

CONGRESS OF LOCAL AND REGIONAL AUTHORITIES OF EUROPE

Opinion 17 (2002)¹ on the second draft world charter of local self-government

The Congress, bearing in mind the proposal of the Chamber of Local Authorities,

1. Having regard to:

a. Opinion 12 (1999) of the CLRAE on the initial draft world charter of local self-government (hereafter world charter);

b. Recommendation 98 (2001) of the CLRAE on the draft world charter of local self-government – state of discussions;

c. the progress report on the preparations of the proposed world charter of local self-government of 20 April 2000, prepared for the Preparatory Committee for the Special Session of the General Assembly of the United Nations Organisation (hereafter UN or United Nations), for an overall review and appraisal of the implementation of the Habitat Agenda (see Appendix II);

d. the second draft world charter, as it emerged from the regional consultations organised under United Nations auspices (see Appendix III);

e. the decision taken on 16 February 2001 at the 18th session of the United Nations Commission on Human Settlements, and particularly the proposed international framework for decentralisation and strengthening of local authorities and their networks, for the purpose of implementing the Habitat Agenda (including the idea and the necessity of a world charter of local self-government and other concepts);

f. the Declaration on Cities and Other Settlements in the New Millennium, adopted by the General Assembly of the UN at the special session for an overall review and appraisal of the implementation of the Habitat Agenda, held in New York from 6 to 8 June 2001;

g. the decision of the General Assembly of the UN to change the Commission on Human Settlements and its secretariat of the United Nations Centre for Human Settlements, as well as its Foundation, into the United Nations Programme for Human Settlements, with effect from 1 January 2002;

2. Welcoming the role played by the international associations of local authorities in promoting the draft world charter;

3. Regarding the changes and additions made to the initial draft world charter at the 2nd expert meeting, held in Nairobi on 13 and 14 April 2000, as globally positive;

4. Welcoming the effort made by the authors of the second draft world charter to give the text that political dimension which it wished to see strengthened when it adopted Opinion 12 (1999);

5. Noting that, in general, the new version reflects a wish for greater clarity that, on the whole, helps to ensure that fuller account is taken of the interests of local authorities, and favours the growth of decentralisation;

6. Particularly welcoming the fact that the authors of the second draft world charter have taken account of the views which it expressed, in Opinion 12 (1999), on strengthening the political dimension, referring to the various levels of self-government, clarifying the provisions on supervision, and explaining the provisions on finance;

7. Agreeing with the authors of the second draft world charter, who refer, in the preamble, to the Universal Declaration of Human Rights, thus recognising that local democracy is a fundamental right;

8. Supporting the idea, reflected in the preamble, that the necessity of strengthening local authorities matches the need for freedom, dignity and sustainable development;

9. Welcoming the inclusion, in the preamble to the new version of the world charter, of provisions that explain the subsidiarity principle and envisage promoting decentralisation through “democratic local authorities”, and no longer just “local authorities”;

10. Welcoming the distinction made between supervision of own powers – which is simply concerned with ensuring that legality is respected – and supervision of delegated powers;

11. Noting, in this connection, that the term “transferred”, which the authors apply to local authorities’ own tasks and responsibilities, is not entirely the right one, may give rise to discussion, and may also be confused with the concept of transferred resources;

12. Welcoming the text’s insistence that the extent of supervision must always be commensurate with the interests that it is intended to protect;

13. Welcoming, in the new Article 9, the concept of a broad variety of resources, and that of adequacy of both own and transferred resources;

14. Welcoming, too, the concept of sustainability of resources, and the text’s making of the point that resources must aim at financial autonomy;

15. Reaffirms its support for the draft world charter’s preparation process;

16. Hopes that dialogue on the draft world charter will continue within the appropriate United Nations forum, and that the international associations of local authorities will be closely involved in it;

17. Reaffirms its readiness to lead the constructive dialogue, which began in its Chamber of Local Authorities in 2001, with associations of local authorities in states that

have indicated that they are opposed to the draft world charter;

18. Considers that the conditions for accession to the future world charter, set out in the second draft, might usefully be made less stringent, and suggests that various degrees and levels of accession be envisaged;

19. Suggests that certain states' opposition to the world charter might be overcome by aiming at a short and precise but flexible text capable of adjusting to various institutional contexts;

20. Considers that the best way of achieving this would be to focus such a text on the constitutional, political and administrative dimensions;

21. Considers that in addition to the institutional aspects that define the scope of political principles of the draft world charter, it would be advisable to refer to the principles of "good governance" and that in this respect the European Urban Charter could be a valuable source of inspiration;

22. Urges the member states of the Council of Europe to use their best efforts to ensure that the drafting process is directly discussed at the appropriate United Nations level;

23. On improvements to the text, and on new ideas and their implications, refers to the more detailed points made by the rapporteurs with the assistance of the Chair of the Group of Independent Experts on the European Charter of Local Self-Government (see Appendix I).

Appendix I

Introductory comments

The Chamber of Local Authorities has decided to inform the Congress of Local and Regional Authorities of Europe of the world charter of local self-government for the third time.

The Congress first became involved when that same Chamber asked it for an opinion on the first version, which had been prepared mainly at the instigation of the International Union of Local Authorities (IULA) as part of the work of the United Nations Commission on Human Settlements (UNCHS Habitat). On the strength of Mrs Gaye Doganoglu's report, the Congress adopted Opinion 12 on the initial draft world charter of local self-government on 17 June 1999.

This document summarised the background to this major initiative, and all the documents essential to an understanding of its scope and significance were appended. The Congress said that it "agreed in principle" with the approach followed, and declared that it was "prepared" to participate in the drafting process. At the same time, it made a number of comments designed, in particular, to increase the text's impact on the development of local self-government. For this purpose, it instructed two of its members – Dr Gerhard Engel as a member of the Institutional Committee of the Chamber of Local Authorities, and Mr Alan Lloyd for the Bureau of the Chamber – to follow subsequent work on the text.

On 30 May 2001, Dr Engel and Mr Lloyd submitted a report (CPL (8) 5, part II) to the Chamber of Local Authorities on the state of the discussion. This report highlighted the extensive consultation that had taken place, particularly at eight regional meetings, and the changes to the text that had ensued, resulting in a "second version".

The rapporteurs also spoke, however, of diplomatic difficulties which had arisen at the very moment when it seemed reasonably likely that this version might, as had been hoped, be tabled for discussion by the United Nations General Assembly in September 2001 – which would have marked the first milestone in the process.

This report generated Recommendation 98 (2001) and Resolution 118 (2001) on the draft world charter of local self-government – state of discussions, which took note of the progress made on basics,² but regretted that the Commission on Human Settlements had been unable, at its latest meeting, to turn "the so far informal dialogue into a formal intergovernmental dialogue with the participation of the associations".

In conclusion, the Congress welcomed the role played so far by international associations of local authorities in promoting the draft world charter, reaffirmed its support for the process and instructed the Institutional Committee of the Chamber of Local Authorities "to prepare an opinion on the second draft world charter, with a view to transmitting it to the United Nations".

This document is intended to help it to do that.

Opinion 12 had grouped the CLRAE's main comments on the initial draft under five main headings, each of them corresponding to a set of provisions in the text. These comments were naturally based on the European Charter of Local Self-Government (hereafter, the European Charter), to which the authors of the draft world charter openly acknowledged their debt. The five sections dealt with: changes made necessary by the "world" context into which the future charter will fit; changes stemming from the framework of the UNCHS's activities; changes and additions based on observing the implementation of the charter in practice; drafting changes; articles taken over from the European Charter which might have been changed to take account of the results of the monitoring system.

The second text, produced by the independent experts at their 2nd meeting (Nairobi, 13 and 14 April 2000) keeps the triple structure of the first draft and the twenty-three initial articles, but makes various changes and additions which can, overall, be regarded as positive. For one thing, the changes take a number of definite steps towards giving the text that "political" dimension which the Congress wished to see strengthened.

1. Action on the CLRAE's comments

This is particularly noticeable on four crucial points: strengthening the political dimension, the reference to various levels of self-government, clarification of the provisions on supervision, and spelling-out of the provisions on finance.

1.1. Allowing for the political dimension of local self-government

This is particularly noticeable in the preamble, of which Opinion 12 regretted that it “only really incorporates one paragraph from the preamble to the European Charter, on roles and responsibilities (the last paragraph of the proposed text of the preamble to the world charter)”. The opinion goes on: “It would be useful for the preamble to be enlarged to express the need for, and importance of, strengthening values linked to local self-government at world level, these values being of a universal nature because they are embodied in a philosophy of protecting and promoting human rights”.

The preamble has in fact been radically recast. The reference to the Universal Declaration of Human Rights has been placed at the beginning, and a new and vital principle has been introduced – that whereby signatory states recognise “that local democracy is a fundamental right”. They declare themselves “convinced of the need to strengthen local authorities for the realisation of the universally recognised objectives of freedom, dignity and sustainable development” – connecting local self-government with very broad objectives, which are themselves in line with the United Nations’ natural concern for development. This connection reinforces the universal implications of self-government and is also the source of various allusions that recur throughout the text, particularly in two other paragraphs in the preamble. One of these notes a link between participation at local level and the “interests of the urban poor, of disabled citizens and of the indigenous population, their social inclusion [and] racial equality”. The other notes the importance of “strong local authorities” and of promoting “economic development”.

The allusion to the subsidiarity principle in the initial draft is amplified in terms which bring the new preamble closer to the preamble to the European Charter, “public tasks and responsibilities shall be exercised by those authorities which are closest to the citizens”, while promoting decentralisation is now seen very clearly as a matter for “democratic local authorities”, and not just “local authorities”.

1.2. The reference to the “regional level”

Referring to co-operation, the preamble says that this can obviously be a matter for local authorities, but not just national governments. An intermediate level of government, which it calls “provincial”, may also be involved. This reference to a level of government that is neither local nor national appears in Article 4, which deals with the scope of local self-government, and particularly the allocation of powers and responsibilities (paragraph 4). It is, of course, implicit in Article 8, paragraph 3, which deals with delegated tasks, and Article 11, paragraph 2, which deals with prior consultation of local authorities.

1.3. The provisions on supervision

In its previous opinion, the Congress noted that “Concerns directly linked to the need for practical application of a policy of ‘human settlements’ appear to have prompted the

authors to depart from the very spirit of the charter”. This comment was clearly taken into account, particularly in Article 8, which – as in the European Charter – deals with supervision.

The wording has been changed to make a clear distinction between supervision of own powers (called “transferred” powers³), whose only purpose is to ensure legality, and supervision of “delegated” powers.

The text specifies that the extent of supervision must always be commensurate “with the interests which it is intended to protect” (Article 8, paragraph 4).

On the other hand, the suggestion that Article 8, paragraph 5, which covers the suspension and dissolution of councils, and the dismissal of elected representatives, should provide for an adversarial procedure has been ignored. It will be remembered, however, that the inclusion of such a paragraph already marked an advance – which can only be welcomed – over the European Charter.

1.4. The provisions on funding

The new Article 9 introduces the concept of a broad variety of resources, and of adequacy of own and transferred resources. It is clearly stated that local authorities must be able to dispose of resources, whether own or transferred, freely.

Article 9, paragraph 2 introduces the concept of sustainability⁴ of resources, and says that these must aim at “financial self-reliance”.

2. Additions and changes to the text

The new text reflects a concern for clarity that leads, in some cases, to the insertion of new paragraphs (Article 8, paragraph 1) or usually, phrases which generally help to ensure that local authority interests are better protected, and encourage decentralisation.

2.1. Drafting improvements and comments

Like all changes, these additions can obviously be spelt out to make them clearer.

For example, although the right to regulate – essential, since it entitles local authorities to adopt regulations in areas for which they are responsible – has been dropped from the definition of local self-government given in the French version of Article 3, paragraph 1. Similarly, the wish to strengthen the powers of local authorities has produced a form of wording that certainly goes too far, since the right to manage extends to “all public affairs”.

This desire for clarity sometimes results in unnecessary repetition. For example, Article 4, paragraph 2 – usefully inserted to make a clearer distinction between general powers prescribed by the constitution and by law, and delegated powers – replaces “basic powers and responsibilities” (the European Charter’s concept) with “fundamental powers, duties and responsibilities”, which causes some confusion and gives the impression that powers and responsibilities for specific additional purposes are not always attributed by law. This is a vital question of

principle, and the fourth monitoring report on the European Charter settled it when it discussed responsibilities and clarified Article 4, paragraph 2 of that text by stating that local authorities (which are not federated entities) have no automatic responsibilities. The only powers they have are those accorded them by the constitution or by law – although both may define their responsibilities in general terms, leaving them free “to exercise their initiative with regard to all local matters which are not excluded by law from their competence nor assigned to any other authority” (Article 4, paragraph 1 of the world charter).

On the other hand, deciding how powers are to be divided between the various public authorities is entirely a matter for the authors of the constitution and the laws. When assigning a particular task to a particular body, the legislature must indicate whether this task is one of its “own”, and so subject only to supervision of legality, or whether it is delegated. This is a familiar problem in federal states, but it has, in recent years, become a source of confusion in new Council of Europe member states – and so needs the closest attention.

Similarly, although the words added to Article 4, paragraph 4 serve a useful purpose by bringing in the concept of full and exclusive powers (“avoiding competencies shared with other levels of government”), the idea that these powers may be limited only by regulations is new – and totally at odds with the principle of self-government. In fact, only laws may limit them.⁵

The other additions actually bring in new ideas, but one wonders whether they are really needed at this stage, and whether they may not jeopardise the aim of strengthening decentralisation.

2.2. The new ideas and their implications

This is true, first of all, of “good local governance” – a very new and modish concept. In fact, there has already been a Congress report on it, and anything the Congress says on it in future should be noted, with a view to expanding and developing the opinion on the initial draft world charter of local self-government. “Governance” includes the idea of effectiveness, but also – and above all – the idea of acting in concert with authorities that are not invariably elected. This was already a problem when the EU Commission’s white paper on governance was being analysed. It is important to ensure that vagueness born of lumping ideas together does not mar a new text.

The same applies to Article 7, paragraph 1, which says that the “conditions of office” of locally elected representatives must guarantee security, but also “good governance” in the free exercise of their functions.

The new paragraph added to Article 8, which says that “Local authorities shall be entitled and enabled to supervise and monitor their own performance and the governance of popularly elected representatives” is another matter. Here, the word “governance” adds nothing.

“Management” could be used instead. However, the main idea introduced by this new paragraph is interesting, since it brings in the notion of “internal monitoring”. In fact, the European Charter says nothing on this – which is a pity. Monitoring from the outside only perpetuates a system in which local authorities are “subject to” other authorities. Many countries, including Germany and the United Kingdom, have both internal and external monitoring, and encourage locally elected representatives to set up self-monitoring procedures.

These systems have the double advantage of obliging managers to keep a general eye on the effectiveness of their own management, and so increasing their capacity for dialogue with any external supervisory authorities. This addition, with slight changes in the wording, certainly embodies a useful idea, and is therefore justified.

The last basic changes inspired by the context in which the draft world charter was prepared comprise a whole series of references to social groups, under various names: “minorities”, “ethnic groups”, “the poor”, and even “races” or “indigenous peoples” – terms which may surprise in a general international text. While it is easy to see why these concepts were introduced, they must not – as the Congress has already noted – be allowed to interfere with the fundamental principle of democracy, which is based on individual responsibility. The concept of community can be accepted in connection with “positive discrimination” policies, but liberty of the individual must not suffer as a result. However, the presence of these terms in this document is almost certainly due to the context in which it was drafted.

Conclusions

To refocus the charter on its main objective, which is to inform, and to strengthen local and regional autonomy within states, it may be necessary to give it an independent impetus, so that it can realise its real potential.

It might be wise to adopt a reasonably pragmatic stance in both cases. Between the last version and the present one, for example, the conditions for acceptance have been made more stringent: every party is asked to consider itself bound by at least 30 paragraphs, instead of 20, of which 12 instead of 10, are compulsory.⁶

It would certainly be better to adopt another approach, which might be to insist on the basic idea of local self-government, which is “novel”, and not easily conceivable in many societies and institutional systems, and define its components as clearly as possible. For this purpose, the text should be short, precise yet flexible, and capable of adjusting to various institutional contexts, and its scope should be restricted to the constitutional, political and administrative dimensions.

Arrangements for adoption and ratification, on the other hand, should be open to negotiation, with a simple declaration or various levels of acceptance as the first step

(or last), universality being more important in this case than intensity (to some extent, the reverse of the situation in Europe).

Appendix II

Role of local authorities, other partners and relevant united nations organisations and agencies in the review and appraisal process

Progress report on the preparations of the proposed world charter of local self-government⁷

Appendix III

World Charter of Local Self-Government⁷

1. Debated and approved by the Chamber of Local Authorities on 4 June 2002 and adopted by the Standing Committee of the Congress on 6 June 2002 (see Doc. CPL (9) 3, draft opinion presented by Dr G. Engel and Mr A. Lloyd, rapporteurs).

2. Paragraph 16 of the report quoted paragraph 12 of the Istanbul Declaration, adopted at the second Habitat Conference in 1996, which had the merit of writing the importance of “promoting decentralisation through democratic local authorities” into an official UN process.

3. A term that may lead to discussion and to confusion with the concept of financial “transfers”.

4. The French translation is frequently inaccurate and may cause problems of interpretation. Ideally, it should be re-read from a strictly legal standpoint, and the translation of certain basic concepts be reviewed.

This is particularly true of “sustainability”, translated throughout as “durabilité”, a term which is wrong for finance, and should be replaced by “stabilité”. Another problem is use of the terms “communauté” or “communautaire”, which have very precise meanings in French, and do not necessarily match the English “community” (noun or adjective). In Article 10, paragraph 1, for example, “fulfilment of their function of community leadership” is translated as “mobilisation communautaire”, whereas “representation des différents groupes” would be a better rendering. Similarly, in the preamble, “organisations communautaires” goes further than “community organisations”, a term that denotes any group of citizens and is best translated, simply, as “organs de représentation”. Third example: the “local communities concerned”, which must be consulted before local authority boundaries are changed (Article 5), should not be translated as “communautés locales”, which is a fairly ambiguous term.

5. This may be another problem of translation. Let the reader decide: English text: “May not be limited by another authority except on the basis of regulations and guidelines as provided for by law”. French text: “Dans les limites de la réglementation et des lignes directrices prévues par la loi”. A better rendering would probably be: “Dans les limites définies par la loi ou en application de celle-ci”.

6. The change in Article 8 on supervision is puzzling. Previously, only supervision of legality (Article 8, paragraph 2) had to be accepted. Now only supervision of delegated powers has to be accepted, and this benefits states more than local authorities. This is certainly not the authors’ intention, and so the wording of Article 8, paragraph 3 itself should probably be adjusted.

7. This document can be found at <http://www.coe.fr/cplre>