Article 28, para. 1, sentence 2 BL, confined the personal scope of application of the Charter, and thus also that of Article 3, para. 2, to municipalities and counties. In this respect, no discrepancy between the Charter and the Basic Law can be detected.

However, the relations between Council of Europe law and German law with reference to the universality of the vote might be worth to be further investigated. In fact, as recognised by the Federal Constitutional Court, when the German Basic Law refers to "the people" exercising State authority, as it does Article 28, para. 1, sentence 2, it means generally "the German people".[777] To supplement Article 28 with an additional provision allowing persons which possess EU citizenship to vote in municipal elections, a federal statute was deemed not sufficent, being thus necessary to pass a corresponding constitutional amendment. Such an amendment would be again necessary to introduce a further derogation from the general rule, that is to say for granting to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the five years preceding the elections, as set out by Article 6 - Chapter C of the European Convention on the Participation of Foreigners in Public Life, a treaty drawn up by the Steering Committee of Local and Regional Democracy in 1992. Requiring a constitutional amendment, this treaty has never been signed and ratified by Germany.[778]

---

776 Cf. Council of Europe, XVI Session (27-29 October 1981), CPL (16) 6, Amendment No. 2, in www.coe.int/archives

777 BVerfGE 83, 37, 59; 83, 60, 70.

778 Deutscher Bundestag, *Antwort der Bundesregierung auf die kleine Anfrage der Abgeordneten Dr. Max Stadler, Gisela Piltz, Ernst Burgbacher, weiterer Abgeordneter und der Fraktion der FDP*, 9 October 2006, Drs. 16/2882.

Hereunder, it will be tried to answer the question as to what is the "council" or "assembly" of the Charter under German law; to what extent the application of the aforementioned electoral principles are extended also to elections in the so-called *Verbandsgemeinden* of Rhineland-Palatinate and whether the same principles could be applied also to joint local authorities similar to *Verbandsgemeinden* in other *Länder*.

2.1. Representative Bodies (*Räte*) Have Substantial Decision-Making Powers

Article 28, para. 1, sentence 2 BL stipulates that in all *Länder* there should be at least one representative body (*Volksvertretung*), that is to say at least one of the governing bodies of municipalities and counties should be elected directly by the people. This body or organ should be a collegiate and not a monocratic one (*Volksvertreter*).[779] Unlike Charter Article 3, para. 2, sentence 1, the Basic Law does however not explicitly specify whether this representative body should also be the organ primarily assigned with the task to exercise the right of local self-administration. According to the dominant opinion,[780] it is however obvious that the representative body should be the body assigned with substantial and not only with formal decision-making powers; in fact, the sovereignty principle, whereby *«all state authority is derived from the people»* (Article 20, para. 2 BL), makes clear that the representative body ought to be assigned with deliberative powers, which have to be exercised in the interests of the local community and cannot be hollowed out by law[781].

According to the dominant opinion[782], every *Land* legislature is relatively free to determine the allocation of powers among the different local political bodies, since they are not to be treated pursuant to the same strict principle of separation of powers applying to State organs exercising sovereign prerogatives. Yet, the representative body should remain the "high governing body" of the local authority, which ought to retain a core of decision-making powers which cannot be hollowed out, a rule which one can also derive from the monitoring practice on Charter Article 3, para. 2, sentence 1. Hence, the representative body can be assisted by other organs to which powers can in principle be delegated,[783] but it should always be assigned by law with essential decision-making powers, including the power to pass by-laws (*Satzungsautonomie*)[784] and the power to approve the

---

779 See: W. Elsner, *Gemeindeverfassungsrecht*, in: H. Peters (ed.), *Handbuch der kommunalen Wissenschaft und Praxis*, Berlin 1956, 287-288.

780 So: J. Frowein, *Die kommunale Volksvertretung*, in: G. Püttner (ed.), HKWP, Bd. I, 82; M. Burgi, *cit*., 115. *Contra*: A. Köttgen, *Wesen und Rechtsform der Gemeinden und Gemeindeverbande*, in: G. Püttner (ed.), HKWP, Bd. I, 195.

781 K. Stern, *Art. 28*, *cit*, 1964, Rn. 45.

782 K. Stern, *Art. 28*, *cit*., 1964, Rn. 50.

783 O. Goennenwein, *cit*., 475-476.

784 BVerfGE 21, 54 (63); 32, 346 (361).

budget, which could thus not be delegated to a non-representative body (*Ratsvorbehalt*).[785]

In line with the spirit of German federalism, the domestic orders of the *Länder* provide for different political structures at both municipal and county level. Whereas at county level no harmonisation between the different systems has ever taken place, at municipal level the 1935 German Municipal Code (DGO) provided for the first time for a harmonised model throughout Germany. Along the past twenty years, again, there have been signs of a spontaenous trend towards harmonisation of the eleven different local government forms, traditionally grouped into four models, the so-called "county constitutions" (*Kreisverfassungen*) and "municipal constitutions" (*Gemeindeverfassungen*): in North-Rhine Westphalia, Lower-Saxony and in rural towns of Schleswig-Holstein the so-called *Norddeutsche Ratsverfassung* prevails, whereas in Baden-Württemberg and Bavaria the so-called *Süddeutsche Ratsverfassung*; Rhineland-Palatinate and the Saarland adopted the so-called *Rheinische Bürgermeisterverfassung,* whereas Hesse and the larger towns of Schleswig-Holstein introduced the so-called *Magistratsverfassung*.

The first model (so-called *Norddeutsche Ratsverfassung*) was introduced by the British administration during occupation of Germany after WWII. Pursuant to it, all powers, if not delegated, were concentrated in a directly-elected council, which then appointed an executive chief (*Gemeinde*- and *Kreisdirektor*), being the mayor in the municipalities and the *Landrat* in the counties merely chairmen of the representative body endowed with ceremonial functions. Since 1994 their role has changed and they are now also directly elected by the people. Yet, the directly elected council was and is recognised by law as the supreme decision-making body competent for all matters. Unlike in North-Rhine Westphalia, though, in Lower-Saxony the mayor was and is joined by an executive committee (*Verwaltungsausschuss*), elected by the council, with broad powers to shape the agenda of the council and veto powers over council decisions.

In the second model (so-called *Süddeutsche Ratsverfassung*), the mayor was directly elected, chaired the city council (*Gemeinderat*) and governed the city's administration. In Baden-Württemberg mayors were putatively non-partisan and are therefore elected not at the same time with the council, whereas in Bavaria council and mayor served for the same period of time. Though the council was the body which takes formally the fundamental decisions affecting the local community, direct election of the mayor put him in a more powerful position so that he could no

---

785 E. Schmidt-Jortzig, *cit*., DÖV 1987, «*Die gemeindewesentlichen Belange gehören in den Rat. Ähnlich dem Parlamentsvorbehalt auf Staatsebene lässt sich hier von einem Ratsvorbehalt sprechen».* Cf also BGHZ 32, 375 (378); OLG-Frankfurt, NVwZ 1982, 581; H. Bethge, *Parlamentsvorbehalt und Rechtssatzvorbehalt für die Kommunalverwaltung,* NVwZ 1983, 577 and ff.; W. Löwer, *Rechtsverhältnisse in der Leistungsverwaltung,* NVwZ, 1986, 793.

longer be dismissed and replaced by the council. In Bavaria, in particular, the mayor was also part of the council and had the right to vote as every other councillor, so that the two bodies were deemed to be equally responsible for exercising the right to local self-administration.

In the third model (so-called *Bürgermeisterverfassung*), originating in the French *maire* system and in use today in Rhineland-Palatinate, the mayor served as a monocratic body elected by the council and presiding over it. Though the council was the leading administrative organ, the mayor had significant decision-making powers and, in case for a need of urgent decisions, could exercise them without the council.

The fourth model (so-called *Magistratsverfassung*) which roots back to the municipal code of Baron vom Stein and which is still in use in Schleswig-Holstein and Hesse, consisted of a collegial administrative body, in which also the mayor takes seat. This body (*Magistrat,* now *Gemeindevorstand*) was elected by the representative body, the council, which, unlike the originary model of the nineteenth century, has the power to take all relevant decisions. These decisions in fact are no longer subject to approval of the *Magistrat*, but the latter can delay their execution if deemed to be illegal or inimical to local interests.

According to the dominant opinion in the German literature, all aforementioned models conform with the Basic Law, since all bodies assigned with the essential decision-making powers are representative bodies[786] whereas those additional bodies which are not representative but nonetheless exercise State authority are at least indirectly legitimised.[787]

To conclude, it has yet to be mentioned that the differences between the four models have been smoothed out along the years by several reforms.[788] Nowadays, in almost all *Länder* the municipal or county council (designated with different names as *Gemeinderat* or *Rat* or *Gemeindevertretung* or *Stadtrat*) is the representative body assigned with the bulk of decision-making powers or at least with a general competence of powers laid down by law, whereas the mayor (*Bürgermeister*) and the county officer (*Landrat*) are mainly endowed with powers for implementing the decisions of the council and carrying out other delegated tasks and are subject to control by the council.[789] Even if

---

786 K. Stern, *Art. 28, cit*., Rn. 50; H.J. Wolff, *cit*., 87; O. Goennenwein, *cit*., 475.

787 See in this respect: BVErfGE 38, 258 (*schleswig-holsteinische Magistratsverfassung*) and BVerfGE 47, 253 (*NRW Bezirksverfassung*).

788 So: M. Burgi, *cit*., 114-116; P. J. Tettinger, P. Erbguth, T. Mann (eds.), *cit*., 61; H. Meyer, *Kommunalverfassungsrecht in den norddeutschen Flächenländern – Annährung oder Diversifizierung?*, NordÖR, Heft 11/2012.

789 J. Frowein, *cit*., 85-86.

the widespread trend towards direct election of mayors has been weakening the position of the council and even if mayors, in several *Länder* jurisdictions, enjoy far reaching decision-making thus endangering the primacy of the council, it can generally be said the the council is the representative body to be directly elected pursuant to both Article 28, para. 1 BL and Article 3, para. 2, sentence 2 of the Charter.[790]

2.2. No Mandatory Direct Election in Non-Territorial Joint Local Authorities

A specific mention needs further to be made for the case of so-called *Verbandsgemeinden*, a particular category of local authorities established in the *Land* Rhine-Palatinate to which the Charter's application was extended. This specific local authority is a joint-local authority (*Gemeindeverband*) pursuant to Article 28, para. 2, sentence 2 BL. Under German constitutional law, the electoral principles laid down in Article 28, para. 1, sent. 2 BL apply to municipalities and counties, not to other joint local authorities (*Gemeindeverbände*) set up in the German *Länder*. For them, as the Federal Constitutional Court acknowledged back in 1979,[791] no constitutional provision requires the existence of a political representative body, nor sets forth that it must be directly elected. Some *Länder* do however provide in their municipal codes for direct universal suffrage for local assemblies of joint local authorities.[792]

This is for instance the case of 161 *Verbandsgemeinden* within Rhineland-Palatinate. This specific category of joint local authorities, which may be translated with the term “township”, embodies a local authority composed of several tiny villages or communities mostly in non-urban areas (so-called *Ortsgemeinden*) which join forces administratively, otherwise not being able to perform public functions by themselves. The model of *Verbandsgemeinden* implies a semi-amalgamation, since small municipalities are not abolished but they are combined in larger administrative units with legal personality carrying out in the interest of the former different public functions. It should therefore not be regarded as a particular form of intermunicipal co-operation under Article 10 of the Charter, because the so-called *Ortsgemeinden* come together for establishing a new community-based authority. However, since *Verbandsgemeinden* are not entitled to discharge own administrative functions different from those of the *Ortsgemeinden,* as it is the case for the Italian

---

790 See in this respect J. Ipsen, *Die Abschaffung der Doppelspitze: Bestandaufnahme einer Reform*, in: J. Oebbecke, D. Ehlers and H. Diemert (eds.), *Kommunalverwaltung in der Reform*, Münster, 2004, holding that a stronger differentiation between the council and the executive bodies should be pursued by means of legislation, for instance by abolishing the membership of the mayor or county officer in the council, which might be said to contravene the principle of direct election as laid down in the Constitution, insofar as the mayor is indirectly legitimised.

791 BVerfGE 52, 95, 111.

792 O. Goennenwein, *cit*., 247; T. Maunz, *Art. 28*, in: T. Maunz and G. Dürig (eds). cit., Rn 22; G. Oehler, *Die Verwaltungsgemeinschaft als Alternative zur Einheitsgemeinde in den neuen Bundesländern,* LKV, 1992, 72.

"unioni di comuni" or the Spanish "diputaciones", one cannot really argue that their deliberative bodies must be directly elected. Nevertheless, the municipal code of the *Land* Rhineland-Palatinate provides for the direct election of the council (*Verbandsgemeinderat*) and also of the mayor (*Bürgermeister*), thus ensuring a wider degree of local democracy. *Prima facie*, the transformation of the township council into an indirectly elected body would not violate Article 28, para. 1, sentence 2 BL, but Article 3, para. 2, sentence 1 of the Charter, which, as a federal statute, binds Rhineland-Palatinate to ensure direct electon. However it has been showed in the first Chapter that, pursuant to the "case-law" of Council of Europe bodies, indirect election can be deemed to comply with the Charter, insofar as the local authority at hand does not undertake own administrative functions and do not have resources of their own, but rather functions of other local authorities.

According to the Explanatory Report, the purpose of Charter Article 3, para. 2 was to ensure that «*the rights of self-government are exercised by authorities that are democratically constituted*». That appears to mean that every public authority discharging own administrative functions at local level shall be democratically constituted. As the Explanatory Report confirms: «*In principle, the requirements set forth in Part I of the Charter relate to all categories or levels of local authority in each member state».* However, as explained above (see *supra* first Chapter), the term "local authorities" under Article 13 of the Charter needs to be construed together with Article 3, para. 1.

The autonomous interpretation of the Charter's terms allows to assert that local authorities within the meaning of the Charter are primarily territorial authorities. Each member State should thus apply to them the electoral guarantees laid down in para. 2, sentence 1. In 2011 the Congress, in its report on reservations and declarations on the Charter, commented on the German declaration made while depositing the instrument of ratification as follows: «*The criterion adopted consists in excluding specific or sectoral modes of co-operation*» and including only local authorities which exist federalwide. *«This criterion is, however, contested, because it does not cater for the general modes of co-operation which are not specified in the declaration (the various forms of Gesamtgemeinden provided for in Länder legislations)»,* including for instance so-called *Ämter* in Brandenburg, Schleswig-Holstein, Mecklenburg-Western Pomerania, *Verwaltungsgemeinschaften* in Bavaria, Saxony and Thuringia, *Samtgemeinden* in Lower-Saxony.[793] However, this comment does not seem very accurate, since not all various forms of *Gesamtgemeinden* in Germany are territorial authorities. To the contrary, most of them are authorities which fulfill mainly inter-municipal purposes (*Bundkörperschaften*) and thus do not exercise any territorial jurisdiction and, quite

[793] Congress of Local and Regional Authorities, *Reservations and Declarations to the European Charter of Local Self-Government*, CPL (21) 5, 28 September 2011, § 42.

reasonably, do not have either to establish deliberative bodies directly elected by the people.[794] Nonetheless, *Land* constitutional law could provide for the direct election of their bodies, hence laying down a more advanced degree of protection than that of the Basic Law. Until now, however, *Länder* constitutional and administrative courts have followed[795] the precedent set by a 1979 ruling of the Federal Constitutional Court which found that the *Ämter* in Schleswig-Holstein could not be classified as joint local authorities pursuant to Article 28, para. 2 BL and to Article 2, para. 2 of the Schleswig-Holstein because they were neither territorial authorities nor local authorities endowed with a substantial share of powers and responsibilities.[796] This ruling does not further prevent courts to check on a case by case analysis whether other "sectoral modes of co-operation" have evolved into territorial or territorial-alike authorities due to the amount of the tasks conferred upon to them by municipalities.[797] So, even if the uniforming interpretation of the Federal Constitutional Court appears to be prevailing in the *Länder,* they still retain the power to provide other local authorities for a more advanced degree of democratic legitimation than the Basic Law. The Charter, in this respect, offers an objective standard, which might prove useful.

Further, it must be observed that, unlike in Italy, where only local authorities mentioned in the Constitution can but, as it will be showed (see *infra* second Chapter § 3.II), must not be directly elected by the people, in Germany, the *Länder* enjoy the power to decide whether other local authorities different from municipalities and counties, which do not have necessarily to be of territorial nature, should be elected by universal and direct suffrage or not. This remarkable difference relates to the system of government in force in Italy and Germany: whereas the former is a regional State in which even Regions with special status cannot fully depart from the local government structures designed by the State, Germany is a federal State in which the *Länder* enjoy more extensive powers in this respect.

Finally, as for higher level joint local authorities with territorial jurisdiction, including *Bezirke* in Bavaria, *Bezirksverbände* in Rhineland-Palatinate as well as joint local authorities *sui generis*, (including the *Region Hannover*, the *Städteregion Aachen* and the *Regionalverband Saarbrücken*) direct election appears to be appropriate. Even if neither formally necessitated by Article 28, para. 1, sent. 2 BL nor by Article 3, para. 2, sentence 1 of the Charter, whose application is confined to municipalities and counties and to *Verbandsgemeinden*, the guarantee of direct election is ensured

---

794 M. Burgi, *Kommunalrecht*, *cit*., 303. Cf. NdS-StGH 3.6.1980, NdS-MBL, 1980, 1031 and H. Spörlein, *Die Samtgemeinden in Niedersachsen*, 1965, 186.

795 OVG MV Judg. 16 March 1993, 4 K 1/92 and LVerfGE Bbg, Judg. 21 January 1998, 8/97.

796 BVerfGE 52, 95.

797 So, for instance: U. Schliesky, C. Ernst, S.E. Schulz, *Die fehlende demokratische Legitimation der Amtsebene*, in: NordÖR 1/2010.

under ordinary legislation. Whenever Germany will decide to remove the reservation related to the personal scope of application of the treaty, the combined reading of Article 28, para. 1, sent. 2 BL read in the light of Article 3, para. 2, sent. 1 of the Charter would provide for a clear federal constitutional guarantee of direct election for all territorial joint local authorities.[798]

3. Direct Democratic Participation Permitted and Enhanced by Law

As seen here above, both under the Charter and under the Basic Law representative democracy is regarded as the primary solution for enabling citizens' participation in the conduct of public affairs, even if directly and participatory democratic instruments are also admitted and, in the past twenty years, on grounds of a general crisis of traditional democratic legitimacy, increasingly fostered by municipal and county codes of the *Länder* which thus appear to rediscover a concept of self-administration from the bottom-up (*von unten nach oben*).

From a German constitutional legal point of view, one has to bear in mind that direct democracy is not explicitly mentioned by the Basic Law. Only Articles 29, 118 and 118 lett. a) BL relate to the tool of the referendum, but confines it to new delimitations of the federal territory. Yet, a very specific form of direct participation by citizens is enshrined in Article 28, para. 1, sentence 4 BL, whereby, at municipal level only, representative councils or assemblies might be replaced by spontaneous assemblies of citizens (*Gemeindeversammlung*). This provision, albeit far-reaching, is more theoretical than linked to practical effects[799] and is owed to the fact that, at the time when the Basic Law entered into force, many small-sized municipalities had never had an elected representative body and, at least initially, it could have been quite costly for them to set up one[800]. Along the first years of the Federal Republic, several *Länder* made use of this provision and regulated the procedure for the establishment of the assemblies in their municipal codes, but over time this institution has almost undergone obsolescence[801] whereas new forms of direct democratic participation have developed.

---

798 Many authors and part of the case-law hold it exists already. See for instance: BVerfGE 83, 37 (53) and 52, 95 (111). K. Waechter, *cit*., Rn. 82; D. Ehlers, *Anmerkung zum Urteil des VerfGH NRW*, DVBl 2001, 1602.

799 *Contra* see: K. Waechter, *cit.*, 229, holding that this provision would show that the Basic Law did not really decide for either representative or direct democracy.

800 K. Stern, *Art. 28*, *cit*., Rn. 52; E. Schmidt-Jortzig, *Gemeindeverfassungstypen in der Bundesrepublik Deutschland*, in: DÖV, 1987, 281-285.

801 Art. 72, para. 1, sentence 4 BW Constitution read in conjunction with §§ 23 III, 65 GO BW; §§ 9, III 80 GO Hesse; Art. 44, para. 3, sentence 2 Lower-Saxonian Constitution read in conjunction with § 75 GO NdS ; § 27 III GO NRW. At the time of the negotiations only the *Gemeindeordnung* of Schleswig-Holstein (§ 54 SH GO) provided for rules for establishing a *Gemeindeversammlung*. Cf. U. Mentz, *Der steinige Weg zu mehr kommunalen Selbstverwaltung in Europa*, in: A. Gasser, *Gemeindefreiheit als Rettung Europas*, Baden-Baden, 1983, 14-15.

In particular, Article 20, para. 2 BL recalls that State authority shall be exercised by the people through elections, but also through «*other votes»,* under which, following to the dominant opinion,[802] fall also local initiatives and referendums (*Bürgerbegehren* and *Bürgerentscheide*). In this respect, each *Land* municipal or county code has laid down its own legislative framework, since, unlike in Italy, local authorities cannot decide with own by-laws whether to allow or not what type of referendum (consultative or binding), but it is up to statutory provisions by the *Länder* to set out a uniform regulatory framework. Thus, one could say that in Germany direct democratic tools ought not only to be permitted by statute, but needs also a legislative framework which cannot be provided by local authorities themselves through their own normative powers. Until the 1990s only the municipal code of Baden-Württemberg provided for such a framework (§ 21 GemO), whereas at county level no direct democratic tool was foreseen.[803] Nowadays, direct democratic instruments at municipal level are regulated in every municipal code, whereas county codes in Baden-Württemberg, Hesse and Thuringia allow for the direct involvement of the county populations.

Referendums (*Bürgerentscheide)* are traditionally initiated by means of a citizens' initiatives (*Bürgerbegehren*) which is then filtered by the council, which can accept the content of the proposal or put it to referendum. Referendums can however also originate in a resolution by the council, as it is the case in Baden-Württemberg, Bavaria, North-Rhine Westphalia, Mecklenburg-Western Pomerania and Schleswig Holstein.[804] The citizens' initiative aim at proposing a particular measure (*initiierend*) or at suppressing it (*kassierend*), they consist of a "yes" or "no" ballot question, accompanied by a motivation, which has to be submitted to the council upon subscription by a minimum number (ranging from 3 percent to 15 percent) of citizens, which in some *Länder* might be required to be German citizens and not only residents.[805] The ballot question shall fall under a subject matter upon which referendums can be held pursuant to statutory provisions. Typically, initiatives impinging on the local budget or requiring to levy new taxes are ruled out by municipal and county codes,[806] which to the contrary require referendum initiators to indicate possible additional public expenditures deriving from it. In general, it might be said that citizens' initiative and referendums cannot be used to the extent to fully replace the council which is the high

802 See one for all: M. Burgi, *cit*., 137.

803 See: G. Püttner and P. Jacoby, *Die politische Bürgermitwirkung*, in: G. Püttner (ed.), cit., 1981, 31-32 and 36.

804 § 21 I GO BW; Art. 18 lett. A II BayGO; § 26 I 2 and 3 GO NRW; § 20 III KV MV; § 16 lett. c.) I GO SH.

805 § 26 II 2 GO NRW. As mentioned above, such a restrictive approach towards foreigners political participation at local level contradicts the terms, i.e. Chapter C, of the Council of Europe Convention on Participation of Foreigners in Public Life at Local Level (1992), which however Germany has not signed yet. Certainly, with reference to EU nationals, it does not appear to conform with the spirit of EU Law, which recognised the right to vote and stand in as a candidate in municipal elections.

806 For an overview of those subject matters which are deemed not to be subject to referendum see: J. Oebbecke, *Nicht bürgerbegehrensfähige Angelegenheiten (Rechtsprechungsanalyse),* DV 37 (2004), 105.

governing body exercising the right to local self-administration. In other words, direct democracy can only complement representative democracy.

This is the reason why the law provides for quorums of participation (which are rather low if compared to the ones set out in Italy) and requires that citizens' initiatives have to be declared admissible by the council, before the referendum itself can take place. This kind of "political supervision" should not surprise at all, since, legally speaking, the citizens' referendum is aimed at enjoying the same legal effect of a decision by the council and thus to be subject to administrative supervision. However, against erroneous council decisions *Länder* statutory provisions ensure a judicial remedy: single initiators are in fact allowed to appeal the decision by the council before administrative courts. Finally, two different legal tools protect the citizens' initiative against political maneuvers by the council. The first is a suspensory measure *apriori* which prevents the enactment of decisions by the council which would make the initiative impossible or unuseful, whereas the second is a suspensory measure *aposteriori* which prevents the council to amend the decision deriving from the referendum for at least two years.

As for specific participatory rights of the local population, one has first to recall that, besides their explicit regulation in municipal and county codes,[807] local authorities are also allowed to introduce themselves new forms of citizenship involvement in decision-making. The constitutional legal basis lies in Article 28, para. 2 BL itself, which recognises the own responsibility of municipalities and joint local authorities thus implying they enjoy organisational freedom for the pursuit of their aims (*Organisationshoheit*). Drawing on this freedom, local authorities are allowed to establish additional forms of citizenship participation different from those already laid down in municipal and county codes.[808] No participation in form of a co-decision (*Mitentscheidung*) can yet ever be granted, since decisions with which the right to local self-administration is exercised pertain exclusively to the representative body (*Volksvertretung*).[809] So, as a rule, non-elected citizens cannot be assigned with the right to vote in the council, nor can a local authority delegate to other bodies functions which are assigned to them by statute.[810]

---

807 In particular, one has to recall at least three tools which are regulated by municipal and county codes, that is to say the *Bürgerversammlung*, an assembly used for consultation of citizens, which are only allowed to discuss and make proposals, and must be called upon request of the population or of the council; the *Bürgerantrag* or *Bürgerinitiative*, which is a formal initiative to the council to deal with a particular question or subject and the *Bürgerbefragung*, a consultative poll among citizens directly affected by a future measure.

808 A. Herbert, *Beratung in der Gemeinde*, NvwZ 1995, 1056; A. Gern, *Zur Zulässigkeit von kommunalen Beiräten, Unterausschüssen, Kommissionen und Komitee,* VBlBW 1993, 127, 128.

809 A. Herbert, *cit.*, 1058; D. Hegele, *Anhörungs-, Mitwirkungs- und Entscheidungsrechte von Einwohnern und Bürgern in der Gemeinde- und Landkreisordnung für den Freistaat Sachsen,* LKV 1994, 17.

810 U. Schliesky and W. Buschmann, *§§ 47 lett. d)-f)*, in: J. Bülow, J.C. Erps, U. Schliesky, J. von Allwörden (eds.), *Kommunalverfassungsrecht Schleswig-Holstein - Kommentar*, , 1997, Rn. 22. Su questa rigidità dell'ordinamento

Local authorities, therefore, enjoy the power to regulate the various forms of involvement of the local population before decisions are taken by the council, in particular when information on a certain subject is being collected and the views of the population might appear relevant. Hence, as recalled also by the Congress of the Council of Europe «*in a number of municipalities, local inhabitants are regularly invited to certain meetings of the representative body where longstanding municipal and development plans are discussed*»[811]. The right of the local communities to influence authorities' participation is institutionalised through specific procedures (participatory budgeting) or through different ad-hoc bodies (*Kommissionen*, *Beiräte*, *Ausschüsse*, *Foren*, etc.), composed of experts or people pertaining to different social groups, including foreign nationals, younger and elderly people (*Ausländerbeiräte*, *Jugendräte, Seniorenbeiräte)*, depending on the choice of each municipality. If a municipality decides to establish a body for participatory purposes, the body itself will neither have to be representative of the local population nor indirectly elected, since it is not expected to exercise any public authority pursuant to Article 20, para. 2 BL. More recently, the establishment of the aforementioned bodies was made binding by means of amendment to the municipal and county codes in North-Rhine Westphalia, Rheinland-Palatinate and Saar.

In general, however, whereas the Congress of the Council of Europe highly recommends to set up such bodies in domestic law, the German literature appears rather skeptical towards tools considered to be superfluos or even detrimental to democracy itself, since they produce a fragmentation of the electorate into social or cultural classes, thus preferring and suggesting the establishment of participatory bodies as plural as possible.[812]

4. The Status of Local Elected Representatives: the Case of Honorary Representatives

The German Basic Law does not embody any explicit constitutional provision guaranteeing the free exercise of local councillors' mandate. However, such a guarantee can be derived from the principle of representative democracy (Article 20, para. 2 BL) and from the ban on imperative mandate applying to the members of the *Bundestag* (Article 38, para. 1, sentence 2 BL). In fact, since Article 28, para. 1, sentence 2 BL sets forth that the constitutional orders of the *Länder* should conform to the principles of republican and democratic State applying at federal level, one might argue that

---

tedesco si vedano le considerazioni di: S. Huber, *Community Organizing in Deutschland: eine "neue" Möglichkeit zur Vitalisierung Lokaler Demokratie?* Potsdam KWI-Arbeitshefte 17, 2010, 73.

811 Congress of Local and Regional Authorities, *Local and Regional Democracy in Germany*, Appendix 3 – Information on Human Rights and Local Authorities, CG (22) 7, 14 March 2012, § 7.

812 H. G. Henneke - K. Ritgen, *Stärkung der Bürgerbeteiligung durch Seniorenbeiräte und niedrige Quoren bei Bürgerbegehren und Bürgerentscheid?,* LKRZ 10/2008, 361-367*;* LVerfG MV, DVBl. 2007, 1102, 1110

among these principles the free mandate of elected representatives is included, since the absence of freedom to exercise a political mandate is not compatible with representative democracy. The same could be said with reference to the social and economic guarantees for the discharge of the political mandate, laid down in Article 48 BL as well as in the Constitutions of the *Länder*. It is certainly true that the Federal Constitutional Court specified that local elected representatives cannot be fully compared and thus treated as members of Parliament at federal or *Land* level, because they are not members of a Parliament on a smaller scale but exercise their right as a branch of the executive power.[813] However, this difference is more striking for particular guarantees, such as parliamentary immunities, as stressed in the Explanatory Report to the Draft Charter *«This guarantee does not of course amount to an immunity of the kind normally enjoyed by members of national parliaments, which is considered to be generally unobtainable and, moreover, unnecessary».*

As for conflict of interests in exercising the mandate of local councillors, Article 137, para. 1 BL allows but does not impose upon the legislature – in this case the legislature of each *Land* - to restrict the right to stand for election in a local election for *«civil servants, other salaried public employees, professional or volunteer members of the Armed Forces, and judges».* According to the Federal Constitutional Court,[814] Article 137, para. 1 BL provides only for an incompatibility clause (*Unvereinbarkeit*), but not for a ineligibility one, since the norm is about restricting but not repealing the right to stand for election. As a result, this means that public functions cannot be carried out simultaneously but civil servants, other salaried pubblic employees, members of the Armed Forces and judges are not prevented from being candidate nor can the validity of their election be challenged. They are only asked to choose between holding their positions or taking up the new one. Hence, in the legal orders of the *Länder*, the free exercise of public functions is object of very detailed regulation in the municipal and counties codes (*Gemeinde- und Kreisordnung*),[815] which set out thouroughly all different types of incompatibility and of conflict of interest for local officials.

To ensure the freedom to exercise the mandate, municipal and county codes provide for compensation schemes for expenses incurred in the exercise of the office (*Auslagenersatz*), for compensation awards taking into account the time and effort spent (*Aufwandsentschädigung*), for compensation for loss of earnings for people who have an income (*Ersatz des Verdienstausfalls*) and for those who have not (*Nachteilausgleich*). Though, open to public debate remains the

---

813 BVerfGE 65, 283, (289).

814 BVerfGE 38, 326, (337). For its application towards local officials see: BVerfG 48, 64; 58, 177; 98, 145.

815 H.H. Kasten, *Ausschussorganisation und Auschussrückruf,* Berlin, 1983, 203-204. So also: E Schmidt-Jortzig, *Kommunalrecht*, *cit*., Rn. 69.

obligation to remunerate local elected representatives. The obligation to provide a remuneration (*Entgelt* or *Vergütung*) is considered by the dominant opinion as contradicting the model of volunteerism (*Ehrenamtlichkeit*) of local representatives. That is probably why, during negotiations on the Charter, the German delegation proposed to completely delete Draft Article 6, para. 2, insofar as this stipulation would have put into question the status of so-called honorary representatives (*Ehrenamtliche Mitglieder*), an institution transplanted in Prussia in the nineteenth century drawing on the English model of self-government (see *supra* § 1).[816] Several municipal codes of the German *Länder* set forth that German citizens (or even only residents, for instance in North-Rhine Westphalia) might be obliged and cannot refuse, if not for serious reasons, to participate in the conduct of public life as honorary representatives, that is to say without drawing any remuneration for work done, but only by being returned a compensation award for expenses incurred in the exercise of the office, compensation for loss of earnings and possibly, compensation for the time and effort spent.[817]

Therefore, the following three situations can be outlined: *Land* legislation rules out or impose caps on certain compensation schemes for honorary representatives,[818] *Land* legislation allows for the implementation of further compensation schemes by local authorities, *Land* legislation rules out remuneration for honorary representatives at local level. Only in the second case, local authorities' regulation granting honorary representatives with further compensation schemes (e.g. for time and effort spent) would not amount to a violation of the law, but, as explained by the Higher Administrative Court of Saxony back in 2009, would be consistent with both *Land* legislation and the Charter, insofar as compensation is meant at preventing local representatives financial disadvantages.[819] In the first and third case, to the contrary, a conflict between domestic and international law might arise, if local authorities should grant honorary representatives with further compensation or even with remuneration. Whereas in the former one might argue that the Charter could be used so as to supplement the scope of the core of local self-government to which pertains the right to compensation for local elected representatives,[820] in the latter case, however, local authorities would retain the power to extend the scope of honorary representatives' rights to the extent that their status and nature would be be completely altered. Since under Charter Article 7,

---

816 Pursuant to K. Waechter, *cit*., 27, nowadays the concept of local self-administration accepted under German constitutional law has emancipated from the idea of *Ehrenamtlichkeit.*

817 § 19 BW GO; § 13 Bay GO; Art. 20 a BayGO and § 8 Ortsgesetz; § 27 Hess GO; § 39, para. 6 NdSGO; § 30, para. 4 and 5 NRWGO; § 18, para. 5 RhPfGO; § 28 and§ 51 KSVG; § 24 SH-GO.

818 See for example: § 27, para. 3 HessGO; § 39, para. 2 Nds GO; § 1, para. 2 EntschVO S-H; § 2 EntschVO M-V. Caps are imposed in particular in Baden-Württemberg (§ 19, para. 1 BW GO) and Lower-Saxony (§ 39, para. 5, sent. 2 NdS-GO).

819 OLG Sachsen, Judg. 26 May 2009, to be found at: http://www.justiz.sachsen.de/ovg/download/4A486-08.pdf

820 BayVGH, Judg. 3 April 2008, BayVBl 2008, 664; OVG LSA, Judg. 3 April 2007 - 4 L 116/06.

para. 2 remuneration is considered as being the maximum and not just a minimum standard of protection of local elected representatives' freedom to exercise their mandate, its award can be weighed up by the State within its margin of appreciation, i.e. it might also decide not to grant it.

Finally, as seen above, Article 7, para. 2 of the Charter does not merely require social security being granted when remuneration is returned to local representatives. To the contrary, also when only compensation for loss of earnings is granted, social security contributions ought also to be paid. With reference to representatives holding a honorary office, German legislation ensures that social security contributions are to be paid (§ 41 SGB IV), insofar as an employment relationship exists (§ 7, para. 1 SGB IV) and insofar as compensation awards are taxable. Social security is granted also in case of compensation for loss of earnings (§ 163, para. 3 SGB VI).[821]

II. The Institutional Design of Local Self-Administration

1. The Principles on Allocation of Powers and Responsibilities

1.1. A Core Area of Powers and Responsibilities Rooted in Jurisprudence

The Charter's notion of a substantial share of public affairs rooted in legislation is very well known also under German local government law. Since local self-administration is protected as an institution for both municipalities and joint local authorities, restrictions to the scope of powers and responsibilities by statute are legitimate only insofar as they do not encroach upon its core (*Kernbereich*). As seen in the first Chapter, under the Charter the substantial share matches with the notion of "basic responsibilities" which ought to be rooted in the Constitution or in legislation (Article 4, para. 1). In the German *Länder*, unlike in Italy, no catalogue of basic or fundamental powers and responsibilities of municipalities and counties exists, so that it appears quite difficult to state to what exactly the "substantial share" amounts. This is all the more true after the so-called *Rastede* judgment by the Federal Constitutional Court, whereby the principle of universal jurisdiction of municipalities is deemed to overlap with the core of their responsibilities.[822]

---

821 B. Schaffarzik, *cit*., 498. Recently, there has been a discussion at federal level as to the abolition of social security for honorary representatives at local level. Social Code provisions, however, must be interpreted in conformity with international law, i.e. with the Charter and thus no such abolition is possible. See: KPV, *Sozialversicherungspflicht für ehrenamtliche Bürgermeister abschaffen,* 21 November 2009.

822 BVerfGE 79, 127 (146).

This statement by the Court does however not clarify when local authorities can be deemed to be institutionally assigned with a substantial share of responsibilities. Universal jurisdiction can in fact be deemed to pertain to the core of local self-administration of municipalities, but that does not say anything about the very scope of powers and responsibilities assigned to them (see *infra* 1.2).

Protecting the core of local self-administration means thus to ensure that a minimum number of powers and responsibilities always rests within local authorities. This minimum number shall be sufficient for exercising the right of local self-administration and therefore concerns only those tasks which are classified in each *Land* as having local nature (*Selbstverwaltungsaufgaben*) and not delegated tasks by the State, which in fact lie in the own responsibility of the State.[823] In other words, municipalities and counties ought to be attributed a share of public affairs having local nature (*Aufgabenbestand*), which allows them to exercise their right to local self-administration. These powers and responsibilities must be essential and not accidental to the nature of local self-administration and enjoy over a certain stability.[824] Part of the literature[825] maintained that municipalities' core may be identified with those responsibilities which do not have supra-local implications. In this case, however, the core would consist of a rather small nucleus of administrative functions. Overall, one has to admit that a positive approach to identify the core is not easy (*definiens indefinibilis*)[826] and, moreover, even if historical developments and traditional manifestations of local self-government might help in identifying it, it cannot provide us with a full list of specific responsibilities, which in fact vary depending on different social, economic and political factors. Apart from the rather vague notion of "affairs of the local community" (see *infra* 1.2 and 1.3) which cannot be revocated and allocated away from municipalities to a higher level of government without an overriding public interest, the case-law of the different *Länder* Constitutional Courts has identified the right to a minimum of financial equipment allowing to carry out not only mandatory functions but at least one voluntary function (*Mindestmaß an freiwilligen Aufgaben*), internal freedom of organisation and local planning powers as pertaining to the core; doubts arose as to whether and if so to what extent the "own responsibility" requirement relates to the essential content of local self-government.[827]

---

823 In some *Länder*, mandatory tasks have to be carried out under the supervision of the State (*Pflichtaufgaben zur Erfüllung nach Weisung*) and therefore ought to be considered delegated tasks pursuant to the Charter, since the State is allowed to extend its instruction powers so as that local authorities have little room to autonomously carry out them. Under German law, however, they have increasingly been considered as local government tasks. See: P.J. Tettinger and K-A. Schwarz, *Art. 28*, in: H. von Mangoldt/F. Starck/C. Klein (eds.), *Art. 28*, Rn. 175.

824 BVerfGE 91, 228 (239).

825 P-P. Humpert, *Genehmigungsvorbehalte im Kommunalverfassungsrecht*, 1990, 105 and W. Loschelder, *Kommunale Selbstverwaltungsgarantie und gemeindliche Gebietsgestaltung*, Berlin, 1976, 50.

826 F. Ossenbühl, *Energierechtsform und kommunale Selbstverwaltung*, Köln, 1998, 53.

827 M. Nierhaus, *Art. 28, cit.*, Rn. 65. See: BVerfGE 107, 1 (18 ff.).

The core of the right to local self-administration of municipalities differs from that of joint local authorities, since the latter are not vested by the Constitution with a specific scope of responsibilities like municipalities. Therefore, the legislature is given more discretion to shape it than it is the case for municipalities. However, also joint local authorities and in particular counties, due to the direct election of their political bodies, cannot be endowed only with delegated tasks by the State, but ought to be attributed with a minimum number of truly local government responsibilities fitting with their nature of supra-local authorities, that is to say which cannot be performed by municipalities on grounds of the extent and nature of the task and requirements of efficiency and economy. (see *infra* 1.3).[828]

Yet, the Charter's provision does not only embody a limit for the legislature to abstaining to revocate and allocate away powers and responsibilities, but provides also for a positive obligation to decentralise powers to the extent that "a substantial share of public affairs" will be eventually carried out by local authorities. In this respect, the Charter represents a strong counterbalance to any project of (re)centralisation and to make local authorities mere agencies of the State, an aspect which is covered also by the Basic Law. In fact, apart from the aforementioned limitations set to the revocation of powers and responsibilities and allocation to higher tiers of government, Article 28, para. 2 BL adheres to a principle of decentralised allocation of powers and therefore should be regarded as protecting local authorities from additional assignments of State responsibilities (*Auftragsangelegenheiten* and *Pflichtaufgaben zur Erfüllung nach Weisung*) by the Federation or by the *Länder,* which may hinder local authorities to exercise their own powers and responsibilities.[829]

Besides the core of local government powers and responsibilities which should make for a substantial share of public affairs, German law established also limitations to attributions to higher level of government of powers and responsibilities which pertain to the so-called edge area (*Randbereich*). In particular, courts apply the prohibition of excessive interference on the part of the State (*Übermaßverbot*) for preventing State's regulation deemed not to be suitable, necessary and proportional.[830] The principle of proportionality is a corollary of the principle of the rule of law (*Rechtsstaat*), designed and recognised by the FCC to assess the validity of law-making and law-enforcement impinging, in particular, on fundamental rights. Even if local self-government is not a

---

828 BVerfGE 119, 331 (353); 83, 363 (383); 79, 127 (150). H. Maurer, *Verfassungsrechtliche Grundlagen der kommunalen Selbstverwaltung*, DVBl 1995, 1046; F.L. Knemeyer and M. Wehr, *Die Garantie der kommunalen Selbstverwaltung nach Art. 28 Abs. in der Rechtsprechung des Bundesverfassungsgerichts*, VerwArch 92 (2001), 333.

829 M. Nierhaus, *Art. 28, cit.,* Rn. 71. BVerfGE, NVwZ 2008, 183 (123).

830 BVerfGE 26, 228; 56, 298; 59, 216; 76, 107; 1, 167 (178). Art. 3, para. 4 of the Draft Charter was meant to be a brake for too much delegation of State tasks and Art. 3, para. 2 a way for preserving non-compulsory tasks. Cf. D. Jesch, *Rechtsstellung und Rechtsschutz der Gemeinden bei der Wahrnehmung „staatlicher Aufgaben"*, DÖV 1960, 739-746.

fundamental right, the principle of proportionality applies to all constitutional guarantees, which can potentially be restricted by means of statute and therefore deserve a special protection against State interference. The principle of proportionality complements the core theory. While the latter protects the objective right to self-government, i.e. serves the purpose to ensure the institutional guarantee is respected against State interference, the former protects both the subjective and the objective right to self-government of local authorities against single and general interferences by the State.[831] As stressed by Isensee,[832] if Article 28, para. 2 BL guaranteed only the core, a broad outer zone around it would remain without any constitutional legal protection and local authorities could be deprived of many of their tasks, whereas non-compulsory responsibilities could be easily transformed into compulsory ones by the State.

1.2. Universal Jurisdiction of Municipalities

In the first Chapter it has been showed that the universal jurisdiction or general competence principle can be construed from a combined reading of Article 3, para. 1 and Article 4, para. 2 and 3 as a principle setting out that municipalities can take initiatives with regard to any matter, that is to say to any public affair, insofar as it has not been already assigned to any another public authority. During negotiations on the text of the Charter the German delegation agreed on the formulation of Draft Charter Article 3, para. 2 (today Article 4, para. 2), considering that German municipalities are treated as having a general residual right to act on their own initiative according to the so-called *Allzuständigkeit* principle. Though, the delegation also proposed to restrict the scope of action of municipalities by introducing the word "local" before the term "public affairs". In fact, Article 28, para. 2 BL embodied the right of local self-administration as related to "matters of the local community" and not in general as to any kind of public affair, as the Charter indeed allows. The amendment proposal to the Charter by the German delegation was eventually rejected so that it might be here useful to point out to what extent the sphere of local self-administration guaranteed under the German Basic Law might be said to be extended pursuant to this Charter's provision.

First of all, it has to be borne in mind that Article 28, para. 2 BL provides for a *general or universal competence* for affairs of the local community for municipalities only (sentence 1) and not for joint local authorities (sentence 2). In other words, the Basic Law identifies the scope of local self-administration of municipalities and confers upon to the legislative branch the task to identify the domain of powers and responsibilities of joint local authorities. Thus, in principle, only

831 BVerfGE 26, 228; B. Schaffarzik, *cit*., 433.
832 J. Isensee, *cit*., 1968, 245-247.

municipalities have an all-embracing jurisdiction and a right to invent new tasks (*Aufgabenfindunsgrecht*), whereas joint local authorities generally operate following to the *ultra-vires principle*, i.e. they act insofar as they are endowed with administrative functions by means of statute. The statute serves both as a limitation of the scope of functions assigned to municipalities and as an instrument for identifying the specific sphere of own responsibilities of joint local authorities. This appears to conform with the aforementioned interpretation of the Charter, whereby the authority which retains the universal jurisdiction is the one which is closest to the citizens (Article 4, para. 3), whereas, even if not explicitly mentioned, higher level local authorities ought to be assigned with a more restricted scope of powers and responsibilities laid out by legislation.

As for the meaning of the expression "affairs of the local community", which can be detected also in many *Länder* Constitutions,[833] it might be argued that the local community naturally extends beyond municipalities administrative borders.[834] The notion of local community has in fact sociological roots and designs a territorial space in which the population feels itself part of a common social entity. As the longstanding case-law of the Federal Constitutional Court pointed out,[835] public affairs with which municipalities cope with must involve needs and interests which *arise* out of the local community or have a *special link* to the local community. If no grassroots relationship exists, the State, i.e. mainly the *Länder,* will be free to decide about their attribution to other local authorities, including joint local authorities. The notion of the affairs of the local community is evidently a flexible one, which does not imply a fixed catalogue of powers and responsibilities pertaining to it, since a choice thereupon depends very much on changing social, economic, political as well as upon historical factors.[836]

However flexible it might be, the notion of "affairs of the local community" is more limited than the one of "public affairs" set out in the Charter and in other *Länder* Constitutions.[837] This means that, even if both under the Basic Law and under the Charter universal jurisdiction has to be regarded as a residual right of municipalities to rule as to the extent of their own sphere of action, the same sphere of action is different, since Charter Article 3, para. 1 read in combination with Article 4, para. 2 conceive municipalities as holding a general political mandate to address any sort of matter

---

833 Art. 97, para. 2 Brandenburg Constitution; Art. 72, para. 1 Mecklenburg-Western Pomerania Constitution; Article 117, para. 3 Saarland Constitution; Article 49 Rheinland-Palatinate Constitution; Article 91 Thuringian Constitution, Article 11 Bavarian Constitution which however speaks of the own affairs of the municipalities.

834 See for instance: A. Gern, *Wirtschaftliche Betätigung der Gemeinden außerhalb ihres Gemeindegebiets*, NJW 2002, 593

835 BVerfGE 8, 122 (123); 50, 195 (201); 52, 95 (120); 79, 127 (151); 83, 37 (150); 110, 370 (400).

836 P.J. Tettinger and K-A. Schwarz, *Art. 28*, in: H. von Mangoldt/F. Starck/C. Klein (eds.), *cit*., Rn. 168.

837 Art. 71, para. 1 Baden-Württemberg Const.; Article 137 Hesse Const.; Art. 57 Lower-Saxonian Const.; Art. 78 North-Rhine Westphalian Const.; Art. 84 Saxonian Const.; Art. 87 Saxonian-Anhalt Const.; Article 46 Schleswig-Holstein Const.

which are capable to deal with, otherwise, limiting them «*to matters which do not have wider implications, would risk relegating them to a marginal role»,* so the Explanatory Report.

Contrary to the assessment by the Congress of the Council of Europe,[838] a possible violation of the Charter can thus be assessed whenever German municipalities are prevented to exercise their initiative with reference to matters which are considered to have more than a local or supra-local significance (*überörtlich*), including foreign and defense policy issues, thus interfering with the competence of the Federation or of the *Länder*.[839] In this respect, also the Explanatory Report to the Charter admits that «*it is accepted that countries will wish to reserve certain functions, such as national defence, for central government».* However, there might be cases in which also foreign and defense policy matters, as well as energy policy matters have local implications. Nonetheless, decisions related to the deployment, equipment and securing of nuclear weapons, to the creation of areas where planting of genetically modified crops shall be banned were deemed by German courts to exceed the scope of the affairs of the local community as laid down by Article 28, para. 2, sentence 1 BL.[840] In such cases, even if not falling within the affairs of the local community, the German case-law has admitted that municipalities can reasonably argue to be affected by decisions taken at federal or even supranational level and thus can at least have a say through their deliberative bodies, for instance by passing a resolution expressing disagreement (*Befassungskompetenz*). The guarantee of local self-administration in Germany has been construed so as that local authorities are not autonomous entities with own political agendas for which applies a sort of presumption of competence, but first and foremost organs enshrined in the administrative structures of the State which, beyond the cases of explicit legislative authorisation, are allowed at the most to commit to symbolic objectives.

In this respect, one could argue that this interpretation of the guarantee of local self-administration under German law does not contravene Charter Article 4, para. 2, since it pertains to the margin of appreciation of each member State to decide what public affairs do have local implications and which ones do have not. Further, as Article 3, para. 1 of the Charter points out, local authorities exercise their right of local self-government insofar as they are able to perform public affairs. Certain public affairs, such as the deployment, equipment and securing of a nuclear waste repository do *per se* exceed the capacities of local authorities, since they require structural and financial resources which local authorities normally do not have and, further, involve public

838 Congress of Local and Regional Authorities, *Local and Regional Democracy in Germany*, CG (22) 7, 14 March 2012, § 54, 55 and 123.
839 BVerfGE 79, 127 (146 and 151 ff.), but also BVerfGE 7, 367; BVerfGE 8, 104; BVerfGE 8, 122. Cf. *Ibid*., *Art. 28,* Rn. 172-173.
840 BVerwGE, NVwZ 1991, 685.

interests other than those of the local community. Yet, the original intent of the treaty, as well as the monitoring practice by Council of Europe bodies have shown that such a restrictive approach of the Charter's provisions cannot be shared. In particular, a distinction between own or local affairs and supra-local affairs has been from the outset rejected as too vague and rigid, whereas the sphere of action of municipalities cannot be made dependent merely on their financial strength.

Hence, the provision of the Charter whereby municipalities should be vested with a general political mandate can be used by German courts within the framework of a friendly interpretation of international law (*völkerrechtsfreundliche Auslegung*) for extending the sphere of action of municipalities within the German legal order.[841] This extensive interpretation would be consistent with the old minority opinion by Joachim Burmeister who observed that Article 28, para. 2 BL speaks of the affairs of the local community and not the local affairs of the community. But it would also be consistent with a parallel trend under German law (see *infra* 7.1.2) whereby conclusion of international co-operation agreements on foreign and defense policy matters by local authorities has increasingly been considered as not exceeding the scope of the affairs of the local community. Herethrough, in fact, part of the literature has showed the slight contradiction whereby a municipality can engage in a transnational partnership of municipalities against the use of nuclear weapons, but it is not allowed to declare its own territory as nuclear weapons free.[842] First signs of such a trend reversal might be traced in a recent case by the Bavarian Constitutional Court (BayVerfGH), which regarded the decision of the Nuremberg municipal council to prohibit the use of gravestones produced with child labor, in accordance with International Labour Organisation (ILO) *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor* (1999) as falling within the scope of affairs of the local community, even if the Federal Administrative Court had found that the decision of the council involved the pursuit of a "global aim" which exceeded the scope of the affairs of the local community. The Bavarian Constitutional Court based its reasoning focusing rather on the impact which constellations apparently exceeding the scope of affairs of a local community might indeed have for the community itself.[843] On grounds of this evolution of German domestic law, it might be said that the Charter was a fairly farsighted treaty, which can still nowadays roduce relevant legal innovations in the domestic legal orders of the Contracting Parties.

---

841 So also: B. Schaffarzik, *cit*., 388-396. Most recently: S. Lorenzmaier, *Grenzen kommunaler Selbstverwaltung und völkerrechtskonforme Auslegung*, BayVBl 2011, 489.

842 BVerwGE 87, 226 (*Munich Case*) and BVerwGE 87, 237 (*Fürth Case*). See H.P. Aust, *„Global Cities" und das Grundgesetz: Kommunales Selbstverwaltungsrecht und auswärtige Gewalt, in:* M. P. Neubauer u.a. (eds.), *L'État, c'est quoi? Staatsgewalt im Wandel, Beiträge der 54. Assistententagung Öffentliches Recht*, Baden-Baden, 2014,

843 See: BayVerfGH, NVwZ-RR 2012, 50.

1.3. The Principle of Subsidiarity and the Division of Powers Between Municipalities (*Gemeinden*) and Counties (*Landkreise*)

As for the principle of subsidiarity, the Charter restricts State's powers to allocate administrative functions away from local authorities, insofar as the latter are still able to perform them (Article 3, para. 1 read in combination with Article 4, para. 4). Though, the concept of vertical subsidiarity has to be conceived as a continuous and dynamic process which allows for revocation and subsequent attribution of tasks to higher level authorities whenever this is required by the extent and nature of the task and by requirements of efficiency and economy. Hereunder, it will be assessed whether the principle of subsidiarity as set out in the Charter is embodied in German constitutional law and, if so, whether it contributes to the division of powers between municipalities and counties.

In Germany, the existence of the subsidiarity principle under constitutional law has been harshly debated by legal scholars for a long time.[844] Some of them applied it to the relationship between local authorities and the State or between municipalities and counties, deriving its existence from the decentralised structure of the State and from the design of a bottom-up rule-making power underpinning Article 28, para. 2 BL.[845] At the time of the negotiations on the Charter, the German delegation did not challenge the wording of Draft Article 3, para. 3. At that time, in fact, the explicit enshrinement of such a principle into the domestic order was very much advocated by the German Association of Towns and Cities (DStGB), which officially complained about a dangerous tendency for public responsibilities to be transferred away from local authorities.[846] Though, all along the 1980s, some legal scholars and also part of the case-law had already attempted to construe Article 28, para. 2, sentences 1 and 2 BL as providing for a principle very similar to that laid down in the Draft Charter, whereby municipalities enjoyed a general competence when affairs of the local community were concerned, whereas only local matters which exceeded the capacity of municipalities (*Leistungsfähigkeit*) had to be performed by counties.[847] The opposite opinion held

---

844 For it: H. Barion, *Die sozialethische Gleichschaltung der Länder und Gemeinden durch den Bund, in:* Der Staat, 3, 1964; G. Dürig, *Verfassung und Verwaltung im Wohlfahrtsstaat*, JZ 1953, 198; H. Kessler, *Der Bund und die Kommunalpolitik,* DVBl 1953, 3; T. Maunz, *Staatsrecht* § 10 II 7. Against it see: W. Scheuner, *Gemeindeverfassung und kommunale Aufgabenstellung in der Gegenwart*, AfK 1962, 158-59; W. Lerche, *Die Gemeinden im Staat und Gesellschaft,* Köln-Berlin, 1965,10; R. Herzog, *Subsidiaritätsprinzip und Staatsverfassung*, Der Staat 2 (1964), 412-13, J. Isensee, *cit.,* 1968, 248.

845 BVerfGE 83, 363 (383), which speaks of a decentralised fulfillment of tasks.

846 Draft Explanatory Memorandum (*Harmegnies Report*), CPL 16 (6), 18.

847 In the case law see: BVerwGE 6, 19; OVG-Lüneburg, 8.3.1979 so-called *Rastede Urteil* and VerfGH NRW 11.7.1980 so-called *Düren Urteil*. In the literature: B. Stür, *Funktionalreform und kommunale Selbstverwaltung*, 1980, 207 ff; W. Blümel, *Gemeinden und Kreisen vor den öffentlichen Aufgaben der Gegenwart*, DV, 1977, 781 ff; P. Mombaur, *Zum Selbstverwaltungsrecht kreisangehoeriger Staedte und Gemeinden*, StuGB, 1980, 300; A. von Mutius, *Grundfälle zum Kommunalrecht*, JuS 1977, 455; F. Wagener, *Gemeindeverbandsrecht in Nordrhein-Westfalen,* Köln, 1967, 14. According to J. Isensee, *cit*., Art. 28, para. 2 BL set forth a sort of "negative subsidiarity", whereby administrative functions assigned to municipalities could be modified or conferred upon to other authorities, but not

that municipalities' universal jurisdiction did not amount to a recognition of subsidiarity in the relationship between different local authorities, since the constitutional provision merely stipulated that both municipalities and counties were concurrently and equally empowered with tasks of local character, the former to a greater extent than the latter[848], but without any evidence of a specific rule whereby administrative functions should be allocated in the first place to municipalities and those having trans or supra-municipal nature to counties.[849] The subsidiarity principle could neither be derived from other provisions of the Basic Law and notably from the principles governing the relationship between the Federation and the *Länder* (Article 30, 70 ff., 83 ff. BL), since the Basic Law does not list the competences under which the former and the latter respectively exercise the legislative power pursuant to a subsidiarity rationale.

Only after the well-known *Rastede* judgment delivered by the Federal Constitutional Court on November 23, 1988, the formal relationship between municipalities and counties was fully clarified and, even if not explicitly mentioned by the Court, one could now say the principle of subsidiarity regulates it.[850] In fact, pursuant to the Court, municipalities are as a rule endowed with affairs of the local community, whereas counties do not enjoy universal jurisdiction but might be assigned to deal with affairs of the local community only as an exception.[851] If both a municipality and a county could carry out the task, then the function should be discharged by the municipality (*in dubio pro municipio*).[852] There is though no rigid hierarchical relationship between municipalities and counties. In general, the conferral of municipal tasks to a county by means of statute shall undergo a proportionality review (*Verhältnismäßigkeit*), whereby revocation and subsequent attribution to a higher level of government (*Hochzonung*) is legitimate only insofar as the responsibility at stake can no longer be orderly fulfilled at municipal level and an overriding public interest for its re-

---

those regarding the local community, which should have always been discharged by them. Pursuant to another opinion, counties did not enjoy universal jurisdiction, but had the right to self-administration in relation of those tasks attributed to them by State law. State law could have not deprived them of all functions, but should have let them a minimum (*Mindestmaß*). So: P. Lerche, *Die Kommunalverfassung in ihrer Bewahrung*, DÖV, 1969, 46; H. Siedentopf, *Die Kreise vor einem neuen Leistungsund Gestaltungsauftrag?,* DVBl, 1975, 13.

848 E. Schmidt-Jortzig and A. Schink, *Subsidiaritätsprinzip und Kommunalordnung*, Stuttgart, 1982, 20 and 65.

849 In the case law see: BVerwGE vom 4.8.1983 (67, 321). E. Schmidt-Jortzig and A. Schink, *cit.*, 22 ff; W. Andriske, *Aufgabenverteilung im Kreis*, 1978; P. Weides, *Das Verhältnis zwischen Gemeinden und Kreisen gem. Art. 28 II GG*, NVwZ 1984, 155 ff.; G. Püttner, *Anmerkung* VerfGH NRW 4.3.1983, DVBl, 1983; G-C. von Unruh, *Der Kreis*, 1972, 238. Yet, some scholars found that counties enjoyed universal juridiction for tasks of supra-local character: P.C. Ernst, *Kreisentwicklungsplanung*, 1979, 202.

850 So M. Nierhaus, *Art. 28*, *cit*., Rn. 68 and M. Nierhaus, *Rechtsprechung mit Kurzkommentar zu VerfG Bbg, Urteil vom 19.5.1994 – 9/93*, EwiR 1994, 1105 ff.; P. Häberle, *Das Prinzip der Subsidiarität aus der Sicht der vergleichenden Verfassungslehre,* AöR 119 (1994), 188 and ff.; J.P. Tettinger and K-A. Schwarz, *Art. 28*, in: H. von Mangoldt and F. Starck and C. Klein (eds.), *Art. 28*, Rn. 204.

851 BVerfGE 79, 127 (149). U. Lusche, *Die Selbstverwaltungsaufgaben der Landkreise*, 1998, 78 ff.; J.P. Tettinger, in: T. Mann and G. Püttner (eds.), HKWP, Vol. 1, 2007, Rn 39. So in the past already: O. Gönnenwein, *Gemeinderecht*, 38; T. Maunz, *Art. 28*, in: T. Maunz and G. Dürig (eds.), *GG-Kommentar*, Rn. 30; A. Köttgen, *Wesen und Rechtsform der Gemeinden und Gemeindeverbände*, HKWP I, 211-215.

852 T. I. Schmidt, *In dubio pro municipio? Zur Aufgabenverteilung zwischen Landkreisen und Gemeinden*, DÖV, 2013, 509 and ff.

allocation must exist. Public interests which are not compatible with Article 28, para. 2 BL cannot represent a legitimate aim to restrict local self-administration. In this respect, the FCC mentioned *inter ali*a: administrative simplification, concentration of responsibilities within certain local authorities, improvement of the cost-effectiveness of State action. Also under the Charter, the prevailing interpretions assumes that economic considerations alone may not be allowed as a valid justification for the allocation of tasks to higher tiers of government.

The Federal Constitutional Court does no longer explicitly mention the performance capacity (*Leistungsfähigkeit*) as a valid criterion to attribute powers to counties, since it feared that affairs of the local community would be otherwise highly dependent on financial transfers by the State. This view is flawed. In fact, the opposite is true: both under the Charter and under German law, it is the municipalities' scope of powers and responsibilities which determines the amount of resources to be transferred to them and not viceversa. This means that the financial situation of a municipality cannot be used as a valid criterion to identify what is an affair of the local community and how many responsibilities should it be endowed with. On the contrary, the judgment states that this expression must be interpreted in the light of criteria which ensures the orderly fulfillment of the tasks.[853] The Court did not put into question the principle itself whereby a municipality should enjoy the capacity to perform a task, but that administrative functions cannot be allocated merely on the basis of "more or less" capacity to perform a task. That this interpretation is correct has been shown also by specific rules laid down in the municipal codes of some *Länder*.[854]

As regards to the substance of their powers and responsibilities, counties are deemed to have an ancillary role for municipalities, carrying out so-called complementing and equalisation tasks (*Ausgleichs- und Ergänzungsfunktion*) as well as supra-municipal tasks (*Übergemeindliche Aufgaben*).[855] This happens to be the case in most German *Länder*.[856] Whenever the *Länder* Constitutions put municipalities and counties on the same footing, as it is the case in Brandenburg,

---

853 BVerfGE 79, 127. Cf. H. Maurer, *cit.*, DVBl, 1995; H-G. Henneke, *Aufgabenzuständigkeit im kreisangehörigen Raum,* Heidelberg, 1992, 15; D. Ehlers, *Die Rechtsprechung zum nordrhein- westfälischen Kommunalrecht der Jahre 1984-89*, NWVBl 1990, 44.

854 § 2 I 2 NGO, § 2 I SächsGO, § 2 I 1 SHGO and § 2 I 1 SHKO.

855 M. Burgi, *cit*., 310; P.J. Tettinger and K-A. Schwarz, *Art. 28*, in: H. von Mangoldt/F. Starck/C. Klein (eds.), *cit*., Rn. 238. H. Heinelt and X. Bertrana (ed.), *The Second Tier of Local Government in Europe*, New York, 2011. In the past see: R. Wiese, *Garantie der Gemeindeverbandsebene*, Frankfurt, 1972*,* 41; G-C. von Unruh, *Der Kreis*, 1972, 232; E. Schmidt-Jortzig and A. Schink, *cit*., 68; G. Leibholz, *Das Prinzip der Selbstverwaltung und der Art. 28 Abs. 2 GG*, DVBl, 1973, 715-718.

856 Complementing tasks are to be found in: § 2, para. 1, sent. LKO BW; § 122, para. 2, sentence 1 Bbg KV; § 2, para. 1, sent. 1 HessLKO; § 2, para. 1, sent. 1 LKO SH; Supralocal tasks are to be found in: Art. 5, para. 1 BayLKO; § 2, para. 1, sent. 1 LKO NRW; § 140, para. 2 SaarlKVG and § 87, para. 1 ThürLKO. Both tasks are to be found in: § 89, para. 1 and para. 2, sent. 1 KV-MV; § 2, para. 1, sent. 1 SachsLKO; and § 3, para. 1, sent. 1 LKO LSA. equalisation tasks are to be found in: § 122, para. 2, sent. 2 BbgKV; § 2, para. 1, sent. 2 HessLKO; § 89, para. 2, sent. 2 KV-MV; § 2, para. 5, Rh-Pf LKO; § 143, para. 3 Saarl KVG; § 1, para. 1, sent. 2 SächsLKO; § 3, para. 1, sent. 2 LKO LSA.

Saxony-Anhalt, Lower-Saxony and North-Rhine Westphalia, the federal constitutional rule operates a correction following to the subsidiarity principle; in Bavaria, complementing and equalisation tasks are not assigned by the law, but subsidiarity nonetheless operates pursuant to the rule which allows counties to take over administrative tasks from municipalities upon their request.[857] Counties, even if not enjoying universal jurisdiction like municipalities, should nonetheless be assigned with a substantial share, i.e. an essential content (*Kernbereich*), of local government responsibilities by the legislature. In particular, this share of responsibilities can in principle be made of mandatory responsibilities only. Yet, *Länder* Constitutions have provided for a more advanced degree of protection of their scope of responsibilities, by recognizing to counties a universal jurisdiction and thus also "a right to invent new tasks" (*Aufgabenfindungsrecht*) which allows them to carry out also voluntary tasks.[858]

Finally, it has to be borne in mind that the subsidiarity principle or clause (*Subsidiaritätsklausel*) finds explicit mention in constitutional or ordinary law of the *Länder* when it comes to carry out local business and economic activities. In particular, municipalities can be assigned with the discharge of a specific economic activity only when a public purpose can be better achieved[859] or even only equally good achieved[860] by a municipal authority than by a private company. Even if the municipality is required by law to convincingly demonstrate in advance that it enjoys the necessary business capacities for carrying out the service as efficiently as or even more efficiently than a private supplier, one could argue that this clause is almost the opposite than what in Italy is called horizontal subsidiarity, which rather implies a presumption in favour of economic and social activities carried out by private actors instead of public authorities (see *infra* third Chapter).

To conclude, the Charter alike, under German law, the subsidiarity principle (*subsidiäre Verbandszuständigkeit*), even if not explicitly mentioned in the case-law of the Federal Constitutional Court, is the main principle on allocation of responsibilities between local authorities and in particular between municipalities and counties in Germany, at least since the so-called

---

857 So: M. Nierhaus, *Art. 28, cit.,* Rn. 68, mentioning Article 97 Brandenburg Constitution and Article 78 of the North-Rhine Westphalian Constitution. See also: Article 57 Lower-Saxony Constitution and Article 87 Saxony-Anhalt Constitution. An interpretation conform to Article 28, para. 2 BL has been provided by the *Länder* Constitutional Courts. For Brandeburg see: LVerfGE 5, 79 (91); 7, 74 (91); 12, 128, (143). For the case of Bavaria, see: Article 52 LKO. Other German *Länder,* including Baden-Württemberg, Brandenburg, Hesse, Rhineland-Palatinate, Schleswig-Holstein, Saarland, Thuringen, set out a *Kompetenz-Kompetenz* for counties, i.e. the power of counties to rule as to the extent of their own responsibilities.

858 K. Ritgen, *Selbstverwaltungsgarantie und Mischverwaltungsverbot al Schranken der Organisationsgewalt des Bundes*, NdSVBl 2008, 189-190.

859 § 102 I n. 3 GO BW; Art. 87 I 1 n. 4 BayGO; § 121 I 1 n. 3 HessGO; § 136 I 2 n. 3 NdSKommVG; § 85 I n. 3 Rh-Pf GO; § 108 I n. 3 Saarl. KSVG; § 71 I n. 4 ThürKO.

860 § 91 III 1 BbgKVerf.; § 68 II n. 3 KV MV; § 107 I 1 n. 3 GO NRW; § 97 I 1 n . 3 SachSGO; § 116 I 1 n. 3 GO LSA; § 101 I n. 3 GO SH.

Rastede judgement of the FCC. Counties, in particular, take over administrative tasks whenever this is required by the their extent and nature as well as by requirements of efficiency and economy. The latter alone are however no sufficient reason for a take over.

1.4. Full and Exclusive Powers and Responsibilities?

In Germany, some *Länder,* building on the British experience, embraced the uniform task model (Brandenburg, North-Rhine Westphalia, Baden-Württemberg, Schleswig-Holstein, Mecklenburg-Western Pomerania, Saxony and Hesse), whereas many others adopted the French dual task model (Bavaria, Lower-Saxony, Rhineland-Palatinate, Saar, Saxony-Anhalt, Thuringia) A dual task model applies further in the rather exceptional but yet significant direct relationship between local authorities and the Federation. In a uniform task model, Article 4, para. 4 of the Charter requires member States to ensure that local authorities are not set too detailed conditions, that is to say enjoy enough discretionary powers when exercising all their responsibilities (voluntary and mandatory). The same principle whereby discretion should be allowed when exercising delegated responsibilities applies in a dual task model, but pursuant to Article 4, para. 5.[861] In a dual task model, Article 4, para. 4 aims rather at preventing a too extensive complementary action by more than one tier of government in carrying out delegated powers and responsibilities. In general, whatever might be the local government system, this Charter's provision aims to protect both the integrity of single powers and responsibilities of local authorities against erosion by the State and to require that also the majority of local authorities' powers be under the only responsibility of local authorities and not shared with other public authorities.

In Germany the aforementioned Charter's principles have the consequence to set a brake to overlapping responsibilities between local authorities and the State (either the *Land* or the Federation) for the majority of their sphere of responsibilities. In particular, it sets a limit on delegation of tasks so as that delegated powers and responsibilities (*Auftragsangelegenheiten)* and those powers and reponsibilities connected to instruction powers by the State (*Weisungsaufgaben*) shall be always considerably quantitatively and qualitatitely fewer and less than the scope of own powers or powers without instruction. In other words, this provision sets a concrete limit to the so-called “false municipalisation” of powers and responsibilities (*unechte Kommunalisierung*) in the dual task model, to the expansion of powers to be exercised upon instruction in the uniform task

---

[861] See in this respect: F.L. Knemeyer, *Implementation of the Charter of Local Self-Government in German Law and Legal Practice*, in: Council of Europe, *Conference on the European Charter of Local Self-Government*, 1992, 68, holding that «*delegation itself gives them the right to do so*».

model, as well as to the so-called *Mischverwaltung* (mixed administration) in the relationship between local authorities and the Federation, i.e. a cooperation between different public authorities that results in interlinkages which cannot ensure that both authorities take independent decisions.

Until now, however, the dominant interpretation of the Basic Law does not consider that a fragmentation of single powers and responsibilities is *per se* as a violation of the right to local-self administration, but, as mentioned, only the undermining of the substantial share of responsibilities considered as a whole triggers the violation of the right.[862] Any statute which allocates a significant portion of administrative functions away from local authorities ought nonetheless to ensure that their essential content remains intact pursuant to the aforementioned *Übermaßverbot*, which might be considered to match with Article 4, para. 4, sentence 2 of the Charter.

In its last report on Germany, the Congress quite interestingly noted that, on the one hand, «*most of the local functions are full and exclusive, in the sense that the local government has an exclusive responsibility for performing these tasks».* However, the Congress continues, *«some tasks and functions are divided between the different levels of government».* In particular, it referred to the traditional distinction between local government tasks and *Länder* or federal delegated tasks (*Auftragsangelegenheiten*). These responsibilities are virtually State responsibilities which are fulfilled by local authorities for practical reasons. Among the latter, the Congress mentions also supervised mandatory responsibilities (*Weisungsaufgaben*), that is to say powers which are exercised «*under the direction and a supervision of the respective Land authorities».* Quite surprisingly*,* instead of investigating on the real impact of delegated and supervised mandatory responsibilities on the overall scope of local government functions, the Congress itself downplays the principle of the Charter by maintaining that «*the Charter's requirement for full and exclusive local government powers is a principle requiring discretionary power for local authorities, rather than a strict rule excluding cooperation with administrative organisations*», whereas it had clearly been ascertained in the first Chapter that Article 4, para. 4 of the Charter was drafted not only with the aim of ensuring discretion in a uniform task model, but rather with the aim of setting limits to delegation of tasks and in particular to the establishment of co-operation forms which might fragment too much the powers of local authorities, thus diluting the own responsibility of local authorities.

2. The Duty to Consult Is Not a Duty to Negotiate

862 So also: B. Schaffarzik, *cit*., 432.

As for the application of Charter Article 4, para. 6 in the German domestic order, one ought to refer first to Article 28, para. 2 BL from which the dominant opinion derives local authorities' right to be consulted by the State on matters which concern them directly - e.g. orders and plans (*Maßnahmen und Planungen*) issued by State administrative authorities relating to the field of spatial planning (*Raumordnung*) - that is to say which can affect the territory or part of the territory of a municipality or a county, but which might also extend beyond their scope of responsibilities.[863] A limited degree of participation is recognised to local authorities also within the legislative making-process whenever legislation might affect interests of local authorities both at federal and at *Land* level.

The German literature is however divided as for the actual degree of consultation, i.e. participation which the Basic Law really ascribes to local authorities. Some authors and part of the case-law believe that compliance with the Basic Law is ensured by the mere right to be informed and heard (*Information* and *Anhörung*), whereas, according to circumstances, consultation can entail a discussion or dispute (*Beratung* or *Erörterung*)[864] or even a serious effort to come to an agreement (*Abstimmung*)[865]. The theory according to which consultation should be granted up to a maximum level is however scarcely supported and in any case only insofar as financial equalisations mechanisms are concerned.[866] Yet, nobody holds that the Basic Law provides for a right of co-decision (*Mitentscheidung*) on the part of local authorities, since this would mean they enjoyed a veto power which would in turn make any legislative provision adopted pursuant to Article 28, para. 2 BL completely obsolete.[867]

According to the monitoring practice on the Charter and a minority opinion in the German constitutional literature, the State must provide for a consultation whose level cannot depend on the degree of interference that the State is expected to exercise, but at the highest possible level, provided that local authorities enjoy the right to avert State interference (*Abwehrrecht*). This interpretation does not follow the prevailing opinion, whereby local authorities' right to participate in the decision making process is not to be derived from the right to local self-administration. In fact, the *Länder* are constitutionally empowered to restrict the right to local self-administration so as

---

863 See, for example: BVerwGE 77, 128 (*Breitbandverkabelung*), whereby.: «*Die Einrichtung von Fernmeldelinien ist aber nicht Angelegenheit des gemeindeeigenen, durch Art. 28 Abs. 2 GG geschützten Wirkungskreises, sondern gehört zu den staatlichen Aufgaben. Das heißt allerdings nicht, daß die Gemeinden bei der fernmelderechtlichen Planfeststellung keine Mitwirkungsrechte hätten».*

864 BVerfGE 56, 298; BVerwGE 77, 128; 77, 134; 81, 95 and 97, 203. K. Waechter, *cit*., Rn. 112 e 130.

865 BVerwGE 51, 6; W. Hoppe and Menke, *Raumplanungs- und Landesplanungsrecht des Bundes und des Landes Rheinland-Pfalzes,* Köln, 1986.

866 BWStGH, ESVGH 49, 241 (257).

867 B. Schaffarzik, *cit*., 461. See also: BVerwGE 77, 128.

that the participation of local authorities in the decision-making process is, so to say, a *quid pluris* which the State recognises to local authorities but which cannot be covered by the right to local self-administration as such.[868] This means that the possibility to start real negotiations with local authorities is a rather theoretical option, since resorting to such kind of consultation might occur only in the very few cases in which restrictions of local self-administration by the State are particularly far-reaching.[869] Nonetheless, Charter Article 4, para. 6 produces some innovations in the domestic legal order, because it applies also to the relationship between local authorities and the Federation. This means that a participation of local authorities to the decision-making process has to be ensured also at federal level insofar as local authorities' interests are affected by federal decisions, even if the Federation is not immediately competent for local self-government.[870]

As for the rest, the requirement to allow for participation in due time, i.e. at a stage in which local authorities can still exercise their influence is recognised also by German law (so-called *rechtzeitige Beteiligung*). The same goes also for the appropriateness of representation, which is to say the possibility to allow the participation of federal or regional associations of municipalities (*Gemeinden*) and counties (*Landkreise*) whenever State's measures affect the interests of a large group of municipalitites or counties and not those of a limited number of authorities.

Unlike in Italy, where consultation generally takes place in a rather corporatist way through bodies deputed for this purpose (so-called *Conferenze*), German law provides for organised procedures enabling local authorities' participation in specific matters.[871] Participation is foreseen whenever the right of local authorities to spatial planning (*Planungshoheit*) is directly or indirectly affected by a particular project or plan. In particular, the federal spatial planning act (*Raumordnungsgesetz*)[872] and the corresponding *Länder* planning acts (*Landesplanungsgesetz*) provide for the involvement of local authorities in the preparation of supra-local or regional plans. Local authorities are also to be consulted whenever a building procedure (*Planfestellungsverfahren*) is initiated. Depending on the single case, local authorities are either merely heard, committed to participate in the procedure if the

---

868 So, for example: A. Gern, *cit*., 1997, Rn. 51; M. Nierhaus, *Art. 28*, *cit*., Rn. 57-61. According to E. Schmidt-Aßmann and P. Badura, *Besonderes Verwaltungsrecht*, *cit*., 354, local authorities' right to participate is a corollary of the right to local self-administration, nonetheless cannot be qualified as a defensive right (*Abwehrrecht*), but enjoys only a relative protection.

869 According to Schaffarzik, the right to consultation should in principle be arranged in the form of a real negotiation (*Verhandlung*). Cf.: B. Schaffarzik, *cit*., 455.

870 Congress of Local and Regional Authorities, *The right of local authorities to be consulted by other levels of government,* CG (23) 11, § 21 and again § 72.

871 B. Schaffarzik, *cit.*, 465.

872 In particular, see: Par. 1 III, Par. 7 V and VII, Par. 9 II 2 and IV, Par. 13 I, Par. 15 III, Par. 18 I-II *Raumordonungsgesetz* (ROG):

planning project (*Fachplanung*) has supra-local significance[873] or committed to give their consent to the building authority if the planning project does not have supra-local significance.[874] Participation can take place twice or even more times, if the planning project has been radically modified in the meantime.[875] Spatial planning responsibilities can be transferred away from municipalities and conferred to other local authorities by means of statute only upon consent of municipalities. A *Land* administration can also transfer planning responsibilities to other local authorities by means of by-laws, but it ought to regulate in a statute how municipalities participate in this procedure. In this respect, the principle of proportionality should be respected as well as the core area of local self-government, under which fall also a minimum of *Planungshoheit*.[876]

Further, as it is the case in the Italian legal order, local authorities' participation in the law-making process, albeit existing, is weak and has never gained pace, even if some scholars pledged for its establishment in the past.[877] The same goes for the election of local representatives in the *Bundesrat*, a proposal which was discussed in the 1970s but has never been taken again into consideration. Only at *Land* level, in Bavaria, there has been until 1999 a corporative and partly territorial based second Chamber, whose members were appointed *inter alia* also by local authorities' associations (see *infra* 7.2). Nowadays, local authorities' participation at federal level is regulated by Sections §§ 41, 44 and 47 of the Common Rules of Procedure for German Federal Ministries (GGO II) as for the participation before the drafting of legislation and by Sections §§ 74, para. 1 and 5 of the Common Ministerial Rules of Procedure (GGO II) as for proposals concerning the implementation of EU law; by Sections §§ 66 II, 69, para. 5 and 70 of the *Bundestag* Rules of Procedure (GeschOBT) as for participation in parliamentary committees before adoption of new legislation; by Sections §§ 62, para. 2 and 70 of the Common Ministerial Rules of Procedure (GGO II) as for participation in the preparation of federal by-laws.[878]

The same goes for the *Land* level, where one can find provisions entailing participatory rights

---

873 This participation consists in informing the municipality about the project and stating the reasons in due time, which can in turn give a statement on the interference with its territory. Section § 38 BauGB. Its violation does not lead to the annullment of the final planning act, but entails a special supplementary procedure.

874 Section § 36 I and II BauGB. In case no consent is given, the final planning act can be annulled by an administrative Court without taking into account whether the *Planungshoheit* has been really infringed upon or not. (BVerwG NVwZ 1986, 556 und BVerwG NVwZ 2008, 1347).

875 BVerwG, Judg. 7 March 2002 – 4 BN 60.01 – a.a.O. vor Rn. 43.

876 G. Hornmann, *§§ 203 I and II BauGB*, in: W. Spannowksy and M. Uechtritz (eds.), *Online-Kommentar BauGB,* Rn. 20.

877 This view was held in particular by J. Fuchs, *Dritte Säule oder was? Zur politischen Vertretung der kommunalen Selbstverwaltung im Bund*, DV n. 4, 1971, 392 ff.

878 In this respect, a recent statement of the Federal Ministry of Finance, answering a question by a German member of Parliament on compliance with the Charter, underlines that consultation of local authorities associations at federal level has been enhanced between 2011 and 2012. Cf. *Antwort des Bundesfinanzministers an Marian Wendt*, Mitglied des Deutschen Bundestages, 27 February 2014, *see* Annex.

directly in many Constitutions[879], in the Rules of Procedure of the *Länder* Parliaments[880] and even in the Municipal and District Codes.[881] More in line with the Italian corporatist experience of local authorities' consultation, is the case of Rhineland-Palatinate, which established in 1996 the so-called *Kommunaler Rat* (Municipal Council), an advisory body which provides the *Land* legislature with advice on matters affecting local self-administration and which can issue recommendations by a two-thirds majority.[882] The Council offers though no room for negotiations with the *Land* administration, but it is only a body which issues opinions and statements, so that one could say that the requirements of the Charter in Rhineland-Palatinate cannot be deemed to be satisfied by the mere establishment of such a Council. However, the set-up of the Council roughly corresponds to what the Congress recommended as being a good practice so as to ensure that consultation develops into negotiation, even though the Congress itself called on the member States to set up joint bodies composed of both member of national and local associations.[883]

As for those procedures where no participation is prescribed by law or by-laws, Article 4, para. 6, i.e. Article 28, para. 2 BL construed in the light of the Charter, shall be given direct effect. This is also the view of the Congress of Local and Regional Authorities, which points out that under domestic law the general duty of the State to consult and the duty to consult only in specific fields are not mutually exclusive.[884] This is the case for example when the legislation procedure at federal level is started in the *Bundesrat*. As the Congress correctly pointed out in its last report, in Germany, the *Bundesrat* is responsible for consulting the *Länder*, and local authorities can only seek to influence the *Land* position through the relevant *Länder* ministries. However, Articles 18 I Hs. 2 and 40 III GeschBRat do not include any reference to local authorities' participation, which cannot even be heard. Here, Article 4, para. 6 can thus provide for an extension of the guarantee of consultation under domestic law.[885]

3. A Limited Subjective Right to Territorial Integrity

---

879 Art. 83, para. 7 Bavarian Constitution, Art. 97, para. 4 Bbg Constitution, Art. 71, para. 4 BW Constitution, Art. 57, para. 6 Lower Saxony Constitution, Art. 84, para. 2 Saxony Constitution and Art. 91 IV Thur. Constitution.

880 § 50 lett. a) 3 BWGeschOLT, § 29, para. 5 SaxGeschOLT, § 79 ThürGeschOLT.

881 § 126-127 ThürGO; § 7 par. 2 BbgGO, § 7 par. 2 BbgLKO; § 6 MVGO; § 147 HeGO; § 129 RhPfGO and § 65 RhPfLKO; § 132 SHGO and § 71 SHLKO.

882 *Landesgesetz über den Kommunalen Rat* vom 22. Dezember 1995 (GVBl, 521 ff.) and *Landesverordnung zur Ausführung des Landesgesetzes über den Kommunalen Rat* vom 18. Juni 1996 (GVBl 236 ff.).

883 Congress of Local and Regional Authorities, Recommendation No. 171 (2005) § 19 lett. d) and Recommendation No. 328 (2012) Par. 4.

884 Congress of Local and Regional Authorities, *The right of local authorities to be consulted by other levels of government*, § 18.

885 Enquête Kommission Verfassungsreform – BT-Drucks. 7/5924, 225; B. Schaffarzik, *cit.*, 466.

During negotiations on the Draft Charter, the German delegation did not express any concern over the wording of Draft Article 4, which stipulated that «*Changes in local authority boundaries shall not be made without prior consultation of the local community or communities concerned, including by means of a referendum where this is permitted by statute».* This provision, which slightly changed in the final text of the Charter, did not present particular legal problems for the constitutional order of West Germany, which had been experiencing a long series of territorial reforms in all *Länder* in the 1960s and 1970s (see *supra* § 1.II).

Consultation of local authorities was in fact a formal constitutional requirement for redrawing boundaries of municipalities and joint local authorities, the power for which pertains to the *Länder* (Articles 30, 70 read in conjunction with Article 73-75 BL). Consultation of local authorities affected by a territorial reform is meant to allow them to exert influence within the legislative process, possibly convincing the legislature that the solution provided is not optimal.[886] Yet, as the Congress notes, «*the German situation is quite special because, in the absence of the legal condition of prior consultation, the Federal Constitutional Court has actually strengthened this requirement»*[887]. In the Federal Constitutional Court's words[888] and in the words of many *Länder* Constitutional Courts[889], the procedural right of municipalities to be consulted is in fact a corollary of the general right of local self-administration enshrined in the Basic Law[890] and in particular of the right of all territorial units of the *Länder* to exercise their jurisdiction within a specific area (so-called *Gebietshoheit*).

A different but related question concerns whether this procedural right to consultation implies also a subjective right of local authorities to their continued existence or to remain unimpaired (*Bestandsgarantie*). According to the current dominant opinion, Article 28, para. 2, sentence 1 BL

---

886 W. Hoppe and H.W. Rengeling, *Rechtsschutz bei der kommunalen Gebietsreform*, Frankfurt, 1973; B. Stüer, *Funktionalreform und Kommunale Selbstverwaltung*, 1980, 145.

887 Congress of Local and Regional Authorities, *The right of local authorities to be consulted by other levels of government,* CG (23) 11, Explanatory Memorandum, § 21. So also B. Schaffarzik, *cit.*, 491.

888 Cf. BVerfGE 50, 50; BVerfGE 50, 195; BVerfGE 56, 298; BVerfGE 86, 90. In the literature see: G. Seibert, *Selbstverwaltungsgarantie und kommunale Gebietsreform. Eine kritische Zwischenbilanz der jüngsten Rechtssprechung zum Recht kommunaler Gebietsänderungen,* 1971.

889 NWVerfGH 20 December 1969; BWStGH, 8.9.1972. More recently see: BWStGH, ESVGH 23, 18 ff.; BbgVerfG, LKV, 1998, 407; NstGHE 2, 1 (146 ff.); NWVerfGH, OVGE 26, 272 ff.; RPVerfGH, AS 11, 1011 ff.; SachsVerfGH, JbSachsOVG 2 (1994), 70 and 119; SAVerfG, LVerfGE 2, 246; TVerfGH, LVerfGE 5, 411.

890 The dominat literature, some *Länder* Constitutional Courts and the Federal Constitutional Court derived the local authorities' right to be consulted not only from the right to *Selbstverwaltung,* but also from other constitutional principles, namely the "rule of law" principle, whereby a State decision which impinges upon a legal person could not take place without its involvement. See: K. Rennert: *Art. 28,* in: D.C. Umbach and T. Clemens (eds.), *Grundgesetz-Kommentar*, Rn. 102 ff.; Rh-Pf VerfGH, 17 April 1969, DVBl 1969, 807; NRW-VerfGH, OVGE 26, 288; 26, 311; 30, 307; BW-StGH, ESVGH 23, 18 ff.; NJW 1975, 1213 ff. Critical remarks in this respect are expressed by: P. Kunig, *Das Rechtsstaatsprinzip: Überlegungen zu seiner Bedeutung fuer das Verfassungsrecht der Bundesrepublik Deutschland*, Tübingen, 1986, 155-156.

provides also for a limited guarantee of continued legal existence for every municipality (*beschränkte individuelle Rechtssubjektsgarantie*),[891] whereby it can not be a mere object of legislation, but has a limited right to defend themselves from State measures which impinge on its right to self-administration. In particular, it enjoys the right to be properly involved in any legislative process which aims at changing its name[892] or its boundaries,[893] but also to take part in several administrative procedures dealing with spatial planning at local level and eventually to seek redress before court if the aforementioned participatory rights are violated. As for joint local authorities, which are territorial units of the *Länder* too, the dominant opinion recognises that pursuant to Article 28, para. 2, sentence 2 BL they enjoy the right to a continued legal existence as an institution.[894] In particular, as mentioned above, counties can not be abolished by means of ordinary statute and they also enjoy a limited subjective right to their continued legal existence. Like for municipalities, the legislature cannot seek to adjust the counties' boundaries or pool together counties without involving them in the legislative process.

In particular, territorial reforms, concerning both municipalities and counties, have to conform with different formal and material requirements, which have been developed by the case-law throughout the *Länder* along the years. The first requirement is the obligation for the legislature to approve a boundary change by means of formal statute[895]. Further, a boundary change is legitimate only after formal hearing of local authorities affected by the change (*Anhörungsgebot*) and for reasons related to the common good or the common interest (*Gemeinwohlvorbehalt*). In this respect, one has to point out that the case-law[896] and legal scholars contributed in outlining the criterion whereby the common interest was to be guaranteed as far as benefits outweighed the costs (*Schaden-Nutzen-Bilanz*). Benefits in terms of improvement of the administrative effectiveness and efficiency of local authorities shall be weighed up against costs (*Abwägungsgebot*), including the loss of identity of a local community and a restriction of local democracy.[897] In some *Länder* a territorial reform can be

---

891 T. Maunz, *Art. 28*, *cit.*, Rn. 45 and ff.; E. Schmidt-Jortzig, *Kommunale Organisationshoheit*, Göttingen, 1979, 139; M. Nierhaus, *Art. 28, cit.*, Rn. 41-42; F. Schoch (ed.), *Besonderes Verwaltungsrecht*, 15th ed., 2013, 23-24. So also ThürVerfGH, 5, 391 (411); *Contra*: K. Stern, *Art. 28, cit.,* Rn. 78 and also in *Staatsrecht I*, 409 ff.; B. Stüer, *cit.*, 91 and 142; Beyerlin, *cit*., 150; J. Burmeister, *cit.*, 188 ff; P.J. Tettinger and K-A. Schwarz, *Art. 28*., *cit.*, Rn. 155.

892 BVerfGE 56, 216 (so-called *Hoheneggelsen case*). Hereabout see: H. Winkelmann, *Das Recht der öffentlich-rechtlichen Namen und Bezeichnungen*, Köln, 1984.

893 Article 28, para. 2 sentence 1 BL does however not protect municipalities against their own decisions to pool together by means of agreement with other municipalities (so-called *self-dissolution*). Cf. at *Land* level: Art. 74 par. 2 BW Constitution.; Art. 98 par. 2 Bbg Constitution.; Art. 88, para. 2 Saxonian Constitution.

894 A. Gern, c*it.*, Rn. 50.

895 OVG Lüneburg, DÖV 1963, 150; BVerWG, DÖV 1964, 346. K. Stern, *Art. 28, cit.,* Rn. 145. More recently: BbgVerfGH, DVBl. 1996, 773 ff. (so-called *Horno case*). Only Bavaria sets forth that the *Land* government can bring about a territorial reform without passing any law for particular kind of boundary changes (Article 12 BayGO).

896 BVerfGE, 50, 50, Fn. 1; StGH BW 8 September 1972 e 14 February 1975; VerfGH NRW 2 November 1973 and 15 March 1975; LVerfG Saxony-Anhalt, Judg. 31 May 1994, LVG 2/93, LVerfGE 2, 227.

897 See in this respect LVerfG Meck-Pomm Judg. 26 July 2007- LVerfG 9 – 17/06, whereby a territorial reorganisation of the counties cannot fully disregard the impact on local democracy, in particular on the right to

deemed to pursue the common good only if it enjoys also a "systematic coherence or consistence" (*Systemgerechtigkeit*), a quite awkward expression which means that, as far as comprehensive territorial reforms are concerned, the legislator ought not to arbitrarily depart from the models and criteria it itself has laid down for achieving the common good.[898] Reasons of expediency or merits (*Zweckmäßigkeit*) cannot be scrutinised by the courts, which in principle should restrain themselves to hold for unconstitutional only those territorial reforms which are evidently not compatible with the constitutional order. Courts have further to check whether there could have been an alternative solution deemed to be less onerous for the appellant authorities (*Erforderlichkeit*) and whether the State intervention has been proportionate in a narrow sense (*Verhältnismäßigkeit*).[899]

As for the duty to consult, it is either directly enshrined in the *Landesverfassungen*[900] or is laid down in the municipal or county codes[901]. The Basic Law does not provide for any particular procedure, leaving the *Länder* free to decide how to regulate it.[902] Nor any constitutional obligation for a community involvement through referendum is to be found in the federal Constitution. Only a minority of six *Landesverfassungen* provide for the involvement of citizens by means of referendum or mere hearing and only in relation to boundary changes of municipalities.[903] According to the case-law, the legislature should properly investigate the matter before issuing its own proposal (*Sachverhaltsermittlung*). Municipalities and counties should be notified about the reform plan, i.e. about the merger or incorporation proposals and the plan should include the very reasons of the boundary changes (*Begründungsgebot*)[904], though it does not give a right to be acquainted with all details related to it[905]; if the reform plan has changed essentially after the consultation, a new consultation process should take place[906]. According to the case law of the *Länder* Constitutional Courts, consultation should take place "in due time" prior to the end of the legislative process (i.e. when influence can still be exerted) and if possible even before its start[907].

---

sustainably carry out the local mandate as a volunteer (*Ehrenamt*) in territories whose surface has been expanded by means of merger.

898 BVerfGE 50, 50; BayVerfGH, DVBl 1978, 806; NRWVerfGH, OVGE 31, 284; K. Stern and G. Püttner, *Grundfragen der Verwaltungreform im Stadt-Umland,* Vol. 2 1969, 25; U. Battis, *Systemgerechtigkeit*, in: R. Stödter and W. Thieme (eds.), *Hamburg, Deutschland, Europa,*Tübingen, 1977, 23-25.

899 BVerfGE 86, 90 (109); 76, 107 (121).

900 Art. 74, para. 2 BW Const.; Art. 59, para. 2 and 3 L-S. Const.

901 G. Seibert, *cit.* 45 ff.. Cf. provisions of the *Länder* municipal codes: Art. 8 II and § III GO BW, Art. 11 II BayGO, § 16 I He GO, § 18 IV L-S GO, § 16 II NRWGO ; § 10 II-VI Rh-Pf GO; §14 III Sax GO; § 15 II S-H GO.

902 So: BVerfGE 56, 298.

903 So K. Stern, *Art. 28, cit.,* Rn.145; Art. 74, para. 2 per. 3 BW-Const.; Art. 98, para. 2 per. 3 BbGConst.; Art. 59, para. 3 Lower-Saxonian Const.; Art. 88, para. 2 per 3 Saxonian Const.; Art. 90, para. 2 Sax-Anh Const.; Art. 92, para. 2 per. 3 ThürConst.

904 W. Hoppe and H-W. Rengeling, *cit*., 159; VerfGHNRW, Judg. v. 9 April 1976; BayVGH Judg. 3 March 1977; NdSStGH Judg. 14 February 1979.

905 So also: B. Stüer, *cit.*, 146.

906 BVerfGE 50, 195 and NRW-VerfGH 18 December 1970.

907 NRW-VerfGH 20 December 1969 and 24 April 1970.

Consultation takes place in the form of hearings,[908] but not necessarily in a formal oral meeting of a committee of the *Landtag* or before the executive power in a ministerial department. It is enough to grant the possibility to deliver a written statement to the legislature or to be heard by a *Land* administrative agency. In order to enable municipalities and counties preparing their official statement they ought to be accorded a reasonable period of time[909]. In case the State disregards the local authorities' right to be consulted, the legislative act can even be declared invalid by the judiciary. According to the dominant opinion, every violation of the obligation to consult local authorities must result in the invalidity of the legislative act[910]. Other authors and a minority case-law hold that if the planned territorial reform is not suited to violate the right to local self-administration, consultation can be avoided and would not result in invalidity[911].

To conclude, unlike in Italy, where criteria for allowing boundary changes are rather poorly detailed and followed by the legislature mainly for questions relating to the establishment or merger of single municipalities, criteria used by German courts were developed from *Länder* constitutional provisions in the context of wide-ranging territorial and functional reforms and are therefore comprehensive and minutious, taking into consideration not only the need for an improvement of the administrative capacity but also the need to preserve minimum democratic requirements. This remarkable difference has also to do with the degree of consultation: whereas in Italy consultation before boundary changes has been regarded mainly as an own initiative or even as a consent of local communities, in Germany it has been rather viewed as a specific form of consultation of local authorities within the framework of a procedure activated by the State and not by the local authorities themselves. Further, whereas in Italy referendums are the (constitutional) rule, in Germany they are the (constitutional) exception. The Charter contributed to synthesize both standards. With respect of Germany, in fact, the treaty provides at the same time for a more and less advanced degree of protection. In fact, whereas the Charter merely implies, but does not affirm a subjective right of local authorities to remain unimpaired, German constitutional theory has developed a limited individual right of municipalities and counties to defend themselves against State's irregular or unjustified mergers before the Constitutional Court. In this respect, the German standard outperforms the standard set in the Charter, which means that there it does not clarify in how far single local authorities enjoy an enforceable right to continued legal existence. On the other

---

908 BVerfGE 50, 50; BVerfGE 50, 195 (202); 86, 90 (107); BWStGH, ESVGH 23, 18 ff.; BbgVerfG, LKV, 1998, 407; NstGHE 2, 1 (146 ff.); NWVerfGH, OVGE 26, 272 ff.; RPVerfGH, AS 11, 1011 ff.; SachsVerfGH, JbSachsOVG 2 (1994), 70 and 119; SAVerfG, LVerfGE 2, 246; TVerfGH, LVerfGE 5, 411.

909 W. Hoppe and H-W. Rengeling, *cit.*, 161-163.

910 *Ibid*. 150-151 and Rh-Pf VerfGH 5 May 1969, 22 December 1969; 5 July 1961.

911 H. Meyer, *Die Kommunale Neugliederung als verfassungsrechtliches Problem*, DÖV, 1971, 807 ff; B. Stüer, *cit*., 146 and NRW-VerfGH 18 December 1970.

hand, as for the right of consultation taken by itself, the Charter provides for a much stronger requirement and namely the right to a real negotiation between the legislature and the local communities concerned and not merely an oral or a written hearing of the local authorities.[912] Under the Charter consultation of local communities can surely be mediated by local authorities, since Article 5 does not bind to call and hold of referendums. However, *ad-hoc* participatory procedures of citizens could be put in place to ensure that the communities themselves can influence the official position of local authorities in which they reside.

4. Freedom of Organisation

4.1. The Power to Shape and Adapt Administrative Structures and a Limited Normative Autonomy

During negotiations on the draft text of the Charter, the German delegation sought to ensure that statutory powers limiting local authorities' rights to organise their own administrative structures were in principle upheld. For this reason, the delegation maintained it would have preferred *«the text agreed in November without the addition proposed by CLRAE Secretariat».* The amendment proposed by the CLRAE Secretariat foresaw that freedom of organisation could have been limited only by *exceptional* - and not mere *additional* - statutory provisions. In other words, apart from exceptional rules, no law could have impinged on the organisational autonomy of local authorities. Yet, this amendment was eventually set aside, following to the German delegation's request.

According to the dominant interpretation of German law, in fact, the so-called *Organisationshoheit* of local authorities could have been limited by general statutory provisions,[913] which did not have to be considered exceptional. To be more precise, both the literature and the case-law of the FCC found that freedom of organisation was entrenched in Article 28, para. 2 BL, provided that the attribution of administrative functions to be carried out in their own responsibility by local authorities (that is to say the acknowledgment of their legal subjectivity) implied that they were also vested with the right to organise their internal administrative structures.[914] However, no agreement existed as to whether this right had to be considered as a corollary of the right to local self-administration[915] or just as a mere "auxiliary power" (*dienende Befugnis*).[916] This was not a mere

---

912 So also: B. Schaffarzik, *cit.*, 494-495.

913 Among others see: W. Brückner, *Die Organisationsgewalt des Staates im kommunalen Bereich*, Würzburg, 1974; E. Schmidt-Jortzig, *Kommunale Organisationshoheit*, 1979.

914 BVerfGE 91, 228 (236) = NVwZ 1995, 677, BVerfGE 38, 258 (278ff.) = NJW 1975, 255; BVerfGE 52, 95 (117); BVerfGE 78, 331(341) = NVwZ 1989, 45; BVerfGE 83, 363 (382) = NVwZ 1992, 365.

915 BVerwG, DVBl, 1984, 680; VerfGH NRW, NJW 1979, 1201; VG Schleswig, Gem. (SchlH), 1982, 240f. und OVG Lüneburg, Gem (SchlH) 1983, 336 and 338; H. Pagenkopf, *Kommunalrecht I*, Rn. 53 and 68; A. Gern, *cit*, Rn. 160 and 174; K. Waechter, *cit*., Rn. 92; M. Burgi, *cit.*, 63; O. Goennenwein, *cit*., 50 and 171.

theoretical concern, but it entailed some very practical implications. If one holds that organisational autonomy does not pertain to the right of local self-administration, one could argue, as Schaffarzik does, that the legislature does not enjoy the power to restrict it pursuant to Article 28, para. 2 BL, since the latter does not refer to the *Organisationshoheit*.[917] Yet, the State, that is to say the *Land*, would enjoy the power to decide about the organisation of its structures (*Organisationsgewalt*) and thus set limits also to the organisational autonomy of local authorities with far less restrictions than it is the case for allocation of public responsibilities. It must however be kept in mind that the legislative power exercised by the *Länder* might extend to any kind of organisational measure only insofar as it does not encroach upon the core of it.[918]

In this respect, as acknowledged in 1995 by the FCC in the so-called *Gleichstellungsbeauftragte* judgment,[919] the freedom of organisation of local authorities is only "relatively guaranteed", i.e. only insofar as it aids local authorities in fulfilling their tasks, whereas no right of self-organisation (*Eigenorganisation*) as such exists.[920] Unlike the allocation of public responsibilities, the power of local authorities to organise their administrative structures does not in fact operate pursuant to the universal jurisdiction or general competence principle. This means that, unlike for allocation of powers and responsibilities among local authorities, this power can easily be restricted by the legislature[921] also for reasons related to administrative simplification, efficiency or whenever required by the effective performance of public responsibilities (*ordungsgemäße Aufgabenwahrnehmung*).

In any case, when trying to concretise the core of freedom of organisation of local authorities, the FCC recalled that the power of local authorities to organise their administrative structures is deemed to be violated whenever the volume of State regulation literally prevents them to approve own by-laws (*Satzungen*) or whenever administrative structures themselves end up being in practice subordinated to State authorities. For each public affair they deal with, local authorities should enjoy enough room for organising their discharge.[922] By-laws (*Satzungen*) account for a significant proportion of all the administrative acts with which local authorities organise themselves and are

---

916 B. Schaffarzik, *Das Gebot der Gleichberechtigung im Spannungsfeld staatlicher Organisationsgewalt und kommunaler Organisationshoheit*, DÖV, 1996, 155; E. Schmidt-Jortzig, *Kommunale Organisationshoheit*, *cit*, 72 ff..

917 B. Schaffarzik, *cit*., 472.

918 Even before the so-called *Gleichstellungsbeauftragte* Judgment by the Federal Constitutional Court (BVerfGE 91, 228), the German literature was fairly sure that such core existed. E. Schmidt-Jortzig, *Kommunalrecht*, 1982, Rn. 123-124 and also E. Schmidt-Jortzig, *cit.*, 1979, 171, who called it "*Mindestmaß an Bewegungsfreiheit*" and cf. the case-law mentioned therein.

919 BVerfGE 91, 228 (240).

920 M. Nierhaus, *Art. 28, cit.*, Rn. 54

921 See for example: BVerfGE 107, 1.

922 BVerfGE, 91, 228 (240). Cf. H. Dreier, *Art. 28, cit.*, Rn. 124; P.J. Tettinger and K-A. Schwarz, *Art. 28*., *cit*., Rn. 228.

therefore regarded by the legal scolarship as the primary tool by means of which local authorities can exercise their autonomy (*Satzungsautonomie*). The *Länder* constitutional provisions enabling local authorities to pass by-laws have mere declaratory nature, since the federal constitutional guarantee of local self-administration itself empowers local authorities to adopt by-laws. The same could be said with reference to Charter Article 3, para. 1, which defines local self-government as the right to *regulate* public affairs.[923]

Within the framework of the law, municipalities and joint local authorities enjoy the power to determine the structure of their governing bodies, the division of tasks, the establishment of agencies, the internal communication, the legal tools for cooperating with other local authorities[924], the private or public form for delivering public services (so-called *Innere* or *Konstitutive Organisationshoheit*).[925] They may decide to create or close down certain sections, departments or offices within the local authority. Other organisational powers can be conferred to and also transferred away from municipalities and counties by the *Länder* (so-called *translative Organisationshoheit*), since it retains competence to shape it. Local authorities' power to organise internal administrative structures partially covers also the discharge of delegated functions.[926] In this respect, in fact, by-laws can be passed by local authorities for carrying out delegated functions only when this is explicitly provided for by the law[927]; as a rule, yet, local authorities can adopt only decrees (*Rechtsverordnungen*) on behalf of the government or of the ministries. This is the case in particular in the field of police and public order law. [928]

As for the "general constitution" of local authorities, only the *Länder* can set by means of legislation the general framework regarding the number of political bodies exercising state authority, their membership, the division of responsibilities between them, rules concerning local authorities' external representation, the different schemes of co-operation between local authorities, the kind of supervision over them (so called *Äußere Organisationshoheit*). That the general structures of local government have to be set down in statutory provisions is a common feature of many local government systems in Europe, which the Charter itself aimed at preserving.

---

923 M. Burgi, *cit*., 195 and ff.

924 The right to execute tasks in cooperation with other local authorities (*Kooperationshoheit)* as a corollary of organisational autonomy was at the time of negogiations under debate. Cf. E. Schmidt-Jortzig, *Kooperationshoheit der Gemeinden und Gemeindeverbände bei Erfüllung ihrer Aufgaben*, in: FG v. Unruh, Heidelberg, 1983, 525. *Contra:* J. Oebbecke, *Zwecksverbandsbildung und Selbstverwaltungsgarantie*, Köln, 1982, 67.

925 So: M. Burgi, *cit.*, 63; W. Engel, *Grenzen und Formen der mittelbaren Kommunalverwaltung*, Köln, 1981.

926 Already before BVerfGE 83, 363 (382), the dominant literature was of this opinion. Cf. E. Schmidt-Jortzig, *cit.*, 187. ff; H. Vietmeier, *Die staatlichen Aufgaben der Kommunen und Ihrer Organe*, Stuttgart, 1992, Fn. 335, O. Gönnenwein, *cit.*, Rn. 171; W. Frenz, *Der Schutz der kommunalen Organisationshoheit*, VerwArch., Vol. 86 (1995), 378, A. Gern, *cit*., Rn. 174.

927 See e.g.: § 4 I 2 BW-GO; § 24 I 2 Rh-PfGO.

928 Cf. M. Burgi, *cit*., 199-200.

Yet, the Charter does not ensure a more far-reaching protection against State encroachments than that provided by Basic Law, no matter if the organisational powers are exercised in the framework of delegated tasks (Article 4, para. 5) or of self-government tasks (Article 6, para. 1). In fact, the power of local authorities to adapt their administrative structures under the Charter was conceived pursuant to German constitutional law, i.e. as not inherent to the nature of the right to local self-government but as an ancillary power serving the purpose of ensuring the proper exercise of local government responsibilities. In particular, the Charter did not ensure any particular protection of local authorities with reference to the aforementioned conferral or revocation of organisational powers (*translative Organisationshoheit*). To the contrary, Article 6, para. 1 allows for "more general statutory provisions" and the Explanatory Report clarifies that they should set «*limited specific requirements*» which «*should not be so widespread as to impose a rigid organisational structure*», almost the same limitation inherent to the core of local authorities' power to organise their internal structures set to the legislative power under German law. Article 4, para. 5 does not stipulate any clear limitation, but only requires that a minimum of discretion should be given also when executing delegated tasks. Hence, the degree of freedom of organisation cannot be but lower than that recognised under Article 6, para. 1. Yet, in this respect, the Basic Law provides for a more far-reaching guarantee, since organisational autonomy is generally granted to local authorities no matter if relating to own responsibilities of local authorities or to delegated ones.

As a conclusion, one can reasonably argue that local authorities' power to adapt their internal organisation as laid down in the Charter is modelled on German constitutional law and in particular on the conceptual separation between principles on allocation of powers and freedom of organisation. In other words, the Charter provides for a standard typical of a federal State, in which local authorities are not a third tier of government and therefore do not enjoy as a rule of a power of self-organisation: freedom of organisation is the exception to the rule, whereby structure and internal organisation of local government are shaped by means of law by the federated State, which retain sovereignty over their own subdivisions. This pattern applies also to unitary States, but it seems to constitute a minimum standard which might be outperformed in polycentric systems, like Italy, but also Spain, where the municipal layer has been granted with wide-ranging powers, as to their internal administrative structures, which can be best shaped and adapted by means of their regulatory powers. This difference can in fact be exemplified also with reference to the normative powers. In fact, unlike in Italy, where the Charters (*Statuti*) and by-laws (*regolamenti*) of local authorities might derogate from the law, thus allowing them not only to greatly differentiate their internal organisation and the discharge of their tasks but also to pursue interests others than those of

the State, in Germany local by-laws, even the so-called main by-law (*Hauptsatzung*), rank lower than parliamentary statutes, might be subject to prior approval by supervisory authorities and provide for a limited normative autonomy insofar as allowed by statute.[929]

4.2. The Power of Staff Recruiment and Principles on Conditions of Service Complement the German Legal Framework

In Germany local authorities also enjoy a so-called *Personalhoheit*, i.e. the power to freely select, appoint, promote and dismiss local government employees.[930] This right is traditionally regarded as a corollary of the freedom of organisation (*Organisationshoheit*). Being vested with legal subjectivity, local authorities have the right to recruit the members of their staff insofar as it serves the purpose of carrying out their functions, including delegated ones.[931]

This right is granted within the framework of the law, i.e. civil service law and labour law. In particular, federal statutory provisions adopted in the 1960s and 1970s pursuant to Article 75, n. 1 BL established common criteria for the internal organisation of the civil service (BRRG) and for the remuneration of civil servants (BSG), thus restricting the scope for own decisions by local authorities. Statutes adopted by the *Länder* normally replicate the federal statutory provisions. Remuneration laws on the contrary vary for certain pay elements from *Land* to *Land*. For salaried employees there are separate collective agreements for the Federation, the *Länder* and local authorities. In general, the federal legislative power serves the purpose of preventing the development of a special treatment of employees at local level and to ensure a higher degree of harmonisation of standards for civil servants pursuant to Article 33 BL[932].

Subjection of local authorities' power to hire their own personnel to statutory constraints is in turn limited by the obligation to abide by the core of the freedom of organisation (*Kernbereich*). In this respect, legal scholars consider being part of the core the power to select and appoint own civil servants and other employees (*Dienstherrnfähigkeit*) pursuant to § 121 nr. 1 BRRG[933] and the power to create new posts and filling them with professional or honorary members. This guarantee prevents a coercive supply of staff by the State in the framework of conferral or delegation of new

---

929 *Ibid*., 204-205.

930 BVerfGE 17, 172 (182); 91, 228 (245); BVerfGE 1, 167 (175); 8, 332 (359 f.); BVerfGE 119, 331 (362); VerfGH NRW Judg. 15 January 2002, 40/00 – NVwZ, 2002, 1502. A. Gern, *cit.*, Rn. 175.

931 T. Maunz, *Art. 28*, *cit*., Rn. 91.

932 BVerfGE 7, 358 (364).

933 BVerfGE 119, 331 (362).

powers to local authorities.[934] In general, it might yet be said that the scope of the right to act autonomously in matters of personnel has been increasingly narrowed down, since the State can decide, upon appropriate justification, which employees shall be assigned with the task to care about local government responsibilities and which employees should be given the task to deal with delegated responsibilities.[935] Further, State laws can decide to establish a gender equality officer (*Gleichstellungsbeauftragte*) and even determine if this position must be filled by a man or a woman.[936] In Italy, no such far reaching restrictions with reference to the organisation of the internal administrative structures exists. One could refer in particular to the case of the local ombudsman (*difensore civico*), whose establishment can, but ought not to be provided by the charters (*statuti*) of the single local authorities only if they see fit (Article 10 T.U.E.L.).

Even more relevant for the relationship between the Charter and the German Basic Law is the *Länder* power to fix by means of by-laws an upper limit or cap for employees to be hired by local authorities. Caps or blocks might also be introduced by local authorities themselves, but are normally occasioned by supervisory authorities requiring a consolidation of the local budget. This power of fixing caps (*Stellenobergrenzen*) or limiting recruitment (*Stellenbesetzungssperren*) was deemed to be in conformity with the *Personalhoheit,* but only insofar as it does not impinge upon the sphere of decision-making powers of local authorities.[937] Finally, no reference can be found in the German literature or in the case-law to the principle enshrined in the Charter whereby the member States ought to ensure that local authorities can always recruit staff whose quality corresponds to the local authorities' responsibilities. This principle might be used as a limit (*Gegenschranke*) to statutory provisions aimed at reorganising the local staff pursuant to rigid division of functions.

5. Administrative Supervision: Cooperation and Coercion

5.1. Review of Legality as a Rule

The Charter principle whereby State administrative supervisory authorities should merely carry out a review of legality over acts issued by local authorities and not also one of expediency is very well-

934 BVerfGE 17, 172, (181 ff.).

935 H-A. Wolff, *Die Personalhoheit als Bestandteil der kommunalen Selbstverwaltungsgarantie,* VerwArch 100 (2009), 280 and ff. Further encroachment comes by EU law as pointed out by J. Nazarek, *cit*., 55.

936 BVerfGE 91, 228 (245).

937 BVerwGE, 1985, 416; VGH-BW, VblBW 1993, 226; BayVerfGH DÖV, 1993, 1007; A. von Mutius and F. Schoch, *Kommunale Selbstverwaltung und Stellenobergrenzen*, DVBl, 1981, 1077 and ff.; T. Maunz, *Art. 28*, *cit*., Rn.91.

known under German constitutional law. Pursuant to Article 28, para. 2 BL, in fact, municipalities' and joint local authorities' "own responsibility" to regulate, respectively, affairs of the local community and other specific public affairs finds its limit in statutory provisions. Statutes limiting the own responsibility of municipalities and of joint local authorities ought to be approved by the *Länder* parliaments, since the Federation has in principle no power to pass laws on matter of local self-administration. Among other limitations, concerning for instance the internal administrative structures of local authorites, *Länder* statutes, i.e. municipal and counties' codes, building upon explicit constitutional provisions in every *Land*,[938] are empowered to provide for the establishment of a system of State administrative supervision (*Staatsaufsicht*) to assess the adherence to the law – i.e. European, federal and *Land* law - of acts issued by local authorities.[939] This subordination of local authorities to State supervision can be constitutionally justified on the basis of Article 20, para. 3 BL, whereby all executive authorities shall be bound by law and justice. Local authorities, as administrative units, i.e. as part of the indirect public administration of the State (*mittelbare Staatsverwaltung*), are regarded as being part of the executive power. Following to Article 79, para. 3 BL, an amendment of the Basic Law concerning the principle of legality of administrative action should thus be declared inadmissable. Hence, State power of supervision over its decentralised administrative units is considered as a necessary counterweight to local self-administration (*Korrelat der Selbsverwaltung*).[940]

The system of legal supervision is characterised by a low level of judicialisation and arranged on three levels in a staggered manner so as to ensure independence and absence of conflict of interests: in almost all *Länder*, legal supervision of small municipalities belongs to the county administrator's office (*Landrat* or, sometimes, *Landratsamt*) - which acts here not as a officer of the county, but as an organ of the State (so-called *Organleihe*) - whereas legal supervision for counties and towns without counties belongs either to the so-called district government (*Bezirksregierung* or *Regierungspräsidium*) or to the regional administration office (*Landesverwaltungsamt*). The State Ministry for the Interior (*Innenministerium des Landes*) is the supreme supervising authority. However, in two *Länder* jurisdictions, Lower-Saxony, Saxony-Anhalt and Saxony[941] the county manager or the county's administrator depending on the *Land* (*Oberkreisdirektor* or *Landrat*)

---

938 See *inter alia:* Article 83, para. 4, n. 2 Bavarian Const. and Article 78, para. 4, n. 1 NRW Const.

939 Other forms of administrative supervision exist and are carried out by the regional parliaments of the *Länder*, the courts of auditors, the judges and the public opinion. Evaluations and comparative studies on the perfomance of local administration are to be carried out pursuant to Article 91 lett. d) BL. Supra-local supervision should not be confounded with local internal audit which is carried out by the local authorities themselves at their own initiative, either through the municipal council or a board of auditors and, in municipalities with over 20.000 inhabitants, through appointment of an independent panel of auditors. Finally, one has also to take into account the mayoral right to objection (*Beanstandungsrecht*) against decisions of the municipal council contravening the law or decisions which might be deemed to endanger the common good of the local community.

940 BVerfGE 6, 104 (118), 78, 331 (341); VerfGH NRW, OVGE 9, 74 (83).

941 § 171, II NdsKomVG; § 112 I 1 SächsGO; §134 I LSAGO.

appears to act no longer as an organ of the State, but as an organ of the county.[942] However, the Federal Constitutional Court found no violation of the right of local self-administration of the municipalities, since the very nature of the State supervision has not been altered by the mere fact of its conferral to a local authority.[943] In this respect, it cannot be said that Germany departs from any international obligation, since the question whether and if so to what extent supervisory powers should be exercised by State or local authorities rests within the domestic organisation of the State. Nonetheless, within the framework of a strict separation of powers between supervisory authorities and local authorities, it seems that the Charter conceives administrative supervision as a State activity: pursuant to the Explanatory Report, in fact, Article 8 «*deals with supervision of local authorities' activities by other levels of government*», thus implying that the coexistence within the same organ of local government responsibilities and supervisory functions should be avoided.

In accordance with Article 11 of the Charter, in Germany decisions by supervisory authorities can be challenged by the same local authorities before administrative courts whenever they hold they have acted in compliance with the law (*Anfechtungsklage*) or when they believe they have the right to a certain act being approved (*Verpflichtungsklage*). However, no citizens' individual right exists as for filing a complaint before an administrative court so as to bring legal supervisory authorities into action, since the latter step in only on the basis of an existing public interest.[944] This conception of supervision is implied also in the Charter's text. Originally, in fact, draft Article 7, para. 4 stipulated that supervision «*must be designed only to safeguard the legitimate interests of other authorities or of individual citizens».* This provision was set aside upon request by the German delegation, which pointed out that: «*This provision should be deleted, as the control of local activities by the state is designed to uphold the superior public interests but not the interests of individual citizens or collectivities».* A supervision which had to be justified in such terms could have been detrimental to the same local authorities, because any sort of public interest could have been interpreted as being "a legitimate interest of another authority or of the citizens" and forced supervisory authorities to take action.

However, one should recall that, unlike in Germany, in Italy there exists so-called *actio popularis*, which allows individual citizens to lodge a complaint before a court not for a violation of their own interests, but to put forward the public interest. The Charter itself however clarifies that Article 8 «*is not concerned with enabling individuals to bring court actions against local authorities»*, thus

---

942 So M. Burgi, *cit*., 96. Similarly: C. Brüning, *Kommunalrecht*, in: D. Ehlers, M. Fehling, H. Punder (eds.), *Besonderes Verwaltungsrecht*, Vol. 3, 2013, 27-28.

943 BVerfGE 78, 331 (348).

944 See *inter alia*: G. Viegener, *Drittschutz Staats-, Wirtschafts- und Gemeinschaftsaufischtsrechtlicher Bestimmungen*, 2007, 145 and 150; O. Kopp and W. R. Schenke (eds.), *VwGO-Kommentar*, § 42, Rn. 87. BVerWG, DÖV, 1972, 723; BVerfGE 31, 33 (42)

confirming the view expressed in the first Chapter whereby the treaty provides for a rather organicist defense of local government rather than a true participation of individuals in the conduct of public affairs.

As for the nature of supervision, supervision is not only a matter of observance of legality by administrative units and supervisory authorities are not mere legal guardians of local authorities with limited capacity. In this respect, the German concept of State administrative supervision is much more sophisticated than that of the European minimum standard laid down in the Charter, which appears to confine it to a blunt scrutiny of legality. In fact, supervision over local authorities in Germany not only covers advisory functions, but aims at coordinating and guiding actions of autonomous decentralised entities, protecting them from themselves or from third parties and ensuring their improvement in performing public services as well as enhancing their social-, cultural- and economic development.[945]

The extent of the supervisory powers is generally restricted to a strict review of legality (*Rechtsmäßigkeit*) in the field of mandatory and voluntary local government responsibilities (so-called *Pflichtaufgaben ohne Weisung* and *Freiwillige Aufgaben*). Prior approval (*Genehmigungsvorbehalt*) by supervisory authorities in relation to certain acts related to the aforementioned responsibilities should be restricted to a mere scrutiny of lawfulness. In practice, however, it can be observed that many by-laws, especially in financial matters (alienation of properties, public borrowing, incurrence of guarantees etc.) but also concerning the adoption of the land-use plans (§ 6 and § 10 BauGB), even if falling within the scope of local responsibilities, undergo a procedure of preventive approval by the supervisory authority which is not confined to legality, but crosses over into shaping the final decision. In other words, supervisory authorities are vested with far reaching powers so as to take into account national fiscal and macroeconomic considerations before giving approval to certain legal acts. This is often justified on the basis of the need to protect local authorities from themselves and mainly to prevent them to running up budget deficits.[946]

Before even mentioning the question of their compatibility with Charter Article 8, para. 1 and para. 3, these supervisory measures are particularly difficult to reconcile with the "own responsibility" requirement laid down in Article 28, para. 2 BL[947] and with several constitutional provisions of the

---

945 See, for instance: J. Oebbecke, *Kommunalaufsicht – nur Rechtsaufsicht oder mehr?*, DÖV, 2001, 406-411; F. W. Held, *Das Verhältnis von Staat und Kommunen am Beispiel der Kommunalaufsicht*, in: J. Ipsen (ed.), *Staat und Kommunen – Kooperation oder Konflikt?,* 1998, 23.

946 So M. Burgi, *cit.*, 98-99.

947 The Federal Constitutional Court recalled that *a priori* supervision cannot grow into a "Einmischungsaufsicht", i.e. into a supervision which interferes with self-administration - BVerfGE, NVwZ 1989, 45. See also: BayVerfGH, Judg. 15 December 1988, NVwZ 1989, 551.

Länder which explicitly restrict State supervision to the mere scrutiny of lawfulness.[948] The case-law of the FCC, however, proved them to be legitimate, insofar as they refer to a field of responsibilities which can be considered part of a "condominium" of similar interests with those of the State or insofar as they are necessary to check local government compatibility with national fiscal policy.[949] By contrast, in other *Länder* constitutional provisions explicitly allow for such deep-reaching administrative controls. In particular, Article 75, para. 1, n. 2 of the Constitution of Baden-Württemberg and Article 89, para. 2 of the Constitution of Saxony provide for a supervisory authorities' right of co-decision in financial matters. Though, subjection of administrative acts falling within the scope of local government responsibilities to the prior approval of supervisory authorities raises serious questions over their conformity with both the Charter and the Basic Law.[950]

Further, Germany embraced the principle of discretionary supervision (*Ermessen*)[951] whereby, if nothing else is provided for by the law,[952] supervisory authorities are empowered to make use of their administrative discretion deciding whether or not a violation of the law deserves to be set aside or not with reference to the public interest. The use of discretion is not an arbitrary act, but stems from the assumption that supervision over local authorities serves not only the rule of law but also and foremost the right to local self-administration and should be aimed at supporting local authorities in carrying out their functions.

In Bavaria, however, until 1997, only municipalities were subject to a strictly legal review by supervisory authorities, whereas statutory provisions based supervision over counties (*Kreise*) and districts (*Bezirke*) on administrative discretion so that it was left up to supervisory authorities whether to intervene or not in case of violations of the law. This principle was finally extended to the supervision over municipalities by the Bavarian legislature in 1997,[953] so that nowadays also the *Landrat* acts legally if it does not intervene in case of trivial violations of the law. Discretion of supervisory authorities does not mean that they are simply allowed to look away when local authorities contravene the law; on the contrary, supervisory authorities should exercise a dutiful discretion (*Ermessensfehlerfrei*), which allows for different factors to be weighed up so as that the overall reasoning can be objectively verifiable. Its use is in fact subject to judicial control by

---

948 For instance, see: Art. 137, para. 3 n. 2 HessConst.; Art. 78 NRW Const; Art. 94 ThürConst.

949 OVG Münster, NVwZ 1988, 1156 (1157) and VGH Kassel, NvwZ 1989, 585 (586); A. Von Mutius, *Kommunalrecht*, *cit.*, 195.

950 K. Stern, *Art. 28, cit.*, Rn. 137 ff. and F. Schoch, *Soll das kommunale Satzungsrecht gegenüber staatlicher und gerichtlicher Kontrolle gestärkt werden?* NVwZ, 1990, 805.

951 BVerfGE, 8, 122 (137). Among legal scholars see: R. Stober, *Kommunalrecht in der BRD*, 3rd ed., Stuttgart-Berlin-Köln, 1996, 151 e 154; A. Gern, *cit.,* Rn. 913. *Contra*: H. Borchert, *Legalitätsprinzip oder Opportunitätsgrundsatz für die Kommunalaufsicht?*, DÖV, 1978.

952 See for instance: §§ 120 ThürKO and ff..

953 See: F.L. Knemeyer, *Rechtsaufsicht als Vertrauensaufsicht*, BayVbl 1999, 193 ff.

administrative courts and ought to be characterised by abidance by the principle of equality before the law (*Gleichheitssatz*). In other cases, supervisory authorities are prevented to exercise discretion which is hence "reduced to zero" (*Ermessensreduzierung auf Null*) and have to follow the measures laid down in statutory provisions.

The Charter does not deal with the question whether discretion by supervisory authorities should be allowed when reviewing the lawfulness of acts issued by local authorities. The principle of proportionality, laid down in Article 8, para. 3, in fact, concerns merely the choice of the appropriate tools to react to violations of the law (so-called *Auswahlermessen*), but not the question whether and when a supervisory authority should intervene or not. Nonetheless, one could argue by means of analogy that within the notion of proportionality falls also the use of discretion by supervisory authorities, since the use or non-use of discretion is based on the choice of a measure which least restricts local authorities prerogatives.[954] In general, it can henceforth be assumed that the very concept of supervision underlying German constitutional law corresponds to the one entrenched in the Charter.

5.2. Review of Expediency for Mandatory Supervised and Delegated Responsibilities

Administrative controls of expediency by a *Land* supervisory authority are generally ruled out by the law, since taking action against local authorities' measures or directly replacing their organs infringes upon the guarantee of "own responsibility" or autonomy *stricto sensu* of municipalities and joint local authorities. Otherwise, in fact, the very core (*Kernbereich*) of the institutional guarantee of local self-administration would be disrupted.

Yet, in Germany administrative supervision of expediency (*Zweckmäßigkeit*) is exceptionally permitted when it comes to delegated tasks, i.e. all those tasks which are carried out by local authorities on behalf of the State. Originally, Article 7, para. 1 of the Draft Charter set forth that State authorities could merely supervise compliance with the law of local authorities' decisions, but they were by no means allowed to assess their expediency. This very rigid principle could hardly be deemed to constitute a common standard of European local government law and was also difficult to reconcile with Draft Article 3, para. 5, which implied that local authorities were not fully autonomous with regard of delegated tasks. This is the reason why, during further negotiations on the treaty, the German delegation, among others, adjusted Draft Article 7 so as to provide a clear exception for delegated tasks and thus suggested to amend the text accordingly.[955] The German proposal was accepted. Unlike in other federal States, depending on the legal order of the *Land* one

954 B. Schaffarzik, *cit.*, 504.
955 C. Hyltoft, *cit.*, 51.

considers, German supervision of expediency regards two different kinds of public responsibilities, that is to say, on the one hand, delegated tasks (*Auftragsangelegenheiten*) and, on the other hand, so-called supervised mandatory responsibilities (*Pflichtaufgaben zur Erfüllung nach Weisung*).

A. The former are common within the so-called "dual task model", typical of Bavaria, Lower-Saxony, Rhineland-Palatinate, Saxony-Anhalt, Thuringia and Saarland, whereby local authorities look after public affairs within their sphere of competence, while simultaneously performing tasks on behalf of the *Land* and, within the limits set by the Basic Law, also of the Federation.[956] With regard to State tasks, *Land* or federal authorities have a fairly broad, but not unlimited power to guide local authorities by means of specific instructions (*Weisungen*) as to how carry out them. In fact, the power to issue instructions ought to be exercised by complying with a series of requirements: State authorities are under the duty to consult local authorities whenever they are about to issue single instructions (*Einzelweisungen*) which might have implications for the discharge of local government functions; instructions must be sufficiently clear and precise and must be bound by law and justice (Article 20, para. 3 BL); instructions cannot be in contradiction with other instructions issued by higher level authorities; in general, instructions cannot interfere directly with the right of local authorities to carry out "own tasks", a principle aimed at ensuring that local responsibilities are full and exclusive insofar as possible[957]. Whenever compliance with State instructions is expected to impact negatively on their discharge, State authorities should weigh up the possible implications of them and choose the less burdensome measure following to the proportionality principle. Furthermore, instructions issued by State authorities cannot undermine the essential content of local authorities freedom of organisation.[958] One can therefore assume that German local authorities are normally vested with the right to adapt the discharge of State tasks according to their administrative structures and to staff organisation (Article 4, para. 5 in combination with Article 8, para. 2 of the Charter).

Instructions concerning delegated tasks are normally not reviewable by administrative courts, because, being decisions issued within the public administration, they do not produce immediate external legal consequences and cannot be qualified as being administrative acts pursuant to § 35 VwVfG (*Administrative Procedure Law*),[959] insofar as they do not impinge upon the right of local

---

956 Even if the general principle set out in Article 85, para. 2 BL is that «*federal laws may not entrust municipalities and associations of municipalities with any tasks»,* the Basic Law itself provides for some explicit exceptions, when the *Länder* execute federal laws, pursuant to Article 84, para. 5 BL, the Federal Government may be authorised by law requiring the consent of the *Bundesrat* to issue instructions in particular cases. The same goes for other responsibilities falling within the transferred sphere (Article 85, para. 3 sentence 1 and para. 4 BL).

957 H. Vietmeier, *Die Rechtsstellung der Kommunen im übertragenen Wirkungskreis*, DVBl 1993, 192 and 194.

958 E. Schmidt-Jortzig, *Kommunale Organisationshoheit*, *cit*., 187 and ff. and W. Roters, *Art. 28*, in: V. Munch, *GG-Kommentar*, Rn 48.

959 According to H.U. Erichsen, DVBl, 1985, 948; D. Ehlers, *cit*., NWVBl 1990, 44 and 80; E. Schmidt-Aßsmann and P. Badura, *Besonderes Verwaltungsrecht*, *cit*., II 3 b); F. Schoch, *Die staatliche Fachaufsicht über Kommunen*, Jura

authorities to freely organise their administrative structures and to freely dispose of their financial resources.[960] In any case, supervisory authorities carrying out expediency controls cannot resort themselves to repressive instruments in order to make local authorities abide by their instructions, but have to refer the case to the supervisory authority exercising the control of legality (*Rechtsaufsicht*). The non-observance of instructions by local authorities amounts in fact to a violation of the law so that supervisory authorities are allowed to make use of the set of tools at their disposal, against which eventually local authorities can lodge a complaint pursuant to § 42, para. 1 VwVfG (*Anfechtungsklage*) before administrative courts. In the end, no violation of Article 8, para. 2 read in conjunction with Article 11 of the Charter can thus be assessed.

B. Supervised mandatory responsibilities are a striking feature of the so-called "uniform task model", typical of North-Rhine Westphalia, Baden-Württemberg, Hesse, Brandenburg, Mecklenburg-Western Pomerania, Saxony and Schleswig-Holstein, whereby both public responsibilities without instruction by the State and public responsibilities pursuant to detailed but limited instructions by the *Länder* administrations fall within the sphere of competence of local authorities. Instructions encompass both the right to intervene by means of directives and the administrative duty to supervise over their implementation (*Sonderaufsicht*). Under these instructions are included also several instruments of preventive supervision, such as special approval of acts (*Genehmigungsvorbehalt*). Unlike for delegated tasks,[961] the instructions by the State do not follow from the nature of the tasks, but find their legal basis exclusively in statutory provisions. If no statutory provision exists, no instruction is legally possible, a fact which complies with the European principle, whereby any kind of administrative supervision over local authorities ought to be explicitly provided by statute.

As to the question whether supervised mandatory functions are to be regarded either as local or as

---

2006, 358 (363), H. Vietmeier, *cit.*, 194 even if it is true that instructions do not produce external legal effects, instructions impinging on the right to local self-administration can be appealed before administrative courts by means of a so-called *Leistungsklage*. Following to J. Ipsen, *Niedersächsisches Kommunalrecht*, 4th ed., Stuttgart, 2011, Rn. 904 ff; E. Schmidt-Jortzig, *Rechtsschutz der Gemeinden gegenüber fachaufsichtlichen Weisungen bei der Fremdverwaltung,* JuS, 1979, 491, instructions shall be considered administrative acts whenever they infringe upon the right to local self-administration. So in the case-law also: BVerwGE, Judg. 5 December 1986 and 11 November 1988. A violation of the right of local authorities which gives them the *locus standi* to bring a complaint pursuant to § 42 para. 1 VwVfG (*Anfechtungsklage*) can be assessed if supervisory authorities violate legal provisions aimed at restricting supervisory powers in the interest of local authorities. See for instance: Article 109, para. 2, sentence 2 BayGO – BVerWG, Judg. 27 February 1978, DVBl, 1978, 638.

960 E. Schmidt-Aßmann and P. Badura, *Besonderes Verwaltungsrecht*, *cit*., IV 3 lett. b), 43 and E. Schmidt-Jortzig, *cit*., 490; A. Gern, *cit.*, Rn. 460 and 837. BVerWG 6, 101 (102); 17, 87 (90); 45, 207 (210);

961 Even in legal orders following the monistic model, tasks can further be delegated (*Auftragsangelegenheiten*) by the *Land*, but that must be explicitly provided for by the law. That no longer occurs in many *Länder*, but only in Brandenburg (§§ 2 III 2, IV 4 BbgKVerf) and Hesse (§ 4 II 2 and III HessGO).

delegated responsibilities, German legal scholars are utterly divided.[962] Here is the interpretation to follow whereby they cannot be regarded as public affairs of the local community *ex* Article 28, para. 2 BL, because they are not carried out in the own responsibility of local authorities. However, in a monistic system, whereby all responsibilities are deemed to rest within local government, instructions by the *Länder* have external legal effects and can be appealed before an administrative court (*Anfechtungsklage*). In fact, insofar as no instruction existed or instructions exceed what *Länder* statutes require, they impinge upon the right to local self-administration.[963] Thus, mandatory supervised functions should be considered as *sui generis* responsibilities, neither entirely "own" of local authorities, nor really "delegated" by the State. Nonetheless, even if in the internal legal order, they cannot be simply deemed to be delegated tasks, for the purpose of the Charter, mandatory supervised functions fall within the latter category. In fact, it has to be borne in mind that the meaning of "delegated tasks" under the Charter is an autonomous one, which cannot in principle be interpreted in the light of single constitutional traditions. That is why under delegated functions one should understand administrative functions which cannot be discharged with full discretion by local authorities, i.e. different from the basic responsibilites of Article 4, para. 1 and which are subject to a limited supervision of expediency by State authorities. From the point of view of the treaty, the German *Weisungsaufgaben* cannot be regarded as local responsibilities, but should be viewed rather as delegated tasks.[964] This appears to be also the understanding of the Congress in 2012 while monitoring the application of the Charter in Germany. The Congress, in fact, did not distinguish between all different kinds of delegated tasks existing in the Federal Republic but it merely observes that: «*The local power is the narrowest when local government carries out delegated tasks ("vom Staat zugewiesene Aufgaben"), because in all these cases, it exercises power on behalf of the central government, under its instructions and control*».[965] This means that, overall, mandatory supervised responsibilities ensure a minimum of autonomy, as required by the Charter.

5.3. Proportionality as a Key Principle for Supervision

962 H.W. Scheerbarth, *Gibt es weiterhin "Auftragsangelegenheiten" im Land Nordrhein- Westfalen?*, DVBl, 1953, 261; Brohm, *Die Eigenständigkeit der Gemeinden,* DÖV, 1986, holding that they have to be qualified as delegated tasks; H-U. Erichsen, *Kommunalrecht NRW*, 69 ff.; W. Riotte and K. Waldecker, *Zur Einordnung der Pflichtaufgaben zur Erfüllung,* NWBl, 1995, 687, holding that they are predominantly own responsibilities of local authorities.

963 In North-Rhine Westphalia see: G. D. Buhren, *Allgemeines Kommunalrecht NRW*, 7th. ed., Stuttgart, 2004, 133 and E. Rehn (ed.), *Gemeindeordnung NRW*, Siegburg, 2014, § 106 B VII 9.

964 Similar remarks are made also by B. Weiss, *cit.*, 193-195.

965 Congress of Local and Regional Authorities, *Report on Local Democracy in Germany*, CG (22) 7, 14 March 2012, § 59 and 131.

The principle of proportionality is commonly applied in Germany as a limitation to all State measures aimed at restricting the right to local self-administration, hence also to those measures issued by supervisory authorities. The existence of such a general limitation to the legislature's power to restrict local self-administration could not be assessed under the Charter. Yet, with specific reference to supervisory measures the Charter indeed requires a proportionality test (Article 8, para. 3) The Explanatory Report recalls, in fact, that this Charter's Article «*draws its inspiration from the principle of "proportionality"*», which here means that any «*controlling authority, in exercising its prerogatives, is obliged to use the method which affects local autonomy the least whilst at the same time achieving the desired result.*».

This conception appears to match with the German definition of the proportionality principle (*Verhältnismaßigkeitsprinzip*), whereby any administrative interference with individual rights has to serve a legitimate purpose and must meet three conditions as developed by the case-law of the Federal Constitutional Court (three-part structure of the proportionality test), that is to say it has to be suitable to attain the aim prescribed by statute; it has to be necessary, that is to say no less onerous measure should be given and it must to be adequate, that is to say proportional in a proper sense, i.e. the administrative action should not impose a burden out of proportion with relation to the end.[966] As mentioned before, this principle applies also in the field of local government law as a limitation for protecting any infringment upon local authorities' prerogatives (*Übermaßverbot*).[967] In this field, the legislation of the *Länder* provides supervisory authorities with a set of different tools - both preventive and repressive - which are to be used strictly pursuant to the principle of proportionality. As the Congress itself recognised in 1995, *«the notable aspects of the supervision system as applied in Germany are therefore the very full range of instruments which it offers for the purpose of supervision, and the sequential character of the measures, which must be applied strictly in accordance with the principle of proportionality*».[968]

The sequence of control, which is very similar in the different legal orders of the *Länder*, but is rather unknown in the Italian legal order, must be laid down into law and works as follows: in the very first place, the legal supervisory authority may ask the local authority to be informed about a specific question; if co-operation proves inadequate, the controlling authority issues a so-called *Anordnung* or order when a local authority fails to adopt a certain act or it resorts to the so-called *Beanstandung* or objection by means of which the supervisory authority expresses its disapproval for a certain act approved by a local authority asking for its removal or modification. Unlike in

---

966 BVerfGE 67, 155 (173, 176, 178).

967 See: B. Schaffarzik, *cit*., 423-433; M. Burgi, *cit*., 68.

968 Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Romania*, CG (2) 5 Part II – Institutional Relations Between Central, Federal or Regional Authorities and Local Authorities: Comparative Law Study, Part II, 30 May-1 June 1995.

Italy, where since 2001 constitutional reform annulment of acts of local authorities by supervisory authorities has been prohibited, the German supervisory authorities often annul acts of local authorities which are deemed to be in violation of the law (*Aufhebung*); if no remedy takes place or if no act is adopted by the organs of the local authority, the controlling authority itself may take action and replace its organs in discharging the task (*Ersatzvornahme*). If all the above measures have proved ineffective further measures are provided by the municipal and counties codes in some *Länder*, such as: the appointment of a commissioner (*Staatsbeauftragte*) to take over some or all local authority's functions; to pronounce the dissolution of the council and to call for the dismissal of the mayor or of the county chiex executive. No other kind of supervisory measure can be issued if the law does not explicitly provide for it (so-called *numerus clausus* principle). In Italy, also on grounds of the abolition of external controls over local authorities' acts (see *infra* third Chapter § 3.II.5), the aforementioned measures are mixed and combined in a rather unproportionate manner together with measures related to controls over organs; in particular, State commissioners can be appointed in cases of grave violations of the law or of fundamental principles of the constitutional order without following any precise and clearly predetermined list of measures, as it is the case in the German legal order.

The Congress commentators observed that «*despite the ostensible severity of central government control measures, it is quite unusual for such action to be taken in respect of a local authority*», because State administrative supervision in Germany provides local authorities with advice and assistance attempting at reinforcing their decision-making capability rather than exercising repressive supervision. The duty to advice (*aufsichtliche Beratung*) consists of providing local authorities with verbal and/or written information, drawing attention to legal and economic problems or pointing out alternatives for dealing with specific problems. Advisory functions, which are also typical of the Italian Court of Auditors, the main organ endowed with external supervision over local authorities in Italy, are the most important tool of prior supervision and a necessary corollary of the co-operative principle (*Kooperationsprinzip*) which is considered even more often to be at the basis of the German system of administrative supervision.[969]

6. The Constitutional Rights and Principles for Adequate Financial Equipment

As showed in the first Chapter, Article 9 of the Charter binds together the general principle of adequate financial equipment (para. 2), whereby resources levied by or transferred to local authorities should be proportionally linked to all tasks they have to discharge, with the special

[969] W. Kahl, *cit*., 472 ff. and R. Pitschas, *Struktur- und Funktionswandel der Aufsicht im Neuen Verwaltungsmanagement,* DÖV, 1998, 907-909.

principle whereby local authorities should dispose of an adequate amount of own revenues on the total amount of resources. Financial autonomy, that is to say the power to manage the local budget without being subject to State interferences, presupposes a right to raise own revenues (para. 1 and 3), a local finance system diversified and buoyant (para. 4), the establishment of procedures of vertical and horizontal equalisation (para. 5), consultation of local authorities to the extent of a sort of negotiation on allocation of resources (para. 6), a limited access to earmarked grants (para. 7) and a limited recourse to public borrowing (para. 8). Hereafter, it must be investigated whether these principles and rights are already enshrined, partially or fully, in German constitutional law and whether the Charter in this respect can help in supplementing or at least precising the German constitutional guarantee of local self-administration.

6.1. The Limited Subjective Right of Local Authorities to Adequate Financial Equipment

Article 28, para. 2, sentence 3 BL - introduced by means of two subsequent constitutional reforms approved in 1994 and in 1997,[970] that is to say less than a decade after the Charter had been ratified by Germany - explicitly acknowledges local authorities' financial autonomy (*Finanzhoheit*) as a corollary of the right to local self-administration, i.e. it stipulates that *«the guarantee of self-government shall extend to the bases of financial autonomy».* The Federal Constitutional Court understands financial autonomy as local authorities' power to manage their budget with own responsibility of revenues and expenditures[971], a definition which echoes the combined reading of Article 3, para. 1 and of Article Article 9, para. 1, sentence 2 of the Charter.

Before 1994, municipalities' and joint local authorities' financial autonomy was construed as deriving from Article 28, para. 2, sentence 1 and 2 BL, whereby local authorities ought to fulfill their duties under their own responsibility (*in eigener Verantwortung*).[972] The own responsibility of local authorities in discharging their administrative functions means in fact that financial equipment cannot be based only on financial transfers or on shares of *Land* revenues. New Article 28, para. 2, sentence 3 BL confirms this interpretation and specifies that the bases of financial autonomy «*shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed»,* that is the right to have own sources of revenues and the right to fix their tax-rates. In particular, the first alternative appears to

---

970 Gesetz zur Änderung des Grundgesetzes - 27 October 1994, BGBl, I S, 1994, 3146 and Gesetz zur Änderung des Grundgesetzes - 20 October 1997, BGBl, I S, 1997, 2470.

971 BVErfGE 71, 25 (36 f.); 83, 363 (386); BVerfGE 22, 180 (207 f.); 23, 353 (365-572); 26, 172 (180-184); 52, 95 (117).

972 Cf. P.J. Tettinger and K-A. Schwarz, *Art. 28*., Rn. 244. J.E. Rosenschon, *Gemeindefinanzsystem und Selbstverwaltungsgarantie*, Köln, 1980, 17-30 and H. Meyer, *Die Finanzverfassung der Gemeinden*, 1969, 49-50; F.L. Knemeyer, *Finanzausstattung der Städte*, Der Städtetag, 1988, 330; C. Meis, *cit.,* 76; K. Waechter, *cit.*, Rn. 89 ff.

correspond to the Charter's obligation, whereby local authorities should dispose of own sources to fund local government tasks, whereas the second appears to match with the right to fix the tax rates (Article 9, para. 1 and para. 3).

Though, as a specific reference to Charter Article 9, para. 1 made by Gern in his handbook on German local government law appears to imply,[973] the standard of the Charter in this respect was and still is higher than that provided for by the Basic Law, which acknowledges the right of municipalities to dispose of own financial resources for discharging their own tasks, but it does not require these revenues to generate an "adequate" proportion of the overall amount of financial resources.[974] Instead, according to part of the German literature, own financial resources are deemed to be adequate simply insofar as they ensure the discharge of non-mandatory or voluntary local government tasks upon which the deliberative body of the local authority freely decided.[975]

In this respect, one has first of all to distinguish between the notion of financial equipment commensurate with the tasks (*aufgabenangemessene Finanzausstattung*) and the notion of a minimum of financial equipment (*finanzielle Mindestausstattung*). The former has been defined by the dominant literature and by the case-law of several Constitutional and State Courts of the *Länder*[976] as the right of local authorities as a whole to dispose of enough resources to carry out all tasks - both transferred (*Pflichtaufgaben*) and delegated (*Auftragsangelegenheiten*)[977] - and also additional tasks upon the discharge of which local councils should be able to decide freely[978]. Hence, it lies upon the State the positive obligation to provide local authorities with the necessary means - either through the entitlement of new sources of revenues or through financial transfers - and also the negative obligation not to deprive local authorities of financial means for the sake to giving them away to other authorities.

---

973 A. Gern, *cit*., 2 ed., 1994, Rn. 161.

974 So also: B. Schaffarzik, *cit.*, 537, who however fails to see the legal implications; B. Weiss, *cit.*, 200-201. Discussing the question in constitutional terms and denying the existence of such criterion in the German legal order also: C. Meis, *cit.*, 78; J. E. Rosenschon, *cit*., 18; A. von Mutius, *KommunalR*, *cit.*, Rn. 259; H-G. Henneke, *Landesfinanzpolitik und Verfassungsrecht,* Heidelberg, 1998, 27; G. Werner, *Die Gemeinde- und Kreisfinanzierung auf dem verfassungsrechtlichen Prüfstand,* VblBW, 1997, 3. In the case-law: BayVerfGH 50, 15, (42); Rh-PfVerfGH, As 15, 66, (71).

975 Cf. C. Meis, *cit.*, 83; K. H. Hettlage, *Die Gemeinden in der Finanzverfassung*, AfK, 1964, 13-14; H. Pagenkopf, *Einführung in die Kommunalwissenschaft*, 1960, 88;

976 StGH BW, 02 June 1956 168 (169); BayVerfGH, 18 January 1952 (12 II 48 (55)) LS 1; VerfGH NRW 23 March 1964, OVGE 19, 297 (306); VerfGH Rh-Pf, 5 December 1978, DVBl 1978 (802 ff); ThürVerfGH, 21 June 2005 and 12 October 2004.

977 Misleading thus B. Weiss, *cit.*, 205.

978 R. Voigt, *cit*., 50; K. H. Hettlage, *cit.*, 14; R. Grawert, *Kommunale Finanzhoheit und Steuerhoheit*, in: A. von Mutius (ed.), *Selbstverwaltung im Staat der Industriegesellschaft, FS von Unruh*, 1995, 587 ff; A. Dombert, 1136-1137; Cf. P.J. Tettinger and K-A. Schwarz, *Art. 28*., *cit*., Rn. 245.

In the reasoning by part of the legal scholars or by the case-law interpreting *Länder* constitutional provisions,[979] the right to a minimum financial equipment often overlaps with the right to adequate financial equipment but it entails another way of conceiving financial equipment, i.e. it sets the ultimate limit beyond which the State cannot go without violating the essential content of local self-administration.[980] How these two rights interact with each other and in how far they are justiciable before national courts remains controversial. Following to the fairly accurate interpretation by Nierhaus[981] and to the case-law of several Constitutional and State Courts,[982] every single local authority can invoke the right to a minimum of financial equipment to carry out all tasks, including those freely decided upon by the local assembly, the violation of which entails the infringement of the core of local self-administration. The *Land* administration cannot invoke the circumstance that providing additional resources to local authorities would disrupt its financial strength (*Leistungsfähigkeit*), but has to act accordingly, either by giving them new sources of revenues or by relieving them of certain tasks. Instead, local authorities as an institution, i.e. municipalities or joint local authorities collectively, can invoke before administrative courts the right to a financial equipment commensurate with the responsibilities they have to fulfill, including a minimum of non-compulsory or free tasks. This right can however might be restricted by state law on accounts of the financial strength of the *Land* and thus it does not amount to the essential core of local self-administration, but merely to the outer boundary (*Randbereich*) of the realm of local self-administration. In other words, the *Land* administration might lawfully refuse a transfer of resources to local authorities on grounds of its financial strength,[983] since local authorities tasks' have to be

---

979 Art. 73, para. 1 BW Const.; Art. 83, para.2 and 3 Bav. Const.; Art. 97, para. 3 and Art. 99 BrandConst.; Art. 137 HessCost.; Art. 37 MV Const.; Art. 57, para. 4 and Art. 58 L-SConst.; Art. 78, para. 3 and 79 NRWConst.; Art. 49 para. 5 Rh-Pf.; Art. 119, para. 2 SaarConst.; Art. 85, para. 1 and 2, Art. 87 SaxConst.; Art. 87, para. 3 and Art. 88 S-Aconst.; Articles 48 and 49 SH-Const.; Art. 93 ThürConst.

980 VerfGH Rh-Pf, Judg. 5 December 1977 - VGH 2/74 - DVBl 1978, 805 and 18 March 1992 - VGH 3/91 - NVwZ 1993, 160; StGH BW, Judg. 10 May 1999 - 2/97 - ESVGH 49, 242; BayVerfGH, Decisions 27 February 1997 - Vf. 17 VII-94 - VerfGHE BY 50, 15 (41) and 28 November 2007 - Vf. 15-VII-05 - VerfGHE BY 60, 184; VerfG Brandenburg, Judg. 16 September 1999 - 28/98 - NVwZ-RR 2000, 130; LVerfG MV, Judg. 11 May 2006 - 1/05 u.a. - LKV 2006, 461 and 26 January 2012 - 33/10 - juris; NdS StGH, Judg. 15 August 1995 - 2/93 u.a. - OVGE 45, 486, 25 November 1997 - 14/95 u.a. - OVGE 47, 497 and 7 March 2008 - 2/05 - NdsVBl 2008, 156; VerfGH NRW, Decision 13 January 2004 - 16/02 - OVGE 50, 306; Judg. 11. 11 December 2007 - 10/06 - OVGE 51, 272 and 19 July 2011 - 32/08 - DVBl 2011, 1155; VerfGH Saar, Judg. 10 January 1994 - Lv 2/92 - NVwZ-RR 1995, 154 and 13 March 2006 - Lv 2/05 - juris; VerfGH Sachsen, Judg. 23 November 2000 - Vf. 53-II-97 - LKV 2001, 224; VerfGH LSA, Judg. 13 May 2006 - LVG 7/05 - NVwZ 2007, 78; ThürVerfGH, Judg. 12 October 2004 - 16/02 - DVBl 2005, 443, and 21 June 2005 - 28/03 - NVwZ-RR 2005, 667 and 18 March 2010 - 52/08 - LKV 2010, 220.

981 M. Nierhaus, *Verfassungsrechtlicher Anspruch der Kommunen auf finanzielle Mindestausstattung*, LKV, 2005, 6. So also: M. Dombert, *Zur Finanziellen Mindestausstattung von Kommunen*, DVBl, 2006, 1137-1138; H-G. Henneke, *Die Kommunen in der Finanzverfassung des Bundes und der Länder*, 4th. ed.., 2008, 225; K. Rennert, *Art. 28, cit.,* Rn 71.

982 NdSStGH, Judg. 16 May 2001 - StGH Sachs/99 NdSVBl (2001), 190; BbgVerfGH, Judg. 16 September 1999 -VfGBbg 28/98 -NvwZ RR (2000), 134; ThürVerfGH, Judgement 21 June 2005.

983 H-G.Henneke, *Begrenzt die finanzielle Leistungsfähigkeit des Landes den Anspruch auf eine aufgabenangemessene Finanzausstattung?*, DÖV, 2008, 857 ff. Cf. BbgLVerfG Judg. 16 September 1999 – VfGBbg 28/98; StGHBW, Judg. 10 May 1999 – GR 2/97; BayVerfGH Judg. 18 April 1996 – Vf 13-VII-93; NRWVerfGH Judg. 1 December 1998 -VerfGH 5/97.

considered as equivalent (*gleichwertig*) to *Land* tasks. The former cannot outweigh the latter, but the apportionment of resources should take place pursuant to a symmetric treatment (*vertikale Verteilungssymmetrie*), whereby financial resources should be allocated between the *Land* and local authorities taking into account the needs of both, i.e. the tasks which ought to be financed. No mechanism links however automatically the tasks with the necessary resources to finance them. In other words, no full coverage of local authorities' tasks can be ensured.[984] The legislature is accorded in fact with a wide margin of discretion in organising its local government financial system and the principle of financial equipment of local authorities can be balanced with other interests having constitutional rank, including each *Land*'s financial strength.[985] As we can observe, the main problems arise when it comes to combine the principle whereby local tasks and *Land* tasks are equivalent (*Gleichwertigkeit*) with the principle whereby a minimum of financial equipment pertains to the core of local self-administration (*Kernbereich*). If the former prevails, the latter cannot be deemed to represent the ultimate limit beyond which the *Land* legislature ought not to go; if the latter prevails, the equivalence would be disrupted, since local tasks would outweigh the responsibilities carried out by the *Land*.[986] The Charter appears to favour the latter solution, hence possibly bringing about a slight modification of the federal structure, based upon two and not three tiers of government.

Further, it remains unsettled whether the right to adequate financial equipment is an institutional right of local authorities as a whole or an individual right of every single local authority. According to part of the literature and of the case-law,[987] every local authority could lodge a complaint against the *Land* administration whenever they allege a violation of their right to financial equipment (*Aushöhlung der Finanzausstattung*) for the totality of local authorities involved, either municipalities or joint local authorities. This does not imply that local authorities may request a specific financial equipment from the State. For another part of the scholars and of the case-law,[988] every local authority by itself could lodge a complaint due to the lack of adequate resources. Hence,

---

984 OVGE Rh-Pf Judg. 15 December 2010, outruled by Rh-PfVerfGH in its Judg. 14 February 2012 -VGH 3/11.

985 VerfGH NRW – Judg. 19 July 2011. BayVerfGH Judg. 28 November 2007; VerfG MV 11 May 2006; VerfG LSA 2000.

986 See: M. Dombert, *Landesverfassungen und Landesverfassungsgerichte in ihrer Bedeutung für den Föderalismus*, in: I. Hartel, *Handbuch Föderalismus*, Berlin-Heidelberg, 2012, 32-34, who contends that if no minimum of financial resources is guaranteed, *Land* tasks would outweigh local government tasks and the *Gleichwertigkeit* principle would also be curtailed.

987 VerfGH NRW, Judg. 19 July 2011; J. Oebbecke, *Ausfallhaftung für zahlungsunfähige Kommunen?*, in: H-U. Erichsen (ed.), *Kommunale Verwaltung im Wandel, Symposium aus Anlass des 60jährigen Bestehens des Kommunalwissenschaftlichen Instituts der Westfälischen Wilhelms-Universität*, Köln, 1999, 169, who holds that only supplementary financial equipment might be implied by this right, whereas local authorities cannot pretend contracted debts to be paid.

988 NdSStGH, Judg. 16 May 2001 - StGH Sachs/99 NdSVBl (2001), 190; BbgVerfGH, Judg.16 September 1999 - VfGBbg 28/98 -NvwZ RR (2000), 134; ThürVerfGH, Judg. 21 June 2005; VerfGH-RhPf in its Judg. 14 February 2012 - VGH 3/11.

it is still under discussion if this right can be described as a corollary of the institutional guarantee of local self-administration (*institutionelle Rechtssubjektsgarantie*) or if it can be said to be a corollary of the limited individual guarantee of local self-administration (*individuelle Rechtssubjektsgarantie*).[989] In the second case, the guarantee would be a more far-reaching one, since a complaint could be lodged without being necessary to awaiting the erosion of the financial equipment of the municipalities or joint local authorities as a whole. In particular, it would be enough to assess whether the single local authority is able or not to fulfill a minimum of voluntary tasks beyond compulsory ones.[990]

Further, individual local authorities could not only pretend from the State to refrain from eroding local financial equipment, but could also ask to be entitled to particular benefits (*Anspruch auf finanzielle Leistungen*) in order to prevent their bankruptcy.[991] In this respect, though, a further problem is how to quantify the benefits aimed at ensuring an adequate equipment, a question which has and could not be answered by *Länder* Constitutional and State Courts, which have contended that no convincing and objective benchmark can be found to assess whether financial equipment is adequate or not.[992] In particular, it appeared highly questionable and arbitrary the proposal to consider as adequate the provision of a fixed amount of resources to be used by local authorities for carrying out non-compulsory or free tasks, e.g. 5 or 10 percent of the total amount of financial resources (*Quotenmodell*).[993]

At present, no consensus exists on these issues in the literature and among the Constitutional and State Courts of the *Länder,* whereas the Federal Constitutional Court has repeatedly refused to take position on this question, i.e. to decide whether Article 28, para. 2 BL envisages a right to adequate financial equipment or, at least, to a minimum financial equipment.[994] Unlike the Federal Administrative Court (*Bundesverwaltungsgericht*),[995] the FCC also did not take the opportunity to

---

989 K. Stern, *Staatsrecht I*, *cit.,* 422; 3 ff.; H-G. Henneke, *cit*., DVBl, 1998, 335; H. Hoppe, DVBl, 1992, 118; Birk/Inhester, DVBl, 1993, 1284. For the existence of an individual subjective right: M. Nierhaus, *cit*., LKV, 2005; Cf. P.J. Tettinger and K-A. Schwarz, *Art. 28*., *cit*., Rn. 246; M. Dombert, *cit*., 1139.

990 D. Roßmüller, *Schutz der kommunalen Finanzausstattung durch Verfahren*, 2008, 80.

991 A. Dombert, *cit.*, 2006, 1139; M. Nierhaus, *cit.*, 2005, 4-5.

992 See *inter alia*: StGH BW, DVBl, 1999, 1351, (1355); BayVerfGH 28.11.2007, VerfGH 60, 184. H-G. Henneke, *Grundstrukturen des kommunalen Finanzausgleichs*, in H-G. Henneke, H. Punder, C. Waldoff (eds.), *Recht der Kommunalfinanzen*, 501; U. Volkmann, *Der Anspruch der Kommunen auf finanzielle Mindestausstattung*, DÖV, 2001, 487 ff.

993 A. Dombert, *cit.*, 1140; F. Schoch and J. Wieland, *Aufgabenzuständigkeit und Finanzierungsverantwortung verbesserter Kinderbetreuung*, Stuttgart, 2004, 81 ff., F. Schoch, *Verfassungsrechtlicher Schutz der kommunalen Finanzautonomie*, Stuttgart, 1997, 353 ff., H. Dreier, *Art. 28*, *cit*., Rn 145, D. Roßmüller, *cit.*, 2008, 80. In the case-law: OVG Saarland, Judg. 19 December 2001 9 R 5/00; NdSOVG Judg. 3 September 2002, DVBl 2003, 281.

994 Cf. BVerfGE 26, 172 (181); 71, 25 (36); NvwZ, 1987, 23, *cit*.: «*Ob die Gewährleistung einer angemessenen Finanzausstattung oder wenigstens die Gewährleistung einer finanziellen Mindestausstattung zum Kernbereich kommunaler Selbstverwaltung gehöre, könne offenbleiben».* More recently see also: BVerfGE 83, 363 (386).

995 BVerwGE, KstZ 1959, 207-208/9; BVerWGE 106, 280, 282, 25.3.1998 and again BVerWGE 8 c. 1.12,

clarify in how far the parallel constitutional provisions of the *Länder* overlap with the provision laid down in the Basic Law and in how far they supplement it.[996] This standing by the FCC can be explained on the basis of the fact that local authorities' financial claims are mainly directed against the *Länder* and not against the Federation, since «*revenues and expenditures of municipalities (joint local authorities) shall also be deemed to be revenues and expenditures of the Länder*» (Article 106, para. 9 BL). In other words, the *Länder* are in charge to grant local authorities with an adequate financial equipment, whereas the Federation cannot directly transfer resources to the local authorities nor it can amend the financial framework of local authorities without the approval of the *Länder*[997]. Nevertheless, one has to bear in mind that the Federation is under the obligation to set out the legal conditions for ensuring that local authorities could finance their tasks by means of those sources of revenues laid down in Article 106 BL. At the same time, the Federation has to abide by the financial responsibility of the *Länder* towards local authorities: all financial revenues foreseen by the Basic Law could only constitute a part and not all sources of revenues.[998] In fact, it is considered to be a prime responsibility of the *Länder* to ensure local authorities' funding, in particular through equalisation schemes (Article 106, para. 7 BL), since the Federation does not enjoy any direct action (*unmittelbarer Durchgriff*) towards local authorities. The Federation has merely to ensure «*that the constitutional order of the Länder conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this article*» (Article 28, para. 3 BL). This means that the Federation ought to discharge a preventive function (*Vorsorgefunktion*) to ensure by means of federal law that local authorities could finance their tasks partially with revenues from taxes established by the Basic Law and that the *Länder* pass on to them the necessary financial resources (Article 106, para. 7, sentence 1 BL)[999].

According to part of the literature and pursuant to part of the case-law, the right to adequate financial equipment is now enshrined in new Article 28, para. 2, sentence 3 BL; herethrough local authorities have been entitled to particular sources of revenues which cannot be lawfully removed by the Federation or by the *Länder* without ensuring other suitable means of compensation.[1000] The

---

31.03.2013.

996 BVerfGE 103, 332 (359/360) = NvwZ-RR 2001, 81.

997 Article 104, lett. a) para. 4 BL and Article 106, para. 8 BL are the most prominent exceptions to the general rule. BVerfGE 26, 172; 71, 25 and 86, 148; K. Stern, *Staatsrecht I*, 422 D. Bayer, *Staatliche Gemeindefinanzierung und Verfassungsrecht*, DVBl, 1993, 1288; M. Dombert, *cit.*, 1136; F. Schoch, Art. 28, in: Maunz/Dürig, Rn. 84 lett. b) and c). B. Weiss, *cit.*, 199-200 and C. Meis, *cit*., 68 ff., contend that local authorities enjoy at least an indirect right to financial equipment towards the Federation whose justiciability is however highly controversial.

998 A. von Mutius/ G. Henneke, *Kommunale Finanzausstattung und Verfassungsrecht*, Siegburg, 1985, 59-61.

999 Cf. J.E. Rosenschon, *cit*., 198. K. Rennert, cit. Rn. 175; A. von Mutius, *cit.*, 138, Rn. 258 and A. von Mutius and H-G. Henneke, *cit.*, 37 ff.

1000 ThürVerfGH Judg. 21 June 2005 – VerfGH 28/03; BVerwGE 25 March 1998, 106, 280, 282. M. Nierhaus, *cit.*, 2005, 4; A. Dombert, *cit*., 1138; F. Schoch, Art. 28, in Maunz/Dürig, Rn. 84 lett. b); J. Nazarek, *cit.*, 104. *Contra* inter alia: J. Müller, *Die Beteiligung der Gemeinden an den Gemeinschaftsteuern: Bestand und Reform, Berlin,* 2010, 60; B.

guarantee of adequate financial equipment is also frequently derived by some scholars from Article 115, lett c.), para. 3 BL, whereby, in case of imminent attack, the Federation would have been in charge of the administration and of the finances of the Federation and of the *Länder,* but had to assure «*the viability* [*Lebensfähigkeit*] *of the Länder, municipalities, and associations of municipalities, especially with respect to financial matters»*. As many scholars argued, if in a situation of emergency the viability of local authorities in financial matters has to be respected, a *fortiori* this should be the case under normal economic conditions[1001]. Other derive it from the requirement of Article 28, para. 2, sentence 1 BL, whereby local authorities should carry out their tasks under their own responsibility. No responsibility can in fact be assessed without adequate financial equipment. The right to self-administration would be meaningless if the Basic Law did not oblige the *Länder* to provide local authorities with adequate resources for discharging their tasks. In other words, it might be deemed to be necessary (so-called *Funktionsnotwendigkeit*) to the right of local self-administration that municipalities and joint local authorities could adequately finance the tasks falling into the scope of the local community.[1002]

On the basis of what has been described hereabove, one has to conclude that: **(a)** no principle exists concerning the adequacy of the amount of own resources weighted against the total volume of resources local authorities are endowed with; **(b)** the right of adequate financial equipment, commensurate with local authorities' responsibilities, is enshrined in the *Länder* Constitutions, but no clarity reigns in the case-law as to whether it pertains to the essential core of local self-administration and hence in how far it can be restricted by *Land* law; **(c)** no benchmark has been discovered in order to estimate the adequacy of local authorities' financial equipment. It has thus to be investigated whether and, if so, how the Charter's provisions can supplement the flaws existing in German constitutional law.

(a) The establishment of the right to adequate financial equipment in the German legal order could greatly influence how financial resources are apportioned between the different tiers of government, so that the *Land* legislature would enjoy less discretion to determine how local government financial system should work and it would bring about a significant decentralisation of fiscal powers to local authorities. In this respect, also the Federation would be under the obligation to

---

Weiss, *cit.*, 202-203 who refers to the original intent of the reform and considers that the new paragraph merely confirmed the legal framework at that time. Cf. Bericht der Gemeinsamen Verfassungskomission, 95, Art. 28, para. 2, sentence 3 BL.

1001 M. Dombert, *cit.*, 1138; K. Schwarz, *Art. 106*, in H. Mangoldt/F. Klein/C. Starck (eds.), *cit*., Rn 101; M. Nierhaus, *cit*., 2005, 5.

1002 A. von Mutius, *KommunalR*, *cit*., 88; H. Pagenkopf, *KommunalR*, *cit*., 80; E. Schmidt-Jortzig, *Kommunalrecht*, *cit*., Rn. 747; K. Stern, *Staatsrecht I*, *cit*., 422.

provide them with further powers to levy own taxes or to have a greater share of common taxes. On the other side, local authorities themselves would be under a stronger duty of responsibility. Levying more resources on their own, they could not shirk responsibilities to other levels of government for not transferring adequate amounts of money or for not leaving enough discretion to them in the use of transfers. Grants should be in principle used only to neutralise cyclically determined changes in own resources and more in general to compensate for insufficient own resources. In the first place, however, every member State has to grant local authorities with an adequate amount of own resources. Only at a second stage, it could transfer them grants or subsidies. As the Congress pointed out in its Recommendation No. 64 (1999) to Germany, «*local self-government is measured in terms of the resources of which local authorities have unrestricted use».* That is why, in relation to Article 9, para. 1 of the Charter, the Congress recommended the Federation to «*restore strong local taxation»,* without being sufficiently precise as to how the principle of adequate own resources might concretely affect the allocation of resources, nor clarifying whether local authorities are empowered with an institutional or an individual right to adequate financial equipment. In particular, the Congress noted that «*transfers offsetting the low level of own resources are larger in the eastern than in the western Länder, but that these subsidies are tending to decrease and will have to be offset by a rise in own resources, still uncertain at the moment*». In its Recommendation No. 320 (2012), taking note of the constitutional reforms approved in 2006 and 2009 in order to «*stabilise or raise the share of local authorities in tax revenues, imposed both at federal or Land levels»,* the Congress did not really verify if the principle had been respected in every *Land* or not, thus showing not to take so seriously its own "jurisprudence", which one might have construed as requiring that at least equal or greater than 50 percent of the total amount of financial resources ought to be own resources of local authorities. In this respect, however, it might be argued that such a rigid criterion might produce an eccessive juridification of the relationships between tiers of government.

(b) Clarification could be requested by *Länder* Constitutional and State Courts to the Federal Constitutional Court pursuant to Article 100, para. 3 BL (so-called *Vorlagepflicht*). The FCC could make clear that the right to adequate financial equipment, though it has to be primarily guaranteed by the *Länder*, is also enshrined in Article 28, para. 2, sentence 3 BL, as it is required by a friendly interpretation (*völkerrechtsfreundliche Auslegung*) of treaty international law and notably of Article 9, para. 2 of the Charter, as well as of the soft-law issued by the Council of Europe in interpreting this Article. In particular, the interpretation by the FCC could clarify that financial equipment can be restricted on grounds of national economic policy, for example establishing ceilings on expenditures and on levels of taxation and, more in general, restrictions taking into account the financial strength

of each *Land*, whereas a minimum of financial resources (*Mindestausstattung*) pertains to the core of local self-government, otherwise the definition laid down in Article 3, para. 1 of the Charter, whereby «*local self-government denotes*» both a formal *right* and the effective *ability* of local authorities to regulate and manage a substantial share of public affairs under their own responsibility would be infringed upon. In other words, the interpretation friendly to interntional law of domestic constitutional provisions triggers the acknowledgement of the right to adequate financial equipment as laid down in the Charter and as already partially recognised in the case-law of some *Länder* Constitutional Courts. Even without a clarifying judgement by the FCC, all *Länder* Constitutional Courts should abide by the Charter's obligations which could themselves work as an harmonising tool[1003].

(c) German local authorities could refer to the aforementioned benchmarks of public finance set by the Steering Committee of the Council of Europe for the arrangement of fair equalisation mechanisms. In fact, as it will be pointed out (see *infra* par. 6.5), the right to adequate financial equipment of local authorities can be best implemented in Germany during the preparation of measures on equalisation of financial resources (*Finanzausgleich*). In particular, according to a certain case-law of the *Länder* Constitutional Courts, laws setting out criteria and indicators of allocation and equalisation of financial resources (*Maßstäbegesetze*) should be passed by the *Länder* legislatures in order to enhance transparency. Further, additional procedural rights for local authorities could be put in place. In particular, drawing on the model of the Financial Planning Committee (see *infra* par. 7) at federal level, the institutionalisation of a formal dialogue between members of both the *Land* and local authorities from which non-binding opinions for the legislature will be issued is seen by many scholars as the only response to the question as how to ensure the right to adequate financial equipment.[1004] However, if these views should prevail, adjudication by courts will concern mainly compliance with the procedural requirements rather than on whether financial equipment can *per se* be judged as being adequate. This approach would ultimately pose at risk the essence of the right to financial equipment. Further, this approach would also lead to violation of the Charter which clearly distinguishes between procedural rights (Article 9, para. 6) and substantive rights (Article 9, para. 1, 2, 3, 5, 8). Thus, provided that both an individual and institutional right of local authorities to adequate financial equipment exist, that a minimum amount of resources should be used for free or voluntary tasks and that a considerable amount of resources should derive from own resources, it should be up to Constitutional Courts to decide case-by-base

---

1003 B. Weiss, *ult. cit*., 909; B. Schaffarzik, *cit.*, 536; F.L. Knemeyer, *cit.*, *Der Städtetag*, 331.

1004 M. Nierhaus, *cit*., 2005, 6-7; M. Dombert, *cit*., 2006, 1141-1143.This reasoning based on proceduralisation resembles that used in case of those human rights for which material criteria for ensuring compliance with them cannot be developed and emphasizes thus the never faded fundamental right nature of the right to local self-administration.

whether it has been encroached upon, by taking into consideration the budgetary situation of the local authorities at hand.[1005]

6.2. The German *Konnexitätsprinzip* at Federal and *Land* Level

Adequate financial equipment shall also be ensured by means of concomitant financining that is to say by ensuring that every new task conferred upon or delegated to local authorities is compensated with the necessary financial means. In this respect one has first to consider the relationship between the Federation and local authorities (1.) and then the relationship between the *Länder* and local authorities (2.).

6.2.1. Federal Level

In the German Basic Law the general principle of "concomitant financing" or "of concomitance" (*Konnexitätsprinzip*) was envisaged, since 1969 constitutional reform, in Article 104 lett. a) para. 1 BL and pertained to the relationship between the Federation and the *Länder*. This principle stipulated that the Federation and the *Länder «shall separately finance the expenditures resulting from the discharge of their respective responsibilities».* In other words: a) the expenditures were to be financed on the basis of the administrative tasks which were to be carried out and not viceversa (so-called *Finanzverfassung als Folgeverfassung*)[1006]; b) no system of "mixed financing" by different tiers of government was normally possible, unless so provided by the law (*Verbot der Mischfinanzierung*).[1007]

The aforementioned provision raised however the question whether the principle could be applied also in the relationship between the *Länder* and local authorities, i.e. whether Article 104 lett. a) BL could have been considered being a specification (*Ausführungsbestimmung*) of Article 28, para. 2 BL. At the time of the negotations on the Charter, part of the literature, building on a judgment by the Federal Administrative Court[1008] and on one by the Federal Constitutional Court[1009], purported that Article 104 lett. a) para. 1 BL contained a general constitutional rule of burden-sharing («*Allgemeine Lastenverteilungsregel»*), which was meant to apply also to the relationship with local authorities since they had to be considered part of the *Länder* administration (Article 106, para. 9

1005 So also: M. Dombert, *cit*., 1143.
1006 P. Kirchhof, *Die Kommunale Finanzhoheit*, in: G. Püttner (ed.), HkWP, vol. 6, 1981, 14.
1007 S. Luther, *Die Lastenverteilung zwischen Bund und Ländern nach der Finanzreform,* Münster, 1974, 50.
1008 BVerwGE 44, 351 (364).
1009 BVerfGE 26, 338 (389 f.).

BL)[1010]. Without such a rule enshrined in the Basic Law, so the doctrine, the right to self-administration, i.e. local authorities' financial autonomy enshrined in Article 28, para. 2 BL, could have been infringed upon by *Länder* laws establishing a financing system not in compliance with the principle of concomitance; in other words, some authors maintained there existed the risk that, unless *Länder* Constitutions themselves provided for a concomitance principle, the *Länder* would have delegated or attributed functions pursuant to Article 83 and 84, para. 1 BL, without necessarily providing local authorities with the correspondent resources[1011]. On the contrary, pursuant to Article 104, lett. a) para. 1 BL, the *Länder* would have had to fully finance expenditures for both attributed and delegated tasks[1012].

As for the relationship between Federation and local authorities, following to Article 104 lett. a), para. 2 read in conjunction with para. 5 BL, if the Federation charged the *Länder* with the execution of federal laws pursuant to Article 85 BL, then it also had to finance related expenditures (*Zweckausgaben*), being the administrative tasks to be considered federal tasks.[1013] According to part of the literature, this rule implied that if those federal tasks were to be carried out by local authorities, the *Länder* should have also transferred the necessary resources to local authorities[1014]. In any case, even where the Basic Law exceptionally foresaw a "mixed financing" system by both the Federation and the *Länder* (Article 104 lett. a) para. 3 as well as Article 104 lett. a) para. 4 BL), no direct transfer of resources from the Federation to the local authorities was constitutionally allowed. Every financial transfer was in fact to occur via the *Länder* administrations[1015].

The aforementioned interpretation of Article 104 lett. a) BL could have been deemed to be in

---

1010 K. Stern, *Staatsrecht I*, *cit.,* 1146; A. von Mutius and H-G. Henneke, *cit.*, 74; E. Schmidt-Jortzig, *cit.*, 1981, 395.

1011 J. Makswit, *Finanzierung kommunaler Fremdverwaltung,* Frankfurt am Main, 1984, 110-111; J. Makswit, *cit*., DVBl, 1046; K. Vogel and P. Kirchhof, *Art. 104 a*, in: R. Dolzer and K. Vogel and K. Graßhof (eds.), *Bonner GG-Kommentar*, Rn. 21, 39, 42, 66; B. Schaffarzik, *cit*., 531.

1012 J. Makswit, *Finanzierung weisungsgebundener Aufgaben,* DVBl, 1984, 1046 and 1048; B. Schaffarzik, *cit*., 534.

1013 A. von Mutius/ H-G. Henneke, *cit.*, 77; J. Makswit, *cit.*, 112. *Contra*: J.E. Rosenschon, *cit*., 39, whereby the provision of Art. 104 lett. a) par. 2 and par. 5 BL was to be considered as an exception to the general rule laid down in Art. 104 lett. a) par. 1, since the Federation finances expenditures for administrative tasks which have to be considered those of the *Länder*.

1014 J. Makswit, c*it.*, 1046; K. Vogela and P. Kirchhof, *cit*., Rn. 75.

1015 J.E. Rosenschon, *cit*., 41 and 43; K. Vogel and P. Kirchhof, *cit.*, Rn. 68. A derogation from the principle according to which the Federation could not directly transfer financial resources to the local authorities is enshrined in Art. 106, para. 8, n. 1 BL, whereby «*If in individual municipalities (associations of municipalities) the Federation requires special facilities to be established that directly result in an increase of expenditure or in reductions in revenue (special burden) to these municipalities (associations of municipalities), the Federation shall grant the necessary compensation if and insofar as the municipalities (associations of municipalities) cannot reasonably be expected to bear the burden»*. This provision has a special character. A financial transfer is guaranteed only insofar as "special facilities" of the Federation have been established. As Art. 106, para. 8 n. 2 BL clarifies: «*In granting such compensation, due account shall be taken of indemnities paid by third parties and financial benefits accruing to these Länder or municipalities (associations of municipalities) as a result of the establishment of such facilities».* Sachs-Kommentar, *Art. 106*, 5th ed, Rn. 47-49; K. Stern, *cit.*, 1163.

conformity with both the aforementioned Draft Charter provision and with Article 9 para. 2 of the Charter, establishing a strict link between delegation of tasks and their financial coverage. However, the above examined interpretation was not really shared neither by the dominant German literature nor by the case law of the *Länder* Constitutional Courts[1016], whereby Article 104 lett. a) BL applied only in the relations between the Federation and the *Länder* and could not have applied, neither directly nor indirectly, to local authorities. Thus, according to the then in force Article 84 para. 1 BL the Federation was allowed to transfer tasks to local authorities or generally modify the inner structure of the *Länder* by means of federal law requiring the consent of the *Bundesrat,* without providing for the necessary resources. In turn, local authorities could not pretend financial resources to be transferred to them. This led to the consequence that it was left up to the Federation and to the *Länder* whether following the principle of concomitant financing or not. No federal constitutional rule requiring the Federation and the *Länder* to compensate for every delegated function existed. Only few *Länder,* such as Baden-Württemberg in 1953, had already enshrined the principle of concomitang financing in their Constitutions. This has contributed to the worsening of the financial situation of German local authorities.[1017] As the Congress itself stated back in its Recommendation No. 64 (1999), the «*lack of any direct funding obligation on the part of the Federation vis-à-vis local authorities, constitutes a violation of Article 9 paragraph 2 of the European Charter of Local Self-Government*».[1018]

Finally, in 2006, the so-called first federal constitutional reform (*Föderalismusreform I*) remarkably introduced new Article 84, para. 1, sentence 7 BL and new Article 85, para. 1, sentence 2 BL, whereby federal statutes can no longer delegate public tasks to local authorities (so-called *Durchgriffsverbot*), whereas only the *Länder* are entrusted with the power to assign federal responsibilities to local authorities by means of a speciale statute (*Ausführungsgesetz*). The assignment of new tasks is very often, even if not always[1019] linked with new costs and expenses on the part of those authorities who have to execute them. The *Länder* are now under the obligation to provide for the necessary compensation, i.e. to comply with the concomitant financing principle. However, this also implies the enforcement of such principle in the Basic Law was rejected. One

---

1016 W. Patzig, *Die Lastenverteilung im Bereich der kommunalen Fremdverwaltung*, DÖV, 1985, 645; S. Mückl, *Finanzverfassungsrechtlicher Schutz der kommunalen Selbstverwaltung*, Stuttgart, 1998, 159; D. Birk and M. Inhester, *Die verfassungsrechtliche Rahmenordnung des kommunalen Finanzausgleichs*, DVBl, 1993. More recently: W. Heun, *Art 104 lett. a),* in: H. Dreier (ed.), *GG-Kommentar*, Rn 20. In the case-law see: VerfGH-RhPf Judg. 5 December 1977, DÖV, 1978, 763 and VerfGH NRW, DVBl, 1985, 686. More recently: VerfGH-RhPf, DVBl 7/2012, 436.

1017 F. Schoch, *Die Sicherung der kommunalen Selbstverwaltung als Föderalismusproblem*, Der Landkreis, 2004, 367 ff..

1018 Congress of Local and Regional Authorities, Recommendation No. 64 (1999), *on the situation of local finances in the Federal Republic of Germany*, lett. B) in relation of Article 9 (2) of the Charter.

1019 So: W. Kluth, *Das kommunale Konnexitätsprinzip der Landesverfassungen*, LKV, 2009, 339. A good example concerning a minimum assessment rate for the trade tax might be found in: M. Faber, *Die Kommunen zwischen Finanzautonomie und staatlicher Aufsicht*, Bonn, 2012, 45 ff..

could therefore argue that the constitutional amendment partially contradicts what the Council of Europe recommended in 1999. Congress Recommendation No. 64 (1999), in fact, suggested the enshrinement in the Basic Law of the principle of concomitant financing of delegated tasks by the Federation; in particular, it invited «*the federal government to consider the possibility of federal financial participation in those welfare services which require nation-wide harmonisation, with local authorities and Länder taking responsibility only for supplementary local or regional services, as proposed by the OECD in 1998 and by the Union of German Towns and Municipalities*».[1020] This recommendation was literally ignored and the very opposite conception prevailed. However, it must be borne in mind that such a constitutional amendment would have probably entailed an alteration of the federal structure of the State, since local authorities would have been treated as a third tier of government and no longer as subdivisions of the *Länder*.

However, all federal statutes enacted before the entry into force of the constitutional amendment continued in force pursuant to Article 125 lett. a) para. 1 BL until modified by the *Länder* by way of own laws (Article 125 lett. a) para. 1 sentence 2 BL and Article 125 lett. b) para. 2 BL). Deviation from federal laws is however unlikely to occur, since in doing so the *Länder* would also be obliged to take over the corresponding financial burden. Thus, in this respect, doubts arise as to whether and in how far the Federation might still be allowed to amend, adapt or extend the amount of tasks delegated by means of federal laws enacted before the entry into force of the constitutional reform. According to an interpretation based upon the case-law of the FCC and followed by the Federal Government,[1021] Article 84, para. 1 sentence 7 BL prohibits only the qualitative enlargement of tasks, that is the restructuration of the tasks involved (*Neukonzeption*), but not a quantitative enlargement of the scope of already delegated tasks. Following to a theleological interpretation, aimed at ensuring local authorities' financial autonomy, another part of the literature pledges for a more comprehensive interpretation of Article 84, para. 1, sentence 7 BL so as to restrict Federation's room of manoeuvre and preventing an additional financial burden being shifted to local authorities.[1022]

1020 Further reference can be made to a proposal by the federal associations of local authorities in the framework of the so-called Enquete-Kommission. Cf. Schlussbericht *cit*., 219 ff.

1021 BVerfGE, Judg. 8 April 1987, Az.: 2 BvR 909/82 and BVerfGE Judg. 9 June 2004, Az.: 1 BvR 636/02 (*Ladenöffnung an Sonn- und Feiertagen*); P. Huber, *Das Verbot der Mischverwaltung – de constitutione lata et ferenda,* DÖV, 2008, 844 ff.; C. Zieglmeier, *Das strikte Konnexitätsprinzip am Beispiel der Bayerischen Verfassung,* NVwZ, 2008; A. Meßmann, *Das Aufgabenübertragungsverbot aus Art. 84 Abs. 1 Satz 7 GG: Hindernis für die Erweiterung bereits übertragener Aufgaben und die Übertragung von Angelegenheiten der örtlichen Gemeinschaft?* DÖV 2010, 726; B. Pieroth, *Art. 84*, in: D. Jarass and B. Pieroth, *GG-Kommentar*, 8th ed., Munchen, 2006, Rn. 3; G. Macht and A. Scharrer, *Landesverfassungsrechtliche Konnexitätsprinzipien und Föderalismusreform*, DVBl, 2008, 1150-1151; U. Becker, *Aufgabenübertragungsverbot und Konnexitätsgebot*, Gutachten im Auftrag der kommunalen Spitzenverbände NRW, Köln, 2012; A. Maiwald, *Art. 125 lett. a)*, in: B. Schmidt-Bleibtreu/H. Hofmann/A. Hopfauf (eds.) *GG-Kommentar*, 2011, Rn 3.

1022 M. Kallerhoff, *Art. 125a I 1 GG im Zusammenspiel mit dem kommunalen Durchgriffsverbot der Art. 84 I 7, Art.*

The dominant opinion supports the opposite interpretation, whereby the Federation is allowed to amend the scope of the public tasks previously delegated to local authorities until to the extent that no complete revision of the scope takes place. This reasoning raises the unsettling question of who is in charge of the expenses arising herefrom, insofar as the *Länder* omit to take over the very same tasks and avoid to transfer them to local authorities. In order to guarantee local authorities' financial autonomy, two solutions in line with Charter Article 9, para. 2 might be put forward: **(a)** the principle of concomitant financing strictly applies on the part of the Federation; **(b)** the principle of concomitant financing strictly applies on the part of the *Länder*.

As for the first solution **(a)**, the Federation might be allowed to quantitatively enlarge the scope of already delegated tasks pursuant to Article 125, lett. a) para. 1 BL read in conjunction with Article 84, para. 1 sentence 7 BL, insofar as it complies with the principle of concomitant financing, as laid down in Article 9, para. 2 of the Charter. In order for this issue to be justiciable by local authorities before the Federal Constitutional Court following to Article 93, para. 1 nr. 4 lett. b) BL, Article 125 lett. a) para. 1 BL read in conjunction with Article 84, para. 1 sentence 7 BL should be deemed to contain a norm "which supplements the constitutional framework of local self-administration"[1023]. In fact, local authorities are normally allowed to bring a complaint merely on the basis of a violation of Article 28, para. 2 BL and can refer to other constitutional provisions only insofar as they are deemed to contribute to supplement its content. In the present case, the FCC already assessed that Article 84, para. 1 BL does not amount to such a norm (BVerfGE 119, 331). However, this assessment relates to former Article 84 para. 1 BL, that is to say before its amendment by 2006 constitutional reform. Nowadays, Article 84, para. 1 sentence 7 BL is generally recognised by the literature as being a suitable standard for constitutional review in procedures with local authorities as constitutional claimants, since former Article 84, para. 1 BL was meant to address only the relationship between the Federation and the *Länder*, whereas the new Article 84, para. 1 sentence 7 BL aims at directly protecting local authorities' right to local self-administration.[1024] The circumstance whereby local authorities would refer here to a combined set of provisions – Article para 84, para. 1, sentence 7 together with Article 125, lett. a), para. 1 BL does not change the fact that they are allowed to lodge a complaint before the FCC in case the Federation assigns them new tasks or unlawfully enlarges the scope of previously delegated ones. In the present case, however,

---

85 I 2 GG, DVBl, 2011; C. Degenhart, *Art. 125 lett. a)* in: M. Sachs (ed.), *GG-Kommentar*, Rn. 7; J. Oebbecke, HStR VI, 3. ed. 2006, § 136 Rn. 32 ff.; M. Burgi, DVBl, 2007, 76 ff.; P. Kirchhof, *Art. 84,* GG-Kommentar,, Rn. 166.

1023 BVerfGE 1, 167 (183); 56, 298 (310).

1024 D. Lück, *Der Beitrag der Kommunalverfassungsbeschwerde zum Schutz der kommunalen Selbstverwaltung*, 2013, 332-334 and V. Mehde, *Art. 28,* in: T. Maunz and G. Dürig (eds.), *GG-Kommentar*, Rn. 179. So already BVerfGE (Hartz IV), Judg. 20 December 2007, 2 BvR 2433/04, 2 BvR 2434/04, Rn. 135 and P. Huber, *cit.*, 2008, 849.

should the Court construe Article 125, lett. a), para. 1 BL pursuant to Article 9, para. 2 of the Charter, i.e. should it assess the violation of the concomitant financing principle by the Federation, it would lay down a principle, even if only for a provisional period, which has been rejected on purpose by the constitutional legislator. Such interpretation, never discussed by the German literature until now, raises again doubts on the compatibility between the aforementioned Charter provision and the German constitutional order. The only viable solution for taking into account the Congress' recommendation would be a constitutional amendment enshrining the principle of concomitant financing in the Basic Law, even if restricted only to those public tasks already delegated by the Federation, as suggested by the Left Party parliamentary group in the Lower House of Parliament (*Bundestag*) in 2011.[1025]

Other authors believe that the principle of concomitant financing on the part of the *Länder* should automatically apply **(b)**. As a rule, *Länder* administrations should provide local authorities with resources matching federal delegated responsibilities, whenever they delegate or confer upon them public tasks. This reasoning follows from the original intent of 2006 federal constitutional reform, which bans the transfer of federal public tasks to local authorities, thus implying that the *Länder* will cover the corresponding expenses. Arguing from analogy, a failure to take over federal public tasks and avoidance to transfer their execution to local authorities has to be considered in the same manner as actively taking over and transferring them. Hence, omission by the *Länder* automatically triggers the application of the principle of concomitant financing on their part. Additionally, when the Federation explicitly does away with public tasks, former *Länder*'s declaratory law provisions assigning federal responsibilities to local authorities, where existing, are deemed to suddenly become constitutive of the transfer of tasks.[1026] This interpretation could be considered as viable solution only if the *Länder*, in turn, enjoyed the right to receive commensurate compensation by the Federation. However, under the Basic Law, this is not the case (Article 104 lett. a) para. 5 BL), since the *Länder* only receive compensation by the Federation for the execution of federal tasks by themselves (Article 104, lett. a), para. 2 BL); moreover, amendments to the Basic Law cannot trigger an implicit amendment or supplementation of the constitutional provisions of the *Länder* Constitutions, which require an active involvement on the part of the *Länder* to take over and transfer public tasks.[1027] No automatic rule in this respect can thus be derived from Article 84, para.

1025 Cf. Deutscher Bundestag – Drs. 17/6491, 5 July 2011. The same proposal was made by the FDP (Free Democratic Party) in 2014 (*Kommunalfinanzen verfassungsrechtlich stärken*, in www.liberale.de, 20 January 2014).

1026 K. Ritgen, *cit.*, 485; H-G. Henneke, *Die Kommunen in der Föderalismusreform*, DVBl, 2006, 869; F. Schoch, *Das landesverfassungsrechtliche Konnexitätsprinzip (Art. 71 Abs. 3 LV) zwischen verfassungsrechtlicher Schutzfunktion und Aushöhlung durch die Praxis*, VBlBW, 2006, 125; M. Trips, *Konnexitätsprinzip und Inklusion*, NdSVBl 2013, 299-300. In the case-law: Bbg-VerfGH, Judg. 15 December 2008 VfGBbg 66/07, NvwZ-RR 2009, 185; NRW-VerfGH Judg. 12 October 2010, Verf-GH 12/09 NVwZ-RR 2011.

1027 G. Macht and A. Scharrer, *cit.*, 1153.

1 sentence 7 BL.[1028] In fact, one has to bear in mind that such a rule was originally proposed by Henneke[1029] while consultation on the reform was still ongoing, but, on purpose, it was eventually not enshrined in the Basic Law. A thorough scrutiny of each *Land* Constitution may let conclude that, from both a literal and systematic point of view, enlargement of already delegated tasks by the Federation cannot be subsumed under those constitutional provisions which commit the *Länder* to provide for arrangements to cover costs of public tasks delegated to local authorities, since in such cases no transfer of tasks by means of law effectively takes place. Exceptions may of course exist, such as when federal public tasks delegated by the Federation were already treated as falling under the concomitant principle of the *Länder* (so-called *Revisionsfall*). Even if the corresponding *Länder* constitutional provisions were construed in the light of Article 9, para. 2 of the Charter, no such automatic rule can be assessed. In fact, Article 9, para. 2 draws on the principle whereby "he who places the order, pays the bill" (*Wer bestellt, bezahlt!*), whereas in the present case the *Länder* would be expected to be responsible for expenses which they have not commanded or created.

To conclude, if the latter solution is neither constitutionally required nor in line with the Charter, the former solution would surely conform to the Charter, but would also be in contradiction with the constitutional identity of the German Federal Republic, which is based on two and not three tiers of government, unless a corresponding constitutional reform occurs. Again the Charter, even if deemed to be neutral with reference to the division of powers and responsibilities between the federal State and the federated States, it might bring about a modification of the federal structure. Hence, one has to point out that other solutions to ensure local authorities' adequate equipment might be possible, in particular within the framework of financial equalisation schemes.

6.2.2. *Land* Level

As already mentioned, 2006 constitutional ban on delegating certain administrative public tasks to local authorities by the Federation implies that, *pro futuro*, only the *Länder* are allowed to empower local authorities with the execution of federal tasks so that they are under the obligation to stand for extra burden which might arise therefrom and, more in general, from any other kind of delegation or conferral of tasks by the *Länder* themselves. Unlike as in the relationship between the Federation and the *Länder*, whereby each of them covers the expenses of the tasks it has to carry out

---

1028 J. Ipsen, *Die Kompetenzverteilung zwischen Bund und Ländern nach der Föderalismusnovelle,* NJW, 2006, 2805 ff.; I. Kesper, *Reform des Föderalismus in der Bundesrepublik Deutschland,* NdSVBl 2006, 154; G. Macht and A. Scharrer, *cit.*, 1158; C. Jäger, *Und wer zahlt den Belastungsausgleich bei Aufgabenübertragungen durch Bundes-, Europa- und Völkerrecht?,* NWBl, 2013, 125, who however does not take into account the Charter's provisions when analysing the obligations existing under international law in this respect.

1029 H-G. Henneke, *ThürVErfGH schreibt Lehrbuch der Kommunalfinanzausgleichsgesetzgebung*, ZG 2006, 95.

(*Ausführungskonnexität*), the relationship between *Länder* and local authorities implies a different conception of the principle of concomitant financing, according to which he who delegates a task also pays for its discharge (*Veranlassungskonnexität*). The latter is also the concept embedded in Article 9 of the Charter.

In the 1980s, at the time of the negotiations, many *Länder* Constitutions did take into account the need to "cover the costs" arising from any kind of delegated administrative task (Article 71, para. 3 BW-Const.; Article 44, para. 4 L-S Const.; Article 78, para. 3 NRWConst.) or to "secure the necessary financial funding" to local authorities (Article 83, para. 3 BavConst.; Article 120, para. 2 SaarConst.;) or to provide them with "the necessary resources in the framework of the compensation and equalisation schemes" (Article 49, para. 5, sentence 1 Rh-PfCOnst.; Article 137, para. 5, sentence 1 HesseConst.). However, it was at the time highly controversial whether the aforementioned constitutional provisions had a binding or only a declaratory or programmatic character. According to some authors they were to be construed as simple "fiscal policy directives" which the *Länder* administrations could have freely decided not to take into account[1030]. In general, though, the *Länder* had the only duty to check out whether local authorities were able to cover the costs with their own receipts, without any help from above. Referring to the practice of some *Länder*, many authors were of the opinion that a "certain obligation to co-financing" existed[1031] or, even, that, "a proportional increase of the funding flowing to local authorities" should have been taken into account for every new task conferred[1032].

According to Makswit, however, one should have distinguished between tasks connected with supervised mandatory responsibilities by the State and those to be carried out without instruction powers (*Weisungsgebundene* and *Weisungsfreie Aufgaben*). In the former case, it should have applied Article 104 lett. a) para. 2 and 5 BL when expenditures related to the execution of the new tasks, whereas so-called additional administrative-expenditures arising from the transferral of the very same tasks were to be carried by the local authorities themselves (*Verwaltungskosten*); in the latter case, for administrative tasks to be carried out without instruction the *Länder* were deemed to be under the duty to check out whether costs could have been covered by local authorities themselves[1033]. At the time of negotiations, hence, the *Länder* were not yet fully abiding by the principle of concomitant financing, since they were used, at first, to impose additional financial burden on local authorities, taking into consideration their financial needs only at a second stage,

---

1030 M. Wixforth, *cit.*, 49; J. Makwsit, *cit.*, 1047.
1031 A. von Mutius, *Gutachten zum 53. DJT*, Berlin, 1980, 55.
1032 M. Borchmann, *Die Verfassungsgarantie*, Der Städtetag, 1980, 470; O. Goennenwein, *cit.*, Rn. 102.
1033 J. Makswit, *cit.*, 1048; B. Weiss, *cit.*, 206.

i.e. within the framework of fiscal equalisation schemes[1034].

That is the reason why the Congress, back in 1999, in relation to Article 9, para. 2 of the Charter, recommended that «*all Länder introduce in their Constitutions provisions relating to the principle of concomitance, drawing on the models set by Baden-Württemberg and Thuringia, Schleswig-Holstein and Brandenburg, which make explicit provision for compensation which is "corresponding" or "appropriate" to the new tasks delegated to local authorities*».[1035] As pointed out in 2012, «*the expectation was that provisions for compensation which is "corresponding" or "appropriate" to the new tasks delegated to local authorities would be made explicit».* It remains thus to be seen whether the aforementioned *Länder* really provided for a concomitant financing principle for any kind of conferral or delegation of tasks and whether the other *Länder* followed this example as recommended by the Congress. If it should be showed that some Constitutions still contain loopholes enabling the *Länder* not to compensate local authorities for burdensome transfers of tasks, it should be checked whether German local authorities could refer to Article 9 para. 2 of the Charter for compelling an interpretation of *Länder* constitutional provisions in accordance with the Charter.

First of all, it has to be investigated what kind of compensation for what kind of tasks has been granted by the Constitutions of Baden-Württemberg, Schleswig-Holstein, Brandenburg and Thuringia[1036]. The rules laid down in the latter four Constitutions can hardly be considered as uniform. In fact, unlike the first three, Article 93, para. 1 and 3 of the Thuringian Constitution established the principle of concomitant financing as applying to both delegated State tasks and to mandatory conferred tasks (*Auftragsverwaltung, Aufgaben des übertragenen Wirkungskreis*, as well as *Pflichtaufgaben zur Erfüllung nach Weisung)*, but not to so-called mandatory tasks having local character (*Pflichtaufgaben des eigenen Wirkungkreis*). The same applies also to Saarland.[1037] Further, unlike in all other *Länder*, with the exception of Saxony-Anhalt, compensation in Thuringia should not be full, but only appropriate (*angemessen*).[1038] In all other *Länder*, the principle of concomitance has been enshrined into the corresponding Constitution as covering also conferral of

---

1034 B. Schaffarzik, *cit.*, 533.

1035 Congress of Local and Regional Authorities, Recommendation 64 (1999), *on the situation of local finances in the Federal Republic of Germany*, B) § 6.

1036 The enforcement of the connexity principle in Thuringia was specifically discussed in 2000 within the framework of an International Conference on Financial Relations Between State, Regional and Local Authorities in Federal States, Moscow (Russian Federation), 5-7 October 2000.

1037 W. Kluth, *cit.*, LKV 8/2009, 340 and K. Ritgen, *Aufgabenübertragungsverbot und Konnexitätsprinzip – aktuelle Fragestellungen*, LKV 11/2011, 483.

1038 See: SachsAnhVerfG 48, LVerfGE 9, 343.

mandatory tasks having a local nature[1039] and specific statutes have been regulating how the principle should work. Further, only in Saxony-Anhalt, according to the case-law of the Constitutional Court, the reallocation of tasks among different local authorities automatically triggers the application of the principle of concomitance.[1040] It has hence to be deduced that in the Congress' view the concomitant financing principle can be deemed to be abided by insofar as delegated tasks and mandatory conferred tasks are compensated to an "appropriate" (*angemessen*) extent and not necessarily in a fully "corresponding" way (*entsprechend*).

This is confirmed by 2012 Congress recommendation itself, whereby the previous recommendation «*has been fully accepted and implemented, as the principle of concomitant financing for covering costs of tasks delegated by Land governments to local authorities. The relevant Land constitutions now guarantee local governments to obtain adequate financial means "at the same time" or"without delay" with the delegation of the tasks and functions».*[1041] Though, it has still to be checked what kind of compensation do the aforementioned constitutional provisions establish. In general, the *Länder* Constitutions provide for a basic rule of "cost-recovery" (*Kostendeckungsregelung*), whereby, when delegating or conferring a particular administrative task to local authorities, the *Länder* either have to allow local authorities to raise own revenues (taxes and contributions) or transfer them additional financial resources. The cost-recovery system, which appears to be akin to the model designed by Article 119, para. 4 of the Italian Constitution (see *infra* third Chapter), has to be distinguished from the compensation for additional burdens (*Mehrbelastungsausgleich*), which covers expenses by local authorities arising out from the discharge of delegated or conferred public tasks. The latter kind of compensation system also remains faithful to the spirit of the principle of concomitance as laid down in Article 9, para. 2 of the Charter, which requires that *any* local responsibility delegated by means of law should be accompanied by proportionate financial equipment. In any case, the general rule applies whereby below a lower limit the *Länder* will not cover the additional expenses to local authorities (so-called *Bagatellgrenze*).[1042] This lower limit cannot be said to be contrary to the principle of the Charter which, as mentioned, sets as a common minimum standard the right to an "appropriate compensation" and not necessarily to a full compensation. Though, identifying new standards and

---

1039 Saxony and Saxony-Anhalt (1992); Thuringia (1993) Art. 46 and 49 Schleswig-Holstein Constitution (1998), Art. 97, para. 3 Brandenburg Constitution and Art. 120, para. 1 and 2 Saarland Constitution (1999), Mecklenburg-Western Pomerania (2000) Art. 137, para. 6 Hesse Constitution (2002), Art. 83 para. 3 Bavarian Constitution (2003), Art. 49, para. 4 and 5 of the Rhineland-Palatinate Constitution and Art. 78 para. 3 of the North-Rhine Westphalian Constitution (2004), Art. 57, para. 4, sentence 2 Lower-Saxony Constitution (2006).

1040 SachsAnh-VerfG 31, Judg. 14 September 2003, Rn. 59 ff.

1041 Congress of Local and Regional Authorities, Recommendation No. 320 (2012), *Report on Local Democracy in Germany*, CG (22) 7 - § 144.

1042 See: Art. 71, para. 3, sentence 2 BW-Verf and Art. 78 para. 3 NRW-Verf. Implied in the Constitutions of the other *Länder* according to W. Kluth, *cit.*, 341 and Zieglmeier, NVwZ 2008, 274.

criteria for precisely compensating local authorities conforms with the Congress last recommendation which suggests the German *Länder* to «*establish standards and criteria for concomitant financing of local authorities providing transparency in the whole financial calculation and planning process thereby providing practical guarantees and reinforcing the framework of this principle with real planning mechanisms involving local government interests».* In this respect, it might be argued that the Bavarian (and Austrian) example should be followed, whereby consultation with local authorities has been institutionally arranged so as to allow them to express their views and put forward their proposals as to the compensation for additional burdens (see *infra* 6.5).

Secondly, it must be borne in mind that the Congress does not clarify upon which conditions a transfer of tasks should trigger the application of the principle of concomitant financing, but, apart from requiring appropriate compensation in due time for both delegation and conferral of tasks, it leaves a decision hereon to the appreciation of each Contracting Party. In particular, the Congress does not construe the principle of concomitance as encompassing re-allocation or re-alignment of tasks among different local authorities or transformation of freely determined local government tasks into mandatory ones. However, flaws in the *Länder* legislation can be assessed not only against *Länder* constitutional provisions, but also against the minimum standard set by Charter Article 9, para. 2. One should, in fact, recall that Saarland is the only *Land* in which the principle of concomitant financing applies only if tasks are delegated by means of parliamentary statute, but not by means of mere by-laws (*Landesverordnungen*).[1043] Again, Saarland does not even provide for a system of compensation for additional burdens (*Mehrbelastungsausgleich*). In Saxony-Anhalt, "joint administrative authorities" (so-called *Verwaltungsgemeinschaften*) cannot lodge a complaint before a court for violation of the principle of concomitance, since Article 87, para. 3 of the *Land* Constitution does not apply to them.[1044] Problems arise also in case of disbursements of additional financial resources to local authorities due to EU regulations or international treaties, whose implications only rarely are taken into account by *Länder* statutory regulations. «*Recent examples of this shortcoming* – did the Congress point out – *is the financing of the maintenance of kindergartens for children under the age of three* [as of 2018]*, or the North Rhine Westphalia Land government's project to provide "social tickets" for public transport to people in need, where the continuation of the programme is financially uncertain».*[1045] Here, the Congress refers to the financial obligations arising out from UN Convention on the Rights of Persons with Disabilities, ratified by Germany in

---

1043 See: Decision by the *Landkreistag* Saarland, 23 August 2013, to be found at: www.landkreistag-saarland.de

1044 SachsAnhVerfG, Judg. 12 July 2005 – 3/04.

1045 Congress of Local and Regional Authorities, Recommendation No. 320 (2012), *Report on Local Democracy in Germany*, § 144.

2008. The question examined by the German literature in this respect is whether and in how far the concomitant financing principle applies to the *Länder.* When analisying whether international treaties affecting exclusive legislative powers of the *Länder* and being lawfully applicable to them cause additional spending to local authorities, one has first to assess whether the treaty itself contains self-executing provisions. If it does not, as it was said to be the case of Article 24 of the aforementioned UN Convention, then treaty's obligations need to be implemented by means of statutory regulations in the domestic legal order of the *Länder,* which however are deemed to enjoy a certain discretion in complying with the principle of concomitant financing when burdens are imposed by international treaties.[1046]

In all aforementioned cases, constitutional provisions establishing the concomitant financing principle could be interpreted in the light of Charter Article 9, para. 2 and of its evolutive interpretation by the Council of Europe. In particular, joint administrative authorities of Saxony-Anhalt could lodge a complaint before the Constitutional Court of the *Land*, arguing that the omission by the *Land* administration not to cover additional costs arising from delegated responsibilites amounts to a violation of Article 87, para. 3 of the Constitution, which must be interpreted in the light of Article 9, para. 2, since the latter should be applied in Germany to all categories of local authorities and not only to municipalities and counties. The same could be said in relation of the consolidated practice in force in Saarland, since Article 9, para. 2 does not differentiate between statutes and by-laws, but provides for a general rule which should be complied with by the *Länder,* due to the principle of loyal co-operation with the Federation (*Bundestreue*). Finally, also financial obligations arising from EU regulations or international treaties should be subsumed under the corresponding constitutional provision establishing the concomitant financing principle laid down in the Charter, so that no discretion by *Länder* legislatures might curtail local authorities' financial autonomy.

6.3. The Institutional Right to Levy Own Taxes and Fix the Tax-Rate

6.3.1. Maintenance of Property Taxes at Local Level Ensured by the Charter?

Local authorities' power to raise own revenues as laid down in the Basic Law does not imply that they enjoy altogether an original right to establish new taxes in previously untaxed areas (so-called

1046 See, as for North-Rhine Westphalia, § 2 para. 1, sentence 2 KonnexAG-NRW.

originäres Steuerfindungsrecht), since the constitutional right to establish new taxes is accorded only to the Federation and to the *Länder* (Article 105 BL). Article 106, para. 6, sentence 1 and 2 BL read in conjunction with Article 105, para. 2, lett. a) BL confirms this interpretation, since it stipulates that «*revenue from local taxes on consumption and expenditures shall accrue to the municipalities or, as may be provided for by Land legislation, to associations of municipalities*». Local authorities' power to create new consumption or expenditures taxes[1047] is not conceived as being a self-executing constitutional right, but only one that has to be recognised by *Land* legislation, «*so long and insofar as such taxes are not substantially similar to taxes regulated by federal law*» (Article 105, para. 2, lett. a), sentence 1 BL). In other words, consumption and expenditure taxes might be levied by local authorities only if a legal basis at *Land* level exists.[1048]

Though, as many legal scholars suggest, each *Land* legislation on the matter could set out provisions having a very wide scope, thus enabling local authorities' power to extend the area of new taxes insofar as possible.[1049] This would also be the solution most friendly towards international law. As pointed out by Schaffarzik, the *Länder* legislators have not limited this right yet, by imposing caps or by linking the tax-rates to other sources of revenues, even though, both the Basic Law and the Charter, endow them with the power to limit this right by means of statute.[1050] The Congress appeared to be not of the same opinion, when, back in 1999, with particular reference to the case of Bavaria, recommended the *Länder* authorities «*to restore minor local excise taxes, where they were greatly reduced in number»* and in particular entertainment taxes and taxes on second homes.

In any case, the mere power to raise minor local excise taxes or charges alone cannot be deemed to make the Federal Republic complying with both its Basic Law and the Charter, which require own revenues being aimed at partially financing local government tasks, whereas the latter also requires that revenues of local authorities should be sufficiently diversified and of flexible nature. Hence, along with the power to raise minor local taxes, municipalities are entitled with more significant sources of revenues. In particular, after 1956 constitutional reform, the Basic Law provides for a so-called *Realsteuergarantie* (Article 106, para. 6 BL) which sets forth that: «*Revenue from property taxes shall accrue to the municipalities»* (sentence 1) and, after 1969 constitutional reform, that

---

1047 One might recall here the most levied types of taxes, also called *Bagatellensteuer*: the entertainment tax, the dogs licence fee, the beverages tax, the sex-tax, the tax on second homes, the throw-away packaging tax on carry-out food (*Verpackungssteuer*). The latter was found unconstitutional in 1998. See: BVerfGE 98, 106 (117 ff.)

1048 R. Grawert, *cit*., *Festgabe von Unruh*, 594 and 604.

1049 A. Von Mutius and G. Henneke, *cit.*, 69.

1050 B. Schaffarzik, *cit*., 540, contending that no limitation pursuant to § 26 GrStG has been made yet by *Länder* legislatures.

«*municipalities shall be authorised to establish the rates at which taxes on real property and trades are levied, within the framework of the laws*» (sentence 2). Alike Article 3, para. 1 read in combination with Article 9, para. 1 and 3 of the Charter, under German constitutional law municipalities' power to collect revenues and determine the rates of property taxes is considered as being a corollary of the right to self-administration enshrined in Article 28, para. 2 BL, since it ensured that local authorities were able to partially finance expenditures through own financial revenues.[1051]

Property taxes contributed at the time of the negotiations on the Charter for a significant amount of all financial revenues which municipalities could dispose of and which enabled municipalities to keep pace with the funding of expenditures[1052]. Pursuant to § 3 para. 2 of the German Fiscal Code, property taxes are the real estate tax (*Grundsteuer*) and the trade tax (*Gewerbesteuer*).[1053] According to the dominant literature, however, the guarantee laid down in Article 106, para. 6 BL does not assure the continued maintenance of a certain kind or of a certain level of property taxation, which is due to be decided by federal statute, but rather ensures that municipalities shall accrue revenues from property taxes, insofar as this kind of taxes exists under federal law[1054]. However, if so interpreted, there would be the risk that the Federation could undermine the municipalities' power to collect revenues through federal statute[1055] and, ultimately, also violate the guarantee laid down in Article 9, para. 1 and 3 of the Charter. Thus, according to other legal scholars, Article 106, para. 6 BL ought to be interpreted as a norm ensuring the maintenance of property taxes and the correspondent municipalities' power to collect revenues from them, even though the provision does not state neither what types of property taxes it refers to nor exactly the amount of revenues that it has to be accorded to municipalities[1056]. In 1986 the Federal Ministry of the Interior recommended the Federal Government to enter a full reservation with reference to Article 9, para. 3 of the Charter, otherwise municipalities could have resorted to it for enforcing their right to maintain the trade tax.[1057] Hence, it might be said that Article 9, para. 3 supplemented the constitutional framework, at least until 1997 constitutional reform. Nowadays, Article 106, para. 6 BL does not assure municipalities against the abolition of property taxes, but merely ensures that

---

1051 K. Stern, *Staatsrecht I, cit.*, 1151.

1052 So for instance: P. Kirchhof, *cit.*, 19-20.

1053 So: BVerfGE 3, 407, 438; BVerwGE, DVBl, 1983, 137.

1054 So: T. Maunz and G. Dürig, *Art. 106*, Rn. 88. O. Goennenwein, *cit*., Rn. 114.

1055 A. von Mutius and G. Henneke, *cit.*, 65 and P. Kirchhof, *cit.*, 20.

1056 BVerfGE 26, 172 (184); K. Stern, *Staatsrecht I*, *cit.*, 1152. W. Heun, *Art. 106*, in: H. Dreier, *GG-Kommentar*, Vol. 3, 2nd. ed. 2008, Rn. 38; K. Schwarz, *Art. 106*, in: H. von Mangoldt/F. Starck/C. Klein (eds.), *cit*., 127.

1057 Standing Treaty Committee of the *Länder*, Protocol of the 194th Session - 10.06.1986 and of the 197th Session - 23.07.1986, as well as Letter of the Federal Ministry of the Interior to the Standing Treaty Committee of the *Länder* 16.10.1986.

they may rely on a source of tax revenues based upon economic ability.[1058] The trade tax amounts to this kind of sources of revenues together with the income tax, but only the former is directly assigned to municipalities, whereas the latter is a joint-tax of the Federation and the *Länder,* of which municipalities can only obtain a share[1059]. Hence, by abolishing the trade tax, the Federation would be under both the constitutional and international obligation to grant municipalities with a new tax revenue based upon economic ability and of which they can determine the tax rate.[1060]

The power to fix and adjust the tax rates (*Hebesatzrecht*) ought to be exercised by way of municipalities' by-laws (*Satzung*) within the framework of the federal law (§ 25 I GrStG and § 16 I GewStG). Since the Basic Law does not provide for a guarantee against the abolition of property taxes or in particular of the trade tax, municipalities enjoy the right to fix their tax rate, insofar as these taxes exist. According to the 1999 Congress report, «*local authorities derive substantial income from these old taxes, particularly the trade tax, which is the third largest German tax in terms of revenue generated. Furthermore, these local taxes are compatible with the European Charter of Local Self-Government since local authorities are able to set the rate without any limitation».* This remark is not entirely correct, since the Federal Constitutional Court clearly pointed out that the right to determine the tax-rate following to Article 28, para. 2, sentence 3 and to Article 106, para. 6, sentence 2 BL is not unlimited. *Länder* statutes establishing minimum and maximum rates (§ 16 para. 5 GewStG) or imposing that all companies should be taxed according to the same tax-rate (§ 16 para. 4, sentence 1 GewStG) do indeed conform with the Basic Law. Though, in interfering with municipalities' right to determine the rate of property taxes, the legislature ought not to impinge upon the core of financial autonomy. This means that municipalities' right can be legitimately restricted insofar as the restricting measure passes a proportionality test.[1061] Problems as to the compatibility with the Charter and in particular with Article 9, para. 3 read in conjunction with Article 8, para. 1 and 3 might arise in particular when the supervisory authority itself sets the tax rate. This occurs following to a decision by a financially troubled municipality not to fix higher tax-rates to balance its budget.[1062] In this case, as pointed out by Oebbecke, the supervising authority should preferably appoint a special State commissioner (*Sparkommissar*) so as that a minimum of political accountability is ensured.[1063]

1058 BVerfGE, 125, 141.

1059 P. Kirchhof, *cit.*, 19. Cfr. J. E. Rosenschon, *cit.*, 79.

1060 Deutscher Bundestag, Drs. 13/8488, S. 5; Deutscher Bundestag, Drs. 13/8340, S. 2.

1061 BVerfGE 125, 141.

1062 OVG Schleswig-Holstein, Judgm. 21 June 2011 – 2 MB 30/11, NordÖR 2011, 468.

1063 J. Oebbecke, *Reaktionen des Rechts auf kommunale Finanzprobleme*, DVBl, 2013, 1412 and 1414. Alternatively, so Oebbecke, the legislative framework ought to be adjusted as follows: if no other revenue can be raised, the obligation should be placed upon municipalities to balance their budget by increasing the real estate tax (*Grundsteuer*). Tax hikes would be enforceable through the ordinary supervisory tools, i.e. *Anordnung* or

With the constitutional reform entered into force in 1969, reliance upon property taxes was limited, at least with reference to the trade tax, in order to reduce the strong dependence of municipalities on this sort of revenue, but also to reduce the existing differences between municipalities in their capacity to generate revenue and, finally, to ensure that both the Federation and the *Länder* could compensate losses deriving from the enshrinement into the Basic Law of municipalities' right to obtain a share of the revenues of the income tax (*Einkommensteuer*).[1064] Federation and the *Länder* in turn received part of the trade tax back (Article 106, para. 6 sentence 4 and 5 BL). A federal law (*Gemeindefinanzreformgesetz*) shall regulate the income tax revenues allocation, «*on the basis of the income taxes paid by their inhabitants*». The very same federal law does however not take into account the possibility to let municipalities decide upon «*supplementary or reduced rates with respect to their share of the tax»,* as permitted under Article 106, para. 5, sentence 3 BL.[1065] Hence, in 1999 the Congress observed that municipalities *«can set neither the base nor rate of income tax, yet have to suffer the consequences, without adequate compensation, of all the tax reforms reducing the burden of income tax and all the rebates introduced ostensibly as a means of administrative rationalisation»* and thus recommended Germany «*to introduce the provision that local authorities* [i.e. municipalities] *may take a higher proportion of income tax»*, otherwise Article 9, para. 3 of the Charter would be violated. Compliance with this provision cannot in fact be assessed with reference to the share of the VAT (so-called *Umsatzsteuer*), which accrues to municipalities pursuant to Article 106, para. 5, lett. a) BL. This provision, enshrined in the Basic Law with 1997 constitutional reform, stipulates that «*from and after 1 January 1998, a share of the revenue from the VAT shall accrue to the municipalities»* without ever mentioning the right of municipalities to fix the rate with respect to their share of tax. Thus, German compliance with the Charter can be achieved either by amending the aforementioned federal law (*Gemeindefinanzreformgesetz*) or by amending the Basic Law.[1066] In this respect, in 1999 the Congress showed its concern over reform proposals of the business tax which was likely to be replaced by proportions of the VAT. In this context, thus, it recommended Germany «*to avoid any infringements of municipalities' right to set the rates of their own taxes*».

To conclude, the constitutional guarantee which ensures municipalities to collect revenues from

---

Beanstandung. This proposal, if enacted, would not contradict the Charter principle, whereby local authorities should dispose freely and without interference of their own resources (Article 9, para. 1), since this right is granted "within national economic policy" constraints. The same can be said with reference to the right to determine the tax-rate, which has to be granted within the framework of the law (Article 9, para. 3).

1064 A. von Mutius and H-G. Henneke, *cit.*, 66-67.

1065 *Ibid*., *cit.*, 63.

1066 So also: B. Schaffarzik, *cit.*, 540-541, who argues that amending the corresponding federal law would be the simplest way for Germany to comply with its international committments.

taxes based upon economic ability and the constitutional provisions which assign municipalities with the property taxes, abides by Article 9, para. 3 of the Charter, insofar as the Federation decides to maintain them and insofar as it commits to provide them with another source of revenue after abolishing them. Further, the Basic Law does not provide for a constitutional right of local authorities to establish new taxes (*Steuerfindungsrecht*), but only for the right of local authorities to finance expenditures through own financial revenues (*eigene Steuereinnahmen*) and in particular through consumption and expenditures taxes within the framework of *Land* law. This conforms to Article 9, para. 3 of the Charter, which avoids to take position on the issue whether a *Steuerfindungsrecht* should be granted or not. As showed above, the Charter stipulates merely that a portion of the taxes used to finance local expenditures should be raised or levied locally, not necessarily that local expenditures should be financed through taxes established by local authorities themselves. Last but not least, the Basic Law does not empower municipalities with the right to determine the tax rate of the income tax, a circumstance which entails a violation of Charter Article 9, para. 3.

6.3.2. The Limited Financial Autonomy of the Counties

Article 9, para. 3 is the only one Charter provision which applies exclusively to German municipalities (*Gemeinden*) and not to German counties (*Landkreise*). More precisely, in Rhineland-Palatinate it neither applies to townships (*Verbandsgemeinden*). The reservations have not been removed since the time of deposit of the instrument of ratification, occurred on September 1, 1988. Hereunder, it will be assessed whether the counties' and townships' right to raise own taxes or charges and to fix their rate can be deemed to be implied by Article 9, para. 1 of the Charter and, if not, what implications for German constitutional law might have removing the aforementioned reservations to the treaty.

First of all, it has to be borne in mind that Article 28, para. 3, sentence 2 BL recognises joint local authorities' financial autonomy, whereas Article 106, para. 6, sentence 6 BL sets forth that «*in accordance with Land legislation, taxes on real estate and on trade as well as the municipalities' share of revenue from the income tax and the VAT may be taken as a basis for calculating the amount of apportionment».* This provision set the legal base for joint-local authorities, not necessarily only for counties, to levying so-called *Umlagen,* that is to say mandatory contributions made by lower level local authorities, i.e. municipalities.[1067] Contributions are determined by

[1067] E. Schmidt-Jortzig, *cit.*, DÖV, 1978, 707.

counties assemblies (*Kreistag*) on the basis of the amount of municipalities revenues and account for more than 40 percent of all counties revenues. They vary between 35 and 75 percent of municipalities' fiscal capacity, used for the calculation of general grants, which is determined on the basis of the yield from municipal and shared taxes. A cap on counties contributions can in principle be set by law, unless it interferes without proportion with the right to local self-administration of municipalities. Further, as mentioned, joint-local authorities could raise own consumption and expenditure taxes, as allowed by Article 106, para. 6, sentence 1 and 2 BL read in conjunction with Article 105, para. 2, lett. a) BL. Unlike for municipalities, the *Länder* have empowered counties to raise only a rather limited number of consumption and expenditures taxes, even if on several occasions, for reasons related to budgetary constraints, have compelled counties to raise charges or fees for delivering certain public services.[1068] According to the Congress, however, «*the Länder had never wished to implement»* Article 106, para. 7 BL, whereby an overall percentage of the *Land* share of total revenue from joint taxes shall accrue to municipalities or, *«as might be determined by the Land, associations of municipalities».* Furthermore, back in 1999, «*in answer to the question of whether the Kreise might be given resources of their own, it was replied that this would challenge the whole system of equalisation and the Landkreistag would come into competition with the other two associations»*. Nonetheless, the Congress recommended *«to amend the federal Constitution to make it possible for a local tax for the benefit of Landkreise to be introduced, so as to remove the relevant reservation expressed by Germany at the time of the ratification in relation to Article 9, para. 3 of the Charter»*[1069].

The Congress reasoning was that, pursuant to the principle "no taxation without representation", counties should also be given the power to raise taxes directly from the citizens, but in a way that municipalities affiliated to the counties did not suffer from a lack of revenues. In 2012 this recommendation was formally not reiterated by the Congress, although it was originally part of the report and also of the draft recommendation, which read as follows: counties should be given the right *«to impose taxes directly beyond the available ones, in line with the Congress objective to extend the scope of the Charter to all entities having direct political legitimacy, ensuring at the same time that such taxes are not levied to the detriment of municipalities that are part of the counties, or by impinging on their fiscal yield».* Upon specific request by the German delegation within the framework of the 22nd Plenary Session held on March 21, 2012, the Congress amended the text of the draft recommendation and cancelled any reference to the introduction of counties'

1068 See, for example: Par. 114.2, sentence 3 (SchulG). VerfGE Schleswig-Holstein, 3 September 2012 - LVerfG 1/12.

1069 Similar proposals were made also by part of the German literature. See for instance. A. Leidinger, *Das Kreisfinanzsystem*, in: G. Püttner (ed.), *cit.*, Vol. 6, 2n ed.., Berlin, 1985, 331-334 and, most recently, by T.I. Schmidt, *Das Besteurungsrecht der Landkreise*, in: KommJur 10 (2014), 361.

power to directly levy own taxes, since – so the German delegation – it would have impaired upon the financial capacity of municipalities and it would have contradicted the nature of the counties, which enjoy no universal jurisdiction and are charged with trans-municipal, complementary and equalisation responsibilities.[1070] One could however argue that, even if generally considered as legitimate,[1071] also mandatory contributions might happen to encroach upon municipalities' financial autonomy.[1072] Instead, by giving counties the right to autonomously raise own taxes, also municipalities would be greatly disburdened and discussions connected to the legitimacy of caps on mandatory contributions would be at large prevented. In fact, if the *Land* administration decided to impose a cap on mandatory contributions, counties would not be compelled to resort to short-term financing (*Kassenkredit*) for the running business, as it is now the case,[1073] but they could raise own taxes, thus avoiding to run higher budget deficits.

It remains to be seen whether the actual legal framework of the counties conforms to the international committments set out in Article 9, para. 1 of the Charter, which requires that local authorities should be entitled to adequate financial resources of their own. Even though the revenues from mandatory contributions are overall adequate, since they represent slightly less than the half of counties revenues, it might be doubted whether mandatory contributions by municipalities can deemed to be "own resources" of the counties, since they merely represent a transfer from municipalities to counties. At the same time, counties' revenues can neither be deemed to be diversified and of buoyant nature, pursuant to Article 9, para. 4 of the Charter, since they do not obtain a share of the income tax nor of the VAT, which are the taxes which afford the necessary flexibility to local authorities' revenues. The "diversification" requirement can however be met, insofar as counties vary the amount of mandatory contributions on the basis of the kind of revenues of the single municipalities.[1074]

6.4. Diversification and Buoyancy in the German Local Finance System

Even if the Charter had not yet come to its existence when 1969 constitutional reform entered into force, it might be said that limits set over time to the so-called *Realsteuergarantie* are in line with the treaty's intent and in particular with both former Article 8 para. 4 of the Draft Charter and with

---

1070 On the amendment proposals by the German delegation watch the intervention by Congress Member, Mrs. Sabine Neff (Germany, GILD-ILDG Group), municipal councillor at Munich City Hall, during the 22nd Session of the Congress of Local and Regional Authorities, held in Strasbourg on March 21, 2012. (Minute 31.00): CoE, *Grassroots Democracy in Germany*, record available at this address: https://www.youtube.com/watch?v=2qiVWbPbLqE

1071 See last e.g.: BVerwGE 101, 99.

1072 BVerfGE, Judg. 07 Febraury 1991 - 2 BvL 24/84 -, BVerfGE 83, 363 (386); BVerwGE 106, 280 (287).

1073 So for instance: J. Oebbecke, *Reaktionen, cit.*, 1413.

1074 See: B. Schaffarzik, *cit.*, 539 and again at 541-542.

final Article 9 para. 4 of the Charter, which is generally interpreted by the Congress as stipulating that local authorities should not be overdependent on property taxes. At 2010, the trade tax (43 percent) and the real estate tax (17 percent) account for almost 60 percent of all tax revenues allocated to municipalities, but only for approximately 20 percent of overall municipalities revenues. The share of the income tax (34 percent) and of the VAT account (4,8 percent) for less than 39 percent of the total amount of taxes and for respectively 15 percent of the overall amount of revenues. According to the Charter, local resources must be sufficiently diversified to enable local authorities to keep pace (as far as practically possible) with the real evolution of the cost of carrying out their tasks. The self-evident intention of this principle is not only to enable local authorities to cover the rising costs of public service delivery, but also to secure an acceptable room for political manoeuvre to them. In Germany, local government taxation amounts to more than 36 percent of all revenues of local authorities, grants and other funds by *Länder* administrations for 35 percent, fees and contributions account for 12 percent, sale of properties for less than 3 percent and other revenues for commercial activities for 13 percent of the total amount of revenues. Pursuant to the Congress, «*German local authorities' own resources are diversified, some of them stable and some flexible in line with economic development».* Overall compliance with Article 9 para. 4 is therefore ensured.[1075]

6.5. Fiscal Equalisation: The German *Finanzausgleich*

During negotiations on the Charter, the German delegation abstained from making observations on Draft Article 8, para. 5, concerning the establishment of financial equalisation schemes in the legal orders of the Contracting Parties, since it appeared to conform to what, respectively, the Basic Law and the *Landesverfassungen* set forth. Nonetheless, upon request by other national delegations, Draft Article 8, para. 5 was slightly, even if not substantially, amended (see *supra* first Chapter). Hereunder, it should be assessed whether Article 9, para. 5, sentence 1 and 2 of the Charter - whereby vertical and horizontal fiscal equalisation payments correct, but do not aim at levelling out «*the effects of the unequal distribution of potential sources of finance and of the financial burden they must support»* - provides for a different guarantee from that established by the Basic Law and by the Constitutions of the *Länder*.

The Basic Law puts the federal States under the obligation to transfer a portion of their joint-taxes receipts to local authorities. This arrangement is called obligatory fiscal union (*obligatorischer Steuerverbund*) and is explicitly laid down in Article 106, para. 7, sentence 1 BL, which prescribes

1075 So also: B. Schaffarzik, *cit.*, 541.

that: «*An overall percentage of the Land share of total revenue from joint taxes, to be determined by Land legislation, shall accrue to the municipalities or associations of municipalities*».[1076] In other words, this provision sets out the constitutional basis for a vertical equalisation scheme, based on the assumption that local authorities' sources of revenue from taxes and contributions do not suffice to finance all local government tasks - including non-compulsory ones and that the *Länder*, and not the Federation, are under the obligation to allocate part of their own resources to them. In addition to the obligatory fiscal union, Article 106, para. 7, sentence 2 provides for a supplementary arrangement, called facultative fiscal union (*freiwilliger Steuerverbund*), whereby the *Länder* are free to «*determine whether and to what extent revenue from Land taxes shall accrue to municipalities (associations of municipalities)*», i.e. whether *Land* tax receipts should also form part of the total volume of the grants. The notion laid down in Article 106, para 7 BL is consistent with the so-called *fiscal purpose* of the equalisation program,[1077] which is corollary of the State duty to equip local authorities with (adequate) financial resources (Article 28, para. 2 BL). The other purpose of any equalisation procedure, though, is to compensate as far as possible local authorities' capacity to generate revenue (*Finanzkraft*) pursuant to their financial needs (*Finanzbedarf*), i.e. to internalize externalities arising from tax competition.

This redistributive purpose of equalisation payments, explicitly mentioned by the Charter, is an integral part of German federalism and can be inferred from Article 106, para. 3, sentence 4, n. 2 BL which requires both the Federation and *the Länder* «*to ensure uniformity of living standards throughout the federal territory*» and also from Article 107, para. 2 BL which stipulates that a federal law requiring the consent of the *Bundesrat*, «*shall ensure a reasonable equalisation of the disparate financial capacities of the Länder, with due regard for the financial capacities and needs of municipalities (associations of municipalities)*».[1078] The aforementioned federal constitutional provisions setting the legal basis for a vertical equalisation scheme find their implementation in specific *Länder* statutes or equalisation laws (*Finanzausgleichsgesetze* - FAG), approved by the *Länder* pursuant to Articles 30 and 70 BL. The *Länder* have a reasonable discretion in shaping the equalisation schemes, i.e. they enjoy discretion as to the overall volume of the financial means and on what basis resources should be transferred to local authorities. As for the limits set to the *Land* discretion, the case-law of the Constitutional and State Courts of the *Länder* found that to lawfully calculate the overall size of transfers, the administration ought to ensure that the sources of revenue are enough for local authorities to carrying out also non-compulsory public tasks (principle of

---

1076 Shares of the income tax and of the VAT are apportioned to the municipalities according to Article 106, para. 5 and para. 5 lett. a) BL. This means that, pursuant to Article 106, para. 7, sentence 1 BL, financial resources from the income tax and from the VAT will additionally flow to municipalities in the form of grants or transfers.

1077 A. Katz, *Der kommunale Finanzausgleich*, in: G. Püttner (ed.), *cit.*, Berlin, 1981, 307.

1078 J. E. Rosenschon, *cit.*, 113; A. Katz, *cit.*, 306 and 308.

adequate financial equipment), within the limits of the *Land*'s financial strength.[1079] The criteria to determine the fiscal capacity of municipalities which conform with Article 9, para 5 of the Charter follow the so-called "standardized tax multipliers" (*fiktive Hebesätze*), i.e. potential receipts which could be raised if tax-rates on property taxes were set at a higher level.[1080] In this way, the *Länder* calculate with more precision the real ability to generate revenue by municipalities. As to the actual calculation of fiscal needs, *Länder* normally consider the number of inhabitants or the status of the local authorities within the structure of the State or also considering specific spending needs. Against equalisation laws which allegedly do not abide by the aforementioned principle, local authorities are allowed to lodge a complaint before the corresponding Constitutional or State Court insofar as ordinary legal remedies are exhausted. The application is admissible only insofar local authorities precise to what extent fiscal equalisation laws concretely interfere with their budgetary situation and with the actual discharge of public tasks.[1081]

The *Landesverfassungen*[1082] and *Länder* statutes provide for equalisation schemes which do not have a mere vertical nature, but are rather vertical with horizontal elements, since the *Länder* are used to issue different kind of grants (*Zuweisungen*) to different kind of local authorities in different amounts. In other words, vertical and horizontal rebalancing occurs simultaneously through vertically asymmetric grants to different local authorities.[1083] In particular, one has to distinguish general grants from grants designed for specific purposes. The former include unconditional special grants for covering high budget deficits (*Bedarfzuweisungen*), as well as unconditional formula-based grants (*Schlüsselzuweisungen*), whereas the latter are mainly the so-called *Zweckzuweisungen*, that is earmarked grants for specific needs. Additionally, but only in certain *Länder* - such as Baden-Württemberg, North Rhine-Westphalia, Hesse, Brandenburg, Schleswig-Holstein and Saxony-Anhalt - a "pure" horizontal rebalancing aimed at setting aside remaining disparities among low-capacity and high-capacity local authorities might be implemented after vertical equalisation has been carried out. Financing occurs through mandatory contributions by municipalities (*Finanzausgleichsumlage*). The Basic Law does not provide for the establishment of local authorities' horizontal equalisation schemes. Though, such schemes are regulated directly by

---

1079 A. von Mutius and H-G. Henneke, *cit.*, 91-92. Cf.: BbgVerfGH, Judg. 16 September 1999, NvwZ-RR 2000, 134; ThürVerfGH, Judg. 21 June 2005, ThürVBl 2005, 228 (129).

1080 So also B. Schaffarzik, *cit.*, 543.

1081 J. E. Rosenschon, *cit.*, 83; P. Kirchhof, *Der Finanzausgleich als Grundlage kommunaler Selbstverwaltung*, DVBl, 1980, 711 and ff.; A. von Mutius and H-G. Henneke, *cit.*, 91. In the case-law: BVerfGE I, 117 (134).

1082 Art. 79 NRWConst.; Art. 45 L-S Const; Art. 137, para. 5 HeConst; Art. 49, para. 5 Rh-Pf Const; Art. 42, para. 1 SHConst.; Art. 83, para. 3 BavConst.; Art. 125 SaarConst.; Art. 73, para. 3 BWConst.

1083 W. Patzig, *Strukturprobleme des kommunalen Finanzausgleichs*, DVBl, 1979, 481; A. von Mutius and H-G. Henneke, *cit.*, 85; J.E. Rosenschon, *cit.*, 123.

federal States laws, which provide for differentiated solutions.[1084]

Since the "system of Charter" requires that «*the solidarity measures should be implemented by an appropriate combination of vertical and horizontal equalisation»,* the legal framework on the equalisation procedures in the Federal Republic appears to conform with it. It remains however to be seen whether equalisation procedures in Germany aim at correcting disparities or tend to levelling out the financial conditions of local authorities. According to the Congress, which examined the issue only once, in 1999, «*the vertical - and in some Länder horizontal - financial equalisation instruments between municipalities are operating very efficiently, on the basis of criteria linked to municipalities' financial capacity and actual needs».* No mention is made by Council of Europe bodies of any risk of levelling out differences in fiscal capacity between German local authorities. In this respect, *Länder* Constitutional Courts found that the very intent of fiscal equalisation procedures as well as the principle of equal treatment between local authorities and ultimately the guarantee of local self-administration stay in contradiction with the idea to level-out local authorities' fiscal disparities (*Nivellierungs-* or *Übernivellierungsverbot*).[1085] Thus, if fiscal needs exceed the fiscal capacity of local authorities, the difference between the two indicators should be balanced by unconditional grants, but not to the full extent.[1086] In the latter case, municipalities enjoy adequate legal protection against such State transfers, since they could theoretically lodge a constitutional complaint before the corresponding Constitutional Court.

6.6. The Duty to Consult Local Authorities on Financial Equalisation Schmes

A formal requirement which should further be met by *Länder* legislation in order to abide by the Charter is consultation of local authorities whenever rules regulating equalisation mechanisms are being written. In fact, Article 9, para. 6 of the Charter requires that, whenever resources are due to be allocated to local authorities within the framework of equalisation procedures, consultation while

1084 K. Stern, *Staatsrecht I, cit.,* 1166.

1085 The federal constitutional principles which, pursuant to the FCC (BVerfGE 72, 330 (418) and 86, 148 (250)) apply to fiscal equalisation payments between the *Federation* and *Länder,* apply also at *Land* level to local fiscal equalisation. So: Nds-StGH, Judg. 16 May 2001 - StGH 6-9/99, 1/00 -, LVerfGE 12, 255 (281); LVerfG-Sachs-Anhalt, Judg. 13 June 2006 - Az.: LVG 7/05; M. Inhester, *Kommunaler Finanzausgleich im Rahmen der Staatsverfassung*, Berlin, 1998,

1086 Even if the fiscal needs were as much as 100 percent compensated (as it has been the case of the counties in Brandenburg), no violation of the ban on levelling could be assessed. Cf. F. Kirchhof, *Kommunaler Finanzausgleich im Flächenbundesstaat*, Köln, 1996, 31.

preparing the relevant legislation should be granted in the form of negotiation.

In general, it might be said that in Germany consultation of local authorities is normally granted, however pursuant to highly differentiated schemes. In this respect, in 1999, the Congress noted «*with concern that associations of local authorities – not only in those Länder where the right of consultation is not constitutionally or legally established – complain that they are not always consulted; the government of the Land of Lower Saxony has even been asked by the constitutional court to co-operate more fully with the associations that represent local authorities».* In 2012 the Congress surprisingly did not follow up on the issue. Hereafter, it might be said that, whereas a general right of consultation is enshrined into the Constitutions of a considerable number of *Länder,* including Saxony (Article 84, para. 2), Brandenburg (Article 97, para. 4), Baden-Württemberg (Article 71, para. 4) and Thuringia (Article 91, para. 4),[1087] when it comes to the framing of the rules of equalisation procedures, *Land* law provides for written and/or oral hearings (*Anhörung*) of the *Länder* associations of local authorities (*Spitzenverbände*) by the *Länder* governments or by the competent parliamentary committees, normally the budgetary and financial committees (*Haushalts- und Finanzausschuss*). No rules on consultation of local authorities can however be found in Lower-Saxony. In Bavaria, Thuringia, Hesse and Brandenburg, if some disagreement on the terms of equalisation procedures remains, the law also provides for a further step of consultation, by allowing formal discussions (*Erörterung*) between local authorities' associations and the *Länder* governments.

No consultation in the form of negotiations does however take place at *Länder* level. Article 9, para. 6 thus helps in complementing the law of the *Länder* in the sense that it requires the governments to involve local authorities in negotiations for framing the rules which will govern the equalisation schemes. No such guarantee can in fact be derived directly from Article 28 BL.[1088] Only Bavaria, building on the Austrian experience, provides for a so-called *Konsultationsvereinbarung*, a non-binding agreement between the government and local authorities should be reached on the terms whereby the principle of concomitant financing should apply, i.e. what the amount of compensations for tasks transferred to and discharged by local authorities should be.[1089]

1087 In other *Länder*, participation of local authorities is granted by ordinary statutes, i.e. by the municipal and county codes, and finds further specification in specific agreements between local authorities and the Land government. See e.g.: Schleswig-Holstein, *Vereinbarung über die Beteiligung der kommunalen Landesverbände beim Erlass von Rechtsvorschriften und allgemeinenVerwaltungsvorschriften* – 27 February 2006.

1088 *Contra*: B. Schaffarzik, *cit.,* 546-547.

1089 Similar regulations can be found in Brandenburg, Hesse, Saarland and Saxony. In particular, in Saxony, Brandenburg and Saarland an *ad hoc* council within the Ministry of Finance (*Beirat für den kommunalen Finanzausgleich*) has been established so as that local authorities can be consulted by the government for any questions relating the apportionment of resources between local governments. In Hesse, after the enshrinment of the principle of

6.7. Restricting Earmarked Grants (*Zweckzuweisungen*) to Abide by the Charter?

Article 8, para. 8, sentence 2 of the Draft Charter set forth that the provision of specific purpose grants (*Zweckzuweisungen*) by the State should have not represented an occasion for justifying State interferences in the policies freely pursued by local authorities. This sentence could have been interpreted as a limit set to the State while allocating financial resources for carrying out delegated functions. Therefore, the German delegation - together with the Irish, the British and the Swiss delegations - tabled an amendment proposal to delete it, «*as it could cause a confrontation between the local authorities and the state (which is abusive) and might be an obstacle to a smooth co-operation*».

Local authorities, whose officials were part of the German delegation, feared probably that the State could have stopped paying specific grants, leaving them with delegated functions whose financial burden would have been nonetheless to be somehow covered. However, during the 1980s, the issue of earmarked grants for covering delegated functions went hand in hand with the transformation of non-mandatory tasks into mandatory ones by means of formal statute.[1090] In other words, the allocation of specific grants by the *Länder* to local authorities hinted a dangerous shift in the allocation of tasks at local level, that of "false municipalisation" (*falsche Kommunalisierung*), which has also to be prevented according to Article 4, para. 4. Though, members of the German delegation considered that a general prohibition of specific grants, i.e. a general rule favouring block-grants (Draft Article 8, para. 8, sentence 1) could have been highly detrimental for local authorities too, since it might have become more difficult for many municipalities to carry out specific investments,[1091] nor they did want to prevent State's interference at all, since specific grants were often used, in the framework of equalisation schemes[1092], for financing delegated functions. However, it must be borne in mind that part of the German literature at the time favoured the idea to do away with *Zweckzuweisungen,* since they ultimately resulted in impinging upon local authorities'

---

concomitant financing in the Constitution, the amount of compensation resources due to be transferred to local authorities has to be determined on the basis of an agreement (*Einvernehmen*) between the government and the local authorities. The agreement should also be the base to calculate the amount of equalisation means. If no agreement can be reached, before the *Land* Parliament starts annual discussions on the budget, a special commission composed of the president of the court of auditors, members of the government, representatives of local authorities and external experts should prepare a report which estimates the amount of resources which should be granted to local authorities. Cf. H-G. Henneke, *Funktionen und Aufgaben der kommunalen Spitzenverbände im europäisierten Bundestaat,* in: T. Mann e G. Puttner (eds.), *cit*., HKWP, Vol.1, 990 ff.

1090 H. Köstering, *cit.*, in G. Püttner (ed), HKWP, Berlin, 1983, 47;

1091 E. Schmidt-Jortzig, *KommunalR*, *cit*., Rn. 264-265.

1092 W. Patzig, *cit*., 1979, 477-490

financial autonomy.[1093]

As showed in the first Chapter, the Draft Charter provision was redrafted in a more compromising way, so as that, for a Contracting Party to complying with it, it suffices that it reduces the ratio of earmarked grants under that of general purpose transfers. As such the former cannot however be deemed to be anti-constitutional, but, when existing, they should not undermine the autonomy which should be granted to local authorities pursuant to Article 4, para. 4 and 5 and Article 6, para. 1. In the German legal order such a rule does not exist but, as proposed by Schaffarzik, could be inferred from the power of local authorities to approve own expenditures (*Ausgabenhoheit*), as laid down in Article 28, para. 2 BL. However, as confirmed by the case-law, no such rule exists with reference to the structure of local equalisation schemes.[1094] For their arrangement, the latter kind of grants (*Schlüsselzuweisungen*) represents indeed the main portion of transfers. As assessed by the Congress back in 1999 «*an average of 75% of federal States transfers take the form of general grants»* and «*that the volume of specific grants allotted to fund infrastructure is far greater in the five new Länder than in the west».* However, the Congress also noted that certain *Länder* made use «*of special funds (Sondertöpfe) used by the administrative departments of ministries in certain sectors, such as construction, economic development and education, and which in practice have something in common with specific investment grants for purposes not necessarily corresponding with those chosen by the local authorities».* The recommendation to the *Länder* to convert some of these funds into general investments grants for local authorities has not been followed, as assessed by the Congress in 2012. In fact, «*the total share of general (block) grants has not changed significantly. Conversely, an opposite trend has more chance to prevail, because nowadays Länder governments seem to be more willing to provide additional resources as special or subject-specific grants for municipalities*». Municipalities, in turn, might have good reasons to continue being equipped with earmarked grants, since they fear that otherwise they would be in charge to finance the same investments by themselves. Insofar, one can argue that Germany does not fully abide by Article 9, para. 7 of the Charter.

6.8. Constraints on Public Borrowing and Institutionalised "Conditionality"

1093 E. Pappermann, *Staatliche Zweckzuweisungen – Ein Hemmnis für die Konsolidierung der kommunalen Haushalte*, DVBl, 1983, 527; W. Petri, *Die staatlichen Finanzzuweisungen im kommunalen Finanzsystem,* Berlin, 1977, 55; R. Voigt, *Die Auswirkungen des Finanzausgleichs zwischen Staat und Gemeinden auf die kommunale Selbstverwaltung von 1919 bis zur Gegenwart*, Berlin, 1975, 67; I. Demny, *Die Gefahr einer Einschränkung der Autonomie der Gemeinden durch Zweckzuweisungen,* Köln, 1966. More recently: F. Kirchhof, *Das Finanzsystem der Landkreise*, DVBl, 1995, 1062 and W. Renzsch and S. Schieren, *Zur Pauschalierung kommunaler Investitionzuweisungen*, in VerwArch 87 (1996), 632 and ff.. *Contra*: E. Schmidt-Jortzig, *KommunalR*, *cit*., Rn. 266 (though see also: Rn. 787).

1094 NRW-VerfGH OVGE 38, 301 (308); 43, 252 (255) and NdS-StGH, DVBl 1998, 188 ff.

Charter Article 9, para. 8 sets out the right of local authorities to public borrowing - at least - on the national capital market and mainly for reasons of capital investment. Limitations might be laid down by legislation on grounds of national economic policy reasons as well as for budgetary reasons, i.e. in line with Charter Article 9, para 1.[1095] Unlike for the Federation and the *Länder,* the right to borrowing for local authorities is not explicitly covered by any constitutional guarantee at federal or *Land* level, even if one could argue that it can be inferred from the general right to financial autonomy laid down in Article 28, para. 2, sentence 3 BL.[1096] In any case, Article 9, para. 8 of the Charter complements the federal constitutional guarantee and provides for a clear minimum standard below which the right of local self-administration could be deemed to be violated, in particular if supervisory authorities, as a general rule, should decide whether borrowing on the open market has to be allowed or not and if State limitations should not be inherent to national economic policy. Further, it shall be borne in mind that, during negotiations, the German delegation succeeded in setting aside any reference to a local authorities' right to borrowing on international financial markets, a circumstance which might be associated with the fears of local savings banks (*Sparkassen*) to loose much of their core business.

At present, only municipal and county codes (*Gemeinde*- and *Landkreisordnungen*) in the different federal States regulate procedures and conditions for access to public borrowing. The legal framework appears to be fairly similar in all *Länder*: borrowing is traditionally limited to financing of high-yields investment expenditures and is allowed by supervisory authorities only if no other way of financing exists or if the latter is unsuitable.[1097] In a number of cases, supervisory authorities are in charge to explicitly authorise the use of borrowing. In fact, the balanced budget rule for local authorities and the debt ceiling (*Schuldenbremse*) enshrined in the Constitutions of the federated States have made borrowing an exception to the general rule, so as that local authorities ought in principle to justify before State authorities their willingness to resort to public borrowing. In 1999 the Congress, noting that «*German local authorities cover an average of just 3 to 4% of their total expenditure through borrowing, a proportion which is very low*», urged the «*federal authorities and the Länder to ease borrowing limits, especially over the period during which numerous German local authorities are facing a local financing crisis».* In 2012, the Congress took note that the recommendation was not implemented. Instead, «*as the overall financial situation has worsened in recent years, the significance of curtailing and limiting borrowing and establishing a debt ceiling in*

1095 So also: B. Weiss, *cit.*, 221.

1096 So: B. Schaffarzik, *cit.*, 547.

1097 §§ 92 para. 2 NGO; §§ 82, para. 2 SächsGO; §§ 85, para. 2 SHGO; §§ 103, para. 2 RhPfGO; §§ 82 GO NRW; §§ 71, para. 2 BayGO; §§ 87, para. 2 BW-GO; §§ 85, para. 2 BrandGO; §§ 103, para. 2 HessGO; §§ 62, para. 2 ThürKO; §§ 100, para. 2 LSA; §§ 92, para. 2 KSVG.

order to break and reduce indebtedness, has paradoxically grown». Since all municipal and county codes provide for similar constraints on public borrowing, it might *prima facie* be doubted that the German legal framework really complies with the Charter provision.

However, it must be borne in mind that the aforementioned constraints are meant to solve the problem of short-term liquidity credit (*Liquiditätskredit* or *Kassenkredit*) which has been increasing from 7 billion euros in 2000 to up to more than 50 billion euros in 2013. This phenomenon is not a federal one, but it concerns especially a group of territorial authorities located in four *Länder*: North-Rhine Westphalia, Hesse, Rhineland-Palatinate and Saar. To enable highly indebted local authorities to amortise their debts, some *Länder* - including North-Rhine Westphalia, Rhineland-Palatinate, Lower-Saxony, Saarland and Hesse -[1098] have set up special purpose vehicles (*Entschuldungsfonds*), i.e. regional funds for debt relief. These vehicles work as temporary lending-out mechanisms for local authorities. The possibility by fiscal irresponsible local authorities to take up loans from the State at a lower interest rate than the current market rate is associated with strict conditionality, i.e. with binding committments on their part to consolidate the budget by cost cutting or by increasing taxes within an agreed time. These vehicles prevent the appointment of a State commissioner (*Staatskommissar*) by the *Land* government, which is generally deemed to be politically expensive, in particular in bigger communities and also prevent any declaration of insolvency, which is not a tool seriously taken into consideration in the German legal order.[1099]

In this respect, the Charter is silent, since it does neither pledge for a ban on insolvency procedures nor for an obligation to implement them into national legislation. In other words, unlike what Cranshaw maintained,[1100] it cannot be argued that funds for debt relief are absolutely mandatory following to Charter Article 9, para. 1, since the obligation to provide local authorities with adequate financial equipment is not unlimited under the Council of Europe interpretation of the Charter. However, in 2012, it must also be borne in mind that the Congress considered that «*The emergence of debt management funds in some Länder can provide effective financial assistance for local authorities, and is a step in the right direction in so far as it does not endanger the ultimate*

1098 *Rahmenvereinbarung zwischen den kommunalen Spitzenverbänden und der Hessischen Landesregierung über einen kommunalen Schutzschirm*, 20 January 2012; *Zukunftsvertrag zwischen der Niedersächsischen Landesregierung und den kommunalen Spitzenverbänden*, 17 December 2009; *NRW-Stärkungspaktgesetz*, 9 December 2011, GV NW, 662; *Kommunale Entschuldunsfonds (Vereinbarung der Rheinland-Pfälzischen Landesregierung mit den kommunalen Spitzenverbänden),* 22 September 2010; *Gesetz über das Sondervermögen „Entschuldung Fonds Kommunen 21"* (Saarland)*,* 1 December 2011, ABl 2011, 507, 509.

1099 According to some legal scholars, local authorities insolvency procedures might be established under German law only if fiscal distresses depended on the management of the local authority itself and not if triggered by inadequate financial equipment by the *Länder*. So, for instance: K.A. Schwarz, *Systematische Überlegungen zur Insolvenzfähigkeit von juristischen Personen des öffentlichen Rechts in Deutschland,* Zeitschrift für Kommunalfinanzen, 2010, 53; A. Faber, *Insolvenzfähigkeit für Kommunen?,* DVBl, 2005, 445.

1100 F. L. Cranshaw, *cit*., 63.

financial autonomy of the local authorities».

Yet, one has to recall that in North-Rhine Westphalia, a *Land* statute passed in 2011 on so-called financial assistance to local authorities due to consolidate their budget (*Stärkungspaktgesetz*) derogated from the provisions laid down in the municipal code by reducing the administrative discretion of supervisory authorities to zero: if local authorities fail to comply with their plans to consolidate the budget within the given deadline, supervisory authorities have to appoint a State commissioner (§ 8), which will be then fully in charge of the authority's finance. In this respect, it might be ascertained a significant analogy with the Italian provisions regulating the mandatory declaration of insolvency (*dichiarazione di dissesto finanziario*) and the appointment of a State commissioner pursuant to § 124 of the North-Rhine Westphalian Municipal Code whenever a local authority fails to present a multi-year budgetary plan of consolidation within a given time (Article 243-bis, para. 5 and Article 243-quater T.U.E.L).

To conclude, whenever the right of local authorities to resort to public borrowing is restricted by *Land* legislation, it should be verified to what extent this restriction can be justified in the light of national economic policy. Yet, it might be said that curtailing the right to borrowing occurs pursuant to the principle of proportionality and in any case does not go beyond its core. In other words, local authorities can be set limits as to what extent they can take up loans and can temporarily be banned to resort to public borrowing as well as restricted in their financial autonomy through conditional lending, but the general principle whereby borrowing for capital investment has to be one of the sources of funding of local authorities is preserved in all German *Länder*.

7. The Right to Co-operation and Free Association

7.1. Intermunicipal Co-operation

During negotiations on the Charter, the German delegation did not put forward any objections to the wording of Draft Article 9, para. 1 and 3 (Article 10, para. 1 and 3 of the final text), since their content appeared to match with the German constitutional framework on the issue. From the very outset, in fact, local authorities' right to co-operate was understood as a corollary of the freedom of organisation (Article 6) and thus enshrined in the Charter after it. Alike, under German law, the right of local authorities to co-operate is traditionally regarded as covered by the power or freedom of organisation of local administrative structures (*Organisationshoheit* or *Organisationsfreiheit*), which in turn is considered to be a complementary guarantee ensuring the fulfillment of the right of

local self-administration, as laid down in Article 28, para. 2 BL.[1101] It remains to be seen whether the Charter guarantees might complement or supplement those of the Basic Law in some respect.

7.1.1. Inter-Municipal Co-operation on a Both Free and Compulsory Basis

The first issue to deal with is whether the constitutional guarantee of inter-municipal co-operation is self-executing or needs to be properly implemented by means of *Länder* legislation. The federal constitutional provision does not appear to be self-executing, since the guarantee of "own responsibility" of municipalities and joint local authorities does as such not give them the right to define and forge different schemes of inter-municipal co-operation, but only to choose among a set of tools or schemes to be laid down by *Länder* statutes.[1102] Yet, one has to bear in mind that Charter Article 10, para. 1, first alternative does not require simple co-operation agreements on a functional basis to be authorised by statute. Limits and restrictions can however be set out pursuant to Article 3, para. 1. In Germany, co-operation agreements having no legal foundation are as a rule prohibited. However, an exception might be represented by so-called "working communities" (*Arbeitsgemeinschaften*) and by "co-operation contracts" (*Kooperationsverträge*), agreements which do not result in the establishment of a new entity but are traditionally established through public contract between local authorities within the limits set by the law. These agreements are traditionally signed for consultative purposes only.[1103]

Apart from this kind of scheme of co-operation on a functional basis, *Land* legislation provides for a wide range of co-operation forms which ensure that local authorities are free to choose the most suitable for achieving their own goals.[1104] *Land* legislation sets out a number of public legal schemes which allows for co-operation, wheras co-operation through private law agreements is only partially allowed.[1105] In particular, one should mention schemes existing throughout all *Länder* and

---

1101 A. Gern, *cit*., Rn. 174; D. Ehlers, *Interkommunale Zusammenarbeit in Gesellschaftsform,* DVBl, 1997, 137 ff.; T. I. Schmidt, *Kommunale Kooperation*, *cit*., 57; M. Burgi, *cit*., 64 and 297. *Contra*: H. Pagenkopf, *cit*., Rn. 107 and ff.; J. Oebbecke, *Zweckverbandsbildung und Selbstverwaltungsgarantie,* Köln, 1983, 69 ff.; R. Stober, *cit.*, 88. Some scholars believe that the power to co-operate ascribed to local authorities cannot find any legal foundation in Art. 28, para. 2 BL since it entails the risk of a loss of responsibilities for single local authorities and a slight relaxation of the democratic legitimation of the association. This minority view cannot be shared, provided that every local authority has in principle the power to decide what functions should be transferred away and on what issues it retains its powers. Moreover, the political bodies of each local authority do vote for transferring away functions or to create a new association (BVerfGE 52, 95).

1102 B. Schaffarzik, *cit*., 480; R. Grawert, *cit*, 485.

1103 S. Kraft-Zörcher and R. Neubauer, *Die Kommunale Arbeitsgemeinschaft – eine Chance kommunale Selbstverwaltung zu sichern*, LKV, 2010, 195. Cf. BVerfGE, Judg. 27 November 1986, NvwZ 1987, 123.

1104 B. Schaffarzik, *cit.*, 481.

1105 Cf. K. Waechter, *cit*., Rn. 80; Art. 2 IV Bay GKZ; §§ 2 II He KGAG, §§ 1 III NRW KGAG, §§ 1 I 3 RhPf ZwVG; §§ 1 II SaarKGAG.

notably the so-called: **a)** special purpose association (*Zweckverband*); **b)** public-law agreement (*öffentlich-rechtliche Vereinbarung*); **c)** administrative community (*Verwaltungsgemeinschaft*).

These co-operation models are to be distinguished from those joint local authorities (e.g. *Ämter, Samtgemeinden, Verbandsgemeinden*), to which the scope of application of the Charter does not extend pursuant to Article 13 and which are neither covered by Article 10. In this respect, in fact, Article 10, para. 1 clearly set forth that local authorities are granted the right to co-operate on a functional basis only within the framework of their powers. In other words, under the Charter, intermunicipal co-operation is meant to allow a co-operation for discharging specific functions, but not to acquire new powers[1106] or to create a new institution, i.e. a new public authority.[1107] In other words, under this provision, local authorities do not enjoy a general right to pool together and establish a completely new local authority, which is rather a power traditionally reserved to the State.

As for the aforementioned different schemes for inter-municipal co-operation, which do not require the establishment of a new public authority with territorial jurisdiction, the so-called *Zweckverband* is a functional association which has to be agreed upon public law contract (§ 54.1 VwVfG),[1108] containing its founding by-law or charter (*Verbandssatzung*), whose entrance into force ought to be authorised by the internal supervisory board.[1109] Through the *Zweckverband*[1110] local authorities try to transfer some of their own tasks or even only one to a special purpose association or consortium, which is financed via contributions (*Verbandsumlagen*) similar to those paid to the counties. The consortium is a public authority endowed with legal personality, but has no territorial jurisdiction.[1111] Because of that, it is not expected to have a directly elected political body pursuant to Article 28, para. 1, sentence 2 BL and Article 3, para. 2 of the Charter, but the members of the association board (*Verbandsversammlung*) have in principle to follow the instructions or directives of their municipal or county council. Problems of compatibility with the concept of local democracy can emerge when members of the association or consortium are also private citizens.

Unlike the former, both the *Verwaltungsgemeinschaft* and the *öffentlich-rechtliche Vereinbarung* are

---

1106 E. Schmidt-Jortzig, *KommunalR*, *cit*., Rn. 390.

1107 So also: B. Schaffarzik, *cit*., 473.

1108 In the *Land* of North-Rhine Westphalia the special purpose association is established directly by means of statute. See H-W. Rengeling, *Formen interkommunaler Zusammenarbeit*, in: G. Püttner (ed.), HKWP, Vol. 2, 1981, 406.

1109 VerfGH BW NVwZ – RR 1990, 215 (216).

1110 §§ 6-8 BW-GKZ; Art. 19-22 Bay GKZ; §§ 9-11 He KGAG; §§ 7-11 NdS ZwVG, §§ 9-11 NRW KGAG; §§ 7-11 RhPf ZwVG, §§ 5-8 SaarKGAG.

1111 The only exception is Baden-Württemberg, where the special purpose association enjoys itself the right to local self-administration (Art. 71, para. 1 BWConst.). Cf. J. Oebbecke, *Zweckverbandsbildung*, *cit*., 6.

non-institutionalised schemes of co-operation[1112] which does not result in the establishment of a new public-authority endowed with legal personality and with a new administrative apparatus. The former serves as a joint administrative support unit for their member municipalities willing to avoid amalgamation into so-called unitary municipalities (*Einheitsgemeinden*), but aim at continuing operate as entities with the right to local self-administration. These joint authorities, run by boards elected by the councils of municipalities, are set up with the task of discharging various tasks listed by *Land* legislation.[1113] The latter is a public administrative agreement or contract between local authorities for delivering specific public services (§ 54.1 VwVfG). For the fulfillment of certain administrative functions, a single authority could be conferred upon with the administrative functions to be carried out for all others (*delegierende Vereinbarung*) or could carry them out for the others (*mandatierende Vereinbarung*). In the former case, the powers would be conferred upon to the one local authority, in the second would rest within the local authorities signatory to the agreement. When it comes to public law agreements of local authorities pertaining to different *Länder*, German law requires the conclusion of so-called State treaties between federated States (*Staatsverträge*). This requirement seems to impose an excessive burden, in particular if relating to the establishment of a "working community", which the Charter sought to eliminate. On the other hand, though, a potential prohibition on treaties between federated States for co-operation agreements between local authorities might impinge upon the German federal principle, since it would mean that local authorities are a fully-fledged third level of government and no longer indirect public administration (*mittelbare Staatsverwaltung*) of the *Länder*.

Apart from that, all three aforementioned schemes are in conformity with the Charter, since local authorities are expected to resort to them if unable to provide certain public services by themselves, that is to say as a rule they resort to them spontaenously and only within the framework of their powers (*Freiverbände*). Yet, through inter-municipal co-operation agreements, local authorities might always try to extend their powers beyond the limits set by statutes.[1114] This is true when it comes to the relationship between municipalities and counties. By co-operating together, municipalities often tend to narrow the counties' own jurisdiction. The possibility to discharge functions of supra-local character was hovewer in principle restricted, unless explicitly provided by law[1115]. In this respect, as mentioned above (see *supra* first Chapter), the Charter is however silent,

---

1112 §§ 25f. BW GKZ; Art. 8-14 Bay GKZ; §§ 24-26 He KGAG; §§ 13 f. NdS ZwVG, §§ 23-25 NRWKGAG; §§ 1 I 2, 13 f RhPf ZwVG, §§ 17-19 SaarKGAG, §§ 18 f SH GKZ. Cf. B. Schaffarzik, *cit.*, 480 and Schmidt-Jortzig, *KommunalR*, *cit*., Rn. 397.

1113 BayVwGemO v. 26 October 1982 (*Verwaltungsgemeinschaft*); §§ 59 ff. BWGO and §2 ff. GKZ BW; §§ 30-33 KGG (*Gemeindeverwaltungsverband*) and (*Amt*).

1114 T. I. Schmidt, *Kommunale Kooperation, cit*., 57 and ff.

1115 See for instance §§ 2 I 3 NRW KrO.

even if one could argue in favor of a presumption towards tasks carried out by municipalities rather than by higher level local authorities (Article 4, para. 3).

As regards the restriction of local authorities' right to inter-municipal co-operation by means of statute, *Länder* legislation may provide for bans on co-operation (*Kooperationsverbote*) or obligations to co-operate (*Pflichtvereinbarungen* or *Pflichtverbände*). In the latter case, coercion into co-operation by means of statute is deemed to comply with Article 28, para. 2 BL only upon consultation[1116] and only insofar as it serves the purpose to ensure that local authorities can properly carry out administrative functions which go beyond their capacities[1117] or insofar this measure is motivated by compelling reasons related to the common good (*dringende Gründe des öffentlichen Wohls*)[1118] and if spontaneous inter-municipal cooperation had previously failed.[1119] All these criteria seem to match with those elaborated with reference to Article 10, para. 1 of the Charter.

As for the scope of inter-municipal co-operation, it is sufficiently broad and covers both local government tasks, i.e. public affairs of the local community[1120] and delegated functions. Agreements or associations/federations/consortia of local authorities can be signed or established only within local authorities' scope of action. In the case of the Charter this scope appears broader than it is the case under the German Basic Law. In the latter, in fact, it must be ensured that co-operation takes place with reference to matters affecting the local community and not in general with reference to any public affair.

7.1.2. A Limited Subjective Right to Enter Interterritorial Co-operation Agreements

1116 See, for instance: Art. 17 II, 29 II BayKommZG.

1117 BW §§ 11 I GKZ, NdS §§15 I 1 ZwVG, NRW §§ 13 I KGAG, Rh-Pf §§ 15 I 1 ZwVG, Sa §§ 12 I KGAG and in the case-law: VerfGH NWDVBl, 1979, 668.

1118 According to B. Schaffarzik, *cit*., 479, this is allowed only for compulsory tasks and for delegated functions, provided that the legislative reservation clause laid down in Article 28, para. 2 BL does not cover the organisational freedom and the cooperation powers of local authorities. So also: E. Schmidt-Jortzig, *KommunalR*, Rn. 395; H. Pagenkopf, *KommunalR,* 198; O. Gönnenwein, *cit.*, 435. However, at that time of the negotiations on the Charter, at least three *Länder* did foresee the establishment of a "Pflichtverband" by means of statute for performing non-compulsory tasks: § 15 I 2 and § 21 III L-S ZwVG; § 22 I NRW KGAG; § 15 I 2, § 21 III Rh-Pf ZwVG.

1119 VerfGH NW DVBl 1979, 668 ff.; VerfGH NRW, DÖV, 1980, 691 (692).

1120 T. I. Schmidt, *Kommunale Kooperation*, *cit*., 56.

As for the power to enter cross-border and more in general interterritorial co-operation agreements, one has to bear in mind that the Charter regards it as a corollary of the general right of local authorities to co-operate with each other. Article 10, para. 3 appears to be preciser than that laid down by the German Basic Law. In fact, pursuant to the case-law of the Federal Constitutional Court, local authorities are granted the right to enter co-operation agreements with other public authorities following to Article 28, para. 2, sentence 1 BL.[1121] However, only the Federal Administrative Court until now has acknowledged that inter-territorial co-operation beyond States' borders is a corollary of their general power of co-operation (*Kooperationshoheit*).[1122] This right is considered by scholars as being a right of local authorities without any explicit reference to the territorial scope,[1123] that is to say forms of inter-territorial co-operation are not restricted to frontier areas, thus encompassing for instance also development co-operation projects with counterparts of non-neighbouring countries.[1124] Agreements entered by German local authorities cannot be considered though as agreements under international law, since they are not subjects of international law endowed with legal capacity. In particular, towns or twinning agreements between local authorities (*Städtepartnerschaften*) cannot be deemed to be acts having legal nature, but merely a political one.[1125]

Yet, the Charter does not really clarify whether the subject matter "inter-territorial co-operation" can collide with the foreign and defense policy of the Contracting Parties and, if so, what relationship should exist between the foreign and defense policy carried out by the State and inter-territorial co-operation pursued by local authorities. Article 10, para. 3 implies that the Contracting Parties shall assign local authorities with a limited power to conduct a "minor foreign policy", but it does not interfere with their internal division of powers, leaving it up to the member States to decide how to regulate this matter. In Germany, inter-territorial co-operation as a subject matter does not fall

---

1121 BVerfGE 119, 331.

1122 BVerwG., Judg. 14 December 1990, BVerwGE 87, 237.

1123 In other words, the constitutional provision is not to be interpreted in a rigid "geographic" way and namely so as that local authorities are allowed to exercise their powers only within their boundaries. So however in the past: H. Klüber, *Das Gemeinderecht in den Ländern der Bundesrepublik Deutschland*, Berlin-Heidelberg, 1972, 23. Instead, the right to local self-administration envisages *per se* an entanglement of powers between different public authorities, which requires cooperation between them in order to deliver public services to the local communities. So also: H. Heberlein, *Kommunale Außenpolitik als Rechtsproblem*, Köln, 1989, 99 and 131. BVerwGE, Judg. 4 August 1983, BayVBl 1984, 309. E. Schmidt-Jortzig, *cit.*, Rn. 466.

1124 *Ibidem*, BVerwGE 87, 237 (238). In the literature see: M. von Schwanenflügel, *cit*., 143; O. Schnakenberg, *Innerdeutsche Städtepartnerschaften,* Baden-Baden, 1990, 186 and 449 ff.; H. Heberlein, *cit.*, 100 ff.; A. Gern, *cit.*, Rn. 72; F. Paul, *cit*., 106 ff.; H. P. Aust, *cit*., 234. *Contra*: U. Beyerlin, *Rechtsprobleme*, 206 ff.. Skeptical also: M. Nettesheim, *Art. 32*, Rn. 122, in: T. Maunz and G. Dürig (eds.), *GG-Kommentar*, Loseblattsammlung, Stand: 69. EL. Cf. Explanatory Report to the Charter, Article 10, para. 3.

1125 U. Fastenrath, *Kompetenzverteilung im Bereich auswärtiger Gewalt*, München, 1986, 46; E.G. Mayer, *Auslandsbeziehungen deutscher Gemeinden*, Bonn, 1986, 160 and ff.; M. Kotzur, *cit*., 161; U. Beyerlin, *Rechtsprobleme*, *cit*., 192 and 213. *Contra*: H. Heberlein, *cit*., 202, who argues these agreements are public law agreements.

within the scope of competence of the Federation or of the *Länder* to conduct foreign relations: it is an *aliud* which does not require to be set out in the Basic Law, but cannot go beyond the limitations set by the Constitution.[1126] In fact, according to the German Basic Law, foreign policy is a subject matter which falls as a rule within the scope of competence of the Federation (Article 32, para. 1 BL) and exceptionally within the scope of competence of the *Länder* (Article 32, para. 3 BL), whereas defense policy is a subject matter falling within the exclusive competence of the Federation (Article 73, para. 1 BL). This means that local authorities are banned from discharging activities interfering with the power to conduct foreign relations,[1127] for instance, attempting to replace measures or make proposals or observations contrary to the spirit of bilateral of multilateral treaties concluded by the Federation or by the federated States.[1128]

On the other hand, agreements or partnerships that solely refer to previous commitments entered by means of international treaty by Germany, without any new commitment changing their terms or any intention to influence the national foreign and defense policy of the State are not to be judged as exceeding local authorities' scope of powers and responsibilities as laid down in the Basic Law[1129]. In this respect, many towns or twinnings agreements postulating a change in the foreign and defense policy of the country were adjudicated by German courts as contradicting the limits set to the right of local self-administration and infringing upon the power of conducting foreign relations.[1130]

A different question is whether local authorities are allowed to discharge public services abroad upon agreement with other local authorities or whether foreign local authorities are allowed to discharge public services in the internal legal order. International law prohibits in principle sovereign acts on another State's territory, unless explicit consent is given by the State. Consent can be awarded to State organs, i.e. also to its territorial units as long as they carry out sovereign

---

1126 So: M. Kotzur, *cit*., 498-499. Cf. also A. Koreng, *Rechtsaufsichtliche Maßahmen gegen internationalen Städtepartnerschaften,* SächsVBl 2008, 160-161, who believes that, local authorities' agreements cannot affect German foreign policy, because they are not endowed with legal capacity under international law. Twinning agreements can only be declared void on grounds of their exceeding the scope of the affairs of the local community.

1127 H. Heberlein, *cit*., 112. «*Das Problem kommunaler Außenpolitik, dass sich dabei in rechtlicher Hinsicht stellt, ist nicht das des "hochpolitischen", sondern das der Begrenzung kommunaler Selbstverwaltung durch die Verbandskompetenz anderer Hoheitsträger»*.

1128 A. Gern, *cit*., Rn 72; K. Meßerschmidt, *Der Grundsatz der Bundestreue und die Gemeinden. Untersucht am Beispiel der "kommunalen Außenpolitik",* DV, 1990, 447; M. Dauster, *Kommunale Deutschlandpolitik?*, NJW, 1990, 1086. Cf. BVerwGE 87, 226 (236).

1129 H. Heberlein, *cit.*, 113.

1130 See: BVerwGE Judg. 14 December 1990, 87, 237. Other examples can be found in the early 1980s. Some twinnings were aimed at normalising the political relations of the Federal Republic with countries of Eastern Europe (Poland) and also with the Democratic Republic, others aimed at influencing the energy policy of the Federation. Cf. M. Kotzur, *cit*., 160 and M. Dauster, *cit*., 1084. Most recently, one has to recall the twinning agreement (*Partnerschaftsvertrag*) concluded between the municipality of Eilenburg in the *Land* of Saxony and the town of Tiraspol, capital city of the separatist republic of Transnistria (Moldova), which is not recognised by Germany and by the European Union as a sovereign State and which might have been considered as interfering in the foreign policy of the Federal Republic.

activities (*acta jure imperii*).[1131] In this case, a previous agreement between sovereign States ought however to be signed. Thereby, local authorities can be empowered with the right to conclude an agreement.[1132] No sovereign activity can on the contrary be assessed whenever local authorities co-operate with each other without exercising public responsibilities on the territory of another State but for *acta jure gestionis*. In this case co-operation agreements, even if concluded pursuant to public law, can be signed without the State being proactive in advance. This is in particular the case of towns partnerships and twinning agreements.[1133]

In Germany cross-border co-operation between local authorities is to be qualified as a sovereign-activity which does not find its source in a *pouvoir municipal* or *Gemeindegewalt* of local communities but for the exercise of which local authorities are empowered by the *Länder.* Local authorities exercise, in fact, a so-called "indirect public administration" (*mittelbare Staatsverwaltung*), which is derived from the *Länder.* The latter are empowered to conclude international treaties on cross-border cooperation regarding sovereign activities (Article 32, para. 3 BL read in conjunction with Article 70 BL)[1134]. In the light of these treaties (*Dachverträge*), laying out general principles on cross-border co-operation, local authorities can then sign their own specific agreements,[1135] over which the *Länder* ought nonetheless to carry out administrative supervision.[1136]. A previous approval of the Federation is further necessary to check out the adherence of the provisions of the treaty to the Federation's political interests. In fact, as also the ECtHR acknowledged on various occasions,[1137] responsibility under international law bears not the local authority involved, but the State, irrespective of its internal structure[1138]. This means that the Federation, albeit not enjoying any constitutional competence to regulate local government, is to be held accountable for any unlawful agreement between German and foreign local authorities, i.e. for all agreements which are not covered by the consent of the other State and also in cases in which local authorities exceeded the powers set out in the co-operation agreement.

1131 M. Kotzur, *cit*., 159.

1132 *Ibid*., 160-161; H-J. Konrad, *Verfassungsrechtliche Probleme von Städtepartnerschaften,* in: A. Dittmann and M. Kilian (eds.): *Kompetenzprobleme der Auswärtigen Gewalt,* Tübingen*,* 1982, 14; T. Stein, *Amtshilfe in auswärtigen Angelegenheiten*, Heidelberg, 1975, 14; G.H. Reichel, *Die Auswärtige Gewalt nach dem Grundgesetz für die BRD* Berlin, 1967, 24; M. Niedobitek, *Das Recht der grenzüberschreitender Verträge*, 2001, 62 ff.

1133 M. Oehm, *Rechtsprobleme Staatsgrenzen überschreitender interkommunaler Zusammenarbeit,* Münster, 1982, 77-79; H. Heberlein, *cit*. 99; J-M. Dupuy, *Cooperation transfrontaliere*, in: Annuaire Francais de droit international, Vol. 22 (1977), 849.

1134 No competence of the Federation according to BVerfGE, Judg. 30 June 1953 – 2, 349, 378.

1135 For instance, Germany signed in 1991 the German-Dutch Cross-Border Treaty and in 1996 the so-called Karlsruhe Accord covering cross-border cooperation with France, Luxembourg and Switzerland.

1136 BVerfGE 8, 122/137; H. Heberlein, *cit*., 154-155.

1137 ECtHR, *Assanidze v. Georgia* - Application No. 71503/01, § 146 and ECtHR, *Ilaşcu and Others v. Moldova and Russia*, Application No. 48787/99, § 313.

1138 Kehler-Hafen Judg., BVerfGE 2, 347/374; E. G. Mayer, *cit.,* 179; M. Oehm, *cit*., 72.

Being local authorities part of the *Länder,* a delegation by the *Länder* to local authorities of the power to entering inter-territorial co-operation agreements falling within the scope of competence of the *Länder* might also be taken into account. In particular, one could think of treaties conferring sovereign powers to international organisations, which falls under the competence of the *Länder* according to Article 24, para. 1, lett. a) BL. In this respect, conclusion by local authorities would not be a corollary of their right to local self-government, but rather expression of sovereign powers of the *Länder.* Hence, local authorities can be delegated only the power to conclude the treaty but not the power to decide whether to enter it or not.[1139]

To conclude, the constitutional right of local authorities to co-operate with local authorities of other States is not self-executing, but requires legislative implementation. Alike, the Charter entitles local authorities with a right to co-operation between local authorities of different countries, which is however conditioned upon the rules set pursuant to the legislative reservation clause laid down in Article 10, para. 3. Thus, the Charter cannot be deemed to complement the German constitutional guarantee, even if it certainly does not prevent a more generous domestic regulation enabling local authorities to co-operate without a previous engagement of the State. In this respect, by implicitly referring to the Outline Convention of 1980, it can be argued that the Draft Charter of 1981 was even clearer in affirming that not every co-operation agreement between local authorities of different countries should have been preceeded by State activity.

Further, one has to point out that the Charter might be a useful tool to solve the apparent contradiction existing in Germany between the general competence principle and the limitation of municipalities' jurisdiction over affairs of the local community. In fact, even if increasingly accepted, co-operation agreements on subject matters which under domestic law would exceed the scope of the affairs of the local community might be construed pursuant to international law, i.e. following to Article 3, para. 1 in combination with Article 10, para. 3 of the Charter, as extended to "global" issues, insofar as not explicitly forbidden by the law.[1140]

7.2. Local Authorities' Freedom of Association: the German *Spitzenverbände*

During negotiations on the Draft Charter, the German delegation challenged some remarks laid down in the Explanatory Memorandum attached thereto, considering that *«the explanatory reasons concerned would be of no significance once the draft Charter is revised».* In fact, vast part of these

---

1139 So M. Kotzur, *cit*., 499-500. Cf. B. Schaffarzik, *cit.*, 483, who however does not grasp this aspect.

1140 See also the solution proposed by: H. P. Aust, *cit*., 224 and ff. and by D. Schefold, *I comuni tedeschi e la globalizzazione*, in: Le Regioni, 1/2008, 16-17.

remarks to Draft Article 9 (now Article 10) was devoted to underline the importance of forming associations of local authorities for representing their interests at national and international level. The German delegation seemed to be rather skeptical about the real need of mentioning this guarantee in the Charter, probably due to the fact that all representatives of the Standing Conference of Local and Regional Authorities were by definition members of one of those associations at domestic level.[1141] In other words, there was no need to protect a right that was considered as being *in re ipsa*, that is to say an already existing and well-established local authorities' right throughout Europe.

In Germany, under the "co-operation clause" which is inferred from Article 28, para. 2 BL, local authorities are also free to build associations (*Spitzenverbände*) to represent their interests and to coordinate their activities[1142]. In particular, there are three federal associations, one representing the interests of the towns without counties (*Deutscher Städtetag*)[1143], one for all other municipalities (*Deutscher Städte- und Gemeindebund*)[1144] and the last one for the counties (*Deutscher Landkreistag*)[1145]. All three associations, in turn, decided in 1953 to federate in one further unitary association (*Bundesvereinigung der kommunalen Spitzenverbände*). Alike, at *Land* level, local authorities are traditionally federated in regional associations, which enjoy an explicit guarantee in several *Länder* Constitutions.[1146] All federal associations mentioned are private associations committed to the public good and not public authorities exercising sovereign powers (*Hoheitsträger*).[1147]

In spite of the fact that a private legal structure allows for a greater extent of organisational freedom, since the associations do not undergo the administrative supervision as every other public authority[1148], it also poses some legal problems, since a part of the German literature was worried about the lobbying activities by the federal associations which might have resulted in a sort of

---

1141 In Germany it follows to an agreement within the three main local authorities' associations and the *Länder* governments and the formal nomination for a two years mandate by the Interior Ministry. H-W. Rengeling, *cit*., 603-604 who mentions a Letter by the Ministry of the Interior – Cf. Brief Innenministerium 0 II 1 – 139 316/5 vom 4.2.1975.

1142 H-J. Wolff/O. Bachof/J. Stober, *cit*., II, § 91 I 2.

1143 The DST was established in 1946, first in the British zone (May), then in the American zone (November) and finally in May 1948 also in the French one. Through Law No. 5 of the Military Government the previous *Deutscher Gemeindetag* was closed down.

1144 The DSTGB was a 1973 merger between the *Deutsche Städtebund* and the *Deutsche Gemeindetag*.

1145 The DLKT was established in 1949.

1146 Article 71, para. 4 BW Constitution; Article 83, para. 7 Bavarian Constitution, Article 97, para. 4 Brandenburg Constitution; Article 57, para. 6 Lower-Saxonian Constitution; Article 84, para. 2 Saxonian Constitution, Article 91, para. 4 Thuringian Constitution.

1147 Only in Bavaria associations of local authorities were established pursuant to public law. There exists the Bavarian Council of Municipalities (*Bayerischer Gemeindetag* – 11 June 1954), the Bavarian Cities Association (*Bayerischer Städteverband* – 13 October 1947) and the County Councils Association (*Landkreisverband Bayern* – 26 March 1949).

1148 See: W. Roters, *Kommunale Mitwirkung an höherstufigen Entscheidungsprozessen,* 1975, 200 ff.

"occupation of the State from outside". This reasoning stems from the assumption that State and society ought to be separated from each other in order to prevent constitutional organs being directly influenced by private interests.[1149]

In particular, in the present case, it came to the following questions: (a) to what extent local authorities could join a private association exercising powers and responsibilities which go beyond the scope of Article 28, para. 2 BL?; (b) if these associations perform local authorithies' tasks, do they possess any democratic legitimation as provided for in Article 28, para. 1, sentence 2 BL?[1150]. These questions are not idle even with reference to the general compliance with the Charter, which conceives local self-government as a right exercised by democratically constituted bodies. In this respect, one might argue that these associations ought to be considered as bottom-up organisations, based on voluntary affiliation by local authorities, whose democratic nature is revealed by the circumstance whereby all members taking part in official meetings are directly elected representatives.

As for the scope of powers and responsibilities, the literature considers that the institutional guarantee of local self-administration empowers local authorities with the right to protect the scope of their responsibilities through specific associations at both *Land* and federal level.[1151] But the power of local authorities to protect their rights at *Land* and federal level finds a limitation in the exercise of sovereign powers. Associations of local authorities cannot be attributed neither powers carried out by constitutional organs nor powers of co-decision with them. That is why, during negotiations on the Charter, the German delegation refused to take into account any proposal on a fully-fledged participation of local authorities in federal decisions determining the distribution of financial resources. Such a right was originally set forth by Draft Article 8, para. 7. In other words the enactment of this provision would have been deemed to be incompatible with the Basic Law or, at least, it would have forced the Federal Republic to amend its Constitution, which foresees that local authorities' interests towards the federal legislation are represented only within the *Bundesrat.*[1152] The same could be said in relation to Draft Article 3, para. 6, according to which *«local authorities shall have the right to an effective share, at a sufficiently early stage, in the study, planning and decision making process for all matters exceeding the scope of a local authority but which have particular local implications».* The German delegation noted that the German

---

1149 W. Roters, *Kommunale Spitzenverbände und funktionales Selbstverwaltungsverstandnis*, DVBl, 1976, 360 ff.

1150 K. Waechter, *cit.*, Rn 120; A. Gern, *cit.*, Rn. 967; E. Schmidt-Aßmann, *Verwaltungslegitimation*, AÖR, (116), 1991, 329.

1151 So, for instance, W. Roters, *cit*., DVBl, 1976, 365 and B. Schaffarzik, *cit.*, 549.

1152 However no consultation right for local authorities has ever been provided for by the rules of procedure of the *Bundesrat*. Cf. J. Lämmle, *Die Beteiligung der Gemeinden an der Gesetzgebung*, DÖV, 1988, 917.

translation of “the right to an effective share” could have entailed a real participation (*Mitwirkung*) in the decision-making process that was not granted to local authorities by German federal constitutional law. In particular, it might have brought about the establishment of a third chamber of local authorities (*Gemeindekammer*) and the recognition of the federal associations of local authorities' participatory rights at federal level, as unsuccessfully requested by them shortly before the Charter entered into force within the framework of the *Enquete Commission for Constitutional Reform.*[1153]

Nowadays local authorities' federal associations and their branches at *Land* level perform two different kinds of tasks: one consists in keeping local authorities informed on all matters of relevance to them, exchanging good practices between their members and providing them with reports and surveys (*Innere Verbandstätigkeit*); the other task consists of taking part in the legislation process and in the execution of laws (*äußere Verbandstätigkeit*). According to German law, as most of the German federal laws have to be executed by local authorities, federal associations of local authorities and their branches at *Land* level are allowed to minimally take part in the legislation process. This kind of participation, covered since 1975 by the rules of procedure of the *Bundestag*[1154] and of different Ministries[1155], but also set out in some *Länder* Constitutions[1156] and in the municipal codes[1157], is rather basic and entails a consultation right on specific topics, such as town planning, land use, local finance, regional and local transportation. Herethrough, local authorities associations can influence lawmaking by delivering their statement on draft legislation insofar as this essentially affects local interests. This obligation on the part of the State to consult with local authorities' associations within the legislation process cannot amount to any binding agreement with the associations, which thus do not enjoy any subjective right to make their proposals prevail over goverment's or parliament's proposals.

Finally, local authorities federal associations' representatives sit in many different State committees, such as the Financial Planning Committee (*Finanzplanungsrat),* a body bringing together *Länder* Finance Ministers and local authorities with the Federal Finance Ministry in order to coordinate fiscal public policy; a government economic advisory board (*Konjunkturrat für die öffentliche Hand*) and the advisory council on spatial planning (*Beirat für Raumordnung*). In Bavaria, from 1947 until 1999, local authorities' associations were allowed to choose six representatives of municipalities and joint local authorities and propose them for the office of senators for a six years

1153 Deutscher Bundestag - *Schlußbericht der Enquete-Kommission Verfassungsreform*, 1976, 222 ff..

1154 § 66 II, 69 V GeschO BT.

1155 § § 25 II GGO II (*Bund*) -1975.

1156 Art. 71 IV BWConst. in combination with § 50a par. 3 GeschO LT BW; Art. 35 BayVerf i.V.m. § 5 par. 4 GeschO BayStaatsReg.

1157 § 147 HessGO; §129 RhPfGO; § 221 Saarl; § 132 S-HGO.

term. Through their membership in the Bavarian Senate, whose members were chosen among social and economic groups (ex-Articles 34-42 Bavarian Constitution), local authorities representatives were allowed to present opinions on law bills[1158]. Particular consultation rights for local authorities' associations are still provided in the Bavarian State Planning Law (*Landesplanungsgesetz*)[1159] and in the Highway Code (*Straßen- und Wegegesetz*)[1160].

The Charter also recognised the right of local authorities to join international associations or organisations representing their interests (Article 10, para. 2, sentence 2). In German constitutional law this right might be subsumed from the aforementioned general local authorities' right to associate at national level.[1161] However, doubts have been cast as to whether local authorities' activities within the framework of international associations could be deemed to be legitimate pursuant to Article 28, para. 2 BL, since they might fall outside the scope of local self-administration.[1162] German local authorities' associations and more precisely the *Deutscher Städtetag* and the *Deutscher Landkreistag* joined the International Union of Local Authorities (IULA, now UCLG) first in 1926 and again in 1949. In 1948 six French mayors and nine German mayors built up the International Union of Mayors (IUM), whereas in 1966 the *Deutscher Städtetag* and the *Deutscher Landkreistag* joined the 1951 established Council of European Municipalities and Regions (CEMR).[1163]

To conclude, unlike what the draft text originally provided, Article 10, para. 2 of the Charter does not grant German local authorities with a more generous right to free association, which in fact can be said to match with the standard enjoyed by federal and regional associations under German constitutional law.

8. Judicial Remedies for Local Authorities Beyond the Charter Minimum Standard

Local authorities in Germany enjoy the status of legal persons under public law (*juristische Personen des öffentlichen Rechts*) and are therefore capable of having rights and duties, including the right to sue and to be sued before civil courts (§ 89 BGB). Owing to the fact that they are entrusted with the autonomous accomplishment of specific administrative functions within the State

1158 J. Lämmle, *cit.*, 1988, 917 ff.
1159 Art. 14, para. 2 and 16, para. 2 BayLandesplanungsgesetz.
1160 Art. 59, para. 3 BayStrassen-undWegeGesetz.
1161 So B. Schaffarzik, *cit.*, 549-550.
1162 So: H. Heberlein, *Kommunale Europapolitik*, BayVBl, 1992, 417.
1163 B. Weinberger, *Internationale Gemeindeverbände und Städtepartnerschaften,* in: G. Puttner (ed.), HKWP, Vol. 2, 1981, 507 ff.

structure, local authorities receive additional legal protection against administrative decisions issued by State authorities allegedly unduly restricting their right to local self-administration. According to the dominant opinion among legal scholars, this happens on the constitutional basis of Article 28, para. 2 BL[1164]: the institutional guarantee of local self-administration contains a subjective right of local authorities, i.e. of municipalities and joint local authorities, to defend their local government responsibilities against administrative acts before an administrative court.[1165]

This means that local authorities can lodge a complaint whenever they maintain the institutional guarantee of local self-administration has been violated (*institutionelle Rechtssubjektsgarantie*). In other words, individual local authorities do not enjoy a subjective right to file a complaint because of the violation of their scope of responsibilities, but they only have a subjective right to lodge a complaint insofar as either the core or the edge area of local self-administration of municipalities or of joint local authorities as a whole has been encroached upon by federal or *Land* statutes.[1166] Further, there is no right of individual local authorities to protect their continued legal existence against State decisions to dissolve or pool them together. However, a limited subjective right to the continued legal existence of local authorities (*individuelle Rechtssubjektsgarantie*) as territorial public authorities is generally recognised at least against State unilateral decisions aimed at altering their boundaries or their names without duly consultation or against decisions taken without enabling their participation in the administrative procedures in accordance with the law. Since German administrative law procedure provides even for two judicial instances before administrative courts, the minimum standard of Article 11 of the Charter can be said to be complied with and even outperformed. Administrative courts may further use the Charter as a legal standard to interpret domestic provisions in the field of local government law. As mentioned, however, this happened only in two, albeit recent, cases.[1167]

Unlike publicly organised religious communities, universities and public broadcasters,[1168] local authorities cannot bring a complaint before an administrative court pursuant to Article 19, para. 3 and 4, sentence 1 BL, which give access to a court in case of violation of an artificial person's

---

1164 See *inter alia*: M. Nierhaus, *Art. 28*, *cit.*, Rn. 45.

1165 Hence, local authorities can refer to § 40 and, depending on the case, also to §§ 42, 43, 47 or 113 VwGO (Code of the Administrative Court Procedure).

1166 BVerfGE 56, 298 (313); 76, 107 (119).

1167 The former has already been discussed with reference to the *Ehrenamt* (see *supra*). OLG Sachsen, Judg. 26 May 2009, to be found at: http://www.justiz.sachsen.de/ovg/download/4A486-08.pdf The other case (VG Stuttgart, Judg. 29 April 2013, AZ 7 K 929/13, to be found at: http://www.vhw.de/nachricht/vg-stuttgart-beschluss-vom-29-april-2013-az-7-k-92913/) related to a request for a provisional order (*einstweilige Anordnung*) by an administrative court to protect the request for a referendum initiated by a group of citizens against the obligation to call a tender for the production and distribution of gas and electricity. The applicants held that this service should be included among the substantial share of public affairs protected by the Charter under its Article 3. The Court dismissed the application, by pointing out that no such a rule could be found in the Charter.

1168 See, respectively: BVerfGE 19, 1; 15, 256 and 31, 314.

fundamental rights by a public authority.[1169] Neither they can bring an individual constitutional complaint (so-called *Individualverfassungsbeschwerde*) before the Federal Constitutional Court (FCC) pursuant to Article 93, para. 1, n. 4, lett. a) BL read in conjunction with § 90 BVerfGG (Federal Constitutional Court Law) due to violations of their own fundamental rights. The reason is that local authorities are deemed to be incorporated in the State machinery and thus cannot be at the same time holders and addressees of fundamental rights (so-called *Konfusionsargument*).[1170] This argument, which is still at the base of the reasoning of the ECtHR, was harshly criticized by German legal scholars arguing that the State cannot be regarded as one single monolithic block so that nothing could prevent its organs being holders or bearers of fundamental rights depending on a case by case analysis.[1171] Therefore, later on, the FCC based its reasoning to deny jurisdiction rather on the functional approach whereby local authorities cannot be holders of fundamental rights since they act on the basis of powers which are attributed to them by the State in accordance with the law without immediate or direct consequences for the individual citizens. Encroachments upon these powers by other State bodies should be thus treated as a sort of dispute between high federal organs (*Organstreit*).[1172]

Nonetheless, unlike before the Strasbourg Court, which construes Article 34 ECHR more restrictively, local authorities in Germany are exceptionally allowed to complain on grounds of violations of procedural fundamental rights (*Prozess- oder Verfahrensgrundrechte*) pursuant to Article 19, para. 4 BL, such as the right to a fair trial and the right to an effective judicial remedy (Articles 101, para. 1, sentence 2 and 103, para. 1 BL), which are corollary of local authorities' capacity to be a party of court proceedings and of their ability to take legal actions before a court.[1173] Disputed remains the question as to what extent local authorities might lodge an individual constitutional complaint (*Individualverfassungsbeschwerde*) for protecting alleged violations of their property.[1174] The Charter does not mention any right in this respect, but the draft Additional Protocol to the Charter, which was adopted as a Congress recommendation in 2007, provides for a specific right of local authorities to property, the notion of which was explicitly based on Article 1 of Protocol No. 1 to the European Convention on Human Rights as well as on the case law of the ECtHR. Thus, one could say that *Länder* Constitutional Courts could adjust their

---

1169 BVerfGE 83, 37 (54). Cf. also: BVerfGE 11, 266 (274); 48, 64 (79); 58, 177 (189); 73, 118 (191). In the literature see: K. Stern, *Staatsrecht III*/1, § 71 III 4, VII 6; Bethge, *Die Grundrechtsberechtigung juristischer Personen nach Art. 19 III GG*, 1985, 25 ff.

1170 BVerfGE 61,82 (105) - *Sasbach*; BVerfGE 21, 362. Cf. A. von Mutius, *Kommunalrecht*, 1996, Rn. 116 ff.

1171 F. Schoch, *Grundrechtsfähigkeit juristischer Personen*, Jura, 2001, 201.

1172 BVerfGE (K) DVBl 2001, 63 – *Berufsgenossenschaft*.

1173 BVerfGE 61, 82 (104); BVerfGE 6, 45; BVerfGE 72, 195.

1174 This is for instance possible for Bavarian local authorities before the Bavarian Constitutional Court. Cf. BayVGHE 29, 105; 37, 101. Cf. also Article 165, para. 1 of the Polish Constitution.

interpretation on the issue, by referring to the soft law of the Council of Europe as a source of legitimation.

In fact, the friendliness towards international law of German courts should relate also to the soft-law on the Charter issued by different bodies of the Council of Europe. Even if decisions of international human rights organs are not self-executing in the domestic legal orders, they can enjoy indirect application. As already happened in the past, in order to substantiate concepts of domestic law, German courts referred to principles laid down in soft-law documents issued by international organisations, even if they could not be classified themselves as general principles of international law and thus they could not be deemed to be legally binding following to Article 25 BL.[1175] In fact, acts issued by international organisations materially contibute to the interpretation of international treaties and in particular help clarifying and supplementing the objective, the meaning or the content of treaty's provisions or even of general principles of international law.[1176] Therefore, they should be taken into account by the States and in particular applied by their courts on the basis of the principle of good faith in international law.[1177]

The aforementioned jurisdictional restrictions with reference to individual constitutional complaints do not prevent local authorities to enjoy direct access to constitutional jurisdiction for other purposes. In fact, Article 93, para. 1, n. 4, lett. b) BL read in conjunction with § 13 n. 8 lett. a) and 91 ff. BVerfGG (Federal Constitutional Court Law) provide municipalities and joint local authorities with a distinctive form of judicial redress (so-called *Kommunalverfassungsbeschwerde*), i.e. with direct access to the FCC whenever they allege violations of the right to local self-administration (Article 28, para. 2 BL) triggered by federal or *Land* laws - but not by administrative

---

1175 International soft-law does not require implementation into domestic legal order pursuant to Article 59, para. 2 BL. (I. Pernice, *Art. 59*, in: H. Dreier, *GG-Kommentar*, 2006, Rn. 28 and F. Schorkopf, *Grundgesetz und Überstaatlichkeit*, Tübingen, 2007, 137 ff..), insofar as it does not purport to alter the meaning or the content of the treaty which it refers to. See on that issue: C. Calliess, *Auswärtige Gewalt - § 72,* in: H. Kube, R. Mellinghoff, G. Morgenthaler, U. Palm, T. Puhl, C. Seiler (eds.), *Leitgedanken des Rechts - Paul Kirchhof zum 70. Geburtstag*, Heidelberg, 2013, 785. Other authors believe that the Parliament should at least approve a deliberation on soft-law acts which regulate the political relations of the Federation or involve the protection of fundamental rights. See: S. Vöneky, *Verfassungsrecht und völkerrechtliche Verträge § 236,* in: J. Isensee-P. Kirchoff (eds.), *Handbuch des Staatsrechts*, 3rd ed., vol. 9 – Internationale Bezüge, 423.

1176 B. Simma / D.E. Khan / M. Zöckler / R. Geiger, *The Role of German Courts in the Enforcement of International Human Rights*, in: B. Conforti and F. Francioni (ed.), *Enforcing International Human Rights in Domestic Courts*, The Hague, 1997, 92-96 ff. cit.: «*Even if not legally binding German courts could accept these decisions at least as a source of inspiration for the interpretation of domestic laws*». See also: A. Bleckmann, *Völkerrecht*, Baden-Baden, 2001, Rn. 229 and U. Fastenrath, *Relative Normativity in International Law*, EJIL, 1993, 321. *Contra*: M. Ruffert, *Rechtsquellen und Rechtsschichten des Verwaltungsrechts,* in: Hoffmann-Riem/Schmidt-Aßmann/A. Voßkuhle (eds.), *Handbuch der Verwaltungswissenschaft*, München, 2006, § 17, 79.

1177 So: B. Simma/S. Benningsen, *Wirtschaftliche, soziale und kulturelle Rechte im Völkerrecht, der internationale Pakt von 1966 und sein Kontrollverfahren,* in: J. F. Bauer (ed.), *FS für E. Steindorff*, 1990, 1497 ff.; E. Klein, in: J. Ipsen/E. Schmidt-Jortzig (eds.), *FS für D. Rauschnig*, 2001, 307; S. R. Laskowski, *Das Menschenrecht auf Wasser,* Tübingen, 2010, 195. *Contra*: C. Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards,* Tübingen, 2012, 217.

acts (e.g.: ministerial decrees),[1178] a circumstance, the latter, which does not contradict the combined reading of Articles 8 and 11 of the Charter, since a judicial remedy against administrative acts is nonetheless ensured.

As noted by some scholars, this constitutional complaint has a vey specific nature, even if it can be regarded as similar to the abstract judicial review (*abstrakte Normenkontrollverfahren*).[1179] Though, the legal possibility to institute proceedings (*Antragsbefugnis*) is in principle limited to violations of Article 28, para. 2 BL.[1180] However, at least from a procedural point of view, which is the same as for the aforementioned individual constitutional complaints,[1181] the right to local self-administration is still understood as being similar to a fundamental right of a local community, as it happened to be under Article 127 of the Weimar Constitution and prior to it, even more clearly, under § 184 of the 1849 St. Paul's Church Constitution and under § 20 of the 1834 Bavarian Municipal Code. In fact, access is given whenever municipalities or joint local authorities allege violations of their right to self-administration while carrying out free or compulsory tasks (*eigene Selbstverwaltungsaufgaben*) or mandatory supervised tasks (*Pflichtaufgaben zur Erfüllung nach Weisung*).[1182]

However, it must be borne in mind that, insofar as complaints for infringement upon the right to local self-administration by *Land* law[1183] can be lodged before *Länder* Constitutional Courts,. i.e. as long as the *Land* Constitution provides for a more generous guarantee, no right to bring a complaint before the FCC exists (§ 91 n. 1 BVerfGG)[1184]. This "subsidiarity-clause" does not find application when local authorities intend to complain about violations of the right to self-administration caused by federal state law[1185]. At the time of negotiations on the Charter, all *Länder*[1186] accorded local

---

1178 A different rule applies in Rheinland-Palatinate, where every act of public authority can be challenged before the *Land* Constitutional Court. Cf. Rh-Pf VerfGH, DÖV 1995, 908 and ff.

1179 Apart from the *Land* Constitution of Rhineland-Palatinate, local authorities in Germany do not retain the right to file a complaint before the FCC without reference to a specific case, so that no abstract judicial review of legislation (*abstrakte Normenkontrollverfahren*) can ever take place. This right pertains only to the Federal government, a *Land* government, or to one fourth of the Members of the *Bundestag* (Article 93 par. 1 sentence 2 BL).

1180 K. Stern, *cit.*, Art. 93, Rn. 275; M. Burgi, *cit.*, 105.

1181 S. Magen, *Kommunalverfassungsveschwerde § 91*, in: D.C. Umbach, T. Clemens and F.W. Dollinger (eds.), *Bundesverfassungsgerichtsgesetz – Mitarbeiterkommentar,* 2nd ed., 2005, 1168.

1182 No constitutional protection is ensured at federal level when local authorities exercise delegated functions by the State. K. Stern, *Art. 28*., *cit.*, Rn. 136.

1183 In Baden-Württemberg, Lower-Saxony and Saxony-Anhalt local authorities can lodge a complaint only against formal laws (i.e. statutes), while in all other *Länder* also against decrees (*Rechtsverordnungen*). Cf. W. Litzenburger, *Die kommunale Verfassungsbeschwerde in Bund und Ländern,* Kiel, 1985, 335 ff. and H. Dreier, *Art. 28, cit*., Rn. 181.

1184 R. Stober, *cit*., 1996, 111.

1185 BVerfGE, 1, 167, 173.

1186 Art. 76 BWConst. and §§ 8 para. 1 n. 8, 54 BWStGHG; Art. 98, para. 4 BayConst., Art. 2 n. 7, 53 BayVfGHG; Art. 140 BreConst.; §§ 13 n. 8, 50 NRWVfGHG; Art. 130, para. 1 Rh-PfConst., § 2 n. 1 lett. a) 23 Rh-Pf VfGHG; Art. 123 SaarConst., § §9 n. 13, 55 SaarVfGHG. In Rhineland-Palatinate, however, local authorities, as legal persons under public law, are entrusted with the right to refer a matter to abstract judicial review alleging violations of their rights against laws or other acts issued by constitutional organs (*Normenkontrollverfahren*).

authorities with the right to lodge a complaint before their own *Land* Constitutional Court. Only Hesse, Lower-Saxony and Schleswig-Holstein did not originally foresee this right. In other words, the right to local self-administration enshrined in the Constitutions of Hesse (Article 137 Hess-Const.), Lower-Saxony (Article 44 L-S Const.) and Schleswig-Holstein (Article 46 SH-Const.) was for a long time not justiciable before their own domestic courts and local authorities could have sought judicial redress against violations to the right to local self-administration as entrenched in Article 28, para. 2 BL before the FCC. Apart from the different legal regime applying to the city-states of Berlin, Hamburg and Bremen, the three aforementioned *Länder* caught up with the others respectively in 1994,[1187] 1993[1188] and 2008[1189]. Yet, constitutional protection of the right to local self-administation before the *Land* Constitutional Court of Baden-Württemberg is ensured only against formal laws, whereas against decrees a constitutional complaint shall be lodged before the FCC.[1190]

Within the framework of a *Kommunalverfassungsbeschwerde*, the Charter's provisions cannot be used as valid criteria to interpret domestic constitutional provisions on local self-administration laid down in the *Länder* Constitutions or in Article 28, para. 2 BL. In fact *Land* constitutional review only concerns the compatibility of a *Land* law with *Land* constitutional provisions. The Charter has the rank of a federal law and thus *Länder* Constitutional Courts cannot refer to it for interpreting the right to self-administration. Nonetheless, one has to recall that, since the Charter is a treaty signed by the Federation, the *Länder* and their bodies ought to comply with it, pursuant to Articles 20, para. 1, 25 and 35 BL. The same goes for federal review on legislation pursuant to Article 28, para. 2 BL. The FCC cannot judge upon the constitutionality of federal statutory provisions pursuant to other federal statutory provisions. However, constitutional complaints brought forward by local authorities can extend the jurisdiction of the Court to scrutinize further violations of the *Land* Constitution or of the Basic Law, insofar as the additional constitutional provisions which allegedly have been violated help shaping the right to self-administration; among them the FCC recognised the infringement of the constitutional prohibition of arbitrary decisions pursuant to Article 3, para. 1 BL (*Willkürverbot*), of the democratic principle enshrined in Article 20, para. 1 BL and of the

---

1187 However, the Hessian Constitution was not accordingly amended. A fundamental right complaint to be issued by local authorities (so-called *kommunale Grundrechtsklage*) was enacted as of November 30, 1994 only in § 46 StGHG, the *Land* statute regulating the Hessian Supreme Court's work.

1188 See the new: Art. 54 n. 5 NdSLV read in conjunction with § 36 NdsStGHG and P. Armbrust, *Einführung in das niedersächsische Kommunalrecht*, Hamburg, 2007, 36-37.

1189 The introduction of a constitutional complaint on the part of local authorities follows the establishment of the *Land* Constitutional Court as of May 1, 2008. See: A. Groth, *Die kommunale Verfassungsbeschwerde zum Schleswig-Holsteinischen Landesverfassungsgericht*, NordÖR, 12/2008, 513-521.

1190 M. Burgi, *cit*., 76. Similar the legal framework to be found in Saxony-Anhalt: BVerfGE 107, 1.

division of powers between the *Länder* and the Federation (Article 70 BL and ff.).[1191]

The only viable solution to enable German constitutional judges to resort to the Charter as a valid instrument to interpret both federal and *Land* constitutional provisions appears to be the aforementioned *völkerrechtsfreundliche Auslegung,* i.e. the international law friendly interpretation of domestic constitutional provisions, whereby, wherever room is left for different interpretations, domestic constitutional provisions on local self-administration should be construed so as that conformity with Germany's international obligations can be achieved and so that, in order to conform with Article 27, para. 1 of the Vienna Convention on the Law of the Treaties of 1989, changes in domestic law should be presumed not to derogate to international commitments according to the *lex posterior* principle.[1192] Until now, provisions of the Charter have been mentioned in three different rulings of *Länder* Constitutional Courts, notably two by the Constitutional Court of Brandenburg[1193] and one by the Constitutional Court of Saxony-Anhalt.[1194] From these three judgments one can infer two conclusions as to the Charter's application in the German subnational constitutional order. According to *Länder* Constitutional Courts, the Charter cannot generally be used as a standard of review (Saxony-Anhalt), but it has nevertheless to be taken into consideration whenever the guarantee provided for by the Charter goes beyond, that is to say complements or supplements what the *Land* Constitution sets out (Brandenburg).

To conclude, German federal and *Land* law provide for a wide range of judicial remedies both at administrative and constitutional or subconstitutional level which greatly outperform the minimum standard set out in Article 11 of the Charter. Nonetheless, a further commitment to apply international standards can derive from the interpretation of the right to property as a fundamental right of local authorities *vis-à-vis* the State, as put forward by the Draft Additional Protocol of the Charter. Finally, even if rarely mentioned in the case-law of *Länder* Constitutional Courts, the Charter was acknowledged as an international treaty whose provisions might complement or supplement those of the federal Constitution or of the *Länder* Constitutions. Until now the guarantees enshrined in Article 5 and 9 were deemed by German Constitutional Courts to be outperformed by the corresponding constitutional guarantees at domestic level. A closer focus on the "system of the Charter" might well convince German courts of the opposite.

1191 BVerfGE 1, 167 (183); 56, 298 (310). As for Articles 84-85 BL see: BVerfGE 119, 331 (356). As for Article 106 par. 5 n. 3 BL see: BVerfGE 71, 25 (37).

1192 BVerfGE 74, 358 (370).

1193 LVerfGE Bbg Judg. 16 September 1999, VfG Bbg 28/98 and LVerfGE Bbg. Judg. 20 January 2000, VfG Bbg 3/99.

1194 LVerfGE Judg. 21 April 2009, LVG 12/08.

§ 4. Conclusion of the *Second Chapter*

In the first Chapter it has been showed that the Charter was modelled on the German conception of local self-administration and its guarantees were construed accordingly. In this Chapter further evidence has been deduced that, in principle, the concept of local self-administration as well as the institutional design of the right to local self-administration under German law overlaps with that of the Charter. This is surely one of the main reasons why the majority of German constitutional and administrative lawyers have been ignoring the Charter so far. Not without a slight airiness the dominant literature and the meagre case-law of *Länder* Constitutional Courts concerning the Charter strongly held that the guarantee provided for by Article 28, para. 2 BL as well as by *Länder* Constitutions ensure the same or even a higher standard than that provided for by the Charter's provisions. Few scholars, however, went into details to explain why and to what extent one could really maintain this was true, whereas almost nobody conceived the treaty as a "living instrument" and as part of a system in which the treaty has been evolutively interpretd by Council of Europe bodies. The few who did investigate further on the matter, including Bert Schaffarzik and Isabel Stirn, reached in fact different conclusions, that is to say that the Charter's provisions are mostly self-executing and entail subjective rights of local authorities. The Charter's neglect has also to do with a traditional skepsis towards the Council of Europe soft law as well as with the modalities followed for the reception of the treaty in the domestic legal order.

The Charter was incorporated into German law by means of a federal statute (*Bundesgesetz*), wheareas the subject matter local government falls traditionally under the legislative power of the German *Länder*. Hereabove, though, it has been showed that, unlike some contrary interpretations in the literature - so, for instance, Matthias von Schwanenflügel and Bernd Weiss - the Charter was rightly enshrined in the domestic legal order as a federal statute. In particular, in fact, the legal basis for its adoption has been found in Article 28, para. 2 and 3 BL. Yet, it might be assumed that a federal statute setting out principles on local self-government was perceived as a potential threat to the differentiation existing between local government systems and regarded as a first step towards the establishment of a federal legislative framework competence (*Bundesrahmenkompetenz*) on local government. Its use for drafting the so-called *Kommunalverfassung* of East Germany in 1990 might confirm this hypothesis.

Further, even if the Charter is indubitably modelled on the German constitutional guarantee of local self-administration, many Charter's provisions set out principles and rights which are more precise

than those which one can explicitly or implicitly derive from Article 28, para. 2 BL and sometimes they even supplement the federal guarantee. German courts could take these views into account by applying domestic law with a so-called favourable attitude towards international law (*Völkerrechtsfreundlichkeit*), as it is the case for the ECHR.

Starting with the concept of local self-administration, one might say that the Charter takes over the old distinction common in German literature between the political and legal concept of local self-administration, the latter of which takes precedence. In particular, as it is the case for the Charter, the constitutional guarantee is mainly an institutional one, whereas individual local authorities enjoy no guarantee against dissolution. Local self-administration cannot be restricted beyond its core area (*Kernbereich*), whereas its edge area (*Randbereich*) cannot be disproportionately encroached upon. The institutional guarantee can be defended by local authorities before a Constitutional Court, either at *Land* or Federal level. Also the combination of local self-administration and local democracy is made according to the German understanding, whereby with the former one has mainly to understand representative democracy, whereas direct democratic participation can only complement but not entirely replace it. The electoral principles of Article 3, para. 2 are explicitly borrowed from Article 28, para. 2, sentence 1 BL, whereas the norm of the Charter whereby only the deliberative body of territorial authorities ought to be directly elected could be easily extended to higher level joint local authorities with territorial jurisdiction (*Höhere Kommunalverbände*), which is guaranteed only under ordinary legislation, but not to minor joint local authorities which do not enjoy territorial jurisdiction.

As for the principles on allocation of powers and responsibilities, the German notion of *Allzuständigkeit* matches with the universal jurisdiction of municipalities, laid down in Article 4, para. 2 and 3 of the Charter. A certain mismatch between the Charter and the Basic Law might be assessed with reference to the scope of responsibilities with which municipalities can be entitled to carry out. In fact, the Charter appears to confer upon municipalities (or local authorities in general) with a general political mandate, which however contradicts the German constitutional framework, which restricts their sphere of action to the "affairs of the local community". Even if under domestic law municipalities cannot deal with questions exceeding the scope of the local community, when it comes to international co-operation with local authorities of foreign States, local authorities are in general freer even under German law so that co-operation agreements on subject matters which under domestic law would exceed the scope of the affairs of the local community (e.g.: foreign and defense policy) might be construed pursuant to Article 3, para. 1 in combination with Article 10, para. 3 of the Charter, as being extended to issues having a "global impact", insofar as not explicitly

forbidden by the law.

Together with the universal jurisdiction principle, allocation of powers between local authorities of different levels follows the subsidiarity principle. Even if not explicitly mentioned in the case-law of the FCC, also in Germany, at least after the so-called *Rastede* judgment, it is in fact the main principle on allocation of responsibilities between municipalities and counties. Subsidiarity is however explicitly mentioned in law and by legal scholars when it comes to the arrangement of economic activities at local level, which can be discharged by local authorities instead of private actors insofar as they demonstrate that they will be able to carry them out as efficiently as or more efficiently than a private company, a principle which is pretty much the opposite of the Italian concept of horizontal subsidiarity.

The guarantee of Article 4, para. 4, whereby powers and responsibilities of local authorities ought to be full and exclusive could be used as a criterion for limiting the so-called "false municipalization" of powers and responsibilities (*unechte Kommunalisierung*), that is to say the trend towards increasing delegation of tasks to local authorities, as well as to the expansion of powers to be exercised upon instruction, as well as to the so-called *Mischverwaltung* (mixed administration) in the relationship between local authorities and the Federation, which however enjoy already constitutional coverage.

For ensuring that local self-administration is not encroached beyond its core, local authorities are given a specific right to be consulted, which is not necessarily more far-reaching than that set out under domestic constitutional law, since it does not necessarily mandate the member States to ensure a right to negotiate on measures approved by the State which have a direct or indirect impact on their scope of powers and responsibilities. Yet, in Germany, this provision might ensure a higher degree of consultation of local authorities at federal level.

As for the territorial guarantee, the minimum standard provided by both the Charter and the Basic Law overlaps, even if under German constitutional law, like under the draft Charter, a limited subjective right of municipalities and counties to defend their continued legal existence is set out, whereas in the final text of the Charter one could only argue it is implied. Further, as for the right of consultation taken by itself, the Charter provides for a much stronger requirement and namely the right to a real participatory procedure involving the local communities concerned and not merely an oral or a written hearing of their authorities.

As for the guarantee of freedom of organisation, it has been pointed out that the Charter understands this guarantee as German constitutional law does, that is to say as a power which can be limited to a greater extent than it is the case for the scope of all other powers and responsibilities. In fact, there exists no right of self-organisation operating pursuant to the universal jurisdiction or general competence principle. To the contrary, freedom of organisation has to be regarded as a sphere of autonomy left to local authorities by the State, which retains sovereignty over the organisation of its administrative structures. As far as delegated functions are concerned, however, the Basic Law provides for a wider degree of freedom of organisation than the Charter. Delegated functions might be subject to administrative supervision of expediency within the limits of proportionality, whereas local government tasks *stricto sensu* are in principle subject only to review of lawfulness, both under the Charter and under German law, even if the Council of Europe interpretation of Article 8 requires that violations of the law by local authorities and dissolution of political bodies can be assessed and ordered only when a final decision of a judicial authority has been reached. In general, administrative supervision over local authorities' acts and organs in Germany is of rather co-operative nature, yet much room for discretion is left to supervisory authorities in balancing pros and cons of coercive measure (*Opportunitätsprinzip*). However, prior supervision of expediency is still carried out for a number of administrative acts to be issued by local authorities.

In the field of the so-called financial guarantees, the similarities between the Charter and German law appear evident from the outset, that is to say from the choice of the adjective “adequate” relating to the financial equipment. However, the Charter helps in addressing interpretative problems related to the nature of the right to adequate financial equipment. In fact, one could argue that this right is both an individual and institutional right of local authorities, which has to be substantiated in a clear criterion setting out that a tantamount of local resources should be made of own resources and which cannot be replaced by ensuring additional procedural guarantees. In this respect, one has to recall that Article 9, para. 3 strengthens the constitutional guarantee which ensures that municipalities will collect revenues from taxes based upon economic ability and commits the Federation to provide them with another source of revenue after abolishing them. Yet, the Basic Law does not empower municipalities with the right to determine the tax rate of the income tax, a circumstance which entails a violation of the minimum standard set out in the treaty.

As for the principle of proportionate compensation for tasks transferred or delegated to local authorities (*Konnexitätsprinzip*), it might be recalled that when it was enshrined in the Charter, not all *Länder* Constitutions provided for such a guaranteeand some of them were only programmatic in nature, so that one could argue that in this respect the treaty ensured at least minimal normative

guidance. Currently, the Charter offers an important reference for a correct application of the principle of concomitant financing in the *Länder* Saxony-Anhalt and Saarland, in the exceptional relationship between Federation and local authorities as well as within the context of new international obligations causing an expenditure increase at local level. As for the equalisation mechanisms, the Charter does not provide for self-executing provisions, apart from Article 9, para. 6 which complements the German constitutional guarantee, since it requires a special form of consultation of local authorities during preparation of the schemes concerning vertical or horizontal equalisation, as those experimented in Austria and Bavaria. Finally, the Charter sets limits to the proliferation of earmarked grants (so-called *Zweckzuweisungen*), which is not considered under German law.

Overall, the Charter and its evolutive interpretation by Council of Europe bodies is thus able to contribute at sorting out interpretative problems of constitutional nature under German law, that is to say even in a domestic legal order, on which the treaty was deliberately modelled thirty years ago. This has mainly to do with the establishment of a "system of the Charter", in which the treaty was construed as a "living instrument" and the guarantees of the treaty were expanded by the soft law of Council of Europe bodies. The circumstance that its provisions were rarely relied upon before German courts has probably to do with a particular type of German *Angst*, that is to say towards strong harmonisation of local government law across the Federation. Harmonisation might in fact result in uniformation, thus impinging on the principle of differentiation of the local government systems on which the legal orders of the *Länder* has been traditionally based.

Third Chapter

Italian Local Pluralism as a "Learning Model"

§ 1. A Brief History of Italian Local Autonomy

I. Medieval Communal Liberty as the Basis for a Narrative of *Autonomia Locale*

Unlike many handbooks on Italian local government law, which merely link the modern concept of *autonomia locale* to the French notion of *pouvoir municipal*,[1195] here it should be pointed out that the tradition of Italian local autonomy as reaffirmed and idealised in the nineteenth century roots back to the Middle Ages and in particular to the communal institutions, whereas one might accept that the provincial institutions are rather "artificial" authorities established within the modern administrative structures of the Savoyard State.

The first Italian organised communities (*civitates*) started being established in the eleventh century when the presence of the Holy Roman Empire in Italy was particularly weak. Whatever might be the very origin of the communes in Europe,[1196] it is a fact that communities started acquiring from crown or territorial lords as well as from episcopal lordships charters confirming customary rights and laws or abrogating uses or obligations. In the twelfth century, it might be observed a transition from *civitas* to commune, which entails the institution of some sort of primordial local autonomy.[1197] Charters became even more far-reaching, control by imperial officials disappeared and, after defeat of forceful territorial lords, communes were set up as corporate constitutions of the landed and mercantile aristocracy, governed by elected bodies (first *consules* and then *podestà*). Autonomy was conceived as both a freedom (from the Emperor) and a liberty (a *iurisdictio* to approve laws in the interest of the own community).[1198] Some communes turned into "city-states"

1195 So, for instance: L. Vandelli, *Il sistema delle autonomie locali*, Bologna, 2004, 11-18.

1196 Plenty of theories have been developed in this respect. For an overview see: P.S. Leicht, *Storia del Diritto Italiano – Il Diritto Pubblico*, Milano, 1972, 206 and ff.

1197 P. Jones, *The Italian City-State: From Commune to Signoria,* Oxford, 1997, 134 and ff.

1198 It is no coincidence that the word juridiction emerges also in the Charter (Article 9, para. 7) and in general

(e.g.: Venice and the other so-called maritime republics of Genova, Amalfi and Pisa), endowed with almost sovereign powers. At the end of the thirteenth century, though, communal institutions were reversed and unmade into seigneural cities (*età delle signorie e dei principati*), regarded by the storiography of the nineteenth century as monarchic entities subject to the will of a sovereign and thus opposed to the alleged republics of the Middle Ages, even if in reality they retained own statutes and the powers to raise own taxes.[1199]

As mentioned in the first and second Chapters, municipal freedom and chartered rights went hand in hand, not only in old England, but also within the Holy Roman Empire. This ideological and moral breath referring to "the communal age" (*età comunale*) appeared to be particularly strong both in Germany and Italy within the context of their respective nations building.[1200] At first, municipal freedoms and liberties were treatied as synonims for independence and sovereignty. Different authors, in fact, including Georg Friedrich Puchta and Carlo Cattaneo,[1201] mentioned the free imperial cities northern of the Alps and the Italian communes turning into city-states (*superiorem non agnoscant*) as virtuos examples of a glorious past towards the future creation of a new State based on municipal federalism. In this respect, however, it must be remembered that whereas in Italy the Holy Roman Empire represented a major obstacle for the development of communes into city-states, as the Peace of Constance of 1183 recalls to mind, in Germany no much unrest in this respect could be registered and free cities were rather in a peaceful relationship with the Emperor.

Subsequently, at the mid of the nineteenth century, other authors, such as Luigi Cibrario and Carl Friedrich Gerber,[1202] began to distinguish between autonomy and independence, by pointing out that the former constituted a limited normative power within the State structures, so that in the Modern Age it could no longer be spoken neither of sovereign cities nor of city-states. More recently, in the twentieth century, other scholars, such as Otto Brunner, pointed out that modern categories, including those of state, sovereignty and independence could definitely not be applied to medieval institutions; moreover, communal institutions, even so-called city-states, had to be understood as part of a bigger whole. In other words, in the Middle Ages, legal pluralism was part of a "system", made of *iura propria*, the law of the cities, which would never have existed without

---

when referring to the allocation of powers and responsibilities to municipalities (principle of 'universal jurisdiction', as laid down in Article 4, para. 2.

1199 P.S. Leicht, *cit*., 284 and ff.

1200 See most recently: P. Costa, *'Così lontano, così vicino'. Il comune medievale e la sua 'autonomia'*, in: Quaderni Fiorentini n. 43 (2014), 689 and ff. and L. Mannori, *Autonomia: tracciato di un lemma nel vocabolario amministrativo italiano dal Settecento alla Costituente*, in: Rivista di Studi dello Stato, 2012.

1201 G.F. Puchta, *Cursus der Institutionen*, Vol. 1, Leipzig, 1853; C. Cattaneo, *Sulla legge comunale e provinciale. Lettera prima,* in: Il Diritto, 7 June 1864.

1202 L. Cibrario, *Storia della monarchia di Savoia*, Vol. 1, Torino, 1840; C.F. Gerber, *Über den Begriff der Autonomie,* in: Archiv für civilistische Praxis, XXXVII, 1854.

the link to the *ius commune*, the universal law of the Empire as a *Respublica Christiana*.[1203]

Alike, in the modern era, cities were and could not but being part of a higher whole, that is to say of the State, the only entity endowed with sovereign powers. On grounds of its previous misuse, the term "autonomy" started to be avoided as a too critical and ambiguous term which could not fit within the categories of the modern State. It is no chance that in this period the terms "auto-amministrazione", "self-government" "decentralisation" and "Selbstverwaltung" flourished and were used to indicate the powers of entities which the State does comprehend as parts of itself. In Italy, at the beginning of the nineteenth century, the term "autarchia" started to be preferred to the word "autonomy", because it was considered as better suited to indicate entities structurally linked to the State,[1204] exercising indirect State administration. In this respect, the word "autarchia" appears to match with the French concept of decentralisation theorised by François Hauriou in France[1205] or to the German concept of "Selbstverwaltung", traditionally defined as «*mittelbare Staatsverwaltung*».[1206] The dualism "autarchia-autonomia" was at the core of an academic dispute until at least the adoption of the Italian Constitution (1947). Yet, one can argue that, initially, the concept of "autarchia" coined by administrative lawyers at the end of the nineteenth century could hardly be reconciled with the term "autonomia", since the former rejected the idea of *pouvoir municipal* and considered local government entities as mere administrative units established by the State and aimed at carrying out administrative action derived from the State, without their own scope of responsibilities. This view which regards local authorities as mere State organs is still dominant under international law. Only later on over the course of the twentieth century, the term "autarchia" started to be regarded as a synonim for "autonomia" and to be opposed to "sovereignty".[1207]

II. From the Edict on Municipalities and Provinces of the Kingdom of Sardinia (1847) to the Republican Constitution (1947)

1203 See for instance: F. Calasso, *Comune (storia)*, in: *Enciclopedia del diritto*, Milano, 1961, 169.

1204 S. Romano, *Decentramento amministrativo,* in: *Enciclopedia giuridica italiana,* 1897.

1205 F. Hauriou, *Etude sur la decentralisation*, in: Extrait du Réportoire du Droit Administratif, Paris, 1892.

1206 On the relationship between the notions of "autarchia" and "Selbstverwaltung" see: A. Longo, *L'evoluzione dei concetti di libertà individuale e autonomia comunale durante il secolo XIX*, in: Archivio giuridico "Filippo Serafini" 73, 1904. On the common roots of the terms "autarchia", "selfgovernment" and "Selbstverwaltung" see: B. Sordi, *cit*., 142 and ff.

1207 So also later on: S. Romano, *Autonomia*, in: *Frammenti di un dizionario giuridico*, Milano, 1947, 23. After the entering into force of the Italian Constitution, the notion of "autarchia" changed again and began to be qualified as the capacity of all public authorities (not only territorial ones) to carry out administrative tasks in their own interest by passing administrative acts having the same nature and the same legal effect of those passed by the State. Cf. Zanobini, *Corso di diritto amministrativo*, Milano, 1958. M.S. Giannini, *Corso di diritto amministrativo*, 1965, vol. I, 219 and ff..

Under these theoretical premises, the local government system in Italy began to be forged in the pre-unitary States and, in particular, in the Kingdom of Piedmont-Sardinia, whose administrative structures were modelled on the French system, pursuant to which communal institutions were mostly considered as mere units dependent upon the State. In particular, it is worth mentioning that the current Italian provinces have their roots in the Savoyard State. Traditionally, Italian handbooks on local government law refer to the Edict No. 659/1847 (*legge comunale e provinciale*) by King Carlo Alberto as the statute establishing modern provinces, building on the French example of departments and arrondissements.[1208] The fourty provinces of the Kingdom of Piedmont-Sardinia established after the Congress of Vienna in 1814-15 were pooled together into six "divisions" in 1818 and, as mentioned, only in 1847-48, under the auspices of King Carlo Alberto, they became "moral persons", endowed with legal personality, consistuted as elected bodies and mostly with the task of coordinating and controlling communal activities. At that time, no local autonomy in modern terms existed yet, since every deliberation of municipal, provincial and divisional level required the previous approval by central or other supervisory authorities, including the *intendente generale,* a government official which anticipates the role played later on by the prefect.

The Albertine Statute (1848), the first octroyed Constitution of the Kingdom of Sardinia and later on of the Italian Kingdom as a whole, did not contain any real guarantee for local autonomy.[1209] To the contrary, Article 74 AS merely stipulated that «*the communal and provincial institutions as well as the communal and provincial boundaries are regulated by means of law».* The only guarantee contained therein related to the construction of the legislative reservation clause as limiting interferences into local autonomy to formal law and not to government decree. However, this clause was never really complied with, since the Statute was conceived as a flexible Constitution.[1210] The first case of non-compliance occured with enactment of the government decree of 1859 (*decreto Rattazzi*), which applied the centralistic and hierarchical structure of the Savoyard State to the annexed territories of Lombardy and Veneto. On that occasion, administrative divisions ultimately disappeared, as they were replaced by provinces directly elected by the people which remained the only existing intermediate layer of government of the Kingdom.[1211]

1208 F. Staderini, *Diritto degli enti locali*, 7th ed., 1997, 36. Cf. also F. Benvenuti, *La Provincia nell'ordinamento costituzionale*, in: E. Rotelli (ed.), *Amministrazione pubblica. Autonomie locali*, Milano, 2010, 173.

1209 So also: R. Balduzzi, *Riflessioni introduttive sui presupposti istituzionali e culturali della "Repubblica delle autonomi"*, in: R. Balduzzi (ed.), *Annuario DRASD 2011*, Milano, 2011, 1-2, quoting P. Aimo, *Stato e poteri locali in Italia. 1848-1995*, Roma, 1997, 6.

1210 T. Groppi, *Autonomia costituzionale e potestà regolamentare degli enti locali*, Milano, 1994, 10.

1211 See: A. Petracchi, L*e origini dell'ordinamento comunale e provinciale italiano*, Milano, 1962 and F. Fabrizzi, *La Provincia. Analisi dell'ente locale più discusso*, Napoli, 2012.

Even if several Italian members of Parliament, including Luigi Carlo Farini and Marco Minghetti, had opted for a federal or regional-decentralised form of State,[1212] with enactment of the Local Government Law No. 2248/1865, the newly born Kingdom of Italy introduced a local government system which was modelled on the centralistic system adopted in France after the Congress of Vienna (1814-1815). In fact, the primary concern at that time was to strengthen the national unity so as to prevent the old borbonic bureaucracy putting in danger the reunification. But the uniformity brought about by this statute was also aimed at applying the "autarchic" categories *en vogue* at that time to the new system. In fact, the concept of self-government defined as people's participation in administrative activities which was highly influencial on Baron vom Stein in Prussia never formed part of the cultural and political background of the political *élites* in Piedmont, who conceived local authorities as entities subject to the State, purely exercising indirect State administration.[1213] On account of that, voting rights were limited on the basis of strictly plutocratic requirements, mayors in municipalities (until 1896) and governors in the provinces were appointed by central authorities, tight controls of legality and expediency were exercised by a multitude of officials (e.g.: *prefetto, commissione centrale per la finanza locale, provveditore alle opere pubbliche*), no organisational autonomy on their part was truly recognised and several mandatory expenditures were imposed upon them. Further, the dissolution of communal and provincial councils was no exception to the general rule of the free mandate of local representatives, but used to be a consolidated practice, in particular in the first twenty years of the new century Nonetheless, it should be borne in mind that the kind of tasks which both communes and provinces carried out was of a different nature than those they are used to carry out today. In the liberal State, between the end of the nineteenth and the beginning of the twentieth century, municipalities and provinces, even if endowed with limited rights to levy own taxes, took over a wide range of responsibilities in the field of local public and social services (local courts, primary schools, roads etc.) and enjoyed the discretional power to exercise so-called administrative functions of non-compulsory nature (*facoltative*) to address problems for which no competence of the State existed.[1214] On grounds of the transition from the liberal to the democratic and welfare State, like in Germany under the so-called Weimar Republic, electoral suffrage was extended between 1912 and 1913 not only at national, but also at municipal and provincial level.[1215]

After the fascists seized the power in 1922, not unlike what happened shortly after in Germany, a first ruthless centralistic reform was enacted with royal decree (R.D. 30 dicembre 1923, n. 2839).

1212 But their conception of local autonomy was not much different from that expressed by those MP, including Lanza, Rattazzi and Ricasoli, who advocated and ultimately imposed their centralistic views. See: T. Groppi, *cit*., 7-8.

1213 So U. Allegretti, *Profilo di storia costituzionale italiana*, Bologna, 1989 as quoted by T. Groppi, *cit*., 12.

1214 F. Pinto, *Diritto degli enti locali*, Torino, 2012, 5-8; F. Staderini, *cit.*, 38-40.

1215 G. De Cesare, *L'ordinamento comunale e provinciale in Italia dal 1862 al 1942*, Milano, 1977, 577.

Three years after, the democratically constituted bodies of municipalities were set aside and replaced by a *podestà*, a government official who exercised functions of both the mayor and the council (Law 24 febbraio 1926, n. 237). The representative bodies of the provinces, whose abolition and replacement with regional authorities had been under discussion since 1923, were also struck down two years later (Law 27 dicembre 1928, n. 2962) and replaced by officials appointed by the King (*presidi* and *rettori*). In 1931, municipalities were reduced from 9000 to 7000 and the creation of new ones was prohibited. With royal decree Royal Decree 3 marzo 1934, n. 383, a new unitary local government consolidated law collecting all previous reforms was enacted (*T.U. della legge comunale e provinciale*). It displayed the deep rejection of the fascist regime towards the notion of self-government and local autonomy; in particular, the idea whereby autonomy could entail the pursue of interests by local authorities different or even opposed to those pursued by the State was radically reversed and a strict notion of "autarchia" was reaffirmed.[1216]

After the fall of the fascist regime, in 1946, the provisions of Law No. 383/1934 which had suppressed the election of the municipal councils on a direct and universal basis with the appointment of the *podestà* were repealed, whereas direct election for provincial councils was re-established in 1951, after the provinces had been called into question as an institution, but were ultimately reaffirmed as territorial authorities endowed with autonomy by the new Constitution. In fact, as of 1948, the Italian Constitution recognized "local autonomies" (declined in the plural as *autonomie locali*) as a fundamental principle of the republican State and entrusted the legislator to promote it (Article 5 IC) and to ensure that legislation adapts to it. In other words, with the enactment of the Constitution, local autonomy appeared to be no longer viewed as the outcome of some sort of self-restraint by the State, but rather as an institution which the State ought to recognize as pre-existing and, in accordance with Article 2 of the Charter, which could not be done away with one stroke of pen by means of ordinary legislation.[1217]

In this respect, the former Article 114 IC could be regarded as a complementary guarantee recognizing municipalities and provinces along with the regions - one would say by quoting the Charter - as the *main foundations* of the Republic, which could thus not be repealed without constitutional amendment. However, the old autarchic conceptions of local government had not

---

1216 See: E. Rotelli, *Le trasformazioni dell'ordinamento comunale e provinciale durante il regime fascista*, in: S. Fontana (ed.), *Il fascismo e le autonomie locali*, Bologna, 1973, 145-155.

1217 See the Explanatory Report to the Draft Italian Constitution, submitted by on. Meuccio Ruini on January 31, 1947, who mentioned John Stuart Mill and the English notion of self-government as participation of the citizens. To be found in www.archivio.camera.it In the scholarship: E. Rotelli, *Art. 128*, in: G. Branca (ed.), *Commentario alla Costituzione*, Bologna, 1990, 3-9 and C. Esposito, *La Costituzione italiana*, Padova, 1954, 67.

been entirely swept away.[1218] In fact, it is certainly true that municipalities and provinces were defined for the first time as "autonomous entities" (former Article 128 IC), but pursuant to the subsequent former Article 129 IC they did not lose their role as decentralised units of the State.[1219] In particular, the dominant scholarship and both the administrative and constitutional case-law seemed to remain loyal to the old autarchic categories, believing that the use of the term "autonomy" by the Constitution had been a mere concession made to the municipal and provincial power to approve by-laws, but, in essence, municipalities and provinces were still mere subdivisions of the State.[1220] In particular, according to this reasoning, the guarantee of autonomy for municipalities and provinces was not as far reaching as the one provided for the regions (former Article 115 IC). The latter enjoyed the power to legislate and were granted organisational freedom and a scope of powers and responsibilities directly fixed in the Constitution (Articles 116-127 IC), whereas municipalities and provinces had no legislative power and the regulation of their powers and responsibilities as well as the identification of the principles on which their autonomy was based was left to provisions approved by the legislature.[1221] This view implied that the legislative reservation clause laid down in Article 128 IC made the actual scope of powers and responsibilities of local authorities highly dependent upon the discretional choices of the legislature. In fact, Article 128 IC stipulated that the scope of functions accorded to municipalities and provinces had to be laid down by statutes of general application (*leggi generali*), a requirement which was understood by the Constitutional Court as confirming a local government system based in principle on uniformity rather than on differentiation, that is to say on the conception whereby the very same kind of local entities shall have been assigned with the same powers and responsibilities throughout the whole country (except for regions with a special Charters)[1222]. However, by reasoning in autarchic terms, a striking discrepancy could be assessed between the scope of powers and responsibilities which could be discretionally shaped by the legislature and other constitutional guarantees, in particular those granting specific rights to local authorities and to their communities for borders' changes laid down in Articles 132 and 133 IC and the guarantee ruling out annulment of local authorities acts' for expediency reasons enshrined in Article 130 IC (see *infra* § 2 II).[1223]

1218 On the autarchic reminiscences in the Italian Constitution see: T. Groppi, *cit*., 48 and ff. and G. Berti, *Art. 5*, in: G. Branca (ed.), *Commentario alla Costituzione*, Bologna, 1975, 277.

1219 On municipalities and provinces as public authorities endowed with self-administration but assigned with a quite narrow political mandate compared to that of regions see: L. Giovenco and A. Romano, *cit*., 10-11.

1220 So M.S. Giannini, *Autonomia pubblica*, in: *Enciclopedia del diritto*, Milano, 1959, IV, 356 ff. and G. Colzi, *La Provincia e il Comune nell'ordinamento costituzionale*, in: P. Calamandrei and F. Levi (eds.), *Commentario sistematico alla Costituzione italiana*, Firenze, 1950, 381.

1221 So in particular: V. Sica, *Contributo alla teoria dell'autonomia costituzionale*, Napoli, 1951, 80 and ff.

1222 See *inter alia:* Corte costituzionale, sentt. n. 61/1958, n. 9/1961, n. 52/1969, n. 164/1972, n. 62/1973. So also: F. Staderini, *Diritto degli enti locali*, Padova, 1989, 52 and ff.

1223 So: T. Groppi, *cit*., 61.

A combined reading of Article 5 and Article 128 IC allowed furthermore to support the argument of the existence of a constitutional guarantee of local autonomy. In fact, even if the legislative reservation clause was broad, legislative provisions on conferral of administrative functions had to be passed by the legislature and not by government by-laws[1224], they had to be general, that is to say there could not be any detailed provision so that some authors believed that the statute required by the Constitution had to be a sort of "organic law"[1225] determining the principles on which the local government system had to be based as well as the functions, i.e. powers and responsibilities, to be conferred upon to municipalities and provinces.[1226] Finally, local autonomy could not be restricted beyond its core, otherwise being Article 5 in combination with Article 128 IC infringed upon. Alike under German constitutional law, an institutional guarantee protecting the essential content of local autonomy might be said to be enshrined also in Italian constitutional law, in spite of the fact that Italian scholars refused to qualify the guarantee as such.[1227]

III. Any Italian Contribution to the Drafting of the Charter?

The European Charter of Local Self-Government was drafted under the advisership of a group of seven experts, one of which was the Italian administrative lawyer, Professor Domenico Sorace and with the participation of the Executive Secretary of the Standing Conference, Mr. Rinaldo Locatelli. Though, one ought to recall that, during negotiations on the Draft Charter with national officials, the Italian delegation to the Standing Conference of Local and Regional Authorities of the Council of Europe did not present any specific amendment proposal and thus it is not fully clear to what extent the Italian understanding and conception of local government directly influenced the drafting of the treaty. An exception is the explicit reference made to the Italian constitutional framework in the Draft Explanatory Memorandum. Therein, in fact, one might read that the model whereby the principle of local self-government should be enshrined in the national Constitutions is Article 5 of the Italian Constitution.

This acknowledgment has two main implications. The first relates to the nature of the guarantee:

1224 Cf. F. Sorrentino, *Le fonti del diritto*, Genova, 1984, 119 and ff.

1225 So: G. Rolla, *L'autonomia delle comunità territoriali – Profili costituzionali*, 2008, 71, referring to the debate and the positions expressed within the Constituent Assembly.

1226 F. Benvenuti, *L'ordinamento repubblicano*, Venezia, 1967, 68 and ff.; C. Mortati, *Istituzioni di diritto pubblico*, Padova, 1975, 994; A. Sandulli, *Manuale di diritto amministrativo*, Napoli, 1989, 434, E. Rotelli, *cit*., 11-12.

1227 See in this respect: Corte costituzionale, n. 52/1969, noting that, on a case-by-case analysis, the Court had to check whether municipalities and provinces retained a core minimum of powers and functions deemed to be necessary for being truly autonomous, as stipulated by Article 128 IC. The existence of this core has been mentioned again by the Court in its rulings n. 378/2000 and n. 238/2007. Cf. also L. Cristanelli, *La garanzia dell'autonomia locale negli ordinamenti italiano e tedesco: un'indagine comparata, con particolare rifermente al comune,* Frankfurt am Main, 2012, 132-134 and P. Carrozza, *Per un diritto costituzionale delle autonomie locali*, in: Panòptica n. 13/2008, 85-86. *Contra*: T. Groppi, *cit*., 79-80.

local self-government deserves to be treated as an institutional guarantee embedded in the Constitution, whereas the mere embedment of a Chapter or Section on the territorial organisation of the State would not suffice; the second relates to the ideal content of the guarantee: as the verb "recognize" clarifies, local self-government has to be regarded as an institution pre-existing the State upon which the State can in principle not encroach. Additionally, Italian local authorities are mentioned in the Draft Explanatory Memorandum when it comes to underline the devolutionary approach followed by Article 4, para. 3 and as for their responsibility to represent the interests of their local communities. The relationship between territory and local community, which is strongly emphasized by Italian legal scholars, stands out also in the Charter and in particular in Article 5, which requires that, before borders' changes can be made, the corresponding local communities ought to be involved.

IV. The Charter as a Tool Fuelling Legislative and Constitutional Adjustment

The IX transitory and final provision of the Italian Constitution, «*the Republic, within three years of the implementation of the Constitution, shall adjust its laws to the needs of local autonomies and the legislative jurisdiction attributed to the regions*». Further, the previous VIII transitory and final provision charged the legislature to re-organise and re-allocate administrative functions among local authorities. Until then, provinces and municipalities «*shall retain those functions they then exercise and others which the regions delegate to them»*. In spite of the apparent solemnity of these time limits, no systematic legislative adjustment of the local government system occured until the 1990s. Yet, for almost half a century, the internal organisation of local authorities and their scope of powers and responsibilities went on being regulated by pre-constitutional law sources, that is to say mainly by Royal Decree 4 February 1915, n. 148 and by Royal Decree 3 March 1934, n. 383.[1228] The case-law of the Constitutional Court and of the administrative courts contributed in maintaining the *status quo*, since they declared the transitory and final provisions as containing non-peremptory norms and the fundamental principle of Article 5 as non immediately self-executing, thus leaving up to the legislator the decision to pass an "organic law" adjusting the old legal framework in accordance with the new autonomy principle.[1229]

Since the 1970s, a number of projects and drafts of "organic law" on local government were submitted to Parliament and heavily discussed. This flow of initiatives reflected the renewed interest of the Italian legal scholarship in local autonomy. In particular, in this period, new theories

---

1228 G. Berti, *Caratteri dell'amministrazione comunale e provinciale*, Padova, 1969, 6.

1229 Corte costituzionale, sent. n. 94/1965.

and interpretations more favourable to autonomy were put forward.[1230] However, before the ratification of the Charter, one has to register the enactment of a dispersed multitude of statutes aimed, *inter alia*, at restoring the electoral system based on universal and direct suffrage in municipalities and provinces, at mitigating controls over local authorities and at decentralising State functions[1231]. This process reached its peak in the 1970s when a major transfer of administrative functions was transferred to municipalities and provinces.[1232] Yet, the transition concerned more the structure and functioning of the regions, which started operating in the 1970s, than local authorities and in 1985 had not been completed yet. According to Vesperini, the adoption and ratification of the Charter constituted the beginning of a third stage in the development of local government in Italy, the first being the pre-constitutional and the second being the period in which the adjustment of the legal framework according to the standards of Constitution was long awaited.[1233]

That the ratification of the Charter represented a turning point for the local government system in Italy can be best explained by commenting on the final statement issued by the Italian delegation to the Standing Conference on March 25, 1983, in which it maintained that the Charter's principles yet conformed to the Italian legal order on local government or, at least, to bills which had been submitted to Parliament for consideration.[1234] The statement does not in fact sound convincing and shows rather that Italy used the Charter later on as a tool for reorganising its administration at the grassroots. In particular, the Italian delegation referred to Law No. 278/1976 for supporting the argument whereby involvement in the running of local government as well as the establishment of the power of local authorities to adopt their own charters (*autonomia statutaria*) were already granted under Italian domestic law. Yet, one has to bear in mind that this Law was aimed at strengthening decentralisation and citizens participation at sub-municipal level, establishing municipal districts (so-called *circoscrizioni*). Even if one might believe that such a reform was indeed in the spirit of the Charter and in particular a first recognition of the «*right of citizens to participate in the conduct of public affairs»*, one has also to remember that during negotiations on the Charter text the organisation of sub-local entities was not at hand, since they are not territorial authorities with own powers and responsibilities, but only administrative subdivisions for the

---

1230 See in particular the works by: F. Pizzetti, *Il sistema costituzionale delle autonomie locali*, Milano, 1979 and G. Rolla, *Note per una rilettura della Costituzione*, in: *Politica del Diritto*, 1978, 474.

1231 One should mention *inter alia*: D.lgs. ltg. 7 January 1946; Law No. 122/1951; T.U. n. 570/1960; Law No. 1102/1971; D.P.R. nn. 1-11/1972.

1232 D.P.R. nn. 24 July 1977 n. 616 in attuazione della legge delega 22 July 1975 n. 382. See on the innovations brought about by this Law: G. Di Giovine, *Il Comune dopo il d.p.r. n. 616/77,* Milano, 1984.

1233 G. Vesperini, *Enti locali*, in: S. Cassese (ed.), *Dizionario di diritto pubblico*, Vol. III, Milano, 2006, 213 ff., as mentioned also in S. Villamena, *Organisation and Responsibilities of Local Authorities in Italy between Unity and Autonomy*, in: C. Panara and M. Varney (eds.), *cit*., 185.

1234 CoE, *Information supplied by the Italian delegation*, 25 March 1983, RM-SL (83) 19; see also the Resolution of the Regional Council of Tuscany (*Consiglio regionale della Toscana*), 2 February 1983, CPL (17) 5, to be found at: www.coe.int/archives.

fulfillment of municipal tasks.[1235]

Further, the reform bill on the reorganisation of the local government system mentioned in the statement, notably the one presented by the Interior Minister, Oscar Luigi Scalfaro, on July 8, 1985[1236] which aimed at recognizing municipalities and provinces as territorial authorities with "full and exclusive" powers and functions to be carried out in the interest of their local communities as well as at empowering local authorities with normative powers and at further reducing controls by supervisory authorities, was eventually abandoned before the Charter was signed. The same should be said with the implementation of financial equalisation procedures and with the acknowledgement of the right to a judicial remedy of local authorities. The former was at the time «*set out in the bills under consideration by the Parliament»*, whereas the latter «*is not to be found in any of our laws on reorganisation of local self-government»,* so the Italian delegation, which hence appears to construe Article 11 as entailing a right of local authorities to have legal redress in order to safeguard their autonomy before the Constitutional Court (see *infra* § 2 II).

Thus, unlike what the delegation maintained, the Charter's provisions were to a great extent groundbreaking for the domestic legal order, which was at that time under reform.[1237] This trend continued later on. In particular, the first step towards overcoming the fragmentation of the legal framework after the entering into force of the Charter was the adoption of Law No. 142/1990. This Law, which finally repealed the pre-constitutional statute on which the local government system was grounded, did not merely consolidate previous laws into one piece of legislation, but also aimed at thouroughly reorganizing the local government system pursuant to the bill presented back in 1982.[1238] The Law was eventually repealed ten years later when a new statute was passed consolidating into a unified text other local government laws approved in the meantime (so-called T.U.E.L. or D.lgs No. 267/2000). In a way, this statute anticipated 2001 constitutional reform, since it explicitly provided local authorities with a number of additional guarantees which ordinary legislation had never acknowledged to them sofar.

First of all, both municipalities and provinces were recognized as autonomous entities pursuing

---

1235 So also the Italian Constitutional Court with reference to the domestic legal order. Cf. Corte costituzionale, sent. 23 aprile 1976, n. 107.

1236 Cf. Senato della Repubblica, IX legislatura, d.d.l. 133 and 311/A (*Ordinamento delle Autonomie locali*), submitted by the Government to the Parliament on July 8, 1985.

1237 So also: G.C. De Martin, *Carta europea dell'autonomia locale e limiti dell'ordinamento italiano*, in Rivista trimestrale di diritto pubblico, 1988, 386 and ff., whereby ordinary legislation on local government had not yet fully implemented the constitutional provisions enshrined in 1948 Constitution. Cf. also: I.M. Marino, *Aspetti della recente evoluzione del diritto degli enti locali*, Palermo, 2007; A. Tarzia, *Corte dei conti e controllo esterno sull'attività economico-finanziaria delle autonomie negli stati regionali*, Padova, 2008, 126 and ff..

1238 F. Pinto, *Diritto degli enti locali*, Torino, 2012, 21-23.

general aims affecting the local communities (Article 3 T.U.E.L.) and thus entrusted with the power to pass by-laws in matters other than those expressly provided for by law, as required by Article 4, para. 2 of the Charter. Pursuant to the Charter Article 4, para. 3 and 4, municipalities and provinces were finally to be assigned with full and exclusive administrative functions on the basis of a clear principle on allocation of tasks, that is to say the subsidiarity principle, thus abandoning the previous practice of fragmentation of functions between many entities. This, in fact, could not be directly derived neither from former Article 128 IC, nor from former Article 118 IC, whereby administrative functions were assigned in principle to regions and, only those with an "exclusive local interest",[1239] could be conferred upon to municipalities and provinces or to other local authorities by means of statute. Further, municipalities' and provinces' scope of responsibilities was indeed differentiated so as that the former enjoyed universal jurisdiction (Article 13 T.U.E.L), whereas the provinces were mainly given supra-municipal functions (Articles 19-20 T.U.E.L.), with a role of both coordination and planning with regard of municipalities and management of public services for so-called "wide-areas". A major decentralisation of administrative functions by the State in many subject matters to other tiers of government (regions, municipalities and provinces) pursuant to the principle of subsidiarity and after proper consultation with all actors involved occured along the same years with the adoption of the so-called Bassanini Law (*legge delega* No. 59/1997, implemented by decree No. 112/1998).

The T.U.E.L. also set out a new institutional arrangement concerning the relationship between the council and the executive, with the first endowed with a closed list of powers and the second with a residual competence, so as to relieve the former of the too many tasks it had been coping with (Articles 42 and 50 T.U.E.L.). The direct election of mayors and of presidents of provinces were enacted by means of Law No. 81/1993, even if no international obligation in this respect existed. Building on Law No. 816/1985, Article 82 T.U.E.L. provided for the right to appropriate financial compensation and remuneration for mayors, provinces' presidents, municipal and provincial councillors and councillors of associations of municipalites, the amount of which had to be determined by government decree. Further, municipalities and provinces were equally given the power to adopt their own by-laws[1240] and "Charters" (*Statuti*), regulating local authorities' organisation and functioning in derogation from the law, and thus enhancing the freedom of local authorities to determine their own administrative structures, as required by Article 6 of the Charter. Additionally, municipalities and provinces were entrusted with the power to call local referenda to decide matters having a local relevance and in general to promote any kind of civil society

---

1239 In this respect see: E. Rotelli, *cit*., 25 and ff.

1240 Pursuant to some authors this power was already constitutionally guaranteed under a combined reading of Article 5 and 128 IC. Cf. *inter alia*: G. Berti, *Caratteri dell'amministrazione comunale e provinciale*, Padova, 1969, 167 and F. Pizzetti, *cit*., 316.

engagement and democratic participation (Article 8 T.U.E.L.), as laid down in Article 3, para. 2, sentence 2 of the Charter and in the 1992 Convention on Participation of Foreigners in Public Life. Finally, the principle of financial autonomy (Article 149 T.U.E.L.) was designed so as to finally ensure that local authorities could rely not only on transfers (as it had been the case since 1972) but also on own revenues, without thus being forced to negotiate financial support with the central government every once in a while. As further set forth by Article 9 of the Charter, administrative functions conferred upon to municipalities and provinces by the State pursuant to Article 7 of legislative decree No. 112/1998 had to be contextually paired with the necessary resources for their discharge (principle of concomitant financing). The principle of concomitant financing for delegated tasks to municipalities was further enshrined in Article 14, para. 3 T.U.E.L.

The constitutional amendments to the Title V, Part II of the Italian Constitution, enacted with Constitutional Law No. 3/2001, introduced great innovations in the domestic order, including the power of the regions to determine their system of government, the constitutionalisation of the right of municipalities, provinces and metropolitan cities to shape and pass their own "charters" (*statuti)*, the attribution of a residual competence upon to the regions, the strengthening of territorial authorities' financial autonomy and the abolition of central government expediency and *apriori* controls over local authorities.

In particular, new Article 114 IC consistently supplemented the local autonomy principle laid down in Article 5 IC. Unlike its former wording, which stipulated that «*The Republic is articulated in Municipalities, Provinces and Regions»*, it sets now forth that «*The Republic is composed of the Municipalities, the Provinces, the Metropolitan Cities, the Regions and the State».* It namely provides for a better distinction between the State and the Republic and it re-defines territorial authorities from a bottom-up perspective: the Italian Republic is not comprised of many administrative subdivisions, but it's the self-governing or autonomous entities that form the Italian Republic.[1241] This institutional understanding of the State structure is deeply related to a subsidiarity understanding, which, since 2001, has been mentioned in the Constitution when it comes to allocate administrative functions (Article 118, para. 1 IC), but that one could derive as being implicit in Article 5 IC as a general principle upon which the Republic is grounded.[1242] All the aforementioned entities are not subject to a hierarchy, but are deemed to have "equal constitutional dignity", which

---

[1241] So: R. Bifulco, *cit*., 138; G. Rolla, *L'autonomia dei Comuni e delle Province*, in: T. Groppi and M. Olivetti (eds.), *La Repubblica delle autonomie. Regioni ed enti locali nel nuovo Titolo V,* 2001, 162. *Contra* see: A. Anzon, *Un passo indietro verso il regionalismo 'duale'*, in V.A., *Il nuovo Titolo V della parte seconda della Costituzione. Primi problemi della sua attuazione (atti dell'incontro di studi di Bologna del 14 gennaio 2002*), Milano, 2002, 230.

[1242] See: A. D'Atena, *Costituzione e principio di sussidiarietà*, in: Quaderni Costituzionali, 2001, 24-25.

means first and foremost that they enjoy an institutional guarantee against suppression.[1243] However, they cannot be considered as placed on a totally equal footing, as the Italian Constitutional Court clarified in its judgment No. 274/2003, when it stated that the Constitution does not establish full equivalence (*equiparazione*) between local authorities and the State in terms of regulatory powers. Article 114, para. 2 IC does indeed distinguish between local and regional authorities' powers and functions on the one hand and the State, holder of sovereign powers, on the other hand.[1244]

To sum up, unlike the case of Germany, which contributed to actively shape the Charter's content, in the case of Italy, it is the Charter's adoption which contributed in enhancing the political willingness to reform the domestic local government system, even at constitutional level. The Charter, in fact, set out a number of principles which were perfectly suited to implement Article 128 IC, which prescribed that municipalities and provinces were autonomous pursuant to the principles laid down by law.[1245] In this respect, it might be argued that the content of the bill submitted to the Italian Parliament in 1985 and which happened to be almost identical to Law No. 142/1990 was influenced by the negotiations on the Charter's text at the level of European Ministers responsible for Local Government. It is no chance, in fact, that Oscar Luigi Scalfaro, the Minister who submitted the groundbreaking bill in July 1985, was also the Italian Minister responsible for Local Government who signed the Charter on behalf of the Italian Republic three months later in Strasbourg. As the Congress of Local and Regional Authorities of the Council of Europe noted in its last report on the situation of local and regional democracy in Italy, it can therefore be affirmed that, *«collectively the changes of the 1990s had been inspired (in part, at least) by Italy's accession to the Charter».*[1246]

§ 2. The Charter as a *Norma Interposta* for the Constitutional Review of Legislation

In this Section, it will be argued that the Charter is an international treaty which fulfills the conditions to be effective in the Italian legal order (I.), is also legally effective in the domestic order due to the adoption of a suitable act of transformation (II.) and has the rank of an ordinary law which cannot be derogated from by

---

1243 This is not the case for other local authorities, including consortia of local authorities (*unioni di comuni*) and mountains communities (*comunità montane*). Cf. Corte costituzionale, sent. 244/2005.

1244 So also: G. Marchetti, *cit*., 3-4.

1245 Cf. E. Rotelli, *cit*., 15-18, who enumerated a number of principles which should have been at the basis of the local government system and which, curiously, matched to a great extent with those enshrined in the Charter.

1246 Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Italy*, CG (24) 8, 19 March 2013, § 29. So also in the legal scolarship: S. Sarti, *La Carta europea delle autonomie locali nell'euritmia della riforma*, Amministrazione civile: rivista di studi e politica amministrativa, 2000, fasc. n. 3, 34-43.

the legislature and which can be used by the Constitutional Cort as a special parameter (*norma interposta*) for the constitutional review of legislation (III.).

I. Validity of Consent under International Law

Together with the Federal Republic of Germany, the Italian Republic was one of the first signatory States to the European Charter of Local Self-Government on October 15, 1985. As it has been showed with reference to Germany, the Charter could produce legal effects in the internal legal order, since (a) it was introducible in the domestic legal order and (b) it was binding upon Italy under international law. In fact, as for (a), the Charter regulates the relationship between subnational authorities and other public authorities of the State, i.e. a purely internal legal matter and, as for (b), it cannot be said that any rule of Italian domestic law of fundamental importance was violated so as to invalidate the consent given by Italy to the treaty. In particular, unlike the case of Germany, at the time in which the Charter was adopted, only the Italian State (and not its Regions) was endowed with the power to conclude international treaties. Alike, no other rule of fundamental importance could be said it was violated when Italy signed the Charter.

II. Validity of Incorporation under Domestic Law

Four years after its signature, on December 30, 1989, Law No. 439/1989 authorizing the Italian President of the Republic to ratify the treaty was passed by the Italian Parliament and entered into force on January 23, 1990.[1247] In other words, the Charter was authorized for ratification and incorporated into the domestic law according to the ordinary procedure for treaties having so-called political nature and implying a modification of domestic laws (Article 80 IC). Ratification of the treaty by the President of the Republic pursuant to Article 87 IC occured on May 11, 1990 and the Charter eventually entered into force in the domestic legal order on September 1, 1990. Unlike Germany, no specific problem was raised by legal scholars with reference to the competence of the State to conclude the treaty, since the Italian regions did not enjoy the same powers as federated States and in any case, at that time, did not enjoy any constitutional right to enter international treaties or agreements with reference to the subject matters within their exclusive competence, as one might argue it is now provided by new Article 117, para. 9 IC. Alike, the regions did not enjoy any constitutional right to incorporate a treaty into the domestic legal order, as one might say to be

[1247] Law 30 December 1990 No. 439 (*Ratifica ed esecuzione della convenzione europea relativa alla Carta europea dell'autonomia locale, firmata a Strasburgo il 15 ottobre 1985*), G.U. n. 17, 22 January 1990.

the case according to new Article 117, para. 5 IC.

Yet, even after 2001 constitutional reform, whenever the subject matter of a treaty pursuant to Article 80 IC falls under the exclusive competence of the regions, the Italian Parliament has been assigned with the jurisdiction to pass a law authorizing the President to ratify a treaty and to incorporate the treaty (so-called *order of execution*) in the domestic legal order.[1248] In this case, however, a previous participation of the regions in the negotiation and conclusion of the treaty and a subsequent involvement in the implementation shall be ensured.[1249] This pattern is not far from that of the Federal Republic of Germany, in which, pursuant to Article 59, para. 2 BL and the Lindau Agreement, the Federation enjoys a general power to approve treaties for the purpose of ratification by the President, but the incorporation act follows the rules on the division of powers laid down in Article 70 and ff. BL. In Italy, yet, in the 1980s, regulation of the subject matter "legal order of local authorities" (*ordinamento degli enti locali*) fell within the exclusive competence of the State (former Article 117, para. 2, lett. p) IC), so that Law No. 439/1989 served both as an act for submitting the treaty to ratification by the President and as an act of incorporation of the legal obligations of the treaty in the domestic legal order.

If the treaty had been signed after 2001, one could argue that the issue of the competence of the Federation or of the *Länder* examined with reference to Germany would apply to some extent also to the Italian State and to the regions, since the State enjoys exclusive competence only for the attribution of the basic responsibilities, the definition of the electoral system and the regulation of the governing bodies of municipalities provinces and metropolitan cities (new Article 117, para. 2, lett. p) IC) in the regions with ordinary Charters (*a statuto ordinario*), whereas regions with special Charters (*a statuto speciale*), i.e. Sicily, Sardinia, Friuli-Venezia Giulia, Trentino-South Tyrol, Aosta Valley, enjoy an exclusive competence for local government.[1250] Nonetheless, limitations to this competence have been laid down over time by the Italian Constitutional Court so that it might seem questionable whether a treaty setting out local government principles and rights could really fall under the exclusive competence of the regions.[1251]

1248 F. Ghera, *Articolo 80*, in: A. Celotto, M. Olivetti, R. Bifulco (eds.), *cit*., 2006, 1570; P. Ivaldi, *L'adattamento del diritto interno al diritto internazionale*, in: S.M. Carbone, R. Luzzatto, A. Santa Maria (eds.), *Istituzioni di Diritto Internazionale*, Torino, 2006, 142-143; A. Cannone, *Trattato internazionale (adattamento al)*, in Enciclopedia del Diritto -Annali, Vo. 5, Milano, 2012, 1341 and ff. See also: Corte costituzionale, n. 299/2010.

1249 F. Ghera, *Articolo 80*, in: A. Celotto, M. Olivetti, R. Bifulco (eds.), *cit*., 2006, 1574-5, observing that the regions might be authorized by State law to conclude a treaty falling within the scope of Article 80 IC.

1250 Regions with special Charters could claim the power to enter an international treaty on local government, since, after 1993 and 2001 constitutional reforms, they had been assigned with exclusive competence in local government matters (Article 2, para. 4, lett. q) Law No. 131/2003). Only Sicily has retained this exclusive competence since 1948 (Article 15, para. 3 Statuto della Regione Sicilia).

1251 See: Corte costituzionale, sentt. n. 238/2007 and n. 230/2001.

As for the scope of application of the treaty in the domestic legal order, one has here to mention that, unlike Germany, when depositing the instrument of ratification, Italy did not enter any reservation, nor it made any declarations under Article 13 of the Charter as to the scope of application or as to the interpretation of some Charter's provisions. In absence thereof, as concluded by the Congress in its last report, *«it may be presumed that Charter standards are to be applied to authorities at all levels – municipalities, provinces and regions».*[1252] Not all local authorities established by Italian law are mentioned here, but only territorial tiers of government recognized as necessary by the Constitution in Article 114, para. 1 IC, that is to say public authorities carrying out own administrative functions in the interest of a local community, as pointed out by Article 3, para. 1 of the Charter. For the purpose of this work, though, it will be mainly focused on local authorities *stricto sensu,* following to the definition of Article 2, para. 1 T.U.E.L.[1253] In fact, even if after 2001 constitutional reform regions have been formally put on an equal footing with municipalities, provinces and metropolitan cities (Article 114, para. 1 IC) and the power of central auditing priorly assigned to a regional body (CORECO) has been abolished (former Articles 124, 125 and 130 IC); even if powers of execution by substitution are exercised only by State authorities and not by regions (Article 120, para. 2 IC), even if the latter can lodge constitutional complaints almost on behalf of municipalities, provinces and metropolitan cities and even if the relationship between regions and local authorities should be based on the duty to loyal co-operation rather than on hierarchy, hierarchical elements remain evident.[1254] In fact, regions with ordinary status enjoy exclusive legislative powers (Article 117, para. 3 and 4 IC) within which they are free to set out the organisation of functions through inter-municipal co-operation or to the establishment of new municipalities by means of regional law. Regions endowed with special Charters even enjoy exclusive competence to regulating their own local government system, thus being comparable more to German *Länder*, to which indeed the Charter does not apply. Further, all regions enjoy the power to attribute or delegate administrative functions (and the corresponding funding) other than the fundamental ones to municipalities, provinces and metropolitan cities in the subject matters

---

1252 Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CG (24), 19 March 2013, § 12.

1253 Article 2, para. 1 T.U.E.L. «*For the purpose of this law under local authorities one has to understand the municipalities, the provinces, the metropolitan cities, the mountain communities, the island communities and consortia of municipalities»* (translation by the author).

1254 So also: O. Chessa, *Pluralismo paritario e autonomie locali nel regionalismo italiano*, in O. Chessa (ed.), *Verso il federalismo "interno". Le autonomie locali nelle Regioni ordinarie e speciali*, Torino, 2009, 14. *Contra*: L. Cristanelli, *cit*., 55-56, believing that there are more similarities than differences between regions and local authorities after 2001 constitutional reform. Cf. also: A. Gentilini, *Regions and Local Authorities*, in: S. Mangiameli, *Italian Regionalism: Between Unitary Traditions and Federal Processes*, 2014, 223 ff, noting that local authorities may still be victims of excessive central powers on the part of both the State and the regions.

attached to their competence so as to ensure a co-ordinated and uniform stance[1255], they have the power to excute acts in substitution of local authorities whenever they do not comply with prescriptions laid down by regional law[1256] and they have to establish Councils of Local Autonomies (Article 123, para. 4 IC) in the same way as at national level the State has the duty to consult local authorities through the so-called Conferences.[1257]

This reasoning is *afortiori* true for the time when the Charter was adopted, that is to say before 2001 constitutional, when municipalities, provinces and regions were not put on an equal footing (old Articles 114 and 128 IC) and the latter were primarily assigned with administrative functions (Article 115 IC).[1258] In a nutshell, even if a certain assimilation between local authorities and regions is evident, both the State and the regions ought to be considered as hierarchical counterparts to municipalities and provinces. Hereunder, it will therefore be assumed that the scope of application of the Charter under domestic law is confined to municipalities, provinces and metropolitan cities.[1259]

III. The Charter's Rank and Value in the Hierarchy of the Italian Sources of Law

As for the rank of the Charter under domestic law, the treaty, as every other international treaty, was incorporated into the domestic legal order by means of a law ordering the execution of the treaty under domestic law and enjoys thus the rank of a national ordinary law (*legge ordinaria*). This implies that, in principle, its provisions could not amount to standards for assessing the constitutionality of laws by the Italian Constitutional Court.

However, after 2001 constitutional reform, new Article 117, para. 1 IC stipulates that: «*Legislative powers shall be vested in the State and the regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations».* Pursuant to two judgements by the Constitutional Court dating back to 2007,[1260] treaties' provisions now enjoy a a

---

1255 P. Falletta, *I sistemi regionali delle autonomie locali*, in: V. Antonelli, *Il cantiere federale delle autonomie locali*, Roma, 2010, 30-31.

1256 Corte costituzionale, sent. n. 43/2004. Cf. L. Musselli, *La sostituzione funzionale della Regione verso gli enti locali nel nuovo modello di governance territoriale,* in www.csfederalismo.it, dicembre 2009.

1257 So also: M. Cosulich, *Il Consiglio delle Autonomie Locali come strumento di raccordo fra Regione ed Enti Locali: un possible modello?*, in: R. Balduzzi (ed.), *Annuario DRASD 2010,* Milano, 2010, 128 and ff.

1258 The application of the Charter to the regions might be said to constitute a victory for the opposite position pursuant to which, under the old constitutional framework, the status of municipalities, provinces and regions was the same. So T. Groppi, *cit*., 77. Against this position see: F. Pizzetti, *cit*., 242 and ff.

1259 On the evolution of the relationship between regions and local authorities in Italy see: G. Marchetti, *Italian Regions and Local Authorities within the framework of a new Autonomist System,* in: Perspectives on Federalism, Vol. 2 Issue 1, 2010, 6-8.

1260 Corte costituzionale, sentt. 348 and 349/2007, see: F. Biondi Dal Monte and F. Fontanelli, *The Decisions No.*

higher rank than ordinary legislation. In particular, they play the role of a sort of special parameter or standard ("norma interposta") for the constitutional review of legislation, since the violation of treaty's provisions produces an indirect violation of the Constitution.[1261] "Norme interposte" are thus contained in ordinary legislation, but enjoy constitutional backing because clauses of the Constitution (in this case, Article 117, para 1 IC) stipulate that they must be complied with, even by other ordinary statutes. Literally, provisions of a treaty are thus "interposed", because they are inserted in between the constitutional standard and the reported provisions allegedly unconstitutional. In principle, this mechanism appears to be more far-reaching than the one whereby domestic law should be interpreted in conformity with international law (*interpretazione conforme*) or, as provided in Germany by the FCC, whereby it should be construed with a friendly approach towards international law (*völkerrechtsfreundliche Auslegung*).

Though, the provisions of an international treaty can substantiate the constitutional standard of Article 117, para. 1 IC, only insofar as the Constitutional Court has previously verified their compatibility with the Constitution itself. Until now, this has been the case only with reference to provisions of the European Convention on Human Rights (ECHR). This does not mean that further provisions of international treaty law will not be granted the same status in the future. According to a minority position in the scholarship, only provisions of treaties which aim at protecting human rights and which are coupled with a judicial monitoring mechanism may be granted the status of "norme interposte".[1262] Though, the Italian Court of Cassation, drawing on the general wording of Article 1 of Law No. 131/2003,[1263] which speaks of international treaties without further speciyfing on their very nature and content, appears to follow the reasoning,[1264] whereby any violation of obligations deriving from international treaty law entails also a violation of the power to legislate as

---

348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System, in www.germanlawjournal.com, Vol. 9, n. 7, 2007, 889-932.

1261 The theory of the "norme interposte" was outlined by: C. Lavagna, *Problemi di giustizia costituzionale sotto il profilo della "manifesta fondatezza"*, Milano, 1957, but see also: M. Siclari, *Le norme interposte nel giudizio di costituzionalità,* Milano, 1992. In English see: G.F. Ferrari, *Introduction to Italian Public Law*, Milano, 2008, 195-196.

1262 V. Sciarabba, *Nuovi punti fermi (e questioni aperte) nei rapporti tra fonti e corti nazionali ed internazionali*, in Giurisprudenza Costituzionale, 2007; L. Condorelli, *La Corte Costituzionale e l'adattamento dell'ordinamento italiano alla CEDU o a qualsiasi obbligo internazionale*? In Diritti umani e Diritto internazionale, 2008; G. Pili, *Il nuovo smalto costituzionale della CEDU agli occhi della Consulta…*, in www.forumcostituzionale.it,2008; V. Gaffuri, *L'esperienza di alcuni ordinamenti nazionali*, in G. Rolla (ed.), *Il sistema europeo di protezione dei diritti fondamentali e i rapporti tra le giurisdizioni,* 321 e sgg.

1263 Law 5 June 2003, n. 131 (G.U. 132, 10 June 2003), so-called "La Loggia Law" on the implementaton of 2001 constitutional reform.

1264 See, *inter alia*: Cass. pen., sent. n. 42420 16 November 2007, referring to the European Convention on Transfer of Persons Sentenced; Cass. Sez. Civ. 14 November 2008, n. 27224, referring to the Schengen Agreements; Cass. SS.UU. 25 February 2009, n. 4466 e n. 4467, referring to the Convention on the Elimination of all Forms of Discrimination against Women; Cass. civ, Sez. I ord. 22 September 2008, n. 23934, as quoted by: I. Carlotto, *I giudici comuni e gli obblighi internazionali dopo le sentenze n. 348 e n. 349 del 2007 della Corte costituzionale: un'analisi sul seguito giurisprudenziale*, in Politica del Diritto 2010, 55 ff.

enshrined in the Constitution.[1265]

Here, building upon the case-law of the Constitutional Court, it might be said that the reasoning of the Court of Cassation is to follow insofar as: **(a)** the supranational obligations at stake are not contrary to fundamental principles of the constitutional order and inalienable human rights and **(b)** from treaty law provisions one can derive a concrete and precise obligation or constraint addressed to the State and not just a programmatic commitment.[1266] As for the former condition *sub* a), one has to recall that the Italian Constitution Court, building upon the *Solange* jurisprudence by the German Constitutional Court,[1267] set a limit to supranational law's supremacy, by pointing out that fundamental principles of the Italian constitutional order and inalienable human rights raise a barrier to the entry of contrary supra-national obligations into the Italian domestic legal system (so-called "dottrina dei controlimiti").[1268] These principles and rights incarnate values which make for the constitutional identity of Italy and, as such, cannot be amended, not even through a process of constitutional reform pursuant to Articles 138 and 139 IC.[1269]

The Charter appears to meet the aforementioned requirements. First of all, as showed in the first Chapter, the Charter is an international treaty and it was accordingly incorporated by Italy with appropriate order of execution into domestic law. One can however doubt as for the "preciseness" of its obligations, since the Italian Constitutional Court, in its judgment No. 325/2010, explicitly declared that Article 3, para. 1 of the Charter has «*predominantly defining nature*», Article 4, para. 2 has «*programmatic nature»,* whereas Article 4, para. 4 is too «*generic*».[1270] However, the Court construed these provisions on the basis of their literal wording, without putting them into context or

---

1265 T. F. Giupponi, *Corte Costituzionale, obblighi internazionali e "controlimiti allargati": che tutto cambi perché tutto rimanga uguale?*, in www.forumcostituzionale.it; D. Schefold, *L'osservanza dei diritti dell'uomo garantiti nei trattati internazionali da parte del giudice italiano*, in www.forumcostituzionale.it, 2008; A. Ferraro, *Recenti sviluppi in tema di diritti fondamentali, tra illegittima espropriazione della funzione propria della CEDU ed irragionevole durata di uno scontro giudiziario*, in Rivista italiana di diritto pubblico comunitario, 2008, 651; C. Zanghi, *La Corte Costituzionale risolve un primo contrasto con la Corte Europea dei Diritti dell'Uomo ed interpreta l'art. 117 della Costituzione: le sentenze del 24 ottobre 2007*, in Dir. Uomo, n. 3, 2007, 50-61. So also: A. Sinagra - P. Bargiacchi, *Fenomeni di adattamento di ordinamenti diversi, in Lezioni di diritto internazionale pubblico*, Torino, 2009, 240.

1266 Corte Costituzionale, sent. 11 marzo 2009 n. 86, § 2, referring to the UN Convention on the Rights of the Child.

1267 See: A. von Bogdandy, M. Kottann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, *Solange ribaltata – Proteggere l'essenza dei diritti fondamentali nei confronti degli Stati membri dell'Unione europea,* in: Rivista trimestrale di diritto pubblico, n. 4/2012, footnote 113.

1268 Corte costituzionale, sent. n. 27/183; n. 232/1989; ord. 454/2006; n. 238/2014.

1269 On the so-called "counter-limits" doctrine see: M. Cartabia, *The Italian Constitutional Court and the relationship between the Italian legal system and EU,* in: A. Slaughter, A. Stone Sweet, J.H.H. Weiler (eds.), *The European Courts and National Courts*, Oxford, 1997, 138.

1270 See: Corte costituzionale, sent. 325/2010, Punto 6.2 del *Considerato in Diritto*. Alike, see judgment by the Regional Administrative Tribunal (TAR) of Lecce, n. 3035/2014. Prior to it the Italian Constitutional Court had already mentioned the Charter on many occasions, i.e.: Corte costituzionale, sent. n. 345/1997; n. 428/1997; n. 378/2000; n. 235/2002.

combining each other and thus without detailed verification of whether they do provide or not for obligations which are more precise than those set out in the Constitution. As recognized also by the Congress, even if directly invoked in a number of direct complaints by Italian regions, the Charter «*has never been determinative to the issue at stake yet*»[1271]. However, as newly acknowledged by the Studies and Research Service of the Italian Constitutional Court in a report on the implementation of the Charter in the Italian legal order, the Charter, even if its provisions are deemed not to be directly applicable, might well in the future fall under those which could be granted the rank of "norme interposte".[1272]

Unfortunately, this has not been the case in the recent Judgment No. 50/2015,[1273] in which the Italian Constitutional Court declared the complaints lodged by several regions against the last local government reform (so-called Delrio Law) as lacking any foundation. In particular, a violation of the State legislative competence as laid down in Article 117, para. 1 IC due to the "interposition" of the Charter could not be assessed by the Court, which confirmed its previous case-law, by asserting first that the Charter enjoys the value of a "policy document" (*documento di indirizzo*). This definition may at first erroneously lead to believe that the Court regards the Charter as mere soft-law. In the light of the procedure which led to the ratification of the treaty pursuant to Article 80 IC and owing to the fact that the Court itself defines Article 3, para. 2 as "a supranational norm" providing for a specific rule, this view can hardly be shared and, indeed, one cannot reasonably think that the Court joined a minority interpretation which treats the treaty as non-binding upon the Parties.[1274] Rather, as the Court did in its previous Ruling No. 325/2010, one could say that the expression *documento di indirizzo* can be better understood if translated with the periphrasis "treaty containing programmatic policies and principles" and not binding rules directly derogating from the

---

1271 Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Italy*, CG (24) 8, 19 March 2013, § 66.

1272 M. Bellocci and R. Nevola, *L'applicazione in Italia della Carta europea dell'autonomia locale*, in www.cortecostituzionale.it, October 2011, 13. In 2014 this opinion has been implicitly quoted by the Italian Court of Auditors, which issued a decision on financial compensation for local elected officials (Article 7 of the Charter). Cf. Corte dei Conti – Sezione Autonomie, Ruling 8 October 2014, n. 24, in www.corteconti.it. In the scholarship see: C. Padula, *L'autonomia: Un principio di scarso valore? La Carta europea dell'autonomia locale e le recenti riforme degli enti locali,* in www.gruppodipisa.it; S.P. Isaza Querini, *Tendenze della cooperazione territoriale in Europa e in Italia alla luce del terzo Protocollo addizionale alla Convenzione di Madrid e del Regolamento UE n. 1302/2013*, in www.federalismi.it n. 18/2014, 33; O. Chessa, *La forma di governo provinciale nel d.d.l. 1542. Profili di incostituzionalità e possibili rimedi*, in www.federalismi.it n. 25/2013, § 13; S. Mangiameli, *Brevi note sulle garanzie delle autonomie locali e sui limiti alla potestà legislativa statale*, in www.astrid-online.it, n. 19/2013; F. Merloni, *La tutela internazionale dell'autonomia degli enti territoriali. La Carta europea dell'autonomia locale del Consiglio d'Europa*, in: Scritti in onore di Giuseppe Palma, Torino, 2012, § 9; G. Boggero, *La conformità della riforma delle Province alla Carta europea dell'autonomia locale, in* www.federalismi.it 20/2012, 7-15. *Contra* however: E. Grosso, *Possono gli organi di governo delle province essere designati mediante elezioni "di secondo grado", a Costituzione vigente?*, in www.astrid-online.it, n. 19/2013.

1273 Corte costituzionale, sent. n. 50/2015, Punto n. 3.4.3. del *Considerato in Diritto*.

1274 So in the scholarship only: V. Parisio, *La Carta Europea delle Autonomie Locali e il Disegno di Legge Delega per la "Carta delle Autonomi Locali" italiana: mera coincidenza nominale o convergenza sostanziale?*, in: Il Foro amministrativo, 2007, 3612.

domestic legislative framework. This reasoning is not new, but on the contrary quite frequently used by Italian Courts and in particular by the Constitutional Court also with respect to human rights treaties so as to preserve a higher degree of discretion for the national legislature; yet, this reasoning is not convincing at all, since the programmatic nature of a treaty is assessed against a national standard and in particular against the attitude of a treaty to contain in itself a domestic act complete of all its essential elements. Since every provision of a treaty is to some extent programmatic, courts ought rather to assess whether an international provision as such requires supplementary implementation in the domestic legal order or could be given direct effect by means of (even hard) interpretative efforts without it.[1275] Notwithstanding its programmatic nature, the Constitutional Court attempts however to provide an interpretation of the Delrio Law in conformity with the Charter which is in turn construed in the light of the Italian Constitution. In other words, the Court takes the Charter more seriously into account than it had done five years before by completely dismissing the complaints asserting its violation. As it is the case also for the European Convention on Human Rights (ECHR),[1276] in fact, the Constitutional Court retains the power to weigh up the rights and principles of the Charter with the rights and principles of the Constitution, thus providing for a systematic interpretation which might differ (and in the present case indeed it does) from the interpretation by the Council of Europe monitoring bodies. Insofar as the reasoning of the Court remains sound, its departure from the interpretative standards of non-judicial bodies seems to some extent justified even more than it is the case for treaties endowed with a judicial mechanism for interpretation and enforcement, like the ECtHR in Strasbourg, since the latter are less politicised and apply standards of interpretation which are not entirely different from those used by the Italian Constitutional Court (ICC). Yet, this power the Court retains for itself bears the risk of being arbitrary to the extent that it allows to avoid the application of common standards or norms consistently applied at supranational level which might also provide for higher levels of protection for individuals but which the Court bluntly dislikes because they would restrict the sovereignty of the State.[1277]

1275 See: T. Scovazzi, *Corso di Diritto Internazionale – Parte III: La Tutela Internazionale dei Diritti Umani*, Roma, 2013, 78 and ff; T. Scovazzi, *The Application by Italian Courts of Human Rights Treaty Law*, in: B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts*, The Hague, 1997, 61 and ff.

1276 See: Corte costituzionale, sent. n. 264/2012, Punto 4.1. del *Considerato in Diritto* e n. 49/2015, Punto 6. del *Considerato in Diritto*.

1277 See for instance: A. Ruggeri, *La Consulta rimette abilmente a punto la strategia dei suoi rapporti con la Corte EDU e, indossando la maschera della consonanza, cela il volto di un sostanziale, perdurante dissenso nei riguardi della giurisprudenza convenzionale,* in www.dirittocomparati.it, 14 December 2012. See however also: R. Bin, *Interpretazione conforme: due o tre cose che so di lei*, in www.rivistaaic.it n. 1/2015, noting that a mere reference to higher standards of protection does not per se constitute an obligation for a domestic court to apply it. Higher standards of protection of a certain right mean in fact lower standards of protection for another right. Rightly, a Constitutional Court ought therefore to weigh them up.

Hereunder, it will be therefore attempted to show that many provisions of the Charter are not generic or programmatic in nature as the Italian Constitutional Court holds, but, to the contrary, if read in combination with each other and construed pursuant to the evolutive interpretation of the Council of Europe, could provide for norms more precise and more far reaching than those which one could derive from the Italian Constitution.

§ 3. Concept and Design of Local Autonomy in the Light of the Charter

Building upon the 1997 and 2013 Congress' reports on the situation of local and regional democracy in Italy, it will be attempted to assess whether Italian local government legislation has over time evolved towards the establishment of a system of self-government more in line with the Charter's principles and rights as developed also by the Council of Europe and to what extent the latter could be said to complement or supplement the guarantees laid down in the Italian Constitution.

I. The Concept of *Autonomia Locale*

1. Local Autonomy as a Fundamental Constitutional Principle

Among the twelve fundamental principles upon which the 1948 Italian Constitution is grounded, one finds also the principle of local autonomy or "autonomia locale". Article 5 of the Constitution stipulates in fact that: «*The Republic is one and indivisible. It recognizes and promotes local autonomies and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation».* As mentioned above, Article 5 IC was used as a landmark by the founding fathers of the European Charter of Local Self-Government in the 1980s while drafting Article 2. It was in fact considered being the most suited example in Western Europe of a constitutional provision emphasizing both autonomy and decentralisation as necessary features of the State, which could not be subject to constitutional amendment.

On the one hand, Article 5 IC favours autonomy at the grass-roots, i.e. a specific legal system of territorial organisation of local communities endowed with own powers which results in institutional pluralism; on the other hand, it promotes to the greatest possible extent administrative decentralisation of State tasks and services. By using the term "recognition", the IC attempted at establishing a link with territorial entities which pre-existed the Republic and were not necessarily

created by it. Nonetheless, self-governing entities are not sovereign, hence they cannot freely decide to secede, since the Republic is "one and indivisible".[1278] Decentralisation of administrative functions deals with the execution of tasks by public administrative authorities other than the State, which not necessarily are local authorities of territorial nature. Decentralisation of delegated tasks *stricto sensu* does not necessarily strengthen autonomy (e.g. *decentramento autarchico*), even though it might imply a certain degree of organisational freedom and of own responsibility upon territorial authorities.[1279] Both aspects – autonomy and decentralisation – mark the transition from the centralistic system of government typical of both post-reunification and fascist eras to a new system of government, based on several self-governing entities,[1280] enjoying own political power and carrying out administrative functions on their own. In particular, autonomy and decentralisation are constitutional principles not only of programmatic nature, as both legal scholars and the case-law appeared to believe until the end of the 1960s, but setting out concrete limitations to the content of legislative acts and to the administrative organisation of the State (Articles 97 and ff. IC).[1281] Even if not fully implemented,[1282] the possible enforcement of these principles before the Constitutional Court and their absolute constitutional rigidity contributed in making the principles of autonomy and decentralisation enshrined in Article 5 IC a legal paradigm for European local government law in the 1980s and, *a posteriori*, one could also affirm it could have inspired Central and Eastern Europe countries in the establishment of their constitutional framework on local government.

The Italian system of local government originally draws on the French dual task model, that is to say on an "administrative integrated model", in which local authorities carry out both State and local administrative functions.[1283] In Italy, the principle of local autonomy is developed but not

---

1278 According to many authors, Article 5 would further prohibit to change the system of government into a federal one, since sovereignty rests only within the State. Cf. Corte costituzionale, sent. n. 365/2007. P. Perlingieri, *cit*., 24-25. More in general, the principle whereby Italy should be "one and indivisible" would require to strike a fair balance between unity on the one hand and autonomy on the other hand so as not to create excessive differences of social and economic nature between different areas of the State (cf. Article 120, para. 2 IC). See: C. Esposito, *cit*., 1954, 67 and ff.; M. Cecchetti, *Corte costituzionale e unità/indivisibilità della Repubblica*, in: R. Balduzzi and J. Luther (eds.), *Dal federalismo devolutivo alla spending review – Annuario DRASD 2012*, Milano, 2012, 117-136.

1279 G. Amato and A. Barbera, *Manuale di Diritto Pubblico*, Bologna, 1997, 531.

1280 Autonomy, declined in the plural form, made scholars speak of a "polycentric State". M. Olivetti, *Lo Stato policentrico delle autonomie*, in T. Groppi and M. Olivetti (eds.), *La Repubblica delle autonomie*. *Regioni ed enti locali nel nuovo Titolo V,* Torino, 2001; G. Amato and A. Barbera, *cit.,* 577. In English see for instance: S. Villamena, *cit*., 187.

1281 So: R. Bifulco, *Articolo 5,* in: R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Torino, 2006, 136, also quoting R. Miele, *La Regione*, in: P. Calamandrei and C. Levi (eds.), *Commentario sistematico alla Costituzione italiana*, II, Firenze, 1950, 232; E. Rotelli, *cit*., 4. *Contra* however: R. Bin and G. Pitruzzella, *Diritto Costituzionale*, 15th. ed., 2014, 137.

1282 See: Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Italy*, CG (24) 8, 19 March 2013, § 31.

1283 On the distinction between uniform and dual task model see: S. Kuhlmann and H. Wollmann, *Introduction to Comparative Public Administration. Administrative Systems in Europe and Reforms,* Cheltenham/Northampton, 2014, 22-23.

confined to the Title V of the Constitution, which merely aims at fixing the constitutional guarantees of the single territorial entities (regions, provinces and municipalities) as well as the general scope of powers and responsibilities which are endowed with and which find further specification in ordinary legislation. The principle of local autonomy is not simply about allocation of powers and responsibilites between layers of government, which is rather a question partly addressed in Italy by the principle of decentralisation and in Germany by the federal principle. Local autonomy as a principle on which the Republic is founded postulates the co-existence of many different legal orders (*ordinamenti giuridici*) within the State, i.e. the legal order of the Republic as a whole and the one of other territorial authorities, to which is attributed the exercise of a portion of sovereign powers.[1284] According to the dominant position in the legal scholarship, the concept of local autonomy laid out by Article 5 IC is deeply bound with the notion of territory within which a local community or population, through democratic involvement, acquires its cultural and social identity. Democratic involvement is mandatory, since Article 1, para. 2 IC stipulates that sovereignty belongs to the people, who exercise it in the forms and limits of the Constitution. This link between Article 5 and Article 1, para. 2 IC makes clear why autonomy and decentralisation could not be reversed by means of constitutional amedment, that is to say because they are both inherent to the republican form of State, protected under Article 139 IC.[1285] As mentioned, this reasoning does not appear to conversely apply in Germany, where the right to local self-administration is not explicitly mentioned in the so-called eternity clause (*Ewigkeitsgarantie*) of Article 79, para. 3 BL.

2. Local Autonomy Implies Partially Uniform Representative Democracy

Pursuant to the definition of local autonomy of one of the most prominent Italian administrative lawyers, Massimo Severo Giannini, the concept of *autonomia locale* entails both a functional and a political element.[1286] Local authorities ought to represent the local communities; from them they receive a specific political mandate which they have to translate into public administrative policies. On the one hand, thus, autonomy means self-government of the local community, on the other hand means entitlement with powers capable to match the expectations of the communities. The law will have to strike a balance between the one (the self-government right of the local community) and the

---

1284 B. Pezzini, *Il principio costituzionale dell'autonomia e le sue regole*, in www.gruppodipisa.it, June 2014, cit.: «*L'autonomia è modalità di esercizio della sovranità popolare, non solo di organizzazione delle funzioni e di riparto delle competenze»;* R. Bifulco, *cit*., 136-137; A. Orsi Battaglini, *Le autonomie locali nell'ordinamento regionale*, Milano, 1974; T. Groppi, *cit*., 75-76. Cf. also: Corte costituzionale, sent. n. 106/2002, Punto n. 3 del *Considerato in Diritto*.

1285 So: R. Bifulco, *cit*., 137; G. Pastori, *Unità nazionale, autonomie, federalismo*, in: Le Regioni, 1995, 71 ff.; L. Paladin, *Problemi e prospettive di un possibile federalismo italiano*, in: Le Regioni, 1996, 612.

1286 M.S. Giannini, *Autonomia (voce)*, in: Enciclopedia del Diritto, Vol. IV, Milano, 1959, 356 and 364.

other element of autonomy (the ability of the authority to develop and implement public policies).

Though, even a minimum of both elements shall always be preserved, there is yet no agreement among Italian constitutional lawyers as to whether governing bodies of intermediate local authorities, in particular those of the provinces (*consigli provinciali*), should always be directly elected by their communities. Unlike the Basic Law (Article 28, para. 1, sentence 2 BL), in fact, the Italian Constitution does not provide for an explicit electoral standard in this respect. Nonetheless, part of the legal scholarship has attempted to derive it from a combined reading of Articles 5 and 114 IC (and prior to 2001 constitutional reform of Articles 5 and 128 IC). In particular, between the 1970s and the 1980s, several scholars started arguing that, whereas Article 114 IC refers to local government authorities as legal persons, Article 5 refers to local communities or populations. In fact, even if not explicitly mentioned, the focus of Article 5 on "local autonomies" means that the Constitution aims at recognizing and promoting first and foremost local communities. The legal persons mentioned in Article 114 IC, i.e. municipalities and provinces are autonomous insofar as they are representative of their corresponding local populations (*enti esponenziali*). By means of the corresponding public authorities local communities exercise their autonomy, a circumstance which should be considered as pertaining to the democratic nature of the Republic (Article 1, para. 1 IC) and as a form and modality of exercising popular sovereignty (Article 1, para. 2 IC).[1287] Indirect election for provincial governing bodies would not conform to this reasoning, because local communities, that is to say provincial communities would be deprived of the right to vote for a local authority which is defined as autonomous by the Constitution. However, following to the aforementioned combined reading of Article 5 and new Article 114 IC, it is rather difficult to argue that the fundamental principle protecting the autonomy of local communities requires that their autonomy should be exercised, both at municipal and provincial level, through direct election of the governing bodies. Indirect election for one level of local government, as long as democratic standards are ensured, would not eliminate provincial communities *tout court,* but would rather make provincial authorities representative of the municipalities within their jurisdiction, that is to say of other authorities. Provincial communities would yet continue to exist and simultaneously would be able to exercise their autonomy as recognized by Article 5 IC through different means other than that of direct suffrage, for example through tools of direct democracy (e.g. referendums at provincial level) or participatory democracy (e.g.: spontaneous assemblies or involvement in decision-making),[1288] as regulated by provincial Charters (*Statuti*).

[1287] E. Rotelli, *cit*., 4-5 and 17; M. Nigro, *Il governo locale*, Roma, 1980, 105; S. Pubusa, *Sovranità popolare e autonomie locali*, Milano, 1984, ; F. Pizzetti, *cit*., 187-189; F. Benvenuti, *La Provincia*, *cit.*, 176. Most recently also: B. Pezzini, *cit*., 4-5.

[1288] Yet, even in this respect, ordinary legislation draws a significant difference, since Article 8, para. 1 T.U.E.L.

The reasoning whereby all territorial authorities listed in new Article 114, para. 1 IC, that is to say municipalities, provinces, metropolitan cities, regions and the State, would all be representative of their respective communities in the same manner because they derive their authority from popular sovereignty, as set out in Article 1, para. 1 IC does not yet say anything about how the people should exercise their sovereignty, either through direct or indirect election or through other modalities[1289] and contradicts the dominant opinion, confirmed by the Constitutional Court, whereby the territorial authorities listed in new Article 114, para. 1 IC are not entirely put on equal footing, but to the contrary, albeit enjoying "equal constitutional status", have different powers and responsibilities[1290] and, as the Constitution itself confirms (Article 133, para. 1 and 2 IC), are granted a different status also with reference to the protection of their boundaries (see *infra* 3).

A last reasoning, based on the rather slim case-law of the Constitutional Court on the topic, might seem more convincing. In fact, on two occasions,[1291] the Court declared as unconstitutional the establishment of additional territorial authorities (besides those already laid down in the Constitution) endowed with universal and direct suffrage, because the only entities to which the Constitution granted political autonomy had to be those listed in Article 114 IC and no authority competing with them could be created by the legislator.[1292] *A contrario*, one should assume therefore that the latter authorities shall always be directly elected by their corresponding local communities. However, such a rule was never really affirmed so clearly as some authors believe,[1293] if one recalls that in another judgment, concerning the provinces in a Region with a special Charter, the Court stated that indirect election would not contradict the principle whereby territorial authorities should be representative of the local communities.[1294] Hence, even by means of an extensive interpretation of the relevant constitutional provisions, it cannot be said that the Italian Constitution provides for a clear rule, whereby all territorial authorities endowed with own and exclusive responsibilities, including the provinces, shall be directly elected by local populations.

It remains to be seen whether Charter Article 3, para. 2, sentence 1, which, ironically, builds itself

---

requires that participatory mechanisms for local citizens should be put in place only at municipal level. Cf. Consiglio di Stato, Ad. Generale 8 June 2000, n. 87, advocating an extension to the provincial level of government.

1289 Cf. also Corte costituzionale, sent. n. 106/2002, whereby popular sovereignty is not only about representation.

1290 Corte costituzionale, sent. nn. 274/2003, 365/2007 e 144/2009.

1291 Corte costituzionale, sentt. nn. 107/1976 and 876/1988, Punto n. 2 del *Considerato in Diritto*.

1292 See in this respect how the German and the Italian systems differ, not as to the outcome, but as to the principles. In Germany in fact the federal principle allows the *Länder* to provide for higher standards of local self-government, that is to say to provide with a direct democratic legitimacy public authorities other than municipalities and counties (see *supra* second Chapter).

1293 M. Massa, *L'esercizio associato delle funzioni e dei servizi comunali. Profili costituzionali*, in Amministrare, Anno XLIII, n. 2 Agosto 2013, 263-264.

1294 Corte costituzionale, sent. n. 96/1968, Punto n. 3 del *Considerato in Diritto*.

upon the German Article 28, para. 1, sentence 2 BL, might be said to complement the Italian constitutional framework in this respect.

2.1. Representative Bodies (*Consigli*) Have Substantial Decision-Making Powers

First of all, it has to be assessed what is under Italian law the deliberative body to which the Charter refers in Article 3, para. 2, sentence 1. At constitutional level, no reference thereof can be found. In fact, since the Italian Constitution does not explicitly mention what local authorities ought to be directly or indireclty elected it neither makes clear what should be the governing body which ought to be representative of the local population.

A clarification can be found in ordinary legislation. In this respect, one has preliminarly to point out that, unlike in Germany, where each *Land* can develop its own local government system, by designing the relationship between the deliberative and the executive organ as it sees fit, in Italy the State enjoys an exclusive legislative power with reference to the definition of the governing bodies of municipalities, provinces and metropolitan cities (Article 117, para. 2, lett. p)). This means that a differentiation is only partially possible, that is to say the State might provide for a different relationship between the governing bodies of the provinces and those of the metropolitan cities and the municipalities, whereas, like in Germany, every single municipality, province and metropolitan city will be able to complement but not to derogate from the legislative framework by further designing the relations between its own governing bodies.

Until 1990 the municipal and provincial council was assigned with a general competence on all matters which were not conferred upon to the mayor or president of the province or to the executive committee (*giunta*) and hence it was clearly to be considered as the deliberative body in both municipalities and provinces. After enactment of Law No. 142/1990 and, in particular, of Law No. 81/1993 on the direct election of the mayor and of the president of the province, the role of the latter was strengthened, the general competence of the council set aside and the periods of office tied one to the other, pursuant to the rule *simul stabunt, simul cadent*. Nonetheless, Articles 36 and 42 of the T.U.E.L. again clarified that the deliberative body of municipalities and provinces was the municipal and the provincial council (*consiglio comunale o provinciale*), being it endowed with those powers which are considered by the Council of Europe to concern more directly the exercise of the right of local self-government - approval of the budget and local taxes, adoption of by-laws and regulations, deliberation on spatial plans - and the supervision over the executive.

On grounds of the recent local government reform, Law No. 56/2014, better known as Delrio Law after the name of the Minister for Regional Affairs and Local Autonomies under the Government of Prime Minister Enrico Letta, the governing bodies of the provinces were completely reorganised and those of the metropolitan cities established for the first time. In particular, Article 1, para. 54 and 55 of the Delrio Law provide for three new governing bodies: the provincial council, the mayors' assembly and the president of the province. The provincial council is the deliberative organ pursuant to the Charter, since it is vested with the the power to adopt regulations, plans, programs and to approve the budget, whereas the mayors' assembly is merely charged with the deliberative task to approve the province "Charter" (*Statuto*), otherwise enjoying only consultative status. The president of the province is the executive organ. Yet, it must be borne in mind that the new organs and their corresponding functions were only broadly outlined by the Law so that the new provinces enjoy a quite significant power of self-organisation.

The same could be said for the new metropolitan cities. Pursuant to Article 1, para. 8 and 9 of the Delrio Law, they will be governed by a metropolitan mayor, a metropolitan council and a metropolitan conference. The metropolitan council is the deliberative body pursuant to the Charter, since it is vested with the power to adopt regulations, plans, programs and to approve the budget, whereas the metropolitan conference is merely charged with the deliberative task to approve the metropolitan city "Charter" (*Statuto*), otherwise enjoying a mere consultative status. The metropolitan mayor, which coincides with the mayor of the biggest municipality of the city, is the executive organ.

2.2. No Mandatory Direct Election for Provinces and Metropolitan Cities

The problem related to the direct election of the provinces and of the metropolitan cities arose most recently, when the first proposals were submitted to the Italian Parliament aimed at transforming the provinces into entities merely supportive of municipalities' tasks, thus totally depriving them of those management responsibilities conferred upon them at least since the 1990s.

This was in particular the case with the enactment of Law Decree No. 201/2011, whose Article 14 conferred upon provinces only a general power of coordinating the activities of the municipalities within their territory. The subsequent Article 17, para. 10 of the Law Decree No. 95/2012 designed a wider scope of responsibilities, confirming only some of the original functions attributed to them in the past with regard to spatial planning, environment, public transportation, roads maintenance and construction and road traffic. Further responsibilities were required to be transferred to municipalities or regions by both State and regions, depending on their competence. These

measures were meant at progressively hollowing out provincial responsibilities and were coupled with a new electoral system setting out the indirect election of the provincial councillors (*elezione di secondo grado*) by municipal councillors and mayors.[1295] The Constitutional Court, requested by many regions to pronounce on the reform's conformity with the Constitution and, *inter alia*, to the Charter, declared its constitutional illegitimacy on grounds of violation by the government of the rules for issuance of Law Decrees (Article 77 IC), without yet going into the merit of the question.[1296]

The question of the constitutional guarantees of the provinces remained of its time and topical after the entering into force of the Delrio Law, which aimed at transforming the provinces into a tier of government fully dependent on municipalities. However, in spite of its aim, the Delrio Law does not truly make them a "multi-utility" or a consortium in the hands of the municipalities, as some scholars wrote.[1297] In fact, as stipulated by Article 1, para. 2 of the Law, the provinces constitute no aggregation or association of municipalities, but remain "territorial authorities over large areas" (*enti territoriali di area vasta*), that is to say both rural and urban areas, a definition which is all but new, since it can first be traced in Law No. 142/1990. And this definition is not merely declaratory. In fact, the scope of own functions attached to the provinces remains mostly the same as before. The "new provinces", in fact, are endowed with responsibilities of mere support to municipalities, some of which (collection and analysis of data and technical and administrative assistance to local authorities) attached to them by law since the 1980s[1298] but also with own administrative functions which range from territorial planning, protection and enhancement of the environment, to planning of transport services, authorization and control over private transport, provincial roads and related road traffic network, management of school buildings. Only few tasks in subject matters including waste management, labour and promotion of economic development might be reallocated among different tiers of government (possibly including the provinces themselves!) by the regions.[1299]

1295 The Congress took note of this reform in its report on intermediate level authorities. See Congress of Local and Regional Authorities, *Second-Tier Local Authorities – Intermediate Governance in Europe*, CG (23) 13, 7 February 2013, § 66-68.

1296 Corte costituzionale, sent. n. 220/2013. On the ruling see, *inter alia*, the following comments: M. Massa, *Come non si devono riformare le Province*, in www.forumcostituzionale.it, 2013; G. Di Cosimo, *Come non si deve usare il decreto-legge*, in www.forumcostituzionale.it, 2013; G. Boggero, *I limiti costituzionali al riordino delle Province nella sentenza n. 220/2013 della Corte costituzionale*, in www.astrid-online.it, 2014.

1297 So for instance J. Luther, *La vastità delle aree e quella dei problemi della loro sistemazione*, in: www.polis.unipmn.it OPAL n. 4 – May 2014; and F. Pizzetti, *Una grande riforma istituzionale: la legge n. 56 del 2014 (legge Delrio)*, in www.astrid-online.it, n. 9/2014.

1298 So already Art. 14 Law No. 142/1990 and Article 11 Law Decree 28 February 1983 No. 55, converted into Law 26 April 1983, No. 131.

1299 According to an agreement reached within the Joint Conference by territorial authorities with the State, the provinces will apparently not be assigned with additional functions by State and regions. If accordingly followed, this re-allocation of responsibilities without considering the provincial level of government would raise doubts of compatibility with the current text Italian Constitution (Article 118 IC), but not with the Charter since Article 4, para. 1, sentence 2 does not make binding conferral of additional tasks besides those defined as basic. Cf. Conferenza unificata, *Accordo per il trasferimento delle funzioni a Regioni e Comuni, finora assegnate alle Province,* 11 September 2014.

Further, responsibilities will be assigned to provinces on account of liquidation, dissolution or winding of consortia at provincial level. Thus, as noted in the literature, the scope of provincial responsibilities does not appear to shrink at all[1300] or, as the Congress believed back in 2013, to be confined to supervision on municipalities, whereas it remains yet to be seen whether old provincial functions will be reallocated only to municipalities or also to regions.

In any case, the "new provinces" do enjoy powers distinct from those of the municipalities, from which they can only theoretically be assigned with municipal functions (Article 1, para 89). Their role is not predominantly supportive of municipalities' activities, as it is the case of the Spanish *diputaciones*, but aimed at managing tasks and delivering services in the interest of a provincial community or population.[1301] As such, they ought to be funded not by means of contributions by municipalities, but via transfers from State and from own taxes, which, even though being very limited, have not been hollowed out yet.[1302]

If the provinces are territorial authorities mainly endowed with own functions, it goes without saying that their deliberative bodies should be representative of the provincial population. Article 1, para. 69 of the Law stipulates that provincial councils will be elected by mayors and municipal councillors of the municipalities within the jurisdiction of the Province and not by the population living within the jurisdiction of the province. Even if Article 1, para. 74 sets forth that the provincial council ought to be elected on the basis of direct, free and secret ballot, the election cannot be considered as direct, since the right to vote and the right to stand in for election is limited to municipal councillors and mayors. Hence, the province is no longer the higher representative governing body of the provincial community, but has turned to an entity representative of the municipalities, even though it is still assigned with own powers distinct from those of the municipalities. Thus, following to the Congress monitoring practice outlined in the first Chapter, one could say that the new electoral system designed by the Delrio Law infringes upon Article 3, para. 2 of the Charter. To the same conclusion came the Congress in its last report when it stated that, in spite of the fact it is not a question for the Congress to decide whether an intermediate level of local government should be retained or repealed, «*the provinces are local authorities for Charter purposes and Article 3 requires that councils be directly elected*».[1303]

1300 C. Padula, *cit*., 8-9; F. Merloni, *Sul destino delle funzioni di area vasta nella prospettiva di una riforma costituzionale del Titolo V,* in: Le Istituzioni del Federalismo n. 2/2014.

1301 With reference to the previous, but similar reform of the Monti government also: S. Civitarese Matteucci, *La garanzia costituzionale della Provincia in Italia e le prospettive della sua trasformazione*, in: Le Istituzioni del Federalismo, n. 3 (2011), 481 and G. Vesperini, *Le nuove province*, in: Giornale di diritto amministrativo, n. 3/2012, 275 and ff.

1302 Artt. 16 and ff. del d.lgs 6 May 2011, n. 68. In reality, the financial situation of the Italian provinces is dramatic, since the State already cut transfers to them, thus bringing them in a state of insolvency (so-called *dissesto finanziario*).

1303 Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CG (24) 8, § 16.

Similar remarks can be made also with reference to mtropolitan cities, which were due to be set up with the enactment of Law No. 142/1990, which first mentioned and regulated their establishment. Though, neither this statute, nor the subsequent one (Law No. 265/1999) have been implemented so that no metropolitan city has been created ever since.[1304] The obligation to establish metropolitan cities is of course not an international one (even if the circulation of models contributed to its popularity throughout Europe and beyond), but was introduced in the Constitution by 2001 constitutional amendment (Article 114, para. 1 IC), which was ultimately implemented by the Delrio Law. The new self-governing entities, already listed by Articles 23 and 24 of Law No. 42/2009 on so-called "fiscal federalism" (i.e.: Milan, Turin, Genoa, Bologna, Venice, Florence, Naples, Rome, Bari and Reggio Calabria), superseded the corresponding provinces by January 1, 2015, but will co-exist with all the municipalities within their jurisdiction, that is to say the municipalities which formed part of the provincial jurisdiction have not been pooled together in a big metropolitan city. To the contrary, the old province has been renamed metropolitan city and was given additional responsibilities – which were previously partly assigned to regions – so as to tackling problems typical of conurbations, including increasing commuting and immigration flows, pollution, economic development and misallocation of resources.

In fact, following to Article 1, para. 44-46 of the Delrio Law, they have been assigned with all functions already attributed to the Provinces as well as with other basic responsibilities which range from general spatial planning (instead of the region), promotion of socio-economic development, roads and transportation, organisation of services of general interest. A residual role is played by those functions supportive of municipalities' activities; municipalities within their jurisdiction are explicitly allowed to delegate or to be delegated functions by the metropolitan city (Article 1, para. 11, lett. b)). Additional functions will be delegated by the State and by the regions following to the principles of subsidiarity, differentiation and adequacy (Article 118, para. 1 and 2 IC). In a nutshell, there can be little doubt that metropolitan cities are territorial authorities with own powers and functions distinct from those of the municipalities, which are likely to be funded not only via State or regional transfers but also by means of local taxes and charges and in any case not by compulsory contributions of the municipalities.[1305] As said before with relation to the provinces, one would expect that the deliberative body of a territorial authority like a metropolitan city be elected by direct suffrage. This is however not the case. Article 1, para. 25 of the Delrio Law, in

---

1304 On the past efforts to establish metropolitan cities in the Italian legal order see: A. Brancasi and P. Caretti, *Il sistema dell'autonomia locale tra esigenze di riforma e spinte conservatrici: il caso della Città metropolitana*, in: Le Regioni n. 4-2010, 727 ff.

1305 Cfr. Unione delle Province Italiane (UPI), *L'attuazione della legge n. 56/2014: il riordino delle funzioni delle Province e delle Città metropolitane e l'accordo in Conferenza unificata*, in www.upinet.it, 3 July 2014.

fact, stipulates that the metropolitan council will be elected by mayors and municipal councillors of the municipalities within the jurisdiction of the metropolitan city and not by the citizens living within the jurisdiction of the metropolitan city. Even if Article 1, para. 30 sets forth that the metropolitan council ought to be elected on the basis of direct, free and secret ballot, the election cannot be considered as direct, since the right to vote and the right to stand in for election is limited to municipal councillors and mayors. The Law exceptionally provides for the election of both the mayor and the council on the basis of universal and direct suffrage (Article 1, para. 22). However, the choice for direct election is subject to two alternative conditions: a) the most populated municipality within the jurisdiction of the metropolitan city (*comune capoluogo*) should be divided into several municipalities; b) the most populated metropolitan cities (i.e. Rome, Milan and Naples) ought to establish so-called "homogenous areas" (*zone omogenee*), to which some of the administrative functions will be delegated. Set aside any comment on the actual purpose of these provisions, it must be borne in mind that, pursuant to the Charter, local self-government is not a right that territorial authorities can freely decide to waive. Local self-government under the Charter has to be understood as an institution which, once enshrined into domestic law, cannot be given up by the legislator, let alone by those public authorities which should enjoy and exercise it as a right. Thus, also the electoral standards followed for the election of deliberative bodies of metropolitan cities cannot be deemed to conform with Article 3, para. 2, sentence 1 of the Charter.

In its recent judgment No. 50/2015 the Italian Constitutional Court did not share this reasoning, thus eventually allowing for a departure from a common European standard but, as mentioned before, formally attempting to provide an interpretation of the Delrio Law in conformity with the system of the Charter. After having assessed that no constitutional provision makes a direct election of the deliberative body of provinces and metropolitan cities binding, the Court in fact stressed that such a rule can not even be derived from Article 3, para. 2 of the Charter. In particular, so the Court, «*the international norm whereby the members of the assemblies ought to be freely elected has indeed a crucial importance as a democratic guarantee of the local government system; yet it has to be understood in the sense that there is a need of effective representativity of the local communities within the assembly. In this respect, an indirect election can not be ruled out, insofar as alternative mechanisms ensuring a real participation of the stakeholders are put in place».* According to the Court, these mechanisms exist, since the members of the provincial assembly have necessarily to be replaced by new members when they no longer perform their duties as councillors or mayors at municipal level (Article 1, para. 65 and 69). In other words, the local communities would still be sovereign. The authors of the complaints, so the Court, did not take into sufficient account the issue of the alternative mechanisms provided for by the law for ensuring democratic participation, but

«*they rather raised the question in abstract and generic terms, without referring neither to the concrete legal framework nor to the responsibilities attached to the new provinces, the latter being a non-negligible aspect also with reference to the European Charter*».

Even if it is true that the regional complaints were not very well reasoned, since they did not take into account the aforementioned relationship between own responsibilities, territorial jurisdiction and direct election, the Court's reasoning does not either appear sound. In fact, rather than focusing on the interpretation of the requirement of "direct election" it affirmed that indirect election of the provincial councils does not contravene the freedom of vote, which is indeed true also under Council of Europe law, but it did not neither address the question of the representativity of authorities exercising own and exclusive powers and responsibilities, nor the question to what extent alternative mechanisms of direct and participatory democracatic tools might supplement and replace representative democratic ones.[1306] In fact, the Court did not examine the question whether the provinces are still territorial authorities with own powers and responsibilities, but it appeared to imply that the requirement of direct election of local authorities deliberative bodies laid down in the Charter cannot complement the electoral standards of the Constitution, which in fact merely provides for the freedom of vote (Article 48, para. 2 IC). A different and more reasoned approach by the Court would have been desirable. In particular, the Court could have taken into account the "case-law" of the Congress and could have come to the conclusion that, even if a rule exists under Council of Europe law, whereby territorial authorities endowed with a set of fundamental powers responsibilities not shared with other levels of government ought to be directly elected by the people, the same rule could be subject to exceptions.

In particular, as far as metropolitan cities are concerned, it could have reasoned that direct election is indeed made possible upon request of the local authorities themselves and that no Congress document refers to local self-government as a right which local authorities cannot waive; as far as provinces are concerned, it could have affirmed that indirect election has been exceptionally admitted in case of transitional reforms awaiting further reforms, as it has been the case in the past with the transformation of the Latvian districts into indirectly elected bodies (see *supra* first Chapter). At present, in fact, a constitutional reform bill has already been approved by one of the two Chambers of the Italian Parliament. This reform aims at amending the Constitution so as to *inter alia* do away with the provinces as self-governing entities endowed with an institutional right against suppression. In other words, once they have disappeared from the text of the Constitution,

---

[1306] See in this respect: A. Lucarelli, *La sentenza n. 50/2015 della Corte Costituzionale. Considerazioni in merito all'istituzione delle città metropolitane*, in: www.federalismi.it n. 8/2015.

their existence will be guaranteed only by ordinary State legislation.

3. Direct Democratic Participation Permitted by Law and Implemented by Local Charters

As observed above with reference to Article 3, para. 2, sentence 2 of the Charter and to Article 20, para. 2 in combination with Article 28, para. 1, sentence 2 BL, also in Italy representative democracy is regarded as the primary solution for enabling citizens' participation in the conduct of public affairs, even if directly and participatory democratic instruments are permitted by the law too. As it will be showed, unlike in Germany, direct democratic tools and in particular referendums are used more at national than at local level, whereas participatory democracy has developed along the lines of the German experience, but on a less institutionalised degree.

The Italian Constitution provides for three different tools of direct democracy: the right of the people to introduce a legislative draft (Article 71), the right to petition (Article 50) and the right to initiate a referendum (Article 75). All these rights are exercised by the people at national level, that is to say popular legislative drafts shall be submitted to the Italian Parliament, petitions should be addressed to the Italian Parliament, whereas referendums can be initiated to repeal laws or other acts having legal force at national level. Regional Charters provide for referendums for repealing laws, consultative referendums, which are unknown at national level, and, more rarely, referendums for proposing a bill (e.g.: Lazio). Further, other two kinds of referendum are set out in the Constitution: one has confirmative nature and relates to constitutional amendments approved by the Parliament with less than a two thirds majority (Article 138), the other has consultative nature and concerns the borders' changes of regions, provinces and municipalities (Articles 132 and 133).

Therefore, no constitutional provision deals with the degree of direct democracy which should be ensured at local level, so that one could argue that national and regional legislators are entrusted with a wide margin of discretion as to the development of new forms of direct and participitory democracy at this tier of government. For a long time, however, the hierarchical principle whereby the authority of the public administration could not be deprived by the participation of citizens, which were considered to being merely subject to it, has been dominant.

Starting with the 1990s reforms, the idea of citizens' participation in administrative procedures and in the conduct of public affairs at local level began to gain pace. In particular, Article 8 T.U.E.L. conferred upon to municipalities, provinces and metropolitan cities themselves the power to regulate in their Charters the mechanisms for ensuring the democratic participation of local

communities. On the one hand, Article 8 requires local authorities to develop forms of citizens' participation at municipal and sub-municipal level (para. 1),[1307] such as fora, commissions or committees as well as specific tools for engaging EU citizens and foreign residents, also building on the principles of the 1992 Convention on the Participation in Public Life of Foreigners at Local Level (para. 5), as well as within the framework of administrative procedures which migh result in the adoption of acts impinging on subjective rights (para. 2); on the other hand, it mandates local authorities to develop forms of popular consultation, including petitions, applications, proposals filed by individual citizens or of group of individuals, whereas it does not oblige local authorities to call and hold local referendums (para. 3), but if they decide to do so, then local referendums can only be held upon request signed by the citizenship and within the scope of subject-matters they deal with according to the law (para. 4).[1308] The power of local authorities to resort to this instrument was first laid down by Article 6, para. 1 of Law No. 142/1990, even if the practice to hold local referendums of consultative nature had been practised since the 1970s.[1309] Yet, the new legal framework is not clear whether referendums shall have, as it was in the past, only consultative[1310] or also binding nature and, if binding, whether referendums might serve at repealing and approving by-laws or also at proposing new by-laws. The choice has ultimately been left to local authorities themselves,[1311] together with the duty to set out all necessary requirements for admitting the question or the questions, including procedures for initiating the consultation, the quorums and the issues on which no consultation can take place.[1312]

Yet, the legal framework set by the State in a time in which enjoyed exclusive legislative powers on local government might be complemented after 2001 constitutional reform by regional legislative

---

1307 Consiglio di Stato, Ad. Gen. 8 June 2000, n. 87/2000, whereby participation should have been allowed also at provincial level.

1308 T.A.R. Puglia - Sez. III, n. 1926/2005, precising that referendums should concern only general administrative acts approved by the governing bodies of a local authority and not acts of implementation of those acts which fall within the competence of the local management (*dirigenza*) or acts which require the approval of higher level authorities.

1309 A. Celotto, *Regional and Local People Consultation through Referendum*, in: Perspectives on Federalism, Vol. 4, Issue 1, 2012, 9.

1310 So for instance: F. Pinto, *cit.*, 82, contending that referendums at local level should be limited otherwise possibly resulting into a plebiscitarian transformation of the form of government.

1311 Consiglio di Stato, sez. I, 14 February 2001, n. 39, finding that, unlike in the past, also referendums for repealing or approving by-laws referendums are legitimate. Yet, the approval via referendum does not really constitute a replacement of classic representative democracy by direct democracy, since the final act is adopted as an act of the council, being referendum only an act within the administrative procedure, but not its final act. Cf. *Art. 8* in: R. Cavallo Perin and A. Romano (eds.), *Commentario breve al Testo Unico degli Enti Locali*, Padova, 2006,

1312 Consiglio di Stato, sez. I, 26 January 2000, n. 3919/1995. See: C. Di Marco, *Democrazia, autonomie locali e partecipazione fra diritto, società e nuovi scenari transnazionali*, Padova, 2009, 275-278. Interestingly, several Charters of Italian local authorities also allowed 16-year-olds the right to sign the popular initiative for a referendum and also to vote in local referendums. The same was affirmed with reference to foreign residents. T.A.R. Toscana, sez. II, 17 November 2011, n. 1754. Not all subject-matters which local authorities are assigned with should be subject to referendum. Consiglio di Stato, sez. I., 4 November 1998, n. 419. Tax issues as well as acts by which the mayor appoints company boards are generally issues on which no referendum can be held.

measures, unless one contends that local authorities enjoy an exclusive normative power in this respect. Yet, at present no Region has passed a law on the use of referendums at local level, which in the practice remain mostly confined to being tools of consultative nature, whose call is prevented by high hurdles, one of which is the legislative clause banning the call of local referendums concomitantly with local or national elections (Article 8 T.U.E.L.). The very reason of this provision lies in the risk of turning the elections themselves into plebiscites, but it threatens to making recourse to referendum even more sporadic. The German experience might teach that direct democracy at the grassroots may be made more vital if local authorities were not in the position to set themselves the procedural rules for calling a referendum, since this bears the risk of leading to the practice of creating high hurdles for preventing their call by local political elites. It is not a chance that Article 3, para. 2, sentence 2 of the Charter appears to confine to statutory provisions the regulation of direct democratic tools.

4. The Status of Local Elected Representatives: The Case of Provincial and Metropolitan Councillors

Within the framework of the reorganisation of the provinces and the establishment of metropolitan cities, the Delrio Law also sets out that provincial and metropolitan councillors as well as provincial and metropolitan executives will be bound to carry out their duties entirely free of charge (Article 1, para. 24 and 84), i.e. they will neither be granted financial compensation for expenses incurred in the exercise of the office nor any other compensation for loss of earnings or remuneration for work done, let alone any social welfare protection. The same applies to municipal councillors and mayors representing their municipalities in the governing bodies of a so-called union or consortium of municipalities (new Article 32, para. 3 T.U.E.L). Apparently, this is not only a derogation from the provisions laid down in Chapter IV of the T.U.E.L. (Articles 77-87) and a possible violation of, *inter alia*, Article 51, para. 1 IC, but first and foremost a blunt contradiction of the international obligation laid down in Article 7, para. 2 of the Charter.[1313] The Congress, in its last report, did not explicitly address this issue, but it merely lamented the reduction in municipal councillors' allowances without pointing out whether a violation of the Charter existed or not.[1314]

The full abolition of any remuneration or compensation scheme (*indennità di funzione, gettoni di*

[1313] So also: P. Racca, *Lo status degli amministratori degli enti locali*, in V. Nicotra and M. Delfino (eds.), *L'ordinamento istituzionale delle autonomie locali*, Vol. 2, ANCI, 2012, 302.

[1314] Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CG (24) 8, § 59. Cf. Article 1, para, 52-62 of Law No. 266/2005, Article 61, para. 10 of Law Decree No. 112/2008; Article 5, para. 6-11 of Law Decree No. 78/2010.

presenza or *rimborsi spese*) for second-tier local politicians stems from a new governmental approach to the role which shall be played by elected representatives in public life and which will presumably apply also the new members of the Senate after the constitutional reform will have been entered into force. For reasons related to budgetary constraints, intermediate local authorities' governing bodies were not only deprived of a system of election based upon direct and universal suffrage, but also of the financial support which is considered to be necessary to ensure they «*may not be prevented by purely material considerations from standing for office»,* as clarified by the Explanatory Report to the Charter. The reason whereby no compensation or remuneration is due draws no longer, as it happened to be the case in the nineteenth century (e.g.: Article 50 of the Albertine Statute), on honorary memberships, but rather on the circumstance that, like councillors of unions or consortia of municipalities, provincial and metropolitan councillors ought to be at the same time municipal councillors and mayors, that is to say local politicians who are already compensated for their activities. The status of provincial and metropolitan councillors is thus recognized as equivalent as the status of municipal councillors or mayors sitting in the governing body of a union or consortium of municipalities. Here, it should be assessed, whether this equivalence can be justified on the basis of the Charter and, in particular, whether local elected officials fulfilling multiple mandates might be compensated or remunerated only for one of them.

First of all, it must be recalled that the Charter does not offer any guarantee against statutory provisions regulating the status of local politicians pertaining to local authorities to which the Charter does not apply. This is indeed the case of councillors of unions or consortia of municipalities, which are not territorial authorities for the purpose of the Charter, but which are covered under Article 10 as inter-municipal entities. However, the very same councillors are also mayors or councillors of the municipalities forming the union or consortium. Thus, our analysis will concentrate on the violation of their latter status rather than on the violation of the status as councillors of the unions or consorta. As for the first question, the Charter does not provide for any explicit principle allowing us to say whether the aforementioned equivalence can be justified or not.[1315] Here, it can only be reminded that provinces and metropolitan cities are not consortia or unions of municipalities pursuant to the Charter. Hence, it might seem adequate to distinguish between the status of local elected representatives of territorial authorities and representatives of non-territorial authorities. Unless one resorts to the principle of proportionality as a general principle of European administrative law, this assessment appears beyond the Charter's scope.

[1315] Such analysis might however be carried out under domestic law pursuant to Article 3, para. 2 IC. See: Corte costituzionale, sent. 30 dicembre 1997, n. 454 (Punto n. 4 del *Considerato in Diritto*).

On the contrary, as for the second question, it has to be borne in mind that Article 7, para. 2 of the Charter applies to all representatives of territorial authorities within the Italian Republic, that is to say to municipalities, provinces, metropolitan cities. This Charter's provision requires all member States to ensure mandatory compensation at least for expenses incurred by local councillors while exercising their functions,[1316] notwithstanding their holding of multiple mandates. Insofar as not incompatible between each other, municipal councillors or mayors should thus receive compensation at least for expenses incurred as councillors of unions or consortia of municipalities and as provincial or metropolitan councillors. It should however be examined whether any margin of appreciation by the member State[1317] in the application of Article 7, para. 2 exists. A clarification comes from the original intent of the Charter, that is to say from the Draft Explanatory Memorandum of 1981, whereby «*the attainment of an electoral mandate should not result in undue financial or professional sacrifices».* In other words, a margin of appreciation can be claimed by the State, that is to say no compensation or remuneration should be granted whenever a local elected official is not burdened with particular (either financial or professional) sacrifices. In this respect, provisions which ensure compensation or remuneration depending on the size of municipalities, even ruling it out in municipalities under 1000 inhabitants (e.g. Article 16, para. 18 Law Decree No. 138/2011), cannot be deemed as entirely illegitimate in light of Article 7, para. 2. However, in the present case no such appreciation was expressed by the legislator which has radically done away with all sorts of compensation or remuneration, thus burdening local elected officials with two different offices in a way which hinders their proper discharge. A further limitation of local elected officials' "financial rights" can be derived from Article 9, para. 1 of the Charter, whereby local authorities shall be entitled to adequate financial resources within the limits set by national economic policy. In times of crisis, it should be considered as adequate to reduce allowances and compensations at all levels of government. However, the abolition of all sorts of compensation schemes and not only of some of them appears to directly curtail the core of local democracy.

II. Institutional Design of Local Autonomy

1. Principles on Allocation of Powers and Responsibilities

[1316] This happens to be the case also when a local elected representative participates in meetings of an international association of local authorities to which the local authority belongs to (Article 7, para. 2 in combination with Article 10, para. 2 of the Charter and Article 85 T.U.E.L.).

[1317] Corte costituzionale, sent. n. 454/1997 and prior to it see: Corte costituzionale, sentt. n. 193/1981 and n. 35/1981, noting that the decision whether local elected officials should be granted compensation or allowances or overlapping of benefits pertains to the margin of appreciation of the legislator. Yet, Article 7, para. 2 of the Charter could not be invoked as a benchmark for assessing constitutionality.

1.1. An Intangible Nucleus of Functions Unsteadily Rooted in Legislation

The constitutional reform enacted in 2001, together with other constitutional provisions already enshrined in the 1947 Constitution (e.g. Article 133, para. 1 and 2 IC on borders changes), provided for a fairly strong legal framework for municipalities and also for provinces and metropolitan cities. In particular, Article 114, para. 2 IC stipulated that «*municipalities, provinces, metropolitan cities and regions are autonomous entities with their own "statutes", powers, and functions according to the principles defined in the Constitution».*

Except for the regulatory power (*potestà regolamentare*) and the power to adopt own Charters (*potestà statutaria*), powers and responsibilities of local authorities, also the basic ones, were not directly laid down in the Constitution, but listed, depending upon the legislative competence, either in national or in regional legislation. This pattern is fully consistent with Article 4, para. 1 of the Charter, which considers the enshrinement of a list of powers and responsibilities in the Constitution as a principle, but not as a rule. In particular, it should be borne in mind that, following to Article 117, para. 2, lett. p) IC, the subject matter «*electoral legislation, governing bodies and fundamental functions of municipalities, provinces and metropolitan cities»* is placed within the exclusive legislative power of the State[1318] and not of the regions, which though shall retain both the power to regulate how fundamental functions falling within their competence should be discharged and shall have a residual competence on the establishment and regulation of other local authorities, i.e. on inter-municipal co-operation. Only the aforementioned five regions with a special Charter have the right to regulate any subject matter concerning local government, yet they shall do that in accordance with the fundamental principles of the Constitution and in particular with the principle whereby the Italian Republic as a whole recognizes and promotes local autonomy (Article 5).

With the adoption of Law No. 131/2003 on implementation of the constitutional reform, the Italian Parliament also delegated the government to pass a legislative decree laying down the new basic responsibilities (*funzioni fondamentali*) of municipalities, provinces and metropolitan cities, as required by new Article 117, para. 2, lett. p) IC. Under "basic responsibilities" Article 2, para. 4, lett. b) of the Law understood those functions which are characteristic of the authority, essential for its functioning and for satisfying the welfare of the corresponding territorial community.[1319] As

---

[1318] This however does not mean the State enjoys the competence to regulate the internal organisation of the governing bodies or how fundamental functions should be executed, aspects which instead have to be regulated by means of local regulations. On implementation of Article 6, see *infra*.

[1319] A distinction between own functions (*funzioni proprie*) and basic functions (*funzioni fondamentali*) has been drawn by: R. Bin, *La funzione amministrativa nel nuovo Titolo V*, in: Le Regioni 2-3/2002, 365. See however: Corte costituzionale, sentt. 238 and 286/2007, noting that basic functions (Article 117, para. 2, lett. p) IC) are equivalent to the

recognized pursuant to the interpretation of Article 5 and former Article 128 IC, local authorities shall always be in charge of an intangible nucleus (*nucleo intangibile*) of responsibilities, otherwise being their autonomy curtailed. For the assessment of this core, in the past the ICC appeared to rely primarily upon the historical experience. The principle of the core has been reaffirmed by the Constitutional Cort after 2001 constitutional reform, but this time the Court has qualified the historical criterion for its assessment as mere auxiliary,[1320] whereas no fixed list of responsibilities exists and the legislator enjoys a wide margin of appreciation for designing this nucleus, when setting out so-called own or basic responsibilities.[1321] In this respect, unlike in Italy, the core of municipal responsibilities under German law (*Kernbereich*) is not left to the legislator as it is the case for counties, but coincides with the general competence on the affairs of the local community over which assessment and delimitation inevitably the FCC and the *Länder* Constitutional Courts retain their jurisdiction. In Italy, the definition of the core by the Constitutional Court is only theoretically possible, since local authorities lack a direct judicial remedy before the ICC (see *infra* 8).

Yet, the evoked decree has never been adopted so that, except for those additional functions attributed over time by the regions, the scope of municipal and provincial basic responsibilities continued for a long time to be outlined by the T.U.E.L. only.[1322] In the 1990s the provinces were attributed, on the one hand, coordinating and planning functions (both economic and spatial), on the other hand, the task of carrying out supra-local or provincial services. Resistance by the regions to give up many of their tasks and a lack of implementation by the State left this reform mostly uncompleted. In 2009, basic responsibilities of municipalities, provinces and metropolitan cities were provisionally set out in the Law No. 42/2009 on so-called "fiscal federalism", which delegated the government to adopt measures to implement the new Article 119 IC on financial autonomy of territorial authorities. Before matching functions to their resources, in fact, it turned out to be necessary laying down first what the basic responsibilities of local authorities were (Article 21). Further, Law No. 42/2009 also set out on a transitional basis the legal framework, and thus also the basic responsibilities, for metropolitan cities, which had never been really established by any statute up to that moment (Article 23).

Three years later, Articles 17, 18 and 19 of the Law Decree No. 95/2012 provided for a new list of

---

own functions mentioned in Article 118, para. 2 IC. For an overview on this debate see: C. Napoli, *Le funzioni amministrative nel Titolo V della Costituzione*, Torino, 2011, 146 and ff.

1320 Corte costituzionale, sent. n. 238/2007, Punto n. 6 del *Considerato in Diritto*.

1321 L. Maccarrone, *Profili di riforma e controriforma nell'attuale assetto delle funzioni amministrative locali*, Torino, 2013, 25. Pursuant to L. De Lucia, *Le funzioni di province e comuni nella Costituzione*, in: Riv. Trim. Dir. Pubbl., 2005, 28, a minimum core of responsibilities should always be granted to local authorities, without being the exercise of the legislative power conditional upon that.

1322 So also: Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Italy*, CG (24) 8, 19 March 2013, § 30.

fundamental or basic responsibilities of municipalities, metropolitan cities and provinces. As seen, the fundamental or basic responsibilities of the provinces, together with those of the metropolitan cities, have been reassessed again with enactment of the Delrio Law, which also contributed to This reassessment together with the obligation of municipalities with a population under 5000 inhabitants to carry out all basic responsibilities by establishing unions or consortia (*unioni di comuni*) is not a completed process: the reallocation of provincial administrative functions either to regions or municipalities as well as the establishment of the unions (deadline has been postponed to 2016) are in fact yet underway.

Henceforth, even if one might regard the amount of public affairs attached to municipalities and provinces as substantial, one has yet to cast doubts whether basic responsibilities are really "rooted" in legislation. The Charter requires in fact that the scope of powers and responsibilities of local authorities enjoys a certain stability and does not change too often, a circumstance which can hardly be assessed in Italy, where, at least since 2001 constitutional reform, the legal framework concerning basic responsibilities has been too frequently amended.

1.2. Universal Jurisdiction of Municipalities

Unlike in Germany, where the general competence principle or principle of universal jurisdiction (*Allzuständigkeit*) explicitly applies to municipalities, but not to counties, in Italy the relationship between municipalities and provinces has been particularly complicated since the adoption of the Constitution in 1948. Before 2001 constitutional reform, the Constitution did not provide for any explicit differentiation between municipalities and provinces. On the contrary, administrative functions could be conferred upon to municipalities and provinces insofar as they touched upon «*exclusive local interests*» (former Article 118 IC). Even if some scholars attempted to distinguish the position of municipalities and provinces by assigning the former with universal jurisdiction and the latter with a specific list of tasks, this interpretation has never really been followed neither by the dominant opinion nor by the legislator.[1323] However, one could say that until 1990, provinces had been neglected by both national and regional legislators, retaining in the practice mainly the role of a territorial division for fulfillment of State tasks on a decentralised basis (*circoscrizione di decentramento statale*), endowed by the regions with limited administrative functions, merely supportive of municipalities' tasks (*ente di servizi con specialità di fini*).[1324] With enactment of Law No. 142/1990 (Article 3, para. 2) and subsequently of the T.U.E.L. (Article 3, para. 3), like

[1323] So: E. Rotelli, *cit*., 25-32.

[1324] This is the expression used by G. Pastori, *Provincia*, Digesto IV Discipline pubblicistiche, XII, Torino, 1997, 201-7.

municipalities, the provinces were defined as autonomous entities pursuing general aims (*enti a fini generali*), that is to say endowed with the task of looking after all issues arising in their territory.[1325]

As it used to be in Germany before the *Rastede* judgment, municipalities and provinces were deemed to be concurrently and equally empowered with tasks affecting the local communities, the former to a greater extent than the latter but without any formal acknowledgment of a specific rule whereby administrative functions should be allocated in principle to municipalities and those having supra-municipal nature to provinces. The Charter does not explicitly refer to the authority which should be assigned with universal jurisdiction, but, as mentioned in the first Chapter, since the assignment of universal jurisdiction upon two different authorities would entail overlapping responsibilities and thus resulting in a violation of Article 4, para. 4 one might argue that authorities closest to the citizens, that is to say municipalities, enjoy a general competence. New Article 118, para. 1 IC appears to match with this view, when it states that «*administrative functions belong to the municipalities except when they are conferred to provinces, metropolitan cities, regions or the state in order to ensure uniform practice».* This new constitutional provision starts from a premise which is very similar to that laid down in Article 4, para. 3, sentence 1 of the Charter, that is to say that public responsibilities should, as a principle, be exercised by those authorities which are closest to the citizens, that is to say by municipalities. In other words, if not explicitly assigned to any other authority, municipalities enjoy a so-called residual administrative competence. This principle can thus also be deemed to draw on Article 4, para. 2 of the Charter, which recognizes the universal jurisdiction of local authorities, i.e. of municipalities, as the guiding principle of how local government ought to be structured in the member States.

Both Charter provisions therefore are almost equivalent with Article 118, para. 1 IC, from which one can construe the rule whereby municipalities enjoy a residual competence with reference to affairs not yet attached to other authorities.[1326] With the adoption of the Delrio Law and after the Judgment no. 50/2015 of the Constitutional Court, one might *a fortiori* argue that the provinces no longer enjoy a general competence or a right to "invent" new tasks (*Aufgabenfindungsrecht*). The definition of the provinces provided in Article 1, para 3 of the Delrio Law, in fact, no longer mentions the pursue of general aims, so that one might hold that from now on Italian provinces will exercise only those powers and responsibilities explicitly set out by law or those conferred upon to

---

1325 So: B. Pezzini, *cit*., 4; P. Perlingieri and R. Messinetti, *Art. 5*, in P. Perlingieri (ed), *Commento alla Costituzione italiana*, 2001, 25. F. Caringella, A. Giuncato, F. Romano, *L'ordinamento degli enti locali*, Milano, 2007, 38-43. *Contra*: F. Pinto, *cit*., 315-317, whereby only with the enactment of the T.U.E.L. one could assess a confusion of roles between municipalities and provinces.

1326 Q. Camerlengo, *Art. 118*, *cit*., 2337; A. Corpaci, *Revisione del Titolo V della Parte II della Costituzione e sistema amministrativo*, in: Le Regioni 2001, 1308. Cf. T.A.R. Calabria 10 ottobre 2003, n. 1285.

them by municipalities. A differentiated approach, enabling the provinces to exercise again a universal jurisdiction, might be pursued by the regions, like in the German *Länder*, if the pending constitutional reform will endow them with the legislative competence on so-called "wide-areas authorities". Yet, at present, it appears that, under the new Article 117, para. 2, lett. p) IC, the State and not the regions will acquire the exclusive legislative competence on this subject.

1.3. The Principles of Subsidiarity, Adequacy and Differentiation

Besides the principle of universal jurisdiction, the constitutional principles pursuant to which allocation of powers and responsibilities between different layers of government ought to be made are enshrined in new Article 118, para. 1 IC. This amendment to the Constitution marked a turning point for the Italian constitutional order, since administrative competence before 2001 was in general discretionally endowed upon the State or upon the regions, depending on their legislative competence (so-called "parallelism of powers").[1327] A conferral of administrative tasks upon to other public authorities should now take place by means of either regional or State law following to the principles of subsidiarity, differentiation and adequacy.

In particular, the concept of subsidiarity of the Charter does not differ much from that of so-called *vertical subsidiarity* laid down in the Italian Constitution. It is no chance in fact that, so to say, the concept of the latter derives from that of the former. As pointed out by some constitutional lawyers, the subsidiarity principle has been mentioned first in Article 2, para. 5 of Law No. 142/1990 and in Article 4, para. 3, lett. a) of Law No. 59/1997 (so-called Bassanini Law) after the implementation of the Charter into the Italian domestic legal order.[1328]

Though, Article 4, para. 3, sentence 2 of the Charter does not *prima facie* provide for the same standards, since it only requires that allocation to upper level authorities «*should weigh up the extent and nature of the task and requirements of efficiency and economy».* However, these criteria are not far too different from the aforementioned principles laid down under Italian law. In fact, the obligation to take into account the extent and the nature of the task, as well as the need to evaluate the efficiency and the economy of their discharge before assignment means that the legislature

---

[1327] According to the constitutional framework prior to 2001 reform, every Region could have delegated its funtions to the Provinces, to the municipalities or to other local authorities (former Article 118, para. 3 IC). State legislation could have then further indicated what functions, within the subject matters of the regions, were of exclusive local character and could have been attributed directly to local authorities. The difference between local affairs and other public affairs has gone lost after the constitutional reform. This can be deemed to be another aspect of convergence between the Charter and the Constitution.

[1328] S. Bartole, *Riflessioni sulla comparsa nell'ordinamento italiano del principio di sussidiarietà*, in: Studium Iuris, 1999, Vol. I, 380-383; A. D'Atena, *Il principio di sussidiarietà nella Costituzione italiana*, in: Rivista italiana di diritto pubblico comunitario, vol. 1, 1997, 603 and ff.

should carry out a subsidiarity test to verify whether a certain layer of government is the adequate one for exercising a specific administrative function. As clarified by Article 7 of the Law No. 131/2003, those local authorities closest to the citizens should, as a principle, be given administrative tasks, but this attribution must go hand in hand with a consideration of the size (both in terms of territory and organisation) of the local authorities concerned[1329] and does not hence correspond to the principle of "proximity". Requirements aimed at ensuring efficiency and economy, even if not explicitly mentioned in Article 118, para. 1 IC, might be said to be implied in the concept of adequacy or, alternatively, in Article 97, para. 2 IC, pursuant to which «*public authorities are organized according to the provisions of law, so as to ensure the efficiency and impartiality of the administration*». Though, the Charter expounds how subsidiarity and adequacy principles should concretely work and thus provides for a more specific provision than the constitutional one.

Under Italian law, subsidiarity works according to a dynamic procedure of descendant and ascendant phases and does not mean that powers and functions should always be rigidly allocated at the level closest to the citizens, but it rather means that, if a level of government is unable to operate and does not properly discharge a certain task, the upper political tier of government should be entitled to use this power so as to ensure uniform practice. Hence, "subsidiarity take-over" (*chiamata in sussidiarietà*), as it is commonly known in the case-law of the Italian Constitutional Court,[1330] does not in principle contradict the Charter, which in fact does not reject the ascending attitude of the principle.[1331] On the contrary, the case-law of the Court might raise doubts of excessive centralisation of functions and legislative powers incompatible with a State committment to decentralisation enshrined in both the Constitution and the Charter. This problematical aspect, which can be detected in particular on financial matters (see *infra* 6), has not been deepened enough by the Congress in its last report, even if it is a crucial one for the assessment of the overall situation of local autonomy in the country.

The principle of differentiation, which replaced the principle of uniformity to be derived from former Article 128 IC, takes finally into account the non-uniformity of Italian local authorities (out of the more than 8000 municipalities spread over the Italian territory, 20 percent has less than 1000 inhabitants and 40 percent less than 2000) and thus allows for a flexible conferral of responsibilities and, more in general, for a reorganisation of the local government system considering the territorial

1329 D. Donati, *Horizontal Subsidiarity in the Italian legal order*, PIFO Occasional Papers No. 15/2012, 7-8.

1330 Corte costituzionale, sent n. 303/2003. See: C. Mainardis, *Chiamata in sussidiarietà e strumenti di raccordo nei rapporti Stato-Regioni,* in: Le Regioni 2/3-2011, 455-498.

1331 So also: Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CG (24) 8, § 44, cit. «*Article 118 articulates very prominently the Charter's principle of subsidiarity».*

differences existing between local authorities throughout the Republic. This should make possible that the same authorities carry out different tasks according to different rules in different areas of the territory of the Republic.[1332] All categories of territorial authorities listed in new Article 114, para. 1 IC should not necessarily pursue general aims (*enti a fini generali*). A differentiation between municipalities, on the one hand and the metropolitan cities and the provinces, on the other hand might first of all be derived from Article 118, para. 1 IC which considers conferral to provinces and metropolitan cities as the exception to the rule whereby municipalities carry out administrative functions.[1333] Nevertheless, provinces and metropolitan cities should also be assigned with a nucleus of own or basic powers and responsibilities (*funzioni proprie o fondamentali*), the absence of which determines a violation of the core of local autonomy, since it entails the alteration of the very nature of the authority at stake, both under the Charter (Article 4, para. 1) and under the Italian Constitution.[1334] Thus, without a constitutional amendment, territorial authorities cannot be transformed into functional or inter-municipal entities supporting other local authorities, for instance building on the model of so-called *unioni di comuni.* Such limited differentiation is admittedly made also by the Charter, which conceives municipalities as the closest level to the citizens and, even if not explicitly, considers intermediate local authorities as a tier of government entrusted mainly with those responsibilities which the former are not suited to carry out.[1335] Thus, it might be legitimate also in the light of the Charter Article 4, para. 3 to consider Italian municipalities as those local authorities exercising universal jurisdiction, whereas provinces and metropolitan cities carry out a limited share of administrative functions. Yet, some of these functions ought to be fundamental, that is to say they ought to be inherent to the the very nature of the territorial authority at hand, which cannot be deprived of. This does not however mean that they are as such immodifiable, but only that territorial authorities should always be assigned with a nucleus of fundamental powers and responsibilities.

A notion which is ignored by the Charter is the so-called "horizontal subsidiarity". Article 118, para. 4 IC defines it as follows «*the State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity».* This appears

---

1332 See, *inter alia*: Corte costituzionale, sent. 243/2005. Prior to 2001 constitutional reform, this principle was taken into consideration by the ICC with reference to Sicily. Cf. Corte costituzionale, sent. n. 286/1997.

1333 Similarly also: L. Vandelli, *Sovranità e federalismo interno: l'autonomia territoriale all'epoca della crisi*, in Le Regioni, 2012, 872 ff.

1334 Cf. Corte costituzionale, sent. 238/2007. S. Cassese, *L'amministrazione nel nuovo Titolo V della Costituzione*, in *Giornale di diritto amministrativo*, 2001, 1194; G. Falcon, *Funzioni amministrative ed enti locali nei nuovi artt. 118 e 117 della Costituzione,* in: Le Regioni 2002, Vol. 2-3, 397; F. Merloni, *Il destino dell'ordinamento degli enti locali (e del relativo Testo unico) nel nuovo Titolo V della Costituzione*, in: Le Regioni, 2002, 415.

1335 Congress of Local and Regional Authorities, *Second-tier local authorities – intermediate governance*, CG (23) 13, 7 February 2013.

in fact to be quite of an Italian notion which barely finds an equivalent in other legal orders. This is confirmed by the Congress report, which appears not to fully grasp what concrete legal consequences this principle entails and mainly relates it to «*the growth in Italy of organisations/consortia at the local level which are quite separate from the local authorities per se*», judging it *«as a challenge to the notion of the pre-eminence of local elected territorial authorities with defined powers, as secured by the Charter».*[1336]

Yet, the horizontal subsidiarity principle as such does not operate as a principle meant at restricting the scope of responsibilities attributed to public authorities, insofar as the autonomous initiatives of private individuals are able to carry out certain functions. In other words, it's not that private initiative is the rule and public authority the exception. This classical liberal interpretation of the constitutional provision can in fact easily be turned down on account of its original intent, which was the promotion by all territorial authorities of civil society engagement (family, associations and even functional entities) in the public sphere through participatory tools, rather than the hollowing out local authorities' responsibilities through privatisation of public services or transforming local authorities into small and self-sufficient communities governed by private law.[1337] According to the dominant position on the topic, the horizontal subsidiarity principle implies that private citizens cannot execute administrative functions themselves, but only that they are allowed to stimulate and seek to influence administrative decisions or to carry out activities of general interest aimed at fostering, for instance, social inclusion or environment protection for non-profit reasons; industrial and commercial activities for profit are therefore not covered by Article 118, para. 4 IC.[1338] In this respect, thus, horizontal subsidiarity partially covers the concept of participatory democracy, but starts from different premises: whereas participatory democracy is conceived as a citizens' power subsidiary to that of representative bodies, horizontal subsidiarity conceives public powers exercise by representative bodies as subsidiary to those exercised by citizens by themselves.[1339] As for the

---

1336 Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CG (24) 8, § 26. Yet, this comment is not entirely misplaced, since it appears that some local authorities have been resorting to the "horizontal subsidiarity" principle for justifying public-private agreements (so-called *convenzioni*) without public procurement procedures. Cf. S. Pellizzari, *Il principio di sussidiarietà orizzontale nella giurisprudenza del giudice amministrativo: problemi di giustiziabilità e prospettive di attuazione,* in Le Istituzioni del Federalismo, n. 3/2011, 605-606.

1337 See: L. Vandelli, *Il sistema*, *cit*., 47. On private communities see the notion of "voluntary city" which is however more of an American than an Italian notion: D. Beito, P. Gordon, A. Tabarrok (eds.)*, The Voluntary City: Choice, Community, and Civil Society,* 2002. For a case-study of a local authority turning into a self-governed community see: S. Boccalatte, *Case study. La città sussidiaria. Partigliano. Quando la realtà precede il diritto (pubblico)*, IBL Focus No. 134, 30 April 2009.

1338 V. Cerulli Irelli, *Sussidiarietà (diritto amministrativo)*, in: Enciclopedia giuridica, Vol. XXX, Roma, 2003. Cf. Consiglio di Stato, 25 August 2003, n. 1440; Consiglio di Stato, sez. V, 6 June 2009, n. 6094; T.A.R Sardegna sez. I, 21 December 2007, n. 2407.

1339 M. Di Folco, *La democrazia partecipativa nelle fonti locali*, in: G.C. De Martin and D. Bolognino, *Democrazia partecipativa e nuove prospettive della cittadinanza*, Milano, 2010, 151.

nature of the constitutional provision, few scholars believe it is directly applicable in the sense that citizens can at any time promote initiatives for taking care of the public good.[1340] This however rarely happens if neither appropriate legal framework has been set out by the State - in particular when it comes to participation in administrative procedures - nor no proper fiscal incentive or tax relief has been granted by the State or by local authorities.[1341]

1.4. Full and Exclusive Powers and Responsibilities ?

Pursuant to the Charter, powers and responsibilities attributed to local authorities should be in principle "full and exclusive" (Article 4, para. 4), i.e. local authorities should be assigned with an amount of local government responsibilities which ought to outweigh the number of delegated responsibilities by the State. Unlike in Germany, where the "false municipalisation" of tasks is a quite common practice of several *Länder*, in Italy a tendency towards decentralisation of additional State tasks and hollowing out of local responsibilities cannot be assessed. By contrast, one might rather ascertain a general trend whereby conferred tasks are not paired with the necessary resources (see *infra* 6.2). Further, the same Charter provision aims at preventing an overlapping or fragmentation of responsibilities between different tiers of government so that for every single function assigned to local authorities, there should be at least one clear and definite power enabling the local authority to exercise it. This principle is enshrined in the Charter, but not explicitly in the Italian Constitution;[1342] again, the Charter helps in providing for a higher degree of protection of local self-government than that designed by the Italian Constitution. This standard appears significant, yet not useful for Italy, where many legal scholars have repeatedly pointed at the intertwining of competences (*intreccio di competenze*) between State, regions and local authorities as one of the aspects creating more confusion within the State machinery.

2. Consultation Through Ad-Hoc Platforms at State and Regional Level

The duty of the State to consult with local authorities in matters affecting their interests, as set out by Article 4, para. 6 of the Charter, is as such not explicitly enshrined in the Italian Constitution. Yet, one might argue that this duty can be derived from the principle of subsidiarity and, above all, of loyal co-operation (*principio di leale collaborazione*) between tiers of government, which is

---

1340 G. Arena, *Il principio di sussidiarietà orizzontale nell'art. 118 u.c. Cost.,* in www.astrid-online.it 2003.

1341 U. A. Felice (ed.), *I percorsi del federalismo fiscale*, Bari, 2012, 59-61. On the most recent attempts to foster horizontal subsidiarity at local level see: D. Servetti, OPAL n. 6/2014

1342 Under the former Article 118, para. 1 IC one could derive this principle from the locution "exclusively local interest" as done by F. Benvenuti, *La Provincia,* in: E. Rotelli (ed.), *Amministrazione pubblica. Autonomie locali,* Milano, 2010, 175.

considered by some scholars and by part of the case-law as a corollary of the fundamental principle of local autonomy laid down in Article 5 IC.[1343] At State level, the principle of loyal co-operation has been implemented with the institutionalisation of three bodies, the so-called "Conferences", by means of ordinary legislation. They aim at bringing together or linking the interests of the different territorial authorities listed in Article 114, para. 1 IC and their institutionalisation starts from the premise that a complete disentanglement of powers and responsibilities between layers of government, and in particular between State and regional legislative powers, is impossible and the tool for preventing conflict must therefore lie in the strenghtening of preventive dialogue and co-operation. Additionally, pursuant to Article 11 of the Constitutional Amendment Law No. 3/2001, participation of local authorities in the consultative talks of the Joint Parliamentary Committee for Regional Affairs (*Commissione bicamerale per le questioni regionali*), the only one Parliamentary Committee mentioned by the Constitution (Article 126, para. 3 IC), might be ensured by the Rules of Procedure of the two chambers of the Italian Parliament, but no implementation thereof has ever followed.[1344] Unlike at State level, at regional level, Article 123, para. 4 of the Constitution itself mandates the establishment of «*a council of local governments* [so-called CAL] *which function as a body for consultations between the region and local authorities*».

The Conferences may be said to obviate the fact that, at least until the constitutional reform pending in Parliament will be passed, the second chamber of the Italian Parliament does not represent the regions or local authorities, that is to say there is no territorially based Senate, in spite of the fact that Italy is not a unitary State, the regions enjoy legislative powers and local authorities have wide ranging normative powers.[1345]

In particular, within the so-called system of the Conferences, one has to distinguish between the

---

[1343] So: Corte costituzionale, sent. n. 470/1988, n. 19 and 242/1997. After 2001 constitutional reform, the principle of loyal co-operation is explicitly mentioned only in Article 120 IC, when substitutive powers of the State are concerned but the Constitutional Court makes clear that it applies to all kinds of relationships between State, regions and local authorities. So Corte costituzionale, sent. n. 282/2002 and 303/203. On the origins of the principle in the Italian constitutional case-law see: A. Gratteri, *La faticosa emersione del principio di leale collaborazione nel quadro costituzionale*, in: E. Bettinelli and F. Rigano (eds.), *La riforma del Titolo V della Costituzione e la giurisprudenza costituzionale.* Atti del seminario di Pavia - 6-7 giugno 2003, Torino, 426.

[1344] N. Lupo, *Le ragioni costituzionali che suggeriscono di integrare quanto prima la composizione della Commissione parlamentare per le questioni regionali*, in: www.federalismi.it n. 3 (2007) and R. Bifulco, *Il contributo dei regolamenti parlamentari alla configurazione della forma di Stato: l'integrazione della Commissione per le questioni regionali,* in: www.astridonline.it, n. 1/2007; G.M. Salerno, *L'integrazione della Commissione parlamentare per le questioni regionali con i rappresentanti delle autonomie territoriali: problemi e disarmonie costituzionali"*, in: Rassegna parlamentare, vol. 49, n. 2, 2007.

[1345] On the evolution of the system of the Conferences see: F. Pizzetti, *Il sistema delle Conferenze e la forma di governo italiana*, in: Le Regioni 2000, 547 and ff.; P. Caretti, *Gli accordi tra Stato, Regioni e autonomie locali: una doccia fredda sul "sistema delle Conferenze"?*, in: Le Regioni 2002, 1169 and ff; R. Carpino, *Evoluzione del sistema delle conferenze*, in: Le Istituzioni del Federalismo, 2006, 15 and ff.; S. Mangiameli, *Riflessioni sul principio cooperativo prima della riforma delle Conferenze*, in: Le Istituzioni del Federalismo, 2007, 26 and ff.

Standing Conference for relations between State, regions and the autonomous provinces of Trento and Bolzano (*Conferenza Stato-Regioni-Province autonome*) which was founded in 1983, is composed of delegates of both the central government and of the regional executives and is endowed with the task to co-ordinate and ensure dialogue between the State and the regions on draft legislation or regulation potentially affecting the interests of the latter. In particular, since 1997, all legislative initiatives which fall under the legislative competence of the regions ought to be submitted to the Conference for discussion. Besides, the Conference for the relations between the State and municipalities, provinces and metropolitan cities (*Conferenza Stato-Città-Autonomie Locali*), was founded in 1996 and is composed of members of the government and representatives of the local authorities associations, whereas the Joint Conference (*Conferenza unificata*), set up in 1997, brings together members of both the other two platforms whenever the subject-matters and the tasks of common interest for state, regions and local authorities (hence, not only municipalities and provinces) are affected.

After discussion, the Conferences adopt understandings (*intese*), agreements (*accordi*) and opinions (*pareri*). In particular, understandings are considered as relatively binding upon the government, which is allowed to depart from them only by providing adequate motivation.[1346] According to the Congress of the Council of Europe, the Conferences «*have ensured very strong rights to consultation and have enabled political influence. It has, for instance, been said that, whilst no Conference has asserted a right to veto a relevant legislative bill, such a bill has, in practice, rarely been adopted against the advice of a Conference*»[1347]. As recognized by the Congress itself, a strong influence on national policy-making has been however more frequent within the State-regions Conference, rather than for the Conference for relations between State and local authorities which still plays a minor role.

In particular, one has to bear in mind that the violation of the principle of loyal co-operation can be assessed by the Constitutional Court whenever agreements or understandings within the Conferences have not been concluded and they had to pursuant to the law, but it cannot be assessed within the legislative process.[1348] In other words, under Italian law, consultation within the Conferences is ensured to the extent that negotiation, at least between State and regions, is formally institutionalised. If one except for the aforementioned Article 11, formal participation or duty to consult within the legislative process is not traditionally regarded as being a concretisation of the principle of loyal co-operation. To the contrary, the principle applies mainly in an administrative

[1346] Corte costituzionale, sent. n. 116/1994.
[1347] Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Italy*, CG
[1348] Corte costituzionale, sent. n. 401/2007, 159/2008, 88/2009, 298/2009, 33/2011,

context, when it comes to the implementation of legislative acts.[1349] In this respect, the Charter could help in making the aforementioned principle more far-reaching, since the interpretation of Article 4, para. 6 of the Charter by the Council of Europe has to be understood as requiring consultation also at different legislative stages, that is to say not only within the context of implementation of relevant legislation (see supra first Chapter § 2.II.1.6).

At regional level, it deserves to be mentioned the role played by Councils of Local Autonomies (*Consigli delle autonomie locali* - CAL), consultative bodies between regions enjoying ordinary status and local authorities, which are best known as organs having constitutional relevance, since they ought to be established by regions according to a specific constitutional provision, added within the framework of 2001 constitutional reform.[1350] In this respect, it might be worth mentioning that the first provisions (but not yet mandatory) enabling the regions to setting up procedures of consultation and dialogue with representatives of local authorities were contained already in Article 3, para. 3 of Law No. 142/1990 and in Article 3, para. 5 of Law No. 112/1998 so as that it might be said they echoed the Charter principle, since it has been showed that the aforementioned statute was conceived when negotiations on the Charter were ongoing. In particular, it should be mentioned that Article 123, para. 4 IC explicitly mentions the mere consultative nature of the organ, thus preventing the establishment of second chambers at regional level.[1351] Nonetheless, it has also been observed that, in principle, these Councils could be transformed in subnational second chambers, by making mandatory the issuance of opinions on certain subject matters within the competence of the regions or by endowing them with a suspensive veto power on draft regional legislation.[1352] Further, additional conferences representing functional autonomies have been set up in a number of regions (Abruzzo, Calabria, Liguria, Marche, Puglia and Tuscany). In the practice, one could argue that the abolition of the Bavarian Senate in the late 1990s has not had any particular influence on their role, but that on the contrary that a moderate subnational shift towards bicameralism has started, even if only to a limited extent, since many regions have made mandatory Councils opinions on draft legislation as far as the functioning of local government, the attribution or delegation of administrative functions or amendments to the regional Charters (*statuti*) are concerned. Councils' negative opinions or opinions conditioned upon modification work like suspensive veto powers which can be overriden by qualified majority by regional councils.[1353] The

---

[1349] Corte costituzionale, sent. n. 299/2012.

[1350] M. Cavino and L. Imarisio, *Il Consiglio delle Autonomie Locali*, Torino, 2012; P. Falletta, *cit*., 44 and ff.

[1351] R. Tarchi and D. Bessi, *Art. 123*, in: R. Bifulco, A. Celotto, M. Olivetti (eds.), *cit*., 2463.

[1352] M. Cosulich, *La rappresentanza degli enti locali: conferenza o consiglio?*, in: Le Istituzioni del Federalismo n. 1/2001.

[1353] Abruzzo (Art. 72, para. 3 St.), Calabria (Art. 48, para 7 St.), Campania (Art. 23, para. 2 St.), Emilia-Romagna (Art. 23, para. 5 St.), Lazio (Art. 67, para. 4 St.), Liguria (Art. 67, para. 2 St.), Lombardia (Art. 54, para. 4 St.), Marche (Art. 38, para. 2 St.) Umbria (Art. 29, para. 2 St.).

modest impact of the Councils' opinions on regional legislation might be explained *inter alia* with the rather disappointing experience of Italian regionalism, whereby the Italian regions have not really developed their legislative powers as much as expected after 2001 constitutional reform.[1354] Rather than on the bicameral experience of Bavaria, one could thus say that Councils of Local Autonomies resemble more the aforementioned Municipal Council (*Kommunaler Rat*) in Rhineland-Palatinate, that is to say akin to advisory bodies issuing opinions and recommendations, but not really organs where consultation develops into negotiation.

The Congress does not appear to be fully convinced of how Council of Local Autonomies in Italy work and it confines its evaluation to a statement from which however it does not seem a that a sufficient investigation as to their functioning has been really carried out, that is to say that «*informal consultative fora are used – and have been important in relation to the recently planned reorganisation of the provinces within regions»*[1355].

Here, it might be said that this is not entirely true. In fact, Article 17 of the Law Decree No. 95/2012, aimed at pooling together the provinces, set out a bottom-up procedure for designing the new boundaries which involved the Councils in the first place, instead of involving municipalities, as stipulated by Article 133, para. 1 IC. Hence, this provision was struck down by the Constitutional Court in the aforementioned judgment No. 220/2013 on the reform of the provinces. Councils of Local Autonomies played rather a role in the lodging of constitutional complaints before the Constitutional complaints against the same reform,[1356] a role which does not have much to do with their being platforms for dialogue and co-operation, but rather for the jurisdictional protection of local authorities' interests (see *infra*). To conclude, Councils of Local Autonomies might indeed be considered as a partial response for ensuring compliance with Article 4, para. 6 of the Charter at regional level, however their role appears rather marginal not only because regional legislative activities are quite poor, but mainly because consultation has been foreseen by regional Charters (*Statuti*) in a fairly limited range of cases.[1357]

3. Municipal, Provincial and Metropolitan Boundary Changes: A Different Degree of

1354 See for instance: N. Viceconte, *Lo Statuto e la forma di governo regionale*, in: S. Mangiameli (ed.), *Il regionalismo italiano tra tradizioni unitarie e processi di federalismo,* Milano, 2012, 191.

1355 Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CG (24) 8, 19 March 2013, § 74

1356 CAL Regione Piemonte (D.G.R. 30 dicembre 2011, n. 110, CAL Resolution 7 December 2011), Lazio (D.G.R. 17 February 2012, n. 44, CAL Resolution 24 gennaio 2012, n. 1), Lombardia (D.G.R. 2 February 2012, n. 2953, CAL Resolution 23 January 2012, n. 2).

1357 A. Cavino and L. Imarisio, *cit*., 63 and ff.

Protection of the Right to Territory

A limited guarantee against abolition of individual local authorities, that is to say against local authorities' boundary changes, is embedded in Article 5 of the Charter. In Italy those territorial local authorities which form the Republic pursuant to Article 114, para. 1 IC and which are thus institutionally guaranteed as whole categories also enjoy a limited subjective right to territorial integrity. Like in Article 5 of the Charter, the territory of local authorities under Italian constitutional law is not only regarded as a constituent element[1358] or even as a limit to the jurisdiction of the aforementioned local authorities,[1359] but is first and foremost conceived in its functional relationship with the local communities or populations living therein.[1360] Therefore, the territorial integrity can be disrupted by the State only after the appropriate involvement of the these communities, pursuant to the procedures regulated by Article 132, para. 2 IC and by Article 133, para. 1 and 2 IC. These provisions set out a distinct approach for municipalities and provinces, whereas no constitutional rule has been introduced for metropolitan cities yet. Since the constitutional protection of local authorities' right to territory is radically different depending on the category of territorial local authority at hand, the impact of the Charter in the domestic order is expected to be different too.

3.1. Municipal Boundaries

As for municipalities, Article 133, para. 2 IC stipulates that «*each Region, after consulting the population involved, may within its own territory and by its own acts establish new municipalities and modify their boundaries and names».* Article 132, para. 2 IC provides for a radically different procedure when it comes to the detachment of municipalities from one region and to the attachment to another. In this latter case, in fact, «*a majority of the people of the municipality or municipalities concerned, expressed by means of a referendum»*, and a «*consultation of the regional council»* should take place, before a State law in the formal sense may proceed to the detachment and subsequent attachment. The question, with reference to the Charter Article 5, is whether "prior consultation of local populations concerned, possibly by means of a referendum" is ensured.

As far as the procedure designed by Article 133, para. 2 IC is concerned, it explicitly mandates the

---

1358 C. Mortati, *Istituzioni di diritto pubblico*, Vol. 1, Padova, 1969, 102.

1359 E. Cannada Bartoli, *Osservazioni intorno a taluni aspetti del territorio comunale*, in: Scritti giuridici in memoria di V.E. Orlando, Padova, 1957, 286.

1360 R. Alessi, *Intorno alla nozione di ente territoriale*, in: Riv. Trim. Dir. Pubbl., 1960, 164; L. Paladin, *Il territorio degli enti autonomi*, in: Riv. Trim. Dir. Pubbl., 1961, 670.

"consultation of the population involved". The wording appears to be similar to that of the Charter, which however provides for a more far-reaching protection (see *supra* first Chapter), since it requires likewise treatment for all local populations (directly or indirectly) concerned, i.e. affected and not, as in the Italian Constitution does, a mere consultation of the populations involved by the boundaries modifications.[1361] However, the last interpretation, originally supported by the Italian Constitutional Court, has progressively evolved into a more flexible one, whereby it is entirely up to the regional legislators to specify which are the populations involved, i.e. having an actual interest in the procedure. In particular, with a decision issued in 2003,[1362] the Court declared as unconstitutional a regional framework law on boundary changes, which preventively did away (that is to say without a reasonable motivation) with the consultation of populations other than those concerned by the boundary modification. Thus, the standard provided by the Charter and by the Constitution is eventually the same. The Constitution, or better to say, its interpretation by the ICC, provides however for a more far-reaching solution: it in fact considers as mandatory, at least for regions with ordinary charters, the holding of a consultative referendum.[1363] A differentiation can be set out by means of regional statute for those local authorities not directly affected by the changes (e.g.: a decision by the municipal council might be sufficient). In any case, unlike for Article 133, para. 1 and for Article 132, para. 2 IC (see *infra*), it must be stressed that the involvement of the local populations is not normally a binding condition for a valid start of the legislative procedure at regional level. Only in Basilicata, Marche and Abruzzo, an outcome favourable to boundary changes is considered to constitute condition of legal validity.[1364]

As for the procedure designed by Article 132, para. 2 IC, it ought to be started at the initiative of those municipalities interested to be detached from a Region and attached to another. Hence, in this case, consultation involves only the local population of the municipality wishing to be detached and subsequently attached to another Region and not other communities, even if they should consider themselves (indirectly) affected by the detachment,[1365] thus being the Charter's guarantee more

---

1361 Corte costituzionale, sent. n. 107/1983 (Borgata Nuova Curnasco) e sent. n. 453/1989 (Noto-Palazzolo Acreide).

1362 Corte costituzionale, sent. n. 47/2003 (Baranzate) Prior to it see: sentt. n. 204/1981 (Cellole-Sessa Aurunca); n. 62/1975 (San Marco Evangelista).

1363 Corte costituzionale, sent. n. 62/1975; n. 204/1981 and n. 279/1994 (Caccuri, Castelsilano, Pazzano, Bivongi, San Pietro Apostolo, Gimigliano) For regions with special Charters holding of consultative referendums is regarded as a general principle which might also be averted if other appropriate instruments could be put in place. Cf. Corte costituzionale, sent. n. 453/1989.

1364 So: E. Ferioli, *Art. 133*, in: R. Bifulco, A. Celotto, M. Olivetti (eds.), *cit*., 2555.

1365 Corte costituzionale, sent. n. 334/2004 (San Michele al Tagliamento). T.F. Giupponi, *Le "popolazioni interessate" e i referendum per le variazioni territoriali, ex artt. 132 e 133 Cost.: territorio che vai, interesse che trovi,* in: www.forumcostituzionale.it, 2004; C. Pagotto, *Per promuovere il referendum di passaggio di province e comuni ad altra Regione o Provincia basta il consenso dei "secessionisti",* in www.rivistaaic.it, 2004.

protective than the constitutional one.[1366] As for the degree of consultation, unlike Article 133, para. 2 IC, here it is the constitutional provision itself very clear, since it explicitly mandates a consultative referendum to be called. After 2001 constitutional reform, Article 132, para. 2 IC also sets out that the referendum shall obtain the majority of the population or populations of the municipality or municipalities concerned. Unlike Article 133, para. 2 IC, here it is the State and not the regions to pass all relevant legislation for ensuring the detachment and the subsequent attachment of the municipality or municipalities, since this change involves the regional boundaries themselves. Hence, the Italian Parliament retains the full power not to follow the outcome of the local referendum, which is in fact not binding upon it, but, as it is the case for Article 133, para. 1 IC (see *infra*), it is prevented to modify it according to its discretional appreciation.

A last remark should be briefly devoted to the relationship between the establishment of new municipalities and constitutional budget constraints, as laid down in Article 81 IC. In this respect, the ICC pointed out that regional statutes involving boundary modifications had not to imply any additional burden on public budgets.[1367] In particular, all demergers or detachments should be *a priori* weighed up against their economic and financial sustainability by the regional legislator, which often sets out a threshold under which no new municipality can be established. After the adoption of the criteria for allocating assets and resources to the new municipalities, the regional branches of the Court of Auditors (*Sezioni regionali della Corte dei Conti*) can verify whether the budgets of the new municipalities comply or not with the so-called Interior Stability Pact (*Patto di stabilità interno*). In general, however, Article 21, para. 3, lett. g) T.U.E.L. enounced a principle favorable to mergers to the detriment of demergers. Nonetheless, no action has been taken in this last respect by the regions so as that in Italy mergers have occurred merely on a spontaneous municipal basis and hence without any significant reduction of municipalities so far. As the Congress noted in its last report, «*the very strong municipal tradition in Italy and the role of municipalities as a natural cultural unit of identity»* led *«to a rejection of voluntary mergers».* A legislative favour for mergers and strict requirements for the establishment of new municipalities cannot *per se* be said to infringe upon the right of local self-government as laid down in the Charter, since Article 3, para. 1 denotes it as the right and the *ability* to regulate and manage a substantial share of public affairs. In other words, local authorities should be organized according to administrative structures which allow them to fulfill the responsibilities they have been assigned with. If of a too small size, they cannot be said to be *able* to manage their public responsibilities

---

[1366] Cf. M. Pedrazza Gorlero, *Le variazioni territoriali delle Regioni*, Padova, 1991, 73 and Id., *Art. 132*, 160 ss.. See however the different assessment by the Court when detachments and mergers of regions pursuant to Article 132, para.1 IC are involved. Corte costituzionale, sent. n. 278/2011 (Principato di Salerno).

[1367] Corte costituzionale, sent. n. 171/2014 (Mappano).

effectively, as required by Article 3, para. 1 in combination with Article 4, para. 3 of the Charter. This functional approach is shared also by the case-law of the German *Länder* Constitutional Courts, which however appear to outweigh costs and benefits of mergers by taking into account also the possible democratic deficits which might originate from a territorial reform. Well reasoned criteria to evaluate territorial reforms without interfering with the legislative power has never really been set out by the Italian case law, which might not have had the chance to do so, since no relevant comprehensive territorial reform has ever occurred in Italy since 1947.

3.2. Provincial Boundaries

The interpretation of Article 133, para. 1 IC has given rise to a very harsh debate among legal scholars since the entry into force of the Constitution. At present it is still not clear whether Article 133, para. 1 IC covers any kind of provincial boundaries' change or whether only boundaries' modifications of single provinces can be said to be included.[1368] Here, it should be checked whether, and if so how, Article 5 of the Charter can contribute at its clarification. First of all, Article 133, para. 1 IC requires that changes follow a "request" by municipalities and consultation of the Region enjoying ordinary status, within which jurisdiction a provincial boundary may be changed or a new province be created. Unlike the following Article 133, para. 2 IC, here it is the State to enjoy the legislative power to establish new provinces or redrew their boundaries. The rationale behind this provision was, like in the previous cases, that a modification should proceed on the basis of a bottom-up and not top-down perspective. Though, according to this constitutional provision, legislative power should not be exercised after consultation with the population concerned, that is to say with the provincial community (which appears to be entirely ignored), but following to a "request" by municipalities and a "consultation" with the corresponding Region. Request appears to mean something more than consultation or opinion. In fact, the municipalities' request binds the legislator to await a decision by municipalities, before starting the legislative process. This request, which appears rather as a corollary of local authorities' freedom of organisation as laid down in Article 6, para. 1 of the Charter, has not to meet any formal requirement. However, it appears sensible to think that it should at least be approved by the municipal council and then submitted to the Parliament. Article 21, para. 3 T.U.E.L. fixed some criteria (majority of the municipalities or of the local populations, territorial homogeneity in terms of socio-economic development, spatial planning etc.) which however were not truly taken into consideration by the legislator when establishing new provinces. The most recent practice in terms of setting up of new provinces shows

[1368] Surely, it does not involve the autonomous provinces of Trento and Bolzano/Bozen, which in fact have to be considered as regions, pursuant to the combined reading of Article 116, para. 2 and Article 131 IC. Nor questions can arise in this respect in the Aosta Valley Region, where no province exists.

in fact that no common standard has been followed. In particular, in some cases, it seems that new provinces were established by means of state law on the basis of a proposal or positive opinion by the Region, rather than upon request of a group of municipalities.[1369] All this being said, Article 5 of the Charter appears not to be really followed, since there is no binding provision for consulting provincial or, at least, municipal populations. Under the government of Mario Monti (2011-2013), a global reorganisation of provincial boundaries was due to be passed, but it was eventually reversed by the Constitutional Court, which ruled down a reform approved by means of government law decree. The question whether a global reorganisation of provincial boundaries by means of ordinary statute could ever take place has until now remained unsettled. For the Charter's purpose, it might be sufficient to consult local populations, that is to say provincial communities, before a comprehensive reorganisation of their borders or territorial reform takes place. However, according to Italian constitutional law, it seemes that the initiative therefore should always lie upon municipalities and could not be taken independently by members of Parliament. This view has been apparently reconsidered by the Constitutional Court in its recent ruling No. 50/2015 on the Delrio Law, whereby Article 133, para. 1 IC applies only to specific cases of borders' changes and not to comprehensive territorial reforms.[1370]

With reference to the aforementioned reform, in any case, a consultation with the provinces was indirectly ensured within the aforementioned Councils of Local Authorities (CAL) and on grounds of frequent exchange of views with the National Association of the Provinces (UPI) within the framework of the so-called Conferences. Quite surprisingly, a territorial guarantee directly involving the provincial population is however provided for by Article 132, para. 2 IC, whereby a consultative referendum at provincial level is conditional for the detachment and subsequent attachment of a province to another region. This makes clear that a provincial community distinct from the municipal communities exists and has to be taken into account by the legislature.

[1369] Parliamentary practice concerning the establishment of new provinces shows that the requirements laid down in the T.U.E.L. were weakened. In particular, as for the establishment of the Provinces of Biella, Verbano Cusio-Ossola, Lecco, Lodi, Prato, Rimini, Vibo Valentia and Crotone, municipalities' initiative has not really played an active role, but merely supportive of previous regions' initiatives. Cf. report by the member of parliament Adriano Ciaffi, submitted on 16 March 1989 (C. 2093-A) and P. Costanzo, *Profili costituzionalistici dell'istituzione di nuove province,* in: Quaderni regionali, 1986, 1366-7. With reference to the more recent case of the Province of Barletta-Trani-Andria (BAT), it is not fully clear whether the active role was that of the Apulia Region or that of a bunch of mayors which submitted the proposal to the government. In the case of Monza-Brianza, to the contrary, the opinion of the Region followed the initiative of the municipalities. Finally, in the case of Fermo, the initiative was taken by a group of forty municipalities. To the contrary, the Italian Parliament did not approve legislative bills submitted by deputies for the establishment of the Provinces of Sulmona, Bassano del Grappa and Venezia orientale, even if the starting initiative by municipalities existed (see: Commissione Affari costituzionali – Senato della Repubblica, 24 January 2002).

[1370] Corte costituzionale, sent. n. 50/2015, Punto n. 3.4.2. del *Considerato in Diritto*. Yet, it must be borne in mind that, according to its previous ruling n. 220/2013, the Court did not entirely ruled out that a global territorial reorganisation could occur without prior initiative of the municipalities. Cf. G. Boggero, *I limiti costituzionali al riordino delle Province nella sentenza n. 220/2013 della Corte costituzionale*, in www.astrid-online.it, 2014, 20 and ff.

However, when it comes to pool together provinces or, in general, to change their boundaries it is up to the municipalities to activate the appropriate legislative procedure. Charter Article 5 might be said to supplement the constitutional provision, insofar as it requires that a consultation of the local communities (and not of local authorities) concerned has to take place. In other words, the T.U.E.L. provision requires the majority of the provincial population to support the redrawing of boundaries (Article 21, para. 3, lett. d)) might be said to implement an international obligation and thus, even if ranking as an ordinary law, shall not be derogated from, but constitutes a "norma interposta" for the constitutional review of legislation.

3.3. Metropolitan Boundaries

No constitutional framework exists yet as for boundary changes of metropolitan cities. 2001 constitutional legislator, in fact, by establishing metropolitan cities, did not amend Article 133 IC, thus leaving them without an explicit territorial guarantee. The question is therefore whether Article 5 of the Charter might help in filling the gap.

First of all, it has to be borne in mind that a provisional legal framework for setting up metropolitan cities was fixed in ordinary legislation, notably in Articles 22 and 23 T.U.E.L., which however were still based on the idea that metropolitan cities and metropolitan areas were two different entities. In particular, municipalities should have issued a proposal on drawing boundaries of the city and the corresponding region should have decided thereupon. As mentioned, this original plan was overturned by the new Delrio Law, which established metropolitan cities as directly superseding the most populated provinces. No bottom-up approach was followed by the legislator in this respect. In fact, as maintained by the Constitutional Court in its ruling n. 50/2015, by virtue of the nature of the matter the establishment of a category of local territorial authorities whose existence is explicitly set out in the national Constitution cannot but resting within the State.[1371]

Yet, it appears that, according to the new Law, only *opting-in*, but no *opting-out* by municipalities within the jurisdiction of the metropolitan city is possible. In other words, Article 1, para. 6 of the Delrio Law allows the municipalities within the jurisdiction of neighbouring provinces to be attached to the new metropolitan city, pursuant to the procedure designed in Article 133, para. 1 IC. However, it appears to prohibit to municipalities within the metropolitan city to be detached from it and be attached to a neighbouring province or, possibly, to create a new province. The draft bill, in fact, allowed also for an *opting-out*, which was eventually repealed on grounds of possible

[1371] Corte costituzionale, sent. n. 50/2015, Punto n. 3.4.1. del *Considerato in Diritto*.

fragmentation of territories.

The procedure followed for metropolitan cities' establishment is doubtfully compliant with the Charter, since no previous consultation with local communities took place before enactment of the law. Further, the involvement of municipalities only for being attached to the metropolitan city does not correspond to the bottom-up approach adopted by the Constitution for municipalities' and provinces' boundary modifications and might be proved impinging upon the equality principle and thus being unconstitutional, unless one argues by analogy that a detachment of municipalities from metropolitan cities is always possibile pursuant to Article 133, para. 1 IC.

In this respect, it should be mentioned that Article 1, para. 50 of the Delrio Law stipulates that, insofar as possible, the T.U.E.L. provisions applying to municipalities shall apply also to metropolitan cities. In fact, in spite of the fact they exercise supra-municipal functions, metropolitan cities joined the National Association of Italian Municipalities (ANCI) and not the Association of the Provinces (UPI). This raises a further doubt on their true legal status and, therefore, also as to how their boundaries could be redrawn.

Here, it might be said that metropolitan cities should be treated like provinces and, therefore, their boundaries can be changed upon request of municipalities, pursuant to the procedure outlined in Article 133, para. 1 IC. Both *opting-in* and *opting-out* solutions should thus be possible. This solution can be said to be implied in the reasoning of the aforementioned reasoning of the Constitutional Court, whereby Article 133, para. 1 IC could not be used for the very establishment of the new authorities, but the legislator ought to resort to it whenever in the future municipalities will request to be detached from or attached to a metropolitan city.[1372]

4. Freedom of Organisation

4.1. The Power of Self-Organisation and a Strong Normative Autonomy

One of the main guarantees which municipalities and provinces reached to achieve on grounds of the 1990s local government reforms was that of "organisational autonomy" (*autonomia organizzativa*) or power of self-organisation (*potere di auto-organizzazione*), a power which in Italy goes hand in hand with the notion of "regulatory autonomy" (*autonomia statutaria e regolamentare*). In fact, the recognition of the latter, that is to say local authorities' power to adopt

[1372] Corte costituzionale, n. 50/2015, Punto n. 3.4.2. del *Considerato in Diritto*.

own Charters (*Statuti*) and to pass by-laws (*regolamenti*), enables them to exercise the former, that is to say to approve all relevant provisions for the organisation of their internal administrative structures and the discharge of their administrative functions. But "regulatory autonomy" is not confined to the field of the organisation of the internal administrative structures, but has to be understood as a truly "normative autonomy", that is to say as the power attributed to bodies different from those of the State to adopt rules of the same legal system. This is the main tool through which local authorities can build and shape their own subnational legal orders (*ordinamento*) and differentiate it from that of the State.

The recognition of local authorities' freedom of organisation and of far-reaching normative powers is what echoes most the old conception of "municipal power" (*pouvoir municipal*)[1373] and what marks the departure from a local government system based on hierarchy and uniformity, which was for a long time considered as being necessary for ensuring equality of the citizens before the State's administration throughout the whole territory, to a new one based on the newly constitutionalised principle of differentiation.[1374] Unlike in Germany, where differentiation is mostly fostered at *Land* level through the adoption of municipal and county codes, in Italy regulatory autonomy at local level empowers local authorities to greatly differentiate internal organisation and discharge of public affairs as well as to pursue own interests different from those of the State.

Before the 1990s, however, it was up to State law to determine the fundamental principles and rules on which each local authority was grounded,[1375] so that one might think that the freedom of organisation laid down in Article 6, para. 1 of the Charter read in combination with Article 3, para. 1, which defines local self-government not only as the right to "manage", but first and foremost as the right to "regulate", that is to say to exercise normative powers, had a major impact in bringing about a change of the Italian legal framework. After enactment of 2001 constitutional reform, the State retained exclusive legislative power over the organisation of its own administrative structures (Article 117, para. 2, lett. g)), whereas the local authorities' powers over their own organisation were primarily accorded to local authorities themselves, as pointed out first by Article 114, para. 2 IC, pursuant to which «*municipalities, provinces, metropolitan cities and regions are autonomous entities with their own charters, powers and functions according to the principles defined in the constitution»* and then also by Article 117, para. 6, sentence 3 IC, which clarified that

---

[1373] So for instance: M. Verpeaux, *La naissance du pouvoir reglementaire*, Paris, 1991.

[1374] F. Carloni, *Lo stato differenziato, Contributo allo studio dei principi di uniformità e differenziazione*, Torino, 2004.

[1375] See: T. Groppi, *cit*., 93; L. Verrienti, *Regolamenti e potere normativo degli enti locali*, in: Digesto IV delle discipline pubblicistiche, Torino, 1995; M. Alì, *Regolamenti degli enti territoriali*, in: Enciclopedia del diritto, VI, Milano, 2002, 931.

«*municipalities, provinces and metropolitan cities enjoy regulatory powers as to the organisation and to the fulfillment of functions assigned to them*».

For the first time, local Charters and by-laws gained direct constitutional relevance. In particular, the source of law through which the power of self-organisation of municipalities, provinces and metropolitan cities has first to be exercised is the local Charter (*Statuto*). This act ought to be passed with a two thirds majority by the deliberative body, i.e. the municipal or provincial council. Therein, as required by Article 6 T.U.E.L. and reinforced by Article 4, para. 1 by Law No. 131/2003 on implementation of 2001 constitutional reform, each local authority has to set out the fundamental rules relating to its internal organisation and functioning.

In particular, each local Charter has to contain provisions referring to the governing bodies and to the relationship between them, within the limits set by State law pursuant to Article 117, para. 2, lett. p) IC. In this respect, one has to recall that municipal or provincial bodies endowed with the power to adopt administrative acts producing external effects relating to the local community are only those listed by national statute, i.e. the mayor or the president, the council and the executive committee (*giunta*) at municipal level. They cannot be abolished nor can additional governing bodies be assigned with powers attributed exclusively to them by law. Besides, the local Charters have to regulate the allocation of powers between the organs themselves, as far as they have not been laid down by statute yet. In this respect, the so-called Delrio Law has recently granted provinces greater freedom to organise the distribution of powers among their internal bodies than it was the case before. Further, the local Charters ought to specify the main criteria as to how the administrative structures of the authority shall be organised and which will be then implemented by means of municipal or provincial by-law (*regolamento degli uffici e dei servizi*). The different forms of internal controls (see *infra* 5), institutional rights of political minorities within the governing bodies, citizens' participatory rights, measures for ensuring gender equality in the governing bodies, as well as how public responsibilities attributed to the authority shall be discharged (by concluding a convention agreement with other local authorities, by awarding public contracts through competitive tender or directly to publicly-owned companies, etc.) have also to be regulated in the local Charters and then possibly detailed through local by-laws. If local authorities should not abide by the statutory obligation to regulate all these matters in their Charters, a substitution by State supervisory authorities might occur (see *infra* 5). Yet, the scope of the local Charters' content is not entirely predetermined by the law, otherwise one would not fully grasp to what really amounts the normative autonomy of local authorities. By contrast, municipalities, provinces and metropolitan cities might regulate therein other organisational aspects which they might consider relevant for the

local community, including the call and holding of local referendums, the establishment of a local ombudsman, the subdivision of the municipal or provincial territory into additional decentralised entities (*circoscrizioni* or *circondari*) and the establishment of a president of the local assembly (*presidente del consiglio*).

As for the rank of the local Charters (*statuti*), the Italian Court of Cassation found that they are administrative acts *sui generis*, since they enjoy legal force as in between ordinary statutes passed by the State or by the regions and local by-laws (*fonte atipica di grado subprimario*).[1376] They can derogate from legislative provisions, but they ought to be in accordance with the principles of the Constitution (e.g.: Article 97, para. 2 IC). However, as provided by Article 4, para. 2 of the Law No. 131/2003, principles can also be set from ordinary legislation, insofar as this explicitly designates them as non-derogable by local charters. This general power of administrative organisation appears to be highly problematic, since it has no longer explicit legal basis in the Constitution. In fact, after 2001 constitutional reform, municipalities and provinces no longer have to comply with principles set out by general statutes of the Republic, as stipulated by former Article 128 IC, but only with principles which one could derive directly from the constitutional text.

As for local by-laws, they ought to comply with the provisions laid down in the local Charters, that is to say they cannot derogate from them (Article 7 T.U.E.L. and Article 4, para. 3 of Law No. 131/2003). Unlike before the enactment of 1990s local government reforms, since 2001 the power to adopt own by-laws has no longer been limited to specific issues, but is of general nature; it is in particular reserved to municipalities, provinces and metropolitan cities for regulating (a) the overall organisation of the administrative structures and (b) the modalities for discharging administrative functions conferred upon to them (Article 4, para. 4). From a combined reading of Article 117, para. 6 IC and Article 118 IC legal scholars derived a "principle of parallelism" between conferral of administrative functions upon local authorities and their regulatory powers.[1377] This does not mean that State and regional law cannot interfere with them. On the contrary, State or regional statutory provisions may be passed for ensuring a minimum of co-ordinated and uniform stance as to the discharge of administrative functions conferred upon to local authorities, as stipulated by Articles 114, 117, para. 6 and 118 IC. In particular, following to the Constitutional Court case-law, it has to be ruled out the interpretation whereby Article 117, para. 6 IC lays down a regulatory reservation clause whereby local authorities, building on the subsidiarity principle, enjoy an exclusive regulatory power (*riserva di competenza regolamentare*), which cannot be restricted by State or

[1376] Court of Cassation, Sez. Unite Civ., sent. n. 12868/2005; Sez. I, n. 25/2008; Sez. Trib, n. 23562/2009; T.A.R. Lazio II sez., n. 139/2009.
[1377] G. Tarli Barbieri and P. Milazzo, *Art. 117, co. 6*, in: R. Bifulco, A. Celotto, M. Olivetti (eds.), *cit*., 2295.

regional statute, as to how administrative functions have to be carried out.[1378]

By contrast, it can be affirmed that this regulatory reservation clause exists only in the sense that, according to the aforementioned principle of parallelism, local authorities do not need to be first entrusted by law for approving by-laws. Further, local by-laws can no longer be restricted by State or regional by-laws or regulations according to a hierarchical principle;[1379] local by-laws can be restricted by State or regional statute only insofar as to ensure a minimum of co-ordinated and uniform stance.[1380] As for the general organisation of their administrative structures, one could argue that local authorities' regulatory powers can be set limits by general principles to be derived directly from the Constitution, in particular from Article 97 IC, whereas, as mentioned, one cannot assess any legislative competence of the State directly enshrined in the Constitution to shape their organisation; unlike in Germany, where this general power is traditionally considered implicitly resting within the *Länder*, the Italian Constitution, after 2001 constitutional reform, appeared to confine State powers in this respect only to the organisation of State administrative structures.[1381] Finally, it has to be recalled that local authorities can exercise their normative powers not for organisational purposes only, but also for regulating a certain public affair within their competence and thus striking a specific balance among the different interests at stake. Yet, local by-laws for this purpose will have to comply with the principles laid down in statutory provisions.[1382]

To conclude, following to 2001 constitutional reform a different set of normative powers has been acknowlegded to local authorities so as to ensure their power of self-organisation. In the practice, local Charters (*Statuti*) and in particular local by-laws (*regolamenti*) have undergone a number of interferences by both state and regional statutory provisions, with the tacit consent of administrative courts which ignored the constitutional guarantees of local normative powers and start from the very old premise of hierarchical subordination of local by-laws to State and regional ones.[1383] Lacking a right to lodge a direct complaint before the Costitutional Court, it is relatively complicated for municipalities, provinces and metropolitan cities to ensure compliance with Article

---

1378 So however in the past: G.C. De Martin, *Intervento,* in: Aa.VV., *Il nuovo Titolo V della parte II della Costituzione. Primi problemi della sua attuazione,* Milano, 2003, 219.

1379 Cf. G. Di Cosimo, *I regolamenti nel sistema delle fonti,* Torino, 2005, 87-88, holding that State or regional by-laws within the competence of the State are legitimate according to the mechanism of *cedevolezza,* that is to say State or regional by-laws are in force until equivalent measures are adopted by means of local by-laws. But see: Corte costituzionale, sent. n. 246/2006, Punto 7.1 del *Considerato in Diritto*.

1380 Corte costituzionale, sentt. nn. 372/2004 and 246/2006.

1381 F. Merloni, *Riflessioni sull'autonomia normativa degli enti locali*, in: Le Regioni n. 1/2008, 101-102.

1382 G. Di Cosimo, *cit*., 75 and ff.

1383 Cons. Stato, sez. IV, sent. n. 6610/2008; sez. V, sent. V n. 2343/2008; n. 1305/2008. On the administrative case-law see: C. Mainardis, *Le fonti degli enti locali tra dottrina e giurisprudenza,* in www.forumcostituzionale.it, 2010. For the experience in the Veneto Region see: M. Gorlani, *I poteri di normazione degli enti locali*, in: E. Gianfrancesco and P. Cavaleri (eds.), *Lineamenti di diritto costituzionale della Regione Veneto*, Torino, 2013, 318 and ff.

117, para. 6 IC as well as with Article 114, para. 2 IC.[1384] Organisational autonomy is further restricted by extensive interpretations of subject matters caught by State legislative powers and in particular of those relating directly to the "protection of competition" (Article 117, para. 2, lett. e) IC), the guarantee of "the core minimum for the enjoyment of social and civil rights" (Article 117, para. 2, lett. m) IC) and to the local government system ("basic responsibilites", "governing bodies" and "electoral legislation" of municipalities, provinces and metropolitan cities). The 1996 Congress recommendation whereby member States should reduce to the strict minimum rules which tend to restrict freedom of local authorities to determine their own administrative structures curiously reminds of the policy recommendation made to the State and to regional legislators by some legal scholars to self-restraint before restricting the regulatory powers of local authorities.[1385]

4.2. The Power of Staff-Recruitment and Principles on Conditions of Service: the Case of Municipal and Provincial Secretaries

As far as Article 6, para. 2 of the Charter is concerned, it might be said that the power of self-organisation of local authorities under Italian law includes also the power of staff recruitment. The difficult relationship between State and local authorities in this subject will be exemplified by an analysis of the case relating to the municipal and provincial secretaries.

In the first place, it has to be recalled that, within the framework of the reform on the public administration of the early 1990s, Italy has instituted contract-based relations between the vast majority of public sector employees and the State represented by a government agency called ARAN (so-called "privatisation of the employment relationship"), leaving scope for collective bargaining and in the end to collective agreements (Legislative Decree No. 165/2001). Civil servants sign a fully-fledged contract governed by private law for four years, whereas bargaining on salaries shall occur every two years. Within the framework of the economic and financial crisis, wages have been frozen. The legal framework applies to both the State and local public administration. At local level, that is to say at the level of each public authority, a further complementary collective bargaining takes place, within the limits of the budget (Article 40 and ff of Legislative Decree No. 165/2001). With enactment of Law No. 150/2009, derogation from statutory provisions by collective agreements at every tier of government has been restricted. In general, it has to be borne in mind that the legal framework on collective agreements extended by the State to the local government system is one of those top-down measures passed for ensuring

[1384] So: M. Mancini, *I regolamenti degli enti locali*, in: Le Regioni n. 1/2008, 148 and ff.
[1385] So: G. Tarli Barbieri and P. Milazzo, *cit*., 2296 and M. Mancini, *cit*., 152.

organisational uniformity throughout all the territory of the Italian Republic. In this respect, since no explicit legislative competence on the administrative organisation of the Republic as a whole exists in the Italian Constitution, the constitutional justification is often found not only in principles which can be directly derived by constitutional provisions, but also in "general principles of the legal order" or even in a non-existing legislative reservation clause for setting out principles on administrative organisation.[1386] These issues are relevant for the purpose of the present analysis, insofar as a far-reaching legislative competence of the State might encroach upon the power of recruitment of local authorities, which indeed are subject to the same rules as other non-territorial administrations.

An issue which was thoroughly examined by the Congress in 1997 was the system of appointment and dismissal of municipal and provincial secretaries (*segretari comunali e provinciali*), state officials which do not exist in Germany and whose tasks were, *inter alia*, to supervise and co-ordinate the duties of the management bodies within a local authority (unless a director general existed), co-operate and provide assistance to the governing bodies so as to ensure that decisions are executed and report on the lawfulness of any decision submitted to the assembly or council of the authority for which they worked. Further powers can nowadays be attributed to the secretaries by the municipality or province's Charter (*Statuto*) or by municipal or provincial by-laws. Secretaries cannot carry out managerial functions and managers (*dirigenti*) of the municipality cannot be hierarchically subject to him.

According to the Congress, which referred to the regulatory framework prior to the so-called Bassanini Acts of the late 1990s, the secretaries «*constitute a state body whose appointment, sanction and dismissal are decided by the Ministry of the Interior. In addition, the function of reporting on the lawfulness of decisions submitted to the assembly or council of the local authorities in which they work reflects their institutional position as linchpins in the state's supervision of municipalities and provinces».*[1387] Following to a certain Charter's interpretation, the governing bodies of local authorities have the right to appoint and dismiss civil servants and local employees (Article 3, para. 2 in combination with Article 6, para. 2). Since the enactment of Law No. 127/1997, one of the several Bassanini Acts, municipal and provincial secretaries have no longer been officials appointed by the Ministry of the Interior,[1388] but, after being chosen from a national

---

1386 Critical on this practice: F. Merloni, *Il ruolo della Regione nella costruzione di una nuova amministrazione territoriale,* in: S. Mangiameli (ed.), *Il regionalismo italiano dall'unità alla Costituente alla sua riforma*, Milano, 2012.

1387 Congress of Local and Regional Authorities, *Report on the implementation of the European Charter of Local Self-Government in Italy*, CPL (4) 4, § 22.

1388 On the compatibility of the power of the Ministry of the Interior with Article 5 and former Article 128 IC see: Corte costituzionale, sent. n. 52/1969, Punto n. 5 del *Considerato in Diritto*, which however did not adjudicate upon

register (*albo*), they are now appointed as well as removed from office by the mayor or by the president of the province, to whom they are subordinate. At the same time, however, they have continued being civil servants employed, through a national qualification system, by a national agency established ad-hoc (*agenzia autonoma per la gestione dell'albo dei segretari comunali e provinciali).* This agency was closed down in 2010, after adoption of Law Decree No. 78/2010 and secretaries are now again formally employees of the State Ministry of the Interior. Their specific condition has not been clarified since then and the Congress itself, in its 2013 report, did not take note of the issue. Further, with 1997 reform, secretaries were deprived of the power of scrutiny over the legitimacy of governing bodies' deliberations.

In the legal scholarship, one might find some remarks about this Congress report as an example of monitoring experience which brought about a reform in a member State. However, one could also argue that the reform of municipal and provincial secretarites was rather fuelled by the call of a national referendum proposing their abolition and which was due to take place in 1997, but which was eventually avoided by the enactment of the aforementioned Law No. 127/1997.

5. Administrative Supervision: Cooperation rather than Coercion

The first Congress' report on the situation of local and regional democracy in Italy, carried out in 1997,[1389] dealt specifically with the administrative supervision over local authorities' activities and over local authorities' elected bodies. Since then, the Italian constitutional legal framework has radically changed, as the last Congress' report briefly shows, but its previous observations are still useful nowadays to better understand what are the actual limits of State supervision pursuant to the Charter.

5.1. Supervision over Local Auhtorities' Acts: Internal Controls of Legality

Before 2001 constitutional reform, pursuant to former Article 130, para. 1 IC, all decisions adopted by municipal and provincial councils or executives on matters within their competence were subject to preventive supervision (so-called *controllo preventivo di legittimità*) by the corresponding regional supervisory committee (so-called CO.RE.CO., *comitato regionale di controllo*) to verify their lawfulness (Law No. 62/1953). There was a maximum time limit of twenty days within which

---

whether the status of municipal and provincial secretary as State civil servant conformed with the Constitution, but rather upon whether recruitment of secretaries by means of a national competition encroached upon local authorities' freedom of organisation. No violation was found in this respect, since the Court considered that a national competition was essential for ensuring regulatory uniformity.

1389 Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CPL (4) 4, 5 June 1997.

the act could be nullified. After nullification, though, the act could not be replaced by the supervisory authority. Municipalities and provinces could appeal against the decisions of the supervisory committees before administrative courts. Supervision might have also involved the expediency. In fact, with reference to a specific category of acts (concerning specifically the estate of the local authority), the committee could require a new deliberation by the council on mere policy grounds, even if, pursuant to Article 130, para. 2 IC, they could not be nullified.

At the beginning of the 1990s, this system was unanimously described as inadequate by the legal scholarship.[1390] In particular, it was considered as highly ineffective, since acts were reviewed on a case by case basis, whereas no comprehensive control on the economy and efficiency of the administrative action took place. The system was further subject to growing political interference: only certain acts passed by certain municipalities or provinces were really supervised so as that scandals could not really be prevented, but were even fuelled by the committees themselves. With the adoption of the Law No. 142/1990 things slowly began to change. Supervision on the merits was, at least formally, set aside, whereas for supervision on the lawfulness it was distinguished between mandatory supervision (*controllo necessario*), which was limited to certain acts passed by the councils, and optional supervision (*controllo eventuale*), which had to occur at the request of a third of members of the council or of the executive with reference to decisions of the municipal and provincial councils relating to particular matters or to serious defects. Additionally, the committee could assess the lawfulness of the budget and annual accounts. This verification included verification that the accounting figures matched the data contained in the decisions. The annual accounts could be modified by or placed under the responsibility of auditors.

According to the Congress' first report, even if controls on the merits were abolished, *apriori* supervision on the lawfulness «*was to become a supervision of expediency, as a result of the excessive number of local activities subject, simultaneously and within a short space of time, to preventive supervision by the regional supervisory committees*». In this respect, therefore, a preventive supervision which could steadily lead to supervision of expediency by the committee and which concerned a large number of acts hardly conformed to the principle whereby supervision should as a rule be strictly limited to legality (Article 8, para. 2) and to the principle of proportionality (Article 8, para. 3) laid down in the Charter.

Additionally, local authorities' right to appeal against supervisory measures was formally ensured by law, but in practice many small municipalities «*were unable to meet the stipulated deadlines or*

1390 F. Pinto, *cit*., 351-352.

afford the cost of proceedings». In its Addendum of the Report on Italy, the Congress found that, after approval of Bassanini Law No. 127/1997, the above problems were mostly resolved, since the preventive scrutiny of lawfulness was considerably reduced, i.e. it had to be exercised only with reference to the Charters (*Statuti*), rules of procedure, budgets and balance sheets, except where otherwise requested by the council in matters concerning, *inter alia*, staff management and calls for tenders. Moreover, under the new legislative provisions, scrutiny of legitimacy was to be strictly confined to matters of procedure, form and competence. Though, concerns remained as to supervision on the budget and on annual accounts which amounted to «*unwarranted supervision of expediency»* contrary to Article 8, para. 2 of the Charter and also undermined local authorities' power to freely dispose of their financial resources (Article 9, para. 1).

Following to 2001 constitutional reform, the old supervisory system which found its legal basis in Article 130 IC has been progressively dismantled,[1391] even if prefects are still deemed to retain minor powers for carrying out preventive control of legality over certain acts (Article 135, para. 1 and 2 T.U.E.L.)[1392]. This is quite a striking difference with the German system, where preventive controls, in particular prior approvals of acts by supervisory authorities, albeit exceptional, are still quite widespread, in particular before local authorities engage into economic activities, adopt new by-laws, pass land-use plans, alienate properties etc. Unlike in Italy, in fact, administrative supervision aims *inter alia* also at ensuring protection of local authorities against themselves.

Further, in Italy, external audit was progressively internalized so as that supervision is now mainly entrusted to internal monitoring bodies, which have to be explicitly mentioned in the local authorities' Charters (*statuti*), that is to say the *revisori dei conti* and the *nuclei di valutazione*. The former verify the lawfulness of every act passed by the local administration (so-called *controllo di regolarità amministrativa e contabile*), in particular financial ones, *inter alia* by issuing an opinion

---

1391 On the constitutional debate about whether the State or the regions are now entitled with the legislative competence to regulate administrative supervision over local authorities' acts see: A. Pitino, *Il potere governativo di annullamento straordinario degli atti amministrativi illegittimi. Riflessioni a margine dell'annullamento disposto dal Governo delle norme dello Statuto del Comune di Genova riguardanti l'elettorato attivo e passivo degli stranieri,* in: Le Regioni n. 6/2006, 1133-1137.

1392 In particular, prefects can request substitutive interventions by the State or by the Region whenever they believe contracts on which the local authority signed disguise connections with mafia organisations (para. 1). Moreover, they can preventively supervise decisions by local authorities concerning tenders, alienations, purchases and in general all sort of contracts, possibly asking for a reconsideration of the decision by the council (para. 2). According to part of the scholarship, after the abolition of Article 130 IC, controls pursuant to Article 135, para. 2 T.U.E.L. cannot longer be exercised. Cf. G. D'Auria, *Appunti sui controlli amministrativi dopo la riforma del nuovo Titolo V (parte II)*, in: Il Lavoro nelle Pubbliche Amministrazioni, Suppl. al Fasc. I, 2002, 90. See however: Cons. St., sez. I, n. 1006/2003, whereby the constitutional legal basis would be Article 117, para. 2, lett. h) IC. So also: *Articolo 135*, in: R. Cavallo Perin and A. Romano (eds.), *Commentario breve al Testo Unico degli Enti Locali*, Padova, 2006, 742. The Congress, back in 1997, considered that exceptional administrative supervision provided for by "anti-mafia legislation" is more a matter of human rights and rule of law and did not want to comment on it.

on the draft budget and by validating the final accounting note, whereas the latter carries out, on a periodical basis, a comprehensive cost-benefits assessment on the administrative action by using economy, efficacy and efficiency standards (*controllo di gestione*). The expediency control on the adequacy of certain measures if compared to the objectives set in advance by the local executive body (*controllo strategico*) is a managerial internal control which is endowed to officials' structures close to the executive (*direttore generale*).

Finally, the Court of Auditors (*Corte dei Conti*) was endowed with the task to supervise the functioning of internal audit monitoring bodies and cooperate with them. In particular, the internal statutory auditors ought to hand over to the Court a report on the budget and on the final accounting note and are under the obligation to report to the Court over any irregularities in the balance sheet. The role of the Court and of its regional branches (*sezioni regionali di controllo*) as external audit bodies over local authorities has become increasingly important within the local government system after 2001 constitutional reform. As stipulated by Article 100, para. 2 IC, the Court «*exercises preventive control over the legitimacy of Government measures, and also ex-post auditing of the administration of the State budget».* The auditing powers of the Court of Auditors with reference to the administrative action of the local authorities cannot replace preventive supervisory powers abolished in 2001. *Apriori* audit compliance concerns only a limited number of governmental acts and not those of the administrative subdivisions of the State. Though, the Court carries out *a posteriori* performance audit, which is aimed at ensuring both compliance of territorial authorities with the balanced budget rule (Article 7, para. 7 Law No. 131/2003) and the accomplishment of the objectives of economy, efficacy and efficiency of administrative action (*controllo sulla gestione*). Unlike internal monitoring bodies, which is active all along the administrative procedures, the Court operates only afterwards and without any power to coerce or issue penalties upon local authorities, but its rulings contain mostly suggestions and remarks as to how sound financial management can be ensured. Administrative supervision through the Court of Auditors is based on co-operation, i.e. on the assumption that compliance can be assured by inducing local authorities to take themselves corrective measures and following them up. The Court also delivers legal opinions on specific matters upon request by local authorities (so-called *funzione consultiva*). In general, it might be said that the Court works following to the basic principles laid down by Charter Article 8. If, however, supervision has to be regarded as a necessary counterweight (*Korrelat*) to local autonomy, one has the impression that, except for the rather hybrid nature of the prefect, Italy has been lacking a fully-fledged external supervisory authority over local authorities since 2001.

In this respect it has to be borne in mind that, after 2001 constitutional reform,[1393] the Italian government has retained a specific and rather exceptional power to nullify administrative acts issued by local authorities' governing bodies, when this is strictly necessary to ensure "the unity of the legal order" (Article 138 T.U.E.L.). This power (so-called *potere di annullamento straordinario del Governo*) should be considered as a rather extraordinary one, since it is not a typical administrative control over local authorities' acts and as such it is not aimed at nullifying all administrative acts arising from lack of jurisdiction, misuse of power (*ultra vires*) and violation of law, as it was priorly the case under the fascist law (Article 6 R.D. No. 383/1934), but only at nullifying those administrative acts which contradict any present and concrete public interest, whose protection is essential for the State to ensuring the aforementioned unity of the legal order, pursuant to Article 5 IC.

In this respect, it deserves to be mentioned that, since at least 2004, the Italian Government has been constantly nullifying charters and by-laws passed by several municipalities (and regions) throughout Italy, by means of which they attempted to grant non-EU foreign citizens who have fulfilled a specific residence qualification both the right to vote and the right to stand in for election, as provided by Article 6 - Chapter C of the 1992 Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level, ratified by Italy in 1997, but with reference to which the Italian Republic entered a reservation, whereby the application of the Convention is confined only to Chapters A and B.

The government, which ought always to proceed after consultation with the local authorities involved and after the Council of State has issued a mandatory, though not binding opinion on the issue, believed that it enjoyed both exclusive legislative and regulatory competence in the subject matter "electoral legislation of local authorities" (Article 117, para. 2, lett. p) IC in combination with Article 117, para. 6 IC)[1394] and thus enjoyed the right to nullify municipalities' charters and by-laws which would have produced a situation in which political rights would have been enjoyed on a

---

[1393] On conformity with 2001 constitutional reform see: Cons. Stato, Sez. I, 22 February 2004, n. 12068/2004 e Cons. Stato, Sez. I, 1 March 2006, n. 4145. See also Corte costituzionale, sent. n. 229/1989, declaring that this power as incompatible with a decentralised administrative supervision as provided for by former Article 125 IC. After 2001 constitutional reform, which put the State and local and regional authorities on equal footing (Article 114, para.1 and 2 IC), one could argue this power disregards local autonomies. In the scholarship see: E. Balboni, *Legge La Loggia e controlli esterni sugli enti autonomi*, Quaderni regionali, 2004, 1061; S. Civitarese Matteucci, *L'autonomia istituzionale normativa degli Enti locali dopo la revisione del Titolo V. Il caso dei controlli*, in: Le Regioni, 2002, 457; V. Cerulli Irelli, *Commento all'art. 8*, *cit*., 179; R. Cameli, *Poteri sostitutivi del Governo ed autonomia costituzionale degli enti territoriali (in margine all'art. 120 Cost.)*, in: *Giur. Cost.*, 2004, 3402; G. Vesperini, *Gli enti locali*, Roma-Bari, 2004, 103; F. Pinto, *cit*., 370-371. *Contra*: A. Pitino, *cit*., 1138-1139 e 1144 and ff.; G. D'Auria, *cit.*, 2002, 90.

[1394] See: T.F. Giupponi, *Il voto agli stranieri extracomunitari: si, no, forse*, in: Quaderni Costituzionali, 2004, 849-850, who rightly contends that extending the right to vote is not a matter of electoral legislation, which only regulates the exercise the right to vote.

different basis, depending on the territorial jurisdiction in which foreigners were living in.[1395] No real consideration was however given to the international legal issue, i.e. as to whether and in how far the State might be allowed to nullify administrative acts whose purpose is to implement provisions of an international treaty in conformity with Article 10, para. 2 IC which stipulates that «*legal regulation of the status of foreigners conforms to international rules and treaties».* The treaty at hand was indeed signed and ratified by the State itself, but with reference to which Italy entered a reservation. In this respect, it might be said that, by every consideration of local authorities' own initiatives, the treaty making power and in particular the power to remove a reservation or withdraw a declaration lies within the exclusive foreign policy competence of the State, in the case of Italy, pursuant to Article 117, para. 1, lett. a) IC. Further, as it is the case for Germany, the reservation can hardly be removed by Italy, since granting the right the vote to non-EU foreigners would most likely impinge on the constitutional provisions which restrict it to Italian citizens (Articles 48 and 51 IC). As pointed above, in fact, international obligations bind the Italian Republic only insofar as they comply with the fundamental principles of the Italian constitutional order.[1396]

This issue seems however having some relevance for the relations between the State and its subnational units since it is one of a number of examples marking a global trend whereby local authorities attempt at implementing themselves international obligations, thus bypassing the States they belong to. In Germany this has been previously showed with reference to a by-law (*Satzung*) of the city of Nuremberg, which banned the use of gravestones produced with child labor, in accordance with a ILO-Convention of 1999. Yet, the case described hereabove is also very peculiar of the Italian legal framework, in which certain local authorities have been trying to extend the use of their indeed strong regulatory powers beyond what the law itself allows. In Germany, except for the aforementioned special case of the city of Bremerhaven, regulatory autonomy (*Satzungsautonomie*) is in general weaker ans as such not suited for extending political rights of foreigners.

5.2. Supervision over Governing Bodies: External Controls of Expediency and Legality

Unlike administrative supervision over local authorities' acts, supervision over local authorities' governing bodies has not undergone major changes in the last thirty years. After 2001 constitutional reform, the legislative competence on this subject-matter has its constitutional basis in both Article

---

1395 The Council of State (*Consiglio di Stato*) has never been fully clear whether this power has its legal base in Article 117, para. 2 lett. p) or in Article 120, para. 2 IC. Cf. A. Pitino, *cit*., 1145 and ff.

1396 So also: T.F. Giupponi, *Stranieri extracomunitari e diritti politici. Problemi costituzionali dell'estensione del diritto di voto in ambito locale,* in www.forumcostituzionale.it, 2007, 7.

117, para. 2, lett. p) IC and Article 120, para. 2, IC.[1397] In particular, the former covers supervision which entails the power to dissolve municipal, provincial and now also metropolitan councils on specific grounds entailing malfunctioning of the governing bodies and to appoint a commissioner until the next elections, whereas the latter covers those cases in which the government executes single or specific acts through a commissioner (so-called *commissario ad acta*) in substitution for local authorities failing to comply with international law (or EU legislation) or in the case of grave danger to public safety and security or whenever action is necessary to preserve legal or economic unity and, in particular, to guarantee a basic level of civil and social entitlements.

5.2.1. The Dissolution of the Governing Bodies

The reasons listed by Article 141 T.U.E.L. for the dissolution of local authorities' councils are in the first place linked to the person of the mayor or president of the province, whose resignation, long-term absence, removal from office or death results in the dissolution of the corresponding municipal or provincial council.[1398] Dissolution of the councils may also result from anti-constitutional acts, persistent and serious violations of the law and serious reasons of public order; a specific kind of dissolution of councils is linked to the involvement or interference from criminal organisations such as the mafia (Article 143 T.U.E.L.)[1399]

In this respect, it has to be assessed whether dissolution of local elected officials under Italian law complies with the aforementioned interpretation of Article 7, para. 1 in combination with Article 8 of the Charter, whereby dissolution, i.e. limits to the free exercise of functions by local representatives can be ordered in cases of manifest malfunctioning of the local authority or in other exceptional cases according to the principle of proportionality by an independent administrative authority or by a court (see *supra* first Chapter). Back in 1997, the Congress considered that «*the state's powers to dissolve municipal councils for reasons which are regulated but unconnected with the local elected representatives themselves (such as those relating to the mayor or the president of the province* - Article 141, n. 1 and 2 T.U.E.L. - *or for generic reasons of public order* - Article 141, para. 1 lett. a) T.U.E.L. - *should be considered as contrary to the Charter».*This statement is

[1397] Article 2, para. 8, lett. m) of Law No. 131/2003. This legal basis has been confirmed by T.A.R. Lazio, sez. I, 18 March 2010, n. 4275 – T.A.R. Emilia-Romagna, sez. I, 25 October 2004, n. 3687; Cons. Stato, sez. VI 15 March 2007. See also *obiter dictum* Corte costituzionale, sent. n. 373/2007.

[1398] The mayor, the president of a province, the members of a council or assembly and other local elected representatives may be removed from office for a number of generic reasons : unconstitutional acts, persistent and serious violations of the law, or serious reasons of public order. The prefect has the power to authorise provisional suspension in cases of serious and urgent necessity (Article 142 T.U.E.L.).

[1399] There are other cases in which a dissolution of local authorities' councils is provided by the T.U.E.L., i.e. Article 193, para. 3 T.U.E.L., Article 247 T.U.E.L., Article 262 T.U.E.L.

particularly strict and has not been repeated in the last Congress' report, even if the regulatory framework has not changed over time. According to the Congress' reasoning, *«in the first case, there are no reasons which would justify the dissolution of a council for reasons affecting only the mayor or the president of the province».*

However, this assessment is not accurate, since dissolution of the council takes place only when the mayor or the president of the province resigns or loses a motion of confidence. In the other cases, the council continues operating (so-called *prorogatio*). The choice of the Italian legislator to dissolve councils for reasons related to the mayor or to the president of the president has to do with the "simul stabunt, simul cadent" rule, which aims at ensuring political stability of local authorities insofar as possible. This choice can hardly be criticized, pertaining to the margin of appreciation of the State to decide how the relations of the deliberative and executive body should work. The Charter, in fact, does not set down any particular rule concerning the relationship between the governing bodies other than that the executive should be responsible to the deliberative body (Article 3, para. 2 of the Charter). But the Congress further contended that *«the vagueness surrounding the reasons for dissolution compromise elected representatives' free exercise of their duties. However the small number of councils which have been dissolved on the grounds of public order point to a prudent exercise of the power granted to the administration».* Also this criticism comes too short, since the Congress did not take into account that the notion of public order had originally been confined to few cases in which public safety has been endangered.[1400] In general, yet, the Italian legal framework appears not as restrictive as in Germany, where only six *Länder* regulate the dissolution of the council[1401] and only three the early termination of the mandate of the mayor[1402] and in any case treating separately the two bodies, a circumstance which might be explained with the fact that for a long time in Germany no simultaneous election of the two bodies took place.

As for the State's functions delegated to municipalities and in particular to mayors (*sindaco quale ufficiale di stato civile*), following to Article 14, para. 3 T.U.E.L., one has to recall that prefects are empowered to arrange inspections and obtain data and information so as to verify whether the

---

[1400] L. Vandelli, *cit*., 134-135, quoting old Council of State's rulings: Cons. St., sez. I, 15 January 1957, n. 2247 and Cons. St., sez. I, 9 October 1956, n. 1705. More recently, some scholars underlined that this provision might leave a wide margin of discretion to the legislator. As for violations of the law, yet they must be persistent and serious. The government follows a procedure, whereby it has first to request the local authority to remove the legal consequences of the acts and it should not be in the position to exercise substitutive action. As for of the notion of public order, it was construed in a restrictive way by the case-law. Cf. P. Milazzo, *Commento all'art. 141. Scioglimento e sospensione dei consigli comunali e provinciali,* in: C. Napoli and N. Pignatelli (ed.), *Codice degli enti locali,* Roma, 2012, 1447-1448.

[1401] Art. 114, para. 3 BayGO; § 141 lett. a) HessGO; § 44 SHGO; § 84 KV MV; § 125 NRW GO; § 125 Rh-Pf GO.

[1402] § 128 BW GO; §118 SächsGO; § 144 LSAGO.

mayor is regularly carrying out delegated tasks (Article 54, para. 9 T.U.E.L.), but not to make any assessment as to the expediency or opportunity.[1403] Hence, this power can be largely deemed to conform with Article 8, para. 2 of the Charter.

In general, it might thus be said that the regulatory framework complies with the Charter's principles. However, it must be borne in mind that additional supervisory powers over local authorities' governing and executive bodies can always be established by means of law. This has proved to be true in the recent past, when the legislator set down that a commissioner should be appointed at the place of the provincial council and of the president of the province whose term of office had already come to an end, at least until the reform transforming the provinces' bodies into indirectly elected ones would have been implemented. This case, even if exceptional, cannot be compared to other cases in which the functioning of the authority has literally broken down and it risked to result in a deprivation *sine die* of the right to self-government, since the mandate of several commissioners in different provinces was repeatedly extended by means of statute (so-called *legge provvedimento*). Yet, one has also to remind that eventually no shortening of the councillors' mandates occured, so that one cannot argue that Article 7, para. 1 of the Charter was infringed upon. Nonetheless, the appointment of a commissioner for a significant and not priorly fixed amount of time appears to collide with the proportionality principle (Article 8, para. 3) and, furthermore, to undermine the institutional obligation which the Italian Republic has to abide by, whereby local self-government has to be exercised by democratically constituted bodies (Preamble and Article 3, para. 2).[1404]

5.2.2. Execution in Substitution by the State

As for the State power to provisionally act in substitution of local authorities, one should recall *inter alia* the appointment by prefects of State commissioners (*commissari ad acta*) whenever local authorities' councils, deliberately or not, avoid to pass the budget within the time set by law (Article 141, para. 2 T.U.E.L.) and of a regional commissioner whenever a local authority lacks spatial planning regulations required for by the law (Article 141, para. 1 lett. c) bis T.U.E.L.). Whether it is for the State or for the Region to appoint the commissioner depends upon the legislative competence in the specific subject matter, as laid down by Article 117 IC. The law must ensure, however, that interventions by commissioners concern only mandatory administrative acts (the budget and spatial planning regulation are among these, but also the approval of the local Charter).

[1403] Cf. S. Rossi, *Il nuovo ruolo del prefetto tra diritti e sicurezza*, in Persona e Danno, 2011.

[1404] On this issue see: G. Boggero and A. Patané, *Profili costituzionali del commissariamento delle Province nelle more di una riforma ordinamentale dell'ente intermedio*, in www.federalismi.it n. 12/2014.

Commissioners are not given discretion in *an* (but only in *quid* and *quomodo*) and they shall exercise their powers in compliance with the principle of proportionality and loyal co-operation (Article 8 of Law No. 131/2003). In particular, the law should provide for guarantees ensuring that the local authorities' involved can at any time spontaneously conform to legal prescriptions and that they are properly consulted within the framework of the procedure of substitution of action. Proportionality is ensured, since the administrative procedure of substitution of action starts with request of information to the local authority by the State or by the Region, it follows a notice to comply within a reasonable time (so-called *diffida ad adempiere*) and finally the substitution of action itself by the designated commissioner, though direct substitution is also possible when the task which has not been accomplished is a delegated one. Local authorities are empowered to have recourse to a judicial remedy against substitutive decisions. The regulatory framework appears hence not to infringe upon any Charter's provision.

6. Financial Equipment of Local Authorities is not yet Adequate

That local self-government cannot be conceived without financial autonomy is widespread common sense which one may detect also from a combined reading of Articles 3, para. 1 and 9 of the Charter. Most recently, this interpretation, which originates in the monitoring practice of the Congress (see *supra* first Chapter), was supported in a complaint against the aforementioned Delrio Law lodged before the Italian Constitutional Court by the Lombardy Region,[1405] whereby there cannot be any financial autonomy pursuant to Article 119 IC, if the governing bodies of local authorities, which are expected to raise taxes and approve expenditures in the interest of the local populations, are not elected directly by the people who are expected to pay the very same local taxes ("*no taxation without representation*").

Hereunder, it has thus to be clarified whether the Italian constitutional framework as well as ordinary legislation have yet conformed to this principle. In particular, it will be first assessed whether the principle of adequate own financial resources is enshrined and complied with in the domestic legal order (6.1); whether municipalities, provinces and metropolitan cities enjoy the power to establish own taxes and fix their rates (6.2); whether the so-called "concomitance principle" has constitutional status and whether it is normally complied with by ordinary legislation (6.3); whether equalization procedures in favour of weaker local authorities exist and work properly (6.4) and, finally, whether local authorities have to overcome burdensome obstacles for having access to financial markets and taking out loans (6.5).

[1405] Ricorso No. 39 per legittimità costituzionale, depositato in cancelleria il 6 giugno 2014 (della Regione Lombardia),(GU 1ª Serie Speciale - Corte Costituzionale n. 31 del 23-7-2014), to be found in www.gazzettaufficiale.it

6.1. The Adequacy of Local Authorities Financial Resources

For a pretty long time the Italian local government finance system was based mainly upon resources allocated from the State to local authorities (so-called "derivate finance"). It is hence no surprise that handbooks on local government law had no chapter on financial autonomy of local authorities until recent times.[1406] In particular, pursuant to 1971 fiscal reform, all main local taxes and quotas of national taxes established in the 1950s and in the 1960s were abolished, *ad hoc* transfers were introduced by means of law and municipalities were merely given a tax on the increase of the value of buildings (*imposta sull'incremento del valore degli immobili*). All deficits run by local authorities were covered by the State insofar as they would accept programs of budgetary reclaim. This system, amended at the end of the 1970s and in the 1980s by introducing limits on expenditures, the obligation by local authorities to present a balanced budget rule, as well as the power to increase tariffs for local services were not successful in providing local authorities with an "adequate" degree of own financial resources and in making the finance system more sound and viable.

Only with the adoption of Law No. 142/1990 and subsequently of the T.U.E.L. (Article 149), the Italian legislator attempted to reverse the system by establishing the principle whereby at least a substantial share of administrative functions of local authorities, in particular those falling under their competence, ought to be funded by their own financial resources, thus recognizing their right to raise revenues in the interest of the local population. Further, investments expenditures had to be financed by an *ad hoc* national fund, whereas a contribution for the execution of essential public services was to be granted by the State. Both own and transferred resources ought to be certain and could not be reduced for a timeframe of three years. In particular, in 1992 the municipal tax on buildings (*imposta comunale sugli immobili*, ICI) was established, whereas the provinces continued depending chiefly on state transfers until 1997, when the Legislative Decree No. 446/1997 empowered municipalities and provinces to regulate their own revenues, except for the determination of the tax base, the taxable persons and the maximum rates. In the same year, the Congress' first report assessed the increase of municipalities' own resources between 1991 and 1994 on the total amount of resources at their disposal (from 38 percent to 57 percent), but lamented the poor level of financial autonomy with reference to the provinces (the share of own resources ranged between 5 percent and 7 percent for the same timeframe), which could hardly be considered as "adequate" and thus consistent with the Charter.[1407]

[1406] Cf. F. Staderini, *cit*., 1989, but even most recently see: F. Pinto, *cit*, 2012, dedicating only few pages to the issue. Only L. Vandelli, *cit*., devotes an entire chapter ofhis handbook to local finances and accounting (239 and ff.).

[1407] Congress of Local and Regional Authorities, *on the implementation of the European Charter of Local Self-*

Without any constitutional provision requiring the national legislator to comply with local authorities' financial autonomy, there could be little hope that the system established by means of ordinary legislation could survive new waves towards centralisation. That was the reason why 2001 constitutional reform established a constitutional guarantee of financial autonomy not only for regions, but also for those local authorities recognized in Article 114, para. 1 IC.[1408] In particular, new Article 119, para. 1 IC stipulates that «*municipalities, provinces, metropolitan cities and regions* – that is to say every single local authority[1409] – *shall have revenue and expenditure autonomy»* and, pursuant to paragraph 2, they all possess «*independent financial resources*», which they can manage according to the needs of their communities.[1410] These resources are listed in paragraphs 2 and 3 of Article 119 IC and are namely: **a)** taxes and revenues levied and collected on their own by local authorities in compliance with the Constitution and according to the principles of co-ordination of State finances and the tax system pursuant to Article 117, para. 3 IC; **b)** shares or direct co-participation in certain State tax revenues related to their respective territories;[1411] **c)** an equalisation fund established by means of State law for the territories having lower per-capita fiscal capacity. Pursuant to paragraph 4, all resources obtained from the aforementioned sources shall enable municipalities, provinces, metropolitan cities and regions to fully finance the administrative functions conferred upon to them (so-called "self-sufficiency clause").[1412]

The implementation of Article 119 IC has never been completed, because the government did not set down in advance how financial needs of local authorities should be assessed. To be more precise, the Law on so-called fiscal federalism committed the government to assessing financial needs on the basis of criterions such as "standard fiscal capacities" (*capacità fiscale standard*) and "standard needs" (*fabbisogni standard*), thus abandoning the criteria of historic expenditures, considered as one of the reasons of the past financial mismanagement by local authorities.[1413] This

---

Government in Italy, CPL (4) 4, 2 June 1997, §§ 39 and ff.

1408 Prior to its amendment, Article 119 IC was meant to grant financial autonomy only to regions and not to local authorities. Cf. Corte costituzionale, sent. n. 61/1987.

1409 A. Brancasi, *L'autonomia finanziaria degli enti territoriali: note esegetiche sul nuovo art. 119 Cost.*, in: Le Regioni n. 1/2003, 24.

1410 Very critical on the openness of this provision and on the predominant role still played by the State is M. Bertolissi, *Intervento*, in: G. Berti and G.C. De Martin (eds.), *Le autonomie territoriali dalla riforma amministrativa alla riforma costituzionale*, Milano, 2001, 115.

1411 Co-participation has thus to be distinguished from the own revenues. New Article 119 IC requires co-participation to be direct and not indirect. Preference is given to co-participation as a share of the total amount of revenues and not to surtaxes on national taxes. As for the relationship with the "respective territory", the legislator will enjoy discretion to decide whether referring to the amount of revenues in a certain area or to the tax assumption within a certain area. So: G. Fransoni and G. Della Cananea, *cit*., 2368.

1412 As for regions with special Charters, one has to remember that 2001 constitutional reform and in particular Article 119 IC do not apply to them insofar as their Charters (*statuti*) provide for a more generous guarantee of financial autonomy. Cf. Corte costituzionale, sent. n. 102/2008. However, diverse principles related to their financial autonomy applies to them too, including the State power of coordination of public finance (Article 117, para. 3 IC). Thus, for instance, also regions with special Charters are bound to respect the Internal Stability Pact.

1413 With enactment of Legislative Decree No. 216/2010 the Government assigned the task of developing the methodology for developing the standard needs to a company (SoSe S.p.a.).

assessment yet implied the prior identification of the fundamental functions of local authorities which however in the last few years underwent a number of reforms mostly connected with the financial crisis. Hence, even if the procedure for the assessment of the standard needs has not stopped and the allocation of resources according to the new,[1414] administrative functions have been financed according to yearly political bargains, i.e. following to past expenditures.[1415]

Adequacy and hence compliance with the Constitution shall thus be measured against the existence of all three sources of revenues, whereas nothing is said by the Constitution concerning the proportion of each of these sources on the overall amount of resources, which will have to be well balanced between each other,[1416] but will vary depending both on discretional choices by the legislator and on the specific situation of the local authorities concerned. However, it might be said that Article 9, para. 1 of the Charter complements the meaning of Article 119, para. 2 IC, since it requires that, among all other sources, own taxes and revenues collected of their own ought to be "adequate" as such. A system funding either municipalities or provinces or metropolitan cities mainly through co-partecipation in revenues and via transfers and only for a minor and irrelevant part through own taxes or revenues would thus represent a violation of the Charter. At present, only economic indicators having yet no legal sanction might provide evidence of what "adequacy" is. In particular, ISTAT is used to calculate: the degree of financial autonomy (*autonomia finanziaria*) as a relationship between, on the one hand, tax- and extra-tax revenues and, on the other hand, all current revenues; the degre of tax-raising autonomy (*autonomia impositiva*) as the relationship between tax revenues and all current revenues, as well the degree of financial dependence on the State or on the regions as the relationship between transfers and all current revenues.

Though, as noted by the Congress in its last report, it appears quite early to make an assessment in this respect, since «*the promise extended by the terms of the Constitution has been most severely compromised by a prolonged failure to enact the legislation necessary for the implementation of those terms and to produce actual change on the ground».* In fact, only eight years after the constitutional reform, the Italian legislature enacted the first law implementing Article 119 IC, that is to say Law No. 42/2009 on so-called "fiscal federalism". This Law committed the Government to adopt a number of legislative decrees for enabling a rapid transition from a system in which local authorities were receiving the major part of their funding from the State to a new system in which local authorities will collect their own financial resources from the people living in their

---

1414 See: M. De Nes, *I fabbisogni standard nell'impianto del federalismo fiscale e della cd. spending review,* in: www.federalismi.it n. 12/2013.

1415 Cf. V. Nicotra and F. Pizzetti, *Dalla fase transitoria alla fase a regime: un quadro di sintesi sulla finanza degli enti locali*, in: V. Nicotra, F. Pizzetti, S. Scozzese (eds.), *Il Federalismo Fiscale*, Roma, 2009, 355.

1416 Corte costituzionale, sent. n. 17/2004. G. Fransoni and G. Della Cananea, *cit*., 2370; P. Bonetti, *L'autonomia finanziaria regionale e locale come motore delle autonomie territoriali: un'introduzione dall'art. 114 all'art. 119 Cost.*, in: Le Regioni n. 5/2010, 1185.

jurisdiction. The new system shall thus be based on the principle of subsidiarity and accountability of local representatives: by decentralising the power to levy taxes, the local community should also be able to better control how their revenues are used.

Pending this process of reorganisation of the local finance system, the Constitutional Court first stated that Article 119 IC is programmatic in nature and could not immediately relied upon before any implementation by the legislator, i.e. but it also appeared willing to set down limitations to the State power to pass laws contradicting the spirit of Article 119 IC, that is to say laws imposing new burdens on local authorities worsening their financial condition or restricting their financial autonomy.[1417] Nonetheless, many years have gone by and Article 119 IC has not been fully implemented yet. Extraordinary measures adopted during the financial crisis and grounded on what the Charter calls "national economic policy" reasons (that is to say under domestic law on the State competence for coordination of public finance and taxation system enshrined in Article 117, para. 3 IC) overshadowed the whole process of the local finance system reorganisation. General caps on local and regional public expenditures, the obligation to present a balanced budget and other specific constraints on the net debt laid down in the so-called Internal Stability Pact (*Patto di Stabilità Interno*) together with legal uncertainty as to the main sources of funding for municipalities resulted in a restriction of their margins of financial autonomy, which on many occasions was deemed to conform to the Constitution by the same ICC.[1418]

To conclude, even if it is true that overall transfers from the State have diminished over time and the share of local taxes on the total amount of resources has increased, local authorities are still consistently reliant upon State regulatory decisions for their funding, so that one could not really affirm that Article 9, para. 1 of the Charter is abided by Italy. From a long-run perspective, one could rather speak of a positive but still unsufficient evolution towards self-financing.[1419]

6.2. Concomitant Financing as a Vague and Non-Justiciable Principle

A question of a certain importance is whether the State and the regions both with ordinary Charters and with special Charters, when conferring new administrative functions upon local authorities, have a constitutional duty to comply with the so-called principle fo concomitant financing (Article 9, para. 2 of the Charter), whereby the conferral of new tasks to local authorities ought always to be matched with all resources needed to carry them out. In its first report, in 1997, the Congress found that «*whenever new duties were transferred to local authorities, the financial resources required to*

[1417] Corte costituzionale, sentt. nn. 37, 241, 320, 423/2004.
[1418] Corte costituzionale, sentt. n. 4/2004 and 417/2005.
[1419] Corte dei conti, *Attuazione e prospettive del federalismo fiscale*, Audizione presso la Commissione parlamentare per l'attuazione del federalismo fiscale, 6 March 2014, 16-18.

implement them correctly do not follow. Paradoxically, if this situation did not change, the new Law No. 59 of 15 March 1997 could make things worse insofar as the number of tasks for which local government is responsible could increase substantially». As mentioned above, for the first time Article 3, para. 2 and 3 as well as Article 7 of Legislative Decree No. 112/1998 explicitly set out such a principle, which however had no constitutional status at the time, since former Article 119 IC did not provide at all for a guarantee of financial autonomy for local authorities. But this principle was largely unknown also in the relationship between State and regions, since the conferral of administrative functions in the late 1970s took place without any concomitant transfer of resources by the State.

Only after 2001 constitutional reform, one could argue that such a principle was enshrined into new Article 119, para. 4 IC, whereby there must be a commensurate relationship between administrative functions and resources for their exercise.[1420] However, this commensuration shall be measured against the provision of financial resources deriving from the three aforementioned sources of revenue, that is to say in particular from own revenues, not against transfers of resources by the State, as the Charter's minimum standard requires.

In this respect, one has to recall that since 2001 constitutional reform, doubts have arisen in the scholarship as to what administrative *functions* mentioned by the Constitution shall be covered by the aforementioned "self-sufficiency clause". Article 119, para. 4 IC specifically mentions functions "attributed" to regions and local authorities, which means in first place that not only administrative, but also legislative functions of the former shall be financed through the aforementioned sources. The interpretative problem around the term "attribution" has been sharpened by Law No. 42/2009 on Fiscal Federalism, which appears to construe restrictively this notion. In fact, according to Article 11 of this Law, under the aforementioned "public functions" one has mainly to understand: fundamental functions of local authorities as laid down by a State law pursuant to Article 117, para. 2, lett. p) IC, the "basic level of benefits relating to civil and social entitlements" to be guaranteed throughout the whole national territory pursuant to a law adopted following to Article 117, para. 2, lett. m) IC, as well as other functions (*altre funzioni*) conferred upon local authorities by the State and by the regions. However, Article 11, para. 1, lett. d) of the same Law also committed the Government to identify the procedures ensuring a concomitant transfer of resources in case of conferral of further functions (*ulteriori funzioni*), following to Article 118 IC. This means that, at least according to the 2009 legislator, not all public functions were to be funded pursuant to the

---

1420 So also: F. Merloni, *La tutela internazionale*, *cit*., 35; G. D'Auria, *Funzioni amministrative e autonomia finanziaria delle Regioni e degli enti locali*, in *Foro it*., 2001, 212. According to S. Martinengo, *Il federalismo fiscale municipale e il difficile processo di autonomia degli enti locali*, in: Studium Iuris, 2013, 550 and ff., the principle of concomitant financing goes hand in hand with that of fiscal federalism and it was first mentioned with reference to the financing of the regional healthcare systems.

combination of revenues provided by Article 119, para. 2 and 3 IC, but that the State might still finance further administrative functions conferred to local authorities via specific transfers. Following to the same Article 11, para. 2, lett. d) of Law No. 42/2009, this transfer of resources has at least to be commensurate with the scope of responsibilities conferred to local authorities, as provided by the aforementioned Article 7, para. 2 of the Law No. 131/2003. In fact, Article 2, para. 5 and Article 7, para. 2 of Law No. 131/2003 set forth that, in the transitional period before the full implementation of Article 119 IC, funding to local authorities had to be commensurate to the responsibilities they were put in charge with and that, before fixing the amount of resources they were assigned with, a mandatory understanding ought to be reached within the Joint Conference State-regions and State-Cities-Local Autonomies.

Hence, one could contend that, until Article 119 IC will not be fully implemented, the Charter principle laid down in Article 9, para. 2 can be used through Article 117, para. 1 IC as a constitutional standard to strengthen the transitional provision on concomitance laid down in Law No. 42/2009 and should be read in combination with Law No. 131/2003, whereas, after full implementation of Article 119 IC, Charter Article 9, para. 2 will still provide for a minimum guarantee for local authorities in case of conferral by the State of further responsibilities different from those which have to be covered according to Article 119, para. 4 IC.[1421] The same pattern applies also at regional level. In the transition towards the new model designed by 2001 reform, the regions are bound to comply with the principle of concomitance not only on the basis of Law No. 131/2003, but also on the basis of the Charter. After full implementation of Article 119 IC, concomitant funding for further responsibilities to which Article 119, para. 4 IC does not apply will be required by the Charter. Here, it must be remembered that Article 119, para. 4 IC will not apply to functions *delegated* to local authorities, but only to functions *attributed* to them, that is to say only to functions the discharge of which is an expression of local autonomy,[1422] nor it will apply to functions funded as part of a supplementary allocation of resources pursuant to Article 119, para. 5.

As for now, many regions with ordinary status have already explicitly enshrined the principle of concomitance of funding for both conferred and delegated functions in their regional Charters, including Tuscany (Article 64), Campania (Article 19, para. 3), Veneto (Article 11, para. 8), Umbria (Article 26, para. 4), Calabria (Article 47) and Abruzzo (Article 70, para. 1). A generic reference to the need of regulating financial transfers related to the attribution or delegation of administrative

---

1421 See *inter alia*: T.A.R. Puglia – (Bari), Sez. II, sent. 26 November 2004 n. 5501.

1422 According to Merloni, the principle enshrined in Article 119, para. 4 IC does not apply to delegated functions by the State or by the regions, but only to attributed or conferred ones. Cf. F. Merloni, *Il rapporto tra Regione ed enti locali nel nuovo Statuto della Regione Emilia-Romagna*, in Le Istituzioni del Federalismo n. 1/2005, 102. See also A. Brancasi, *L'attuazione del federalismo attraverso i principi contenuti nell'art. 119 Cost*., in: F. Amatucci and G. Clemente di San Luca, *I principi costituzionali e comunitari del federalismo fiscale*, Torino, 2007, 20-21.

functions to local authorities is made in the regional Charter of Emilia-Romagna (Article 24, para. 4), Molise (Article 63) and Basilicata (Article 55). In the regions with special Charters, only the Charter of Friuli-Venezia Giulia (Article 11, para. 3) explicitly provides for the same rule. No reference at all to this issue can be found neither in the special Charters of Sicily, Aosta Valley, Trentino-South Tyrol, Sardinia nor in the ordinary Charters of Lombardy, Piedmont, Puglia and Marche, where this question is normally dealt with by the single regional laws conferring case by case administrative functions to local authorities.[1423]

It might be worth noting that, most recently, the Provinces of Verbano-Cusio-Ossola, Biella and Alessandria located in the Piedmont Region complained about the regional allocation of resources following to the enactment of Regional Law no. 9/2013. The Admininistrative Court for the Piedmont Region (T.A.R. - Piemonte) essentially shared their view, but decided to first lodge a complaint before the ICC on the constitutionality of the aforementioned regional law, which has not been adjudicated yet.[1424] The Constitutional Court will have *inter alia* to scrutinize whether local financial autonomy (Article 119, para. 1 IC) has been infringed upon, that is to say whether it conforms with the Constitution that administrative functions conferred or delegated upon to the aforementioned Provinces by the Region were not concomitantly paired with the corresponding financial resources, thus being the former compelled to finance them with own revenues they allege not to have. If the Court should find a violation of Article 119, para. 1 IC this would mean that the concomitance principle is a corollary of financial autonomy, which however hardly can be the case when functions are delegated. Better would have been if the Administrative Court for the Piedmont Region had mentioned also Article 117, para. 1 IC (i.e. Article 9, para. 2 of the Charter), which constitutes a more precise benchmark of constitutionl review.

To sum up, the question might be answered as follows: Italy has not explicitly enshrined the principle of concomitant financing in the Constitution. Only in recent times the principle has gained importance in the constitutional debate. This is acknowledged also by the political rapporteurs of the Congress, who however «*cannot accept, in particular, that the financial resources of local authorities are (...) "commensurate" with their continuing responsibilities».* New Article 119, para. 4 IC provides for a more sophisticated guarantee of financial autonomy than that of the Charter, whereby the State is under the obligation to put local authorities in the condition to be self-sufficient. This guarantee does not really match with the one set out in Article 9, para. 2 of the Charter, which requires a transfer of resources for each new conferral or delegation of responsibilities. This principle can be detected in subconstitutional and ordinary legislation but not

---

1423 In particular see: Law No. 36/2008 of the Puglia Region (Legge regionale 19 dicembre 2008 n. 36 "*Norme per il conferimento delle funzioni e dei compiti amministrativi al sistema delle autonomie locali*").

1424 T.A.R. Piemonte, ord. 24 gennaio 2014, n. 71.

at constitutional level, unless one intends to construe Article 119, para. 1 IC accordingly. That is the reason why alleged violations of the principle of concomitance by State and regions should be checked on the basis of Article 117, para. 1 IC, that is to say against the "norme interposte" of the Charter.

6.3. Local Authorities Enjoy a Limited Power to Raise Own Taxes and Fix their Rates

As mentioned, since the early 1990s the share of local taxes on the total amount of resources at disposal of local authorities has increased. It remains however to be seen whether this increase has concerned all categories of local authorities - that is to say municipalities, provinces and metropolitan cities indifferently - and whether this trend truly reflects a devolution of tax-raising powers to them, pursuant to Article 9, para. 3 of the Charter.

First of all, it has to be borne in mind that according to Articles 2 and 12 of the Law No. 42/2009 on so-called fiscal federalism, local authorities have not only been entrusted with the power to pass by-laws concerning taxes established either by the State or by the regions, but they also have the power to fix and adapt their rates. However, even under new Article 119, para. 2 IC, no autonomous power of local authorities to create new taxes themselves exists.[1425] According to Article 23 IC, in fact, «*no obligation of a personal or financial nature may be imposed on any person except by law*»[1426]. It remains though to be seen whether this law should be a regional or a State one. According to the dominant position in the scholarship and ultimately shared by the ICC,[1427] the regions can neither pass legislation on existing taxes, established and regulated by the State (so also Article 7, Law No. 42/2009), nor create new local taxes on their own, before the State has explicitly set out the fundamental principles following to which the regions are allowed to act. Hence, even if the State does not formally enjoy exclusive competence to regulate the subject matter of local authorities' own taxes (*tributi propri*), but retains only a concurrent power of coordination of State finance and of the tax system (Article 117, para. 4 IC read in combination with Article 119, para. 2 IC), it yet ended up governing the whole tax system on the basis of its exclusive competence on the tax system

---

1425 Hence, no much difference with the legal framework in force before 2001 constitutional reform exists. Cf. Article 42 of Legislative Decree No. 46/1997.

1426 There were however authors advocating the power of municipalities to issue regulations derogating from State or regional law. See: L. Antonini, *Articolo 23*, in: A. Celotto, M. Olivetti, R. Bifulco (eds.), *Commentario alla Costituzione*, 2006, 497.

1427 G. Della Cananea, *Autonomie e responsabilità nell'art. 119 della Costituzione,* in Il lavoro della P.A., 2002, n. 1, 70. and A. D'Atena, *Prime impressioni sul progetto di riforma del Titolo V*, in: G. Berti, G.C. De Martin (ed.), *Le autonomie territoriali: dalla riforma amministrativa alla riforma costituzionale*, n. 20 dei Quaderni del Centro di ricerca "Vittorio Bachelet", Milano 2001, 236. *Contra*: A. Brancasi, *cit*., 13. Cf. Corte costituzionale, sentt. n. 37/2004, 261/2004, n. 2 and 75/2006, n. 335 and 397/2005, n. 102/2008, n. 123/2010.

of the State (Article 117, para. 2, lett. e) IC), so that basically no relevant space for regional legislation and for local regulation is left. Further, the power of local authorities with regard of their "own taxes" is of another kind from that assigned to the regions, since the former do not enjoy legislative powers and ought therefore to be authorized by law to pass regulations on taxes established by State or regional law.[1428]

In the practice, it can be argued that, even following to the new constitutional framework, whereby the State enjoys a rather limited competence on specific subject matters (Article 117, para. 2 IC) and, conversely, regions and municipalities are the entities which, as a rule, are endowed respectively with legislative powers and administrative functions, the State, through its power of coordination of public finance and of the tax system (Article 117, para. 3 IC), has yet continued to hold a general power of establishing, amending and abolishing local authorities' main own taxes.[1429] All taxes levied at regional and local level, thus, cannot be deemed to be own taxes of local authorities *stricto sensu*, since it is the State which has the power to determine the assumption (*presupposto*), the tax base (*base imponibile*), the taxable persons (*soggetti passivi*) and the maximum rate (*aliquota massima*).[1430] However, the dominant opinion, supported by the case-law of the ICC, has construed the concept of "own taxes" *stricto sensu* not as taxes established directly by the same entities which will levy them, but as taxes which can be established by either the State or by the regions and whose main elements (apart from the tax base) will then be regulated by local authorities.

The prominent power retained by the State can be explained first in the light of the constitutional provision enshrined in Article 53 IC, whereby the tax system shall be progressive, thus making the State as the guarantor of progressivity of the whole system, also in respect of regions. Secondly, the State has been granted the task by the ICC to ensure that no fragmentation of the tax system or duplication of taxes occurs on the territory of the Italian Republic. Local authorities might thus exercise the mere power to "activate" a certain tax established by the State or by the Region, introduce detractions, reductions and exemptions and fix the rate in the range provided for by the law.[1431] The political proposal made in the past by scholars like Antonini and Brancasi to make State

---

1428 G. Fransoni and G. Della Cananea, *cit*., 2365-2366. *Contra*: F. Gallo, *Prime osservazioni sul nuovo art. 119 Cost.*, in Rassegna Tributaria, n. 2/2002, 591.

1429 So also: A. Brancasi, *cit*., 32. This power has to be exercised within the limits set by the ICC in the aforementioned rulings n. 37 and 241/2004, whereby, after 2001 constitutional reform, the already existing scope for financial autonomy cannot be restricted. The abolition of certain revenues should be fairly compensated. However, the burden of proof that the loss of revenues disrupts the proper discharge of their functions lies upon the regions (or local authorities) involved. Cf. Corte costituzionale, sent. n. 121/2013 e n. 36/2014.

1430 As for regional taxes see: Corte costituzionale, sentt. nn. 296-297/2003 and n. 311/2003. As for local taxes see: Corte costituzionale, n. 335 and 397/2005, n. 75 and 412/2006, n. 24/2008, n. 298/2009.

1431 So also: G. Fransoni and G. Della Cananea, *Articolo 119*, in: A. Celotto, M. Olivetti, R. Bifulco (eds.), *cit*., 2363 and ff. A different reasoning applies to regions endowed with special autonomy status. See: Corte costituzionale, sent. n. 102/2008 on Sicily and n. 357/2010 on Trentino-South Tyrol, where regions can establish own taxes even

legislation as limited as possible, for example by limiting it to the identification of the areas or the fields in which taxes could then be levied at regional or local level or by setting a limit on the overall fiscal pressure, has never been really taken into consideration by political elites.[1432]

Currently, as for the legislative framework of the tax system at local system, it deserves to be mentioned that with the enactment of Legislative Decree No. 23/2011, one of several decrees implementing Law No. 42/2009, the State allocated to local authorities a portion of national taxes as a compensation for certain State transfers' cut. In particular, municipalities were initially given a share of the national VAT, which had to be equivalent to 2 percent of the revenues of personal income tax (IRPEF). This co-participation, in force as of 2012, was first withdrawn and ultimately repealed in 2013. As for the personal income tax itself, municipalities may levy a municipal surtax with a range of 0-0,8 percent of tax variation. Both sources were conceived as shares of national taxes, pursuant to Article 119, para. 3 IC. In addition, a local municipal tax (IMU), that is to say a property tax on the notional rental value of both main and subsidiary houses, was introduced as the main source of own funding. As pointed out by the Congress, municipalities had «*the discretion to vary (within small margins) the levels of tax to be levied within their areas and there are a range of discretionary discounts to meet cases of hardship».* In particular, municipalities may deliberately increase or reduce the standard rate of 0,76 percent by a maximum of 0,3 percent. At the time when the Congress report was issued, the major problem connected with this municipal tax was the divertion of a significant proportion of it (nearly half of its revenues) to the State. The problem was eventually sorted out by Law No. 228/2012 in favor of municipalities, but, as regards the main dwellings, the IMU was completely repealed two years after its entering into force. In fact, with Law No. 147/2013 the Italian legislature introduced the new IUC (*imposta unica comunale*), the so-called single municipal tax, which is composed of three different taxes: the IMU, which still has to be payed on luxus first residences and on all properties other than first homes; the TASI, a tax on indivisible public services, which is paid by owners if the properties are unlet and by the landlord together with the tenant if on rent; the TARI, a tax on collection and disposal of waste at municipal level which is paid according to the square meters of the real estate. This combination of taxes, whose rate cannot exceed 1,06 percent, has not be yet proved to be successful in providing municipalities with a consistent source of revenues, since it entered into force as of 2014 and, as of 2015, it might be amended again.

---

without any legal basis set by the State and could even amend the tax base and the tax rates of State taxes whose revenues is entirely transferred to them. On the power of local authorities to autonomously set exemptions and reductions without prior legislative authorization see, *inter alia*: M. Cardillo, *Potestà regolamentare comunale*, in: A. Uricchio, *La fiscalità locale tra modelli gestori e nuovi strumenti di prelievo,* Santarcangelo di Romagna, 2013, 57-59 ff.

[1432] L. Antonini, *cit*., 498 ff. and A. Brancasi, *cit*., 94 ff.

Other own taxes provided for by the aforementioned legislative decree are the secondary municipal tax (*imposta municipale secondaria*) on advertising and duties on public billboard; a tax intended to fund a particular activity or area of public expenditure for ten years time (*imposta di scopo*); the tourist stay tax (*imposta di soggiorno*) or the disembarkation tax (*imposta di sbarco*) for municipalities located on a island. To conclude, one might already contend that all local authorities were given taxing powers which can make for an adequate revenue of own financial resources. It is true that own financial resources are made also of other revenues, i.e. alienations of public properties, penalties etc., but if one restricts the scope of assessment to taxing autonomy of municipalities, one has to conclude that it is still highly limited and conditioned upon State choices. In particular, municipalities have suffered a situation in which, in particular between 2008 and 2010, they could not rely on revenues from any major own taxes, whereas nowadays they can adapt the tax rates only on a very limited scale.

The situation with the provinces and with the newly born metropolitan cities is not much different, if not even worse. The former have never disposed of significant financial revenues on their own until the second half of the 1990s, when transfers were radically reduced and the share of own revenues on the total amount of revenues reached 43 percent in 1999. Following to the entering into force of 2001 constitutional reform the situation has changed and transfers began to increase again. After the outbreak of the debt crisis, transfers to the provinces by State and regions were radically cut so as that, paradoxically, the degree of both tax-raising autonomy (*autonomia impositiva*) and financial autonomy (*autonomia finanziaria*) of the provinces has increased according to ISTAT (2012).

However, one has to take into account that the provinces, unlike municipalities, do not levy any significant own taxes, but predominantly shares or surtaxes on national taxes. After the adoption of Delrio Law No. 56/2014, the main revenues upon which the provinces will rely upon will be likewise, as provided for by Legislative Decree No. 68/2011, that is to say the provincial tax for environmental protection activities (TEFA), the waste disposal tax (established by Article 5, Law No. 549/1995), the levy for the occupation of public land (COSAP or TOSAP), the co-partecipation in the revenues of the personal income tax (IRPEF) to a maximum extent of 0,6 percent of the total amount of revenues, the additional provincial vehicle registration tax (IPT) and the motor insurance premium tax (RC auto), whose rate they can increase or decrease by 3.5 percent starting from a standard rate of 12,5 percent set by the State, thus effectively charging between 9 percent and 16 percent. Other revenues, including both State transfers and the local surtax on electricity consumption outside houses, were abolished by the State between 2011 and 2012. However, the

nominal revenues of the aforementioned taxes or charges have been dramatically decreasing due to crisis effects and evasion. The provincial finance system is not as diversified and buoyant as the municipal one and thus cannot keep pace with the increasing expenditures the provinces have to cope with. Limitations on provincial expenditures for the maintenance of school buildings were hence eased as of 2015. As for the metropolitan cities, they are expected to inherit many of the same tax revenues through which the old provinces were funded, but, until now, it is not clear whether additional taxing powers will be conferred upon to them by the national legislator who, within the framework of the Delrio Law, committed the government to adopt new legislative decrees on the local government finance of provinces and metropolitan cities (Article 1, para. 97).

6.4. Equalisation Before the "Equalisation Fund"

Unlike the former wording of Article 119 IC, which did not explicitly foresee any equalization scheme, one of the three revenues which shall make for self-sufficiency of local authorities is the equalisation fund (Article 119, para. 3 IC), which ought to be set up for local authorities with lower per-capita fiscal capacity and cannot be subject to allocation constraints. Supplementary resources might further be provided by the State to single local authorities affected by socio-economic difficulties, according to Article 119, para. 5 IC. Whereas the former is both a general and mandatory measure suited to cover both current and capital expenditures incurred by local authorities while performing their functions, the second is a specific and optional measure suited to cover additional expenses and special interventions, which can, but does not have to be put in place by the State.[1433] *Prima facie,* the new constitutional framework appears to be highly in tune with the Charter and in particular with Article 9, para. 5. Hereunder, it should though be assessed more in details whether objective criteria to determine the "needs-capacity-gap" were identified by the Italian legislator before establishing equalisation mechanisms, whether existing equalisation mechanisms are or not a combination of vertical and horizontal measures and, finally, whether equalisation in Italy really serves the purpose to help weaker local authorities or, to the contrary, it is a system thought to replace revenue sources which should be rather levied by local authorities themselves making maximum use of fiscal capacity.

Preliminarly, one has to bear in mind that, like Article 9, para. 5, the provision of Article 119, para. 3 IC is programmatic in nature and requires implementation by the legislature. As the Congress rapporteurs found during their monitoring activities, «*although the government assured us that an experimental pilot project to introduce equalisation was underway (Legislative Decree No 88 of*

[1433] F. Fransoni and G. Della Cananea, *cit*., 2372.

2011), there is no general scheme in operation yet and this continues, therefore, to be a huge gap in the arrangements still to be made for the implementation of fiscal federalism»[1434]. Indeed, many years after the entering into force of the constitutional reform, no equalisation fund has been eventually put in place by the government, so that one of the three sources of revenues upon which the new local goverment finance system should be grounded is still missing. As Article 13 of Law No. 42/2009 on "fiscal federalism" pointed out, two complementary issues should in fact be completed before starting the fund: the determination of both the standard fiscal capacity of local authorities and of the standard needs of local authorities for discharging so-called fundamental administrative functions. Hence, equalisation should be based on criteria which are completely different from those used in the past, that is to say the concrete needs of the local authorities concerned and what the available resources are before transferring them.[1435] Currently, calculation of the standard needs has almost come to an end, so that in the near future one would expect the fund aimed at offsetting the imbalances in the fiscal capacities of local authorities being finally operative.

This fund will provide local authorities with general-purpose transfers, since new Article 119, para. 3 IC forbids the legislator to constrain the allocation of grants for specific purposes, a provision which appears to conform to Charter Article 9, para. 7.[1436] and which is aimed at avoiding interferences by the State or by the regions in how functions are exercised by local authorities. However, transfers for specific purposes might continue enjoying a relevant role on the basis of Article 119, para. 5 IC, which allows for special contributions by the State on rather exceptional and specific occasions and not for the purpose of the normal discharge of public services.[1437] In this respect, Legislative Decree No. 88/2011 established the fund for cohesion and development (*fondo per la coesione e lo sviluppo*), replacing the former fund for under-developed areas (*fondo per le aree sottoutilizzate*), aimed at reducing economic and social imbalances and at fostering the exercise of the rights of the person and which should not be aimed at replacing local and regional authorities in their own efforts to ensure these rights.

This does not mean that a system of redistribution of resources between local authorities (*horizontal*

1434 Congress of Local and Regional Authorities, *Report on Local and Regional Democracy in Italy*, CG (24) 8, 19 March 2013, § 65.

1435 G. Della Cananea, *Autonomie e perequazione nell'articolo 119 della Costituzione*, in: Le Istituzioni del Federalismo n. 1/2005, 139.

1436 Corte costituzionale, sent. n. 370/2003; n. 16 and 423/2004. Allocation constraints were turned down in particular whenever the regions were entrusted with either residual or concurrent legislative powers on a certain subject matter.

1437 See: Corte costituzionale, sent. n. 49/2004, whereby the Court declared not being conform to the Constitution State funds established for the specific purpose of infrastructural development at local level, since it did not represent an exceptional reason. However, several funds established by State law were declared as conform to the Constitution, insofar as aimed at ensuring the exercise of fundamental rights. See: Corte costituzionale, sent. n. 50/2008. Cf. F. Biondi Dal Monte, *La Corte costituzionale torna sui fondi statali vincolati con alcune novità in materia di immigrazione*, in: Le Regioni, n. 3/2008, 638-657.

equalisation) or from the State to local authorities (*vertical equalisation*) has never been established in Italy yet. To the contrary, with enactment of Legislative Decrees No. 23/2011, No. 68/2011 and No. 88/2011, implementing Law No. 42/2009 on fiscal federalism, three different mechanisms were set up in this respect. Until the entry into force of the equalisation fund set out by Article 119 IC, the first two legislative decrees provided for the establishment of two experimental redistribution and equalisation funds (*fondi sperimentali di riequilibrio*) aimed, the former, at financing municipalities through both the co-participation in the revenues to the VAT and through the revenues or shares of real estate taxes (flat tax on the rental income, personal income tax from the ownership of land or buildings, mortgage and land registry tax) and the latter, at financing the provinces through a co-participation to the revenues of the personal income tax (IRPEF). At the same time the State reduced the existing transfers to municipalities and provinces, allegedly in proportion to the extent of shares of revenues flowing to the two funds (Article 2, para. 3 of Legislative Decree No. 23/2011 and Article 18 of Legislative Decree No. 68/2011)[1438]. The amount of resources and the criteria on how allocating them among local authorities had to be decided following to understandings reached within the Conference State-Cities-Local Autonomies. Concomitantly, the two decrees also urged regions with ordinary status to establish regional funds of similar nature, by financing them with a co-participation of no more than 30 percent of the revenues of the car tax (*bollo auto*) and by abolishing all corresponding regional transfers to local authorities.[1439]

Both aforementioned transitional solutions appear to constitute a trenchant example of horizontal and not of vertical equalisation. To be more precise, the impression is that no real equalisation, but just a compensation takes place for the oscillating tax revenues caused by fiscal reforms. Unlike what Article 21, para. 1, lett. d) of the Law No. 42/2009 required, the provisional redistribution and equalisation fund for municipalities did not take into account the fiscal capacities of municipalities, but merely considered the territorial distribution of the overall revenues of real estate taxes and the municipalities inhabitants' number. Hence, allocation of resources follows the old scheme of State transfers used until 2010.[1440]

With enactment of Law Decree No. 95/2012 on the so-called *spending review*, the amount of resources of the second fund flowing to the provinces was radically reduced, yet without providing them with other sources of revenues, i.e. of own revenues (Article 16, para. 7), thus making rather impossible for them to carry out their own functions.[1441] With further legislative acts, the fund was

---

[1438] See: D.P.C.M. 12 April 2012 (for the provinces) and D.P.C.M. 13 June 2012 (for the municipalities).

[1439] As for equalisation in the regions with special Charters, Article 27 of the Law No. 42/2009 stipulates that they also concur to the common goal of financial equalisation on the basis of separated agreements with the State, whereas State legislative provisions apply to them only insofar as they concern funding to metropolitan cities, equalisation in the field of infrastructures and special contributions for cohesion and development.

[1440] So also: L. Antonini, E. Longobardi, A. Zanardi, *Le prospettive per la costruzione di un sistema perequativo per i comuni,* in www.astrid-online.it, 13 February 2013.

[1441] In this respect, one should recall that the Piedmont Region lodged a complaint before the ICC against Article

completely drained out by the State, so that, starting from 2015, the Provinces won't receive any resources at all from the fund, but, quite flabbergastingly, they will even be bound to transfer part of their own revenues to the State, a measure which can hardly be said in tune with the principle of financial autonomy and with the obligation to equalisation laid down in both the Constitution and in the Charter.[1442]

The redistribution and equalisation fund for municipalities was replaced the year after its enty into force by a fund of municipal solidarity (*fondo di solidarietà comunale*), adopted with Law No. 228/2012 and which is financed by a share of revenues retained from the main municipal tax (IMU), as provided by its Article 1, para. 380, lett. d). Unlike for its predecessor, the allocation of resources within the new solidarity fund shall occur partially by taking into account the financial needs of municipalities (*fabbisogni standard*), insofar as they have already been determined by the technical committees charged with the task of their elaboration. To sum up, unlike the former fund, the new one seemed to pursue both compensation and equalisation goals, but, after the adoption of Law Decree No. 35/2013, the solidarity fund was expected to work like its predecessor, thus aiming at compensating municipalities for a lack and reduction of resources. As of 2014, the legal framework changed again and, with enactment of Law No. 147/2013, the fund, which was thought as a transitional one, will become permanent. Further, 10 percent of the resources of the fund ought to flow to municipalities according to their financial needs.

As the Congress noted, «*the equalisation process as the basis for the distribution of State funding and an essential element in the achievement of fiscal federalism has been absorbed into the overriding project which is to cut public sector expenditure. Instead of being a vehicle for the implementation of fiscal federalism and a fair system for the distribution of State funds, equalisation has also become a part of the system of cuts. Necessary though this may be thought to be, it risks the distortion (and perhaps destruction) of the project as a whole*»[1443].

Indeed, if one does not consider the fund for cohesion and development, one should conclude that in Italy there is no vertical equalisation mechanism, but only two rather inefficient horizontal schemes,

---

16, para. 7 and 8 of the Law Decree. However, the Court declared the application inadmissable, because the Piedmont Region did not demonstrate, *inter alia*, how the legislative provisions infringed upon the financial autonomy of the Provinces, that is to say did not clarify to what extent the Provinces were unable to properly discharge their administrative functions. Cf. Corte costituzionale, sent. n. 36/2014. In this respect, however, it should be mentioned that the cuts were measured by a ministerial decree (D.M. 25 October 2012) by taking into account all current provincial expenditures and thus not distinguishing between those expenditures aimed at financing own functions and those aimed at financing functions delegated by the State or by the regions. The legal basis for the calculation has been meanwhile corrected by Article 10, para. 1, lett. b) of the Law Decree No. 35/2013. Cf. Consiglio di Stato, Sez. III, sent. 3 February 2014 n. 475.

1442 L. Oliveri, *Province, per favore non chiamamoli tagli*, in www.leggioggi.it, 16 December 2014; M. Orlando, *L'attuazione in Piemonte della legge 56/2014: il riordino delle funzioni delle province,* in: Politiche Piemonte, n. 31/2014.

1443 Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CG (24) 8, 19 March 2013, § 65.

which transfer resources originally attached to local authorities to the State and then back to local authorities. In a system where funding shall no longer build on transfers by the State, but on own revenues of local authorities a major role ought to be played also by equalisation. As for now, the amount of resources flowing from the two funds to local authorities were marginal and mainly aimed at compensating local authorities for missing revenues: whereas the amount of resources assigned to the municipal solidarity fund has slightly increased, the national redistribution fund for the provinces has been drained out by spending cuts approved by the Monti government between 2011 and 2012. To conclude, by using the words of the Congress, one can only take note of the «*insufficiency of the mechanisms and procedures for financial equalisation at the local and regional levels and the resulting unfairness and financial burdens»*, thus being fully justified the Congress recommendation whereby Italy has to «*develop and implement equalisation procedures in order to achieve a functional system of local and regional funding»*, which ought to be compatible with Charter Article 9, para. 5.

6.5. Constitutional Constraints on Public Borrowing at the Grassroots

One of the most important provisions of the Charter, at least as far as Italy is concerned, is Article 9, para. 8, which sets forth that local authorities should be in principle free to take out loans and, more in general, to borrow on the financial markets for capital investment purposes. Unfortunately, the Congress did not examine in details Italy's compliance with this provision. Here, it should thus be checked whether such a guarantee exists also under the Italian Constitution and, in particular, whether domestic provisions provide for stricter constraints on grounds of national economic policy, hence infringing upon the core of the right to have recourse to public borrowing.

First of all, Article 119, para. 6 IC stipulates that municipalities, provinces and metropolitan cities «*may only contract loans to the purpose of financing investments, with the concomitant adoption of amortization plans and subject to the condition that budget balance is ensured for all authorities within each region taken as a whole. State guarantees on such loans are excluded».* Whereas State and regions ought also to comply with the balanced budget rule embedded in Article 81 IC,[1444] for local authorities Article 119, para. 6 IC should be read in combination with the provisions laid down in the so-called "Reinforced Law" (*legge rinforzata*) No. 243/2012 on the implementation of the balanced budget rule enshrined in the Constitution.[1445] In other words, no balanced budget rule

1444 On the enshrinement of the balanced budget rule into the Italian Constitution see: G. Boggero and P. Annicchino, *Who Will Ever Kick Us Out? Italy, The Fiscal Compact and the Balanced Budget Rule*, in European Public Law, No. 2/2014, 247-261.

1445 On the consequences of this law for regions and local authorities see: G. Boggero, *Gli obblighi di Regioni ed enti locali dopo la legge n. 243/2012*, in: Amministrare a. XLIV, n. 1/2014, aprile, 93-148 and A. Gagliano, *The Introduction of the "Balanced Budget" Principle into the Italian Constitution: What Perspectives for the Financial Autonomy of Regional and Local Governments?*, in: Perspectives on Federalism, Vol. 5, No. 1 (2013).

exists at constitutional level as regards local authorities. This rule is laid down, though, in the aforementoned Law, which is a sort of "organic law", through which Italy aims at ensuring the sustainability of the public administration debt considered as a whole. Limits to indebtedness are set likewise for both regions and local authorities.

First of all, the aforementioned Law No. 243/2012 recalls that, as of 2016, regions and local authorities could resort to public borrowing only for capital investment and with the concomitant adoption of amortization plans. The "Reinforced Law" does not say whether local authorities should be priorly authorized by the State to contract loans or to resort to the financial markets. Hence, one could say that no constitutional rule exists in this respect. However, one should remember that local authorities' access to the financial markets underwent a process of liberalisation after enactment of Law No. 724/1994 and the Ministerial Decree No. 420/1996, which allowed local authorities to enter into loans and bond transactions so as to satisfy their financial needs for capital investment which ought to be exactly planned in advance and to perform operations on currency swaps to hedge their risks if they had issued debt in a foreign currency.[1446] Before this date, as it is still the case in many northern European countries, local authorities were forced to borrow directly from the Italian State bank, CDP (*Cassa Depositi e Prestiti*).

Even after the liberalisation, a number of restrictions was set to their power to freely address the private financial markets. *Inter alia*, local authorities ought to be in a sound financial position (i.e. they shall be compliant with the Internal Stability Pact), bonds shall have no less than a 5-year maturity and the quantity of the operations entered by the local authority shall not exceed a certain percentage of the current revenues (4 percent as of 2014). The political decision to take out loan bonds or enter other operations shall lie within the municipal or provincial council, which has also to regularly inform about the scope and extent of the authority's operations the Ministry of Economy and Finances (MEF) upon which lies a general task of coordination. This task is grounded in Article 117, para. 3 IC and is mainly aimed at monitoring the overall situation of local governments' debt and, in particular, to ensure that refinancing operations of a certain size (over 100 million euro) occur at a convenient time.[1447] Further, it ought to be mentioned that until enactment of Law No. 289/2002 the State provided for amortization of loans taken up by local authorities, a practice not unknown in the Council of Europe and which has been criticized by two recommendations of the Committee of Ministers in 2004 and 2005.[1448]

[1446] Additional legislative provisions are set by Law No. 448/2001 and by Ministerial Decree No. 389/2003. On Italian local governments' right to resort to derivatives instruments see: M. Acciari and L. Zamagni, *The Case of Derivatives Negotiated by Italian Local Authorities and the Issue of the "Hidden Costs"*, Santarcangelo di Romagna, 2011, 59 and ff.

[1447] Cf. Corte costituzionale, sent. n. 376/2003.

[1448] Recommendation Rec(2005)1 of the Committee of Ministers to member states *on the financial resources of*

Article 9, para. 8 of the Charter requires that access to the national capital markets shall be allowed "within the limits of the law". As the Explanatory Report points out, the law shall be understood in a formal way, so as that «*procedures and conditions for access to these sources may be laid down by legislation».* Whereas in Germany procedures for resorting to public borrowing and their restrictions are generally set out by statute, i.e. in the municipal and county codes, in Italy, much of the procedures and of the conditions are laid down by ministerial decrees with a marginal involvement of local authorities. In fact, unlike what Article 4, para. 6 prescribes, local authorities ought only to be heard by the government, whereas no understanding with them is required within the Joint Conference. In this respect, thus, the Italian legislative framework appears rather poor and can hardly be deemed in tune with the Charter.

As for the notion of "borrowing", one has to bear in mind that it is not further clarified by the "Reinforced Law", since it was already made clear by national legislation after enactment of 2001 constitutional reform (Law No. 350/2003). The "Reinforced Law" allows for the introduction of further State legislative provisions of ordinary nature, thus enabling the enlargement or the reduction of the scope of the borrowing notion laid down in the Constitution (Article 10, para. 1). In particular, it still remains possible for local authorities to resort to public borrowing for making contributions of assets to companies or agencies (*società partecipate*) to which they have externalised the discharge of certain functions[1449]. As for the obligation to set up amortization or repayment plans, the "Reinforced Law" does not set a specific timeframe a part from that of the useful life of the investment (a notion which is further precised by ordinary legislation), but requires local authorities resorting to public borrowing for capital investment expenditures to budgetary realigniment within three years (Article 9, para. 1, lett. b)). More importantly, the "Reinforced Law" sets out a further condition which should be met by local authorities before taking out loans: borrowing operations shall be carried out on the basis of special agreements reached at a regional level in order to ensure that, in the reference fiscal year, the final cash based accounts of all local authorities within the Region in question, including the Region itself, are balanced (Article 10, para. 3). For this purpose, pursuant to rules and criteria laid down by ministerial decree, every Region will have the task of coordinating and matching all requests for capital investments coming from local authorities located within its jurisdiction. Finally, local authorities may in any case continue borrowing within the limits set in their budget plan for the cost of debt servicing.

As it is the case in some German *Länder*, over-indebted local authorities in Italy are subject to a

---

local and regional authorities, § 76. So also: Recommendation Rec(2004)1 of the Committee of Ministers to member states *on financial and budgetary management at local and regional levels*, § 34.

[1449] In this respect see the amendment proposal A.C. 4596, which aimed at amending Article 119, para. 6 IC by explicitly prohibiting contributions which are very often used for bailing out companies to which the local authority has externalised its functions.

very detailed set of rules which have to apply depending on the seriousness of their financial situation. Unlike in Germany, local authorities in Italy can declare *de facto* insolvency (*dissesto finanziario*). The declaration of insolvency and all procedural arrangements following to it (Article 244 and ff. T.U.E.L.) is however to be considered as the *ultima ratio;* local authorities can in fact avoid it, by ensuring consolidation of their budgets in a given time-framework. In particular, when local authorities are "structurally distressed" (Article 242 and 243 T.U.E.L.), that is to say when more than half of a set of parameters laid down by law are negative,[1450] local authorities are subject to control by a central Commission which can reduce funding to them if they fail to cover their costs according to the rules.[1451] If the financial distress of local authorities is regarded by the regional branches of the Court of Auditours as leading towards insolvency, local authorities can still resort to a specific mechanism, which is called "multiyear financial adjustment procedure" (*procedura di riequilibrio finanziario pluriennale*) (Article 243-bis and ff. T.U.E.L.). This procedure greatly restricts local authorities financial autonomy since it commits them to follow a consolidation plan, but allows them to take up loans at a favourable rate from a fund established at national level (*fondo di rotazione*)[1452] If even this procedure should not enable local authorities to recover from their distressed financial situation, a formal declaration of insolvency should be made. In this respect, the regional branches of the Court of Auditors can also coerce the municipal or provincial council into making the same declaration, if the local authority at stake did not approve the consolidation plan or did not follow it. The declaration of insolvency leads to the appointment of a body, the so-called extraordinary liquidation committee (OSL), entrusted with the management of the authority's finances which however does not bring about the decadence of the council, of the mayor or of the president of the province but only to the restriction of their budgetary powers (Article 252 and ff. T.U.E.L.)[1453].

To sum up, one could argue that, since the ratification of the Charter, Italy has made possible easier access to financial markets for local authorities. However, many limitations to this right have been introduced over time by means of ordinary legislation and ministerial by-laws or decrees. On the

---

[1450] The parameters refer to: the amount of annual financial deficit related to op-erating revenues; the amount of un-cashed revenues from the current year taxes and services related to operating revenues; the amount of un-cashed revenues from past years taxes and services related to operating revenues from the current year; the total amount of un-paid operating expenses related to operating expenses; legal procedure of enforced (judicial) compensation related to operating expenses; the total amount of expenses for person-nel related to a specific percentage of total operating revenues, according to the demographic dimension of the LG; the exposed capital debt related to operating revenues; off-balance sheets debts occurred in the current year related to operating revenues; un-refunded cash-advance related to operating revenues; maneuvers of budgetary re-balancing via selling assets or affecting reserves related to total operating expenses.

[1451] E. Ruggeri, *Articolo 244*, in: C. Napoli e N. Pignatelli (eds.), *Codice degli Enti Locali*, Roma, 2012, 2177 and ff.

[1452] For an overview of how this procedure works see: G. Delledonne, *Articoli 243-bis, 243-ter, 243-quater, 243-quinquies,* in: C. Napoli e N. Pignatelli (eds.), *Codice degli Enti Locali*, 2nd ed., Roma, 2013, 2159 and ff.

[1453] C.M. Cantore, *Articolo 252 and ff.*, in: C. Napoli e N. Pignatelli (eds.), *Codice degli Enti Locali*, Roma, 2012, 1972 and ff.

one hand, one could contend that these limitations are part of a more general European trend towards tougher fiscal and budgetary constraints, which can be justified on the basis of national fiscal and economic policy (Article 9, para. 1), but on the other hand, it has to be borne in mind that too often national legislation is basically replaced by ministerial by-laws or decrees to whose issuance local authorities do not participate at all. Hence, at least from a procedural point of view, a higher degree of consultation with local authorities within the Conferences would be advisable. In this respect, recent innovations which entrust the regions with a prominent role of coordination, even if not completely doing away with ministerial by-laws setting the frame, appear to apply the principle of subsidiarity to equalisation issues.

In any case, as it has been showed with reference to Germany, the ratification of the *Fiscal Compact* did not change much of the legal framework concerning local authorities' right to have recourse to public borrowing nor it changed the machinery of State supervision over local budgets. From the point of view of the system of sources of law, it caused some rules previously enshrined in ordinary legislation becoming part of an "organic law", which now can be repealed only using qualified majority voting in Parliament. This is the case in particular of the aforementioned Articles 9, para. 1 and 10, para. 3 of the "Reinforced Law", but, overall, most debt limitations were yet part of the domestic legal order, so that one cannot say that State supervisory authorities have been assigned with further powers to coerce local authorities into consolidation of their budgets.

7. The Right to Co-operation and Free Association

7.1. Inter-Municipal Co-operation

7.1.1. Co-operation on Both a Free and Compulsory Basis

Following to local government reforms passed during the 1990s, Italian local authorities were empowered with growing organisational autonomy. They could finally pass themselves the local Charters (*Statuti*) regulating their structure and the organisation for service delivery and, in this respect, were also given additional regulatory powers. A corollary of the principle of organisational autonomy enshrined in Article 6 of the Charter is the right to form consortia with other local authorities so as to carry out certain administrative functions, as well as to enter co-operation agreements (even on a transfrontier basis) for protecting and promoting their interests. This right, enshrined in Article 10, para. 1 and 3 of the Charter, is not explicitly enshrined in the Italian Constitution but, after 2001 constitutional reform, can be derived not only from the recognition of

the so-called *autonomia statutaria e regolamentare*, which implies that municipalities, provinces and metropolitan cities are free to decide how administrative functions ought to be discharged, but also from the aforementioned principle of adequacy, laid down in Article 118, para. 2 IC, which has been construed as providing that municipalities shall handle their tasks within an adequate territorial jurisdiction, possibly decentralising functions to lower units or co-operating with each other (Article 13 T.U.E.L.). The Charter's provision contributes thus at precising and integrating the constitutional framework: local authorities have the right to co-operate as a corollary of their freedom of organisation. Co-operation agreements might be reached even without a legal basis set out by the legislator, whereas co-operation resulting in new institutional arrangements has to occur within the framework of the law.

In Italy, though, Article 97, para. 2 IC always requires a legislative framework for inter-municipal co-operation which cannot be based on spontaneous initiatives by local authorities only.[1454] In both State (e.g. Article 27 and 30-33 T.U.E.L.) and regional legislation inter-municipal co-operation has been developing in many guises: on the one hand, local authorities have been co-operating both through consortia (*consorzi*) and unions of municipalities (*unioni di comuni*). The former were public-private or wholly public controlled legal entities established upon agreement, originally aimed at carrying out few or even single functions or deliver certain public services, eventually repealed by Law No. 191/2009. As the Congress pointed out in its last report, «*the huge extent of their current deployment* – in particular by regions – *raises acute questions of accountability and potential impropriety»,* since no adequate democratic arrangement was ensured.[1455] The latter were first conceived as entities for progressively merging small municipalities while becoming more recently the most prominent category of networks to be set up by municipalities willing to engage in a joint management of basic functions without fully neglecting democratic legitimation.[1456] On the other hand, inter-municipal co-operation followed the non-institutional path of so-called *convenzioni* and *accordi di programma*, that is to say private law agreements on common objectives which however do not result in the establishment of a new legal entity. This latter kind of co-operation has flourished, whereas the former has not expanded on grounds of "localist behaviours" by municipalities. Unlike in Germany, in Italy these latter tools are regulated by the law, whereas under German law it is theoretically possible to establish them (*Arbeitsgemeinschaften* and

---

1454 M. Massa, *cit*., 280; F. Merloni, *Il destino dell'ordinamento degli enti locali (e del relativo Testo Unico) nel nuovo Titolo V della Costituzione*, in Le Regioni, 2002, 428 and ff.

1455 So: F. Pinto, *cit*., 336-337. In fact, unlike as for unions of municipalities, the board of directors (*consiglio di amministrazione*) of consortia could be composed of members different than local elected officials.

1456 Nonetheless, the Congress stressed that the number of associations of municipalities rose rapidly between 2000 and 2005 and that «*recent years have seen a further steady increase in the number of local "associations" of municipalities».* Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, § 75.

Kooperationsverträge) even without a regulatory framework.

This phenomenon has recently led the national legislature to pass statutes coercing municipalities into co-operation. In particular, with enactment of Law Decree No. 78/2010 (Article 14) and of Law Decree No. 95/2012 (Article 19) the legislator mandated that, for municipalities with a population under 5000 inhabitants, all basic functions ought to be executed by consortia (*unioni di comuni*), which shall account at least for 10.000 inhabitants or 3000 for mountain unions of municipalities or by private law agreements (*convenzioni*) which should last for at least three years. Provided that the Italian Constitutional Court has already found that the new unions or consortia conform to the Constitution, i.e. the legislative power of the regions to regulate the subject matter was not curtailed (Judgments No. 22 and 44/2014), the other question to be answered here is whether coercive co-operation agreements for handling services or all basic functions originally attached by law to municipalities conform to Article 10, para. 1 and to Article 3, para. 1 and 2 of the Charter, that is to say whether municipalities can lawfully be coerced into co-operation and, if so, whether they can still be deemed to manage and regulate a substantial share of public affairs under their own responsibility, as required by the Charter.[1457]

As for the first question, from the Congress monitoring practice one could hardly derive a ban on co-erced cooperation agreements. In fact, as long as Article 10, para. 1 of the Charter provides for the right of local authorities to form consortia for the sake of exercising their powers "within the framework of the law", the law might also co-erce them into co-operation.[1458] Further, coercion into co-operation is the other side of the coin of the right to negative co-operation. Hence, a violation of Article 10, para. 1 of the Charter cannot be assessed. However, as mentioned in the first Chapter, the legislature ought not to undermine the core of principles and rights which makes for a minimum of local autonomy, otherwise it would hollow it out. This core restricting legislator's sphere of action when coercing into inter-municipal co-operation can be summed up as follows: adequate consultation with local authorities involved should be always ensured (Article 4, para. 6), local authorities affected by these measures should retain a minimum of freedom to determine how to organize their administrative structures for the sake of co-operation (Article 6, para. 1), coercive measures should comply with the principles laid down in Article 8.

In this respect, it should be recalled that in the first place municipalities enjoy the power to pass the "Charter" of the union (*Statuto*), aimed at regulating how functions should be carried out, whereas

1457 This question has been put forward also by C. Padula, *cit*., 6 ff.

1458 B. Schaffarzik, *cit.*, 479; T.I. Schmidt, *Kommunale Kooperation*, *cit*., 97-99.

they retain powers to control and influence the governing body of the union; further, according to the case-law of the Italian Constitutional Court, municipalities ought to be consulted before dissolution of the unions.[1459] In this respect, one has to recall that in general higher standards apply in Germany: in fact, compulsory unions (*Pflichtverbände*) can be set up in principle only for the discharge of compulsory or mandatory tasks but not for free or voluntary tasks; additionally, local authorities may be given the right to withdraw from the compulsory union, a previous consultation before its establishment should always be granted and a deadline for allowing voluntary unions should first be set before resorting to compulsory ones. In Italy, further, supervisory mechanisms are less straightforward and can hardly be deemed in compliance with Article 8, para. 1 and 3. In fact, whenever municipalities should fail to set up the compulsory union within the deadline set down by law, a notice or circular (*circolare*) of the Ministry of the Interior has mandated prefects to issue an order or warning (*diffida ad adempiere*) requiring municipalities to comply with the law; if this should not be the case, the prefect will be bound to appoint a commissioner (*commissario ad acta*), who will himself establish the union.[1460] Unlike in Germany, where proportionality is ensured by a wide-ranging set of supervisory measures of different intensity, laid down by law, in Italy mere notices by a Ministry referring to a general provision on supervision (Article 8 of Law No. 131/2003) make the appointment of a commissioner being not the *ultima ratio,* but one of the primary options at disposal of prefects.

Padula added to the core of local autonomy which ought to be respected also the principle whereby local authorities co-operating on a co-ercive basis ought not to be deprived of a substantial share of responsibilities, that is to say of basic responsibilities (Articles 3, para. 1 in combination with Article 4, para. 1), on the contrary, according to other scholars, once coerced into co-operation they should at least be given the power to determine what functions ought to be discharged at supra-municipal level.[1461] The existence of a core of basic municipal functions might appear theoretically consistent, not only from a constitutional point of view,[1462] but also from the point of view of the Charter (see *supra* first Chapter); however, it should be borne in mind that the Charter does not appear to offer guarantees against measures transferring functions to authorities other than central or regional authorities. In fact, as mentioned above, the Charter does not explicitly deal with the relationship between local authorities themselves, even if, pursuant to an analogic reasoning, Article

---

[1459] Corte costituzionale, sentt. n. 244/2005; 456/2005; 397/2006. Before see: Corte costituzionale, sent. n. 229/2001.

[1460] Circolare del Ministero dell'Interno, 12 January 2015, 38ª – A051-DC.AA.LL.

[1461] See: G. Meloni, *Organismi comunali ed ente intermedio*, in: R. Balduzzi (ed.), *Annuario DRASD 2011*, Milano, 2011, 34 and V. Tondi della Mura, *La riforma delle unioni di comuni fra ingegneria e approssimazione istituzionali*, in: Scritti in onore di Valerio Onida, Milano, 2011, 1934 and ff.

[1462] See in this respect also: M. Massa, *cit*., 268 and 275-6.

4, para. 3 could be also construed in this way. Even if the Charter should be deemed to apply to any relationships between territorial local authorities, it should be stressed that the principle of subsidiarity, as enshrined in Article 4, para. 3, empowers the legislator to make adequacy assessments while allocating administrative functions. In other words, the Charter does indeed not require that all municipalities in a State exercise the same basic administrative functions, regardless of their size. A similar reasoning could be made following to Article 118, para. 1 IC.[1463]

A further limitation to the legislature's action in co-ercing co-operation is democratic representativity. Even if no universal and direct election is mandatory for the governing bodies of consortia, which are not territorial authorities pursuant to Article 3, para. 1 of the Charter,[1464] the Explanatory Report to Draft Charter Article 9 stressed that: «*The lack of direct democratic legitimation and of administrative transparency set limits to the proliferation and expansion of such association».* Since Draft Article 9 has not been amended during negotiations on the treaty and it perfectly matches with the wording of Charter Article 10, the aforementioned comment might be considered as displaying the original intent in favour of the existence of democratic limits to the establishment of consortia or federations of local authorities by means of statute. This means that the legislature should preserve a minimum of democratic representativity even when it comes to the establishment of consortia or unions which are not local authorities under Article 3 of the Charter, for example by ensuring a fair representation of each constituency and of political minorities. In this respect, it should be mentioned that, in a report on second-tier local authorities in Europe, the Congress specified with reference to Italy that the law ought always to «*ensure a fair representation of each constituency and of all political groups».*[1465]

However, the Congress did not deal with this question in its last report and merely offered political advice to the government, by assessing that an expanded use of local authority co-operation would be a substantial part of the answer to a problem of fragmentation that it will unlikely be achieved neither with the consent of the affected municipalities and their populations nor with compulsory mergers. The question whether an expanded use of compulsory co-operation would conform to the

---

1463 See the complaints lodged before the ICC by the regions Liguria, Emilia-Romagna and Umbria against Article 16 of Law Decree No. 138/2011 and the final decision by the Court. Corte costituzionale, sent. n. 44/2014.

1464 Whereas the Charter does not prohibit the direct election of the governing bodies of non-territorial local authorities, the case law of the Italian Constitutional Court followed a stricter theoretical pattern, whereby the establishment of local authorities others than those enshrined in Article 114, para. 1 IC cannot result in a universal and direct election by the people. On the contrary, additional local authorities should always be derived by territorial authorities and thus indirect election should be the rule. So: M. Massa, *cit*., 264, commenting on different rulings by the ICC.

1465 Congress of Local and Regional Authorities, *Second Tier Local Authorities – Intermediate Governance*, CG (23) 13, 7 February 2013. See for example the case of Spain, where the law provided for a mechanism whereby all le circoscrizioni elettorali devono disporre di un seggio ed in nessuna di esse devono essere concentrati più dei tre quinti del numero complessivo dei deputati provinciali.

Charter remained fully unsettled. Article 1, para. 105 of the Delrio Law appears to comply with the aforementioned requirement, since it stipulates that the governing body of the unions shall be composed of municipal councillors elected by the municipal councils, by ensuring a representation of the minorities and of each constituency. It remains to be seen whether in the practice, on a case by case analysis, compliance with the Charter can be said to be ensured.

7.1.2. A Limited Subjective Right to Enter Interterritorial Co-operation Agreements

The question whether and, if so, to what extent Italy has recognized a right to crossborder and interterritorial co-operation of local authorities with other territorial authorities in foreign countries has never been examined by the Congress. Its last report on the situation of local and regional democracy in Italy merely pointed out that the Italian Republic had neither signed nor ratified 1998 Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning interterritorial co-operation and 2009 Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs), but it forgot to mention that Italy signed but did not ratify 1995 Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities and it totally neglected to assess whether both crossborder and inter-territorial co-operation of local authorities were sufficiently guaranteed under Italian (constitutional) law. Hereafter, it will be attempted to show that Italy does not fully abide by with Article 10, para. 3 of the Charter.

Prior to the enactment of Law No. 616/1977, the international activities of Italian territorial authorities were minimal. It prevailed a restrictive interpretation of Articles 5 and 128 IC, whereby international relations were attached to the exclusive competence of the Republic, otherwise being the unity and indivisibility of the Republic necessarily curtailed.[1466] With the adoption of Law No. 616/1977, as a rule, regions could not carry out any promotional activities inherent to the subject matters assigned to their competence, unless there had been a prior understanding (*intesa*) with the central government.

In 1984, Italy ratified the European Outline Convention on Transfrontier Co-operation with Law No. 948/1984. Pursuant to Article 3 read in combination with Article 5 of the Convention, crossborder co-operation agreements could be concluded by Italian regions, provinces,

[1466] Corte costituzionale, sentt. n. 42 and 68/1961.

municipalities, mountain communities, municipal and provincial consortia[1467] directly adjacent to a foreign State or situated within 25 km of the border with territorial authorities of neighbouring States only after understanding with central government and only if previous bilateral agreements (so-called *accordi di copertura*) setting out the scope of possible co-operation activities had been signed between the Italian Republic and its neighbouring States. Agreements of this nature have been signed in the subsequent ten years with Austria (on January 27, 1993), Switzerland (on February 24, 1993) and France (on November 26, 1993), but not yet with Slovenia.[1468] Hence, no cross-border agreement between Italian and Slovenian territorial authorities could ever occur, building solely on the Outline Convention provisions which are *per se* not self-executing. As such, the lack of a bilateral treaty has not at all prevented cross-border co-operation between Italy and Slovenia to flourish.[1469]

After enactment of 2001 constitutional reform, all Italian regions have been accorded the power to enter international understandings with other territorial authorities or agreements with foreign States in those subject matters attached to their exclusive competence (new Article 117, para. 9 IC). As to the former, the regions are currently no longer required to priorly reach an understanding (*intesa*) with the Office of the Prime Minister (*Presidenza del Consiglio*), but they only have to inform it as well as the Ministry of Foreign Affairs (Article 6, para. 2 of Law No. 131/2003) before signing the international agreement and they can proceed on the basis of "silence gives consent" rule. However, regions have to be expressly authorized, i.e. to be given full powers, to sign an international agreement with another State engaging State responsibility (Article 6, para. 3 of Law No. 131/2003).[1470]

1467 Following to 2001 constitutional reform, also metropolitan cities has to be added to this list.

1468 Cf. M. Vellano, *La cooperazione regionale nell'Unione europea*, Torino, 2014, 68 and ff..

1469 The beginning of cross-border co-operation between Slovenia and Italy dates back to 60s-70s with Trigon and the Alps Adria Community. Since 1962, Gorizia and Nova Gorica have been collaborating together. The same could be said for Trieste and Koper. The situation has particularly improved after the collapse of Yugoslavia and the EU-membership of Slovenia in 2004, even if the European Commission decided to fund seven-years-programme of transfrontier activities between the two countries since 1995 (INTERREG II, III and IV). Member of the Adriatic Euroregion since 2006, Slovenia is currently interested in joining the new Euroregion "Euregio Without Borders" too, established in 2013 by the Italian regions Veneto and Friuli-Venezia Giulia together with the Austrian *Land* of Carinthia. A right to cross-border co-operation for Italian local authorities would make co-operation with Slovenia easier. Even if Slovenia has already ratified all Protocols to the Outline Convention, it must be borne in mind that it's Slovenia which has sofar stood behind in this respect on grounds of the lacking regionalisation of the country. Cf. Congress of Local and Regional Authorities, *Local and Regional Democracy in Slovenia*, CG (21) 12, 18 October 2011; S. Lipott, *Twin cities: cooperation beyond walls. The case of cross- border cooperation between Italy and Slovenia,* COST Action Working Paper, 2013.

1470 For agreements with other States, which can be executive and applicative of international agreements already in force, technical-administrative and programmatic, the Foreign Ministry can in the first place outline the principles and criteria to be followed in conducting negotiations, whereas in the second place will confer the power of signature to the Region. This does not mean however that regions are mere organs of the State when negotiating and signing an international treaty. Cf. Corte costituzionale, sent. 18 luglio 2004, n. 238. G. Conetti, *The New External Powers of the Italian regions*, in: N. Ronzitti (ed.), *I rapporti di vicinato dell'Italia con Croazia, Serbia-Montenegro e Slovenia*, Milano, 2005, 131 ff.

Article 6, para. 7 of the same Law further stipulated that municipalities, provinces and metropolitan cities, in the subject matters attributed to their competence, were allowed to continue their co-operation activities having so-called "international importance" (*attività di mero rilievo internazionale*),[1471] that is to say activities to be regulated under private law, such as for instance twinnings, involving the exchange of information or best practices between local authorities of different countries but not entailing the power to entering understandings which might engage the international responsibility of the State.[1472] Only in the framework of the bilateral treaties priorly signed with France, Austria and Switzerland, local authorities can also enter crossborder understandings with other territorial authorities which are to be regulated by the law of each member State, but which, again, cannot result in the international responsibility of the Italian Republic. Local authorities must normally provide obligatory communication about these activities to the corresponding Region, to the Office of the Prime Minister and to the Ministry of Foreign Affairs, otherwise being their activities to be declared void by the Constitutional Court.[1473]

As for the conclusion of international agreements, i.e. understandings by Italian local authorities, it should be distinguished between cross-border and general inter-territorial co-operation understandings. As for the former, it has already been pointed out that this is restricted to agreements with territorial authorities of a country with which a bilateral treaty with the Italian Republic already exists. Yet, no such a right has been generally granted by Italy to its local authorities, since Article 117, para. 9 IC only assigned it to the regions.[1474] This is the reason why Italy signed, but did not eventually ratify the Additional Protocol and the subsequent Protocols to the Outline Convention. However, it must be borne in mind that Italy ratified the European Charter of Local Self-Government, hence being now in non-compliance with its Article 10, para. 3, that is to

---

1471 The Italian Constitutional Court clarified between the 1980s and the 1990s what it should be understood under matters of international importance and distinguished this notion from that of "promotional activities". The latter are a residual category, i.e. all those activities aimed at fostering economic, social and cultural development within the exclusive competence of the territorial authority, whereas the former can hardly be positively defined. Among others, the Court mentioned study activities, exchange of information, twinnings, understandings aimed at harmonizing their action, participation at conferences and malls, letters of intent, courtesy visits. This distinction has been laid down into law later on. See: Decree of the President of the Republic - D.P.R. 31 March 1994, *Atto di indirizzo e coordinamento in materia di attività all'estero delle regioni e delle province autonome*.

1472 In this respect, several municipal Charters (*Statuti*) referred directly to the European Charter as a source of additional legitimation of their engagement in international activities (e.g. Comune di Tavernelle Val di Pesa).

1473 So: Corte costituzionale, sent. 30 June 1989, n. 739. After enactment of D.P.R. 31 March 1994, territorial authorities only have to inform the government about some of their co-operation activities and they are free to operate according to the silent-gives-consent rule, for others they are immediately free to proceed without notification (See: Article 2, lett. a) and lett. b)). Advocating the overcoming of this distinction is: R. Dickmann, *Appunti sulle prospettive della cooperazione transfrontaliera fra enti locali infraregionali*, in www.federalismi.it n. 14/2006, 14.

1474 R. Dickmann, *cit*., 7. And see also the Explanatory Report to the draft bill for ratitication of the Protocol (A.C. 6168) submitted to the Italian Parliament on November 8, 2005. A further attempt to ratify the Protocol has been carried out on April 29, 2008 (A.C. 39).

say with its international obligations pursuant to Article 117, para. 1 IC. In fact, at present, municipalities, provinces and metropolitan cities can only partially and upon information to the government carry out inter-territorial or crossboder co-operation activities with their counterparts abroad, whereas no procedure for entering binding agreements on their own has been yet set out by Italian Law.[1475]

An innovation which goes even beyond what the Charter sets out has been brought about in the EU by the recent adoption of Regulation 1082/2006/EC, as amended by Regulation No. 1302/2013, on European Groupings of Interterritorial Cooperation (EGTC) into domestic law (Law No. 88/2009).[1476] In fact, the EU Regulation, building on former Article 159 TEC, provides local authorities with a far-reaching instrument for crossborder co-operation, directly applicable in the domestic legal order, by means of which they are allowed to establish consortia with legal personality under EU law. These consortia can carry out activities of common interest and which can be funded or co-funded directly by the European Commission. In other words, the decision by the Italian Government not to ratify the Council of Europe Protocols has been to a certain extent compensated by the adoption of this Regulation. The first grouping made up of local authorities only was established in 2012 by the municipalities of Gorizia, Nova Gorica and Šempeter-Vrtojba. After the enactment of the EGTC regulation, it should be now possible for Italy to ratify both Protocol No. 2 and No. 3 to the European Outline Convention on Transfrontier Co-operation. In particular, Protocol No. 3 will complement the aforementioned EU regulation by ensuring the possibility to establish inter-territorial and crossborder co-operation consortia endowed with legal personality with the participation of territorial authorities and communities of non-EU countries, e.g. Switzerland, whose activities could only hardly be funded by the European Union.[1477]

As pointed out by Dickmann, the ratification of these Protocols would however require the Italian legislator to clarify what will be the law applicable to the crossborder consortia established in Italy and to what extent will the Ministry of Foreign Affairs be allowed to intervene in outlining the principles to be followed for the establishment of these consortia or in denying the power to enter

---

1475 In this respect, Article 1, para. 86, lett. b) of the Delrio Law sets out that those provinces directly adjacent to a foreign State and whose territory is entirely mountainous (Sondrio, Verbano-Cusio-Ossola and Belluno) are exclusively assigned with the basic task of taking care of the crossborder relations with territorial authorities of the neighbouring States, with which they can enter agreements and conventions (*accordi* e *convenzioni*). As far as one can understand, these agreements can however hardly be considered as agreements under public law.

1476 See *inter alia*: L. Mascali, *Il Gruppo Europeo di Cooperazione Territoriale nel Regolamento 1082/2006*, Firenze, 2010, 27; S.P. Isaza Querini, *cit*., 5 and ff.

1477 So: M. Morelli, *La democrazia partecipativa nella governance dell'Unione europea*, Milano, 2011, 160 and S.P. Isaza Querini, *cit*., 36 e 38. The EGTC regulation exceptionally allows for the involvement of third countries. See for example: CODE 24 – Corridor Development Rotterdam-Genoa (Italy, the Netherlands, Germany and Switzerland).

the founder's agreement.[1478] To conclude, one could argue that, unlike in Germany where cross-border and inter-territorial co-operation has extensively been considered as an affair of the local community pursuant to Article 28, para. 2 BL, in Italy municipalities and provinces (except for mountain provinces) are as a principle not allowed to engage in cross-border or interterritorial co-operation activities on grounds of their universal jurisdiction, unless explicitly authorised by the State. Over the course of the years only regions have gained more freedom from the State in this respect, whereas the relations between local authorities and the State remain typical of a unitary State.

7.2. Local Authorities' Freedom of Association: The Italian *Associazioni degli Enti Locali*

Unlike in Germany, the freedom of Italian local authorities to join associations promoting and defending their interests at regional, national or even international level has never really brought about a sound theoretical debate on the legal implications of their joining private associations which might fulfill responsibilities going beyond the scope of local self-government or being not sufficiently democratic for participating in decision-making processes.

In its last report, the Congress confined itself to find that Article 10, para. 2, containing «*the right to formation of associations, is respected»,* since no legal restriction exists in Italy as to the establishment of new associations by local authorities. In particular, municipalities are represented by the National Association of Italian Municipalities (ANCI), set up in 1901 as a non-profit private association, whereas provinces are represented by the Association of Italian Provinces (UPI), founded in 1908. Further, the Congress mentions also the associations representing specific sub-groups of the former association, that is to say the National Association of Municipalities and Mountain Communities (UNCEM). The national associations have own branches in all regions. No comment by the Congress has been made as to the aforementioned decision of metropolitan cities to join ANCI and not UPI, since at that time the Delrio Law had not yet been enacted. Yet, quite understandably, the choice to join one association or another pertains to local authorities themselves and cannot be judged by an international organisation.

As to the their role and activities, the Congress mentions that *«these associations are active in the promotion of their members' interests and generally, it seems, the associations are in a good position to influence the decision-making of Government*». In this respect, in fact, one has to recall that the aforementioned associations do not only lobby on single members of parliament in non-

1478 R. Dickmann, *cit*., 12-13.

institutional fora, but mainly participate through their own representatives – six nominated by UPI and fourteen by ANCI – in the meetings of the Conference State-Cities-Local Autonomies (Article 8, para. 2 of Legislative Decree No. 281/1997) as well as in the Joint Conference and in any other intergovernmental meeting having consultative nature. After the establishment of the Councils of Local Autonomies (CAL) at regional level, in some regions associations of local authorities have been granted the power to select a portion of its members (Veneto), whereas in other regions the presidents of ANCI, UPI and UNCEM enjoy even a seat, with (Piedmont, Lombardy, Liguria and Lazio) or without enjoying the right to vote (Calabria and Abruzzo). In this respect, one has to recall the new wording of Article 54, para. 1 of the Charter of the Lombardy Region (*Statuto della Regione Lombardia*), whereby the members of CALs shall be selected for representing local authorities and their mostly representative associations. Rightly, part of the legal scholarship has pointed out that Councils of Local Autonomies (CAL) shall be representative of the local authorities which are in turn representative of the local populations or communities. Associations of local authorities are not per se representative of local authorities, but represents their members according to the rules of their private charters (*statuti*),[1479] so that it sounds quite odd that a regional Charter requires that an organ of the Region shall represent the associations of local authorities.

Finally, one has to remember that the T.U.E.L. devotes three of its provisions to the associations of local authorities (Articles 270-272). These provisions relate to the payment of annual contributions by local authorities to local authorities' associations and stipulate how and when to leave the association (negative freedom of association), set the headquarters of local authorities' associations at sub-national level, allow the detachment of local authorities' employees to the associations and, even more importantly, to the role played by associations of local authorities in international co-operation programms passed and financed by the Ministry of Foreign Affairs.

8. Judicial Remedies For Ensuring Protection of Local Autonomy Below the Charter Minimum Standard

As explained in the first Chapter, Article 11 of the Charter provides for the right of local authorities to initiate legal proceedings and to appeal administrative decisions by higher level authorities for alleged violations of local self-government or of their powers as entrenched in the Constitution or as provided by statutory provisions.

[1479] M. Cosulich, *cit*., 2010, 122, footnote n. 11, mentioning G. U. Rescigno, *Consiglio delle autonomie locali e Costituzione*, in: Politica e Diritto, 2/2003, 236.

In Italy, as the Congress last report admits, *«there appears to be no problem with public authorities vindicating their rights, as necessary, in the administrative courts».*[1480] In fact, as entities having legal personality, municipalities, provinces and metropolitan cities can take court action and can be sued either before ordinary or administrative tribunals, depending on the issue at hand. In particular, it is up to local authorities' local Charters to determine by whom local authorities' shall be represented in legal proceedings (Article 6 T.U.E.L.). Even executive civil servants or heads of administrative departments within a local authority (*dirigenti*) and not only local elected representatives can legally represent the authority in legal proceedings, whereas in Germany in principle only the mayor (*Bürgermeister*) and the county officer (*Landrat*) are allowed by State law to represent the municipality before court.

This Italian flexibility does not *per se* constitute a problem with reference to the Charter' standards. Yet, if allowed to initiate legal proceedings or to appeal rulings without authorisation by the executive bodies of the local authority concerned,[1481] there might be indeed a problem of conformity with the Charter (Article 3, para. 2 in combination with Article 11), since the Congress has constantly stressed that the right to local self-government should be exercised by representatives elected and not by civil servants.[1482] However, it must be borne in mind that, as for functions for which only heads of administrative departments are responsible, no intrusion on the part of local elected representatives shall be allowed, in particular by the executive committee (*giunta*), because the local government system in Italy has been based since the early 1990s upon the distinction between political-administrative autonomy (*autonomia di indirizzo-politico amministrativo*), on the one hand, and managerial autonomy, on the other hand (*autonomia di gestione*). Hence, as long as taking court action or appealing rulings involves the latter, no violation of the Charter can reasonably be assessed. Instead, under "local self-government" as laid down in Article 3 one should understand only the former, that is to say the so-called political-administrative autonomy. It pertains in fact to the margin of appreciation of the member State to decide to what activities should be applied the legal definition of Article 3 of the Charter.

It pertains also to the margin of appreciation of the State to allow individual citizens to replace local authorities or supervisory bodies and obtain from a person or a group a remedy in the public interest

---

[1480] Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy*, CG (24) 8, 19 March 2013, § 78.

[1481] See: Corte di Cassazione, Sez. Unite Civili (n. 12868/2005).

[1482] The assumption whereby decisions whether initiating or continuing legal arguments pertained to the bodies exercising the right of self-government (*autonomia di indirizzo politico-amministrativo*) was quite common in the scholarship prior to the T.U.E.L. adoption. See: F. Pinto, *cit*., 76.

(so-called *actio popularis*).[1483] The Italian legal order, unlike the German,[1484] provides for popular actions at local level. In fact, Article 9 T.U.E.L. stipulates that citizens can exceptionally bring action before court to defend a public interest whenever the municipality or the province is empowered to, but fails to do it. Further, Article 70 T.U.E.L. enables citizens to lodge a complaint to denonunce incompatibilities, thus determining the end of the mandate (*decadenza*) of a local representative. Here, the citizen acts instead of the supervisory authority, the prefect, for ensuring the good functioning of the public administration. This latter tool, more than the former, conforms with the spirit of Council of Europe soft-law, which conceives supervision as first and foremost as a task of citizens which exercise it through election but also through alternative mechanisms like this one, whereas it is rather skeptical towards all those mechanisms entailing the risk of making the right of local-self-government a right of individuals and no longer of public authorities (see *supra* first Chapter).[1485]

Except for the right to take court action or to appeal administrative decisions, in Italy there exists no direct access by local authorities to the Constitutional Court. This lack of legal protection is due to the fact that, unlike for example in Spain, Austria and Germany, direct access is not granted to individuals willing to defend their constitutionally protected fundamental rights[1486] as well as to the fact that legal scholars have always contended that recognition of such a right would have constituted a source of perpetual legal disputes between local authorities, regions and the State before the ICC.[1487] Among subnational entities of the Republic, only entities endowed with legislative powers, that is to say the regions, have the right to lodge a direct constitutional challenge before the Court, as stipulated by Article 127, para. 2 IC, whereby «*whenever a region regards a state law, another act of the state having the force of law, or a law of another region as infringing on its own sphere of powers, it may raise the question of its constitutionality before the constitutional court within sixty days of the publication of said law or act»,* (so-called *ricorso costituzionale in via principale*). Further, as stipulated by Article 134 IC, the Court is also empowered to deliver judgments on «*conflicts arising from allocation of powers of the State and*

1483 On the history and concept of *actio popularis* see: M. Caielli, *Cittadini e giustizia costituzionale. Contributi allo studio dell'actio popularis*, Torino, 2015.

1484 An exception is the Bavarian *Popularklage* (Article 54, para. 1 of the Law on the Bavarian Constitutional Court).

1485 Cf. in this respect T.A.R. Emilia-Romagna, Sez. I, sent. n. 1618/2007, contending that individual citizens cannot use the action for advocating a thesis other than that of the local authority, otherwise contravening the principle of democratic representativity.

1486 On the 1997 constitutional amendment proposal setting forth the direct access for local authorities to the ICC see: M. Piredda, *Le garanzie per gli enti locali nella riforma costituzionale delle autonomie,* Quaderni del Centro di Ricerca sulle amministrazioni pubbliche "Vittorio Bachelet", Milano, Giuffrè, 1997.

1487 So for instance: G. Grottanelli Dè Santi, *Enti territoriali minori e conflitto tra i poteri dello Stato*, in Giurisprudenza costituzionale, 1970, 1168 and again later on: S. Grassi, *La Corte costituzionale come oggetto e come giudice delle riforme costituzionali,* in AA.VV., *La riforma della Costituzione*, Milano 1999; A. Baldassarre, *Una costituzione da rifare*, Torino, 1998, 64.

those powers allocated to State and regions, and between regions» (so-called *conflitto di attribuzioni tra poteri dello Stato*). As for the latter, local authorities are not even allowed to intervene *ad adiuvandum* or *ad opponendum* in the legal proceedings, since cross-examination is ensured only for the two parties admitted before the Court, that is to say the State and the regions. Protection of local authorities' scope of powers and responsibilities can hence occur only indirectly, if the State or a Region successfully challenge laws which also encroach upon their prerogatives.[1488]

As for the latter, after 2001 constitutional reform, Article 9, para. 2 of Law No. 131/2003 empowered the Councils of Local Autonomies (CAL) to put forward to the regional executives their petition to challenge before the Constitutional Court parliamentary statutes or any other act having the force of law allegedly encroaching upon local authorities' rights and powers protected by the Constitution. The regional executives (*giunte regionali*) will not be bound by this petition, but will autonomously decide whether or not referring the law before the Court. Local authorities will not enjoy the right to intervene.[1489] According to a longstanding case-law by the Constitutional Court,[1490] the alleged violation of constitutional provisions as put forward by local authorities should be deemed to directly or indirectly impinge on the own sphere of powers of the regions, otherwise being the challenge to be declared inadmissable by the Court itself (*criterio della ridondanza*). Local self-government can hence be protected only insofar as also regional autonomy deserves to be protected against the State.[1491] Since the local government reforms of the 1990s, this criterion has been used in a more flexible way by the Court, which, at least on specific occasions, appeared to be wanting to do away with it so as to allow for a constitutional complaint by the regions on behalf of local authorities, that is to say through indirect standing.[1492]

A converse recourse against regional laws by the State upon petition of local authorities is provided for by Article 9, para. 3 of Law No. 131/2003, which empowers the Government to lodge a constitutional complaint before the Constitutional Court against regional laws undermining local

---

1488 See: Corte costituzionale, sent. n. 101/1970; n. 157/1975; n. 286/1985; n. 130/2009.

1489 Corte costituzionale, ord. n. 533/2002, sent. n. 307/2003.

1490 Corte costituzionale, sentt. n. 196/2004, n. 169 and n. 95/2007, n. 417/2005, n. 311 and 151/2012; n. 128/2011; n. 326 and 40/2010, n. 36/2014. And prior to it see also: sent. n. 408/1998 and n. 171/1999.

1491 E. Gianfrancesco, *L'incidenza della riforma del titolo V sul giudizio costituzionale*, in: E. Bettinelli and F. Riganò (eds.), *La riforma del titolo V della Costituzione e la giurisprudenza costituzionale"*, Quaderni del gruppo di Pisa, Torino, 2004.

1492 Corte costituzionale, sentt. n. 220/2013, n. 311/2012, n. 298/2009, in which the Court did not really check whether a connection between the infrigments alleged by local authorities and the sphere of regional powers existed. Cf. G. Boggero, *I limiti costituzionali alla riforma delle Province nella sentenza n. 220/2013 della Corte costituzionale*, in www.astrid-online.it, February 2014, 3-6; G. Di Cosimo, *Se le Regioni difendono gli enti locali di fronte alla Corte Costituzionale*, in: Le Regioni, 2010; C. Salazar, *Politicità e asimmetria nel giudizio in via principale: un binomio in evoluzione?*, in: *I ricorsi in via principale*, Palazzo Della Consulta, Roma, Vol. 1, 2011, 45-127.

autonomy upon request of the Standing Conference of State-Cities and Local Autonomies.[1493]

In this respect, one has to bear in mind that a violation of the duty to loyal co-operation (*principio di leale collaborazione*) on the part of the Region or on the part of the State within the legislative making process cannot be said to impinge on local authorities scope of functions or powers. As recalled by the Constitutional Court in its longstanding case-law, the alleged violation of the principle of loyal co-operation within the legislative process cannot be the basis of any constitutional complaint by subnational entities, if the obligation to co-operate is not explicitly required by a constitutional provision.[1494] Justiciability might however be ensured by construing Article 4, para. 6 and Article 11 of the Charter as an international obligation requiring the member States to allow local authorities to invoke the violation of their right of consultation, i.e. of the duty of loyal co-operation before the Constitutional Court.

Additionally, municipalities, provinces and metropolitan cities, as every other physical or legal person, enjoy the right, within judicial proceedings, to ask judges to "raise the issue of constitutionality" before the Constitutional Court with reference to provisions deemed to be relevant for the solution of the case at stake (*ricorso costituzionale in via incidentale*).[1495] Once the complaint has been lodged, only local authorities which are parties in the proceedings before the ordinary or administrative judge are allowed to intervene in legal proceedings before the Constitutional Court.[1496] In any case, access to judicial review by the ICC remains indirect and highly depends on how, if ever, the judge, by referring the question to the Court, will spell out the issue of constitutionality, which of course cannot be modified by the mere intervention of the local authorities concerned. Further, even when the issue is referred to the Court, review might be highly uneffective or inefficient, since protection risks to be untimely ensured.

To sum up, notwithstanding the fact that the Italian Constitution recognizes local autonomy as a fundamental principle on which the Republic is grounded (Article 5 IC) and it endows local authorities with a specific scope of powers and responsibilities in the Title V of its Constitution, it still prevents local authorities to lodge direct constitutional complaints before the Constitutional

---

1493 In this respect, no particular connection between State and local authorities' responsibilities should exist. Cf. Corte costituzionale, sentt. n. 94 and 274/2003.

1494 See: Corte costituzionale, sent. n. 372 and n. 222 del 2008, n. 401 del 2007, sent. n. 121 del 2013, sent. n. 278/2010, sent. n. 33 e n. 79/2011. Cf. R. Balduzzi, *Riflessioni introduttive sui presupposti istituzionali e culturali della "Repubblica delle autonomie"*, in: R. Balduzzi (ed.), *cit*., 2011, 10 ff.

1495 The question at stake in the judicial proceedings before the so-called judge *a quo* cannot be entirely identified with the question to be solved by the ICC (so-called *fictio litis*), otherwise being the complaint inadmissible.

1496 That other local authorities intervene occured only in exceptional cases. See: Q. Camerlengo, *Gli enti locali e la giustizia costituzionale*, in Giur. Cost. 2009 n. 2, 1341.

Court to protect it. Indirect standing through regional complaint is further restricted by the scope of constitutional standards which can be invoked before the Court. Similarly to Germany, where local authorities can directly invoke the violation of a limited number of constitutional provisions, in Italy the regions can invoke a violation of local prerogatives only insofar as they impinge on their prerogatives too. Even if the loose criteria used by the Court permitted in some cases a sort of substitution or indirect standing of local authorities by the regions or by the State, one cannot argue that municipalities, provinces and metropolitan cities have been really enabled to protect adequately their constitutional prerogatives as it is the case in Germany, where the system of a direct constitutional complaint could be more easily introduced on grounds of its federal structure, which allows to disperse judicial review among many *Länder* Constitutional Courts, thus relieving the Federal Constitutional Court from a growing burden of work. Hence, even if it is certainly true that the Charter confers a certain margin of appreciation upon the State as to the implementation of the right enshrined in Article 11, one shall better follow the monitoring practice of the Congress, whereby local authorities with a protected constitutional status should be given direct access, where existing, to the Constitutional Court.[1497]

§ 4. Conclusion of the *Third Chapter*

Poorly investigated by the Italian constitutional legal scholarship in the last fifteen years, compliance by Italian law, both constitutional and ordinary, with the provisions of the European Charter of Local Self-Government appears to be a topic which still deserves further academic research on grounds of the rather frequent local government reforms passed by the Italian Parliament and also by Regional Councils, in particular those of Regions with a special Charter.

Hereabove, it has been attempted to provide an overlook of the main issues concerning the Italian *autonomia locale* which might be useful to measure not only against the Constitution, but also against the Charter's standards, which are deemed by many scholars (but not by the Italian Constitutional Court) to be “norme interposte” for the constitutional review of legislation, that is to say provisions of ordinary legislation which give concreteness to a constitutional provision, in the present case Article 117, para. 1 IC. In particular, drawing on the monitoring activities carried out by the Congress of Local and Regional Authorities of the Council of Europe, it has been showed

---

[1497] So also: Recommendation No. 337 (2013), Congress of Local and Regional Authorities, *Local and Regional Democracy in Italy,* CG (24) 8, 19 March 2013, § 1, lett i), whereby the Italian authorities were invited to review the law in order to allow the provinces and municipalities with the right to apply, through a representative, to the Constitutional Court. So also F. Merloni, *cit*., *Riflessioni*, 2008, 92.

that, since the enactment of the Charter with Law No. 439/1989, the local government framework has been accordingly amended, most importantly over the course of the 1990s. On the other hand, the Italian constitutional framework was only limitedly taken into consideration while drafting the Charter and, specifically, when it mandates the member States to recognise the principle of local self-government in their own Constitutions, but also when the treaty conceives local authorities as representative of their respective territorial communities and requires mandatory consultation of the latter for local borders' changes. Yet, overall, the Charter's provisions are influenced by a common German understanding of local self-government as self-administration of local authorities. In this respect, one can hence argue that insofar as the Charter's provisions might help in complementing and supplementing the Italian constitutional framework they might also entail a legal transplant from the German federal constitutional order.

In particular, the German model alike, the Charter understands local self-government as an institutional guarantee, which ought to be defended, when existing, before the Constitutional Court. In Italy, protection of the core of local autonomy (*nucleo intangibile*) is mentioned with reference to own or basic responsibilities (*funzioni proprie o fondamentali*) which ought to be laid down by the legislator, yet no fully-fledged legal doctrine has developed around this concept, which by contrast is central for constitutional local government law in Germany. In this respect, convergence might be ensured in the future if Italian local authorities will be able to submit their complaints directly to the Constitutional Court. Today in fact this right is only partially ensured through indirect standing. Yet, Articles 2, 3, para. 1 and 11 of the Charter, even if read in combination, cannot be regarded as self-executing, since direct access to the Constitutional Court can be granted to local authorities only upon constitutional amendment passed pursuant to Article 138 IC.

As for the allocation of powers and responsibilities between different tiers of government, it might be said that 1990s reforms and 2001 constitutional reform has brought about an institutional change as far as the relation between both local authorities and the State and municipalities and the provinces are concerned. This change might be regarded also from the perspective of a convergence between the German and the Italian model. In fact, nowadays and even more after the enactment of the Delrio Law, both German and Italian municipalities can be said to enjoy universal jurisdiction, whereas counties and provinces are assigned by the law with a limited amount of administrative functions only.[1498] Conferral of administrative responsibilities to the latter follows the principles of

[1498] Cf. L. Cristanelli, *cit*., 197, contending that whereas in Germany municipalities truly enjoy universal jurisdiction, in Italy this jurisdiction can be said to be conditioned upon the allocation of the administrative functions by the legislator. However, this view does not take into account that also in Germany the competence of municipalities usually depends on an allocation by statutory provisions or decrees and that in Italy municipalities are traditionally considered as “enti a fini generali”, that is to say Article 118 IC might be interpreted as setting out a general residual administrative competence of municipalities for all affairs of the local community. Hence, the difference is more apparent than real.

subsidiarity, adequacy and differentiation. These principles ensuing from the Charter and rooted in the German legal order at least since the *Rastede* Judgment enable the legislator (and even local authorities themselves) to confer public responsibilities upon to lower or higher territorial authorities depending on the case.

Further, unlike under German law, where differentiation of the local government system is ensured by the *Länder* competence over local government, but uniformity is required by the Constitution as to the standards of election of municipal and county representative bodies, in Italy uniformity of the local government system is ensured by the State exclusive legislative competence for fixing the basic responsibilities, regulating the governing bodies and choosing the electoral system, but differentiation is provided by State legislation as to the standards of election of local authorities provided by the Constitution: in fact, whereas direct election is required for municipalities, indirect election is allowed for provinces and metropolitan cities. In this respect, the Charter might serve as an harmonising tool, since, building on Article 28, para. 1, sentence 2 BL, it helps in pointing out what the minimum democratic standard for territorial local authorities of Europe is. As long as a local authority is territorial in nature and carries out tasks in the interest of the local population and not in the interest of lower local authorities, its governing body shall be directly elected by the same local population which it aims to represent. This is currently the case of the Italian provinces and metropolitan cities, which have been transformed into indirectly elected entities even if they still perform activities in the interest of a provincial and metropolitan community. Yet, the Italian Constitutional Court in its recent judgment No. 50/2015 has not taken into account the interpretation of the Charter as provided by the Congress of the Council of Europe, thus *de facto* preventing a constitutional legal transplant from the German federal constitutional order.

Further, the Charter sets out a principle of compensation and remuneration of local representatives which only implicitly can be derived from the Italian Constitution and which constitutes a limitation to legislature's cuts plans, but not to the voluntary discharge of the local mandate by part of the representatives of the local assembly (the German *Ehrenamt*). Yet, in the case of the recent Delrio Law, the transformation of the provincial mandate of all councillors into a non-remunarated and non even compensated mandate was justified on grounds of the State legislative competence to set out principles on consolidation of the public finance.This idea permeates also the pending constitutional reform, pursuant to which a new territorial based second Chamber (the Senate) will be established, whose members will neither be remunerated nor compensated.

As for local authorities' territorial integrity, the Charter complements the Constitution, insofar as the latter does not impose upon the State the duty to consult the municipal populations affected by borders' changes but only those of the authorities which ask to be detached from a municipality or a

region; further, as for provincial communities, they shall also be involved, directly or indirectly through their associations; as for metropolitan cities, their recent establishment has occurred without any involvement of the local communities.

When it comes to inter-municipal co-operation, the Charter offers a higher degree of protection against an expanded use of coerced co-operation, in particular whenever it impinges upon the core of freedom of organisation, which is deemed to cover also the choice as to how public responsibilities should be performed, whereas in the Italian domestic legal order the question as to how basic responsibilities shall be discharged has been regarded by the ICC as falling under the exclusive legislative competence of the State (Article 117, para. 2, lett. p) IC) and not of the regions (Article 117, para. 4 IC) nor confined to the own regulatory power of local authorities (Article 117, para. 6 IC). Despite the constitutional framework after 2001 constitutional reform appeared more favourable to the power of internal self-organisation of local authorities, in the end, like in Germany, local authorities struggle for preserving the core of their self-organisation against erosion by statutory provisions. In this respect, however, the Charter does not appear to provide for a more far-reaching guarantee than that set out in the Italian Constitution.

By contrast, the Charter provides for a subjective right of local authorities to freely enter inter-territorial binding agreements with their counterparts abroad. Yet, whereas in Germany cross-border and inter-territorial co-operation activities are deemed to fall within the affairs of the local community, in Italy, without previous information to the government, which theoretically may oppose, local authorities can not engage in any co-operation activity, including entering agreements with their counterparts abroad. As for cross-border agreements, like in Germany, consortia with local authorities of different countries can be established only if previous bilateral agreements between sovereign States have been signed. The EGTC Regulation 1082/2006/EC has contributed in making the legal framework for local authorities throughout the EU much easier, yet for the establishment of consortia between local authorities of EU and non-EU countries (e.g.: Italy and Switzerland), the ratification of Protocol No. 2 and No. 3 to the Outline Convention on Cross-Border Convention might still provide for a useful legal basis.

As far as administrative supervision is concerned, after 2001 constitutional reform, in Italy control over local authorities has been mostly internalised, whereas external control has been confined to a great extent to lawfulness. Supervision on the merits by the Court of Auditors is mostly of non-coercive character. A certain margin of supervisory discretion remains within the central government through its prefects, in particular with reference to the dissolution of councils and, more in general, to the so-called execution in substitution. In particular, the principle of proportionality, as set out in the German legal order and in the Charter, is not consistently followed, since the

central government does not always issue the least invasive measure against local authorities: unlike in Germany, in Italy the appointment of commissioners does not in fact amount to a last resort measure among a full range of different measures at the disposal of supervisory authorities.[1499]

But the field in which the Italian constitutional and legislative framework might mostly be complemented by the Charter is the financial one: resources ought to be matched to municipal and provincial functions and in particular a concomitant financing for attributed and delegated tasks should be ensured; municipalities, provinces and metropolitan cities shall be vested with a more far-reaching power to levy own taxes and fix their rates; equalisation procedures shall be finally put in place pursuant to the financial needs of local authorities. As far as consultation within equalisation procedures is concerned, understandings with local authorities within the so-called Joint Conference shall be made mandatory as long as a territorial-based second chamber of Parliament will not be established and empowered with a veto.

In a time in which both structural and institutional reforms are increasingly pushed through by supranational organisations, including the EU, the IMF and the OECD, also administrative structures of the State, once considered by international lawyers as an exclusive domain of the State, are being modified pursuant to international recommendations, which however are issued without duly taking into account the core of local autonomy as set out in specific international documents, e.g. in the Charter. In Italy, in particular, it must be borne in mind that the reform of the provinces is deemed to have been imposed by the European Central Bank (ECB), which, in a confidential letter sent to the Italian Prime Minister on August 5, 2011, explicitly mentioned the «*need for a strong commitment to abolish or consolidate some intermediary administrative layers (such as the provinces)».* Further, the same letter stipulated that borrowing, *«including commercial debt and expenditures of regional and local governments should be placed under tight control, in line with the principles of the ongoing reform of intergovernmental fiscal relations».*[1500] If one might think it is true, as the weekly *The Economist* is used to believe, that Italy needs an "external constraint" (*vincolo esterno*) for passing so-called structural reforms which cannot be agreed upon by the Italian political class itself,[1501] it is all the same true that an "international constitutional" constraint is also needed for explaining that "certain things cannot be done", that is to say for ensuring that any reform involving the internal administrative structures, *a fortiori* those conceived at and imposed by a supranational organisation, shall always comply with minimum constitutional

---

[1499] So also: L. Cristanelli, *cit*., 205.

[1500] Letter by Jean-Claude Trichet and Mario Draghi to the Italian Prime Minister, Silvio Berlusconi, August 5, 2011, to be found in: E. Olivito, *Crisi economico-finanziaria ed equilibri costituzionali. Qualche spunto a partire dalla lettera della BCE al Governo italiano*, in Rivista dell'Associazione Italiana Costituzionalisti n. 1/2014.

[1501] The term "external constraint" has been used by *The Economist* on several occasions, at least since 2010. See for instance the *Charlemagne* columns: *Bored by Brussels*, 29th July 2010; *A Tale of two Italians*, 29 October 2011; *Italian Politics: All Roads Lead to Monti?,* 3 November 2012.

guarantees for local autonomy, which can most easily be found in the European Charter of Local Self-Goverment and in the monitoring practice by Council of Europe bodies.

Final Conclusions

In the present work, it has been attempted to point out that the European Charter of Local Self-Government is not an isolated and neglected legal text. By contrast, there exists a "system of the Charter" within the Council of Europe, that is to say a complicated interplay between hard law and various soft law sources issued by different bodies and agencies which contribute to enliven and invigorate the Charter, an international treaty which, in spite of appearance to the contrary, is not equal to a vague political declaration, but mostly contains provisions of substantive law which are sufficiently precise to be given direct effect in the domestic legal orders of Council of Europe member States. The content of the relevant engagements and the yardsticks for its interpretation have been enlighted in the first Chapter. Further, it has been examined to what extent the *chartered* principles and rights of local self-government have been *constitutionalised* in the Council of Europe member States, most notably in the domestic legal orders of the two member States which first signed it, namely the Federal Republic of Germany and the Italian Republic.

The research showed that, from the point of view of so-called "international constitutionalism",[1502] the system of the Charter still matters even thirty years after the adoption of the treaty.

In particular:

1. It matters for the evolution of regional public international law;

2. It matters for the assessment of a common constitutional local government law within the EU;

3. It matters for the promotion of institutional pluralism within Council of Europe member States and for the circulation of legal models between member States.

1502

On the academic debate going on on "international constitutionalism" the literature is voluminous. See *inter alia*: B. Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev., 1997, 771 and ff.; A. von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany,* in: Harvard Law Journal, Vol. 47, No. 1, 223 and ff.; S. Cassese, *Oltre lo Stato. Verso una nuova Costituzione globale?,* Napoli, 2006; E. De Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 Leiden Journal of International Law (2006) 3; J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law*, Oxford, 2009.

1. The Charter conceives local self-government and local authorities departing from the classical assumption which is still quite common under public international law whereby the former has to be regarded largely as an internal affair of a sovereign State and the latter are mere organs thereof endowed with no legal personality and capacity.[1503]

In fact, it can be said that the dominant opinion among public international lawyers embraces a rather old and strict "autarchic" conception of local self-government: even if they enjoy devolved autonomy under domestic law, local authorities are deemed to pursue the same interests as the State. Hence, they cannot be held responsible for their conduct under international law (Article 4, para. 1 and 2 of the Articles on Responsibility of State for Internationally Wrongful Acts – 2001) and a State cannot invoke provisions of its internal law as a valid justification for its failure to perform a treaty (Article 27 of the Vienna Convention on the Law of the Treaties – 1969), including those regarding its territorial structure.[1504] A State will anyhow be held responsible for the conduct of its units under international law and, unless it has entered a specific reservation while depositing the instrument of ratification of a treaty, will not be able to escape from its international responsibility.[1505]

The system of the Charter reversed this conception of local autonomy which dates back to the late nineteenth early twentieth century. At least in Europe, local authorities have to be regarded as self-governing polities not in the sense that they are sovereign or independent, but, akin to the model followed for the protection of national minorities, in the sense that political authority must be internally authorised by citizens, through democratic participation and specific procedures, even if the administrative functions they perform are attributed upon to them by the State.[1506] In this respect, thus, local self-government can no longer be regarded as a purely internal issue, but should be considered as an institutional guarantee which ought to be constitutionalised and which must not be restricted beyond its very essence, otherwise being international law violated. Therefore, as it is the case for fundamental human rights, the forty seven member States of the Council of Europe are committed to organise their administrative structures drawing on the self-government principles and rights laid down in the Charter and supplemented by recommendations, resolutions and opinions of

---

1503 As Marti Koskenniemi concluded by 1994, autonomy is simply an internal political decision. Cf. M. Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, International and Comparative Law Quarterly, Vol. 43 n. 2, 1994, 269. Cf. also: V. Epps, *Evolving Concepts of Self-Determination and Autonomy in International Law: The Legal Status of Tibet*, Journal of East Asia and International Law, 2008, 217 and ff..

1504 At the Vienna Conference the adoption of a provision which stipulated the capacity of State members of a federal union to become parties to an international treaty was eventually turned down. Cf. Article 5, para. 2 of the ILC's 1966 Draft Articles on the Law of the Treaties. See, however, also Article 46 of the Vienna Convention.

1505 L. Oppenheim, *International Law: A Treatise,* in: H. Lauterpacht (ed.), 8th ed., London, 1955, 19.

1506 So: R. Bauböck, *cit*., 2014, 752.

Council of Europe bodies. Local self-government unites in itself cultural, political, social and economic dimensions of "any democratic regime", as the Preamble stipulates, which cannot be done away by sovereign States. In this respect, one should therefore argue that, at least from the point of view of regional international law, an international scrutiny on local autonomy, as that carried out by the Congress of Local and Regional Authorities, can no longer be considered as a violation of the customary principle of non-intervention in the internal affairs of a State, i.e. in the domestic organization of administrative structures (*see* para. 4 of the Friendly Relations Declaration of 1970).

The provisions of the Charter and the soft law by the Council of Europe represent one of the many signes that unitary States are indeed likely to disaggregate[1507] and that, since at least two decades, local authorites have been increasingly acting as "semi-independent" polities in the global arena pursuing own interests different from those of the States.[1508] Hence, the system of the Charter might be perceived as a first concrete step towards the recognition of the legal personality of territorial local authorities under international law.[1509] The current rule whereby they trigger the responsibility of the State, while at the same time gaining greater autonomy from it, creates in fact a paradoxical situation which has been "detected" also by the Strasbourg Court. The ECtHR denies in fact that local authorities could be holders of fundamental rights as well as that local self-government is a right which might be adjudicated before itself. However, in *Assanidze v. Georgia* the Court grasped the contradictions underlying this doctrine. In particular it found that «*the central authorities have taken all the procedural steps possible to secure compliance with the judgment acquitting the applicant»,* but «*within the domestic system those matters are directly imputable to the local authorities of the Ajarian Autonomous Republic».* Yet, *«it is solely the responsibility of the Georgian State that is engaged under the Convention».*[1510]

Issues of this sort might indeed offer good legal reasons on the part of the States either to recentralise powers and impose additional central supervision on local authorities or to pledge for a new doctrine on sub-national responsibility under international law. Developing a theory on sub-

---

1507 On the concept of "State disaggregation" see: A-M. Slaughter, *Disaggregated Sovereignty, Towards the Public Accountability of Global Government Networks,* in: Government Opposition No. 39, 2004, 159–190.

1508 For an overview of this trend towards a global local government law see *inter alia*: Y. Blank, *Localism in the New Global Order*, Harvard International Law Journal, Vol. 47 No. 1, 2006, 263-281; Y. Blank, *The City and the World*, Columbia Journal of Transnational Law, Vol. 45 No. 1, 2006, 875-939; G. E. Frug and D. J. Barron, *International Local Government Law*, The Urban Lawyer 38 (2006), 1-44; M. Beltran De Felipe, *La internacionalización de las ciudades (y del régimen municipal)*, in: Revista de estudios de la administración local y autonómica, 305 (2007), 57-83; H. Aust, *Auf dem Weg zu einem Recht der globalen Stadt,* ZaöRV 73 (2013), 673-704.

1509 For a proposal in this respect but limited to EU law see: K. Naumann and C. Schmitz, *Kommunen und Grundfreiheiten - bloße Verpflichtung oder auch Berechtigung?*, NWBl, 6/2011, 208-214.

1510 ECtHR, *Assanidze v. Georgia,* Application No. 71503/01, § 146.

national responsibility might serve different purposes: not to deprive local authorities of their responsibilities under domestic law, to prevent States from entering ever more reservations concerning provisions of the internal law while negotiating on a treaty and to release States from responsibility they logically ought not to assume.[1511]

2. But the system of the Charter matters also when it comes to identify the main features of a subject which appears rather vague and indefinite for those who are not familiar with the issue, i.e. European constitutional local government law. Owing to the fact that also in Europe local government has always been perceived as a truly internal affair of sovereign States, the aforementioned locution generates puzzlement even among legal scholars who deal with the constitutional foundations of the European Union. Yet, the "system of the Charter" offers a minimum, but fairly complete and consistent set of principles and rights of constitutional nature against which one can more easily assess the actual "common denominator" of the different local government systems across Europe and thus ultimately answer the question whether a sort of "Ius Localis Commune Europaeum" exists. Such investigation is not a purely intellectual exercise, but it might contribute to advance the cause of European legal unity and in particular to lay down solid municipal foundations not only for a European Federation which currently appears utopian, but also for the current European Union, whose bodies shall be bound to comply with the principles on local autonomy laid down in the Charter insofar as they are deemed to be part of the common constitutional traditions.

In this respect, it might be argued that several, even if not all principles of the Charter can be deemed to form part of the common constitutional traditions of the EU member States (Article 6, para. 2 TEU) and thus could be recognised as general principles of EU law. In particular, it has been showed above that the principle of local self-government or autonomy as a guarantee for public territorial authorities (and only limitedly as a right of individual citzens) is enshrined in the majority of the Constitutions of Council of Europe member States and, where it is not explicitly endowed with a constitutional guarantee, like in the United Kingdom, it yet has solid roots in tradition. No State within the European Union regards territorial local authorities as decentralised administrative entities merely fulfilling State or delegated tasks, but, even if all to a different extent, each member State grants at least one category of local authorities, usually municipalities, with a limited amount of basic powers and responsibilities for addressing matters which affects citizens at the grassroots.

[1511] For a first proposal in this respect: P. J. Spiro, *The States and International Human Rights*, Fordham Law Review, 66 Fordham Law Review, Vol. 66 No. 2 (1997), 567-597.

Municipalities are territorial local authorities, whose deliberative bodies are directly elected by the people. As a rule, also intermediate local authorities, if territorial in nature, are directly elected. Executive bodies, i.e. mayors, should preferably be directly elected and in any case ought not to be appointed or dismissed by higher level authorities. In this respect, Belgium and the Netherlands still represent an exception to the general rule. Further, whereas the subsidiarity principle as a principle on allocation of powers between local and other territorial authorities is common only to a yet growing group of federal and regional countries, it can be said that, as far the allocation of powers is concerned, the very common European principle is the general competence or universal jurisdiction principle of municipalities, which has largely been recognised throughout the EU. Also consultation of local authorities when their interests are affected by acts of other layers of government might be deemed to be a general principle of EU law. This principle in fact was one of the first to be recognised also at supranational level with the establishment of the Standing Conference within the Council of Europe and the Committee of the Regions within the EU. Consultation has to be arranged at least in the form of hearings, that is to say either by giving a statement or by submitting observations. Borders of local authorities can in principle be changed only upon consultation of the local communities (through optional or even binding referendums). Yet, the power of organisation of the internal administrative structures of local authorities can be said to be a general principle of EU law only insofar as a minimum of regulatory powers is preserved for carrying out the powers and responsibilities attached to local authorities. In particular, co-operative agreements between local authorities for discharging local public services are widely recognised across the EU, whereas interterritorial co-operation can be said to be a shared principle only as far as twinnings and the simplest schemes of decentralised co-operation are concerned. Yet, the freedom of organisation of local authorities does not amount to a recognition of a true normative autonomy of local authorities independent from that of the State or to a limit to privatisations of local utilities. Likewise, it can be said that also the principles of administrative supervision over local authorities as confined to ex post supervision rather than to prior supervision and as limited to legality and only exceptionally to expediency are principles largely recognised across EU countries. Finally, to the principles generally recognised by all EU member States one ought to ascribe also the principle pursuant to which local authorities shall have the power to determine their expenditures and the principle whereby the member State ought to ensure adequate financial means to local authorities. This principle, however, unlike what the Charter foresees, amounts to a principle of trasferring or, at most, of sharing resources with local authorities, whereas the right to impose own taxes and fix their rates as well as the establishment of equalisation mechanisms are recognised in a minority of countries, mostly of federal or regional nature, except for minor local excise taxes which are assigned to local authorities all across Europe. Finally, also the principle of a judicial remedy for

local authorities is generally recognised by the law of all EU member States as a mean for ensuring legality of State administration; in particular, access to the national constitutional courts is either directly or indirectly ensured in all countries where such a court exists.

3. Finally, the system of the Charter still matters today because it builds a highly detailed reference framework offering normative guidance for establishing a local government system from the very start (as it was the case in the 1990s for Central and Eastern Europe countries), as well as for passing far-reaching local government reforms in those member States which already have set up one. In particular, normative guidance by the Council of Europe fosters pluralism within the single domestic orders as well as circulation of legal models, that is to say of local government principles between different systems. This process, which is part of the wider phenomenon of "internationalisation of constitutional law", occurs through different channels and in particular through ad-hoc consultancy by Council of Europe experts in those member States which apply for their aid (most recently Albania, Armenia and especially Ukraine), as well as through issuance of country-by-country, general reports, recommendations and resolutions.[1512]

Even when no explicit normative guidance is provided, the system of the Charter might nonetheless help to better grasp how models have been circulating between Council of Europe member States. The present work has attempted to outline that the Charter was mostly shaped pursuant to a German legal conception of local self-government as laid down in Article 28, para. 2 of the Basic Law. Italian reforms of local government were partly inspired by the Charter and thus, indirectly, also by its underlying German nature. Whereas full compliance with the system of the Charter by Italy would entail a stronger "injection" of federal municipalism onto the domestic order, in Germany the system of the Charter contributes to complement and precise the content and the limits of the federal guarantee of local self-administration, but it also preserves its potentially innovative value, since full abidance by certain provisions and recommendations might entail a partial alteration of the federal structure.

In particular, in fact, it ought to be recalled that an extensive application of the Charter, which has the rank of a federal statute (*Bundesgesetz*), could reduce the margin of differentiation between the different local government systems of the German *Länder,* could strengthen the position of local authorities towards both the Federation and the *Länder* themselves and, possibly, could establish direct relations between the Federation and local authorities. As for the effects of harmonisation of

---

[1512] See: S. Bartole, *International Constitutionalism and Conditionality. The Experience of the Venice Commission*, in: Rivista dell'Associazione Italiana Costituzionalisti No. 4/2014, 3.

the Charter, one should *inter alia* recall the direct election for all territorial local authorities (that is to say also for *Höhere Kommunalverbände*); as for the strengthening of local authorities' position towards the State, one has to recall the recognition of a general political mandate for municipalities, the guarantee of local authorities against so-called "false municipalisation", the right to co-operate between local authorities of different *Länder* without their prior agreement, the right to receive adequate financial treatment from the *Länder,* the right to determine the tax rate of the income tax for municipalities and the right to levy own taxes for counties; direct relations between local authorities and the Federation might be (re)-established on grounds of the extensive application of the concomitant financing principle as well as following to an extensive application of the principle of consultation at federal level, in particular through the *Bundesrat.*

By contrast, in Italy it has been assessed a progressive convergence towards the principles of the Charter, even if the last local government reform (so-called Delrio Law) derogated from the rule of direct election and from the rule of mandatory compensation for local provincial representatives. In general, however, the Charter can mostly contribute to supplement and complement the constitutional provisions on local government, providing for rules of more precise nature and thus streghtening the position of local authorities towards the State and the Regions akin to the model of municipal federalism. In this last respect, the choice by Italy to apply the Charter also to Regions might reduce the potential of convergence between the German and the Italian systems and increase concurrence of powers between Regions and local authorities. Yet, the system of the Charter appears to follow the aforementioned distinction between local authorities *stricto sensu* and regional authorities, so that the latter shall be treated more like federated States.

Yet, after thirty years, even if a trend towards convergence might be observed, the differences between the main features permeating the two national local government systems remain present. In particular, it should be recalled that in both legal orders the essential content or core area doctrine has been asserted by the corresponding Constitutional Court, even if in Italy it constitutes a less effective tool of protection of local authorities' sphere of powers and responsibilities, since it has never been substantiated by further jurisprudence. The concept remains thus very vague and its definition rests within the State. In the absence of a right of local authorities to lodge a direct complaint before the Constitutional Court, as it is the case in Germany, the Court itself will seldom be referred to determine whether the core has been encroached upon by the State or by the Regions.

Yet, the relations between municipalities and provinces or metropolitan cities in Italy and between municipalities and counties in Germany has been experiencing a similar parallel evolution towards

recognition of universal jurisdiction for municipalities and allocation of powers and responsibilities according to the principle of subsidiarity for counties. Though, even if the Delrio Law designed the new provinces building on the model of the German *Kreis* and the Spanish *diputación,* the German legal framework appears to remain more flexible than the Italian one, since powers and responsibilities might be more easily conferred upon to counties by municipalities and viceversa, whereas in Italy the relations between municipalities and provinces are in principle governed by statute and made more complicated by the administrative role of the Regions and (possibly upon entry into force of the pending constitutional reform) by a less far-reaching institutional guarantee of the province.

With reference to consultation, whereas in Italy local authorities are involved in permanent dialogue within the framework of highly formalised intergovernmental relations between lawyers of government, in Germany consultation of local authorities appears to occur at the grassroots within the framework of administrative procedures rather than at federal level, where their right to be heard is not different from that of other organisations or entities. The concept of loyal co-operation underlying the Charter sets out an extension of this principle to the relations between the Federation or the *Länder* and local authorities. Yet, no formal consultation within the framework of the legislative process has ever been allowed by Italy or Germany due to their regional and federal structures. A limited territorial integrity of local authorities is recognised in both constitutional legal orders, even if in Italy borders' changes ought to be passed upon holding of a referendum, whereas in Germany it normally suffices when the authorities themselves are heard. However, at *Land* level, mostly in East Germany, a convergence towards the Italian model and the model designed by the Charter can be observed.

Relevant differences appear to exist as far as the internal organisation and the regulatory powers of local authorities are concerned. However, they are ultimately more formal than substantial. Whereas in Germany the freedom of organisation of the administrative structures is ensured only insofar as it helps local authorities in carrying out their functions, in Italy the Constitution appears to provide for a fully fledged power of self-organisation and with a regulatory reservation clause in favour of local authorities. Yet, in the practice, also in Italy by-laws and local charters have been repeatedly treated by administrative courts according to the *lex superior* principle rather than according to a competence principle. Unlike in Germany, where differentiation between local government systems is mostly provided by municipal and county codes at *Land* level, in Italy by-laws and charters have been increasingly regulating matters which were once regulated by statute (e.g.: tools for ensuring direct and participatory democracy). Convergence can be assessed also within the field of inter-

municipal co-operation, into which local authorities can be coerced by the State both in Italy and Germany. Yet, in Italy, inter-municipal co-operation appears to represent a tool used for forcing amalgamation rather than for enhancing delivery of public services, whereas in Germany coercion into co-operation on large scale, that is to say for carrying out all main local government powers and responsibilities has never been ordered by means of statute as it has recently been the case in Italy. A further sign of convergence can be observed within the framework of administrative supervision: Italy has been dismantling the old controls on the expediency of administrative acts of local authorities. Yet, it seems that, unlike in Germany, proportionality is not truly regarded as one of the main principles guiding administrative supervision.

Finally, the most striking differences between the two constitutional frameworks on local government relate not only to the judicial protection of the guarantee of local autonomy, but also as to how local authorities are provided with financial means. Unlike in Germany, where the principle of adequate financial equipment is generally regarded as belonging to the core of the right to local self-administration, in Italy it has remained largely under-elaborated by the Constitutional Court. Even new Article 119, para. 4 IC, whereby there must be a commensurate relationship between administrative functions and resources for their exercise, it remains more programmatic than prescriptive and cannot be relied upon in court before the new local finance system has been implemented. The same could be said with reference to the provision requiring the establishment of a financial equalisation fund, which still lacks any implementation by the Italian legislator.

To conclude, it might be argued that further convergence of the German and Italian local government systems might be ensured by abiding with the principles and rights elaborated within the system of the Charter.

Bibliography

A.A., *Regioni ed autonomie territoriali nel diritto internazionale ed europeo*, X Convegno SIDI, Napoli, 2006.

A.A, *Procedures for regional and local authority participation in European Policy Making in the Member States,* Committee of the Regions & ISSiRFA, Brussels, 2005.

M. Acciari and L. Zamagni, *The Case of Derivatives Negotiated by Italian Local Authorities and the Issue of the "Hidden Costs"*, Santarcangelo di Romagna, 2011.

B. Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev., 1997, 771 and ff.

S. Affholder, *The Congress of Local and Regional Authorities: Grass-Roots Cooperation*, in: T. J. Kleinsorge (ed.), *Council of Europe*, Alphen aan de Rijn, 2010.

P. Aimo, *Stato e poteri locali in Italia. 1848-1995*, Roma, 1997.

J.F. Akandji-Kombé and G. Marcou, *Report on the Impact of the Lisbon Treaty on the European Charter of Local Self-Government*, CDLR (2011) 51, 3 October 2011.

P. Akkermans, *The European Charter of Local Self-Government*, in: Institut du federalisme de l'Universite de Fribourg, *The Territorial Distribution of Power in Europe*, Fribourg, 1990.

F. Albanese, *Which international guarantees of local self-government?*, Council of Europe, Strasbourg, 1996.

R. Alessi, *Intorno alla nozione di ente territoriale*, in: Riv. Trim. Dir. Pubbl., 1960, 308 and ff.

R. Alexy, *A Theory of Constitutional Rights*, Oxford, 2002.

M. Ali, *Regolamenti degli enti territoriali*, in: Enciclopedia del diritto, Agg. VI, Milano, 2002.

U. Allegretti, *Profilo di storia costituzionale italiana*, Bologna, 1989.

U. Allegretti, *Democrazia Partecipativa. Esperienze e Prospettive in Italia e in Europa*, Firenze, 2010.

M.R. Allegri, *Cooperazione transnazionale tra enti substatali: dalla Convenzione di Madrid al GECT*, in: Le Regioni n. 2/2009, 207 and ff.

M. Allers and E. Merkus, *Soft Budget Constraint but No Moral Hazard? The Dutch Local Government Bailout Puzzle,* University of Groningen – Centre for Research on Local Government Economics (COELO), October 2013.

G. Amato and A. Barbera, *Manuale di Diritto Pubblico*, 5th ed., Bologna, 1997.

S.L. Anthony, *Autonomy and the Council of Europe – with special reference to the applitcation of*

Article 3 of the First Protocol of the European Convention on Human Rights, in: M. Suksi (ed.), *Autonomy: Applications and Implications*, The Hague, 1998, 317 and ff.

D. Antiseri, *Mercato, sussidiarietà e Europa nella tradizione del cattolicesimo liberale*, prolusione tenuta all'inaugurazione della S.S.A.I., Roma 20 febbraio 2003.

V. Antonelli, *Le autonomie locali: una questione europea*, in: Amministrazione in Cammino, 2012.
L. Antonini, *Articolo 23*, in A. Celotto, M. Olivetti, R. Bifulco (ed.), *Commentario alla Costituzione*, 2006, 2227 and ff.

L. Antonini, E. Longobardi, A. Zanardi, *Le prospettive per la costruzione di un sistema perequativo per i comuni, in* www.astrid-online.it, 13 February 2013.

A. Anzon Demmig, *Un passo indietro verso il regionalismo 'duale*, in: V.A., *Il nuovo Titolo V della parte seconda della Costituzione. Primi problemi della sua attuazione (atti dell'incontro di studi di Bologna del 14 gennaio 2002*), Milano, 2002

Y. Arai (ed.), *The Margin of Appreciation Doctrine and the Principle of Proportionality*, Antwerpen-Oxford-New York, 2001.

G. Arena, *Il principio di sussidiarietà orizzontale nell'articolo 118, u.c. della Costituzione,* in www.astrid-online.it 2003.

P. Armbrust, *Einführung in das niedersächsische Kommunalrecht*, Hamburg, 2007.

M. Ascheri, *Medioevo del potere – Le istituzioni laiche ed eccleasiastiche*, Bologna, 2005.

R.J. Asensio, *La posición institucional de las Diputaciones provinciales a partir de la Ley de Racionalización y Sostenibilidad de la Administración Local*, Diario de Derecho Municipal, 13 January 2014.

J.B. Auby, *Mega-Cities, Glocalisation and the Law of the Future*, in: FICHL Publication Series No. 11 (2011).

H. P. Aust, *Auf dem Weg zu einem Recht der globalen Stadt,* ZaöRV 73 (2013), 673 and ff.

H. P. Aust, *„Global Cities" und das Grundgesetz: Kommunales Selbstverwaltungsrecht und auswärtige Gewalt*, in: M. P. Neubauer u.a. (eds.), *L'État, c'est quoi? Staatsgewalt im Wandel, Beiträge der 54. Assistententagung Öffentliches Recht*, Baden-Baden, 2014, 215 and ff.

E. Balboni, *Legge La Loggia e controlli esterni sugli enti autonomi*, in: Quaderni regionali, 2004, 1053 and ff.

A. Baldassarre, *Una costituzione da rifare*, Torino, 1998.

R. Balduzzi, *Riflessioni introduttive sui presupposti istituzionali e culturali della "Repubblica delle autonomie"*, in: R. Balduzzi (ed.), *Annuario DRASD 2011*, Milano, 2011, 5 and ff.

A. Ballard, *British Borough Charters 1042-1216*, Cambridge, 2010.

H. Barion, *Die sozialethische Gleichschaltung der Länder und Gemeinden durch den Bund,* in: Der Staat, 3, 1964.

J. Barroche, *La subsidiarité française: existe-t-elle?*, in www.droitconstitutionnel.fr,

S. Bartole, *Riflessioni sulla comparsa nell'ordinamento italiano del principio di sussidiarietà*, in: Studium Iuris, n. 4/1999, 380 and ff.

S. Bartole, *Riflessioni conclusive sul principio di sussidiarietà*, in: A. Rinella, L. Coen, R. Scarciglia (eds.), *Sussidiarietà e ordinamenti costituzionali. Esperienze a confronto*, Padova, 1999, 245 and ff.

S. Bartole, *International Constitutionalism and Conditionality. The Experience of the Venice Commission*, in: Rivista dell'Associazione Italiana Costituzionalisti No. 4/2014,

U. Battis, *Systemgerechtigkeit*, in: R. Stödter and W. Thieme (eds.), *Hamburg, Deutschland, Europa,* FS für H.P. Ipsen*,* Tübingen, 1977, 11 and ff.

R. Bauböck, *The Three Levels of Citizenship within the European Union,* in: German Law Journal, Vol. 15 No. 5, 2014.

F-A. Baumann, *Die allgemeine untere staatliche Verwaltungsbehörde im Landkreis*, Berlin, 1967.

R.H. Bautier, *Caractères spécifiques des chartes médiévales,* in: R.H. Bautier (ed.), *Chartes, sceaux and chancelleries. Études de diplomatique et de sigillographie médiévales*, 7 Paris, 1990.

D. Bayer, *Staatliche Gemeindefinanzierung und Verfassungsrecht*, DVBl, 1993, 1287 and ff.

U. Becker, *Aufgabenübertragungsverbot und Konnexitätsgebot*, Gutachten im Auftrag der kommunalen Spitzenverbände NRW, Köln, 2012.

D. Beito, P. Gordon, A. Tabarrok (eds.)*, The Voluntary City: Choice, Community, and Civil Society,* 2002.

M. Bellocci/R. Nevola, *L'applicazione in Italia della Carta europea dell'autonomia locale*, in www.cortecostituzionale.it, October 2011.

N. Belloubet Frier, *Vers un modèl européen d'administration locale?,* in *Revue française d'administration publique* 1/ 2007 (n° 121-122), 5-5.

M. Beltran De Felipe, *La inernacionalización de las ciudades (y del régimen municipal)*, in: Revista de estudios de la administración local y autonómica, 305 (2007), 57 and ff.

F. Benoit-Rohmer and H. Klebes, *Council of Europe Law: Towards a Paneuropean Legal Area,* Strasbourg*,* 2005.

F. Benvenuti, *La Provincia,* in: E. Rotelli (ed.), *Amministrazione pubblica. Autonomie locali,* Milano, 2010, 173 and ff.

V. Berger, *The Code of Good Practices in Electoral Matters in the Case-Law of the European Court of Human Rights*, Conference on "The European Electoral Heritage: Ten Years of Code of Good Practices in Electoral Matters", Tirana, Albania, 2-3 July 2012.

H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition,* Cambridge, 1983.

G. Berti, *Caratteri dell'amministrazione comunale e provinciale*, Padova, 1969.

M. Bertolissi, *Relazione sul tema autonomia finanziaria e distribuzione delle risorse*, in: G. Berti and G.C. De Martin (eds.), *Le autonomie territoriali dalla riforma amministrativa alla riforma costituzionale*, Milano, 2001, 115 and ff.

H. Bethge, *Die Grundrechtssicherung im föderativen Bereich*, AöR 110, 1985. 169 and ff.

H. Bethge, *§ 91*, in: T. Maunz, B. Bleibtreu, F. Klein, G. Ulsamer, *Bundesverfassungsgerichtsgesetz – Loseblatt Kommentar*, 2002.

E. Bettinelli and F. Rigano, *La riforma del Titolo V della Costituzione e la giurisprudenza costituzionale,* in: Quaderni del Gruppo di Pisa, Torino, 2004.

U. Beyerlin, *Rechtsprobleme der lokalen grenzüberschreitenden Zusammenarbeit*, Berlin/Heidelberg, 1988.

G. Biaggini, *Il federalismo fiscale in Svizzera*, in: J. Woelk (ed.), *Federalismo fiscale tra differenziazione e solidarietà*, EURAC, Bolzano, 2010.

L. Bielzer, *Perzeption, Grenzen und Chancen des Subsidiaritätsprinzips im Prozess der Europäischen Einigung. Eine international vergeleichende Analyse an historischer Perspektive*, Münster, 2003.

R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Torino, 2006.

R. Bifulco, *Articolo 5,* in: R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Torino, 2006.

R. Bifulco, *Il contributo dei regolamenti parlamentari alla configurazione della forma di Stato: l'integrazione della Commissione per le questioni regionali,* in: www.astridonline.it, n. 1 (2007).

R. Bin, *La funzione amministrativa nel nuovo Titolo V*, in: Le Regioni 2-3/2002, 365 and ff.

R. Bin, *Soft Law*, in: A. Somma (ed.), *Soft Law e Hard Law nelle società postmoderne*, Torino, 2009, 31 and ff.

R. Bin and G. Pitruzzella, *Diritto Costituzionale*, 15th ed., Milano, 2014.

R. Bin, *Interpretazione conforme: due o tre cose che so di lei*, in www.rivistaaic.it n. 1/2015.

F. Biondi Dal Monte, *La Corte costituzionale torna sui fondi statali vincolati con alcune novità in materia di immigrazione*, in: Le Regioni, n. 3/2008.

F. Biondi Dal Monte / F. Fontanelli, *The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System*, in www.germanlawjournal.com, Vol. 9, n. 7, 2007.

D. Birk and M. Inhester, *Die verfassungsrechtliche Rahmenordnung des kommunalen Finanzausgleichs*, DVBl, 1993, 1281 and ff.

W. Blackstone, *Commentaries on the Laws of England*, ed. with introductions by S.N. Katz., Chicago, 1979.

P. Blair, *Die Gestaltung der kommunalen Selbstverwaltung in den europäischen Staaten*, DÖV, 1988, 1002 and ff.

P. Blair, *Vorbereitung der Charta im Rahmen des Europarats und gegenwärtiger Stand der Unterzeichnung und Ratifikation*, in: F.L. Knemeyer, *Die Europäische Charta der kommunalen Selbstverwaltung*, 1989, 43 and ff.

Y. Blank, *Localism in the New Global Order*, Harvard International Law Journal, Vol. 47 - No. 1, 2006, 263 and ff.

Y. Blank, *The City and the World*, Columbia Journal of Transnational Law, Vol. 45 No. 1, 2006, 875 and ff.

H-J. Blanke, *Die kommunale Selbstverwaltung im Zuge fortschreitender Integration*, DVBl 1993, 819 and ff.

A. Bleckmann, *Verfassungsrang der Europäischen Menschenrechtskonvention?*, 21 EGZ, 1994, 149 and ff.

A. Bleckmann, *Völkerrecht*, Baden-Baden, 2001.

W. Blümel, *Gemeinden und Kreisen vor den oeffentlichen Aufgaben der Gegenwart*, in DV, 1977, 188 and ff.

D. Blumenwitz, *Zur Rechtsproblematik von Städtepartnerschaftsabkommen,* BayVBl, 1980, 193 and ff.

S. Boccalatte, *Case study. La città sussidiaria. Partigliano. Quando la realtà precede il diritto (pubblico)*, IBL Focus No. 134, 30 April 2009.

A. von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany,* in: Harvard Law Journal, Vol. 47, No. 1, 223 and ff.

A. von Bogdandy and S. Schill, *Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag*, ZaöRV 70 (2010), 701 and ff.

A. von Bogdandy, M. Kottann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, *Solange ribaltata - Proteggere l'essenza dei diritti fondamentali nei confronti degli Stati membri dell'Unione europea,* in: Rivista trimestrale di diritto pubblico, n. 4/2012, 225 and ff.

G. Boggero, *La conformità della riforma delle Province alla Carta europea dell'autonomia locale, in* www.federalismi.it 20/2012.

G. Boggero, *I limiti costituzionali alla riforma delle Province nella sentenza n. 220/2013 della Corte costituzionale*, in www.astrid-online.it, February 2014.

G. Boggero, *Gli obblighi di Regioni ed enti locali dopo la legge n. 243/2012*, in Amministrare a. XLIV, April - n. 1/2014.

G. Boggero and P. Annicchino, *Who Will Ever Kick Us Out? Italy, The Fiscal Compact and the Balanced Budget Rule*, in: European Public Law, No. 2/2014.

U. Bohner, *Entstehung und Bedeutung der EKC unter besonderer Berücksichtigung ihrer Rezeption in den Reformstaaten Mittel- und Osteuropas,* in: F.L. Knemeyer (ed.), *Kommunale Selbstverwaltung in Ost und West*, Baden-Baden, 2003.

P. Bonetti, *L'autonomia finanziaria regionale e locale come motore delle autonomie territoriali: un'introduzione dall'art. 114 all'art. 119 Cost.*, in: Le Regioni n. 5/2010, 1161 and ff.

H. Borchert, *Legalitätsprinzip oder Opportunitätsgrundsatz für die Kommunalaufsicht?*, DÖV, 1978, 721 and ff.

M. Borchmann, *Die Verfassungsgarantie*, Der Städtetag, 1980.

M. Bothe, *Rechtsprobleme grenzüberschreitender Planung*, AöR 102 (1977), 68 and ff.

M. Boulet, *Les collectivités territoriales françaises dans le processus d'integration européenne*, L'Harmattan, Paris, 2012.

Y. Le Bouthillier, *Article 32 Convention of 1969*, in: O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of the Treaties*, Oxford, 2011, 841 and ff.

A. Boyer, *La cooperation intercommunale en France,* in: Le Istituzioni del Federalismo, Vol. 3 (2012),

A. Brancasi, *L'autonomia finanziaria degli enti territoriali: note esegetiche sul nuovo art. 119 Cost.*, in: Le Regioni n. 1/2003, 24.

A. Brancasi, *L'attuazione del federalismo attraverso i principi contenuti nell'art. 119 Cost*., in: F. Amatucci and G. Clemente di San Luca, *I principi costituzionali e comunitari del federalismo fiscale*, Torino, 2007.

A. Brancasi and P. Caretti, *Il sistema dell'autonomia locale tra esigenze di riforma e spinte conservatrici: il caso della Città metropolitana*, in Le Regioni n. 4/2010,

W. Brohm, *Die Eigenständigkeit der Gemeinden,* DÖV, 1986, 397 and ff.

S. Bross and H. Scholler, *Grundzüge des Kommunalrechts in der Bundesrepublik Deutschland*, Heidelberg, 1976.

W. Brückner, *Die Organisationsgewalt des Staates im kommunalen Bereich*, Würzburg, 1974.

C. Brüning, *Kommunalrecht*, in: D. Ehlers, M. Fehling, H. Punder (eds.), *Besonderes Verwaltungsrecht*, Vol. 3, 2013, § 64.

T. Buergenthal, *Self-Executing and Non Self-Executing Treaties in National and International Law,* 235 Recueil des Cours, 1992.

G. D. Buhren, *Allgemeines Kommunalrecht NRW*, 7th. ed., Stuttgart, 2004.

S. W. Burger, *Local and regional autonomy in the European context: the impact of the Council of Europe and the European Union on the sub-state structure of Slovenia and Croatia*, University of Graz, Univ., Dipl.-Arb., 2013.

M. Burgi, *Kommunalrecht*, 4nd ed., München, 2012.

M. Burgi, *Federal Republic of Germany*, in: N. Steytler (ed.), *Local Government and Metropolitan Regions in Federal Systems,* Montreal/Kingston, 2009, 136 and ff.

E. Burke, *Speech on Mr. Fox's East India Bill,* December 1, 1783, in: P. Marshall (ed.), *The Writings and Speeches of Edmund Burke*, Vol. 5, Oxford, 2000, 403 and ff.

J. Burmeister, *Verfassungstheoretische Neukonzeption der kommunalen Selbstverwaltung*, 1977.

J. Burmeister, *Selbstverwaltungsgarantie und wirtschaftliche Betätigung*, in: G. Püttner (ed.), HWKP, vol. 5, 1982, 26 and ff.

M. Caielli, *Cittadini e giustizia costituzionale. Contributi allo studio dell'actio popularis*, Torino, 2015.

F. Calasso, *Comune (storia)*, in: *Enciclopedia del diritto*, Milano, 1961.

C. Calliess, *Auswärtige Gewalt*, in: J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. 4,

C. Calliess, *Auswärtige Gewalt - § 72,* in: H. Kube, R. Mellinghoff, G. Morgenthaler, U. Palm, T. Puhl, C. Seiler (eds.), *Leitgedanken des Rechts - Paul Kirchhof zum 70. Geburtstag*, Heidelberg, 2013, 775 and ff.

R. Cameli, *Poteri sostitutivi del Governo ed autonomia costituzionale degli enti territoriali (in margine all'art. 120 Cost.)*, in: Giurisprudenza Costituzionale, 2004.

Q. Camerlengo, *Articolo 118*, in: R. Bifulco, A. Celotto, M. Olivetti (eds,) *Commentario alla Costituzione*, vol. 3, Torino, 2006, 2337 and ff.

Q. Camerlengo, *Gli enti locali e la giustizia costituzionale*, in: Giurisprudenza Costituzionale, 2009 n. 2, 1341 and ff.

E. Cannada Bartoli, *Osservazioni intorno a taluni aspetti del territorio comunale*, in: Scritti giuridici in memoria di V.E. Orlando, Padova, 1957, 285 and ff.

A. Cannone, *Trattato internazionale (adattamento al)*, in Enciclopedia del Diritto - Annali, Vol. 5, Milano, 2012, 1321 and ff.

A. Cantadori, *La Carta europea delle autonomie locali,* in: Nuova Rassegna Legislativa, 1991, 436 and ff.

C.M. Cantore, *Articolo 252 and ff.*, in: C. Napoli e N. Pignatelli (eds.), *Codice degli Enti Locali*, Roma, 2012, 1972 and ff.

M. Cardillo, *Potestà regolamentare comunale*, in: A. Uricchio, *La fiscalità locale tra modelli gestori e nuovi strumenti di prelievo,* Santarcangelo di Romagna, 2014.

P. Caretti, *Gli accordi tra Stato, Regioni e autonomie locali: una doccia fredda sul "sistema delle Conferenze"?*, in: Le Regioni n. 5/2002, 1169 and ff.

F. Caringella, A. Giuncato, F. Romano, *L'ordinamento degli enti locali*, Milano, 2007.

F. Carloni, *Lo stato differenziato, Contributo allo studio dei principi di uniformità e differenziazione*, Torino, 2004.

I. Carlotto, *I giudici comuni e gli obblighi internazionali dopo le sentenze n. 348 e n. 349 del 2007 della Corte costituzionale: un'analisi sul seguito giurisprudenziale*, in: Politica del Diritto, 2010, 55 ff.

R. Carpino, *Evoluzione del sistema delle conferenze*, in: Le Istituzioni del Federalismo, n. 1/2006, 15 and ff.

K. Carstens, *Das Recht des Europarats,* Berlin, 1956.

M. Cartabia, *The Italian Constitutional Court and the relationship between the Italian legal system and EU,* in: A. Slaughter, A. Stone Sweet, J.H.H. Weiler (eds.), *The European Courts and National Courts,* Oxford, 1997.

A. Cassese, *International Law*, 2nd ed., 2005.

S. Cassese, *Autarchia*, in: Enciclopedia del Diritto IV, Milano, 1959, 324 and ff.

S. Cassese, *L'amministrazione nel nuovo Titolo V della Costituzione*, in *Giornale di diritto amministrativo*, 2001, 1193 and ff.

S. Cassese, *Oltre lo Stato. Verso una nuova Costituzione globale?,* Napoli, 2006

J.M. Castellà Andreu, *La relevancia del tribunal constitucional en la configuraciòn del Estado autonòmico español* in: E. Bettinelli and F. Rigano (eds.), *La riforma del titolo V della Costituzione e la giurisprudenza costituzionale,* in: Quaderni del Gruppo di Pisa, Torino, 2004.

C. Cattaneo, *Sulla legge comunale e provinciale - Lettera prima,* in: Il Diritto, 7 giugno 1864.

R. Cavallo Perin and A. Romano (eds.), *Commentario breve al Testo Unico degli Enti Locali*, Padova, 2006.

M. Cavino and L. Imarisio, *Il Consiglio delle Autonomie Locali*, Torino, 2012.

M. Cecchetti, *Corte costituzionale e unità/indivisibilità della Repubblica*, in: R. Balduzzi and J. Luther (eds.), *Dal federalismo devolutivo alla spending review – Annuario DRASD 2012*, Milano, 2013.

A. Celotto, *Regional and Local People Consultation through Referendum*, in: Perspectives on Federalism, Vol. 4, Issue 1, 2012.

V. Cerulli Irelli, *Sussidiarietà (diritto amministrtivo)*, in Enc. giur., XXX, Roma, 2003, 1 and ff.

J. Chaplin, *Subsidiarity and Social Pluralism*, in: M. Evans and A. Zimmermann (eds.), *Global Perspectives on Subsidiarity*, Dordrecht-Heidelberg-New York-London, 2014.

J. Chapuisat, *Libertés locales et libertés publiques*, AJDA, 1982, 349 and ff.

O. Chessa, *Pluralismo paritario e autonomie locali nel regionalismo italiano*, in: O. Chessa (ed.), *Verso il federalismo "interno". Le autonomie locali nelle Regioni ordinarie e speciali*, Torino, 2009.

O. Chessa, *La forma di governo provinciale nel d.d.l. 1542. Profili di incostituzionalità e possibili rimedi*, in www.federalismi.it n. 25/2013.

L. Cibrario, *Storia della monarchia di Savoia*, Vol. 1, Torino, 1840

S. Civitarese Matteucci, *La garanzia costituzionale della Provincia in Italia e le prospettive della sua trasformazione*, in: Le Istituzioni del Federalismo, n. 3/2011, 467 and ff.

S. Civitarese Matteucci, *L'autonomia istituzionale normativa degli Enti locali dopo la revisione del Titolo V parte II della Costituzione. Il caso dei controlli*, in: Le Regioni, 2002, 445 and ff.

E. Cloots, *National Identity in EU Law*, Oxford, 2015.

V. Cocucci, *Nuove forme di cooperazione territoriale transfrontaliera: il Gruppo Europeo di Cooperazione Territoriale,* in Riv. Trim. Dir. Pubblico Comunitario, 2008, 891 and ff.

I. Colzi, *La Provincia e il Comune nell'ordinamento costituzionale*, in: P. Calamandrei and F. Levi (eds.), *Commentario sistematico alla Costituzione italiana*, Firenze, 1950.

L. Condemi, *Verso una carta europea dell'autonomie locali* in Amministrazione e Contabilità dello Stato e degli Enti Pubblici, 1985.

L. Condorelli, *La Corte Costituzionale e l'adattamento dell'ordinamento italiano alla CEDU o a qualsiasi obbligo internazionale*? In Diritti umani e Diritto internazionale, 2008.

G. Conetti, *The New External Powers of the Italian Regions*, in: N. Ronzitti (ed.), *I rapporti di vicinato dell'Italia con Croazia, Serbia-Montenegro e Slovenia*, Milano, 2005.

A. Corpaci, *Revisione del Titolo V della Parte II della Costituzione e sistema amministrativo*, in: Le Regioni 2001,

O. Corten and P. Klein (eds), *The Vienna Convention on the Law of the Treaties* – A Commentary,

Oxford, 2011.

M. Cosulich, *Il Consiglio delle Autonomie Locali come strumento di raccordo fra Regione ed Enti Locali: un possible modello?*, in: R. Balduzzi (ed.), *Annuario DRASD 2010,* Milano, 2010, 117 and ff.

M. Cosulich, *La rappresentanza degli enti locali: conferenza o consiglio?*, in: Le Istituzioni del Federalismo n. 1/2001, 228 and ff.

P. Costa, *'Così lontano, così vicino'. Il comune medievale e la sua 'autonomia'*, in. Quaderni Fiorentini n. 43 (2014), 689 and ff.

F.L. Cranshaw, *Insolvenz- und finanzrechtliche Perspektiven der Insolvenz von juristischen Personen des Öffentlichen Rechts, insbesondere Kommunen*, Berlin, 2007.

L. Cristanelli, *La garanzia costituzionale dell'autonomia locale. Un'analisi comparata tra diritto tedesco e diritto italiano,* Frankfurt am Main, 2008.

M. Croce and A. Salvatore, *The Legal Theory of Carl Schmitt*, Abingdon, 2013.

H. Cullen, *The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights*, in: Human Rights Law Review (9), 1, 2009, 63 and ff.

A. Cygan, *Regional Governance, Subsidiarity and Accountability within EU's Multilevel Polity*, in European Public Law, 19, no. 1 (2013), 161 and ff.

B. Dafflon, *Fiscal Capacity Equalization in Horizontal Fiscal Equalization Programs*, in: R. Boadway and A. Shah (eds.), *Intergovernmental Fiscal Transfers. Principles and Practice*, Washington, 2007, 361 and ff.

A. D'Atena, *Il principio di sussidiarietà nella Costituzione italiana*, in: Rivista italiana di diritto pubblico comunitario, vol. 1, 1997, 603 and ff.

A. D'Atena, *Costituzione e principio di sussidiarietà*, Quaderni Costituzionali n. 1/2001, 13 and ff.

A. D'Atena, *Prime impressioni sul progetto di riforma del Titolo V*, in G. Berti and G.C. De Martin (eds.), *Le autonomie territoriali: dalla riforma amministrativa alla riforma costituzionale*, n. 20 dei Quaderni del Centro di ricerca "Vittorio Bachelet", Milano 2001.

A. D'Atena (ed.) *L'Europa delle autonomie. Le Regioni e l'Unione europea,* Giuffrè, Milano, 2003.

G. D'Auria, *Appunti sui controlli amministrativi dopo la riforma del nuovo Titolo V (parte II)*, in: Il Lavoro nelle Pubbliche Amministrazioni, Suppl. al Fasc. I, 2002.

M. Dauster, *Kommunale Deutschlandpolitik?*, NJW, Heft 7 – 1990, 1084 and ff.

A. De Becker, *Local Government in Belgium*: *A Catch 22 Between Autonomy and Hierarchy*, in: C. Panara and M. Varney (ed.), *Local Government in Europe*, London, 2013, 26 and ff.

G. De Beco, *The Role of European Human Rights Monitoring Mechanisms*, in: G. De Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of Europe*, Strasbourg, 2012,

G. De Burca, *Legal Principles as an Instrument of Differentiation: The Principles of Proportionality and Subsidiarity,* in: B. De Witte, D. Hanf, E. Vos (eds.), *The Many Faces of Differentiation in EU Law,* Oxford, 2001, 131 and ff.

G. De Cesare, *L'ordinamento comunale e provinciale in Italia dal 1862 al 1942*, Milano, 1977.

C. Degenhart, *Art. 125 lett. a),* in: M. Sachs (ed.), *GG-Kommentar,* 5th ed, München, 2009,

A. Delcamp, *The European Charter of Local Self-Government and its Application. Drafting, Principles, Implementation*, in: Council of Europe, *North/South Local Democracy: The European Charter of Local Self-Government in Action*, Studies and Texts no. 54, Strasbourg, 1997.

A. Delcamp, *La Charte europeenne de l'autonomie locale et son systeme de control,* in: Annuaire des collectivités locales, Vol. 19, 1999.

G. Della Cananea, *Autonomie e responsabilità nell'art. 119 della Costituzione,* in Il lavoro della P.A., 2002, n. 1.

G. Delledonne, *Articoli 243-bis, 243-ter, 243-quater, 243-quinquies,* in: C. Napoli e N. Pignatelli (eds.), *Codice degli Enti Locali*, 2nd ed., Roma, 2013, 2159 and ff.

L. De Lucia, *Le funzioni di province e comuni nella Costituzione*, in: Riv. Trim. Dir. Pubbl., 2005, 23 and ff.

G. C. De Martin, *Carta europea dell'autonomia locale e limiti dell'ordinamento italiano*, in Riv. trim. dir. Pubbl., 1988, 386 and ff.

G.C. De Martin, *Intervento,* in: Aa.VV., *Il nuovo titolo V della parte II della Costituzione. Primi problemi della sua attuazione,* Milano, 2003.

G.C. De Martin, *La regionalizzazione dell'ordinamento degli enti locali,* Amministrazione in Cammino, 2013.

M. De Nes, *La Corte EDU entra nel merito della procedura di dissesto finanziario degli enti locali italiani. I casi di Pennino e De Luca,* in www.dpce-online.it 2013-4.

E. De Wet, *The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 Leiden Journal of International Law (2006) 3

R. Dickmann, *Appunti sulle prospettive della cooperazione transfrontaliera fra enti locali infraregionali*, in www.federalismi.it n. 14/2006.

G. Di Cosimo, *I regolamenti nel sistema delle fonti,* Torino, 2005.

G. Di Cosimo, *Se le Regioni difendono gli enti locali di fronte alla Corte Costituzionale*, in: Le Regioni, 2010.

G. Di Cosimo, *Come non si deve usare il decreto-legge*, in www.forumcostituzionale.it, 2013.

M. Di Folco, *La democrazia partecipativa nelle fonti locali*, in: G.C. De Martin and D. Bolognino (eds.), *Democrazia partecipativa e nuove prospettive della cittadinanza*, Milano, 2010.

A. Di Gaspare, *Autogoverno*, in: Enciclopedia giuridica Treccani, vol. 4, Roma, 1988.

G. Di Giovine, *Il Comune dopo il d.p.r. n. 616/77*, Milano, 1984.

C. Di Marco, *Democrazia, autonomie locali e partecipazione fra diritto, società e nuovi scenari transnazionali*, Padova, 2009.

E. Di Salvatore, *Autonomie locali e Unione europea*, in Teoria del diritto e dello Stato, nn. 1-2, 2003.

B.E. Dollery, J. Garcea, E. C. Le Sage (eds), *Local Government Reform: A Comparative Analysis of Advanced Anglo-American Countries*, Cheltenham, 2008.

M. Dombert, *Landesverfassungen und Landesverfassungsgerichte in ihrer Bedeutung fuer den Föderalismus*, in: I. Hartel, *Handbuch Föderalismus*, Berlin-Heidelberg, 2012.

M. Dombert, *Zur Finanziellen Mindestausstattung von Kommunen*, DVBl, 2006, 1136 and ff.

D. Donati, *Horizontal Subsidiarity in the Italian legal order*, PIFO Occasional Papers No. 15/2012, 7-8.

O. Dörr, *Article 31 – Interpretation of Treaties,* in: O. Dörr and C. Schmalenbach (eds.), *Vienna Convention on the Law of the Treaties: A Commentary,* Berlin/Heidelberg, 2012, 520 and ff.

H. Dreier, *Art. 28*, in: H. Dreier (ed.), *Grundgesetz-Kommentar*, 2nd ed., Tübingen, 2006.

J-M. Dupuy, *Coopération transfrontalière*, in: Annuaire Francais de droit international, Vol. 22 (1977).

G. Dürig, *Verfassung und Verwaltung im Wohlfahrtsstaat*, JZ 1953, 193 and ff.

G. Dürig, *Art. 1*, in: T. Maunz and G. Dürig (eds.), *Grundgesetz-Kommentar*, München, 1997.

D. Ehlers, *Die Rechtsprechung zum nordrhein- westfälischen Kommunalrecht der Jahre 1984-89*, NWVBl 1990, 44 and ff.

D. Ehlers, *Anmerkung zum Urteil des VerfGH NRW,* DVBl 2001.

D. Ehlers, *Interkommunale Zusammenarbeit in Gesellschaftsform,* DVBl, 1997, 137 and ff.

U. Eisenhardt, *Deutsche Rechtsgeschichte*, 5th ed., München, 2008.

W. Elsner, *Gemeindeverfassungsrecht*, in: H. Peters (ed.), *Handbuch der kommunalen Wissenschaft und Praxis*, Berlin 1956.

G. Engel, *Struktur und Umsetzung der EKC*, in F.L. Knemeyer (ed.), *Die Europäische Charta der Kommunalen Selbstverwaltung*, Baden-Baden, 1989.

W. Engel, *Grenzen und Formen der mittelbaren Kommunalverwaltung*, Köln, 1981.

C. Engeli, *Neuanfänge der Selbstverwaltung nach 1945*, in: G. Püttner (ed.), *Handbuch der kommunalen Wissenschaft und Praxis*, Vol. 1, 2nd ed, Berlin, 1981, 114 and ff.

V.C. Epps, *Evolving Concepts of Self-Determination and Autonomy in International Law: The Legal Status of Tibet*, Journal of East Asia and International Law, (217), 2008.

H-U. Erichsen, *Kommunalrecht des Landes Nordrhein-Westfalen*, 2nd ed., Siegburg, 1997, 69 ff.;

C. Esposito, *La Costituzione italiana. Saggi*, Padova, 1954.

F. Fabbrini, *Fundamental Rights in Europe - Challenges and Transformations in Comparative Perspective,* Oxford, 2014.

A. Faber, *Insolvenzfähigkeit für Kommunen?,* DVBl, 2005, 933 and ff.

A. Faber, *Die Zukunft kommunaler Selbstverwaltung und der Gedanke der Subsidiarität in den Europäischen Gemeinschaften*, DVBl, 1991, 1126 and ff.

H. Faber, *Art. 28*, in: E. Denninger (ed.), *Grundgesetz Kommentar,* v. II, 3rd ed., Neuwied, 2002.

M. Faber, *Die Kommunen zwischen Finanzautonomie und staatlicher Aufsicht*, Bonn, 2012.

A. Fahrmeir, *Rechtfertigungsnarrative. Zur Begründung normativer Ordnung durch Erzählungen*, Frankfurt am Main, 2013.

G. Falcon, *Funzioni amministrative ed enti locali nei nuovi artt. 118 e 117 della Costituzione,* in: Le Regioni n.2/3 2002, 383 and ff.

P. Falletta, *I sistemi regionali delle autonomie locali*, in: V. Antonelli, *Il cantiere federale delle autonomie locali*, Roma, 2010, 19 and ff.

U. Fastenrath, *Kompetenzverteilung im Bereich auswärtiger Gewalt*, München, 1986.

U. Fastenrath, *Relative Normativity in International Law,* 4 EJIL, 1993, 305 and ff.

U. A. Felice (ed.), *I percorsi del federalismo fiscale*, Bari, 2012.

E. Ferioli, *Art. 133*, in: R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Torino, 2006.

G.F. Ferrari, *Introduction to Italian Public Law*, Milano, 2008.

A. Ferraro, *Recenti sviluppi in tema di diritti fondamentali, tra illegittima espropriazione della funzione propria della CEDU ed irragionevole durata di uno scontro giudiziario*, in Rivista italiana di diritto pubblico comunitario, 2008, 651 and ff.

L. Fonnesu, *Il ritorno dell'autonomia. Kant e la filosofia classica tedesca*, in: Quaderni Fiorentini XLIII (2014), 25 and ff.

E. Forsthoff, *Krise der Gemeindeverwaltung im heutigen Staat,* Berlin, 1932.

H.W. Fowler (ed.), *The Coincise Oxford Dictionary of Current English*, Oxford, 1960.

T.M. Franck, *Proportionality in International Law*, Law & Ethics of Human Rights, Vol. 4, Issue 2, 2010.

G. Fransoni and G. Della Cananea, *Articolo 119*, in: A. Celotto, M. Olivetti, R. Bifulco (eds.), *Commentario alla Costituzione*, 2006, 2358 and ff.

W. Frenz, *Kommunale Selbstverwaltung und europäische Integration*, in: M. Hoffmann and al (eds.) *Kommunale Selbstverwaltung im Spiegel von Verfassungsrecht und Verwaltungsrecht,* Stuttgart, 1996, 9 and ff.

H-J. Friehe, *Kleines Problemkompendium zum Thema Kulturabkommen des Bunde*s, JA, Vol. 15, 1983, 117 and ff.

M. Frigo, *Dalla Convenzione di Madrid all'Euroregione: prove di integrazione transfrontaliera*, in: L. Daniele (ed.), *Regioni ed autonomie territoriali nel diritto internazionale ed europeo, X Convegno SIDI*, Napoli, 2006, 405 and ff.

W. Frotscher, *Stadtparlament und Stadtregierung*, ZParl, 7 (1976), 494 and ff.

G. E. Frug and D. J. Barron, *International Local Government Law*, The Urban Lawyer 38 (2006)

J. Fuchs, *Dritte Säule oder was? Zur politischen Vertretung der kommunalen Selbstverwaltung im Bund*, DV n. 4, 1971, 385 and ff.

V. Gaffuri, *L'esperienza di alcuni ordinamenti nazionali*, in G. Rolla (ed.), *Il sistema europeo di protezione dei diritti fondamentali e i rapporti tra le giurisdizioni,* 321 and ff.

A. Gagliano, *The Introduction of the "Balanced Budget" Principle into the Italian Constitution: What Perspectives for the Financial Autonomy of Regional and Local Governments?*, in Perspectives on Federalism, Vol. 5, No. 1 (2013).

A. Galette, *The Draft European Charter of. Local Self Government Submitted by The Conference of Local and Regional Authorities of Europe,* in: German Yearbook of International Law, Vol. 25, 1982, 309 and ff.

A. Galette, *Europäische Aspekte der Kommunalen Selbstverwaltung,* in: A. von Mutius (ed.), *Festschrift für von Unruh,* Heidelberg, 1983, 1096 and ff.

F. Gallo, *Prime osservazioni sul nuovo art. 119 Cost.*, in Rassegna Tributaria n. 2/2002

A. Gamper, *Von der Charta der lokalen zur Charta der regionalen Selbstverwaltung?*, in: E. Alber and C. Zwilling (eds), *Gemeinden im Europaischen Mehrebenensystem: Herausforderungen im 21. Jahrhundert*, Vol. 26, Baden-Baden, 2014.

A. Gamper, *Local Government in Austria*, in: A-M. Moreno (ed.), *Local Government in the member States of the European Union*: *A Comparative Legal Perspective*, Madrid, 2012, 23 and ff.

J. Garcìa Roca, *Sobre la posibilidad de configurar una acciòn para la defensa de la autonomia local por sus propios titulares ante el Tribunal constitucional: es factible un conflicto local e indirecto contra leyes?,* in Aa.Vv., *La defensa de la autonomia local ante el Tribunal constitucional,* Madrid 1997.

R. K. Gardiner, *Treaty Interpretation*, Oxford, 2008.

A. Gasser, *Staatlicher Großraum und autonome Kleinräume*, Basel, 1976.

R. Geiger, *Grundgesetz und Völkerrecht*, 4th. ed., München, 2009.

R. Geissler, *Kommunalrechtliche Steuerungsansätze der Haushaltskonsolidierung,* KWI- Gutachten n. 4, Potsdam, 2009.

A. Gentilini, *Regions and Local Authorities*, in: S. Mangiameli, *Italian Regionalism: Between Unitary Traditions and Federal Processes*, 2014, 221 and ff.

C. F. Gerber, *Über den Begriff der Autonomie*, in: Archiv für civilistische Praxis, XXXVII, 1854.

A. Gern, *Deutsches Kommunalrecht*, Baden-Baden, 2nd ed. 1997.

A. Gern, *Zur Zulässigkeit von kommunalen Beiräten, Unterausschüssen, Kommissionen und Komitee,* VBlBW 1993, 127 and ff.

E. Gianfrancesco, *L'incidenza della riforma del titolo V sul giudizio costituzionale*, in: E. Bettinelli and F. Riganò (eds.), *La riforma del titolo V della Costituzione e la giurisprudenza costituzionale"*, Quaderni del gruppo di Pisa, Torino, 2004, 51 and ff.

M.S. Giannini, *Corso di diritto amministrativo*, Milano, 1965.

M.S. Giannini, *Autonomia (voce)*, in: Enciclopedia del Diritto, Vol. IV, Milano, 1959.

O. von Gierke, *Rechtsgeschichte der deutschen Genossenschaft*, Berlin, 1868.

O. von Gierke, *Giovanni Althusius e lo sviluppo storico delle teorie politiche giusnaturalistiche*, Torino, 1974, (1880).

T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law*, Cheltenham, 2011.

V. Gioberti, *Del primato morale e civile degli italiani*, Bruxelles, 1843.

L. Giovenco and A. Romano, *L'ordinamento comunale*, 10th ed., Milano, 1987.

T.F. Giupponi, *Il voto agli stranieri extracomunitari: si, no, forse*, in: Quaderni Costituzionali, 2004.

T.F. Giupponi, *Corte Costituzionale, obblighi internazionali e "controlimiti allargati": che tutto cambi perché tutto rimanga uguale?*, in www.forumcostituzionale.it, 2005.

T.F. Giupponi, *Verso un diritto europeo degli enti locali?*, in www.forumcostituzionale.it, 2005

T.F. Giupponi, *Stranieri extracomunitari e diritti politici. Problemi costituzionali dell'estensione del diritto di voto in ambito locale,* in www.forumcostituzionale.it, 2007.

R. von Gneist, *Die heutige englische Communalverfassung und Communalverwaltung oder das System des Selfgovernment,* Berlin, 1871.

J. L. Goldsmith and E. A. Posner, *The Limits of International Law,* Oxford, 2005.

O. Goennenwein, *Gemeinderecht*, Tübingen, 1963.

M. Gorlani, *I poteri di normazione degli enti locali,* in: E. Gianfrancesco and P. Cavaleri (eds.), *Lineamenti di diritto costituzionale della Regione Veneto*, Torino, 2013, 308 and ff.

F. P. Grad and R. F. Williams, *State Constitutions for the Twenty-First Century. Drafting State Constitutions, Revisions and Amendments,* New York, 2006.

R. Granderath, *Praxis des Bundesverfassungsgerichts*, DÖV 1973, 332 and ff.

I. Grassi, *Il ruolo europeo delle autonomie locali. La Carta europea delle autonomie locali e la Comunità europea dopo il Trattato di Maastricht*, N. l. civ. Comm, 1992, 1178 and ff.

A. Gratteri, *La faticosa emersione del principio di leale collaborazione nel quadro costituzionale*, in: E. Bettinelli and F. Rigano (eds.), *La riforma del Titolo V della Costituzione e la giurisprudenza costituzionale. Atti del seminario di Pavia - 6-7 giugno 2003*, Torino.

R. Grawert, *Kommunale Finanzhoheit und Steuerhoheit*, in: A. von Mutius (ed.), *Selbstverwaltung im Staat der Industriegesellschaft, FS von Unruh*, Heidelberg, 1983, 537 and ff.

E. Greve, *Local Government in Denmark*, in A-M. Moreno (ed.), *Local Government in the member States of the European Union: Comparative Legal Perspective*, Madrid, 2012, 135 and ff.

T. Groppi, *Autonomia costituzionale e potestà regolamentare degli enti locali*, Milano, 1994.

T. Groppi, *La garanzia dell'autonomia costituzionale degli enti locali: un'analisi comparata*, in Le Regioni n. 5/1998, 1023 and ff.

E. Grosso, *Possono gli organi di governo delle province essere designati mediante elezioni "di secondo grado", a Costituzione vigente?*, in www.astrid-online.it, n. 19/2013.

A. Groth, *Die kommunale Verfassungsbeschwerde zum Schleswig-Holsteinischen Landesverfassungsgericht*, NordÖR, 12/2008, 513 and ff.

G. Grottanelli Dè Santi, *Enti territoriali minori e conflitto tra i poteri dello Stato*, in Giurisprudenza costituzionale, 1970, 1168 and ff.

L. Guillod, *Le principe de subsidiaritè en droit communautaire and en droit constitutionnel,* Petites Affiches, 19 avril 2007 n° 79.

A. T. Guzman and T. L. Meyer, *International Soft Law,* Journal of Legal Analysis, Vol. 2, No.1, Spring 2010, 171 and ff.

P. Häberle, *Das Prinzip der Subsidiarität aus der Sicht der vergleichenden Verfassungslehre,* AöR 119 (1994), 169 and ff.

P. Häberle, *Die Wesensgehaltsgarantie des Art. 19 II – zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt*, 3rd ed., Heidelberg, 1983.

P. Häberle, *Kommunale Selbstverwaltung unter dem Stern des Gemeineuropäischen Verfassungsrechts*, JöR n.F. 58, 2010, 301 and ff.

P. Häberle, *Europäische Verfassungslehre*, Baden-Baden, 7th ed., 2011.

U. Häfelin/G. Müller/F. Uhlmann, *Allgemeines Verwaltungsrecht*, 6th ed., Zürich/St. Gallen, 2010.

H. Heberlein, *Die Europäische Charta der kommunalen Selbstverwaltung*, in: J. Ipsen (ed.), *IX Bad*

Iburger Gespräche, Gemeinden und Kreise in einem vereinten Europa, Osnabrück, 1999.

H. Heberlein, *Die Kommunale Selbstverwaltung im Vertrag von Lissabon – ein Mehrwert für die Kommunen,* BayVBl, No. 7/2014.

C. Hauschild, *DDR: Vom sozialistischen Einheitsstaat in die föderale und kommunale Demokratie*, in: In: B. Blanke (ed.), *Staat und Stadt. Sonderband PVS*, Opladen, 1991b, 213 and ff.

F. Hauriou, *Etude sur la decentralisation*, in: Extrait du Réportoire du Droit Administratif, Paris, 1892.

A. Haverkamp, *Der Konstanzer Frieden zwischen dem Kaiser und Lombardenbund,* in: H. Maurer (ed.), *Kommunale Bündnisse Oberitaliens und Oberdeutschlands im Vergleich*, Sigmaringen, 1987, 11 and ff.

H. Heberlein, *Grenznachbarschaftliche Zusammenarbeit auf kommunaler Basis*, DÖV, 1996, 100 and ff.

H. Heberlein, *Kommunale Europapolitik*, BayVBl, 1992, 417 and ff.

H. Heberlein, *Kommunale Außenpolitik als Rechtsproblem*, Köln, 1989.

H. Heffter, *Die deutsche Selbstverwaltung im 19. Jahrhundert – Geschichte der Ideen und Institutionen,* 2nd ed., Stuttgart, 1969.

H. Heinelt and X. Bertrana (ed.), *The Second Tier of Local Government in Europe*, New York, 2011.

F. W. Held, *Das Verhältnis von Staat und Kommunen am Beispiel der Kommunalaufsicht*, in: J. Ipsen, *Staat und Kommunen – Kooperation oder Konflikt?,* 1998.

J. Hellermann, *Örtliche Daseinsvorsorge und gemeindliche Selbstverwaltung,* Tübingen, 2000.

R. Hendler, *Selbstverwaltung als Ordnungsprinzip,* Berlin-Bonn, 1984.

H-G. Henneke, *Landesfinanzpolitik und Verfassungsrecht,* Heidelberg, 1998.

H-G. Henneke, *Aufgabenzuständigkeit im kreisangehörigen Raum,* Heidelberg, 1992.

H-G. Henneke, *Die Kommunen in der Föderalismusreform*, DVBl, 2006, 867 and ff.

G. Henneke, *ThürVErfGH schreibt Lehrbuch der Kommunalfinanzausgleichsgesetzgebung*, ZG 2006, 73 and ff.

H-G. Henneke, *Grundstrukturen des kommunalen Finanzausgleichs*, in: H-G. Henneke, H. Punder, C. Waldhoff (eds.), *Recht der Kommunalfinanzen*, München, 2006, 449 and ff.

H-G. Henneke and. K. Ritgen: *Aktivierung bürgerschaftlicher Selbst-Verwaltung in Städten, Kreisen und Gemeinden - zur Bedeutung der Lehren des Freiherrn vom Stein für die kommunale Selbstverwaltung der Gegenwart,* DVBl 2007, 1253 and ff.

H-G. Henneke ad K. Ritgen, *Stärkung der Bürgerbeteiligung durch Seniorenbeiräte und niedrige Quoren bei Bürgerbegehren und Bürgerentscheid?,* LKRZ 10/2008, 361 and ff.

H-G. Henneke, *Die Kommunen in der Finanzverfassung des Bundes und der Länder,* 4th. ed., Wiesbaden, 2008.

H-G.Henneke, *Begrenzt die finanzielle Leistungsfähigkeit des Landes den Anspruch auf eine aufgabenangemessene Finanzausstattung?*, DÖV, 2008, 857 and ff.

H-G. Henneke, *Funktionen und Aufgaben der kommunalen Spitzenverbände im europäisierten Bundestaat,* in: T. Mann e G. Püttner (eds.), *cit*., HKWP, Vol.1, 2007.

H-G. Henneke, *Landesfinanzpolitik und Verfassungsrecht,* Heidelberg, 1998.

A. Herbert, *Beratung in der Gemeinde*, NVwZ 1995, 1056 and ff.

R. Herzog, *Subsidiaritätsprinzip und Staatsverfassung*, Der Staat, 1963, 399 and ff.

R. Hertzog, *Le difficile établissement d'une démocratie locale en Europe de l'Est: Quelques problèmes d'application de la Charte européenne de l'Autonomie Locale*, in : Libertés, Justice, Tolérance: Mélanges en Hommage au Doyen Gérard Cohen-Jonathan (Vol. II), Bruxelles, 2004.

K. H. Hettlage, *Die Gemeinden in der Finanzverfassung*, AfK, 1964, 1 and ff.

W. Heun, *Art 104 lett. a),* in: H. Dreier (ed.), *GG-Kommentar,* Vol. 3, 2000.

B. Hien, *Die gerichtliche Interpretation der kommunalen Selbstverwaltung*, BayVBl, 1993, 33 and ff.

D. Hill, *Democratic Theory and Local Government,* London, 1974.

P. Hillard, *Das Ende der Schweiz?*,Schweizer Zeit, No. 10-2004 available at: www.schweizerzeit.ch

C. Himsworth, *Treaty-Making for Standards of Local Government: The European Charter of Local Self-Government and its possible application beyond Europe*, Working Paper Series, University of Edinburgh, 2011.

C. Himsworth, *Local Government in the United Kingdom*, in: A. M. Moreno (ed.), *Local Government in the member States of the European Union: A Comparative Legal Perspective*, Madrid, 2012, 663 and ff.

C. Hirsch, *Kulturhoheit und Auswärtige Gewalt*, Berlin, 1968.

J. Hofmann, *Verankerung der Grundvoraussetzung kommunaler und regionaler Selbstverwaltung in einer Europäischen Verfassung*, in: F.L. Knemeyer (ed.), *Die Europäische Charta der kommunalen Selbstverwaltung,* Baden-Baden, 1989, 211 and ff.

W. Hofmann, *Die Entwicklung der kommunalen Selbstverwaltung 1848-1918*, in: G. Püttner (ed.), *Handbuch der kommunalen Wissenschaft und Praxis,* Vol. 1, Berlin, 1981, 71 and ff.

F. Hoffmeister, *Die Europäische Menschenrechtskonvention als Grundrechtsverfassung und ihre Bedeutung in Deutschland,* 40 Der Staat, 2001, 349 and ff.

D.B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford, 2012.

D.B. Hollis, *Why State Consent Still Matters: Non-State Actors, Treaties and the Changing Sources of International Law*, 23 Berkeley Journal of International Law 137 (2005)

W. Hoppe and H.W. Rengeling, *Rechtsschutz bei der kommunalen Gebietsreform*, Frankfurt am Main, 1973.

W. Hoppe and R. Menke, *Raumplanungs- und Landesplanungsrecht des Bundes und des Landes Rheinland-Pfalzes,* Köln, 1986.

G. Hornmann, *§§ 203 I and II BauGB,* in: W. Spannowksy and M. Uechtritz (eds.), *Online-Kommentar – Baugesetzbuch,* 14th ed., München, 2011.

F. Hufen, *Die Zukunft der kommunalen Selbstverwaltung,* in: M.E. Geis and D. Lorenz (eds.), *FS Maurer,* 2001, 1177 and ff.

P-P. Humpert, *Genehmigungsvorbehalte im Kommunalverfassungsrecht*, Köln, 1990.

C. Hyltoft, *Die Arbeit des Europaratsauschusses für lokale Strukturen*, in: F.L. Knemeyer, *Die Europäische Charta der kommunalen Selbstverwaltung*, Baden-Baden, 1989, 49 and ff.

M. Iannella, *I rapporti tra lo Stato e le autonomie nella procedura di dissesto alla luce delle sentenza della Corte EDU Pennino e De Luca*, DPCE 2014 – III, 1112 and ff.

J. Ipsen, *Niedersächsisches Kommunalrecht*, 4th ed., Stuttgart, 2011.

J. Ipsen, *Schutzbereich der Selbstverwaltungsgarantie und Einwirkungsmöglichkeiten des Gesetzgebers*, in ZG (1994), 194 and ff.

J. Ipsen, *Die Kompetenzverteilung zwischen Bund und Ländern nach der Föderalismusnovelle,* NJW, 2006, 2801 and ff.

S.P. Isaza Querini, *Tendenze della cooperazione territoriale in Europa e in Italia alla luce del terzo Protocollo addizionale alla Convenzione di Madrid e del Regolamento UE n. 1302/2013*, in: www.federalismi.it n. 18/2014.

J. Isensee, *Subsidiaritätsprinzip und Verfassungsrecht*, Berlin, 1968.

P . Ivaldi, *L'adattamento del diritto interno al diritto internazionale*, in: S.M. Carbone, R. Luzzatto, A. Santa Maria (eds.), *Istituzioni di Diritto Internazionale*, Torino, 2006, 126 and ff.

R. Kägi-Diener, *Art. 50*, in: B. Ehrenzeller, P. Mastronardi, R. J. Schweizer, K. A. Vallender (eds.), *Die schweizerische Bundesverfassung*: *Kommentar*, 2008.

W. Kahl, *Die Staatsaufsicht. Entstehung, Wandel und Neubestimmung unter besonderer Berücksichtigung der Aufsicht über die Gemeinden*, Tübingen, 2000.

M. Kallerhoff, *Art. 125a I 1 GG im Zusammenspiel mit dem kommunalen Durchgriffsverbot der Art. 84 I 7, Art. 85 I 2 GG,* DVBl, 2011, 6 and ff.

J. Kaltenborn, *Der Schutz der kommunalen Selbstverwaltung im Recht der Europäischen Union*, 1996, 48 and ff.

H.H. Kasten, *Ausschussorganisation und Auschussrückruf,* Berlin, 1983.

A. Katz, *Der kommunale Finanzausgleich*, in: G. Püttner (ed), HKWP, Vol. 6, Berlin, 1981, 563 and ff.

H. Kelsen, G. Fröhlich, A. Merkl, *Die Bundesverfassung vom 1. Oktober 1920*, Wien, 1922.

I. Kesper, *Reform des Föderalismus in der Bundesrepublik Deutschland* NdSVbl 2006, 145 and ff.

H. Kessler, *Der Bund und die Kommunalpolitik,* DVBl 1953, 1 and ff.

K. Kettwig, *Rechtsgrundlagen dezentraler grenzüberschreitender Zusammenarbeit im deutsch-polnischen und deutsch-tschechischen Grenzraum*, Frankfurt am Main, 1994.

A. Kiefer, *Human Rights: Local and Regional Authorities in Action,* in: W. Benedek et al. (ed.), European Yearbook on Human Rights, 2011.

J. Kim, *General Grants vs. Earmarked Grants: Does Practice Meet Theory?*, Korea Institute of Public Finance – Working Papers, 2009.

J. Kincaid, *Comparative Observations*, in: J. Kincaid and G.A. Tarr (eds), *Constitutional Origins, Structure and Change in Federal Countries – A Global Dialogue on Federalism,* Vol. 1, Baskerville, 2005.

F. Kirchhof, *Das Finanzsystem der Landkreise*, DVBl, 1995, 1057 and ff.

F. Kirchhof, *Kommunaler Finanzausgleich im Flächenbundesstaat*, Köln, 1996.

P. Kirchhof, *Die Kommunale Finanzhoheit*, in: G. Püttner (ed.), HKWP, Vol. 6, 1981, 3 and ff.

P. Kirchhof, *Der Finanzausgleich als Grundlage kommunaler Selbstverwaltung,* DVBl, 1980, 711 and ff.

J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law*, Oxford, 2009

B. Klein, *Kommunale Kooperationen zwischen Innerstaatlichem Organisationsakt und Markt,* Osnabrück, 2012.

E. Klein, *Der Schutz der Grund- und Menschenrechte durch den EGMR*, in, D. Merten / H.J. Papier (eds.), *Handbuch der Grundrechte in Deutschland und in Europa,* Vol. 6, 2010, 593 and ff.

E. Klein, in: J. Ipsen/E. Schmidt-Jortzig (eds.), in: *FS Rauschnig*, Köln, 2001, 301 and ff.

H.H. Klein, *Demokratie und Selbstverwaltung*, in: *FS Forsthoff,* München, 1972, 165 and ff.

H. Klüber, *Das Gemeinderecht in den Ländern der Bundesrepublik Deutschland*, Berlin-Heidelberg, 1972.

W. Kluth, *Das kommunale Konnexitatsprinzip der Landesverfassungen*, LKV 8 (2009), 338 and ff.

F.L. Knemeyer, *Die Europäische Charta der kommunalen Selbstverwaltung*, Baden-Baden, 1989.

F.L. Knemeyer, *Die Europäische Charta der kommunalen Selbstverwaltung*, DÖV, 1988, 997 and ff.

F. L. Knemeyer, *Kommunale Selbstverwaltung in Europa – die Schutzfunktion des Europarates,* BayVbl, 2000, 449 and ff.

F. L. Knemeyer and M. Wehr, *Die Garantie der kommunalen Selbstverwaltung nach Art. 28 Abs. in der Rechtsprechung des Bundesverfassungsgerichts*, VerwArch 92 (2001), 317 and ff.

F.L. Knemeyer, *Rechtsaufsicht als Vertrauensaufsicht*, BayVbl 1999, 193 and ff.

F.L. Knemeyer, *Finanzausstattung der Städte*, Der Städtetag, 1988, 330 and ff.

D. Kochenov, *Free Movement and Participation in the Parliamentary Elections in the member States of Nationality: an Ignored Link?*, in: Maastricht Journal of European and Comparative Law, 2009.

H-J. Konrad, *Verfassungsrechtliche Probleme von Städtepartnerschaften,* in: A. Dittmann/M. Kilian (eds.): *Kompetenzprobleme der Auswärtigen Gewalt,* Tübingen*,* 1982, 138 and ff.

A. Koreng, *Rechtsaufsichtliche Maßahmen gegen internationalen Städtepartnerschaften,* SächsVBl 2008, 157 and ff.

M. Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, (43) International and Comparative Law Quarterly, 1994, 241 and ff.

D. Kostakopoulou, *The Future Governance of Citizenship,* Oxford, 2008.

H. Köstering, *Das Verhältnis zwischen Gemeinde- und Kreisaufgaben einschließlich der Funktionalreform*, in: G. Püttner (ed.), HKWP, Vol.3, 1981.

A. Köttgen, *Wesen und Rechtsform der Gemeinden und Gemeindeverbände*, in: G. Puttner, HKWP, 1st ed., Vol. 1, Berlin, 1981, 215 and ff.

E. Kotzmann and B. Binder, *Zweiter Länderbericht Österreich*, in: F.L. Knemeyer (ed.), *Die Europäische Charta der kommunalen Selbstverwaltung*, 1989, 63 and ff.

M. Kotzur, *Föderalisierung, Regionalisierung und Kommunalisierung als Strukturprinzipien des europäischen Verfassungsraumes,* in: P. Häberle (ed.), *Jahrbuch des Öffentlichen Rechts der Gegenwart*, 2002, 257 and ff.

M. Kotzur, *Grenznachbarschaftliche Zusammenarbeit in Europa Der Beitrag von Art. 24 Abs. 1 a GG zu einer Lehre vom kooperativen Verfassungs- und Verwaltungsstaat*, Berlin, 2004.

S. Kraft-Zörcher and R. Neubauer, *Die Kommunale Arbeitsgemeinschaft – eine Chance kommunale Selbstverwaltung zu sichern*, LKV, 2010, 193 and ff.

S. Kuhlmann and H. Wollmann, *Introduction to Comparative Public Administration. Administrative Systems in Europe and Reforms,* Cheltenham/Northampton, 2014.

P. Kunig, *Das Rechtsstaatsprinzip: Überlegungen zu seiner Bedeutung fuer das Verfassungsrecht der Bundesrepublik Deutschland*, Tübingen, 1986.

C. Jäger, *Und wer zahlt den Belastungsausgleich bei Aufgabenübertragungen durch Bundes-, Europa- und Völkerrecht?,* NWBl 2013, 121 and ff.

C. Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards,* Tübingen, 2012.

D. Jesch, *Gesetz und Verwaltung — Rechtsstellung und Rechtsschutz der Gemeinden bei der Wahrnehmung „staatlicher" Aufgaben,* DÖV, 1960, 739 and ff.

P. Jones, *The Italian City-State: From Commune to Signoria,* Oxford, 1997.

A. De Laubadere/ J.C. Venezia/ Y. Gaudemet, *Traité de droit administratif*, Vol. 1, 10th. ed., Paris, 1994, 108.

J. Lämmle, *Die Beteiligung der Gemeinden an der Gesetzgebung*, DÖV, 1988, 916 and ff.

S. R. Laskowski, *Das Menschenrecht auf Wasser,* Tübingen, 2010.

P. Leach, *Taking a Case to the European Court of Human Rights,* 3rd ed., Oxford, 2011.

V. A. Leary, *Lessons from the Experience of the International Labour Organisation*, in P. Alston (ed.), *The United Nations and Human Rights. A Critical Appraisal*, Oxford, 1992, 619 and ff.

G. Leibholz, *Das Prinzip der Selbstverwaltung und der Art. 28 Abs. 2 GG*, in DVBl, 1973, 715 and ff.

P.S. Leicht, *Storia del Diritto Italiano – Il Diritto Pubblico*, Milano, 1972.

A. Leidinger, *Das Kreisfinanzsystem*, in: G. Püttner (ed.), *cit.*, Vol. 6, 2nd ed.., Berlin, 1985, 331 and ff.

W. Leitermann, *EKC in Kraft,* in Der Städtetag 10/1988, 679.

W. Leitermann, *Magna Charta der kommunalen Grundrechte*, Europa Kommunal, 1998.

U. Leonardy, *Treating-Making Powers and Foreign Relations of Federated States*, in: B. Coppieters, D. Darchiashvili and N. Akaba (eds.), *Federal Practice - Exploring Alternatives for Georgia and Abkhazia*, Brussels (VUB University Press) 2000.

W. Lerche, *Die Gemeinden im Staat und Gesellschaft,* Köln-Berlin, 1965

G. Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in: G. Follesdal, A. Ulfstein and B. Peters (eds.) *Constituting Europe: the European Court of Human Rights in a National, European and Global Context,*Cambridge, 2013, 106 and ff.

N. Levrat, *L'Europe et ses collectivites territoriales:réflexions sur l'organisation et l'exercice du pouvoir territorial dans un monde globalisé*, Bruxelles, 2005.

N. Levrat, *The European Grouping of Territorial Cooperation*, Study carried out for the Committee of the Regions, in: www.cor.europa.eu, CoR No. 117 (2007).

S. Lipott, *Twin cities: cooperation beyond walls. The case of cross- border cooperation between Italy and Slovenia,* COST Action Working Paper, 2013.

W. Litzenburger, *Die kommunale Verfassungsbeschwerde in Bund und Ländern,* Kiel, 1985.

A. Longo, *L'evoluzione dei concetti di libertà individuale e autonomia comunale durante il secolo XIX*, in: Archivio giuridico "Filippo Serafini" 73, 1904.

S. Lorenzmaier, *Grenzen kommunaler Selbstverwaltung und völkerrechtskonforme Auslegung*, BayVBl 2011, 485 and ff.

W. Loschelder, *Die Kommunalverfassung in ihrer Bewährung*, DÖV, 1969, 801 and ff.

W. Loschelder, *Kommunale Selbstverwaltungsgarantie und gemeindliche Gebietsgestaltung*, Berlin, 1976.

W. Löwer, *Rechtsverhältnisse in der Leistungsverwaltung,* NVwZ, 1986, 793 and ff.

A. Lucarelli, *La sentenza n. 50/2015 della Corte Costituzionale. Considerazioni in merito all'istituzione delle città metropolitane*, in: www.federalismi.it n. 8/2015.

F. Luchaire, *Reflexions sur la subsidiarité* in: *L'Europe en formation: Hommage à Alexandre Marc*, nn. 319-320 2000-2001, 201 and ff.

N. Lupo, *Le ragioni costituzionali che suggeriscono di integrare quanto prima la composizione della Commissione parlamentare per le questioni regionali*, in: www.federalismi.it n. 3/2007.

U. Lusche, *Die Selbstverwaltungsaufgaben der Landkreise*, Stuttgart, 1998.

J. Luther, *Costituzionalismo e regionalismo europeo*, in: Le Regioni n. 6/2007, 933 and ff.

J. Luther, *Alla ricerca di un concetto giuridico europeo di autonomia,* in: A.A., Scritti in onore di Antonio d'Atena, Milano, 2014, 1733 and ff.

J. Luther, *Le Province in trasformazione: resilienza o miserere?*, in www.federalismi.it, May 2015.

J. Luther, *La vastità delle aree e quella dei problemi della loro sistemazione*, in: www.polis.unipmn.it OPAL n. 4 – May 2014.

S. Luther, *Die Lastenverteilung zwischen Bund und Ländern nach der Finanzreform,* Münster, 1974.

L. Maccarrone, *Profili di riforma e controriforma nell'attuale assetto delle funzioni amministrative locali*, Torino, 2013.

G. Macht and A. Scharrer, *Landesverfassungsrechtliche Konnexitätsprinzipien und Föderalismusreform*, DVBl, 2008, 1150 and ff.

P. Macklem, *Militant Democracy, Legal Pluralism and the Paradox of Self-Determination*, International Journal of Constitutional Law, 4 (3), 2006, 488 and ff.

S. Magen, *Kommunalverfassungsveschwerde - § 91*, in: D.C. Umbach and T. Clemens and F.W. Dollinger (eds.), *Bundesverfassungsgerichtsgesetz – Mitarbeiterkommentar,* 2nd ed., 2005.

O. Maier, *Die Ergänzung der Europäischen Kommunalcharta durch eine 'Europäische Charta der kommunalen und regionalen Finanzen'* in: F.L. Knemeyer (ed.), *Die Europäische Charta der kommunalen Selbstverwaltung. Entstehung und Bedeutung. Länderberichte und Analysen,* Baden-Baden, 1989, 195 and ff.

C. Mainardis, *Le fonti degli enti locali tra dottrina e giurisprudenza,* in www.forumcostituzionale.it, 2010.

C. Mainardis, *Chiamata in sussidiarietà e strumenti di raccordo nei rapporti Stato-Regioni,* in: Le Regioni 2/3-2011, 455 and ff.

A. Maiwald, *Art. 125 lett. a)*, in: B. Schmidt-Bleibtreu/H. Hofmann/A. Hopfauf (eds.) *GG-Kommentar*, 2011.

J. Makswit, *Finanzierung weisungsgebundener Aufgaben,* DVBl, 1984, 1044 and ff.

J. Makswit, *Finanzierung kommunaler Fremdverwaltung,* Frankfurt am Main, 1984.

J. Malenovsky, *Suivi des engagements des Etats membres du Conseil de l'Europe par son Assemblee Parlamentaire. Une course difficile entre droit et politique*, in: Annuaire français de droit international, 43 (1997), 637 and ff.

L. Malo, *Autonomie Locale et Union Européenne*, Bruxelles, 2010.

M. Mancini, *I regolamenti degli enti locali tra riserva di competenza e "preferenza" in un multilevel system of government*, in: Le Regioni n. 1/2008, 155 and ff.

S. Mangiameli, *Riflessioni sul principio cooperativo prima della riforma delle Conferenze*, in: Le Istituzioni del Federalismo, 2007, 26 and ff.

S. Mangiameli, *Brevi note sulle garanzie delle autonomie locali e sui limiti alla potestà legislativa statale*, in www.astrid-online.it, n. 19/2013.

L. Mannori, *Autonomia: fortuna di un lemma nel vocabolario delle libertà locali tra Francia e Italia*, in: Quaderni Fiorentini XLIII (2014), 65 and ff.

G. Marchetti, *Italian Regions and Local Authorities within the framework of a new Autonomist System,* in: Perspectives on Federalism, Vol. 2 Issue 1, 2010.

G. Marcou, *L'autonomie des collectivites locales en Europe: fondements, formes et limites,* in: Caisse des Depôts et Consignations, *Quel avenir pour l'autonomie des collectivites territoriales?*, 1999, 31 and ff.

I.M. Marino, *Aspetti della recente evoluzione del diritto degli enti locali*, Palermo, 2007.

S. Martinengo, *Il federalismo fiscale municipale e il difficile processo di autonomia degli enti locali*, in: Studium Iuris, (5) 2013, 550 and ff.

A. Martini and W. Müller, *Der Schutz der kommunalen Selbstverwaltung in der europäischen Integration durch nationales Verfassungsrecht und gemeinschaftsrechtliche allgemeine Rechtsgrundsätze*, BayVbl 1993, 161 and ff.

J. Martinez Soria, *Kommunale Selbstverwaltung im europäischen Vergleich* in: T. Mann and G. Püttner (eds.), HdbKWP, Vol. 1, 2007, 1013 and ff.

L. Mascali, *Il Gruppo Europeo di Cooperazione Territoriale nel Regolamento 1082/2006*, Firenze, 2010.

M. Massa, *L'esercizio associato delle funzioni e dei servizi comunali. Profili costituzionali*, in: Amministrare, Anno XLIII, n. 2 Agosto 2013.

M. Massa, *Come non si devono riformare le Province*, in www.forumcostituzionale.it, 2013.

H-F. Mattenklodt, *Territoriale Gliederung - Gemeinden und Kreise vor und nach der Gebietsreform*, in: G. Püttner (ed.), *Handbuch der kommunalen Wissenschaft und Praxis*, Vol. 1, Berlin, 1981, 154 and ff.

T. Maunz, *Art. 59*, in: T. Maunz and G. Dürig (eds.), *GG-Kommentar,* München,Vol 3, 1988.

H. Maurer, *Kommunalrecht*, in: H. Maurer and R. Hendler (eds.), *Baden-Württembergisches Staats- und Verwaltungsrecht*, Frankfurt am Main, 1990, 1 and ff.

H. Maurer, *Verfassungsrechtliche Grundlagen der kommunalen Selbstverwaltung*, DVBl 1995, 1037 and ff.

E. Mayer*, Italienische Verfassungsgeschichte von der Gotenzeit bis zur Zunftherrschaft,* Leipzig, 1909.

E.G. Mayer, *Auslandsbeziehungen deutscher Gemeinden,* Bonn, 1986.

F. Mayer, *Allgemeines Verwaltungsrecht*, 4th. ed., Stuttgart, 1977.

V. Mehde, *Art. 28,* in: T. Maunz and G. Dürig (eds.), *GG-Kommentar,* 2013

C. Meis, *Verfassungsrechtliche Beziehungen zwischen Bund und Gemeinden*, Baden-Baden, 1989.

J. Meligrana, *Redrawing Local Government Boundaries: An International Study of Politics, Procedures and Decisions*, UBC Press, Vancouver, 2004.

G. Meloni, *Organismi comunali ed ente intermedio*, in: R. Balduzzi (ed.), *Annuario DRASD 2011*, Milano, 2011, 27 and ff.

U. Mentz, *Der steinige Weg zu mehr kommunalen Selbstverwaltung in Europa*, in: A. Gasser, *Gemeindefreiheit als Rettung Europas*, Baden-Baden, 1983, 10 and ff.

Y. Meny, *Introduction*, in Y. Meny and B. De Witte (eds), *Dix ans de regionalisation en Europe. Bilan et perspectives 1970-1980*, Paris, 1982, 5 and ff.

F. Merloni, *Il destino dell'ordinamento degli enti locali (e del relativo Testo unico) nel nuovo Titolo V della Costituzione*, in: Le Regioni, n.2/3 2002, 409 and ff.

F. Merloni, *Il rapporto tra Regione ed enti locali nel nuovo Statuto della Regione Emilia-Romagna*, in Le Istituzioni del Federalismo n. 1/2005, 95 and ff.

F. Merloni, *Prospects for strengthening the role of the European Charter of Local Self-Government,* in: CoE, *The European Charter of Local Self-Government – 20th anniversary*, Strasbourg, 2005.

F. Merloni, *Riflessioni sull'autonomia normativa degli enti locali*, in: Le Regioni n. 1/2008, 91 and ff.

F. Merloni, *La tutela internazionale dell'autonomia degli enti territoriali. La Carta europea dell'autonomia locale del Consiglio d'Europa*, in Scritti in onore di Giuseppe Palma, Torino, 2012.

F. Merloni, *Il ruolo della Regione nella costruzione di una nuova amministrazione territoriale,* in: S. Mangiameli (ed.), *Il regionalismo italiano dall'unità alla Costituente alla sua riforma*, Milano, 2012.

F. Merloni, *Sul destino delle funzioni di area vasta nella prospettiva di una riforma costituzionale del Titolo V,* in: Le Istituzioni del Federalismo n. 2/2014, 215 and ff.

K. Meßerschmidt, *Der Grundsatz der Bundestreue und die Gemeinden. Untersucht am Beispiel der "kommunalen Außenpolitik"*, DV (23) 1990, 425 and ff.

A. Meßmann, *Das Aufgabenübertragungsverbot aus Art. 84 Abs. 1 Satz 7 GG: Hindernis für die Erweiterung bereits übertragener Aufgaben und die Übertragung von Angelegenheiten der örtlichen Gemeinschaft?* DÖV 2010, 726 and ff.

H. Meyer, *Die Finanzverfassung der Gemeinden*, 1969.

H. Meyer, *Die Kommunale Neugliederung als verfassungsrechtliches Problem*, DÖV, 1971, 801 and ff.

H. Meyer, *Kommunalverfassungsrecht in den norddeutschen Flächenländern – Annährung oder Diversifizierung?*, NordÖR 2012, 475 and ff.

R. Miele, *La Regione*, in: P. Calamandrei/C. Levi, *Commentario sistematico alla Costituzione italiana*, II, Firenze, 1950.

P. Milazzo, *Commento all'art. 141. Scioglimento e sospensione dei consigli comunali e provinciali,* in: C. Napoli and N. Pignatelli (ed.), *Codice degli enti locali,* Roma, 2012, 1447 and ff.

J. S. Mill, *Considerations on Representative Government* - Chapter XV, 1865.

T. Modeen, *Länderbericht Nordische Staaten,* in: F.L. Knemeyer (ed.), *Die Europäische Charta der kommunalen Selbstverwaltung*, Baden-Baden, 1989.

P. Molsberger, *Das Subsidiaritätsprinzip im Prozess europäischer Konstitutionalisierung*, Berlin, 2009.

P. Mombaur, *Zum Selbstverwaltungsrecht kreisangehoeriger Staedte und Gemeinden*, in: StuGB, 1980, 297 and ff.

M. Morelli, *La democrazia partecipativa nella governance dell'Unione europea*, Milano, 2011.

A. M. Moreno, *Local Government in the Member States of the European Union: a Comparative Legal Perspective*, INAP, 2012.

C. Mortati, *Istituzioni di diritto pubblico*, Vol. 1, Padova, 1969.

S. Mückl, *Finanzverfassungsrechtlicher Schutz der kommunalen Selbstverwaltung*, Stuttgart, 1998.

J. Müller, *Die Beteiligung der Gemeinden an den Gemeinschaftsteuern: Bestand und Reform, Berlin,* 2010.

P.C. Müller-Graff, *Das Soft Law der Europäischen Organisationen: Einführung,* Baden-Baden, 2012.

R. Musgrave, *Theory of Fiscal Federalism*, in: Public Finance, 24 (4) (1969), 521 and ff.

M-B. Nagler, *Die Einwirkung sekundären EWG-Rechts auf die gemeindliche Selbstverwaltung nach Art. 28 II 1 des Grundgesetzes für die Bundesrepublik Deutschland,* 1992.

C. Napoli, *Le funzioni amministrative nel Titolo V della Costituzione*, Torino, 2011.

K.O. Nass, *Die Deutschen Kommunen in der Europäischen Union*, FS Faber, Tübingen, 2007, 57 and ff.

J. Nazarek, *Kommunale Selbstverwaltung und Europäische Integration*, Uni-Leipzig, Leipzig, 2001.

M. Nettesheim, *Art. 32*, in: T. Maunz and G. Dürig (eds.), *GG-Kommentar*, Loseblattsammlung, Stand: 69, 2007.

H. Neuhofer, *Territoriale Selbstverwaltung*, Wien, 1979.

M. Newton and L. May, *Proportionality in International Law*, Oxford, 2014.

D.M. Nicholas, *The Growth of the Medieval City: From Late Antiquity to the Early Fourteenth Century,* London, 1997.

V. Nicotra and F. Pizzetti, *Dalla fase transitoria alla fase a regime: un quadro di sintesi sulla finanza degli enti locali*, in: V. Nicotra, F. Pizzetti, S. Scozzese (eds.), *Il Federalismo Fiscale*, Roma, 2009.

M. Nierhaus, *Verfassungsrechtlicher Anspruch der Kommunen auf finanzielle Mindestausstattung*, LKV, 2005.

M. Nierhaus, *Art. 28*, in M. Sachs (ed.): *Grundgesetz Kommentar*, 2003.

M. Nierhaus, *Rechtsprechung mit Kurzkommentar zu VerfG Bbg, Urteil vom 19.5.1994 – 9/93*, EwiR 1994, 1.

M. Nigro, *Il governo locale*, Roma, 1980.

J. Noakes, *Die kommunale Selbstverwaltung im Dritten Reich*, in: A.M. Birke/M. Brechtken (eds.), *Kommunale Selbstverwaltung/Local Self-Government*, München, 1996, 65 and ff.

A. Nollkaemper, *National Courts and the International Rule of Law*, Oxford, 2011.

W.E. Oates, *Fiscal Federalism*, New York, 1972.

P. Oberndorfer, *Die Kommunalverfassung in Österreich*, in: G. Püttner (ed.), HKWP I, Vol. 5, Berlin, 1982, 533 and ff.

J. Oebbecke, *Zweckverbandsbildung und Selbstverwaltungsgarantie,* Köln, 1983.

J. Oebbecke, *Gemeindeverbandsrecht Nordrhein-Westfalen*, Köln, 1984.

J.Oebbecke, *Ausfallhaftung für zahlungsunfähige Kommunen?*, in: H-U. Erichsen (ed.), *Kommunale Verwaltung im Wandel, Symposium aus Anlass des 60jährigen Bestehens des Kommunalwissenschaftlichen Instituts der Westfälischen Wilhelms-Universität*, Köln, 1999, 165 and ff.

J. Oebbecke, *Kommunalaufsicht – nur Rechtsaufsicht oder mehr?*, DÖV, 2001, 406 and ff.

J. Oebbecke, *Selbstverwaltung angesichts von Europäisierung und Ökonomisierung*, VVDStRL (62) 2003, 366 and ff.

J. Oebbecke, *Nicht bürgerbegehrensfähige Angelegenheiten (Rechtsprechungsanalyse),* DV (37) 2004, 105 and ff.

J. Oebbecke, *Reaktionen des Rechts auf kommunale Finanzprobleme*, DVBl 22 (2013),1409 and ff.

G. Oehler, *Die Verwaltungsgemeinschaft als Alternative zur Einheitsgemeinde in den neuen Bundesländern,* LKV, 1992, 72 and ff.

M. Oehm, *Rechtsprobleme Staatsgrenzen überschreitender interkommunaler Zusammenarbeit,* Münster, 1982.

A. Oddenino and P. Silvestri, *Autonomie locali e istituzioni sovranazionali*, in: S. Sicardi (ed.), *Le autonomie territoriali e funzionali nella provincia di Cuneo in prospettiva trasfrontaliera (alla luce del principio di sussidiarietà)*, Napoli, 2011, 97 and ff.

L. Oliveri, *Province, per favore non chiamamoli tagli*, in www.leggioggi.it, 16 December 2014.

M. Olivetti, *Lo Stato policentrico delle autonomie*, in T. Groppi and M. Olivetti (eds.), *La Repubblica delle autonomie*. *Regioni ed enti locali nel nuovo Titolo V,* Torino, 2001, 85 and ff.

E. Olivito, *Crisi economico-finanziaria ed equilibri costituzionali. Qualche spunto a partire dalla lettera della BCE al Governo italiano*, in Rivista dell'Associazione Italiana Costituzionalisti n. 1/2014.

L. Oppenheim, *International Law: A Treatise,* in: H. Lauterpacht (ed.), 8th ed., London, 1955, 19.

M. Orlando, *L'attuazione in Piemonte della legge 56/2014: il riordino delle funzioni delle province,* in: Politiche Piemonte, n. 31/2014.

A. Orsi Battaglini, *Le autonomie locali nell'ordinamento regionale*, Milano, 1974.

F. Ossenbühl, *Satzung - § 66*, in: J. Isensee and P. Kirchhof (eds.), HbStR III, Heidelberg, 2004.

F. Ossenbühl, *Energierechtsform und kommunale Selbstverwaltung*, Köln, 1998.

Y. Ott, *Der Parlamentscharakter der Gemeindevertretung,* Baden-Baden, 1994.

A. Padrono, *La Carta europea dell'autonomia locale, un pilastro nella costruzione dell'Europa unita*, in: Quaderni regionali, 1989.

C. Padula, *L'autonomia: Un principio di scarso valore? La carta europea dell'autonomia locale e le recenti riforme degli enti locali,* in www.gruppodipisa.it, 2014.

H. Pagenkopf, *Kommunalrecht*, Vol. 1, 2nd ed., Berlin, 1975.

H. Pagenkopf, *Einführung in die Kommunalwissenschaft*, 1960.

L. Paladin, *Il territorio degli enti autonomi*, in: Riv. Trim. Dir. Pubbl., 1961, 607 and ff.

L. Paladin, *Problemi e prospettive di un possibile federalismo italiano*, in: Le Regioni, 1996, 609 and ff.

C. Panara, *The Contribution of Local Self-Government to Constitutionalism in the Member States and in the EU Multilayered System of Governance*, in: C. Panara and M. Varney (ed.), *Local Government in Europe*, London, 2013, 369 and ff.

A. Papaux and R. Samson, *Article 33 Convention of 1969*, in: O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of the Treaties*, Oxford, 2011, 866 and ff.

E. Pappermann, *Bundesrahmenkompetenz zur Vereinheitlichung des Kommunalrechts*, in: DVBl, 1972, 643 and ff.

E. Pappermann, *Der Status der Gemeinden und Kreise als Gebietskorperschaften,* in: G. Püttner (ed.), HKWP, vol. 1, Berlin, 1981.

E. Pappermann, *Staatliche Zweckzuweisungen – Ein Hemmnis für die Konsolidierung der kommunalen Haushalte*, DVBl, 1983, 521 and ff.

L. Parejo, *Implementation of the European Charter of Local Self-Government in the Spanish Legal System,* in: Conference on the European Charter of Local Self-Government: Barcelona, 23-25 January 1992, 51 and ff.

V. Parisio, *Carta europea delle Autonomie locali e principio di sussidiarietà*, in: F. A. Roversi Monaco (ed.), *Sussidiarietà e Pubbliche Amministrazioni*, Rimini, 1997.

V. Parisio, *Europa delle autonomie locali e principio di sussidiarietà*: *la Carta europea delle autonomie locali*, in *Il Foro Amministrativo*, 1995, 2128 and ff.

G. Pastori, *Unità nazionale, autonomie, federalismo*, in: Le Regioni, n. 1/1995, 71 and ff.

G. Pastori, *Provincia*, Digesto IV – Discipline pubblicistiche, XII, Torino, 1997, 201 and ff.

C. Pateman, *Participation and Democratic Theory,* Cambridge, 1970.

W. Patzig, *Die Lastenverteilung im Bereich der kommunalen Fremdverwaltung*, DÖV, 1985, 645 and ff.

M. Pedrazza Gorlero, *Le variazioni territoriali delle Regioni*, Padova, 1991.

S. Pellizzari, *Il principio di sussidiarietà orizzontale nella giurisprudenza del giudice amministrativo: problemi di giustiziabilità e prospettive di attuazione,* in Le Istituzioni del Federalismo, n. 3/2011, 593 and ff.

P. Perlingieri and R. Messinetti, *Art. 5*, in: *Commentario alla Costituzione,* Napoli, 2001.

I. Pernice, *Art. 59*, in: H. Dreier (ed.), *GG-Kommentar*, München, 2006.

P. Pernthaler, *Die verfassungsrechtlichen Schranken der Selbstverwaltung in Österreich*, Wien, 1967,

J. Petaux, *Democracy and Human Rights for Europe: The Council of Europe's Contribution,* Strasbourg, 2009.

H. Peters, *Lehrbuch der Verwaltung*, Berlin-Göttingen-Heidelberg, 1949.

A. Petracchi, L*e origini dell'ordinamento comunale e provinciale italiano*, Milano, 1962.

W. Petri, *Die staatlichen Finanzzuweisungen im kommunalen Finanzsystem,* Berlin, 1977.

S. Petzold, *Entstehungsgeschichte und wesentliche Erwägungen bei der Ausarbeitung des Entwurfs für eine vorläufige Kommunalverfassung in der DDR*, in: F-L. Knemeyer (ed.), *Aufbau der kommunalen Selbstverwaltung in der DDR*, Baden-Baden, 1990, 235 and ff.

B. Pezzini, *Il principio costituzionale dell'autonomia e le sue regole*, in www.gruppodipisa.it, 6-7 giugno 2014.

P.A. Pfizer, *Autonomie*, in: K. Von Rotteck and K. Welcker (eds.), *Staatslexikon*, Vol. 5, Leipzig, 1864, 476 and ff.

J-C. Pielow, *Autonomia Local in Spanien und Kommunale Selbstverwaltung in Deutschland*, München, 1993.

J-C. Pielow, *Grundstrukturen öffentlicher Versorgung,* Tübingen, 2001.

B. Pieroth, *Art. 84*, in: D. Jarass and B. Pieroth, *GG-Kommentar*, 8th ed., München, 2006.

C. Pippan, *Die Förderung der Menschenrechte und der Demokratie als Aufgabe der Entwicklungszusammenarbeit der EG*, Frankfurt am Main, 2002.

G. Pili, *Il nuovo smalto costituzionale della CEDU agli occhi della Consulta…*, in www.forumcostituzionale.it, 2008.

F. Pinto, *Diritto degli Enti Locali*, Torino, 2012.

M. Piredda, *Le garanzie per gli enti locali nella riforma costituzionale delle autonomie,* in: Quaderni del Centro di Ricerca sulle amministrazioni pubbliche "Vittorio Bachelet", Milano, Giuffrè, 1997.

A. Pitino, *Il potere governativo di annullamento straordinario degli atti amministrativi illegittimi. Riflessioni a margine dell'annullamento disposto dal Governo delle norme dello Statuto del Comune di Genova riguardanti l'elettorato attivo e passivo degli stranieri,* in: Le Regioni n. 6/2006, 1127 and ff.

R. Pitschas, *Struktur- und Funktionswandel der Aufsicht im Neuen Verwaltungsmanagement,* DÖV, 1998, 907 and ff.

F. Pizzetti, *Il sistema costituzionale delle autonomie locali*, Milano, 1979.

F. Pizzetti, *Il sistema delle Conferenze e la forma di governo italiana*, in: Le Regioni n. 3-4/2000, 547 and ff.;

F. Pizzetti, *Le autonomie locali e l'Europa*, in Le Regioni, n. 5/2002, 935 and ff.

F. Pizzetti, *Una grande riforma istituzionale: la legge n. 56 del 2014 (legge Delrio)*, in www.astrid-online.it, n. 9/2014.

J. M. Pontier, *Autonomie locale, libre administration, décentralisation,* in: A.A., *En hommage à Francis Delpérée: itinéraires d'un constitutionnaliste* Bruxelles, 2007.

P.P. Portinaro, *Il labirinto delle istituzioni nella storia europea*, Bologna, 2007.

L. Pratchett, *Local Autonomy, Local Democracy and the 'New Localism',* in: Political Studies, Vol. 52 (2004), 358 and ff.

H. Preuss, *Die Entwicklung der kommunalen Selbstverwaltung in Deutschland*, in: P. Laband (ed.), *Handbuch der Politik*, 1919.

P. J. Proudhon, *Du Principe Fédératif et de la Nécessitè de Reconstituer le Parti de la Révolution*. Paris, 1863.

S. Pubusa, *Sovranità popolare e autonomie locali*, Milano, 1984.

G. F. Puchta, *Cursus der Institutionen*, vol. I., Leipzig, 1853.

A. Puttler, *Art. 4 EUV*, in: C. Calliess and M. Ruffert (eds.), *EUV/AEUV Kommentar,* 4th ed., 2011.

G. Püttner, *Der Streit um das Verhältnis von Demokratie und Selbstverwaltung*, in: T. Mann and G. Püttner (eds.), HKWP, 2007, 381 and ff.

G. Püttner and P. Jacoby, *Die politische Bürgermitwirkung*, in: G. Püttner (ed.), HKWP, Vol. 2, Berlin, 1982, 33 and ff.

P. Racca, *Lo status degli amministratori degli enti locali*, in V. Nicotra and M. Delfino (eds.), *L'ordinamento istituzionale delle autonomie locali*, Vol. 2, ANCI, 2012, 300 and ff.

S. Raich, *Grenzüberschreitende und interregionale Zusammenarbeit in einem Europa der Regionen,* Baden-Baden, 1994.

K. Raustiala, *Form and Substance in International Agreements*, (99) American Journal of International Law, 2005, 581 and ff.

F. Regehr, *Die völkerrechtliche Vertragspraxis in der Bundesrepublik,* Berlin, 1974.

E. Rehn (ed.), *Gemeindeordnung NRW*, Siegburg, 2014.

G.H. Reichel, *Die Auswärtige Gewalt nach dem Grundgesetz für die BRD,* Berlin, 1967.

H-W. Rengeling, *Die Zusammensetzung der Standigen Konferenz der Gemeinden und Regionen des Europarates, insbesondere aus deutscher Sicht*, DVBl, 1985, 600 and ff.

H-W. Rengeling, *Formen interkommunaler Zusammenarbeit*, in: G. Püttner (ed.), HKWP, Vol. 2, Berlin, 1981, 386 and ff.

K. Rennert: *Art. 28,* in: D.C. Umbach and T. Clemens (eds.), *Grundgesetz-Kommentar*,

W. Renzsch and S. Schieren, *Zur Pauschalierung kommunaler Investitionszuweisungen*, VerwArch 87 (1996), 618 and ff.

G. U. Rescigno, *Consiglio delle autonomie locali e Costituzione*, in: Politica e Diritto, 2/2003, 231 and ff.

G. Ress, *Menschenrechtskonvention und Vertragsstaaten. Die Wirkungen der Urteile des Europäischen Gerichtshofs für Menschenrechte im innerstaatlichen Recht und vor innerstaatlichen Gerichten*, in: I. Maier (ed.), *Europäischer Menschenrechtsschutz - Schranken und Wirkungen, Verhandlungen des 35. Internationalen Kolloquiums über die Europäische Menschenrechtskonvention*, Heidelberg, 1982, 227 and ff.

I. Richter, *Zweckverbandsrecht im Freistaat Sachsen*, Berlin, 2012.

W. Riotte and K. Waldecker, *Zur Einordnung der Pflichtaufgaben zur Erfüllung,* NWBl, 1995, 401 and ff.

K. Ritgen, *Aufgabenübertragungsverbot und Konnexitätsprinzip – aktuelle Fragestellungen*, LKV 11/2011, 481 and ff.

K. Ritgen, *Selbstverwaltungsgarantie und Mischverwaltungsverbot al Schranken der Organisationsgewalt des Bundes*, NdSVBl 2008, 185 and ff.

J. G. Roca, *From States' International Commitment to Organise Free Elections to the Citizens' Right to Vote and Stand for Election (Art. 3 P1 ECHR)*, in: J. G. Roca and P. Santolaya (ed.), *Europe of Rights: A Compendium on the European Convention on Human Rights*, Leiden, 2012.

K. Roepstorff, *The Politics of Self-Determination. Beyond Decolonisation Process,* London, 2013, 50 ff.

G. Rolla, *L'autonomia costituzionale delle comunità territoriali. Tendenze e problemi*, in: T. Groppi (ed.), *Principio di autonomia e forma dello Stato*, Torino, 1998, 15 and ff.

G. Rolla, *L'autonomia dei Comuni e delle Province*, in: T. Groppi and M. Olivetti (eds.), *La Repubblica delle autonomie. Regioni ed enti locali nel nuovo Titolo V,* 2001, 162 and ff.

G. Rolla, *L'autonomia delle comunità territoriali: profili costituzionali*, Milano, 2008.

G. Rolla, *Note per una rilettura della Costituzione*, in: *Politica del Diritto*, 1978, 474 and ff.

S. Romano, *Decentramento amministrativo*, in: Enciclopedia giuridica italiana, Vol. IV, Napoli, 1897.

N. Ronzitti, *Introduzione al diritto internazionale,* 4th ed., Torino, 2013.

N. Ronzitti, *I rapporti transfrontalieri delle regioni*, in: Le Regioni n. 4/1989, 955 and ff.

J.E. Rosenschon, *Gemeindefinanzsystem und Selbstverwaltungsgarantie*, Köln, 1980.

S. Rossi, *Il nuovo ruolo del prefetto tra diritti e sicurezza*, in: A. Lorenzetti, S. Rossi (eds.), *Le ordinanze sindacali in materia di incolumità pubblica e sicurezza urbana. Origini, contenuti, limiti*, Quaderni del Dipartimento di Scienze Giuridiche, Università degli Studi di Bergamo, Napoli, 2009, 123 and ff.

D. Roßmüller, *Schutz der kommunalen Finanzausstattung durch Verfahren*, München, 2008.

E. Rotelli, *Le trasformazioni dell'ordinamento comunale e provinciale durante il regime fascista*, in S. Fontana (ed.), *Il fascismo e le autonomie locali*, Bologna, 1973, 145 and ff.

E. Rotelli, *Art. 128*, in: G. Branca and A. Pizzorusso (eds.), *Commentario della Costituzione. Le Regioni, le Province, i Comuni*, Bologna-Roma, 1990, 11 and ff.

W. Roters, *Kommunale Spitzenverbände und funktionales Selbstverwaltungsverstandnis*, DVBl, 1976, 359 and ff.

M. Ruffert, *Unions- und gemeinschaftsrechtliche Einwirkungen auf die kommunale Selbstverwaltung*, in: T. Mann and G. Püttner (eds.), HKWP, Bd. 1, 2nd ed., 2007.

M. Ruffert, *Rechtsquellen und Rechtsschichten des Verwaltungsrechts,* in: Hoffmann-Riem/Schmidt-Aßmann/A. Voßkuhle (eds.), *Handbuch der Verwaltungswissenschaft*, München, 2006, § 17.

F. Rugge, *Metamorfosi di una nozione costituzionale nella Germania contemporanea,* in: P. Schera (ed.), *Le autonomie e l'Europa. Profili storici e comparati*, Bologna, 1993, 163 and ff.

A. Ruggeri, *La Consulta rimette abilmente a punto la strategia dei suoi rapporti con la Corte EDU e, indossando la maschera della consonanza, cela il volto di un sostanziale, perdurante dissenso nei riguardi della giurisprudenza convenzionale,* in www.diritticomparati.it, 14 December 2012.

E. Ruggeri, *Articolo 244*, in: C. Napoli e N. Pignatelli (eds.), *Codice degli Enti Locali*, Roma, 2012, 2177 and ff.

C. Salazar, *Politicità e asimmetria nel giudizio in via principale: un binomio in evoluzione?*, in: *I*

ricorsi in via principale, Palazzo Della Consulta, Roma, Vol. 1, 2011.

G.M. Salerno, *L'integrazione della Commissione parlamentare per le questioni regionali con i rappresentanti delle autonomie territoriali: problemi e disarmonie costituzionali"*, in: Rassegna parlamentare, vol. 49, n. 2, 2007, 379 and ff.

J. Salmon, *Article 26*, in: O. Corten and P. Klein (eds), *The Vienna Convention on the Law of the Treaties – A Commentary*, Vol. I, 659 and ff.

C. Samara, *Die verfassungsrechtliche Stellung der griechischen kommunalen Selbstverwaltung im Rahmen der europaischen Integration*, Konstanz, 1995.

D. Saparniene and A. Lazauskiene, *Local Government in Lithuania*, in: A-M. Moreno (ed.), *Local Government in the member States of the European Union: Comparative Legal Perspective,* Madrid, 2012, 392 and ff.

S. Sarti, *La Carta europea delle autonomie locali nell'euritmia della riforma*, Amministrazione civile: rivista di studi e politica amministrativa, 2000, fasc. n. 3,

F.C. von Savigny, *Geschichte des Römischen Rechts im Mittealter*, Heidelberg, 1834.

T. Schäfer, *Die deutsche kommunale Selbstverwaltung in der Europäischen Union*, Stuttgart, 1998.

B.Schaffarzik, *Das Gebot der Gleichberechtigung im Spannungsfeld staatlicher Organisationsgewalt und kommunaler Organisationshoheit*, DÖV, 1996, 152 and ff.

B. Schaffarzik, *Der Schutz der kommunalen Selbstverwaltung im europäischen Mehrebenensystem*, in: T. Mann and G. Puttner (eds.), Handbuch der Kommunalen Wissenschaft und Praxis, 2007, 269 and ff

B. Schaffarzik, *Handbuch der Europäischen Charta der kommunalen Selbstverwaltung*, Stuttgart, 2002

H.W. Scheerbarth, *Gibt es weiterhin "Auftragsangelegenheiten" im Land Nordrhein- Westfalen?*, DVBl, 1953, 261 and ff.

D. Schefold, *Problems of Local Self-Government in the Netherlands: a study elaborated by the Council of Europe*, in: www.issirfa.cnr.it, 2006.

D. Schefold, *Der Schutz der Kommunalen Selbstverwaltung durch den Europarat,* in: S. Breitenmoser, B. Ehrenzeller, M. Sassòli, W. Stoffel, B. Wagner Pfeifer (eds.)*, Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber,* Baden-Baden, 2007, 1068 and ff.

D. Schefold, *I comuni tedeschi e la globalizzazione*, in: Le Regioni, 1/2008, 11 and ff.

C. Scheps, *Das Örtlichkeitsprinzip im kommunalen Wirtschaftsrecht*, Berlin, 2005.

W. Scheuner, *Gemeindeverfassung und kommunale Aufgabenstellung in der Gegenwart*, AfK (1) 1962, 149 and ff.

W. Scheuner, *Neubestimmung der kommunalen Selbstverwaltung,* AfK, (12) 1973, 1 and ff.

F. Schorkopf, *Grundgesetz und Überstaatlichkeit,* Tübingen, 2007.

L. Senden, *Soft Law in European Community Law*, Oxford-Portland, 2004.

M. N. Shaw, *Peoples, Territorialism and Boundaries,* in European Journal of International Law (8) (3) 1997, 478 and ff.

N. Skoutaris, *Comparing the Subnational Constitutional Space of the European Sub-State Entities in the Area of Foreign Affairs,* Perspectives on Federalism, Vol. 4, no. 2, 2012.

U. Schliesky, C. Ernst, S.E. Schulz, *Die fehlende demokratische Legitimation der Amtsebene*, in: NordÖR 1/2010, 6 and ff.

W. Schmidt, *Die "Institutionelle Garantie" der kommunalen Selbstverwaltung und das Grundgesetz*, in: G. Frank and H-W. Langrehr (eds.) *Die Gemeinde - FS für Heiko Faber*, Tübingen, 2007, 17 and ff.

T.I. Schmidt, *Kommunale Kooperation*, Tübingen, 2005.

T. I. Schmidt, *Sind die EG und die EU an die Europäische Charta der kommunalen Selbstverwaltung gebunden?,* EuR 2003, 936 and ff.

T. I. Schmidt, *In dubio pro municipio? Zur Aufgabenverteilung zwischen Landkreisen und Gemeinden*, DÖV 2013, 509 and ff.

T.I. Schmidt, *Das Besteurungsrecht der Landkreise*, in: KommJur 10 (2014), 361 and ff.

E. Schmidt-Assmann and P. Badura, *Besonderes Verwaltungsrecht*, 13th ed., Heidelberg, 2005.

E. Schmidt-Aßmann, *Kommunale Selbstverwaltung nach Rastede*, in: *FS H. Sendler*, 1991, 121 and ff.

E. Schmidt-Aßmann, *Verwaltungslegitimation*, AÖR, (116), 1991, 329 and ff.

G. Schmidt-Eichstädt, *Staatsverwaltung und Selbstverwaltung bei Rudolf von Gneist,* Die Verwaltung, Vol. 8 (1975), 345 and ff.

G. Schmidt-Eichstädt, *Bundesgesetze und Gemeinden*, Stuttgart, 1981.

E. Schmidt-Jortzig, *Aktuelle Perspektiven der kommunalen Finanzverfassung,* DÖV, 1987, 201 and ff.

E. Schmidt-Jortzig, *Kommunalrecht*, Stuttgart, 1982.

E. Schmidt-Jortzig, *Kommunale Organisationshoheit,* Göttingen, 1979.

E. Schmidt-Jortzig and A. Schink, *Subsidiaritätsprinzip und Kommunalordnung*, Stuttgart, 1982.

G. Schmoller, *Deutsches Städtewesen in älterer Zeit,* Bern/Leipzig, 1922.

O. Schnakenberg, *Innerdeutsche Städtepartnerschaften,* Baden-Baden, 1990.

M.W. Schneider, *Kommunaler Einfluss in Europa: die Einflussnahme der Kommunen beim Europarat als Modell für die Europäische Union; KGRE, AdR und EKC als Säulen eines europäischen Kommunalschutzes,* Frankfurt am Main, 2004.

M.W. Schneider, *Die Vorbildfunktion der EKC für eine Weltcharta der kommunalen Selbstverwaltung*, in: F.L. Knemeyer, *Kommunale Selbstverwaltung in Ost und West*, Baden-Baden, 2003.

R. Schnur, *Regionalkreise? Grundsätzliche Bemerkungen zur Schaffung von sogenannten Regionalkreisen, insbesondere in Nordrhein-Westfalen,* Köln, 1971.

F. Schoch (ed.), *Besonderes Verwaltungsrecht*, 15th. ed., Heidelberg, 2013.

F. Schoch, *Soll das kommunale Satzungsrecht gegenüber staatlicher und gerichtlicher Kontrolle gestärkt werden?* NVwZ, 1990, 801 and ff.

F. Schoch, *Verfassungsrechtlicher Schutz der kommunalen Finanzautonomie*, Stuttgart, 1997.

F. Schoch, *Grundrechtsfähigkeit juristischer Personen*, Jura, 2001, 201 and ff.

F. Schoch, *Das landesverfassungsrechtliche Konnexitätsprinzip (Art. 71 Abs. 3 LV) zwischen verfassungsrechtlicher Schutzfunktion und Aushöhlung durch die Praxis*, VBlBW, 2006, 122 and ff.

F. Schoch, *Die Sicherung der kommunalen Selbstverwaltung als Föderalismusproblem*, Der Landkreis, 2004, 367 and ff.

F. Schoch and J. Wieland, *Aufgabenzuständigkeit und Finanzierungsverantwortungverbesserter Kinderbetreuung*, Stuttgart, 2004.

H. Scholler, *Rechtsreform und Rechtstransfer in der Mongolei*, Münster, 2010.

H. Scholler and S. Bross, *Grundzüge des Kommunalrechts in der Bundesrepublik Deutschland*, Heidelberg, 1976.

D. Schwab, *Die Selbstverwaltungsidee des Freiherrn vom Stein und ihre geistigen Grundlagen*, Frankfurt am Main, 1971.

M. von Schwanenflügel, *Entwicklungszusammenarbeit als Aufgabe der Gemeinden und Kreise*, Berlin, 1993.

K. Schwarz, *Staatsgarantie für kommunale Verbindlichkeiten bei „faktischem Konkurs von Kommunen*“, Baden-Baden, 1998.

K. Schwarz, *Der Einfluss des Europäischen Stabilitätspaktes auf die Ebene der kommunalen Selbstverwaltung*, NWVBl 2012, 245 and ff.

K. Schwarz, *Art. 106,* in H. Mangoldt/F. Klein/C. Starck (eds.), *Kommentar zum Grundgesetz*, v. II, 5th. ed., München 2005.

K. Schwarz, *Systematische Überlegungen zur Insolvenzfähigkeit von juristischen Personen des öffentlichen Rechts in Deutschland,* Zeitschrift für Kommunalfinanzen, 2010, 49 and ff.

M. Schweitzer, *Staatsrecht III*, 7th ed., Heidelberg, 2000.

V. Sciarabba, *Nuovi punti fermi (e questioni aperte) nei rapporti tra fonti e corti nazionali ed internazionali*, in Giurisprudenza Costituzionale, 2007, 3579 and ff.

J. Scott, *Transnational Regionalism; Strategic Geopolitics, and European Integration: The Case of the Baltic Sea Region*, in H. Nicol and I. Townsend-Gault (eds.), *Holding the Line: Borders in a Global World*, Vancouver, 2005, 90 and ff.

T. Scovazzi, *The Application by Italian Courts of Human Rights Treaty Law*, in: B. Conforti and F. Francioni (eds.), *Enforcing International Human Rights in Domestic Courts*, The Hague, 1997, 59 and ff.

T. Scovazzi, *Corso di Diritto Internazionale – Parte III La tutela internazionale dei diritti umani*, Roma, 2013.

J.W. Sedlar, *East Central Europe in the Middle Ages, 1000-1500*, Vol. III, Seattle, 1994.

G. Seele and F. Ossenbühl, *Rahmengesetzgebung des Bundes für das Gemeindewesen?*, DÖV, 1972, 479 and ff.

G. Seele, *Die übergemeindliche Kommunalverwaltung in Europa,* in: T. Mann and G. Püttner (eds.), HKWP, Vol. 1, 1st ed., 2007.

O. Seewald, *Kommunalrecht*, in: U. Steiner (ed.), *Besonderes Verwaltungsrecht*, 6th ed., Heidelberg, 1999.

G. Seibert, *Selbstverwaltungsgarantie und kommunale Gebietsreform. Eine kritische Zwischenbilanz der jüngsten Rechtssprechung zum Recht kommunaler Gebietsänderungen,* Frankfurt am Main, 1971.

I. Seidl-Hohenveldern and T. Stein, *Völkerrecht*, 10th ed., Köln-Berlin-Bonn-München, 2000.

A.Shah, *The Practice of Fiscal Federalism: Comparative Perspectives*, London, 2007.

Y. Shany, *Toward a General Margin of Appreciation Doctrine in International Law*, EJIL Vol. 16 (2005), 907 and ff.

V. Sica, *Contributo alla teoria dell'autonomia costituzionale*, Napoli, 1951.

M. Siclari, *Le norme interposte nel giudizio di costituzionalità,* Padova, 1992.

H. Siedentopf, *Europäische Gemeinschaft und kommunale Betätigung*, DÖV, 1988, 988 and ff.

H. Siedentopf, *Verwaltungsgerichtsbarkeit – Umweltschutz- Kommunale Selbstverwaltung*, Speyer, 1991.

H. Siedentopf, *Die Kreise vor einem neuen Leistungsund Gestaltungsauftrag?,* DVBl, 1975, 13 and ff.

K. Sieveking*, Europäisches Gemeinschaftsrecht und Stadtstaaten*, *Verfassungsrechtliche Probleme bei der Einführung des Kommunalen Ausländerwahlrechts*, DÖV, 1993, 449 and ff.

B. Simma / D.E. Khan / M. Zöckler / R. Geiger, *The Role of German Courts in the Enforcement of International Human Rights*, in: B. Conforti and F. Francioni (eds.), *Enforcing International Human*

Rights in Domestic Courts, The Hague, 1997, 71 and ff.

S. Simon, *Liberalisierung von Dienstleistungen der Daseinsvorsorge im WTO- und EU-Recht,* Tübingen, 2009.

A. Sinagra - P. Bargiacchi, *Fenomeni di adattamento di ordinamenti diversi, in Lezioni di diritto internazionale pubblico*, Torino, 2009.

A-M. Slaughter, *Disaggregated Sovereignty, Towards the Public Accountability of Global Government Networks,* in: Government Opposition No. 39, 2004, 159 and ff.

B. Sordi, *Selfgovernment, Selbstverwaltung, Autarchia: Fondali Inglesi per Scenografie Continentali*: in Quaderni Fiorentini XLIII (2014), 135 and ff.

J-M. Sorel and V. Boré Eveno, *Article 31 Convention of 1969*, in: O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of the Treaties*, Oxford, 2011, 804 and ff.

J. Sorens, *The Partisan Logic of Decentralization in Europe*, Regional and Federal Studies Vol. (19) Issue 2, 2009, 255 and ff.

F. Sorrentino, *Le fonti del diritto*, Genova, 1984.

P. J. Spiro, *The States and International Human Rights*, Fordham Law Review, 66 Fordham Law Review, Vol. 66 No. 2 (1997), 567 and ff.

H. Spörlein, *Die Samtgemeinden in Niedersachsen*, Göttingen, 1965.

F. Staderini, *Diritto degli enti locali*, 7th ed., Padova, 1997.

H-J. Stargardt, *Gemeindepartnerschaften und Europacharta der kommunalen Selbstverwaltung fuhrten die Volker Europas zusammen*, DVP, 1990.

T. Stein, *Amtshilfe in auswärtigen Angelegenheiten*, Heidelberg, 1975.

F. Steinbach and E. Becker, *Geschichtliche Grundlagen der kommunalen Selbstverwaltung in Deutschland*, Bonn, 1932.

K. Stern, *Der rechtliche Standort der Gemeindewirtschaft,* AfK 3 1964, 81 and ff.

K. Stern, *Art. 28*, in: R. Dolzer and K. Vogel and K. Graßhof (eds.), *Bonner GG-Kommentar,* 1964.

K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland,* Vol. 1, München, 1977.

K. Stern, *Auswärtige Gewalt und Lindauer Abkommen,* in: J. Ipsen et al. (eds), *Verfassungsrecht im Wandel*, *Wiedervereinigung Deutschlands. Deutschland in der Europäischen Union. Verfassungsstaat und Föderalismus,* Köln, Berlin, Bonn, München, 1995, 251 and ff.

K. Stern, *Europäische Union und Kommunale Selbstverwaltung*, FS Friauf, Heidelberg, 1996, 82.

K. Stern, *Kommunale Selbstverwaltung in europäischer Perspektive,* NdSVBl 1/2010, 1 and ff.

K. Stern and G. Püttner, *Grundfragen der Verwaltungreform im Stadt-Umland,* Vol. 2, Berlin, 1969.

R. Stettner, *Grundfragen einer Kompetenzlehre*, Berlin, 1983.

I. Stirn, *Lokale und regionale Selbstverwaltung in Europa*, Karlsruhe, 2013.

R. Stober, *Kommunalrecht in der BRD*, 3rd ed., Stuttgart-Berlin-Köln, 1996.

G. Stoker, *Introduction: Normative Theories of Local Government and Local Democracy* in: D. King and G. Stoker (eds.) *Rethinking Local Democracy,* London, 1996, 1 and ff.

S. Stokstad, *Kommunalt selvstyre – kompetansefordelingen mellom Stortinget, statsforvaltningen og kommunene*, University of Oslo – Faculty of Law, 2012.

D. Strazzari, *Harmonizing Trends vs Domestic Regulatory Frameworks: Looking for the European Law on Cross-Border Cooperation*, European Journal of Legal Studies 4 (2011), 151 and ff.

R. Streinz, *Art. 32*, in M. Sachs (ed.), *GG-Kommentar*, 2nd ed., München, 1998.

B. Stür, *Funktionalreform und kommunale Selbstverwaltung*, Göttingen, 1980.

M. Suksi, *Autonomy: Applications and Implications*, The Hague, 1998.

S. Tanasescu, *Local Government in Romania*, in: A.M. Moreno (ed.), *Local Government in the member States of the European Union. A Comparative Perspective*, Madrid, 2012, 532 and ff.

R. Tarchi and D. Bessi, *Art. 123*, in: R. Bifulco, A. Celotto, M. Olivetti (eds.), *cit*., 2453 and ff.

G. Tarli Barbieri and P. Milazzo, *Art. 117, co. 6*, in: R. Bifulco, A. Celotto, M. Olivetti (eds.), *Commentario alla Costituzione*, Torino, 2006, 2276 and ff.

H-M. Ten Napel, *The European Court of Human Rights and Political Rights: The Need for More Guidance*, in: European Constitutional Law Review, Vol. 5 (2009), 464 and ff.

L. Tepe, *Verfassungsrechtliche Vorgaben für Zuständigkeitsverlagerungen zwischen Gemeindeverbandsebenen*, Stuttgart, 2009.

P. J. Tettinger, W. Erbguth, T. Mann (eds.), *Besonderes Verwaltungsrecht,* 11th ed.., Heidelberg, 2012.

W. Thieme, *Die Gliederung der deutschen Verwaltung*, in G. Puttner (ed.), *HKWP,* Vol. 1, Berlin, 1981, 135 and ff.

M. Thies, *Zur Situation der gemeindlichen Selbstverwaltung im europäischen Einigungsprozess : unter besonderer Berücksichtigung der Vorschriften des EG-Vertrages über staatliche Beihilfen und der EG-Umweltpolitik*, Frankfurt am Main, 1995.

D. Thürer, *The Role of Soft Law in the Actual Process of European Integration*, in: O. Jacot-Guillarmod (ed.), *L'avenir du libre-échange en Europe: vers un espace économique européen?,* 1990.

D. Thürer, *Schweizerische Gemeindeautonomie und die Europäische Charta der kommunalen Selbstverwaltung*, in: F. Cagianaut / W. Geiger / Y. Hangartner / E. Höhn (eds.), *Aktuelle Probleme des Staats- und Verwaltungsrechts*, Festschrift für Otto Kaufmann zum 75. Geburtstag,

Bern/Stuttgart, 1989, 232 and ff.

C.M. Tiebout, *An economic theory of fiscal decentralisation in public finance needs, sources and utilisation*, Princeton, 1961.

A. de Tocqueville, *Democracy in America*, translation by H. Reeve, London, 1835.

C. Tomuschat, C. Schmidt, R. Blumel, R. Grawert (eds.), *Der Verfassungsstaat im Geflecht der internationalen Beziehungen*. *Gemeinden und Kreise vor den öffentlichen Aufgaben der Gegenwart, Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Basel vom 5. bis 8. Oktober 1977,* Berlin, 1978.

C. Tomuschat, *Component Territorial Units of States under International Law,* in: L. Daniele (ed.), *Regioni e Autonomie territoriali nel diritto internazionale ed europeo*, Napoli, 2005, 34 and ff.

C. Tomuschat, *ECHR Judgments and the Federal Constitutional Court*, in German Law Journal, Vol. 11 n. 5, 2010, 513 and ff.

V. Tondi della Mura, *La riforma delle unioni di comuni fra ingegneria e approssimazione istituzionali*, in Scritti in onore di Valerio Onida, Milano, 2011, 1911 and ff.

J. Tornos, *Improving control for the implementation of the European Charter of Local Self-Government*, in: Conference on the European Charter of Local Self-Government, Barcelona 23-25 January 1992, 181 and ff.

G. Treves, *Autarchia, autogoverno, autonomia*, in: Rivista trimestrale di diritto pubblico, 1957, 286 and ff.;

H. D. Treviranus, *Preamble*, in: R. Bernhardt (ed.), EPIL, Vol. 3, 1997, 1097 and ff.

M. Trips, *Konnexitätsprinzip und Inklusion*, NdSVBl 2013, 297 and ff.

L. Trucco, *La democrazia elettorale tra margine di apprezzamento degli stati e tutela dei diritti individuali*, in: M. Cartabia (ed.), *Dieci casi sui diritti in Europa*, Bologna, 2011.

K. Tuori, *On Legal Hybrids and Perspectivism, Transnational Law Rethinking European Law and Legal Thinking,* in M. Maduro, K. Tuori and S. Sankari (eds.), Cambridge, 2014, 11 and ff.

W. Vandebruwaene, *What Scope for Subnational Autonomy: the Issue of the Legal Enforcement of the Principle of Subsidiarity,* Perspectives on Federalism, Vol. 6, No. 2, 2014.

L. Vandelli, *Sovranità e federalismo interno: l'autonomia territoriale all'epoca della crisi*, in Le Regioni, n.5/6-2012, 845 and ff.

L. Vandelli, *The general principles of the European Charter of Local Self-Government and their implementation in Italy*, in: *Conference on the European Charter of Local Self-Government:* Barcelona, 23-25 gennaio 1992.

L. Vandelli, *Il sistema delle autonomie locali*, Bologna, 2004.

F. Vanneste, *General International Law Before Human Rights Courts*, Oxford, 2010.

P. Van Nuffel, *Does EU Decision-Making Take into Account Regional Interests?*, in: E. Cloots, G. De Baere, S. Sottiaux, (eds.) *Federalism in the European Union,* Oxford, 2012, 191 and ff.

M. Vellano, *La cooperazione regionale nell'Unione europea*, Torino, 2014.

M. Verpeaux, *La naissance du pouvoir reglementaire*, Paris, 1991.

L. Verrienti, *Regolamenti e potere normativo degli enti locali*, in: Digesto IV delle discipline pubblicistiche, Torino, 1995.

G. Vesperini, *Gli enti locali*, Roma-Bari, 2004.

G. Vesperini, *Enti locali*, in: S. Cassese (ed.), *Dizionario di diritto pubblico*, Vol. III, Milano, 2006.

G. Vesperini, *Le nuove province*, in: Giornale di diritto amministrativo, n. 3/2012, 272 and ff.

A. Vetter, *Die Europaische Charta der kommunalen Selbstverwaltung, 1989 (EKC) und ihre politische Bedeutung*, in: O. Gabriel/P.C.Müller-Graff/C.Steger, *Kommunale Aufgaben im Europäischen Binnenmarkt*, Baden-Baden, 2010.

N. Viceconte, *Lo Statuto e la forma di governo regionale*, in: S. Mangiameli (ed.), *Il regionalismo italiano tra tradizioni unitarie e processi di federalismo,* Milano, 2012, 169 and ff.

G. Viegener, *Drittschutz Staats-, Wirtschafts- und Gemeinschaftsaufischtsrechtlicher Bestimmungen*, Frankfurt am Main, 2007.

H. Vietmeier, *Die staatlichen Aufgaben der Kommunen und Ihrer Organe*, Stuttgart, 1992.

H. Vietmeier, *Die Rechtsstellung der Kommunen im übertragenen Wirkungskreis*, DVBl 1993, 190 and ff.

I. Vilka, *Local Government in Latvia*, in. A-M. Moreno (ed.), *Local Government in the member States of the European Union: Comparative Legal Perspective*, Madrid, 2012, 367 and ff.

M.A. Villagràn Abarzuà, *Verfassungsrechtliche Grundlagen der Gemeindeverwaltung in Chile*, Frankfurt am Main, 2010.

S. Vöneky, *Verfassungsrecht und völkerrechtliche Verträge § 236,* in: J. Isensee-P. Kirchoff (eds.), *Handbuch des Staatsrechts*, 3rd ed., Vol. 9 – Internationale Bezüge.

R. Voigt, *Die Auswirkungen des Finanzausgleichs zwischen Staat und Gemeinden auf die kommunale Selbstverwaltung von 1919 bis zur Gegenwart*, Berlin, 1975.

U. Volkmann, *Der Anspruch der Kommunen auf finanzielle Mindestausstattung*, DÖV, 2001, 497 and ff.

H. von Hausen, *Die Zuständigkeit des Bundesgesetzgebers aus Art. 84 und 85 GG*, DÖV, 1960, 1 and ff.

H. von Mangoldt/F. Starck/C. Klein (eds.), *Grundgesetz Kommentar*, 2005.

A. von Mutius, *Grundfälle zum Kommunalrecht*, JuS 1977, 319 and ff.

A. von Mutius, *Kommunalrecht,* München, 1996.

A. von Mutius and F. Schoch, *Kommunale Selbstverwaltung und Stellenobergrenzen*, DVBl, 1981, 1077 and ff.

A. von Mutius/ G. Henneke, *Kommunale Finanzausstattung und Verfassungsrecht*, Siegburg, 1985.
G-C. von Unruh, *Ursprung und Entwicklung der kommunalen Selbstverwaltung im frühkonstitutionellen Zeitalter*, in: G. Püttner and T. Mann (eds.), *Handbuch der kommunalen Wissenschaft und Praxis,* Vol. 1, Berlin, 2007.

M. von Schwanenflügel, *Entwicklungszusammenarbeit als Aufgabe der Gemeinden und Kreise*, Berlin, 1993.

G-C. von Unruh, *Regionalismus in Europa – Realität und Probleme*, BayVbl, 1993, 11.

G-C. von Unruh, *Die kommunale Selbstverwaltung im Grundgesetz und ihr genetisches Modell*, Berlin, 1973.

G-C. Von Unruh, *Der Kreis*, Berlin/Köln, 1972.

S. Von Zimmermann Wienhues, *Kommunale Selbstverwaltung in einer europäischen Union,* Berlin, 1997.

K. Waechter, *Kommunalrecht*, 2nd. ed., Berlin, 1995.

F. Wagener, *Gemeindeverbandsrecht in Nordrhein-Westfalen,* Köln, 1967.

A. Warleigh, *The Committee of the Regions: Institutionalising Multi-Level Governance*, London, 1999.

P. Weides, *Das Verhältnis zwischen Gemeinden und Kreisen gem. Art. 28 II GG*, NVwG 1984, 155 and ff.

B. Weinberger, *Internationale Gemeindeverbände und Städtepartnerschaften,* in: G. Püttner (ed.), HKWP, Vol. 2, Berlin, 1981, 506 and ff.

B. Weiss, *Einführung und Umsetzung der EKC in Deutschland: insbesondere in Bayern und Nordrhein-Westfalen,* Frankfurt am Main, 1996.

B. Weiss, *Die völkerrechtliche Pflicht zur aufgabenadequaten Finanzausstattung der Kommunen*, in DÖV (2000), 905 and ff.

G. Werner, *Die Gemeinde- und Kreisfinanzierung auf dem verfassungsrechtlichen Prüfstand,* VblBW, 1997, 1 and ff.

R. Wiese, *Garantie der Gemeindeverbandsebene*, Frankfurt am Main, 1972.

B. Wieser, *Zur Demokratisierung der Bezirksverwaltung in Österreich,* International and Comparative Law Review, 2008.

P. Williams-Riquier, *La charte européenne de l'autonomie locale: un instrument juridique*

international pour la décentralisation, in: Revue Française d'Administration Publique, n. 1/2007 (121-122)

J. Woelk, *Transformation Bottom-Up? Local Government Reforms in the Western Balkans compared,* CAST Working Papers, 2005.

J. Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, Padova, 2008.

J. Wohlfarth, *Neue Gesetze zur kommunalen grenzuberschreitenden Zusammenarbeit in Frankreich und im Saarland*, NVwZ 1994, 1072 and ff.

H-J. Wolff/O. Bachof/J. Stober, *Verwaltungsrecht II*, München, 1978.

H-A. Wolff, *Die Personalhoheit als Bestandteil der kommunalen Selbstverwaltungsgarantie,* VerwArch 100 (2009).

H. Wollmann, *The Two Waves of Territorial Reform of Local Government in Germany,* in: J. Meligrana, *Redrawing Local Government Boundaries: An International Study of Politics, Procedures and Decisions*, Vancouver, 2004, 106 and ff.

H. Wollmann, *Reforming Local Leadership and Local Democracy: The Cases of England, Sweden, Germany and France in Comparative Perspective,* in: Local Government Studies, 34:2, London, 2008.

C. Zanghi, *La Corte Costituzionale risolve un primo contrasto con la Corte Europea dei Diritti dell'Uomo ed interpreta l'art. 117 della Costituzione: le sentenze del 24 ottobre 2007*, in Dir. Uomo, n. 3, 2007, 50 and ff.

C. Zieglmeier, *Das strikte Konnexitätsprinzip am Beispiel der Bayerischen Verfassung,* NvwZ, 2008.

F. Zucca, *The International Relations of Local Authorities*, Frankfurt am Main, 2012.

M. Zuleeg, *Abschluss und Rechtswirkung volkerrechtlicher Verträge in der Bundesrepublik Deutschland*, JA, 1983.