

## Study on the Right to Equal Participation in Public Affairs in Western Europe

### *Analysis of legislation, jurisprudence and practice*

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### Table des matières

INTRODUCTION	3
1. DISCRIMINATION FACED BY VARIOUS SOCIAL GROUPS	5
A. The right to vote of non-nationals and non-residents	5
1. <i>Non-nationals</i>	5
2. <i>Non-resident citizens</i>	7
B. Women	8
C. Minorities and indigenous people	9
D. Persons with disabilities	11
E. Prisoners	13
2. INFORMATION AND COMMUNICATION TECHNOLOGY AND THE RIGHT TO PARTICIPATE	13
A. ICTs and elections	13
B. ICTs and new forms of participation	14
1. <i>Promoting transparency and access to information through the use of ICTS</i>	14
2. <i>Involvement in the consultation process</i>	15
3. <i>Access to the decision-making process</i>	16
3. PARTICIPATION BEYOND THE STATE LEVEL	17
CONCLUSION	18
ANNEX 1 : Women in National Parliaments	20
ANNEX 2 : Gender Quotas	21
ANNEX 3 : Relevant Applicable Standards	22

### Liste des abréviations

ACFC	Advisory Committee on the Framework Convention for the Protection of National Minorities
CERD	Convention/Committee on the Elimination of Racial Discrimination
CESCR	Convention/Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRDP	Convention/Committee on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRI	European Commission Against Racism and Intolerance
ESCR	European Committee on Social Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
OSCE	Organization for Security and Co-operation in Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPR	Universal Periodic Review
Venice Commission	European Commission for Democracy through Law
WEOG	Western European and Others Group

## Introduction

The right to equal participation in public affairs provided in Article 25 of the ICCPR is closely linked to the idea of democracy. As stated by the Human Rights Committee in General Comment No. 25, it “lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant”. Its material scope is wide since it comprises the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service.

The Human Rights Committee has interpreted the conduct of public affairs as “a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”<sup>1</sup> The right to take part in the conduct of public affairs may be exercised directly, by holding legislative bodies’ positions or executive office and through direct consultation mechanisms or indirectly through freely chosen representatives but also by exerting influence through public debate or civil society organizations.<sup>2</sup> In other words, the conduct of public affairs entails the right to be fully involved in and to influence decision-making processes at each phase of the policy-making cycle: formulation, monitoring and implementation of policies and legislation that have an impact on right holders.<sup>3</sup>

This study therefore covers the various aspects of Article 25, i.e. the right to participate in the electoral process, but also between elections and in decision-making processes more broadly.

For the purpose of this study, Western Europe relates to the United Nations “Western Europe and Others” (WEOG) regional group minus the “American” and “Pacific” States

(Canada, United States of America, Australia and New Zealand). This study covers the following 25 countries: Andorra, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey and the United Kingdom. Other studies focusing on different regions complement this one.<sup>4</sup>

### The applicable legal framework

Applicable standards in Western Europe derive from the United Nations and domestic law, but also from regional organisations, namely the Council of Europe, the European Union and the OSCE.<sup>5</sup>

UN applicable standards relevant to this study are Article 21 UDHR, Article 25 ICCPR, Article 8 CDESCR, Articles 7 and 8 CEDAW, Article 5(c) CERD and Article 29 CRPD.

In the framework of the Council of Europe, article 3 of Protocol 1 to the ECHR recognizes the obligation for States Parties “to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”. This provision is considered by the Court “of prime importance in the Convention system” since “it enshrines a characteristic principle of democracy”.<sup>6</sup> However, the right to free elections is limited in scope to the election of the “legislature” and does not apply to referendums for example.<sup>7</sup> Besides, restrictions to the right protected by Article 3 of Protocol No. 1 ECHR may apply.

The ECtHR has also emphasised that the rights guaranteed under Article 3 Protocol 1<sup>8</sup> are not limited to the right to stand in elections or to the elections themselves but covers the period running from the election campaign to the actual exercise of office.<sup>9</sup> Articles 10 and 11 of the

<sup>1</sup> Human Rights Committee General Comment No 25, para. 5. The Committee further considers that the means by which individual citizens exercise this right “should be established by the constitution and other laws”. *Ibid.*

<sup>2</sup> *Id.*, paras. 6-9.

<sup>3</sup> See OHCHR, Factors that impede equal political participation and steps to overcome those challenges, A/HRC/27/29, paras. 17-21.

<sup>4</sup> See the studies on the right to equal participation in the Americas, Africa, Asia, Central Asia and Eastern Europe on the OHCHR website: <http://www.ohchr.org/EN/Issues/Pages/DraftGuidelinesRighttoParticipationPublicAffairs.aspx>.

<sup>5</sup> See table of relevant applicable standards, Annex 5.

<sup>6</sup> ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium*, application No. 9267/81, judgement of 2 March 1987, para. 47.

<sup>7</sup> As recalled recently by the Court in a case regarding the referendum on Scottish independence. ECtHR, *Moohan and Gillon v. the United Kingdom* (dec.), Nos. 22962/15 and 23345/15, 13 June 2017. See also *X v. the United Kingdom* (dec.), No. 7096/75, 3 October 1975; *McLean and Cole v. the United Kingdom* (dec.), Nos. 12626/13 and 2522/12, 11 June 2013.

<sup>8</sup> The Court makes a distinction between “active” and “passive” electoral rights, namely between the right to participate in an election as a voter and the right to stand as a candidate for election. Such “passive” electoral rights enjoy a lesser degree of protection than the “active” rights. See ECtHR Guide on Article 3 of Protocol No. 1 – Right to free elections, 31 August 2017, [http://www.echr.coe.int/Documents/Guide\\_Art\\_3\\_Protocol\\_1\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf). See also ECtHR Factsheet, *Right to free elections*, May 2013, [http://www.echr.coe.int/Documents/FS\\_Free\\_elections\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Free_elections_ENG.pdf) and ECtHR Factsheet, *Right to vote*, October 2016, [http://www.echr.coe.int/Documents/FS\\_Vote\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Vote_ENG.pdf)

<sup>9</sup> ECtHR Guide on Article 3 of Protocol No. 1 – Right to free elections, *op. cit.*, from para. 79.

ECHR relating to freedom of expression and freedom of assembly and association are also relevant. The Council of Europe has also developed standards applying to specific groups, namely national minorities,<sup>10</sup> women,<sup>11</sup> persons with disabilities,<sup>12</sup> and foreigners.<sup>13</sup> Finally, the European Social Charter and more precisely Article E read in conjunction with Article 30, are also considered to cover rights relating to civic and citizens' participation.<sup>14</sup>

At the European Union level, a distinction needs to be drawn between the human rights recognized to all under the law of the EU (EU treaties and CJEU case law)<sup>15</sup> and EU citizens' rights.<sup>16</sup> Rights recognized to all are only protected within the scope of application of EU law. The right to participation in public affairs for EU citizens is protected by the Lisbon Treaty in its Articles 10 and 11. These provisions underline the principle of representative democracy via the European Parliament, representing the citizens directly at European level. Article 10(3) guarantees the right of "every citizen" to "participate in the democratic life of the Union" and provides that "[d]ecisions shall be taken as openly and as closely as

possible to the citizen." For its part, the Charter of Fundamental Rights of the EU guarantees the right of every citizen of the Union to vote and stand as candidate at elections to the European Parliament (Article 39) and at municipal elections (Article 40).

For its part, the OSCE has adopted several documents relating to the right to participation of national minorities,<sup>17</sup> women<sup>18</sup> and persons with disabilities<sup>19</sup>. Besides, the OSCE provides a regulatory framework to participating States through the elaboration of guidelines and recommendations, notably on the participation of national minorities and associations,<sup>20</sup> some of which with the Council of Europe Venice Commission.<sup>21</sup>

The UN, CoE and the OSCE standards apply to all 25 countries apart from Israel. Israel is not a party to the ECHR. It is a party to other CoE conventions – none of which are relevant to this study<sup>22</sup> – and a member of the Venice Commission. As an OSCE partner for co-operation, Israel may also participate in the yearly human dimension

<sup>10</sup> Framework Convention for the Protection of National Minorities (Article 15) and Advisory Committee on the Framework Convention on national minorities (ACFC) Thematic Commentary No. 2 on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs.

<sup>11</sup> Committee of Ministers Recommendation Rec(2003)3 on balanced participation of women and men in political and public decision making.

<sup>12</sup> Committee of Ministers Recommendation CM/Rec(2011)14 on the participation of persons with disabilities in political and public life.

<sup>13</sup> Convention on the Participation of Foreigners in Public Life at Local Level adopted in 1992.

<sup>14</sup> According to the CoE European Committee on Social Rights, the reference to social rights in Article 30 should not be understood too narrowly and the fight against social exclusion is one area where the notion of the indivisibility of fundamental rights takes on special importance and, in this regard, *the right to vote, like other rights relating to civic and citizens' participation*, constitutes a necessary dimension in achieving social integration and inclusion and *is thus covered by Article 30*. ECSR, *European Roma Rights Centre (ERRC) v. France*, Complaint No. 51/2008, decision on the merits of 19 October 2009, para. 99, (emphasis added).

<sup>15</sup> Article 6 of the Lisbon Treaty provides that the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the EU (para. 1), that it shall accede to the ECHR (para. 2) and that fundamental rights shall constitute principles of the Union's law (para. 3). Besides, the CJEU has been instrumental in enforcing respect for human rights in the EU. See European Parliament, *Respect for Fundamental Rights in the European Union*, Fact Sheet, European Union, June 2017.

<sup>16</sup> Article 9 of the Lisbon Treaty: "Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it."

<sup>17</sup> Copenhagen document of 1990: (35) "The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities"; Helsinki document of 1992: "(24) Will intensify [...] efforts to ensure the free exercise by persons belonging to national minorities, [...] of their human rights and fundamental freedoms, including the right to participate fully, in accordance with the democratic decision-making procedures of each State, in the political, economic, social and cultural life of their countries including through democratic participation in decision-making and consultative bodies at the national, regional and local level". See also the Lund Recommendations on the Effective Participation of Minorities in Public Life of 1999.

<sup>18</sup> Moscow document of 1991: (40.8) "encourage and promote equal opportunity for full participation by women in all aspects of political and public life".

<sup>19</sup> Moscow document of 1991: (41.3) "promote the appropriate participation of [...] persons [with disabilities] in decision-making in fields concerning them".

<sup>20</sup> See the OSCE Guidelines to Assist National Minority Participation in the Electoral Process (2001); Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes 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, April 2015.

<sup>21</sup> OSCE/ODIHR – Venice Commission Guidelines on Political Party Regulation (2010); OSCE/ODIHR – Venice Commission Guidelines on Freedom of Association (2015).

<sup>22</sup> See the list of CoE conventions signed and ratified by Israel as non European non member State as of 15 January 2018: <https://www.coe.int/en/web/conventions/search-on-states/-/conventions/treaty/country/ISR>.

implementation meetings.<sup>23</sup> EU standards do not apply to non EU Member States (Andorra, Iceland, Israel, Liechtenstein, Monaco, Norway, San Marino, Switzerland and Turkey).

This study is necessarily limited in scope and therefore non-exhaustive. Not all standards, cases and practices have been compiled and studied.<sup>24</sup> The most recent reports and views of the following UN Human Rights bodies have been processed: Human Rights Committee, CESCR, CERD, CEDAW, CRDP, relevant special procedures and UPR recommendations. At the European level, the relevant ECtHR and CJEU judgments as well as the most recent reports, recommendations and resolutions from the following bodies have been considered: the Commissioner for Human Rights, Committee of Ministers, the European Commission Against Racism and Intolerance (ECRI), the Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC) and the Venice Commission.

In line with Human Rights Council Resolution 33/22,<sup>25</sup> this study focuses on three main aspects: discrimination faced by several social groups in their enjoyment of the right to participate in public affairs (I), new forms of participation and new technologies as an opportunity to allow more people to take part in elections (II) and public participation beyond the State level (III).

### 1. Discrimination faced by various social groups

Various social groups face specific challenges and discrimination.<sup>26</sup> The Human Rights Committee has clarified that “not all differentiation constitutes discrimination in the enjoyment of the right to participate if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant”.<sup>27</sup> Discrimination in the right to participation in public affairs

remains a major issue. In Western Europe, the various social groups identified are non-nationals and non-resident citizens (A), women (B), minorities and indigenous peoples (C), persons with disabilities (D) and prisoners (E).

#### A. The right to vote of non-nationals and non-resident citizens

Historically, the right to vote and political participation more generally were granted both on the basis of citizenship and residence. Nowadays, mobility raises the issue of the right to vote of non-nationals as well as non-resident citizens.<sup>28</sup>

##### 1. Non-nationals

The Maastricht Treaty of 1992 established the EU citizenship with the rights attached, including the right to vote and stand as candidate in municipal elections and in elections to the European Parliament, but only for EU citizens residing in other Member States.<sup>29</sup> As a result, the right to vote in local elections has been introduced in EU countries since 1993 for EU citizens. As regards the beneficiaries of the right to vote in elections to the European Parliament, the CJEU ruled in its judgments *Spain v. United Kingdom*<sup>30</sup> and *Eman and Sevinger*<sup>31</sup> that, as EU law currently stands, the definition of the persons entitled to exercise that right falls within the competence of each Member State.

The European Convention on the Participation of Foreigners in Public Life at Local Level of 1992, which has only been ratified by 9 States, including 7 covered by this

<sup>23</sup> For more information on these meetings, see: <http://www.osce.org/odihr/hdim>.

<sup>24</sup> For the compilations of the UN Human Rights bodies and the European jurisprudence in relation to all countries covered by the study, see Annexes 1 and 2.

<sup>25</sup> Human Rights Council Resolution 33/22, 30 September 2016, *Equal participation in political and public affairs*. The Council has also decided separately to establish a forum on human rights, democracy and rule of law, which purpose is “to provide a platform for promoting dialogue and cooperation on issues pertaining to the relationship between these areas” and to “identify and analyze best practices, challenges and opportunities for States in their efforts to secure respect for human rights, democracy and the rule of law”. The theme of the first session of the forum was “Widening the Democratic Space: the role of youth in public decision-making”. See Resolution 28/14, 26 March 2015, *Human rights, democracy and the rule of law*.

<sup>26</sup> See Human Rights Council Resolution 33/22 of 30 September 2016: “many people continue to face obstacles, such as discrimination [...] in the enjoyment of their right to participate in public affairs of their countries” (OP1), “women, persons belonging to marginalized groups or minorities, and persons in vulnerable situations are among those who are most affected by discrimination in participation in political and public affairs” (OP2).

<sup>27</sup> Human Rights Committee, *Gillot et al v. France*, CCPR/C/75/D/932/2000, 21 July 2002, para. 13.5.

<sup>28</sup> European Parliament Directorate-General for Internal Policies, Policy Department Citizens’ Rights and Constitutional Affairs, *Franchise and Electoral Participation of Third Country Citizens Residing in the European Union and of European Union Citizens Residing in Third Countries*, 2013.

<sup>29</sup> Article 8(b)(1) and (2) of the Maastricht Treaty on European Union.

<sup>30</sup> CJEU, *Spain v. United Kingdom*, C-145/04, EU:C:2006:543, paras 70 and 78.

<sup>31</sup> CJEU, *Eman and Sevinger*, C-300/04, EU:C:2006:545, paras 43 and 45.

study<sup>32</sup> provides in Article 6 for electoral rights to be granted to foreigners after lawful and habitual residence for five years preceding the elections. In ECRI's view, a country which has large numbers of foreign residents who participate actively in the life and prosperity of the local community should allow them to contribute to the local decision-making process on matters which affect them.<sup>33</sup>

As regards third-country citizens, for example in Ireland, non-EU citizens may vote at local government elections.<sup>34</sup> In Spain, non-citizens cannot vote, apart from reciprocity agreements with some countries (Chile, Colombia, Ecuador, Norway, New Zealand, Paraguay and Peru). However, these agreements do not confer the right to stand for election.<sup>35</sup> Likewise, in Portugal, based on reciprocity, apart from EU citizens, nationals of the following States have voting rights at local level: Brazil, Cape Verde, Norway, Uruguay, Venezuela, Chile, Argentina and Iceland. Nationals of EU countries, Brazil and Cape Verde can also stand as candidates in local elections.<sup>36</sup>

Ultimately, granting citizenship is a way of furthering political participation. It has also been argued that it indirectly stimulates a better representation of members of ethnic minority groups in the public sector when public

service employment requires citizenship, as is the case in Spain for instance<sup>37</sup>. The EU Fundamental Rights Agency considers that “[r]esidence status and access to citizenship are important for immigrants and descendants of immigrants [...] for individuals’ active political participation”.<sup>38</sup> The European Convention on Nationality, which has been ratified by 21 States including 10 covered by this study,<sup>39</sup> provides that the period of residence required of an applicant by a State to become a citizen should not exceed ten years of residence. Most countries in Europe abide by this standard and require between five and ten years of residence.<sup>40</sup> However, conditions for acquiring nationality have been tightened in several countries in recent years regarding the length of residency or through the imposition of languages tests.<sup>41</sup> Civic integration tests<sup>42</sup> have been perceived as potential hurdles to obtain citizenship and naturalisation. In some countries, the mandatory nature of civic integration and the resulting sanctions for failed applicants has also been questioned. ECRI has thus recommended to several countries that they should combine any obligation to participate in these integration programs with incentives and rewards, confining sanctions to cases where

<sup>32</sup> As of 25 January 2018, the 7 States parties covered by this study are Denmark, Finland, Iceland, Italy, the Netherlands, Norway and Sweden. The other two States parties to the Convention are Albania and the Czech Republic. See [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144/signatures?p\\_auth=shZQQ7s2](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/144/signatures?p_auth=shZQQ7s2).

<sup>33</sup> ECRI 2015 report on Portugal, para. 148.

<sup>34</sup> ECRI 2012 report on Ireland, para. 7.

<sup>35</sup> ECRI 2011 report on Spain, para. 159.

<sup>36</sup> ECRI 2013 report on Portugal, para. 147.

<sup>37</sup> ECRI 2011 report on Spain, para. 158.

<sup>38</sup> FRA, Second EU Minorities Survey, Muslims, Selected Findings, 2017, pp. 18-19.

<sup>39</sup> As of 25 January 2018, the 10 States parties covered by this study are Austria, Denmark, Finland, Germany, Iceland, Luxembourg, the Netherlands, Norway, Portugal and Sweden. For the full list of States Parties, see [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166/signatures?p\\_auth=shZQQ7s2](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166/signatures?p_auth=shZQQ7s2).

<sup>40</sup> Some “small” States constitute exceptions. In Liechtenstein, the law provides a 30-year residence requirement with the years spent in Liechtenstein before the age of 20 counting double – a very long period compared to the 10-year requirement provided for under the European Convention on Nationality of the Council of Europe. The other possibility in order to obtain citizenship is the system of voting by local residents whereby a favourable vote by the local residents of the municipality in which the applicant resides is necessary. Both the CoE Commissioner for Human Rights and ECRI have recommended reviewing these “excessively restricted” requirements in line with the principles of the European Convention on Nationality. Commissioner for Human Rights press release following his visit, 2012; ECRI 2013 country report, paras 10-12. In San Marino, a law of 21 March 2012 reduces from 30 to 25 years the period of continued residence required for acquiring citizenship. It reduces this period to 18 years for those who have lived continuously in the territory since birth and to 10 years for those who are stateless. The requirement for the spouses of citizens of San Marino of a minimum period of 15 years of residence remains as in the previous law (ECRI 2013 report, from para. 20).

<sup>41</sup> In Belgium, a new law entered into force on 1 January 2013. Through the fast track procedure, foreigners can acquire Belgian nationality after five years of legal residence if they are already “linguistically, socially and economically integrated before they apply”. The normal procedure also requires ten years of legal residence, proof of knowledge of one of the national languages and that the candidate “participates in the welcoming Community”, ECRI 2013 report on Belgium. In Norway, the CERD has considered that the language programme “may be a barrier for access to citizenship and naturalization for certain groups”, CERD/C/NOR/CO/19-20, para. 11.

<sup>42</sup> The CJEU considered the lawfulness of integration measures in Germany and the Netherlands in three cases, although the legal basis to rule on these measures was not the right to participation or even fundamental rights more generally. CJEU, *Dogan*, judgment of 10 July 2014, Case C-138/13; *K and A*, judgment of 9 July 2015, Case C-153/14; *P and S*, judgment of 4 June 2015, Case C-579/13. For an analysis of these three cases, see Sarah Ganty, “Civic Integration Tests Under the Control of the European Court of Justice: a Perilous Tightrope Walk between Margin of Appreciation of the Member States and Protection of Third Country Nationals”, *European Journal of Human Rights*, 2016/1, pp. 32-56.

incentives have failed and integration without participation in these measures is not likely.<sup>43</sup>

Statelessness should also be mentioned. Without any nationality, stateless persons<sup>44</sup> do not enjoy the same basic rights as nationals and are therefore deprived of their right to participate in public affairs.

## 2. Non-resident citizens

Restrictions to the right to participate in public affairs may also be based on a residence criterion – as opposed to nationality. This mostly concerns the exercise of the right to vote for non-resident citizens. The ECtHR grants a large “margin of appreciation” to States and its case-law is very clear in that regard. In its *Shindler v. the United Kingdom* case, the Court considered, as the law currently stood, that States were under no obligation to grant non-residents unrestricted access to the franchise, whilst noting the trend in favour of voting rights for non-resident citizens. In this landmark case concerning the United Kingdom where the law provides that non-resident citizens lose the right to vote in national elections 15 years after they have emigrated, the Court concluded that the “legislation struck a fair balance between the conflicting interests at stake, namely the genuine interest of the applicant, as a British citizen, to participate in parliamentary elections in his

country of origin and the chosen legislative policy of respondent State to confine the parliamentary franchise to those citizens with a close connection with the United Kingdom and who would therefore be most directly affected by its laws”.<sup>45</sup>

The ECtHR case-law is in contrast with European State practice, which overwhelmingly endorses the right to vote for non-resident citizens.<sup>46</sup> The right to vote from abroad is recognised in many states for citizens resident abroad or temporarily out of the country without any restrictions concerning the period of absence or the obligation to have resided in the country.<sup>47</sup> This situation was acknowledged in a Venice Commission study<sup>48</sup> and supported by its report on out-of-country voting.<sup>49</sup> Citizens abroad are allowed to vote in all elections in four countries covered by the study: Austria, Denmark, Iceland, and Norway. In Ireland and Israel, the only people allowed to vote abroad are members of the diplomatic corps and the army.<sup>50</sup> The Human Rights Committee has not had to consider this specific issue regarding a national election.<sup>51</sup> Its General Comment No. 25 only states that Article 25 of the Covenant protects the rights of “every citizen”.

In terms of voting rights of non-nationals in the countries studied, EU citizens living in EU countries enjoy broader participation since they can vote in local elections. Third-

<sup>43</sup> 2013 report on Belgium, para. 110; 2013 report on Germany, para. 75. ECRI has also strongly criticised the Netherlands' civic integration programme in its 2013 report, paras 196, 197 and 200.

<sup>44</sup> The 1954 Convention relating to the Status of Stateless Persons defined the term “stateless person” as a person who is not considered as a national by any State under the operation of its law (Article 1). By the end of 2013, according to UNHCR statistics, 49587 persons were under the UNHCR statelessness mandate in the 25 countries covered by this study, including 20450 in Sweden and 11709 in Germany. No data is available for Andorra and San Marino. Statistics available at <http://www.unhcr.org/protection/statelessness/546e01319/statistics-stateless-persons.html>.

<sup>45</sup> ECtHR, *Shindler v. the United Kingdom*, 7 May 2013, application No. 19840/09, para. 118.

<sup>46</sup> As recalled by Richard Lappin, “The Right to Vote for Non-Resident Citizens in Europe”, *International & Comparative Law Quarterly*, 65(4), October 2016, pp. 859-894, p. 873. See also Julie Fraser (2017). “Inclusive Democracy: Franchise Limitations on Non-Resident Citizens as an Unjust Restriction of Rights under the European Convention on Human Rights”, *Utrecht Journal of International and European Law*, 33(84), pp.23-43.

<sup>47</sup> This is the case in the following states: Austria, Belgium, Finland, France, Iceland, Italy, Luxembourg, Monaco, Norway, Netherlands, Portugal, Romania, Spain, Sweden and Switzerland. The principle of the right to vote from abroad of citizens who are permanently resident abroad or temporarily out of the country is therefore recognised in a broad majority of the states considered, para. 25.

<sup>48</sup> “Overall, to deal with voters on electoral lists who de facto reside abroad seems particularly important in times of globalisation and increased mobility of individuals. Cross-border migration is a growing phenomenon. Since the latter is likely to increase in the future, the need to address related problems – such as voters on electoral lists who de facto reside abroad – likewise becomes more pressing”, Christina Binder, ‘Comments on Electoral Lists and Voters Residing De Facto Abroad’ (27 January 2015) Study No 748/2013 (CDL-EL (2015)003), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-EL\(2015\)003-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-EL(2015)003-e). See also László Trócsányi, “The Regulation of External Voting at National and International Level”, *Minority Studies*, 16: 13., pp. 13-24.

<sup>49</sup> Venice Commission, *Report on out-of-country voting*, 24 June 2011, CDL-AD(2011)022. The report concludes: “Although the introduction of the right to vote for citizens who live abroad is not required by the principles of the European electoral heritage, the European Commission for Democracy through Law suggests that states, in view of citizens' European mobility, and in accordance with the particular situation of certain states, adopt a positive approach to the right to vote of citizens living abroad, since this right fosters the development of national and European citizenship”, para. 99.

<sup>50</sup> *Idem*, paras 55 and 22. For a table presenting the countries and the elections in which their non-resident citizens are allowed to vote, see para. 55.

<sup>51</sup> In *Gillot v. France*, the Committee considered the nature and purpose of a specific election strictly limited *ratione loci* to local ballots on self-determination and observed that the restrictions had no consequences for participation in general elections, whether legislative, presidential, European or municipal, or other referendums. *Gillot et al v. France*, CCPR/C/75/D/932/2000, 21 July 2002, para. 13.17.

countries nationals' right to vote in local elections remains exceptional. A positive trend should be noted in favour of voting rights of non-resident citizens. As shown by European State practice and acknowledged by the European Court of Human Rights and the Venice Commission, the right to vote from abroad is recognised in many states for citizens residents abroad or temporarily out of the country without any restrictions based on the period of time spent abroad or residency in the country.

Overall, a number of trends and good practices can be identified regarding equal participation in public affairs of non-citizens and non-resident citizens in the countries covered by the study. These include:

- Granting foreigners electoral rights in the country where they live after lawful and habitual residence for five years preceding the elections, in line with the European Convention on the Participation of Foreigners in Public Life at Local Level;
- Allowing non-resident citizens to vote from abroad regardless of how long they have been abroad, as is the case in most countries considered;
- Provide a number of years of legal residence required to acquire citizenship in line with the European Convention on Nationality (no longer than ten years), as is also the case in most countries studied;
- Where foreigners, including migrants, do not have voting rights, promoting their contribution to the political debate and decision-making processes more generally.<sup>52</sup>

## B. Women

Even though women tend to be better represented than they were in most countries concerned,<sup>53</sup> the Council of Europe Gender Equality Commission considers that the full and equitable participation of women in political and public life remains to be achieved in most of the member States, both in legislative, executive and administrative bodies at the local, regional and national levels. The Commission concludes that a "huge amount of progress remains to be made to reach 50-50 by 2030."<sup>54</sup>

In terms of parity threshold, the Council of Europe generally considers a 50/50 participation rate to be the objective whilst the representation of either women or men in political and public life should not fall below 40%.<sup>55</sup> For its part, the European Union also encourages setting up a target of 50% representation of men and women in national parliaments and in the European Parliament<sup>56</sup>, whilst the Commission has "set itself a target of 40 % women in senior and middle management by the end of 2019" (end of its mandate).<sup>57</sup>

According to the Venice Commission and the Committee of Ministers of the Council of Europe, electoral gender quotas can be considered an appropriate and legitimate measure to increase women's parliamentary representation. In the Committee of Minister's 2009 Declaration "Making Gender Equality a Reality", Member States are urged to enable positive action or special measures to be adopted in order to achieve balanced representation in political and public decision-making.<sup>58</sup> The UN human rights treaty bodies also regularly encourage States Parties to resort to gender quotas to improve women's representation in political life.<sup>59</sup> However, quotas do not always function effectively<sup>60</sup> and are not always enforced due to the "leniency of the sanctions"<sup>61</sup> or because some political parties appear to

<sup>52</sup> For more details, see OSCE/ODIHR Meeting Report, Civic and Political Participation of Migrants: Challenges and Good Practices in Line with OSCE Commitments and International Standards, Concluding Recommendations, November 2017.

<sup>53</sup> For an overview of women's representation in national parliaments, see Annex 3.

<sup>54</sup> CoE Gender Equality Commission, Implementation of the Council of Europe Gender Equality Strategy 2014-2017, Annual Report 2016 <https://rm.coe.int/16806eeb7b>, p. 15.

<sup>55</sup> CoE Recommendation Rec(2003)3 of the Committee of Ministers and explanatory memorandum on *Balanced participation of women and men in political and public decision-making*, Appendix; Recommendation CM/REC (2007)17 of the Committee of Ministers on gender equality standards and mechanisms, paras 31-33.

<sup>56</sup> European Parliament report on Women in Political Decision-Making – Quality and Equality (2011/2295(INI)), para. 8.

<sup>57</sup> European Commission Strategic Engagement for Gender Equality 2016-2019, Annex 3.

<sup>58</sup> Similarly, in accordance with OSCE Decision No. 7/09 on Women's Participation in Political and Public Life, the Ministerial Council calls on the participating States to "consider possible legislative measures, which would facilitate a more balanced participation of women and men in political and public life and especially in decision-making", and to "encourage all political actors to promote equal participation of women and men in political parties, with a view to achieving better gender-balance representation in elected public offices at all levels of decision-making." All such steps are considered good practice. Guidelines on political party regulation, by OSCE/ODIHR and Venice Commission – adopted by the Venice Commission at its 84th Plenary Session, 15-16 October 2010, para. 102.

<sup>59</sup> See the compilation of UN human rights bodies jurisprudence, Annex 1.

<sup>60</sup> See CEDAW Concluding Observations on Greece, CEDAW/C/GRC/CO/7, 2013, para. 24.

<sup>61</sup> See CEDAW Concluding Observations on Portugal in which the Committee criticizes the "leniency of the sanctions" applied in the event of failure to comply with the quota, CEDAW/C/PRT/CO/8-9, 2015, para. 30.



prefer to be fined rather than to nominate women candidates for elections.<sup>62</sup> Data gathered show that very few countries have adopted legislated quotas and none provide reserved seats for women in the lower or single house. However, in most countries, political parties have *voluntary* gender quotas.<sup>63</sup>

Given the broad under-representation of women, the Venice Commission considers that quotas should be viewed as compensation for obstacles to women's access to parliament. They can help to overcome structural, cultural and political constraints on women's representation.<sup>64</sup> Furthermore, the Venice Commission gives guidance as to the rate of women candidates, considering that gender quotas should provide for "at least 30% of women on party lists, while 40% or 50% is preferable."<sup>65</sup> The CEDAW Committee also recommended to several European countries close monitoring and regular assessments of women participation in political life and of gender quotas to evaluate the impact of those mechanisms and check whether adjustments are needed.<sup>66</sup>

The good practices analysed in the concerned countries as well as European institutions to advance women's political representation lie mainly in the adoption of adequate and enforced quotas (Ireland<sup>67</sup>, France in local elections<sup>68</sup>).

### C. Minorities and indigenous people

Indigenous peoples in the countries covered by the study include the Sami people in Finland, Norway and Sweden and the Kanaks in New Caledonia (France).<sup>69</sup> The main minority whose concerns are raised in terms of participation in public affairs in the region is the Roma, as demonstrated by the compilation of European jurisprudence and reports.<sup>70</sup>

Several issues are highlighted in the jurisprudence and reports researched. Sometimes minorities are not recognised as such by law. In Denmark, the only recognised minority is the German minority in South Jutland.<sup>71</sup> France does not recognise any,<sup>72</sup> whilst Italy does not recognise the Roma, Sinti and Caminanti (Travellers).<sup>73</sup>

Both the European Commission and the Council of Europe have taken action to improve the civil and political participation of Roma citizens.<sup>74</sup> In 2011, the European Commission planned an "EU Framework for National Roma Integration Strategies up to 2020".<sup>75</sup> In response, the EU Fundamental Rights Agency has launched the LERI (Local Engagement for Roma Inclusion) programme to investigate how Roma can be best involved in Roma

<sup>62</sup> See CEDAW Concluding Observations on France, CEDAW/C/FRA/CO/7-8, 2016, para. 28.

<sup>63</sup> See Annex 4 based on the Gender Quotas Database. <https://www.idea.int/data-tools/data/gender-quotas>.

<sup>64</sup> Venice Commission Report on the Impact of Electoral Systems on Women's Representation in Politics, 2009, para. 115. [http://www.venice.coe.int/webforms/documents/CDL-AD\(2009\)029.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2009)029.aspx). See also Compilation of Venice Commission Opinions and Reports Concerning Gender Equality, 2016, from p. 19. [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2016\)007-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)007-e).

<sup>65</sup> Venice Commission Report on the Impact of Electoral Systems on Women's Representation in Politics, *op.cit.*, para. 117.

<sup>66</sup> See, for example, CEDAW Concluding observations on Andorra, 2013, CEDAW/C/AND/CO/2-3; Belgium ("gender test"), 2014, CEDAW/C/BEL/CO/7; Denmark, 2015, CEDAW/C/DNK/CO/8.

<sup>67</sup> See CommDH 2017 report on Ireland: quotas effective to improve women's representation.

<sup>68</sup> 2013 Amendments to the electoral code, related to the election of the departmental and regional councils, (Article L 191 of the Electoral Code) providing for a new system of nomination of both female and male candidates ('binôme'). This resulted in 48% of women elected regional councilors and 50% departmental councilors. It should be noted however that only 3 out of 18 regions and 10% of *départements* are presided by a woman.

<sup>69</sup> For examples of good practices regarding indigenous peoples' participation in decision making, notably the Sami Parliaments in Norway, Sweden and Finland and the Customary Senate consisting of Kanak Senators in New Caledonia (France), see Final report of the study on indigenous peoples and the right to participate in decision-making, A/HRC/18/42, 17 August 2011, paras 24-29.

<sup>70</sup> See Annex 2.

<sup>71</sup> See Government comments to the ACFC 4<sup>th</sup> Opinion on Denmark of 2014: "As the German minority in South Jutland has been identified as the only existing national minority in Denmark, there are no grounds for reviewing the articles of the Convention in consultation with other groups as these groups do not constitute or represent a national minority within the meaning of the Framework Convention". Other ethnic groups are nonetheless present in Denmark. The ACFC considers that the provision of the Framework Convention should be extended to other groups, namely the Roma, the Faroese and Greenlanders living in mainland Denmark. See ACFC 4<sup>th</sup> Opinion on Denmark adopted on 20 May 2014, paras. 19-20.

<sup>72</sup> Article 1 of the French Constitution. France has also made a reservation to Article 27 of the ICCPR protecting minority rights.

<sup>73</sup> CoE ACFC Fourth Opinion on Italy, 19 November 2015, paras 25-26.

<sup>74</sup> On measures taken by the EU Member States to improve Roma inclusion, see FRA, Fundamental Rights Report, 2017, p. 114.

<sup>75</sup> See the Commission's Communication to EU Parliament, Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011)173, 5 April 2011, final, endorsed by the Heads of State and Governments on 23-24 June 2011. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0173&from=en>.

integration policies.<sup>76</sup> Several localities participate in the project in Finland, France, Greece, Italy, Spain and the United Kingdom. At the national level, Member States committed to develop, implement and monitor Roma integration strategies, one aspect of which aims to support the active citizenship of Roma by promoting their social, economic, political and cultural participation.<sup>77</sup>

Preferential voting systems have also been considered as a means to improve political participation of minorities, and to facilitate the representation of minorities.<sup>78</sup> The ECtHR has long asserted that minority protection justifies the application of a different electoral system within the State in order to ensure better minority representation in the legislature.<sup>79</sup>

Nevertheless, it has established that, “any electoral system must be assessed in the light of the political evolution of the country concerned”, and, as a result, “features that would be unacceptable in the context of one system may accordingly be justified in the context of another”.<sup>80</sup> The 2001 OSCE Warsaw Guidelines to Assist National Minority Participation in the Electoral Process elaborate further on preference voting systems, such as the single transferable vote (STV) (proportional system) and the alternative vote (AV) (majority system).<sup>81</sup> In its *Partei Die Friesen v. Germany* case, the ECtHR refers to Opinions of the Advisory Committee on the Framework Convention and the Venice Commission, which point at the

potential negative impact of minimum electoral thresholds on the chances of national minorities to be represented in elected bodies, such as Parliaments...<sup>82</sup>

Despite efforts to increase the political participation of minorities, frustration is expressed where institutions are not in place to allow their meaningful participation and when representative structures lack binding decision-making powers. The gap between formal consultation processes and a genuine interest to hear minorities' views has been highlighted in several countries.<sup>83</sup> In this respect, the CoE ACFC considers that “it is not sufficient for States to ensure formal participation of persons belonging to minorities; States must also ensure that the participation of minority representatives has a substantial influence on decisions which are taken, so that there is, as far as possible, a shared ownership of the decisions taken.”<sup>84</sup>

Encouraging examples of effective consultation and involvement in decision-making can be found for example in Portugal with Roma mediators in local government<sup>85</sup>, in Sweden where, in a number of municipalities, representatives of national minorities can participate in decision-making on allocation for grants, e.g. the Finnish minority in Stockholm.<sup>86</sup> The experience of the OSCE High Commissioner on National Minorities (HCNM) shows that such bodies, which are able to comment directly on issues of minority concern, can be more effective than representation in parliament. A minority expert nominated

<sup>76</sup> See the dedicated webpage at: <http://fra.europa.eu/en/project/2015/local-engagement-roma-inclusion-leri-multi-annual-roma-programme>.

<sup>77</sup> For the annual reports on assessing the implementation of the various national strategies, see the dedicated webpage at: [https://ec.europa.eu/info/publications/national-roma-integration-strategies-annual-reports\\_en](https://ec.europa.eu/info/publications/national-roma-integration-strategies-annual-reports_en).

<sup>78</sup> Lund recommendation 9.

<sup>79</sup> European Commission on Human Rights, *Lindsey and others v. the United Kingdom*, application No. 8364/78, judgement of 8 March 1979.

<sup>80</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, application No. 9267/81, judgement of 2 March 1987. On the issue of thresholds and their impact on minority participation, dissenting opinion in another European Court case warned that high thresholds virtually eliminate the possibility of regional or minority parties entering parliament and distort the essential purpose of a proportional system, thus suppressing parliamentary criticism and debate, which are the essence of representative democracy. *Yumak and Sadak v. Turkey*, application No. 10226/03, judgement of 8 July 2008.

<sup>81</sup> OSCE Guidelines to Assist National Minority Participation in the Electoral Process, OSCE/ ODIHR, Warsaw, 2001, pp. 26-8. See also Venice Commission, *The participation of minorities in public life*, April 2011, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD\(2011\)045-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2011)045-e), p. 63.

<sup>82</sup> In its *Partei Die Friesen v. Germany* (2016), the ECtHR acknowledged that the 5% threshold could have a “chilling effect” on potential voters not wishing to “waste” their votes on a political party that was unable to achieve that score (para. 34). However, the Court considered that the possibility of exemption from the minimum threshold was “merely” presented as one of many options and that no clear and binding obligation derived from the Framework Convention to exempt national minority parties from electoral thresholds (para. 43).

<sup>83</sup> See UN & European compilations, Annexes 1 and 2: Italy, ACFC Fourth Opinion on Italy, paras 37, 44; Spain, Special Rapporteur on racism report, paras 32, 70, ECRI 2011 Report on the National Roma Council, paras 126-127; Sweden, ACFC Fourth Opinion on Sweden, paras 101, 105.

<sup>84</sup> CoE ACFC Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and public affairs, adopted on 27 February 2008 (ACFC/31DOC(2008)001), para. 19.

<sup>85</sup> CoE CommDH, 8 March 2017, <https://www.coe.int/en/web/commissioner/-/portugal-progress-in-participation-of-roma-in-local-decision-making-should-be-sustained>, ECRI Report 2013, para. 119. <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Portugal/PRT-CbC-IV-2013-020-ENG.pdf>.

<sup>86</sup> CoE ACFC Fourth Opinion, 22 June 2017, para. 35.

to, for example, an inter-ministerial commission, may in some cases exert more direct influence on government policy than a parliamentary representative. However, while the HCNM has always encouraged and welcomed the establishment of such dialogue mechanisms, he has also emphasized that such forums should only complement, rather than substitute, direct political representation.<sup>87</sup> Another good practice lies in initiatives to increase diversity in public service, for example the police in Denmark,<sup>88</sup> or the association of officers belonging to minorities in London's Metropolitan Police and the Gypsy Roma Traveller Police Association<sup>89</sup> in the United Kingdom<sup>90</sup>. Finally, electoral systems should facilitate the representation of minorities.<sup>91</sup>

#### D. Persons with disabilities

Significant challenges remain for the realisation of the right to participation of persons with disabilities.<sup>92</sup> From a legal point of view, the right to vote is often linked to legal capacity. Therefore, people who have been deprived of their legal capacity, be it wholly or in part, are deprived of their right to vote.<sup>93</sup> In its General Comment No. 25, the Human Rights Committee considered that only "established mental incapacity may be a ground for denying a person the right to vote or to hold office."<sup>94</sup> Since then, the Human Rights Committee has aligned its

position with that of the ECtHR, which ruled that the automatic disenfranchisement due to mental health problem, without an individualised judicial assessment, was a violation of the right to vote.<sup>95</sup>

In recent concluding observations, the Human Rights Committee has invited States parties to ensure that their legislation does not discriminate against persons with mental disabilities by denying them the right to vote on bases that are disproportionate or that have no reasonable or objective relation to their ability to vote.<sup>96</sup> For its part, the CRPD goes further and considers that "Article 29 does not provide for any reasonable restriction or exception for any group of persons with disabilities. Therefore, an exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including a restriction pursuant to an individualized assessment, constitutes discrimination on the basis of disability".<sup>97</sup> Only a small number of the concerned countries have lifted all restrictions on the political participation of persons with psychosocial or intellectual disabilities, i.e. Austria, Italy, the Netherlands, Sweden and the United Kingdom.<sup>98</sup>

According to the Human Rights Committee General Comment No. 25, physical disability may never be a legitimate ground for restricting the right to vote. However,

<sup>87</sup> See, for example, OSCE HCNM letter to H.E. Mr Anatoly Zlenko, Minister for Foreign Affairs of Ukraine, 4 December 2001. Quoted in "Special measures to promote minority representation in elected bodies: the experience of the OSCE High Commissioner on National Minorities", in *The participation of minorities in public life*, Venice Commission, Council of Europe, April 2011.

<sup>88</sup> ECRI conclusions on implementation of previous recommendations, 2015. <https://www.coe.int/t/dghl/monitoring/ecri/country-by-country/denmark/DNK-IFU-IV-2015-23-ENG.pdf>

<sup>89</sup> See their website: <http://www.grtpa.com/>.

<sup>90</sup> CoE ACFC Fourth Opinion, 25 May 2016, para 132.

<sup>91</sup> Lund recommendation 9.

<sup>92</sup> For an overview of the situation in EU Member States, see FRA, *The right to political participation for persons with disabilities: human rights indicators*, 2014.

<sup>93</sup> See criticism by János Fiala-Butora et al., "The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities", *Harvard Journal of International Law*, 55:1, Winter 2014, pp. 71-104 in which the authors argue that "the fundamental right to vote cannot be curtailed on the basis of an alleged lack of capacity. Disenfranchisement based on individual assessment unjustly excludes a certain number of voting-capable individuals. Since all those affected are persons with disabilities, this violates the requirement of equality expressed in general international human rights law that recently was explicitly extended to cover disability". See also, by the same authors, "Facilitating an Equal Right to Vote for Persons with Disabilities", *Journal of Human Rights Practice*, 6:1, 2014, pp. 115-139.

<sup>94</sup> Human Rights Committee General Comment No 25, para. 4. See also *Human Rights and Disability, The current use and future potential of United Nations human rights instruments in the context of disability*, United Nations, New York and Geneva, 2002, from p. 63.

<sup>95</sup> The ECtHR concluded in its landmark *Alajos Kiss v. Hungary* ruling "that an indiscriminate removal of voting rights, without an individualised judicial evaluation and solely based on a mental disability necessitating partial guardianship, cannot be considered compatible with the legitimate grounds for restricting the right to vote." Judgment No. No. 38832/06, judgment of 20 May 2010. See also FRA, *The right to political participation of persons with mental health problems and persons with intellectual disabilities*, 2010, from p. 9.

<sup>96</sup> See, *inter alia*, Human Rights Committee Concluding Observations on Czech Republic 2013, CCPR/C/CZE/CO/3, para. 12; San Marino 2015, CCPR/C/SMR/CO/3, para. 23; Cambodia 2015, CCPR/C/KHM/CO/2, para. 26; Poland 2016, CCPR/C/POL/CO/7, para. 42.

<sup>97</sup> CRPD, *Zsolt Bujdosó and al. v. Hungary*, 16 October 2013, CRPD/C/10/D/4/2011, para. 9.4. (emphasis added). The UN Special Rapporteur on the rights of persons with disabilities also considers that "[n]o one should be restricted, either in law or in practice, in the enjoyment of political rights on the grounds of disability", A/HRC/31/62, 12 January 2016, para. 19.

<sup>98</sup> For an overview of the legal status of the right of persons with disabilities to vote in the EU, see FRA, *The right to political participation for persons with disabilities: human rights indicators*, *op. cit.*, from p. 39.

accessibility represents the main issue as physical access to the polling stations is not always guaranteed. In some other cases, persons who are blind or visually impaired are obliged to vote verbally in front of a group of people thereby undermining their right to vote by secret ballot.<sup>99</sup> The CRDP recommends that accessibility and reasonable accommodation for persons with disabilities be ensured at all stages of the electoral cycle in order to facilitate the exercise of the right to vote in private or to be assisted by an assistant of one's own choice.<sup>100</sup>

The Committee of Ministers of the Council of Europe has encouraged governments to continue their efforts in this field by adopting appropriate legislation, developing support services so that persons with disabilities can participate in political life as citizens holding equal political rights and obligations.<sup>101</sup>

- A wide range of good examples derive from the legislation and practice in various countries covered by the study. These good practices relate to the participation to the drafting of new legislation, physical accessibility to polling stations, the provision of information in accessible formats, the promotion and use of new technologies. Good practices include:<sup>102</sup>
- Consultation and collaboration between the government and organizations to formulate new legislation (Spain, Sweden);
- Collection of data on the political participation of persons with disabilities (Germany<sup>103</sup>);
- Surveying the accessibility of polling stations (Denmark, UK<sup>104</sup>);
- Introduction of polling booths in institutions which helped especially those who are too frail to travel (Finland, Malta) and in accessible

buildings (Portugal), transportation to polling stations (Finland), assisting person available in polling stations (Germany<sup>105</sup>);

- Alternatives to voting at polling stations: mobile polling booths in non-accessible polling stations so voters can vote in their neighborhood (Germany), postal voting (Italy for voters living abroad, Germany, Liechtenstein, Spain for disabled people amongst others, Switzerland, UK), e-voting;<sup>106</sup>
- Systems for ensuring confidentiality of the vote (Sweden<sup>107</sup>);
- Use of sign language interpretation during election campaigns (France), text on major TV channels for political communication (France, Norway), elections information available in Braille and audio form (Finland);<sup>108</sup>
- Project to empower people with learning disabilities through active citizenship and participation in political elections ("My opinion my vote" in Denmark, Italy, Ireland, Malta, Spain<sup>109</sup>), training on political processes with interactive debates between self-advocates and politicians (Netherlands), use of website platforms and social media to influence political debates on the right of persons with disabilities (Netherlands), websites providing political information in an accessible way (Austria)<sup>110</sup>, use of e-learning to support getting people with disabilities closer to political office (UK<sup>111</sup>);

<sup>99</sup> As is the case in some places in Malta. See Human Rights Committee Concluding Observations 2014 CCPR/C/MLT/CO/2, para. 21.

<sup>100</sup> See CRDP Concluding observations on the United Kingdom, 2017, CRDP/C/GBR/CO/1, para. 60.

<sup>101</sup> Recommendation CM/Rec(2011)14 to Member States on the participation of persons with disabilities in political and public life.

<sup>102</sup> Unless stated otherwise, the source of the information is The Academic Network of European Disability Experts (ANED) country reports on political participation. <http://www.disability-europe.net/theme/political-participation?page=2>.

<sup>103</sup> See A/HRC/19/36, Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities, 21 December 2011, para. 64.

<sup>104</sup> Persons with mental health conditions are eligible to vote, including those in psychiatric

<sup>105</sup> EU Agency for Fundamental Rights (FRA), The right to political participation for persons with disabilities: human rights indicators, 2014, p. 72.

<sup>106</sup> The Academic Network of European Disability Experts (ANED) country reports on political participation. <http://www.disability-europe.net/theme/political-participation?page=2>.

<sup>107</sup> *Idem*.

<sup>108</sup> CRPD/C/SWE/CO/1, para. 4.

<sup>109</sup> The Academic Network of European Disability Experts (ANED) country reports on political participation. <http://www.disability-europe.net/theme/political-participation?page=2>.

<sup>110</sup> EU Agency for Fundamental Rights (FRA), The right to political participation for persons with disabilities: human rights indicators, 2014, p. 25.

<sup>111</sup> RECHTleicht.at provides information on political participation with regard to persons with disabilities and is also available in Austrian Sign Language.

<sup>112</sup> <https://www.gov.uk/government/publications/access-to-elected-office-for-disabled-people-a-response-to-the-consultation>.

- Provision of adequate support to office holders with disabilities (Italy).<sup>112</sup>

### E. Prisoners

Countries having no restrictions on prisoners' right to vote pursuant to sentences of imprisonment include Denmark, Ireland, Finland, Spain, Sweden, and Switzerland. Countries with partial restrictions include Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Malta, The Netherlands and Portugal. The United Kingdom is the only Western European country providing for a blanket ban on prisoner voting.<sup>113</sup>

Both the ECtHR<sup>114</sup> and the CJEU<sup>115</sup> have ruled that a ban on prisoner's voting rights was lawful under certain circumstances and apply the proportionality test. The main issue with the UK blanket ban is its automatic nature that does not take into account the nature and gravity of the criminal offence or the length of the sentence.

Even in countries where prisoners are not deprived of their right to vote, practical obstacles hinder its exercise. In France, for example, prisoners cannot vote in prison and therefore have to vote by proxy (which raises problems in terms of ballot secrecy when they are detained in places away from their usual residence where they might not know anyone<sup>116</sup>) or need to obtain a temporary absence from custody, which judges rarely issue. As a result, only 4 to 8 % of prisoners in the country exercise their right to vote depending on elections.<sup>117</sup>

A number of good practices aimed to tackle these practical obstacles can be observed in various countries. For example, mobile voting stations are brought into prison in Finland, Italy, Portugal, and the Netherlands. Another practical means is to allow postal voting for prisoners, whilst ensuring secret ballot, as is the case in Denmark, Ireland and Switzerland.<sup>118</sup>

## 2. Information and Communication Technology (ICTs) and the right to participate

The development of modern information and communication technologies (ICTs)<sup>119</sup> represents an opportunity to enable more people to exercise their right to participate in public affairs, including to vote, thus remedying some discrimination issues identified previously. However, ICTs also present challenges in terms of cybersecurity and quality of information notably (A). New forms of participation have also emerged in the context of general decline in traditional forms of political participation (B).

### A. ICTs and elections

ICTs are in use in the following areas:

- Voter registration and identification;
- Electronic voting, if accessible and when guaranteeing the secrecy of the ballot;
- Processing of elections results;
- Use of open source technology in election administration
- Online data publication by electoral management bodies (EMBs)

ICTs have the potential to tackle some discriminations issues and enable more citizens to vote by overcoming practical obstacles, including accessibility. Non-resident citizens, persons with disabilities who cannot go to polling stations and prisoners may benefit from new technologies. E-voting is used in Belgium and in Switzerland in several cantons for voters living abroad. Sweden is planning to introduce fully accessible e-voting on a trial basis for the 2018 elections<sup>120</sup>. France dropped electronic voting for

<sup>112</sup> Several examples in Parliament or the regional assembly in the Campania region amongst many others where office holders receive support through personal assistants, technological tools and transport. ANED Country reports on citizenship and political participation, Italy, 2 May 2014.

<sup>113</sup> With only Armenia, Bulgaria, Estonia, Georgia, Hungary, Liechtenstein and Russia in the Council of Europe imposing similar restrictions. As of November 2017, the domestic law still had not changed even though there were rumours regarding an end to the blanket ban repeatedly condemned by the ECtHR. See *The Guardian*, 29 October 2017, "Government reportedly planning to allow some UK prisoners to vote". <https://www.theguardian.com/society/2017/oct/29/government-planning-to-allow-some-prisoners-to-vote-european-court-human-rights>. See also "Prisoners' voting rights: developments since May 2015", Briefing Paper No. CBP 7461, 15 February 2016, House of Commons Library.

<sup>114</sup> See ECtHR Facsheet, *Prisoners' right to vote*, July 2017.

<sup>115</sup> CJEU, Grand Chamber, *Delvigne*, 6 October 2015, C-650/13, para. 49.

<sup>116</sup> If prisoners have cut ties with the place where they lived before being incarcerated, they have to register to vote in the municipality where the prison is and find someone to vote by proxy who is also registered in that same municipality, which can prove challenging.

<sup>117</sup> Observatoire international des prisons, "Les détenus ont-ils le droit de voter ?", <https://oip.org/en-bref/les-detenus-ont-ils-le-droit-de-voter/>.

<sup>118</sup> Liberty, "Liberty's Briefing on Prisoners' Voting Rights", October 2016, para. 23.

<sup>119</sup> See the ICTs in elections database hosted by the International Institute for Democracy and Election Assistance (IDEA) : <https://www.idea.int/data-tools/data/icts-elections>.

<sup>120</sup> See CRDP Concluding Observations on Sweden, CRPD/C/SWE/CO/1, 2014, para. 4.

citizens abroad in 2017 due to the risk of cyber attacks.<sup>121</sup> The Netherlands announced that all ballots in the 2017 general election would be counted by hand and not electronically<sup>122</sup> due to similar cybersecurity concerns amid allegations of election hacking in Western countries. Germany ended electronic voting in 2009 following a Constitutional Court ruling.<sup>123</sup> This technology has also been abandoned in Finland, Ireland and Norway. Feasibility studies and tests have been carried out in various countries, some of which had already tested and abandoned the technology.<sup>124</sup>

Apart from concerns over cybersecurity and privacy, another downside related to new technologies has been the rise of disinformation and populist discourse on social media,<sup>125</sup> which has an impact on the quality of information necessary to make informed choices.

### B. ICTs and new forms of participation

Voter turnout in Western Europe has been decreasing steadily in the past decades.<sup>126</sup> In contrast with the decline in representative democracy, new forms of deliberative and participatory democracy have emerged. Their main purpose is to (re-)connect participation with political decision.<sup>127</sup> ICTs have contributed to promote the exercise of the right to participate. Thanks to technology, transparency and access to information have been facilitated, thus promoting active involvement of concerned persons. Besides, online participation has developed to enable more people to take part in consultation, decision-making and monitoring processes. Internet is widely available in the concerned countries. In Finland and France, access to the Internet is even recognized as a right.<sup>128</sup>

### 1. Promoting transparency and access to information through the use of ICTs

Transparency and access to information for citizens to make informed choices have been key features of the recent evolution, notwithstanding the rise of “fake news” and challenges related to disinformation. As far as openness and transparency in public service are concerned, the 2016 EU E-Government Report indicates that although transparency seems to be on the agenda of most governments, “results are diffuse”. According to the report, countries that lead by example and practice are adopting a new attitude towards public service include Austria, Germany, Denmark, Finland, France, the Netherlands and Spain.<sup>129</sup>

Several positive initiatives deserve to be mentioned, amongst many more. In France, for example, the lower chamber’s data website<sup>130</sup> aims to strengthen the transparency of the legislative process and of the operation of the National Assembly. Besides general data on the legislative files, proceedings and proposed amendments, the platform also includes information on how each deputy has voted in the past years. In Germany, the Federal Agency for Civic Education makes available large amounts of information. The range of topics includes European integration, participation in politics and in society, issues relating to the economy and the financial markets, migration, and social change, as well as historical issues and democracy in general.<sup>131</sup>

In Greece, every municipality has the obligation to have an official website on which all decisions issued by the municipal organs are posted.<sup>132</sup> In Israel, as part of the “Open Government Action Plan”, over 240 Government

<sup>121</sup> Reuters, “France drops electronic voting for citizens abroad over cybersecurity fears”, 6 March 2017, <https://www.reuters.com/article/us-france-election-cyber/france-drops-electronic-voting-for-citizens-abroad-over-cybersecurity-fears-idUSKBN16D233>.

<sup>122</sup> *The Guardian*, “Dutch will count all election ballots by hand to thwart hacking”, 2 February 2017, <https://www.theguardian.com/world/2017/feb/02/dutch-will-count-all-election-ballots-by-hand-to-thwart-cyber-hacking>.

<sup>123</sup> <https://www.ndi.org/e-voting-guide/examples/constitutionality-of-electronic-voting-germany>.

<sup>124</sup> Iceland, Italy, Finland, Portugal, Spain, Turkey, UK. See ICTs in elections database.

<sup>125</sup> See the Joint Declaration on freedom of expression and “fake news” by the UN Special Rapporteur on freedom of opinion and expression, the OSCE Representative on freedom of the media, the OAS Special Rapporteur on freedom of expression and the ACHPR Special Rapporteur on freedom of expression and access to information, 3 March 2017.

<sup>126</sup> As noted by the OHCHR, see OHCHR Best Practices and Challenges, A/HRC/30/26, para. 18. See also IIDEA, *Voter Turnout in Western Europe since 1945*, 2004 and Pascal Delwit, “The End of Voters in Europe? Electoral Turnout in Europe since WWII”, *Open Journal of Political Science*, 3, 2013, pp. 44-52.

<sup>127</sup> For a historical presentation of these two concepts, see Antonio Florida, “Participatory Democracy versus Deliberative Democracy: Elements for a Possible Theoretical Genealogy. Two Histories, some intersections”, available at <https://ecpr.eu/Filestore/PaperProposal/71d7f83c-3fe4-4b11-82a2-c151cd3769f4.pdf>.

<sup>128</sup> OHCHR Best Practices and Challenges, A/HRC/30/26, para. 41.

<sup>129</sup> European Commission, eGovernment Benchmark 2016, A turning point for eGovernment development in Europe? 2016, p.10. <https://ec.europa.eu/digital-single-market/en/news/eu-egovernment-report-2016-shows-online-public-services-improved-unevenly>.

<sup>130</sup> <http://data.assemblee-nationale.fr/>.

<sup>131</sup> <http://www.bpb.de/die-bpb/138852/federal-agency-for-civic-education>.

<sup>132</sup> OHCHR Best Practices and Challenges, A/HRC/30/26, para. 41.

databases have been published online<sup>133</sup> concerning more than 30 Government offices to increase transparency.

In the Netherlands, “Open State”<sup>134</sup> intends to introduce an “action democracy”, promote active involvement and political transparency at the municipal level.<sup>135</sup> Citizens may address social issues themselves without the intervention of a public authority through an access to all public sector data. It also allows access to detailed information on decision-making documents, including spending of the municipality/province.

In the UK, the Freedom of Information Act adopted in 2000 entitles any person to make a request for information to a public authority, which has to convey the information no later than 12 days following the date of receipt of the request.<sup>136</sup>

These developments show that new technologies have enabled more persons to be better informed and to participate more directly in public affairs.

## 2. Involvement in the consultation process

New forms of participation have developed regarding the various stages of the decision-making process. During the consultation phase, the Internet can be used to foster direct influence on political and public affairs. Examples are many.<sup>137</sup> In Denmark, the eDem platform promotes dialogue at the national and at the local levels.<sup>138</sup> In Finland, public e-participation is encouraged through various initiatives. Citizens with voting rights can launch initiatives to propose new laws, amend existing laws or propose the withdrawal of existing legislation.<sup>139</sup> A similar

service is available at the local level.<sup>140</sup> Another online consultation platform for dialogue is open to the public in general.<sup>141</sup>

In France, the National Assembly data’s website mentioned above<sup>142</sup> also aims to strengthen ties between citizens and their representatives. It is used to call on the opinion and expertise of internet users more generally. All internet users can submit contributions to studies developed by rapporteurs in charge of specific legislative bills, who can annex them to their reports. In Germany, the “eOpinio” platform<sup>143</sup> enables citizens to have their opinions included in political decision-making processes at the local level (citizen survey, participatory budget, suggestions, questions, participation in planning processes for public buildings or streets).<sup>144</sup>

In Israel, the city of Tel Aviv has adopted a “smart city” strategy whereby digital services enable local residents’ participation through the Digitel platform. The Digitel Residents Club is open to all residents of Tel Aviv aged 13 and older.<sup>145</sup> In Italy, the “Monithon” platform provides another example of civil society consultation.<sup>146</sup> The platform promotes monitoring of development project funded by the Italian Government and the EU by the civil society and individuals.<sup>147</sup> In Malta, online public consultation is also organised through a platform set up by the Government to encourage “the general public, civil society organisations, trade unions, business organisations, political parties, governmental institutions and all others that would like to contribute, to participate in the process of online public consultation.”<sup>148</sup>

<sup>133</sup> <https://data.gov.il>.

<sup>134</sup> <http://zoek.openraadsinformatie.nl/#/>.

<sup>135</sup> <https://openstate.eu/en/projects/political-transparency/open-municipal-information/>.

<sup>136</sup> OHCHR Best Practices and Challenges, A/HRC/30/26, para. 41.

<sup>137</sup> For more examples, see European Commission, Europe for Citizens Programme, Janez Krek, Bruno Losito, Rebecca Ridley and Bryony Hoskins, “Good practices report – Participatory Citizenship in the European Union”, 2012, Appendix A (table by country) from p. 35.

<sup>138</sup> European Commission, Europe for Citizens Programme, Janez Krek, Bruno Losito, Rebecca Ridley and Bryony Hoskins, “Good practices report – Participatory Citizenship in the European Union”, *op. cit.*, p. 31. Several layers/forms of participation, both on national (Smart City, Open Data Innovation Strategy, Inclusion...) and local level (Digital Citizen Panels, Statutory Elected Senior Citizens’ Council...). Use diverse ICT tools to involve all citizens, including through inclusion programs for persons with disabilities and social media involvement; Winner of the Open Government Partnership Awards for the Statutory Elected Senior Citizens’ Council. [http://danske-aeldreraad.dk/wordPress/wp-content/uploads/2014/09/v2\\_SeniorCitizensCouncils\\_DENMARK\\_OnePageSummary.pdf](http://danske-aeldreraad.dk/wordPress/wp-content/uploads/2014/09/v2_SeniorCitizensCouncils_DENMARK_OnePageSummary.pdf). The “Good Basic Data for Everyone” explicitly refers to data being made freely available to “individuals”, p. 7. [http://www.eurogeographics.org/sites/default/files/BasicData\\_UK\\_web\\_2012%2010%2008.pdf](http://www.eurogeographics.org/sites/default/files/BasicData_UK_web_2012%2010%2008.pdf).

<sup>139</sup> <https://www.kansalaisaloite.fi/fi>. As of 18 February 2018, 703 initiatives were launched, 18 of which were submitted to Parliament.

<sup>140</sup> <https://www.kuntalaisaloite.fi/fi>.

<sup>141</sup> <https://www.otakantaa.fi/fi/>.

<sup>142</sup> Available at: <http://data.assemblee-nationale.fr/>.

<sup>143</sup> Available at: <https://www.eopinio.de/>.

<sup>144</sup> see European Commission, Europe for Citizens Programme, Janez Krek, Bruno Losito, Rebecca Ridley and Bryony Hoskins, “Good practices report – Participatory Citizenship in the European Union”, 2012, p. 12.

<sup>145</sup> <https://customers.microsoft.com/en-gb/story/tel-aviv-government-azure>.

<sup>146</sup> <http://www.monithon.it/about-english/>.

<sup>147</sup> <http://www.monithon.it/media/css/Toolkit%20Monithon.pdf>.

<sup>148</sup> [http://meae.gov.mt/en/Public\\_Consultations/Pages/Home.aspx](http://meae.gov.mt/en/Public_Consultations/Pages/Home.aspx).

Examples of how rights holders are involved through consultative mechanisms have also been identified in Greece notably, where municipalities and regions may establish committees composed of civil society representatives, which are then consulted by local government before it draws up the budget and social policy measures.<sup>149</sup> In Norway, consultative mechanisms involving under-represented groups have also been identified, for example a contact committee for immigrants and the authorities, which advises the Government on the views of persons with an immigrant background with regard to State policy.<sup>150</sup>

### 3. Access to the decision-making process

Beyond the consultation phase, new forms of participation have also been used to involve citizens in the decision-making itself. One example increasingly popular in Europe is participatory budgeting, allowing community members to directly decide how to spend part of a public budget and therefore to influence the budget decisions that affect their lives.<sup>151</sup>

Participatory budgeting in Europe was born of the need to revive democratic participation, strengthen civil society, modernise public services and combat corruption. It has grown considerably over the past 10-15 years. Between 2005 and 2012, European examples increased from 55 to over 1 300. Overall, over 8 million European citizens are actively involved in participatory budget.<sup>152</sup> It is also promoted by supranational organisations, namely the World Bank, the UN through the UN-Habitat programme and the EU. Citizen participation has been encouraged and facilitated at the various stages of the process: submission of proposals, deliberation, vote, implementation and

monitoring of the decision taken thanks to online platforms.<sup>153</sup>

Another form of participatory democracy lies in citizens' initiatives that can become legislation, thus directly involving citizens in the law-making process. For example, in Finland, legislation on same-sex marriage was supported by signatories and subsequently approved by Parliament in 2014.<sup>154</sup> Ireland established a parliamentary online petitions system, which enables members of the public to take their policy concerns directly to Parliament and influence the parliamentary agenda.<sup>155</sup>

In sum, new technologies and new forms of participatory and deliberative democracy have enabled citizens to participate more directly to public affairs, at all stages of the decision-making process.<sup>156</sup> New avenues promoting effective participation through the use of ICTs could also be explored. Good practices identified in that regard include:

- Making information widely and easily accessible (user-friendly platforms);
- Organising genuinely active and direct consultation and participation in the decision-making process (binding opinion, co-drafting of policies);<sup>157</sup>
- Enabling citizens' participation at the various stages of the policy-making process, including monitoring and assessment of the implementation of the adopted policies.

<sup>149</sup> OHCHR Best Practices and Challenges, A/HRC/30/26, para. 43.

<sup>150</sup> OHCHR Best Practices and Challenges, A/HRC/30/26, para. 42.

<sup>151</sup> In France alone, 46 cities have adopted it, a number that has doubled in one year. *Le Monde*, "Outre Paris, 45 villes françaises ont adopté le budget participatif", 6 octobre 2017. [http://www.lemonde.fr/les-decodeurs/article/2017/10/06/outre-paris-45-villes-francaises-ont-adopte-le-budget-participatif\\_5197506\\_4355770.html](http://www.lemonde.fr/les-decodeurs/article/2017/10/06/outre-paris-45-villes-francaises-ont-adopte-le-budget-participatif_5197506_4355770.html).

<sup>152</sup> "Participatory budgeting, An innovative approach", Briefing, European Parliament, January 2016, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573894/EPRS\\_BRI%282016%29573894\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573894/EPRS_BRI%282016%29573894_EN.pdf). Lisbon was the first European city to introduce online participatory budget in 2008. In 2014, Paris became home to the largest participatory budget in Europe.

<sup>153</sup> "Hope for Democracy, 25 years of participatory budgeting worldwide", Nelson Dias, April 2014, [https://www.buergerhaushalt.org/sites/default/files/downloads/Studie\\_Hope\\_for\\_democracy\\_-\\_25\\_years\\_of\\_participatory\\_budgeting\\_worldwide.pdf](https://www.buergerhaushalt.org/sites/default/files/downloads/Studie_Hope_for_democracy_-_25_years_of_participatory_budgeting_worldwide.pdf). See also Yves Sintomer, Anja Röcke and Carsten Herzberg, *Participatory Budgeting in Europe: Democracy and public governance*, Routledge, 2016, 268 p.

<sup>154</sup> OHCHR Best Practices and Challenges, A/HRC/30/26, para. 48.

<sup>155</sup> OHCHR Best Practices and Challenges, A/HRC/30/26, para. 48.

<sup>156</sup> For more examples, see European Center for Not-for-profit Law, *Civil Participation in Decision-Making Processes, An Overview of Standards and Practices in Council of Europe Member States*, May 2016.

<sup>157</sup> See FRA Director Michael O'Flaherty's speech on access to decision-making processes: "Our research has furthermore showed us that in a number of EU countries, the authorities seem to be confusing consultation and participation. This gives rise to a situation in which the state claims that an invitation to civil society organisations to participate in initial consultations before a project begins is proof of their participation in those projects. But of course, these are two very different things". "Towards a stronger civil society in Europe", 6 June 2017. <http://fra.europa.eu/en/speech/2017/future-role-civil-society-safeguarding-and-promoting-fundamental-rights-europe>.



### 3. Participation beyond the State level

Participation in public affairs is also relevant beyond the State level, notably in international organisations. As stated in the Human Rights Committee General Comment No. 25, the conduct of public affairs covers “the formulation and implementation of policy at *international*, national, regional and local levels.”<sup>158</sup>

EU countries citizens participate in public affairs through the direct election of their representatives to the European Parliament,<sup>159</sup> which powers and political weight have increased over time.<sup>160</sup>

The Lisbon Treaty in particular enhances representative and participatory democracy in an attempt to tackle the growing “democratic deficit”. It strengthens the role played by the European Parliament by extending its legislative and budgetary powers. It also provides that the European Parliament elects the President of the Commission.<sup>161</sup> Efforts have been made to increase transparency and citizen participation.

The Lisbon Treaty thus guarantees the right of “every citizen” to “participate in the democratic life of the Union” and provides that “[d]ecisions shall be taken as openly and as closely as possible to the citizen”.<sup>162</sup> It also creates the right of citizens’ initiative (ECI) whereby citizens from a “significant number of Member States” may ask the

Commission to propose a draft legislation if they gather at least one million signatures.<sup>163</sup>

In a recent case, the CJEU, recalled that the “right to undertake an ECI constitutes [...] an instrument concerning the right of citizens to participate in the democratic life of the Union”.<sup>164</sup> In May 2017, the European Commission launched a consultation initiative to revise the 2011 ECI Regulation and tackle the main shortcomings identified in its 2015 report on its application.<sup>165</sup>

In practice, public participation in decision-making is also realised through the right of the general public to access documents. Regulation No 1049/2001 on public access to documents held by the EU institutions (Access Regulation)<sup>166</sup> has, together with case law, been instrumental in developing the right of citizen access to documents.<sup>167</sup>

The CJEU has played a key role in clarifying the principle of public access and its linkage with the principle of democracy.<sup>168</sup> In its landmark ruling *Turco v. Council*, the CJEU has held that “it is for the Council to balance the particular interest to be protected by non-disclosure of the document concerned against, inter alia, the public interest in the document being made accessible in the light of the advantages stemming [...] from increased openness, in

<sup>158</sup> Para. 5. (emphasis added).

<sup>159</sup> Decision and Act concerning the election of the representatives of the European Parliament by direct universal suffrage of 20 September 1976, as amended by the Council Decisions of 25 June and 23 September 2002. The first direct elections to the European Parliament took place in June 1979.

<sup>160</sup> The Maastricht Treaty (1992) introduced the codecision procedure in some legislation areas through which the European Parliament became co-legislator with the Council. The Treaties of Amsterdam (1997) and Nice (2001) extended the scope of the codecision procedure to most areas of legislation and reformed the procedure to place the Parliament as co-legislator on an equal footing with the Council.

<sup>161</sup> Article 14(1) TEU: “1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.”

<sup>162</sup> Article 10(3) TEU: “3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.”

<sup>163</sup> Article 11(4) TEU: “Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.” The procedures and conditions for submitting an ECI have been specified in Regulation No 211/2011 of 26 February 2011. This Regulation notably clarified that “[t]he signatories of a citizens’ initiative shall come from at least one quarter of Member States”, Article 7(1).

<sup>164</sup> In this case regarding an ECI submitted by a Greek national in order to allow the cancellation of the public debt of countries in a state of necessity, the CJEU clarified the legal regime and object of the ECI instrument. CJEU, Grand Chamber, *Alexios Anagnostakis v. Commission*, 12 September 2017, Case C-589/15 P, para. 24. See also Denys Simon, “Initiative citoyenne, Commentaire”, *Europe* No. 11, November 2017, Comm.399.

<sup>165</sup> Report on the application of Regulation (EU) No 211/2011 on the citizens’ initiative, 31 May 2015, COM(2015) 145 final. See also the Commission’ roadmap on the revision of the ECI: [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-2537702\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-2537702_en).

<sup>166</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43.

<sup>167</sup> European Parliament Directorate-General for International Policies, Policy Department C, Citizens’ Rights and Constitutional Affairs, *Openness, Transparency and the Right of Access to Documents in the EU*, 2016, p. 4.

<sup>168</sup> On transparency and the “democratic deficit” of the EU, see Irma Spahiu, “Courts: An Effective Venue to Promote Government Transparency? The Case of the Court of Justice of the European Union”, *Utrecht Journal of International and European Law*, 31(80), 2015, pp. 5-24.

that *this enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Those considerations are clearly of particular relevance where the Council is acting in its legislative capacity.*<sup>169</sup>

More recently, in its *Access Info Europe v. Council of the EU* case, the CJEU also had to consider the balance between the principle of transparency and the preservation of the effectiveness of the Council's decision-making process. The Court found that the Council infringed the Access Regulation by denying disclosure of information because the risk that delegations would refrain from submitting written proposals did not sufficiently undermine the decision-making process to justify the refusal of access to the requested information.<sup>170</sup>

Apart from the call for access to documents, the issue of transparency within the EU has also been tackled through the question of lobbying and its regulation to ensure transparency and accountability of the decision-making process. This question is as topical as ever regarding issues such as herbicide glyphosate and endocrine disruptors in recent years.

The European Parliament was the first institution to introduce transparency rules for lobbyists in 1995, followed by the Commission in 2008. More recently, in 2011, the two institutions merged their two instruments into a joint voluntary transparency register<sup>171</sup> which aims to answer core questions such as what interests are being pursued, by whom and with what budgets.<sup>172</sup> In 2016, a proposal aimed to make this register mandatory and extend it to the Council of the EU was introduced.<sup>173</sup> This proposal is currently being negotiated between Members

of the European Parliament, the Commission and the Council.<sup>174</sup>

These developments at the EU level show a trend towards enhanced transparency and more effective public participation in the EU institutions. The call for the EU to become more “democratic” and grant citizens’ representatives more power at the institutional level is also at the heart of the draft Treaty for the democratisation of the Euro-Zone proposed by leading French scholars, including economist Thomas Piketty.<sup>175</sup>

## Conclusion

This study reveals that many positive practices can be identified and learned from in terms of equal participation in public affairs in the 25 concerned countries around the three aspects highlighted: non-discrimination, new forms of participation and new technologies, and participation at the international level. It suggests an overall aspiration for genuine and effective participation in the decision-making process.

This study also demonstrates the opportunity that new technologies (ICTs) represent to enable more people to participate. Regarding discrimination faced by various groups as to their voting rights, electronic voting may allow practical obstacles to be overcome and enable non-residents citizens, persons with disabilities or prisoners to exercise their right to vote. ICTs have also been instrumental in the development of new forms of participation, namely deliberative and participatory democracy.

Finally, the call for transparency in decision-making processes, at the national and international levels, is being tackled by various countries and the EU. These developments bode well for the future of citizens’ equal participation in public affairs.

<sup>169</sup> CJEU, Joined Cases *P Kingdom of Sweden and Maurizio Turco v. the Council*, 1<sup>st</sup> July 2008, C-39/05 P and C-52/05 paras 45-46. (emphasis added).

<sup>170</sup> The information concerned the identity of delegations of European Member States making policy proposals under an Article 4(3) exemption to the Regulation. CJEU, *Access Info Europe v. Council of the EU*, 17 October 2013, C-280/11P, paras 59-60.

<sup>171</sup> European Parliament, EU Transparency Register Briefing, December 2014. <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-542170-European-Transparency-Register-FINAL.pdf>.

<sup>172</sup> <http://ec.europa.eu/transparencyregister/public/homePage.do>. As of 29 January 2018, 11692 registrants were in the register.

<sup>173</sup> Proposal for a Interinstitutional Agreement on a mandatory Transparency Register, 28 September 2016, COM(2016)627 final. (6): “The three institutions recognise the necessity to establish a mandatory Transparency Register”.

<sup>174</sup> See European Parliament press release, “More lobby transparency to foster public trust in EU institutions”, 15 June 2017, <http://www.europarl.europa.eu/news/en/press-room/20170615IPR77523/more-lobby-transparency-to-foster-public-trust-in-eu-institutions>.

<sup>175</sup> Taking into account the imbalance in terms of powers granted to the Executive and the “deficit of democratic legitimacy”, the idea is to re-place representative democracy at the centre of European economic policies. The draft Treaty aims to create a Parliamentary Assembly of the Euro Zone for the representatives of national parliaments to be directly and fully involved in the governance of the area. For the English version of the draft Treaty, see <http://piketty.pse.ens.fr/files/T-DEM%20-%20Final%20english%20version%20march2017.pdf>. Stéphanie Hennette, Thomas Piketty, Guillaume Sacriste, Antoine Vauchez, *Pour un traité de démocratisation de l'Europe*, Seuil, 2017, 93 p. See also Thomas Piketty's interview on the proposed draft Treaty, *Le Monde*, 14 avril 2017, <http://piketty.blog.lemonde.fr/2017/04/14/pour-un-traite-de-democratisation-de-leurope-pourquoi-comment/>.

Overall, the scope of Article 25 seems to be expanding. The material scope of the right to participation in public affairs appears to include more and new forms of participation. Its personal scope also seems to develop beyond “citizens” as initiatives to enhance public participation increasingly aim to involve all persons affected by the decisions at stake. ■

### Annex 1 : Women in National Parliaments

Situation as of 1<sup>st</sup> October 2017

Country	Lower or single House				Upper House or Senate			
	Elections	Seats	Women	% Women	Elections	Seats	Women	% Women
Andorra	01.03.2015	28	9	32.1	--	--	--	--
Austria	20.09.2013	183	56	30.6	N/A	61	19	31.1
Belgium	25.05.2014	150	57	38.0	03.07.2014	60	30	50
Denmark	18.06.2015	179	67	37.4	--	--	--	--
Finland	19.04.2015	200	84	42.0	--	--	--	--
France	11.06.2017	577	225	39.0	24.09.2017	348	102	29.3
Germany	24.09.2017	709	218	30.7	N/A	69	27	39.1
Greece	20.09.2015	300	55	18.3	--	--	--	--
Iceland	29.10.2016	63	30	47.6	--	--	--	--
Ireland	26.02.2016	158	35	22.2	25.04.2016	60	18	30.0
Israel	17.03.2015	120	33	27.5	--	--	--	--
Italy	24.02.2013	630	195	31.0	24.02.2013	320	91	28.4
Liechtenstein	05.02.2017	25	3	12.0	--	--	--	--
Luxembourg	20.10.2013	60	17	28.3	--	--	--	--
Malta	03.06.2017	67	8	11.9	--	--	--	--
Monaco	10.02.2013	24	5	20.8	--	--	--	--
Netherlands	15.03.2017	150	54	36.0	26.05.2015	75	26	34.7
Norway	11.09.2017	169	70	41.4	--	--	--	--
Portugal	04.10.2015	230	80	34.8	--	--	--	--
San Marino	20.11.2016	60	16	26.7	--	--	--	--
Spain	26.06.2016	350	137	39.1	26.06.2016	266	101	38.0
Sweden	14.09.2014	349	152	43.6	--	--	--	--
Switzerland	18.10.2015	200	65	32.5	23.10.2011	46	7	15.2
Turkey	01.11.2015	549	80	14.6	--	--	--	--
United Kingdom	08.06.2017	650	208	32.0	N/A	805	207	25.7

Source : Inter-Parliamentary Union, <http://archive.ipu.org/wmn-e/classif.htm>. The data in the table above has been compiled by the Inter-Parliamentary Union on the basis of information provided by National Parliaments by 1st October 2017.

**Annex 2 : Gender Quotas**

<i>Country</i>	<i>Legislated quotas</i>	<i>Voluntary political parties quotas</i>
Andorra**		
Austria		X
Belgium	X	
Denmark		
Finland**		
France		X
Germany		X
Greece	X	X
Iceland		X
Ireland	X	
Israel		X
Italy		X
Liechtenstein**		
Luxembourg		X
Malta		X
Monaco**		
Netherlands		X
Norway		X
Portugal		
San Marino**		
Spain		X
Sweden		X
Switzerland		X
Turkey		X
United Kingdom		X

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\*\* No data available on the database.

\*\* No data available on the database.

\*\* No data available on the database.

\*\* No data available on the database.

\*\* No data available on the database.

### Annex 3 : Relevant Applicable Standards

<i>Countries</i>	<i>UN</i>	<i>CoE</i>	<i>EU</i>	<i>OSCE</i>
Andorra	X	X		X
Austria	X	X	X	X
Belgium	X	X	X	X
Denmark	X	X	X	X
Finland	X	X	X	X
France	X	X	X	X
Germany	X	X	X	X
Greece	X	X	X	X
Iceland	X	X		X
Ireland	X	X	X	X
Israel	X	X*		X**
Italy	X	X	X	X
Liechtenstein	X	X		X
Luxembourg	X	X	X	X
Malta	X	X	X	X
Monaco	X	X		X
Netherlands	X	X	X	X
Norway	X	X		X
Portugal	X	X	X	X
San Marino	X	X		X
Spain	X	X	X	X
Sweden	X	X	X	X
Switzerland	X	X		X
Turkey	X	X		X
UK	X	X	X	X

\* Israel is not a Member State of the Council of Europe but has the observer status to the Parliamentary Assembly and is a party to several CoE conventions, none of which are relevant to this study. See: <https://www.coe.int/en/web/conventions/search-on-states/-/conventions/treaty/country/ISR>.

\*\* Israel is not one of the 47 participating States but a partner for co-operation and as such is welcome to participate in the OSCE yearly human dimension meetings.