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OHCHR CALL FOR INPUT:

Information to be taken into account during the preparation of the draft guidelines on the effective implementation of the right to participate in public affairs

Submission by the European Center for Not-for-Profit Law (ECNL) May 2017

The European Center for Not-for-Profit Law (ECNL) respectfully submits the following points for consideration in the development of the guidelines for effective implementation of the right to public affairs.

Introduction

The need for creating stronger guarantees to the right to participation in the conduct of public affairs (i.e., right to engage in policy and law making processes) has become more prominent over the past years. Several reports note a wide range of encouraging practices in some countries that implement and support participation. But in the same time there is a worrying trend of limiting participation in decision-making processes.¹

In some of the democracies, the trust of people in elected institutions and functions seems to be eroding gravely, dialogue between the authorities and the people is decreasing, and there is trend towards a general decline in traditional forms of participation. The enhanced participation mechanisms, when implemented meaningfully and consistently, can help bridge these gaps and bring people back to processes which shape the societies. Moreover, the underlying role of participatory democracy is not to replace representative democracy, which is based on the separation of powers and free and fair elections; it is rather to supplement it and enhance its functioning. Participatory democracy does not suspend constitutional and legal competences of representatives from the executive and legislature, but actually supports and enhances the importance and effectiveness of representative democracy. There is no example to show otherwise.

We are confident the time has arrived to develop a set or guidance at the UN level which can provide support to the promotion, protection and implementation of the right to participate in public affairs in the context of existing human rights law. Therefore, we hope that the draft being prepared by OHCHR will contribute to meaningful, effective implementation of this right.

¹ As noted in previous OHCHR reports as well as regional bodies reports, e.g., Council of Europe, PACE, Resolution 1746 (2010) Democracy in Europe: crisis and perspectives; and Secretary General of the Council of Europe, State of Democracy, Human Rights and the Rule of Law in Europe. A shared responsibility for democratic security in Europe, 2015



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This submission focuses on public participation between elections, namely, participation in policy and decision-making processes. The input draws from the report prepared by ECNL for the Council of Europe², and other ECNL materials.

We propose the content of the guidelines for the right to participate in public affairs should discuss:

1. Scope and definitions of the right
2. General principles
3. Perquisites for participation, including the enabling environment
4. Framework for participation
5. Practical guidance, with overarching mechanisms, instruments, structures and practices that provide for meaningful and effective participation.

Hereby we elaborate these points in further detail:

1. Scope and definitions of the right

The Guidelines should discuss specific aspects of the right to participate in public affairs, including the overall scope and definitions. These could be based on the General Comment on Article 25 of ICCPR and other relevant international standards. The Guidelines should emphasize that the right to participation in the policy and law/decision-making processes is distinct right from the right to vote. The section should also discuss that participation models are inevitably applicable to the general public and individuals, as Article 25 ICCPR provides that everyone shall have the right and the opportunity to participate. Furthermore, there are recent examples in countries to limit participation by characterizing it as political activities (of individuals or organized group). Therefore, it is important for guidelines to distinguish between activities related to policy and decision-making processes and those related to political activities.³

2. General principles

The Guidelines should reflect on some of the general principles that convey the purpose of participation, such as:

- participation, in terms of collecting and channelling views of various members and concerned people to input the policy and decision making process;
- trust, as honest interaction between various stakeholders in participation;

² Civil Participation in Decision-Making Processes, An Overview of Standards and Practices in Council of Europe, May 2016 Member States <https://rm.coe.int/168068690f>

³ See for example: Council of Europe, Expert Council on NGO Law: Regulating Political Activities of Non-governmental Organisations, December 2015 <https://rm.coe.int/1680640fc2>



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- accountability and transparency, at all stages from all stakeholders.⁴

3. Perquisites for participation, including the enabling environment

There is a clear connection between the possibility of people and organized groups to participate in policy and decision making and the enabling conditions for their operation and expression. This is particularly emphasized in the General Comment on Article 25 of ICCPR:

"Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves. This participation is supported by ensuring freedom of expression, assembly and association". (§8) *"The right to freedom of association, including the right to form and join organisations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25"* (§26).

The same is recognized by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, who stated that *"both individuals involved in association and the association itself must be protected by international human rights law and shall be able to participate in the State's decision making process."*⁵ It is important for guidelines to acknowledge that and, that when countries review their frameworks for participation, they should also consider and improve the conditions that enable individuals and organized groups to engage and contribute in policy and decision-making process (e.g., such conditions include: freedom to associate, express opinions, to access resources, including from foreign sources, to operate without unwarranted government interference, to engage in different activities, to form networks and contribute opinions also in multilateral bodies). Such approach will contribute to the success of the participatory models and the overall practice of participation.

4. Framework for participation

There are various levels for participation (such as access to information, consultation, active involvement, dialogue) and it is important for the guidelines to recognize those and their relationship with the policy cycle to highlight how meaningful participation can be achieved. Most policy documents consider participation as a continuum of interaction between different levels of public authority and the public, which ranges from informing and listening to developing and implementing jointly agreed proposals and draft policies or legal documents.

⁴ For more see: OSCE-ODIHR – Venice Commission, Guidelines on Freedom of Association, 2015. Available at <http://www.osce.org/odihr/132371?download=true>. 2. OSCE-ODIHR, from the Participants to the Civil Society Forum Organized on the Margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association, Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes, April 2015 <http://www.osce.org/odihr/185841?download=true>

⁵ UN Human Rights Council, *Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association*, 21 May 2012, A/HRC/20/27, available at: http://freeassembly.net/wp-content/uploads/2013/10/A-HRC-20-27_en-annual-report-May-2012.pdf



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The Guidelines should more specifically elaborate the different levels of participation,⁶ the ways in which they manifest themselves in practice and build specific recommendations that would help governments apply and guarantee them in legislative processes. For example, around the access to information recommendations could include: providing timely and accurate information relevant for the drafting process during all stages through means that reach out to the target groups and wider audiences. Recommendations around consultations could include: access to the process by all target groups, using various modalities for consultation including online platforms, giving appropriate time for opinions as well as feedback on the results from the consultation. Recommendations for the process of joint development of documents could include: creating cross-sector working groups that include representatives of authorities, stakeholders and NGOs with specific expertise needed, selected through open procedures based on clear criteria.

5. Practical guidance, with overarching mechanisms, instruments, structures and practices that provide for meaningful and effective participation.

It is important for the Guidelines to emphasise that participation is not a one-off endeavour and cannot be truly achieved if it is not nurtured continuously. There are various models in practice that can facilitate sustainable and meaningful participation, through legislative framework or practical instruments. The Guidelines should explore and elaborate how these models work and feed into the different levels and modalities of participation and how countries can implement them to ensure that the principles and norms of civil participation are respected. For example:

- Integrating guarantees for participation in national legal frameworks;
- Introducing E-participation mechanisms;
- Increasing understanding and monitoring implementation;
- Establishing structures for cooperation on different levels;
- Providing for remedies in case participation principles are not followed.

ECNL appreciates the opportunity to provide its opinion in the development of these guidelines and remains available to contribute to the process with additional expertise and materials as needed.

⁶ On how the access to information, consultation, active involvement, dialogue are defined see: <https://www.coe.int/en/web/ingo/civil-participation>; or Civil Participation in Decision-Making Processes, An Overview of Standards and Practices in Council of Europe, May 2016 Member States <https://rm.coe.int/168068690f> or ECNL: *Comparative Overview of European Standards and Practices in Regulating Public Participation*: http://ecnl.org/dindocuments/382_Comparative%20Overview%20Participation%20in%20Law%20Making%20eng.pdf