



## **Explanatory Report to the Convention on the Participation of Foreigners in Public Life at Local Level**

Strasbourg, 5.II.1992

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1. The Convention on the Participation of Foreigners in Public Life at Local Level was drawn up within the Council of Europe by the Steering Committee on Local and Regional Authorities (CDLR). It was opened for signature by the member States of the Council of Europe on 5 February 1992.

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

### **A. Background**

1. In recent decades, most member States of the Council of Europe have experienced a marked increase in the number of foreign nationals residing on their territory. Partly for political and humanitarian reasons, partly as a result of differing economic situations and the freedom of movement entailed by growing economic integration in Europe, an increasing number of people have settled with varying degrees of permanence in countries other than their countries of origin.

2. This situation raises for the governments and the other public authorities concerned the problem of integrating such foreign residents into the community in which they live – a problem which is all the more acute in the light of the phenomena of intolerance which have sometimes appeared.

3. Although one means of facilitating integration is to simplify naturalisation procedures, many foreign residents are unwilling to change their nationality. Therefore, for these people, measures should be sought which would allow them to participate in the affairs of their local community.

4. Such an objective must be of major importance to the Council of Europe in the light of the fundamental values stated in its Statute, namely individual freedom, political liberty and the rule of law, which form the basis of all genuine democracy, and its attachment to the universal and indivisible nature of human rights and fundamental freedoms.

5. Accordingly, successive recommendations of the Parliamentary Assembly have emphasised the need for action in relation to the status of migrant workers and to the political rights of aliens. Similarly, the Standing Conference of Local and Regional Authorities of Europe devoted a number of resolutions to the problem as it related to the local level. Finally, the European Ministers responsible for Local Government took up the same theme at several of their conferences.

6. These various initiatives within the framework of the Council of Europe tended to identify different categories of measures forming part of a step-by-step approach to enable foreign residents to participate as fully as possible in local life and in the local decision-making process, and in particular:

- provision of full information about civic rights and duties;
- mechanisms such as consultative committees to represent the views of foreign residents at the level of local authorities;
- granting foreigners who have fulfilled a specific residence qualification the right to vote and stand for election at local authority level.

7. Broadly speaking, these different categories of measures are also to be found in the present convention.

8. In response to the pronouncements of the Parliamentary Assembly, the CLRAE and the Conference of Ministers responsible for Local Government, the Committee of Ministers in 1981 adopted Recommendation No. R (81) 18 to member States concerning participation at municipal level, which also relates to foreign residents. This Recommendation refers to a number of factors – the often considerable contribution of foreign residents to the economic life and prosperity of the local community, their share in the taxes levied on all residents, the family links sometimes created with native families and their general contribution to the social and cultural life of the community – as having generated a legitimate aspiration to fuller participation in the management of local affairs. Accordingly, the measures recommended include the encouragement of participation in local life by foreign residents, in particular:

- by providing for them a specific and active information policy;
- by ensuring that account is taken as far as possible of their needs and wishes;
- by promoting the creation of local representative bodies for foreign residents to be consulted whenever appropriate;
- by taking whatever steps are necessary to promote equal opportunities for foreign residents and to promote good relations between all residents, whatever their nationality;
- as regards those member States which already provide for participation by some foreign residents in local elections, by considering the extension, if necessary on a reciprocal basis, of such right to vote to all foreign residents who are nationals of member States.

9. At the same time, work was set in train within the Council of Europe in accordance with the conclusions of the 4th Conference of European Ministers responsible for Local Government calling for "a study of the possibility of drafting a multilateral instrument defining minimum civil rights in local public life, including the right to vote and stand for election at local authority level, for nationals of one member State living in another, and the conditions required for recognition of those rights". This showed that a number of European countries had taken constitutional and legislative measures to grant resident non-nationals the right to vote in local authority elections. In the light of the information assembled, a majority of the delegations attending the 7th Conference in Salzburg in 1986 expressed themselves in favour of concluding a convention on this subject.

10. It was against this background that the Committee of Ministers instructed the Steering Committee on Local and Regional Authorities (CDLR) to prepare a draft convention of general scope, that is not limited to the question of voting rights but covering all the problems posed by the participation of foreigners in local public life.

11. The CDLR drew up the text of the draft convention at three meetings held during 1988 and 1989. Before finalising the text, it sought the opinion of both the European Committee on Migration (CDMG) and the Steering Committee for Human Rights (CDDH).

## **B. Main features of the Convention**

12. The subject matter of the convention corresponds to the longstanding concerns of the Council of Europe in this field. Its substantive provisions are divided into three chapters:

- Chapter A deals with the "classical" rights of freedom of expression, assembly and association and the involvement of foreign residents in procedures for the consultation of the local population;
- Chapter B concerns the creation of consultative bodies or other institutional arrangements to represent foreign residents at local level;
- Chapter C covers the right of foreign residents to vote and stand as candidates in local authority elections.

13. To some extent the present convention may be seen as being complementary to existing Council of Europe conventions. Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms, in its Articles 10 and 11, guarantees the right to freedom of expression and that to freedom of peaceful assembly and freedom of association with others not only to citizens of the State concerned but to everyone. Moreover, Article 14 specifies that the enjoyment of these rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. However, Article 16 stipulates that nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens. At the same time, it should be noted that in virtue of Article 60 of the European Convention on Human Rights, there is nothing to prevent the Contracting Parties from going beyond the threshold of protection accorded by the European Convention on Human Rights, by granting other rights by means of national legislation or international conventions. In this sense, therefore, it may be affirmed that the present convention has been drafted in the spirit of the European Convention on Human Rights.

14. Furthermore, the present convention, in Article 3 expressly adopts the formulation of the rights guaranteed by Articles 10 and 11 of the European Convention on Human Rights. The existence of identical texts could give rise to fears that - in virtue of the principle laid down by the International Court of Justice in the "Case concerning military and paramilitary activities in and against Nicaragua", according to which two legal norms of different origins, even if they have an identical content, continue to exist and apply separately (Nicaragua versus United States of America, Judgment of 27 July 1986, paragraphs 171 and 172 to 182) - there could be a divergence between the present convention and the European Convention on Human Rights.

15. In the committee's opinion, such a danger does not exist. On the one hand, Article 9, paragraph 3, specifies that such interpretations as might be given to its provisions cannot affect norms deriving from another legal instrument, whether internal or international. On the other hand, it should be borne in mind that the present convention has been devised in such a way as to require the enactment of domestic legal norms adopting the content of its provisions. These norms of domestic law are liable to be challenged through the machinery established

by the European Convention on Human Rights for controlling its application, which constitutes an additional guarantee against any attempt to interpret the present convention differently.

16. The European Convention on the legal status of migrant workers provides for equality of treatment with regard to working and living conditions but does not affect the exercise of civil or political rights.

17. Against this background, the present convention seeks to define more precisely the civil and political rights which foreign residents should enjoy, as well as the institutional arrangements which should be made to facilitate their participation in public affairs.

18. The convention concerns the participation of foreign residents at local level. For those who live in a local community, numerous aspects of their daily life – such as housing, education, local amenities, public transport, cultural and sports facilities – are influenced by decisions taken by the local authority. Moreover, foreign residents participate actively in the life and prosperity of the local community. Therefore, for countries espousing the democratic principles of the Council of Europe it is fair to examine how a sometimes sizeable group of long-term local residents can contribute to the local decision-making process on matters which affect them.

19. Similar considerations could be applied to some aspects of decision-making at central government level. Nevertheless, it is arguable that there is a closer link between possession of citizenship and participation in procedures for determining what may be conceived of as the "national will", which would exclude participation of foreigners in national political life. Consequently, except in relation to the human rights in Article 3, paragraph 1, which are not divisible in terms of the level at which they are exercised, the convention's scope is clearly confined to the local level.

20. Since it relates explicitly to local authorities, the text of the convention has to take account of the principles of local autonomy enshrined in the European Charter of Local Self-Government and of the constitutional arrangements in certain member States which prevent national governments from imposing detailed obligations on local authorities with regard to the manner in which they organise their internal affairs. Respect for local autonomy is reflected in particular in the wording of Article 4, which provides that the Parties shall endeavour to ensure that reasonable efforts are made to involve foreign residents in procedures for the consultation of the local population. It is further apparent in the nature of the obligations laid down in Article 5, which provides in particular for facilitation and encouragement of the setting up of consultative bodies rather than the imposition of a uniform system.

21. The convention is conceived in such a way that it is possible to accede to it by accepting all three of the chapters or one or two. The intention is that those States which have particular constitutional or other difficulties with one chapter should not thereby be prevented from acceding to the convention. The possibility of a gradual acceptance of the different chapters of the convention in line with the internal developments within each State is moreover explicitly provided for.

## **C. Commentary on the provisions of the Convention**

### **Preamble**

22. The preamble sets out the reasons which led the member States of the Council of Europe to draw up the convention and indicates how the convention corresponds to the fundamental aims of the Council of Europe. It reaffirms the commitment of the signatory States to the universal and indivisible nature of human rights. Furthermore, reference is made to the fact that foreign residents participate economically and culturally in the life of the local community and generally have the same duties as citizens at local level. These considerations justify a

common commitment to enhance the possibilities of participation in local public life which are open to foreign residents.

## **Part I**

### **Article 1**

23. This article refers to the division of the convention into three chapters as follows:

- Chapter A deals with freedom of opinion and assembly and the right to join associations, as well as with the involvement of foreign residents in procedures for the consultation of local citizens;
- Chapter B concerns the creation at local level of consultative bodies to represent foreign residents;
- Chapter C concerns the right of foreign residents to vote and stand for election at the local level.

24. Article 1 provides that contracting States may accept all three chapters of the convention. If, however, they decide to accept only a part, there is a minimum obligation to accept Chapter A, so as not to ignore the rights guaranteed by the European Convention on Human Rights. In addition, States may accept Chapter B or C. This provision is intended to ensure that those member States which find themselves unable to subscribe to either of Chapters B or C of the convention are not obliged to reject it *in toto*. Paragraph 2 holds out the possibility of a gradual acceptance of the different chapters of the convention.

25. It is recognised that there is a special relationship between Chapters B and C: some member States which have applied the provisions of Chapter C by granting voting rights to foreign residents, and have to that extent placed the latter on a par with citizens, may take the view that it thereby becomes superfluous or even inappropriate to create special consultative bodies to represent foreign residents as such. Accordingly, they will agree to apply the provisions of Chapters A and C only. However, other member States in the same position may consider that the special circumstances and problems of foreign residents may nevertheless justify special consultative arrangements for ascertaining the views of the foreign resident community, including those foreigners who do not yet meet the residence requirement for the right to vote in local elections. For this reason, Chapters B and C have not been made mutually exclusive.

### **Article 2**

26. This article contains a definition of the expression "foreign residents" as used in the present convention. A suggestion that it would be preferable to speak of resident "non-nationals", on the grounds that the latter term does not have the same emotional overtones as "foreigners", was not implemented because of the difficulty of finding a concise equivalent in French.

## **Chapter A**

### **Article 3**

27. In relation to the exercise of the rights laid down in Article 3, most member States provide for a number of restrictions, corresponding for the most part to some of those permitted by the Convention for the Protection of Human Rights and Fundamental Freedoms: restrictions necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of

the rights and freedoms of others. However, such provisions vary considerably from State to State, which explains why the convention has not attempted, in Article 9, to harmonise them.

28. In any case, what matters for the purposes of the present convention is that within each State foreign residents should not be subject to different treatment from citizens with respect to the rights in question. It remains true, nevertheless, that the legislation on aliens in force in certain member States allows discretion to impose special restrictions on the political activity of aliens. The wording of Article 9, which is specifically referred to under Article 3, gives the possibility to States to subject the rights accorded under Article 3 to the restrictions provided for by the European Convention on Human Rights.

29. It did not seem appropriate to introduce a restriction whereby the rights guaranteed to foreign residents by Article 3, paragraph *a*, would apply only at the local level or in relation to matters within the competence of the local authority. Such a distinction would be difficult to make in practice and no member State appears to apply it.

30. The same consideration applies to the right to join associations which is laid down in paragraph *b*. On the other hand, with regard to the right of foreign residents to form associations of their own, the same paragraph specifically speaks of local associations; it also defines one purpose of such associations as "defence of their interests in relation to matters falling within the province of the local authority". This qualification seems appropriate in view of the more restrictive provisions applying to political associations of aliens in certain member States, not least on account of the possible foreign relations implications of the activities of associations which aim to exert political influence in the country of origin. Restrictions which are exclusively applicable to aliens are less relevant on the local level than at national level: political activities of foreign residents are more likely to be considered inappropriate when they affect national policy questions than when only local problems are at issue.

31. The right of foreign residents to join associations which is stipulated in Article 3, paragraph *b*, implies an obligation for the public authorities, subject to the provisions of Article 9, not to hinder foreign residents from becoming members of associations. It does not affect the question of the right of associations to define their own membership.

#### **Article 4**

32. The subjects of public inquiries or other procedures for consulting local citizens, especially with regard to planning questions, may be of equal concern to foreign residents. This article aims to ensure that efforts are made to involve them in such procedures. Such efforts must be "reasonable", that is such as could reasonably be expected of the authorities in question (for example in the light of the financial and staff resources available). However, the wording of the article takes account of the fact that in some member States the internal allocation of competence is such that the national authorities have no direct power of intervention concerning the manner in which local authorities conduct their affairs.

### **Chapter B**

#### **Article 5**

33. The institutional arrangements provided for in this article for the representation of foreign residents at local level may take a variety of forms, in particular:

- a. participation by representatives of foreign residents in an advisory capacity in the deliberations of local authority committees;
- b. consultative committees with mixed membership comprising members of local authority committees and representatives of foreign residents;

c. consultative councils with purely foreign membership.

It is furthermore left to the competent authorities to determine whether the representatives of the foreign residents should be directly elected or nominated by the relevant organisations.

34. In view of the great differences in the size of local authorities across Europe, it did not seem possible to lay down uniform requirements about either the absolute number or the percentage of foreign residents which justify the appointment of a consultative body. The decision as to what is a "significant number" must be taken in each national context.

35. The text of Article 5 takes as full account as possible of the principle of local autonomy by providing that the obligation of the parties to the convention is not to impose on local authorities detailed and uniform arrangements for the consultation of foreign residents but to remove any legal or other obstacles to the setting up of consultative bodies and to encourage and facilitate their creation. The text of the article, however, does not exclude the possibility, in States where this is feasible, of adopting legislation of a general nature imposing precise duties on local authorities.

## Chapter C

### Article 6

36. It was originally envisaged that the Parties to the convention should undertake to grant one another's nationals the right to vote in local authority elections on a basis of reciprocity, or at any rate that this right would be reserved to nationals of other Council of Europe member States. However, in the course of the intergovernmental discussions on the draft convention it seemed preferable that Chapter C, like Chapters A and B, should apply to all foreign residents without distinction of nationality. This approach is justified on the following grounds:

i. Most of the member States which have accorded foreign residents the right to vote in local elections (Denmark, Ireland, Netherlands, Norway, Sweden) do not limit this right to nationals of particular States. The exceptions are Finland and Iceland, where the franchise for local government elections has been extended to nationals of other member States of the Nordic Council, and the United Kingdom, where Commonwealth citizens and citizens of the Republic of Ireland may vote in local and national elections.

ii. A restriction of the right to vote in local elections to nationals of other member States would not make it easier for those countries which have constitutional obstacles to accept Chapter C.

iii. The considerations adduced in the preamble concerning the participation of foreign residents in the life of the local community and the fact that they generally have the same duties as citizens at the local level apply to foreign residents of all nationalities. To create a discrimination between those foreign nationals who enjoy voting rights and those who do not, would be politically problematical.

37. The terms of Article 6, paragraph 1, do not exclude the possibility of certain formal procedural requirements being laid down for the granting of the right to vote to each foreign resident, even though these may not apply to nationals of the State in question. Such procedural requirements may include the need for a foreign resident specifically to apply to be entered on the electoral register of the local authority. However, any formal procedural requirements must not be of such a character as to detract from the substance of the provisions of Article 6 (1) or constitute significant obstacles to the exercise of the rights conferred thereby upon foreign residents.

38. With regard to the period of residence required to qualify for the right to vote, it is clear that it should be long enough for the elector to have become familiar with the local community and its political situation and issues. The period of five years chosen for the right to vote is the longest period required in any of the countries which have already granted foreigners the right to vote in local elections. The only exceptions are the Swiss cantons of Neuchâtel and Jura, which (normally) have a ten-year residence qualification; however, earlier proposals involving a ten- or twelve-year residence qualification met with the objection that this period was longer than that normally required for acquiring full citizenship.

39. The residence requirement of five years is not satisfied by a period of residence at some time in the past or by the accumulation of several periods of residence. Rather, to qualify for the right to vote in local elections, a foreign national must have been ordinarily resident during the five-year period preceding the elections. The expression "habitual" indicates that for the purpose of calculating length of residence, brief periods of absence on holiday, on business or for other personal reasons do not affect a person's quality as resident in the State concerned. It is left to each Party to determine, in accordance with domestic law, whether the five years are counted in relation to the date of the elections themselves or in relation to a qualifying date for the establishment of the electoral register.

40. The question was raised as to whether the period of residence laid down in Article 6 for foreign nationals to be entitled to vote in local authority elections should refer to residence in the local authority concerned, since the frame of reference for exercising the right is the local authority. However, it is noteworthy that none of the countries which have accorded voting rights to foreign nationals appears to require a period of residence within the local authority itself; the residence qualification relates to the national territory (except for an additional requirement in the Swiss canton of Neuchâtel of one year's residence in the canton). Moreover, in countries which do not have internal registration procedures a residence qualification linked to the local authority might be difficult to verify. For these reasons, it was decided that the period of residence stipulated in Article 6 should refer to residence anywhere in the State concerned.

41. All those countries which have extended the local government franchise to foreign nationals have accorded them both active and passive voting rights. The present convention text follows their example by providing that both the right to vote and to stand for election be granted to foreign residents. However, in order to take account of the problems of one or more member States whose legal system countenances the right of foreign residents to vote but not that to stand for election, Article 6, paragraph 2, allows a Party to the convention to accept Chapter C while granting only the right to vote.

42. It is sometimes argued that a candidate for election needs to be more fully integrated into the local community than a simple elector and therefore needs to have been resident there for a longer period. However, none of the Council of Europe member States which have already extended the local government franchise to foreign residents makes a distinction between the residence qualification for the right to vote and that to stand for election. The convention text follows the practice of these countries.

## **Article 7**

43. Bearing in mind that the residence requirements stipulated in Article 6 for the right to vote in local authority elections correspond, in general, to the longest period required in those countries which have already introduced voting rights for foreigners, this article permits Parties to the convention to require a shorter residence qualification. The simple Statement in this article of the possibility open to the Parties to lower the residence requirements should not be interpreted as precluding the right of a State or States, with regard to the political rights of foreigners resident on their territory, to grant other, more extensive rights than those provided for by the present convention.



## Part II

### Article 8

44. The intention of this article is to encourage an active policy of information because foreign residents often have particular problems of interpretation and need to be made aware of their rights. The text leaves it up to each Party to determine, in accordance with its domestic law, which authorities shall be responsible for providing the information in question. Moreover, depending on the situation in the country concerned, the requirements of this article may be satisfied by the provision of information to foreign residents within the general framework of information given to all local residents or by means of publicity in the media, etc. It does not necessarily entail formal measures by the Parties to the convention to require local authorities to identify each foreign resident and send him or her relevant documentation.

### Article 9

45. This article specifies circumstances in which Parties may restrict the rights granted to foreign residents under the convention. The provisions of paragraph 1 are based on the model of Article 15, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms and refer to circumstances of war or public emergency. Paragraphs 2 and 3, on the other hand, refer only to Chapter A of Part I. They take account of the fact that in certain member States the law provides for the exercise of certain rights by aliens being subject to particular formalities. The restrictions provided for in paragraph 2 relate to Article 3, paragraph *a*, and have been drafted on the model of Article 10, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms. Those mentioned in paragraph 3 relate to Article 3, paragraph *b*, and are modelled on Article 11, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms.

46. Paragraph 3 of Article 9 is based on Article 60 of the Convention for the Protection of Human Rights and Fundamental Freedoms. It seeks to exclude the possibility that any of the provisions of the convention might be so interpreted as to detract from the protection accorded to the rights in question by national legislation or other international agreements.

### Article 10

47. The convention does not make provision for a specific body responsible for supervising its implementation. It is therefore all the more important that the Secretary General of the Council of Europe should be in a position to follow developments in the individual Parties with regard to the participation of foreign residents in local public life. Article 10 is intended to facilitate this task by creating an obligation for each Party to supply relevant information. It corresponds to similar provisions in other Council of Europe conventions.

## Part III

### Articles 11 – 18

48. The final clauses contained in Articles 11 to 18 are closely based on the model final clauses for conventions and agreements concluded within the Council of Europe. The insertion of Article 14 and item *d* of Article 19 takes account of the possibility given to the Parties by Article 1, paragraph 2, to enlarge subsequently the scope of their undertakings under the convention. The insertion of item *e* of Article 19 takes account of the obligation to notify the Secretary General of any measure taken in accordance with Article 9, paragraph 4.

49. The purpose of Article 15 is to define the categories of local authorities to which the convention applies. Although some previous proposals for the participation of foreign residents had been limited to the municipal level, there did not seem to be any compelling reason for excluding other categories of local authorities, particularly as the concept of "municipality" could pose some problems in the United Kingdom and Ireland. It therefore seemed best to extend the provisions of the convention to all local authorities, leaving those Parties which have problems with such an extension the freedom to specify which categories of territorial authorities are covered. The wording of Article 15 is closely based on that used for the European Charter of Local Self-Government.