



Explanatory Report to the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority

Utrecht, 16.XI.2009

I. The Additional Protocol was drawn up within the Council of Europe by the European Committee for Local and Regional Democracy (CDLR). It was opened to signature as a convention by the States signatories to the European Charter of Local Self-Government on 16 November 2009.

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 Additional Protocol, although it may facilitate the understanding of its provisions.

A. Origins of the Additional Protocol

The Preamble of the European Charter of Local Self-Government itself, adopted and opened for signature on 15 October 1985, recognises 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. The Charter itself does not include substantive provisions on the topic.

The Additional Protocol to the European Charter of Local Self-Government on democratic participation is, in terms of standard setting, the culmination of more than two decades of intergovernmental work by the Council of Europe on democratic participation at local level.

As early as in 1978, the European Ministers responsible for Local Government at their 3rd meeting (Stockholm, 7-8 September 1978) adopted a resolution concerning citizen participation at the municipal level. The same topic appeared in the conclusions of their 4th meeting (Madrid, 21-23 May 1980).

In addition to numerous reports prepared by the CDLR, the Committee of Ministers over the years adopted a number of recommendations to member States pertaining to the topic, all prepared by the CDLR:

- Recommendation R(81)18 concerning participation at municipal level;
- Recommendation R(96)2 on referendums and popular initiatives;
- Recommendation Rec(2001)19 on the participation of citizens in local public life.

Following the adoption by the Committee of Ministers of Recommendation Rec(2001)19, the CDLR agreed to keep the implementation of this recommendation under review as well as to explore possible further steps, including standard-setting.

The Conference of European ministers responsible for Local and Regional Government at its 14th session in Budapest (24-25 February 2005) adopted the Budapest Declaration in which ministers agreed “to make delivering good local and regional governance an essential objective to be pursued by our member States in order to respond to the challenges facing our societies and meet the legitimate expectations of our citizens”.

In the Budapest Agenda, adopted at the same occasion and subsequently endorsed by the Third Summit of Heads of State and Government of the member States of the Council of Europe (Warsaw, 16-17 May 2005), the Ministers identified the challenges and actions to be taken in the period 2005-2010.

“Responding to the changing ways in which citizens engage in public life at local level and, in some cases, the decreasing willingness to do so” figured among the challenges identified. In order to address this challenge, the Ministers agreed “to examine the desirability and feasibility of introducing convention-based legal standards on the participation of citizens in public life at local and regional level”.

The CDLR and its sub-committee of Experts on Democratic Participation and Public Ethics (LR-DP) worked on this subject, first by examining the different options for the types of convention it would be possible to prepare and subsequently by developing concrete proposals for substantive provisions.

At the 15th session of the Ministerial Conference, which took place in Valencia (15-16 October 2007), the Ministers gave a decisive political impetus to the process. They declared:

“2. The European culture of democratic participation of citizens in local public life constitutes an essential feature in our common understanding of and commitment to 21st century democracy in our continent. It therefore deserves to be enshrined in a pan-European legal instrument such as a convention. On this basis, we ask that the preparation of a draft Additional Protocol to the European Charter of Local Self-Government (ETS 122) be brought to a successful conclusion with a view to submitting it to the Committee of Ministers for approval and opening for signature and ratification before 31 December 2008.

3. This Protocol should reflect and respect the wealth and diversity of participatory techniques and procedures established in national, regional or local legislation and cover the following topics:

- the right to participation in public life at local level;
- the right to information from local authorities;
- the duties of local authorities to enable the exercise of these rights”.

The CDLR, assisted by the LR-DP Committee and, as from 2009, its successor, the Committee of Experts on Good democratic governance at local and regional level (LR-GG), took forward the drafting work which was completed in April 2009. The draft of the protocol was approved and sent by the CDLR to the Committee of Ministers in April 2009.

The Ministers' Deputies adopted the Additional Protocol on 9 September 2009 and opened it for signature by member States Party to the Charter at the 16th session of the Council of Europe Conference of Ministers responsible for Local and Regional Government, on 16 and 17 November 2009 in Utrecht.

B. General remarks

The Additional Protocol aims to bring within the scope of the Charter the right of everyone to participate in the affairs of a local authority.

The establishment of an individual right to participate in the affairs of a local authority reflects a long-term societal development in European States. All countries, in different ways and to differing degrees, have come to recognise the fundamental importance of citizens being engaged and involved in public life. Democratic institutions should not be designed and cannot be sustained without taking on board the fundamental role and place of citizen participation.

Three main reasons are recognised for making this so. Firstly, participation is crucial to help sustain the legitimacy of decisions and deliver accountability. A second key argument is that public authorities need to listen and learn in order to design better policies and services. Finally, participation has an intrinsic value. It gives a sense of belonging and makes local communities places where people want to live and work, now and in the future.

Based on these considerations it was felt that the Charter, which commits the Parties to applying basic rules guaranteeing the political, administrative and financial independence of local authorities should also offer member States Party to the Charter the possibility to extend the scope of their international legal obligations to include certain rights for individuals at local level.

The addition of rights for individuals at local level does not in any way mitigate nor dilute the fundamental importance and validity of existing provisions of the Charter. The Charter embodies the conviction that the degree of self-government enjoyed by local authorities may be regarded as a touchstone of genuine democracy. By adding rights of individuals to the possible substantive provisions of the Charter its role as a beacon for democracy can only be enhanced.

The initial approach to this Additional Protocol, namely to include the right of access to the official information of a local authority, was abandoned because the adoption and opening for signature by the Committee of Ministers of the Council of Europe Convention on the Access to Official Documents (CETS No. 205) on 27 November 2008 was deemed to render the inclusion of such a specific provision in the current Additional protocol unnecessary.

C. Commentary on the Additional Protocol's provisions

Preamble

The short Preamble succinctly sets out the reasons for adopting this Additional Protocol. The reference to the Council of Europe Convention on the Access to Official Documents was included to underline the substantive link between the two instruments (see also the general remarks above).

Article 1 – Right to participate in the affairs of a local authority

Paragraph 1

The first paragraph sets out the main substantive provision and is cast in the form of an individual right.

Paragraph 2

The second paragraph sets out the content of the individual right to participate in the affairs of a local authority.

Paragraph 3

The third paragraph requires a Party to the Additional Protocol to establish and/or maintain a legislative framework that facilitates the right to participate in the affairs of a local authority. This framework need not provide for uniform measures, but may provide for measures that differ according to objective circumstances of people and/or of local authorities. An explicit stipulation is included to rule out that differentiation leads or amounts to discrimination.

Paragraph 4.1

This paragraph guarantees at international level the right of nationals of the Party to participate, as voters or candidates, in the election of members of the council or assembly of a local authority in which they reside. No such international guarantee is provided elsewhere. Article 3 of the first Additional Protocol to the European Convention of Human Rights concerns only elections for the legislature. Article 3 paragraph 2 of the Charter provides for the democratic election of local councils but is not cast as an individual right.

The word “nationals” was preferred to that of “citizens” in order to use the same terminology as in the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level (ETS 144).

It should be noted that this article does not open an unconditional right for the benefit of the nationals of each Party to participate as voters or as candidates in the elections of the local authority in question.

In fact, in conformity with paragraph 5.1 and following, the Parties may establish conditions, formalities and restrictions to the exercise of this right.

Thus, paragraph 4.1 makes it possible to open the right to vote only to persons who have the citizenship of the state Party and who are in the enjoyment of their civil and political rights in accordance of the national rules in force.

At the same time, it is up to the applicable electoral law of the state Party to determine the criteria of eligibility of nationals to functions of responsibility in local authorities.

Paragraph 4.2

The guarantee at international level contained in the previous paragraph is limited to nationals of the Party who reside within the area of the local authority.

The purpose of the current paragraph is to make clear that the Additional Protocol does not oppose the granting of electoral rights by the Party to other persons, such as nationals not resident in the local authority or non-nationals. If the Party chooses to grant such a right, this provision requires it to do so by law.

This paragraph does thus not provide for an individual electoral right of non-nationals of the Party. Under Council of Europe standards, this matter is the subject of Part C of the Convention on the Participation of Foreigners in Public Life at Local Level.

Paragraph 5.1

Paragraphs 5.1 – 5.3 deal with the issue of limitations that may and in some cases must be imposed on the exercise of the right to participate in the affairs of a local authority.

Limitations on individual rights may, of course, not be arbitrary. Paragraph 5.1 therefore requires that any formalities, conditions or restrictions shall be prescribed by law and be compatible with the Party's international legal obligations. Whereas the reference to the Party's international legal obligations may, strictly speaking, appear superfluous, its inclusion was deemed appropriate in order to draw attention to relevant other international legal obligations, first and foremost of which are those provided for by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Paragraph 5.2

This paragraph requires the Party to establish formalities, conditions and restrictions necessary to ensure that the ethical integrity and transparency of the exercise of local authorities' powers and responsibilities are not jeopardised by the exercise of the right to participate. The inclusion of this provision demonstrates the determination of the parties to safeguard against wholly inappropriate actions such as bribery or the use of force or coercion forms of participation and requires them to take appropriate action. Any formalities conditions and restrictions introduced in this respect must meet the standard set out in paragraph 5.1.

Paragraph 5.3

This paragraph deals with formalities, conditions or restrictions other than those under paragraph 5.2. It provides criteria which, in addition to those under paragraph 5.1, apply in order for a formality, condition or restriction to be acceptable. The three grounds set out in this paragraph are alternatives, i.e. for a formality, condition or restriction to be acceptable, it suffices that one them is applicable.

Article 2 – Implementing measures for the right to participate

Paragraph 1

This paragraph sets out the general obligation on Parties to take all measures such as are necessary to give effect to the right to participate in the affairs of a local authority. This includes, but is not limited to, measures of domestic law. Further specification of the measures to be taken is given in paragraph 2.

Paragraph 2

This paragraph enumerates, non-exhaustively, measures that are to be taken as part of the effort deriving from the general obligation set out in paragraph 1. They pertain to issues that the drafters of the Additional Protocol identified as being of particular importance.

Paragraph 3

This provision corresponds, as regards the possibility for differentiation between categories of local authorities, to Article 1 paragraph 3.

Paragraph 4

This paragraph ensures the proper consultation of local authorities in the planning and decision-making processes concerning the legal and other measures of implementation. Its wording is drawn from Article 4 paragraph 6 of the Charter.

Article 3 – Authorities to which the Protocol applies

Articles 3 and 4 allow for choices to be made in the scope of application of the Additional Protocol, both as regards authorities and as regards territory. Identical provisions exist in the Charter itself. It was decided to include these possibilities for choice in the Additional Protocol to enable States to apply its provisions also to territorial authorities not covered by the Charter.

It was considered self-evident that at the very least all authorities and territory covered by the Charter would also be covered by the Additional Protocol.

Whilst establishing as a general point of departure that the Protocol applies to all the categories of local authorities existing within the territory of the Party, this provision allows, in terms identical to that of Article 13 of the Charter, for the possibility of confining at the time of ratification, acceptance or approval the scope of the Additional Protocol. Furthermore, again as Article 13 of the Charter, it provides parties with a permanent possibility to enlarge the scope of application.

Article 4 – Territorial application

This provision sets out the provisions on territorial application which are usual to Council of Europe conventions.

Articles 5 – 7

These provisions contain the rules usual for Council of Europe Treaties concerning the signature, ratification, acceptance, approval, entry into force, notifications, communications and denunciation.

The protocol will enter into force on the first day of the month following the expiration of a period of three months after the date on which eight member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 5.