

The Congress of Local and Regional Authorities



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Report on the reception of the European Charter of Local Self-Government into the legal systems of ratifying countries and on the legal protection of local self-government

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Questionnaire

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I. FOREWORD

1. The Congress of Local and Regional Authorities has already dealt with the subject of incorporating the Charter into the legal systems of the ratifying states on several occasions. Among the more important were Mr Van Cauwenberghe's first report, Congress Recommendation 2 (1994), the CDLR's report of December 1995, the Woehrling, Doganoglu and Lloyd report and Congress Recommendation 39 (1998).
2. The 1998 report, which is commonly referred to as the "Woehrling report", provides an excellent basis for our discussion. It is based on highly detailed knowledge of the countries considered in this report, which goes beyond the information presented in the CDLR report. Two very important issues will be comprehensively addressed again in this document – firstly, the classification of countries in terms of the way in which they approach the incorporation of international treaties into domestic law ("monistic" and "dualistic" countries) and, secondly, the close connection between the incorporation of the Charter into domestic law and the judicial protection of local self-government.
3. The changes that have occurred in the meantime, over a period of fewer than ten years, are very significant and seem to call for a further look at these issues.
4. As was emphasised in the Halvarsson-Smith report on 20 years of the Charter and at the Lisbon Conference, the first change is the success of the Charter, which can be put down to the effectiveness of its monitoring procedures. This consists, in the first place, of political oversight over the countries' commitment to complying with Charter principles in their own legislation and, in the second, of legal review, in other words direct assessment of potential conflict between domestic legislation (and states' actions and conduct) and the principles of the Charter.
5. The monitoring process has made it possible to continually reassess the interpretation of the Charter and progressively establish a "Charter culture".
6. There is a current trend to "enrich" the Charter directly through the adoption of additional protocols. As a result, Charter principles are being fleshed out and becoming ever more detailed and self-executing.
7. A number of large countries were not dealt with in the Woehrling report because they had not yet ratified the Charter. The main countries left out were France, the United Kingdom, and the Russian Federation, together with most of the eastern and south-east European countries (17 in total).
8. In these countries political pressure from the Council of Europe may have brought progress both in the attitudes of states (through the reception of the Charter into domestic law, the fact of assigning it greater legal force and the amendment of domestic legislation to bring it into line with Charter principles) and in constitutional and ordinary case-law.
9. Although the additional protocol does not depart from traditional methods, radical changes in outlook are proposed, not just where it comes to defending local authorities (*vis-à-vis* central governments and regions with powers in the area of the legal rules governing local self-government) but also as regards granting rights to citizens in their dealings with local authorities, as a result of which judicial remedies are established.
10. The Charter can promote its own reception into domestic law through the introduction of measures designed to indicate clearly which of its provisions are self-executing as soon as it is ratified, or by drawing up provisions which compel ratifying countries to give an undertaking that they will transpose the Charter or identify those provisions that are self-executing within a predetermined time-frame.
11. The process of progressive consolidation of the European Convention of Human Rights through its Court might serve as a new reference point for the Charter of Local Self-Government even though the monitoring procedures set up by the Congress have always remained on the level of a political assessment of the suitability and compliance of ratifying countries' domestic law. The Charter, unlike the Convention, has not prompted the creation of a judicial authority as such (a kind of "European Court of Local Self-Government"). Still, that need not prevent the Charter from becoming more and more of a binding and even self-executing instrument in the ratifying countries.
12. Legal protection of local self-government (and citizens' rights) is still closely bound up with the question of reception, and changes are due in this area in a number of countries.

II. DRAFT QUESTIONNAIRE

A. DEFINITION OF THE CONCEPT OF RECEPTION

Being an international convention, the Charter itself lays down the procedures under which the countries, by signing and ratifying it, undertake to “consider themselves bound”, or “express their consent to be bound by the Charter”. These undertakings do not at that stage mean that the Charter is incorporated into the domestic legal system.

The word “reception” is considered here to mean any process of *assigning a legal status to the European Charter of Local Self-Government in a country’s domestic legal system*. Irrespective of the methods, instruments or procedures adopted, the Charter becomes a source of domestic law that can be applied directly or indirectly by the state authorities and the courts, which grant rights to local authorities and their citizens on the basis of this text.

The following questionnaire is intended for all countries which have signed and ratified the European Charter of Local Self-Government and is designed to evaluate its reception.

B. DEGREES OF RECEPTION OF THE CHARTER

1. On ratifying the Charter, did your country state reservations or limitations to the undertakings prescribed by the Charter? Briefly describe your country’s reservation regime.

Armenia ratifying the Charter has stated the following reservations: Article 5, Article 6, paragraphs 1 and 2, Article 7, paragraph 2, Article 10, paragraph 3.

2. Your country has signed and ratified the Charter:

a) has it formally transposed the Charter, in the sense of the definition in A above, into its domestic law?

Yes.

b) does it consider itself to be bound by the Charter, even though the latter has not been given legal force?

If your reply to the foregoing question was a), please move on to section 4.

If your reply was b), please answer the questions in section 3.

3. Countries which make no provision for the reception of the Charter into domestic law

3.1. Has your country stated grounds for not transposing the Charter into its domestic law? If so, what are the reasons given¹?

3.2. Although it has not deemed it necessary to transpose the Charter into its domestic law, has your country checked that current domestic legislation complies with the Charter?

3.3. As far as you know, have the Congress’s monitoring procedures highlighted any cases of non-compliance of your country’s legislation with the Charter? In what way ?

3.4. If so, has your country’s position remained unaltered in this respect or have you noticed changes, such as political or academic opinions or legislative or judicial decisions in which views have been expressed in favour of transposing the Charter into domestic law? Please give details of these opinions and/or decisions, enclosing a brief list of the most important ones.

3.5. Has it been suggested in your country that the failure to transpose the Charter prevents any forward-looking interpretation thereof and means that any Charter principles that have been interpreted in this way cannot be applied in the domestic law currently in force in the field of local self-government? If so, who has raised the problem? Please give details, including the references of any documents on the subject.

¹ For example, a) the Charter has a purely political value; b) the Charter is purely an international commitment by the state, which retains full control over its own legislation; c) the domestic legislation is already compatible with the Charter, which does not therefore need to be transposed; d) other.

3.6. As far as you know, are there any laws which make explicit or implicit reference to the Charter and its values, mentioning for example that their provisions were adopted in compliance with the Charter? If so, please cite examples.

C. MEANS OF RECEPTION OF THE CHARTER (for countries which make provision for the reception of the Charter into domestic law)

4. “Automatic” / “non-automatic” reception.

4.1. Definition

“Automatic” reception means the reception of a treaty or charter where it occurs without the need to carry out any formal act. Assignment of legal status is effected *ipso jure* and follows from the ratification of the treaty or charter.

“Non-automatic” reception means the reception of a treaty or charter by means of one or more specific acts required to transpose the treaty or charter.

4.2. In your country, does reception

a. follow automatically from ratification (as with all other international treaties)? Was the Charter automatically transposed as a whole or did a separate instrument have to be adopted to incorporate it or some of its provisions into domestic law? For example, although the Charter was transposed from a formal viewpoint, did specific laws have to be passed in order for its principles or provisions to have legal force?

Reception follows automatically from ratification (as with all other international treaties).

b. result from the adoption of a legal instrument, separate from the ratifying law and necessary for reception? Please specify which type of instrument is necessary (constitutional law, institutional law, ordinary law, other source of law).

4.3. As far as you know, has there been any change in attitude in your country towards the system for transposing the Charter automatically into your domestic law, shifting towards a preference for a system of non-automatic reception, or the reverse?

As far as I know, there has not been any change in attitude in my country.

5. Rank assigned to the Charter as a source of law

5.1. What rank does your country assign the Charter in the hierarchy of rules? Is it regarded as :

a. a constitutional law ;

b. an institutional law² :

The European Charter of Local Self-government as an international treaty is a constituent part of the legal system of the Republic of Armenia. If a ratified international treaty stipulates norms other than those stipulated in the laws, the norms of the treaty shall prevail. The international treaties not complying with the Constitution can not be ratified.

c. an ordinary law;

d. other?

C. LEGAL EFFECTS OF CHARTER RECEPTION

6. Binding/direct effects

6.1. Definition

² As for example, organic laws in France or in Spain

Binding effect³ presupposes a requirement to alter the country's national or regional legislation to bring it into line with the Charter.

Direct effect⁴ entails giving the Charter the status of a source of domestic law, through which rights can be granted directly (to local authorities or citizens).

6.2. In your country, whether reception is automatic or non-automatic, are the effects of reception

- a. binding?
- b. direct? **Yes.**

6.3 Where the effects are binding,

6.3.1. Whose duty is it to amend domestic legislation to bring it into line with the Charter – the national legislature (through constitutional, institutional or ordinary law), regional legislatures or both?

6.3.2. What are the binding effects of reception of the Charter vis-à-vis bodies with law-making powers (parliaments at various levels)? Does the binding effect mean that laws must be amended within a stipulated time or that the effects of reception must be made explicit in the legislation, or does it have any other consequences? (Please give details)

6.3.3. Are the constitutional or ordinary courts empowered to intervene in the law-making process and can they help to highlight any incompatibilities that there may be between draft laws and the Charter?

6.4. Where the effects are direct,

6.4.1. If the rank given to the Charter is that of a *constitutional or institutional law*, what are the consequences for current or future laws that are found to be incompatible with the Charter? Please describe the possible consequences⁵:

If the Charter stipulates norms other than those stipulated in the laws, the norms of the Charter shall prevail.

³ The binding effect of the Charter as international treaty obliges the signatory state. This would be the case for « dualist » countries.

⁴ There is a direct effect when the Charter is directly applicable in domestic law. This would be the case for « monist » countries.

⁵ From the following possibilities:

1) need for an explicit declaration of unlawfulness: Please state whether this is a constitutional instrument or a declaration of another type. Please state who is empowered to make such a declaration, whether the power may apply both to national and to regional laws and what procedures are involved;

2) need for a law repealing legislation that is incompatible with the Charter: Please state whether repeal may apply both to national and to regional laws, or whether, for the latter, the repeal must be carried out at regional level;

3) automatic repeal, without the need to make a declaration or enact a repealing law;

4) a finding that a law which is incompatible with the Charter is inapplicable in a particular case (in accordance with the system currently in force with regard to the application of Community law in the member states) as a result of:

4.1.) an interpretation by a court required to rule on the application of a national or regional law which it considers incompatible with the Charter. In such cases, the court will issue a declaration of unlawfulness, whose consequence will be that the law does not apply in the instant case but not that it has to be eliminated from domestic law.

Do courts have such powers in your country or are they required to apply these laws and see to it that they are applied even if they are incompatible with the Charter, without being able to rule on the extent of the Charter's legal force?

4.2.) an interpretation by a public authority required to rule on the application of a national or regional law which is found to be incompatible with the Charter. The consequence of such an interpretation will be that the law does not apply in the instant case but not that it has to be eliminated from domestic law. Do the authorities have such powers in your country or are they required to apply these laws even if they are found to be incompatible with the Charter?

5) Other consequences (please give details).

6.4.2. If the rank given to the Charter is that of an *ordinary law*, what are the consequences for current or future *national legislation* that is found to be incompatible with the Charter? Please describe the possible consequences⁶:

6.4.3. If the Charter has the same rank as an *ordinary law*, what are the consequences for current or future *regional legislation*⁷ that is found to be incompatible with the Charter? Please describe the possible consequences⁸:

7. Distinction between “programmatic” and “operative” provisions applied to the provisions of the Charter, and how they affect reception (Question whether or not a given provision of the Charter is “self-executing”)

7.1. Definitions

The Charter contains provisions referred to as “programmatic” setting objectives and laying down general principles, and provisions that may be called “operative” which are therefore more specific and immediately effective.

⁶ From the following possibilities:

- 1) need to enact a law repealing the legislation at variance with the Charter;
- 2) automatic repeal, which courts and other authorities must acknowledge in cases brought before them relating to the application of a law that is incompatible with the Charter, enacted before the date of reception;
- 3) a finding that a law which is incompatible with the Charter is inapplicable in a particular case because it (in accordance with the rules governing the application of Community law in the member states) as a result, for example, of:

3.1.) an interpretation by a court required to rule on the application of a national law at variance with the Charter. In such cases, the court will issue a declaration of unlawfulness, whose consequence will be that the law at issue does not apply in the instant case, but not that it has to be eliminated from domestic law. Do courts have such powers in your country or are they required to apply these laws even if they are found to be incompatible with the Charter?

3.2.) an interpretation by a public authority required to rule on the application of a national law at variance with the Charter. The consequence of such an interpretation will be that the law does not apply in the instant case but not that it has to be eliminated from domestic law. Do the authorities have such powers in your country or are they required to apply these laws even if they are incompatible with the Charter?

- 4) Other consequences (please give details).

⁷ Laws passed by the component entities of federal states or by regions with legislative powers are considered to be regional legislation for present purposes.

From the following possibilities:

- 1) need for a law repealing legislation that is incompatible with the Charter: Please specify which body has the power to repeal regional laws (is another regional law necessary or will a national law suffice and, if so, under what conditions?)
- 2) automatic repeal, which courts and other authorities must acknowledge in cases brought before them relating to the application of a regional law that is incompatible with the Charter, enacted before the date of reception;
- 3) a finding that a law which is incompatible with the Charter is inapplicable in a particular case because it (in accordance with the rules governing the application of Community law in the member states) as a result, for example, of:

3.1.) an interpretation by a court required to rule on the application of a national law at variance with the Charter. In such cases, the court will issue a declaration of unlawfulness, whose consequence will be that the law at issue does not apply in the instant case but not that it has to be eliminated from domestic law. Do courts have such powers in your country or are they required to apply these laws even if they are incompatible with the Charter?

3.2.) an interpretation by a public authority required to rule on the application of a regional law at variance with the Charter. The consequence of such an interpretation will be that the law does not apply in the instant case but not that it has to be eliminated from domestic law. Do the authorities have such powers in your country or are they required to apply these laws even if they are incompatible with the Charter?

- 4) Other consequences (please give details).

7.2. In your country, is any distinction drawn between “programmatic” provisions of the Charter, which have status as principles but no direct effects, and “operative” provisions which have such direct effects ? Please state whether this distinction has been established in legislation or case-law or is purely “academic”.

There isn't any distinction drawn between “programmatic” provisions and “operative” provisions of the Charter.

7.3. In your country, does the distinction between “programmatic” provisions and “operative” provisions have any effect on the reception of the Charter into domestic law? ⁹

No.

⁹ For example, the following effects might be possible: a. Charter provisions with the status of principles are transposed, but only with binding effects (requiring amendment of the instruments of domestic law); b. operative” Charter provisions are transposed as self-executing provisions.

D. THE CHARTER'S OWN CONTRIBUTION TO ITS RECEPTION INTO THE LEGAL SYSTEMS OF RATIFYING COUNTRIES (for all countries)

8. As an international treaty, the Charter is based on the principle that it has binding effects. Its reception, which entails direct effects in domestic law, depends on the wishes of the ratifying countries. The question is whether the text of the Charter itself could be framed in a way that would prompt the signatory countries to transpose it even more directly into their domestic legal systems¹⁰.

8.1. What in your view would your country's reaction be to a reframing of the Charter and/or an additional protocol thereto, aimed at requiring countries ratifying the Charter and/or the protocol to transpose it along the lines suggested in paragraphs a) to g) above?

The paragraph a) will be acceptable for my country.

E. JUDICIAL PROTECTION OF LOCAL SELF-GOVERNMENT (for all countries)

9. Remedies before the courts stipulated in the domestic legal system

9.1. In any assessment of the forms of reception of the Charter and the legal consequences thereof, considerable importance is attached to the role of judges, whether their responsibility is for assessing the compatibility or constitutionality of laws or for interpreting laws with a view to their application to specific cases. The questions that might be put in this respect are as follows:

9.1.1. Remedies of local authorities

In your country, are local authorities granted rights of access to the following courts:

- a) **constitutional courts to put questions relating to the constitutionality of local self-government laws (review of the constitutionality of laws)?** Are these rights restricted and, if so, to what extent?

These rights are not restricted.

Also, the Constitutional Court, by the application of the President of Armenia, prior to the ratification of international treaties (including the Charter) shall determine the compliance of the commitments stipulated therein with the Constitution.

- b) constitutional courts (right of constitutional appeal) to put questions about the compliance with the Charter of local self-government laws? Are these rights restricted and, if so, to what extent?
- c) ordinary courts to put questions about the constitutionality of local self-government laws or their compliance with an institutional or ordinary law which has been brought into line with the Charter? Are these rights restricted and, if so, to what extent?
- d) ordinary courts to complain about local self-government laws whose effects on local self-government are allegedly incompatible with the Constitution, an international convention (such as the Charter) or with an institutional or ordinary law which has been brought into line with the Charter? Can local

¹⁰ For example, it might be possible to embody one or another of the following undertakings in the Charter (the following list is set out in ascending order of the binding nature of the commitment), so that reception could:

- a) be automatic and explicit: the Charter itself would specify that ratification automatically gives it legal force (irrespective of the general system adopted by the country – automatic or non-automatic – with regard to the reception of international law);
- b) have only binding, but specific, effects: the Charter would include a requirement to amend current domestic legislation within a time frame the Charter itself would set;
- c) have direct binding effects: the Charter as a whole or some of its provisions would have direct effects on the ratifying country's domestic legal system, based on a declaration contained in the Charter itself;
- d) give the Charter as a whole or some of its provisions a rank equivalent to that of an ordinary law, based on a declaration contained in the Charter itself;
- e) be based on a declaration contained in the Charter itself, giving the Charter as a whole a higher rank than that of an ordinary national or regional law, making it a source of law;
- f) give constitutional or ordinary courts powers to set aside or repeal laws at variance with the Charter, based on a declaration contained in the Charter itself;
- g) give courts and authorities required to rule on the application of a national or regional law considered incompatible with the Charter, the power not to apply the law to the case being heard, based on a declaration contained in the Charter itself.

authorities seek direct protection of their local self-government rights? Are these rights restricted and, if so, to what extent?

Local authorities can seek direct protection of their local self-government rights. But this takes place rarely because autonomy of local authorities and courts from the national level executive authorities is very low.

9.1.2. Remedies of the citizens of local authorities

Does your country grant the citizens of local authorities rights of access to the following courts:

- a) constitutional courts to put questions on the constitutionality or compliance with the Charter of local self-government laws? Are these rights restricted and, if so, to what extent?

The application to the Constitutional Court may be filed by every person in a specific case when the final judicial act has been adopted, when the possibilities of judicial protection have been exhausted and when the constitutionality of a law provision applied by the act in question is being challenged;

- b) ordinary courts to complain about local self-government laws whose effects on local self-government are allegedly incompatible with the Constitution, an international convention (such as the Charter) or an institutional or ordinary law which has been brought into line with the Charter? Can citizens seek direct protection of their local self-government rights? Are these rights restricted and, if so, to what extent?
- c) ordinary courts to seek direct legal protection of some of their local government rights? Are these rights restricted and, if so, to what extent?

The citizens can apply ordinary courts to seek direct legal protection of some of their local government rights.

9.2. What stage has the political and legal debate reached in your country on granting judicial remedies to local authorities and their citizens for the judicial protection of local self-government and of citizens' local government rights?

These are constitutional rights but rarely used as mentioned in p.9.1.1.

9.3. What, in your view, would your country's attitude be towards the proposal that the Charter (or additional protocols thereto) should require ratifying countries to carry out the direct and binding reception of one of the forms of legal protection outlined in the paragraphs above?

This will be acceptable for my country as I have mentioned above. It is easy to sign and ratify international treaty or law but it is not a satisfactory condition for their enforcement in practice.

F) OVERALL ASSESSMENT (for all countries)

10. Give an overall assessment of the reception of the Charter into your country's legal system. What in your opinion are the factors in favour of acceptance of a more binding role for the Charter? What factors are holding progress back? What is the position at national level (in government and parliament)? What is the position of local authorities and local authority associations? What is the position of citizens and their associations?

The reception of the Charter into legal system of Armenia is well done. Local self-government related laws are mainly compliance with the Charter. But there is a great gap between legislation and practice. There are many cases when some provisions of the Charter and laws are not implemented or violated in practice.

Armenia is under the monitoring of the PACE and has commitment to the CoE related to the Charter also. The monitoring process is mainly focused on reflection of the provisions of the Charter into legal system of Armenia. In my opinion, the monitoring must be concentrated on enforcement of the provisions of the Charter.

There are different opinions among the actors of local self-government (central government, local authorities, associations, etc.) related to this issue. But above mentioned opinion is widely spread.