



Explanatory Report to the European Charter of Local Self-Government

Strasbourg, 15.X.1985

I. The European Charter of Local Self-Government was drawn up within the Council of Europe 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. It was opened to signature as a convention by the member states of the Council of Europe on 15 October 1985.

II. The text of the explanatory report prepared on the basis of the committee's discussions and submitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Charter, although it may facilitate the understanding of its provisions.

A. Origins of the Charter

The European Charter of Local Self-Government is the culmination of a series of initiatives and many years of deliberation within the Council of Europe.

The protection and strengthening of local autonomy in Europe by means of a document expounding the principles subscribed to by all the democratic states of Europe is a longstanding ambition in local government circles. Moreover, it was recognised at an early stage that such a text should aim at securing the adherence of those whose actions are primarily at issue in any defence of local autonomy, namely governments.

The Council of Europe, as the custodian of human rights and the upholder of the principles of democratic government, was the obvious framework within which to draft and adopt such an instrument; all the more so because, as long ago as 1957, it showed its appreciation of the importance of local authorities by establishing for them a representative body at European level known as the Standing Conference of Local and Regional Authorities of Europe (CLRAE) ⁽¹⁾.

It was indeed the CLRAE which, in its Resolution 64 (1968), proposed a Declaration of Principles on Local Autonomy and called upon the Committee of Ministers of the Council of Europe to adopt it. This initiative was supported by the Consultative Assembly, which in its Recommendation 615 (1970) presented to the Committee of Ministers a text closely based on that of the CLRAE and drafted jointly by the two bodies. The proposed declaration was, however, of a rather too general and sweeping character for any firm action to be taken on it.

(*) As from 14 January 1994 the Standing Conference was transformed into the Congress of Local and Regional Authorities of Europe (CLRAE), as a recognition of its political significance

The new initiative of the CLRAE in 1981 was therefore based on a more flexible approach. But the view was also taken that a mere non-binding declaration of principles could not do justice to the importance of local autonomy or to the nature of the threats to which it is exposed. Rather, government must be asked to enter into binding commitments. The necessary flexibility to take account of the differences between national constitutional arrangements and administrative traditions was to be built in, not by excessively diluting the requirements of the new instruments but by allowing governments a degree of choice with regard to the provisions by which they would consider themselves bound.

The logical outcome of this approach was the submission to the Committee of Ministers, in CLRAE Resolution 126 (1981), of a draft European Charter of Local Self-Government with the request that it be adopted with the status of a European convention.

The Committee of Ministers decided to transmit the CLRAE's proposals to the Steering Committee for Regional and Municipal Matters (CDRM) with a view to their being discussed at the 5th Conference of European Ministers responsible for Local Government (Lugano, 5-7 October 1982). In their conclusions, the Ministers present at Lugano

"...consider that this draft Charter constitutes an important step towards a definition of the principles of local autonomy, while noting the reservations of some ministers about the need for a Charter in the form a binding convention and about some aspects of the content of the Charter;

ask the Committee of Ministers of the Council of Europe to instruct the Steering Committee for Regional and Municipal Matters (CDRM), in contact with the Conference of Local and Regional Authorities of Europe, to make the necessary changes to the draft European Charter of Local Self-Government in accordance with the comments concerning the form and the substance made during the conference, so that it may be submitted to them for approval at their next conference..."

The Committee of Ministers so instructed the CDRM, which thereupon carried out a thorough revision of the draft Charter. In application of the conclusions of the Lugano Conference, representatives of the CLRAE participated in the discussions.

The text of the draft Charter as revised by the CDRM was finally submitted to the 6th Conference of European Ministers responsible for Local Government, which met in Rome from 6 to 8 November 1984. After examining this text, the ministers expressed their unanimous agreement on the principles contained in it. With regard to the legal form which the Charter should take, a majority of ministers expressed themselves in favour of a convention.

In the light of the opinions of the Consultative Assembly and the Rome Ministerial Conference, the Committee of Ministers therefore adopted the European Charter of Local Self-Government in the form of a convention in June 1985. In recognition of the fact that the initiative for the Charter had originally come from the Standing Conference of Local and Regional Authorities of Europe, it was decided that the convention should be opened for signature on 15 October 1985 on the occasion of the CLRAE's 20th Plenary Session.

B. General remarks

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, which are closest to the citizen and give him the opportunity of participating effectively in the making of decisions affecting his everyday environment.

The Charter commits the parties to applying basic rules guaranteeing the political, administrative and financial independence of local authorities. It is thus a demonstration, at European level, of the political will to give substance at all levels of territorial administration to the principles of local self-government since its foundation by the Council of Europe, which considers its function to be the keeping of Europe's democratic conscience and the defence of human rights in the widest sense. Indeed, it embodies the conviction that the degree of self-government enjoyed by local authorities may be regarded as a touchstone of genuine democracy.

The Charter is in three parts. The first part contains the substantive provisions setting out the principles of local self-government. It specifies the need for a constitutional and legal foundation for local self-government, defines the concept and establishes principles governing the nature and scope of local authorities' powers. Further articles are concerned with protecting the boundaries of local authorities, ensuring that they have autonomy as regards their administrative structures and access to competent staff and defining conditions for the holding of local elective office. Two major articles aim at limiting administrative supervision of the activities of local authorities and ensuring that they have adequate financial resources at their disposal on terms which do not impair their basic autonomy. The remaining provisions in this part cover the right of local authorities to co-operate and form associations and the protection of local self-government by the right of recourse to a judicial remedy.

Part II contains miscellaneous provisions relating to the scope of the undertakings entered into by the parties. In accordance with the intention of securing a realistic balance between the safeguarding of essential principles and the flexibility necessary to take account of the legal and institutional peculiarities of the various member States, it permits the parties specifically to exclude certain provisions of the Charter from those by which they consider themselves bound. It thus represents a compromise between, on the one hand, acknowledgement of the fact that local self-government affects the structure and organisation of the state itself, which is a basic concern of government and, on the other hand, the objective of protecting a minimum of basic principles which any democratic system of local government should respect. Moreover, the commitments of the parties can subsequently be added to, whenever the relevant obstacles have been removed.

Potentially, the principles of local self-government laid down in the Charter apply to all the levels or categories of local authorities in each member state, and indeed also, *mutatis mutandis*, to territorial authorities at regional level. However, to allow for special cases, the parties are permitted to exclude certain categories of authorities from the scope of the Charter.

The Charter does not provide for an institutionalised system of control of its application, beyond a requirement for parties to supply all relevant information concerning legislative or other measures taken for the purpose of complying with the Charter. Consideration was indeed given to setting up an international system of supervision analogous to that of the European Social Charter. However, it was felt possible to dispense with complex supervisory machinery, given that the presence within the Council of Europe of the CLRAE with direct access to the Committee of Ministers would ensure adequate political control of compliance by the parties with the requirements of the Charter.

The last part of the text contains final provisions consistent with those customarily used in conventions drawn up under the auspices of the Council of Europe.

The European Charter of Local Self-Government is the first multilateral legal instrument to define and safeguard the principles of local autonomy, one of the pillars of democracy which it is the Council of Europe's function to defend and develop. It may be hoped that it will thus make a substantial contribution to the protection and enhancement of common European values.

C. Commentary on the Charter's provisions

Preamble

The preamble provides an opportunity for a statement of the basic premises underlying the Charter. These are, essentially:

- the vital contribution of local self-government to democracy, effective administration and the decentralisation of power;
- the important role of local authorities in the construction of Europe;
- the need for local authorities to be democratically constituted and enjoy wide-ranging autonomy.

Article 1

Article 1 expresses the general undertaking of the parties to observe the principles of local self-government laid down in Part I of the Charter (Articles 2-11), to the extent prescribed by Article 12.

Article 2

This article provides that the principle of local self-government should be enshrined in written law.

In view of the importance of the principle, it is further desirable that this should be achieved by including it in the fundamental text governing the organisation of the state, that is to say, the Constitution. However, it was recognised that, 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.

Account must also be taken of the fact that, in federal countries, local government may be regulated by the federated States rather than by the central federal government. For the federal States, this Charter in no way affects the division of powers and responsibilities between the federal State and the federated States.

Article 3

This article lays down the essential characteristics of local self-government as they are to be understood for the purposes of the Charter.

Paragraph 1

The notion of "ability" expresses the idea that the legal right to regulate and manage certain public affairs must be accompanied by the means of doing so effectively. The inclusion of the phrase "within the limits of the law" recognises the fact that this right and ability may be defined more closely by legislation.

"Under their own responsibility" stresses that local authorities should not be limited to merely acting as agents of higher authorities.

It is not possible to define precisely what affairs local authorities should be entitled to regulate and manage. Expressions such as "local affairs" and "own affairs" were rejected as too vague and difficult to interpret. The traditions of member states as to the affairs which are regarded as belonging to the preserve of local authorities differ greatly. In reality most affairs have both local and national implications and responsibility for them may vary between countries and over time, and may even be shared between different levels of government. To limit local authorities to matters which do not have wider implications would risk relegating them to a marginal role. On the other hand, it is accepted that countries will wish to reserve certain functions, such as national defence, for central government. The intention of the Charter is that local authorities should have a broad range of responsibilities which are capable of being carried out at local level. The definition of these responsibilities is the subject of Article 4.

Paragraph 2

The rights of self-government must be exercised by democratically constituted authorities. This principle is in accordance with the importance attached by the Council of Europe to democratic forms of government.

This right normally entails a representative assembly with or without executive bodies subordinate thereto, but allowance is also made for the possibility of direct democracy where this is provided for by statute.

Article 4

As was explained in the comments on Article 3, it is not possible, nor would it be appropriate to attempt, to enumerate exhaustively the powers and responsibilities which should appertain to local government throughout Europe. However, this article lays down the general principles on which the responsibilities of local authorities and the nature of their powers should be based.

Paragraph 1

Since the nature of local authorities' responsibilities is fundamental to the reality of local self-government, it is in the interests of both clarity and legal certainty that basic responsibilities should not be assigned to them on an *ad hoc* basis but should be sufficiently rooted in legislation. Normally, responsibilities should be conferred by the Constitution or an Act of Parliament. However, notwithstanding the use of the word "statute" in this paragraph, it is acknowledged that in certain countries some delegation by parliament of power to assign specific responsibilities, particularly in respect of details or of matters requiring implementation as a result of European Community directives, may be desirable for the sake of efficiency, provided parliament retains adequate powers of supervision over 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.

Paragraph 2

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. Where these fields of action have local implications and are not excluded from the general competence obtaining in most member states, it is important to the conception of local authorities as political entities acting in their own right to promote the general welfare of their inhabitants that they have the right to exercise their initiative in these matters. The general rules under which they may act in such cases may, however, be laid down by law. In certain member states, however, local authorities must be able to adduce statutory authority for their actions. A wide discretion beyond specific responsibilities can be given to local authorities under such a system, whose existence is to that extent comprehended by Article 4, paragraph 2.

Paragraph 3

This paragraph articulates the general principle that the exercise of public responsibilities should be decentralised. This principle has been stated on a number of occasions within the context of the Council of Europe and in particular in the Conclusions of the Lisbon Conference of European Ministers responsible for Local Government in 1977. This implies that, unless the size or nature of a task is such that it requires to be treated within a larger territorial area or there are overriding considerations of efficiency or economy, it should generally be entrusted to the most local level of government.

This clause does not imply, however, a requirement systematically to decentralise functions to such local authorities which, because of their nature and size, can only accomplish limited tasks.

Paragraph 4

This paragraph is concerned with the problem of overlapping responsibilities. In the interest of clarity and for the sake of avoiding any tendency towards a progressive dilution of responsibility, powers should normally be full and exclusive. However, complementary action by different levels of authority is required in certain fields and it is important that in these cases the intervention by central or regional authorities takes place in accordance with clear legislative provisions.

Paragraph 5

The administrative structures of local authorities and their familiarity with local conditions may make them appropriate bodies to implement certain functions, the ultimate responsibility for which falls on supra-local authorities. It is important, however, in order that recourse to such delegation does not excessively impinge on the sphere of independent authority of the local level, that the latter should, when possible, be allowed to take account of local circumstances in exercising delegated powers. It is recognised, however, 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.

Paragraph 6

Whilst paragraphs 1 to 5 deal with matters which come within the scope of local authorities, paragraph 6 is concerned both with matters coming within the scope of such authorities and with matters which are outside their scope but by which they are particularly affected. The text provides that the manner and timing of consultation should be such that the local authorities have a real possibility to exercise influence, whilst conceding that exceptional circumstances may override the consultation requirement particularly in cases of urgency. 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.

Article 5

Proposals for changes to its boundaries, of which amalgamations with other authorities are extreme cases, are obviously of fundamental importance to a local authority and the citizens whom it serves. Whilst in most countries it is regarded as unrealistic to expect the local community to have power to veto such changes, prior consultation of it, either directly or indirectly, is essential. Referendums will possibly provide an appropriate procedure for such consultations but there is no statutory provision for them in a number of countries. Where statutory provisions do not make recourse to a referendum mandatory, other forms of consultation may be exercised.

Article 6

Paragraph 1

The text of this paragraph deals not with the general constitution of the local authority and its council but rather with the way in which its administrative services are organised. Whilst central or regional laws may lay down certain general principles for this organisation, local authorities must be able to order their own administrative structures to take account of local circumstances and administrative efficiency. Limited specific requirements in central or regional laws concerning, for example, the establishment of certain committees or the creation of certain administrative posts are acceptable but these should not be so widespread as to impose a rigid organisational structure.

Paragraph 2

In addition to the appropriate management structures, it is essential to the efficiency and effectiveness of a local authority that it is able to recruit and maintain a staff whose quality corresponds to the authority's responsibilities. This clearly depends in large degree on the local authority's ability to offer sufficiently favourable conditions of service.

Article 7

This article aims at ensuring both that elected representatives may not be prevented by the action of a third party from carrying out their functions and that some categories of persons may not be prevented by purely material considerations from standing for office. The material considerations include appropriate financial compensation for expenses flowing from the exercise of functions and, as appropriate, compensation for loss of earnings and, particularly in the case of councillors elected to full-time executive responsibilities, remuneration and corresponding social welfare protection. 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.

Paragraph 3

This paragraph provides that disqualification from the holding of local elective office should only be based on objective legal criteria and not on *ad hoc* decisions. Normally this means that cases of incompatibility will be laid down by statute. However, cases have been noted of firmly entrenched, non-written legal principles, which seem to provide adequate guarantees.

Article 8

This article deals with supervision of local authorities' activities by other levels of government. It is not concerned with enabling individuals to bring court actions against local authorities nor is it concerned with the appointment and activities of an ombudsman or other official body having an investigatory role. The provisions are above all relevant to the philosophy of supervision normally associated with the *contrôle de tutelle* which have long been the tradition in a number of countries. They thus concern such 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.

Paragraph 1

Paragraph 1 provides that there should be an adequate legislative basis for supervision and thus rules out *ad hoc* supervisory procedures.

Paragraph 2

Administrative supervision should normally be confined to the question of the legality of local authority action and not its expediency. One particular but not the sole exception is made in the case of delegated tasks, where the authority delegating its powers may wish to exercise some supervision over the way in which the task is carried out. This should not, however, result in preventing the local authority from exercising a certain discretion as provided for in Article 4, paragraph 5.

Paragraph 3

The text draws its inspiration from the principle of "proportionality", whereby the 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.

Since access to judicial remedies against the improper exercise of supervision and control is covered by Article 11, precise provisions on the conditions and manner of intervention in specific situations have not been felt to be essential.

Article 9

The legal authority to perform certain functions is meaningless if local authorities are deprived of the financial resources to carry them out.

Paragraph 1

This paragraph seeks to ensure that local authorities shall not be deprived of their freedom to determine expenditure priorities.

Paragraph 2

The principle in question is that there should be an adequate relationship between the financial resources available to a local authority and the tasks it performs. This relationship is particularly strong for functions which have been specifically assigned to it.

Paragraph 3

The exercise of a political choice in weighing the benefit of services provided against the cost to the local taxpayer or the user is a fundamental duty of local elected representatives. It is accepted that central or regional statutes may set overall limits to local authorities' powers of taxation; however, they must not prevent the effective functioning of the process of local accountability.

Paragraph 4

Certain taxes or sources of local authority finance are, by their nature or for practical reasons, relatively unresponsive to the effects of inflation and other economic factors. Excessive reliance on such taxes or sources can bring local authorities into difficulties since the costs of providing services are directly influenced by the evolution of economic factors. It is recognised, however, that even in the case of relatively dynamic sources of revenue there can be no automatic link between cost and resource movements.

Paragraph 6

Where redistributed resources are allocated according to specific criteria set out in legislation, the provisions of this paragraph will be met if the local authorities are consulted during the preparation of the relevant legislation.

Paragraph 7

Block grants or even sector-specific grants are preferable, from the point of view of local authority freedom of action, to grants earmarked for specific projects. It would be unrealistic to expect all specific project grants to be replaced by general grants, particularly for major capital investments, but excessive recourse to such grants will severely restrict a local authority's freedom to exercise its discretion with regard to expenditure priorities. However, the part of total resources represented by grants varies considerably between countries, and a higher ratio of project-specific grants to more general grants may be considered reasonable where grants as a whole represent a relatively insignificant proportion of total revenue.

The second sentence of Article 9, paragraph 7, seeks to ensure that a grant for a specific purpose does not undermine a local authority's freedom to exercise discretion within its own sphere of competence.

Paragraph 8

It is important for local authorities that they have access to loan finance for capital investment. The possible sources of such finance will, however, inevitably depend on the structure of each country's capital markets; procedures and conditions for access to these sources may be laid down by legislation.

Article 10

Paragraph 1

This paragraph covers co-operation between local authorities on a functional basis with a view in particular to seeking greater efficiency through joint projects or carrying out tasks which are beyond the capacity of a single authority. Such co-operation may take the form of the creation of consortia or federations of authorities, although a legal framework for the creation of such bodies may be laid down by legislation.

Paragraph 2

Paragraph 2 is concerned with associations whose objectives are much more general than the functional considerations of paragraph 1 and which normally seek to represent all local authorities of a particular kind or kinds on a regional or national basis. The right to belong to associations of this type does not however imply central government recognition of any individual association as a valid interlocutor.

In a Council of Europe instrument of this type, 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, a number of which are active in the promotion of European unity along lines which accord with the aims laid down in the statute of the Council of Europe.

However, Article 10.2 leaves to individual member states the choice of means, legislative or otherwise, whereby the principle is given effect.

Paragraph 3

Direct co-operation with individual local authorities of other countries should also be permitted, although the manner of such co-operation must respect such legal rules as may exist in each country and take place within the framework of the powers of the authorities in question.

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, although some forms of co-operation need not be restricted to frontier areas.

Article 11

By recourse to a judicial remedy is meant access by a local authority to:

- a. a properly constituted court of law, or
- b. 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.

An instance has been noted in one country where, 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. This judicial remedy, which is available if the decision is based on a manifestly incorrect application of the law, is in accordance with the requirements of this article.

Article 12

The formulation of the principles of local self-government laid down in Part I of the Charter had to try to reconcile the wide diversity of legal systems and local government structures existing in the member states of the Council of Europe. Nevertheless, it is recognised that individual governments may still face constitutional or practical impediments to subscribing to particular provisions of the Charter.

This article accordingly adopts the "compulsory nucleus" system first established by the European Social Charter, by providing that the Parties to the European Charter of Local Self-Government are required to subscribe to at least twenty of the thirty paragraphs of Part I of the Charter, including at least ten from a nucleus of fourteen basic principles. However, as the ultimate aim remains compliance with all the provisions of the Charter, the Parties are specifically enabled to add to their undertakings as and when this becomes possible.

Article 13

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. They potentially apply also to regional authorities where these exist. However, the special legal form or constitutional status of certain regions (in particular the member states of federations) may preclude their being made subject to the same requirements as local authorities. Furthermore, in one or two member states there exists a category of local authorities which, because of their small size, have only minor or consultative functions. To take account of such exceptional cases, Article 13 permits the Parties to exclude certain categories of authorities from the scope of the Charter.

Article 14

This article is intended to facilitate the monitoring of the application of the Charter in the individual Parties by creating an obligation for the latter to supply relevant information to the Secretary General of the Council of Europe. Especially in the absence of a specific body responsible for supervising the implementation of the Charter, it is particularly important that information should be available to the Secretary General concerning any changes of legislation or other measures which have a significant impact on local autonomy as defined in the Charter.

Articles 15 to 18

The final clauses contained in Articles 15 to 18 are based on the model final clauses for conventions and agreements concluded within the Council of Europe.