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THE RIGHT TO WATER IN BELGIUM

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INTRODUCTION

This paper examines the legal processes of recognition and implementation of the human right to water in Belgium. Since the 1990s, Belgium has adopted new strategies and enacted legal instruments in order to guarantee equal access to drinking water and sanitation for everyone. Hence, in those aspects related to the human right to water, the Belgian legal framework might be regarded as a useful model for water law reform in other countries.

Firstly, this paper examines the institutional structure for water services delivery in Belgium. It focuses on regional legislation having incorporated the right to have access to drinking water and sanitation. This is discussed through an analysis of the legal instruments enacted (para.1) and the relevant jurisprudence of the Court of Arbitration of Belgium (para.2). Secondly, this paper pays special attention to the recent initiative for reforming the Belgian Constitution, aiming at including the right to water as an independent individual right within it (para.3).

I. THE LEGAL FRAMEWORK

Belgium is a Federal State composed by three regions: the Flemish region, the Walloon region and the Brussels-Capital region. Despite sufficient rainfalls, water in Belgium is overall rather scarce. Flanders, which constitutes half of the country's surface, is poor in aquifers whereas in the Walloon region groundwater is abundant, but overexploited in some areas. However, the Walloon region provides Flanders and Brussels with the largest amount of drinking water.¹

In Belgium, water services provision is mainly under the jurisdiction of the regions and municipalities. In fact, the Federal Government has only limited saying in the water sector. Its competences are rather general and their main concern, among others is international relations, economic policy, and the protection of consumers' interests. Therefore, accountability for water services provision is fragmented between regions, municipalities and inter-municipal companies.

Regions are responsible for the design and application of environmental policy - including the preservation of water against pollution -, the production and distribution of drinking water, the adoption of pricing mechanisms and compliance with European Directives. Municipalities are mainly accountable for drinking water supply, including the planning and coordination of this specific sector. Finally, the Federal Government has also appointed some Inter-municipal companies to improve coordination among municipalities. These companies are in charge of harmonising selected issues handled differently in diverse municipal strategies.

Although accountability for the provision of drinking water and sanitation is consequently shared among different administrative organs, access for everyone to water and sanitation in overall is guaranteed throughout the Belgian territory. However, even if access is guaranteed, the average water tariff for household consumption is quite expensive and is set around 2 euros per m³ in all three regions.²

A. The Flemish Region

Since 1997, the Flemish Region has recognised that 'every customer is entitled to a basic uninterrupted supply of [...] water for household purposes in order to be able to live decently according to prevailing living standards'.³ As a result, in Flanders everyone has the right to a minimal supply of 15 m³ of free water per person per year⁴

1 See F. Varone and D. Aubin, *Institutional Water Regimes in Belgium: Towards Integrated Management?* 5 (Working Paper presented at the Symposium on Sustainable Management of Natural Resources and Quality Food Production, organised by KUL-UCL, Louvain-la-Neuve, 5-6 February 2001).

2 See Study on Human Rights and the Access to Water, Contribution of the Government of Belgium 2 (Contribution to the OHCHR Study on Human Right Obligations related to Equitable Access to Safe Drinking Water and Sanitation, 2005), available at <http://www2.ohchr.org/english/issues/water/contributions/Belgium.pdf> [hereafter Study on Human Rights and the Access to Water].

3 Article 3.1, Décret de la Communauté Flamande concernant diverses mesures d'accompagnement du budget 1997, 20 December 1996, *Moniteur belge*, 31 December 1996, 3rd edition.

4 *Id.* Article 34.

according to recommendations of the World Health Organisation. This ‘individual approach’, allotting water to individuals as such and not to households as units, regardless of the number of inhabitants per household, seeks to increase equality in the allocation of free water among families in the long term.⁵

Moreover, the Flemish regional legislation for water also aims to improve water saving in domestic consumption. To this end, this region has adopted a progressive water-pricing mechanism. This means that the final tariff depends on consumption because the price of water varies according to the amount used. The water tariff is composed of three elements. Firstly, there is a basic fee covering fixed costs of connection, independently from the household consumption; secondly, there is a free minimal quantity of water supplied to every household (15 m³); and thirdly, there is a variable cost depending on the surplus consumption. The latter cost depends on different blocks of water consumption established by the distribution company in accord with regional authorities.

Sanitation follows the same scheme and a fixed tariff is set by the society in charge of providing the service. However, in Flanders it is necessary to distinguish between the regional and the municipal provision of sanitation services. The first one provides a uniform service in the whole region, whereas the second one depends on characteristics of the municipalities and varies from one area to the next. Whilst drinking water is paid through a tariff, sanitation is included in the regional tax regime. Indeed, in the Flemish region everyone has to pay a sanitation tax, except the poorest citizens, living under the Minimum Subsistence Level. Included in this group are: retired people with a minimal pension; people with low income that have the right to receive social aid and persons with disabilities that are supported by public solidarity. Moreover, Flanders is fostering initiatives to improve rainwater storage, in an effort to decrease water consumption and to make people aware of drinking water issues and water scarcity.⁶

B. The Walloon Region

The Walloon region recognised the right to access to drinking water in 1999. Since then everyone is entitled to have ‘access to drinking water of sufficient quality and quantity to cover their food, domestic and health needs’.⁷

The Environmental Code of 2004 pays great attention to water issues, specifically in book II, also called Water Code, which declares that water is part of the ‘common heritage of the Walloon region’.⁸ According to the Water Code ‘everyone has the right to dispose of drinking water in sufficient quality and quantity’.⁹

In the Walloon region, a progressive pricing mechanism composed of four blocks of consumption determines the water tariff. It provides a minimum block of 30 m³ per household per year at a lower price than all other blocks and, as a result, this mechanism discourages excessive water consumption and facilitates access to water to small users. This pricing system is largely financed by cross-subsidies coming from larger users.¹⁰

According to regional legislation, the Walloon Region has integrated all different costs of providing water services in one bill, taking into account the ‘true cost’ of water. This bill includes drinking water production and distribution, and wastewater collection and treatment, complying with the European Water Framework Directive of 2000.¹¹ Every year, water companies have to determine the true cost of water, based on the foreseeable cost of the service set in the water management plan by the Walloon Government with the preventive authorisation of the Economic Federal Public Service. The true cost refers both to drinking water distribution and sanitation. Specifically, the

5 See H. Smets, *Pour un droit effectif à l'eau potable* 31 (Nanterre: AESN, revised ed., 2005). See also H. Smets, *La solidarité pour l'eau potable* 79 (Paris: L'Harmattan, 2004) and F. Varone, ‘L'accès gratuit à l'eau potable bénéficie-t-il nécessairement au plus défavorisés ? Une discussion critique à l'aune du cas de la Flandre’, 2(1) *Ethics and Economics* 1 (2004).

6 See P. Cornut et al., ‘Public-Club and Individual Management of Natural Resources: The Case of Domestic Rainwater Tanks in Belgium’, 137 *Die Erde* 273 (2006).

7 Article 1.2, Décret de la Région Wallonne relatif au cycle de l'eau et instituant une société publique de gestion de l'eau, 15 April 1999, *Moniteur belge*, 22 June 1999.

8 Article 1.1, Décret relatif au Livre II du Code de l'Environnement constituant le Code de l'Eau, *Moniteur belge*, 23 July 2004 [hereafter Code de l'Eau] (free translation by the author).

9 *Id.* Article 1(3).

10 See Study on Human Rights and the Access to Water, note 2 above.

11 Directive 2000/60 of the European Parliament and of the Council Establishing a Framework for the Community Action in the Field of Water Policy, 23 October 2000, *O.J. L.* 327 (22 December 2000).

final tariff of water distribution consists of two parts: a fixed amount, regardless of consumption, which depends only on the connection agreement; and a variable part, which is calculated on the basis of real household consumption and which is divided in four levels of price. As a result, the price actually includes the cost of water production, water distribution, water preservation against pollution, and sewerage treatment.

In 2003, the Walloon region passed legislation granting equitable access to water to everyone.¹² To this end, the Water Code set up a Social Fund for Water, which provides financial support to people having difficulties to pay their water bill, and is financed by a tax of 0,0125 euros/m³.¹³ Hence, water distribution companies are in charge of informing insolvent people of the existence of this fund, which is in place since March 2004. Unfortunately it is only available to the francophone area of the region and not to the German-speaking community.¹⁴ This instrument seeks to resort to solidarity for improving access to water services of the poor, and strengthening the role of water distribution companies.¹⁵ Finally, the Walloon region is also in the process of introducing a new water tax to finance water projects in selected developing countries. This tax, which will be similar to the one for the Social Water Fund, will provide poorest developing countries with financial and technical support to implement the human right to water in those regions.

C. The Brussels-capital Region

The Brussels region's legislation recognised 'the right to distribution of drinking water for household consumption' in 1994.¹⁶ A progressive water pricing mechanism has been adopted in this region as well. It consists of three blocks of consumption, followed by a fourth open block - above 60 m³ per person per year - at the highest price. The first m³ costs 3.8 times less than the highest one.¹⁷

The water tariff is composed of four elements. Firstly, there is a fixed price that varies depending on the connection agreement, even without consumption. Secondly, there is a price for the overall water services provision, on the basis of the solidarity and progressive pricing principles.¹⁸ Thirdly, there is a cost for sanitation, which is entrusted by the municipalities to the *Intercommunale bruxelloise de distribution d'eau* (IBDE).¹⁹

The Brussels region's legislation has created some tools to implement solidarity and participation in access to drinking water and sanitation. For instance, it provides poorest people with a refund of the sanitation tax.²⁰ This tax is not constant, but it varies from one municipality to the next. Its amount is between 0,1 and 0,3 euros/m³. A Social Fund for Water is also set up and is financed by a tax of 0,01 euro/m³ of water used.

Moreover, in case of insolvency, the legality of water disconnections depends on both a preliminary investigation of the Welfare Centre and on a judicial decision.

12 See Décret relative à la création d'un Fond Social de l'Eau en Région Wallonne, 20 February 2003, *Moniteur belge*, 19 March 2003 [hereafter Décret 2003].

13 See Article 234, Code de l'Eau, note 8 above.

14 Article 1, Décret 2003, note 12 above.

15 In 2004, 0,5% of applicants were eligible for the Social Fund for Water and they received an average of 132 euros. See Study on Human Rights and the Access to Water, note 2 above at 3. Today, the intervention platform is set at 188 euros per year, plus 54 euros per person beyond the third member, and this amount is updated on a yearly basis. The amount of this fund has been increased since its constitution. See P. Boury, Tarification de l'eau en Belgique - Un accès équitable à l'eau 2 (Paper presented at the Journée Scientifique et technique ENGEES-CEMAGREF, entitled 'Les politiques d'accès à l'eau des public défavorisés mises en oeuvre ici et ailleurs: regards croisés', 22 January 2008).

16 See Article 2.2, Ordonnance réglementant la fourniture d'eau alimentaire distribuée par réseau en région bruxelloise, 8 September 1994, *Moniteur belge*, 29 September 1994 [hereafter Ordonnance 1994].

17 See Smets (2005), note 5 above at 33.

18 This is divided in four bands depending on the amount of domestic water consumed. They are: the vital tariff - from 0 to 15m³/year - which is 0,80 euro/m³; the *Social* tariff - from 15 to 30m³/year - which is 1,39 euros/m³; the normal tariff - from 30 to 60m³/year - which is 2,06 euros/m³; and the comfort tariff - from 60 m³/an and more - which is 3,06 euros/m³. These bands are calculated on an individual basis in order to equitably value the water consumption and to implement water saving. See Intercommunale bruxelloise de distribution d'eau (IBDE), available at <http://www.ibde.be>.

19 The water cost for sanitation consumption is nearly 0,43 euro/m³. *Id.*

20 Since 2003, this tax is refunded to people living alone and that have an annual income lower or equal to 700 euros/month; to households that have an annual income lower or equal to 934 euros, and to people with at least 66% of handicap.

Concluding this overview, it is important to notice that the progressive pricing mechanism introduced into the Belgian legislation contributes to social and economic goals, even in response to general concerns about affordability of water for households. The normative framework seeks to ensure that everyone has effective access to water services. People in need will not be disconnected and the price of water will be affordable to poor households throughout a structured system of cross-subsides and solidarity payments. Therefore, despite differences, all regional regulations reflect the idea that water is a public good with a strong social dimension.

II. THE RIGHT TO WATER IN THE CASE LAW OF THE COURT OF ARBITRATION OF BELGIUM

Generally speaking, the case law concerning the right to have access to drinking water is rather scarce. Many cases are only related to the division of competencies, technical and detailed aspects of the norms rather than on fundamental rights as such, and on the right to water in particular. However, in 1996, the Court of Arbitration of Belgium had an opportunity to rule on it for the first time in the Brussels region, in *A.s.b.l. Syndicat national des propriétaires et autres* case.²¹

This case involved the 1994 regional ordinance of the Brussels-Capital region which ruled that water distribution companies do not have the right to disconnect tenants who do not pay their water bill.²² However, they are entitled to account the water bill to the landlord.²³ As a consequence of this ordinance, an association of owners filed a petition to the Court of Arbitration of Belgium asking for nullification of the norm in question. They argued that owners should not be forced to pay for water that has been exploited by tenants. They based their claim on an alleged breach of Articles 10 and 11 of the Belgian Constitution.²⁴ In fact, they argued that everyone has to bear the costs of their own consumption, and not to pay for someone else's use of water services. They asserted therefore a violation of the principles of equality and non-discrimination.

In its judgment the Court did not agree with this request of nullification. Judges established that each owner had the right to connect their property to the water distribution system and even to rent the property or not. Of course, the primary obligation to pay water bills falls on the tenant. Nevertheless, the Court considered that access to a minimum of drinking water and sanitation is a fundamental right. As a result, even if the tenant is not able to pay, the access to basic water services must continue to be guaranteed to them and, thus, the owner is still solidarily obliged towards the water company.²⁵ This means that, in case of insolvency of the tenants, the company has the right to account the bill to the owner on the basis of their decision to connect their property to the distribution system in the first place and, thereafter, to rent it.

The Court specified that, on the basis of Article 2 of the regional ordinance, every resident of a house connected to the distribution network had the right to receive water for domestic consumption. This provision matches two objectives. The first one is 'to guarantee the best conditions for implementing the public task of water distribution, and the second one is to consecrate the absolute right to drinking water supply'.²⁶ This judgment aims, therefore, to seek 'a balance between the economic interests of the distribution company and the full realisation of the right to water for everyone'.²⁷

As already mentioned, Belgian Courts have ruled in only a limited number of cases involving access to drinking water and sanitation. Nevertheless, the ruling in *Commune de Wemmel* case is another fundamental decision of the

21 *A.s.b.l. Syndicat national des propriétaires et autres*, Cour d'Arbitrage de Belgique, Arrêt N°9/1996, 8 February 1996, *Moniteur belge*, 1996(02)00035 [hereafter *Syndicat national des propriétaires*].

22 See Article 5.2, Ordonnance 1994, note 16 above.

23 *Id.* Article 3.2.

24 Article 10, [equality], Constitution of Belgium: '(1) There are no class distinctions in the State.

(2) Belgians are equal before the law; they are the only ones eligible for civil and military service, but for the exceptions that could be made by law for special cases'. Article 11, [non discrimination and minorities], Constitution of Belgium: 'Enjoyment of the rights and freedoms recognised for Belgians should be ensured without discrimination. To this end, laws and decrees guarantee notably the rights and freedoms of ideological and philosophical minorities'. (English version available at http://www.fed-parl.be/constitution_uk.html)

25 See Section I, Para. III, 2, *Syndicat national des propriétaires*, note 21 above at 3.

26 Para. B.5, *Syndicat national des propriétaires*, note 21 above at 11 (free translation by the author).

27 *Id.*

Court of Arbitration of Belgium on water issues.²⁸ This case concerned the legal framework for drinking water in the Flemish region. Having set a minimal amount of 15 m³ of drinking water free of charge, which every person is entitled to, an increase in water tariffs over this specific amount was noted according to the ratio of full-cost recovery. In 1998, one of the members of an inter-municipal drinking water company opposed this new regulation, arguing that it interfered with the competence of the municipal water companies over the determination of the price of water.

In its judgement, the Court of Arbitration stated that Flanders has the right to introduce this free amount, according to its exclusive competence concerning water production and distribution as well as pricing and incomes policies.²⁹ The Court ruled that the new regulation pursued two aims. Firstly, it implemented the right of everyone to have a minimum access to drinking water, which arises from Article 23 of the Belgian Constitution, and also from Agenda 21 of 1992. Secondly, the progressive mechanism promoted rational water consumption and thus a decrease of wasted water. According to this judgement, both these aspects contributed to realise the right to enjoy a healthy environment, which was guaranteed by Article 23 of the Constitution. In fact, a free supply of water would cause a natural increase in prices for larger consumption and, therefore, it would encourage people to save water and moderate consumption.

III. THE WATER RESOLUTION AND THE CONSTITUTIONAL REVISION

In April 2005, the Belgian Federal Government adopted the *Water Resolution*, which recognises access to safe drinking water as a human right that should be included in the Constitution.³⁰ This resolution is grounded on a number of premises.

Firstly, water, however indispensable for life, is scarce in many areas of the world and the water crisis strikes in particular the poorest developing countries. At the same time, today international obligations are set up to the purpose of officially recognising the right to water as a fundamental human right and guaranteeing equitable conditions in access to water without any discrimination.³¹ The Resolution even refers to the realisation of the right to water as an instrument to achieve other Millennium Development Goals, such as fighting poverty, improving public health, and decreasing children and women mortality.

Secondly, the Belgian Federal Government argues that privatisation and the principle of full-cost recovery do not produce positive results and even lead to a rise in water prices. This rise risks affecting affordability of water for households in need, and it can also lead to a decrease in water quality. In this process, a key-role is played by international institutions, such as the World Bank and the International Monetary Fund, which are overall in favour of privatisation and liberalisation of drinking water services all over the world. Conversely, the Belgian regional parliaments and the European Parliament support the implementation of water as a public good and they claim the exclusion of water services from liberalisation or privatisation processes.

Thirdly, The Water Resolution welcomes the civil society's commitment to support the human right to water. In fact, between 2001 and 2002, 120.000 Belgian citizens and institutions have signed the Belgian Water Manifesto, which would ultimately be enclosed to the works for the World Summit on Sustainable Development in Johannesburg in 2002.

Given these premises, the Federal Government has been asked to consecrate the right to sufficient drinking water - in quantity and quality - as a fundamental human right and to take all necessary measures to enshrine this right within the Belgian Constitution. The resolution also pushes towards the recognition of specific state obligations to guarantee the realisation of this fundamental entitlement.

To put into practice these objectives, the Resolution focuses on some core principles, such as the development of sustainable technologies, users' participation and cooperation, integrated water management, natural monopoly for water services, principle of universal access to water, equitable and non discriminatory approach, and decision

²⁸ *Commune de Wemmel*, Cour d'arbitrage, Arrêt N°36/1998, 1 Avril 1998, *Moniteur belge*, 24 April 1998.

²⁹ *Id.* para. B.4.2, at 13.

³⁰ See *Chambre des Représentants de Belgique*, 14 March 2005, Proposition de Résolution 'Accès à l'eau pour chacun', texte adopté par la Commission spéciale mondialisation (Doc. 51 1666/002).

³¹ See Committee on Economic Social and Cultural Rights, General Comment No. 15 (2002), The Right to Water (Arts. 11 and 12 of the International Covenant on Economic Social and Cultural Rights), UN Doc. E/C.12/2002/11 (2002).

making power to regions in the distribution process. As a consequence, it suggests withdrawing from financial aids, loans or other instruments aimed to enhance privatisation or liberalisation and condemning all forms of illicit appropriation and privation of drinking water as obstacles to the universality of the right to water.

On the basis of the Water Resolution, a constitutional revision has been proposed to the Belgian Senate.³² This project consists of adding a new paragraph to Article 23 on economic, social and cultural rights. This new paragraph would recognise ‘the right to an adequate water supply, sufficient in quality and quantity’ as one of these constitutional entitlements.³³

The reform initiative considers that ‘water is an indispensable element for sanitation and health. The public management of this sector is indispensable in guaranteeing equal access and supply’, arguing that ‘it is a collective responsibility to ensure to every human being access to water, in quality and quantity sufficient to lead a life in conformity with human dignity’.³⁴ This bill states that ‘the official recognition of the right to water in the constitution is an important step towards the concretisation of this right’.³⁵

In January 2006, the Senate asked for an opinion on this bill to the Federal Council of Sustainable Development (CFDD). The Council stated the vital importance of the right to drinking water. Members in favour of the constitutional revision argued that, considering the growing importance of access to water for everybody, it was necessary to recognise this right, not just implicitly but also explicitly, as a fundamental right. However, some members considered that the constitutional recognition of the right to water is not a natural consequence of the central value of water. Therefore, its inclusion in the Constitutional text is not a priority for Belgium. They considered that in Belgium access to water and satisfactory water quality are ensured within a solid framework, both at a European and at a domestic level, and that it was even clearly considered as a political concern. In addition, they thought that Article 23.2 actually included the right to water in its current interpretation. The right to water would be implicitly included in the right to health, and also as a component of the right to live in a healthy environment. As a result, according to this opinion, the addition of a new paragraph to the Constitution was not necessary, because people had already an effective access to drinking water, which was the main objective of that initiative.³⁶ Today this text is still pendent at the Parliament, but if such a constitutional revision takes place, Belgium would be the first European Union countries to include the right to water in its Constitution.³⁷

FINAL REMARKS

This overview of the human right to water in Belgium leads to formulate three observations. Firstly, every Belgian region has included the right to drinking water and sanitation within its own legislative framework, and even the jurisprudence of the Court of Arbitration has ruled on its realisation under the ‘constitutional shelter’. Nevertheless, this right is not yet recognised as a compelling entitlement at a national level. Belgium is however in process to recognise the right to water and sanitation as a fundamental constitutional right.

Secondly, there is an evident social concern in guaranteeing the realisation of this right at the regional level. In fact, following a social and equitable objective, the legal structure of the right to have access to water at the regional level is characterised by several legal solutions that highlight this aspect. The individual approach for the free water quota, the judicial guarantees in the disconnection proceeding, the regional Social Water Funds, the cross-subsidy instruments and the exoneration of poorest from paying sanitation taxes confirm this tendency.

Thirdly, the recent bill towards including the right to water as an independent right in the Constitution is contributing to the coherence of this system. This provision within the constitutional text would give the right to water an official recognition and ensure full implementation.

32 See Chambre des Représentants de Belgique, 11 February 2008, Révision de la Constitution, Révision de l’Article 23 de la Constitution en vue de consacrer le droit à l’eau (déposé par Mme Karine Lalieux, MM. Dirk Van der Maelen et Jean Cornil), Doc. 52 0788/001, 5 (free translation by the author).

33 *Id.* at 5 (free translation by the author).

34 *Id.* at 4 (free translation by the author).

35 *Id.*

36 See Conseil Fédéral du Développement Durable (CFDD), Avis sur la révision de la Constitution concernant le droit à l’eau, *CFDD INFO - Bulletin d’information du Conseil Fédéral du Développement Durable*, n. 26 (March 2006), available at http://www.belspo.be/frdocfd/DOC/pub/ad_av/2006/2006a04f.pdf.

37 See Constitution of Greece, art and Constitution of Romania, art

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