



Fundamental constitutional rights and freedoms - participation, trust and public debate as conditions for democracy

Theme 1

**Background document
prepared by the Secretariat on the instruction
of the President of the Parliamentary Assembly of the Council of
Europe**

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1. Introduction

1. The European Conference of Presidents of Parliaments offers an excellent forum for exchanges between the leaders of national parliaments on subjects related to the ever-evolving challenges of democracy in European societies.

2. The Parliamentary Assembly of the Council of Europe (PACE) has a continuous focus on democracy in European societies. PACE is one of the statutory organs of the Council of Europe and is composed of members of the member states' national parliaments thus represent citizens throughout the continent. The Parliamentary Assembly, aims primarily at safeguarding and promoting democracy in Europe. Together with human rights and the rule of law, democracy constitutes one of the three pillars of the Council of Europe, the oldest pan-European Organisation.¹

3. For the purpose of promoting democracy, the Assembly follows democratic developments, draws attention to any risks or threats to democracy, and submits proposals for common answers and possible solutions. It does so not only through debates and adopting resolutions and/or recommendations on the state of democracy in Europe, but also on specific aspects of the functioning of democracy.² It has also prompted the creation of, and contributes yearly to the organisation of the World Forum for Democracy.

In this context, the thrust of the first theme proposed for this year's Conference of Presidents of Parliaments consists in bringing together two fundamental aspects of democracy:

- *Democracy as a political system guaranteeing fundamental individual rights and freedoms by the supreme law, i.e. the Constitution;*
- *Democracy as a form of society which, beyond the sum of individual rights, implies not only delegating and taking decisions but also debating, participating in the conduct of public affairs and living together in dignity, respect, trust and solidarity.*

4. Norway, the host of this year's European Conference of Presidents of Parliaments, celebrates the bicentenary of its Constitution. – the oldest written Constitution in Europe. This and the fact that Norway's Supreme Court is also one of the oldest "constitutional courts" in the continent, adds to the topicality of this debate.

2. Democracy as a political system guaranteeing fundamental individual rights and freedoms by the Constitution³

5. To preserve the stability of democratic political order, fundamental individual freedoms and rights, they are guaranteed in constitutions which are rigid (with the exception of the United Kingdom) so that they cannot be changed or annulled by ordinary law.

6. In the late 18th century Constitutional democracy replaced radical or absolute democracy, which was the product of revolutionary dogmas on both sides of the Atlantic. Whereas radical democracy is perceived as sovereignty which lies in the whole people, expressing itself through an all-powerful assembly, constitutional democracy is by definition a system where there is a balance of values and

¹ See inter alia Parliamentary Assembly [Resolution 1547 \(2007\)](#) on the state of human rights and democracy in Europe.

² See relevant texts on the website of the European Conference of Presidents of Parliament under « documentation ».

³ See [CDL-STD\(1994\)010](#), Introductory statement by President Antonio La Pergola and [CDL-STD\(1995\)015](#), Rights suitable for protection by constitutional appeal procedures, Professor J.L. Cascajo Castro.

powers. The powers allotted between different organs and subject to limitations, – which, under a regent charter, becomes a cogent guideline for the governmental process.⁴

7. Examination of constitutional texts reveals the heterogeneous character of fundamental rights and freedoms for which distinctive criteria are applied in the various constitutional systems. The theme under consideration, i.e. the link between such rights and the democratic political system, refers mainly to the right to personal freedom and security, the right to private and family life (including data protection), freedom of expression, of assembly and of association (including the right to set up and/or belong to political parties), freedom of conscience, as well as the right to vote and to be elected.

8. Despite the heterogeneous character of fundamental rights and freedoms guaranteed in constitutional texts throughout the continent, some common essential characteristics can be identified:

- From the substantive point of view, fundamental rights are considered to derive from the legal conscience and culture of the constituent authority. They take precedence because they are the very essence of the constitutional system. In the case law of higher courts, they frequently function as a sort of modern-day natural law.
- From a procedural point of view, their most specific characteristic which best defines them is their constraining effect on the legislator and executive authority. Fundamental rights are set forth and acknowledged by the Constitution, not in statutory provisions, and the latter must respect their essential nature at all times. Thus, since the early days of constitutional democracy, the guarantee of supremacy of the Constitution over the legislature and executive authority has always been stressed in the field of fundamental rights.

9. In this latter respect, an essential role is played by the techniques of verifying constitutionality which have over the years been developed and perfected. In fact, once the Constitution is laid down as supreme law, its observance needs to be guaranteed. Constitutional justice has thus progressed, in different forms, hand in hand with constitutional democracy. In some systems, courts protect rights only through judicial review of legislation; in others, they have been given the added power to adjudicate direct claims lodged by individuals, after exhaustion of other internal means of redress. At any rate, the growing appeal of constitutional justice lies in the moral force it has acquired in the eyes of citizens.

10. Unique among Council of Europe member States, fundamental rights and freedoms are further protected by an international court, namely the European Court of Human Rights. The latter can be seized after the exhaustion of domestic remedies, including, as appropriate, an effective constitutional appeal. Thus, to the domestic verification of constitutionality is added an international verification of compatibility with the European Convention of Human Rights. With the future accession of the European Union to the European Convention of Human Rights, this form of human rights protection will be further strengthened. It will permit individuals to bring breaches of their fundamental rights, not only by their nation state but also by the European Union and its institutions, before the Strasbourg Court.⁵ A coherent system of human rights protection across the continent will thus be ensured.

3. Democracy as a form of society calling for public debate, participation and trust

11. As important as the constitutional and international protection of fundamental individual rights and freedoms is, it is not sufficient to ensure effective democracy in the sense of democracy as a form of society. Democracy as a form of society goes beyond the sum of individual rights and implies not only delegating and taking decisions but also debating, participating in the conduct of public affairs and living together in dignity, respect, trust and solidarity.

12. Representative democracy has suffered for some time now from growing citizen's dissatisfaction and mistrust, as witnessed by low election turn-outs, a disinterest in current institutionalised procedures and a rise of populist and extremist movements. It, has recently been one of the main victims of the global economic and financial, but also social crisis. Austerity measures,

⁴ It is worth noting that the British constitution, whereas it is the only flexible constitution in Europe, has inspired constitution-makers worldwide.

⁵ See Resolution 1839 (2011) on The impact of the Lisbon Treaty on the Council of Europe and [Resolution 1610 \(2008\)](#) on The accession of the European Union/European Community to the European Convention on Human Rights, with further references.

imposed by governments through international negotiation mechanisms, with limited parliamentary control and practically no citizens' participation, have bred distrust among the public, especially the young. It is thus more urgent than ever to look carefully at the second aspect of democracy, as a form of society, beyond the traditional forms of mandates and delegation, with which fewer and fewer citizens seem to be satisfied, to regain their trust.

13. Representative democracy – parliaments – must remain at the heart of governance. However, there is a need to establish, in addition, forms of interaction between citizens and those who govern them. This is necessary to include, in a carefully designed manner, direct democratic elements in the decision-making process.

14. As the report on “Democracy in Europe: crisis and perspectives”, debated by the Parliamentary Assembly in June 2010, stressed,⁶ politicising society is not based solely on considering the proper use of universal suffrage. Participatory and deliberative structures which involve citizens must be found. Representatives must be elected, but also held to account. The idea of a political system that involves choosing a champion for four or five years must be given up. Reducing decision-making opportunities to elections alone prevents politics from functioning properly.

15. Democracy cannot just be achieved through institutions, but by building public meeting places. Democracy should not be seen as a matter only of delegating and taking decisions but also of discussing and living together in dignity, respect, trust and solidarity. As the Assembly underlined in its Resolution 1746 (2010), “[democracy] is a work in progress, which is put to the test on a daily basis”.

16. Citizen-based participatory democracy should be perceived as an on-going communicative process as more and more people become involved in public affairs and thus regain trust in politics. Participatory democracy is therefore more closely linked to the idea of association, deliberation, information, accountability and transparency on the part of those who govern. In a truly participatory and deliberative democracy, the point of view and interests of disadvantaged or vulnerable groups must also be taken into account in the decision-making process, itself based on open public debate. The idea is that if all citizens are deemed liable to pay taxes, they should all also be deemed capable of taking part in public affairs and decision-making and of holding their representatives and rulers to account.

17. To ensure that participatory democracy will not be manipulated or abused, a strong democratic infrastructure is necessary. This includes:

- the proper funding of political parties;
- strong civil society organisations which must be able to participate in the public debate; transparency and a fair balance of resources available to the various actors participating in public debate;
- a genuine curb on commercial lobbying;
- media which are able to serve - as a pillar of democracy - the common cause, as well as public institutions which are able to offer civic education to all.

18. This requires the consolidation of political responsibility, especially in terms of responsiveness and of accountability. Independent supervisory institutions such as ombudsperson's offices and bodies dealing with access to public documents and data protection, as well as constitutional courts, can help to develop this concept of political responsibility. This can inspire the increased trust of citizens, provided that their own membership and methods of operation are democratic and that they are perceived as democratic.

19. In his conclusions at the end of the 2012 European Conference of Presidents of Parliaments, the President of the Assembly emphasised the need for parliaments to promote participatory democracy, rather than seeing such developments as competing with institutions of representative democracy. He mentioned in particular:

- participatory budgeting processes; citizen-initiated referenda; national petitions; citizens' conferences or juries; voluntary-sector activity; activity of associations;
- transnational networks formed by citizens to address specific issues, such as environmental, social or even constitutional ones.

⁶ See [Doc. 12279](#), as well as [Resolution 1746 \(2010\)](#) and [Recommendation 1928 \(2010\)](#).

20. Recently, the capacity for political participation has increased remarkably. Networks and blogs on the Internet provide growing opportunities for millions of people, including for political communication on the local, national and transnational levels. In addition, more concepts are being practised to develop innovations, mediating conflicts and finding compromises. This may support the extension of civil society groups and decentralised self-government.

21. It is also worth recalling the European Citizens' Initiative (ECI), which was introduced with the European Union Lisbon Treaty, as the first transnational citizen right which gives a million European citizens from a significant number of states the opportunity to present legislative proposals to the European Commission.

22. Another important aspect of the subject under consideration, which was also mentioned in the conclusions of the previous Conference, is that of citizenship education and political training. It is worth recalling that in Athenian democracy, effective citizen participation was not an abstract right but a genuine practice. This effective participation was shaped by the whole life of the community, the education of citizens and education in public affairs (*paideia pros ta koina*). In reinventing democracy today, focus should again be put on education in public affairs and improving citizens' civic education. In this respect, the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (Recommendation CM/Rec(2010)7) is of special relevance.

23. It must also be recalled that when suggesting ways to promote and strengthen democracy in Europe, the Assembly, in its Resolution 1746 (2010) and its Recommendation 1928 (2010), reiterated its earlier proposal for the establishment of a "Strasbourg Democracy Forum" - a forum to serve as an umbrella structure providing an international reference in the field of democracy and a laboratory for new ideas and proposals. In a welcome development, such a "World Forum for Democracy" was indeed set up and started operating as of 2012.

24. The theme of this year's World Forum for Democracy (WFD) – "*From participation to influence: can youth revitalise democracy*" - is of most relevance for the subject-matter under consideration.⁷ It is true that whereas a wide range of formal participation opportunities for youth exists – elected student representatives, local youth councils, youth parliaments, youth branches of political parties etc., their impact is relatively weak. It is thus crucial to enhance youth democratic involvement, not only in terms of participation (quantity) but also in terms of influence (quality). Therefore the objective of this year's WFD as stated in its official website is the following: "*to identify cases where such structures are genuine vectors of democratic participation rather than an alibi, and to explore the conditions which make them successful. New ways of socialising and organising are being forged and pioneered by the young via on-line media and social networks, from a perspective which may challenge established models of democratic governance. Moreover, there are a number of successful political figures deeply engaged in the existing structures of representative democracy who try to improve the system 'from within'*".

25. Last but not least, in its Resolution 1746 (2010) and its Recommendation 1928 (2010), the Assembly also launched the idea of an additional protocol to the European Convention on Human Rights, guaranteeing the right to participate in the conduct of public affairs as a human right and fundamental freedom. This would supplement the right to vote and stand for elections as guaranteed by the Protocol to the Convention (ETS. No 9, ratified by all except two members States of the Council of Europe), as well as similar initiatives taken at local level (in particular the Additional Protocol to the European Charter of Local Self-Government, known as the "Utrecht Protocol"). The Assembly had also resolved to organise public debates in the context of the drafting process of this new protocol, in close consultation with the Venice Commission. This process offers an opportunity to promote public discourse and raise awareness on the need to increase citizens' active participation and ensure further involvement of all people in the conduct of public affairs.

26. The idea of drafting an additional protocol to the ECHR has so far not been taken any further. Therefore, the 2014 European Conference of Presidents of Parliaments could offer an excellent opportunity to re-launch this debate as it brings together the two aspects of democracy which the proposed theme is meant to address. Including the right to participation, as a fundamental aspect of democracy, in the category of fundamental individual rights and freedoms to be guaranteed by the European Convention on Human Rights.

⁷ Link to the website of the World Forum for Democracy: <http://www.coe.int/en/web/world-forum-democracy/home>