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(VENICE COMMISSION)

COMMENTS

ON LEGISLATIVE INITIATIVE IN EUROPE

by

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I. Introduction

1. I accept the terminology proposed by the Secretariat, but I have the feeling that it could be advisable restricting the use of the expression " right " to the entrusting of the legislative initiative to subjects who are outside the organization of the State and of the public authorities, while I prefer using directly the expression " power " when the legislative initiative of State's bodies or public authorities is at stake. As a matter of fact the modern constitutions provide for the submission of acts of legislative initiative non only by State's bodies but also by other public authorities (for instance, local government entities, local government entities) or by groups of electors directly. Therefore we have to distinguish cases where the legislative initiative is the manifestation of a public power from the cases where it is the result of the exercise of a right to democratic participation of the citizens or of associations or communities of citizens. On one side, we are in the frame of the indirect or representative democracy, while, on the other side, we are dealing with arrangements which pertain to the direct democracy.

2. Moreover the formal identification of the acts of legislative initiative deserves some attention, because the constitutions can provide directly for the formal requisites of the acts of legislative initiative or they can leave the adoption of the necessary rules to the Standing Orders of the Parliament or to specific legislative acts. For instance, art. 71 of the Italian Constitution provides for the exercise of the people's legislative initiative requiring the submission of a draft of law drawn up in articles, but other constitutions could leave the drafting of the bill to the parliamentary commissions authorizing the submission of a written exposition of the content of the initiative by the citizens without requiring a draft of law drawn up in articles. In this case the written document submitted will be the basis of the work of the members of the Parliament aimed at drafting the bill.

3. This introduction offers the guidelines of the present paper which is dealing 1) with the identification of the subjects who can be entrusted with the power of legislative initiative, 2) with the rules concerning the drafting of the relevant acts, 3) with the possible content of the acts of legislative initiative and the content which is interdicted to them, 4) with the procedural rules which have to be complied with in view of the submission of the relevant acts, of their examination by the legislative assemblies and of their final approval. Inspiration will be drawn from the constitutions presently in force in the Council of Europe member States, even if not always the specific textual reference are made.

II. The subjects of the power of legislative initiative.

4. In the parliamentary democracies the Cabinet and the members of the Parliament share the power of the legislative initiative. Its exercise by the Executive is considered a necessary manifestation of the political leadership of the Cabinet when it has the confidence of the Parliament, but at the same time the results of the initiative may give a clear evidence of the continuity of this confidence or, possibly, of its declining. Therefore the legislative initiative of the members of the Parliament is an useful arrangement to counterbalance the power of the Cabinet or to correct its initiatives, and it offers to the opposition the way of emphasizing the differences between its political guidelines and the political guidelines of the Cabinet. Sometimes provisions are adopted to strengthen the individual initiatives of the members of the Parliament requiring the subscription of a certain number of them or the support of one of the leaders of the parliamentary fractions (see art. 103 const. Estonia, and art.65 Const. Latvia).

5. The entrusting of the legislative initiative to the President of the Republic should not be advisable in parliamentary systems of government if the President has not a political responsibility. Different is, obviously, the situation in the presidential systems of government. The principle of separation of powers should suggest avoiding the entrusting of the legislative initiative to judicial bodies or to Constitutional Courts.

6. But the power of the Cabinet is frequently wider than the power of the members of the Parliament. As a matter of fact it has a better knowledge of the social and economic problems, of the needs of the public administration and of the implementation of the legislation, and – last but not least – of the financial means which can be budgeted for a particular purpose by the parliamentary decisions. Therefore, it happens that a constitution does not authorize the members of the Parliament to submit legislative proposals which have financial effects, or does not allow the approval of a parliamentary proposal which can have such effects, without the consent of the Cabinet (art. 82 const. Albania, art. 75 const. Armenia, art. 40 const. France, and art. 20 const. Ireland). Moreover, it is the Cabinet which is in the position of submitting the State's budget to the approval of the Parliament, or of asking the Parliament the ratification of international treaties signed by the Cabinet.

7. Cabinet and Parliament, that is the members of the Parliament, are the traditional actors in the legislative decision making processes. But in the contemporary pluralistic society the exigency is growing bigger that the Parliament is open to the requests of the civil society and of the institutions which are particularly in touch with the civil society. This exigency is especially dealt with through the entrusting of the right to the legislative initiative to citizens, to autonomous territorial entities, to trade unions and to associations and organizations of the citizens (for the rights of citizens see art. 71 const. Macedonia). There is obviously the danger that the proposals submitted by these subjects are conditioned by corporatist or fractional interests and they can force the Parliament to look for difficult compromises which cannot always take into account the national general interests. Therefore the constitutional provisions in the matter should delimit correctly – for instance - the possible content of the relevant acts of initiative of the local authorities, restricting it to the territorial dimension of the competence of the local authorities or to the social interests supported by the concerned associations or communities of citizens (art. 121 const. Italy). In some States the legislative initiative of the citizens has to be supported by the signatures of citizens of different territories of the country (art. 41 const. Austria, art. 73 const. Romania).

8. On the other side, it is frequent the adoption of special arrangements aimed at guaranteeing the insertion of the relevant acts of legislative initiative in the agenda of the Parliament to avoid that the members of the Parliament put them aside and postpone their position iin the agenda without giving them the due attention.

9. Sometimes the constitutional legislator wants to give a more solid basis, in the frame of the public opinion, to these initiatives and provide for their signature by a relevant number of citizens (art. 81 const. Albania, art. 72 const. Hungary, art.68 const. Lithuania, art.. 118 const. Poland, art. 80 const. Cyprus), and not by the representatives of the associations or communities only. In this case the legislative initiative is a right given to all the electors which can be positively exercised in presence of the required number of individual adhesions, while social communities or associations display the role of leading promoters of the initiative only. It is not really an institution of direct democracy, because in any case the final decision remain with the representative authorities, that is the Parliament, but it is frequently accepted as a corrective of the indirect democracy.

III. The drafting of the act of legislative initiative

10. The drafting of an act of legislative initiative requires, on one side, technical knowledge and experience, while, on the other side, shapes the act itself in terms which are not easily understood by people who don't have the required technical knowledge and experience. Therefore the constitutional legislator has, at least, two different alternatives when he is dealing with the right of legislative initiative of the citizens. If he wants to take into account the exigency that the common electors are able to understand the content of the initiative, he could provide for the presentation of a document summarizing the purposes of the new proposed legislation and the practical arrangements for its implementation: in this case the drawing up in articles of the bill shall be left to the internal bodies of the Parliament. But, if the legislator wants to guarantee the conformity of the final result of the initiative with the purposes of the citizens, he

should require that the act of the legislative initiative is directly drawn up in articles by the initiators of the procedure, leaving to the explanatory introduction of the document the task of providing the necessary information for the citizens who don't have technical knowledge and experience in the legal field.

11. The technical exigencies of the Cabinet legislative initiative has frequently suggested the adoption of handbooks of drafting, that is collections of rules and suggestions for a better drafting of the acts of legislative initiative. In United Kingdom the drafting of the legislation is entrusted to a special Office which take care of the redaction of the texts submitted by the Cabinet to the Parliament, of their amendments and – sometimes – even of the texts submitted by the members of the Parliament (but see also art. 39 const. France requiring the advise of the Council of State on the bills of the Cabinet). It is certainly a difficult problem finding an agreement between the needs of the democratic participation and the purposes of a legislation able to deal with the complexity of the present social and economic problems, but a solution has to be found and not always the history of the European Parliaments offer useful suggestions. Probably a compromise could be adopted by establishing in the frame of the organization of the parliamentary assemblies special commission or offices responsible for a correct drafting of the legislation. But when the right of legislative initiative is given also to subjects and entities outside the frame of the relations between Cabinet and Parliament an internal parliamentary solution could not be sufficient.

IV. The content of the acts of legislative initiative

12. The possible content of the acts of legislative initiative is strictly depending on the distribution of the competences between the State's bodies, the autonomous territorial entities and the social subjects. For instance, in the frame of a parliamentary system of government where the Cabinet survives on the basis of the parliamentary confidence only but has – at the same time – the leadership of the activity of the legislative assemblies, there are matters which are reserved to the legislative initiative of the Cabinet. This is the case of the yearly financial acts, I mean the State's budget and the connected financial legislation providing for the introduction of new expenses and for the correction of the tax rates (see, for instance, art. 87 cost. Bulgaria and art. 42 const. Czech Republic). The same can be said in order of the proposal aimed at the ratification of the international treaties subscribed by the Executive, and recently special novelties are connected with the membership in the European Union, because the Cabinets are mainly responsible for the adoption of the European decisions and for their implementation, especially with regard to the s.c. directives and to the judgements of the European Court of Justice. As matter of fact we can say that in principle when the Cabinet has the responsibility for dealing with special problems or for managing relations with other States or international institutions, the follow-up legislative initiative is reserved to the Cabinet.

13. The content of the initiatives of the entities which are outside the organization of the State shall be delimited taking into account the competences or the social interests represented by the entities themselves. The right of the electors should have the only limitations deriving from the existence of the reservations of power to the Cabinet (budgets, financial acts and ratification of the international treaties, for instance). If it is adopted the way of entrusting the right of legislative initiative to trade unions, social associations or communities, the possible content of the relevant acts of legislative initiative should be restricted to the matters and interests which are the object of the activities of those entities and are not directly dealt with by the exercise of their freedoms and rights: the legislative initiative cannot be a way to delegate or transfer private functions of the social associations or communities and of the trade unions to the State in contradiction of the principle of horizontal subsidiarity.

14. When the power of legislative initiative of autonomous territorial entities is at stake (art. 41 const. Czech Republic, art. 121 const. Italy, art. 87 const. Spain, art. 167 const. Portugal, art. 104 const. Russia; in Germany the power of legislative initiative is given to the Bundesrat), we shall probably distinguish the entities which have legislative functions from those entities which don't have legislative functions. In the last case acts of legislative initiative should be allowed to

cover all matters which have special interest and relevance for the entities which are submitting the acts themselves, while in the first case the autonomous territorial entities should obviously restrict their initiatives to matters and interests which are affecting the social communities which they represent, and should be restrain from dealing with matters and interests which fall in their own competence: also in this case, again, the authors of the acts of legislative initiative should not be allowed to transfer to the national Parliament functions which are entrusted to their competence.

V. Procedural rules for the submission, the examination and the approvals of the acts of legislative initiative.

15. The submission of acts of legislative initiative has to be guaranteed by the Constitution as far as it regards the exercise of a constitutional power or of a constitutional right. But the implementation of the relevant constitutional provisions falls, on one side, in the competence of the ordinary legislation and, on the other side, in the competence of the standing orders of the Parliament. Standing Orders are therefore competent for all the aspects of the procedure which affect the internal functioning of the parliamentary assemblies: therefore they will cover the submission, the examination and the approval of the legislative initiatives of the members of the Parliament, while they will restrict their rule to the examination and approval of the other acts of legislative initiative whose submission needs the completion of procedures which take place outside the Parliament. The ordinary legislation will provide for the collection of the necessary signatures of the citizens in the case of the people's initiative, and it will deal with the approval of the acts of legislative initiative by the Cabinet or by the competent bodies of the autonomous territorial entities and of the social associations or communities or trade unions.

16. Obviously special importance have the provisions dealing with the collection of the signatures of the citizens because their number and authenticity are to be guaranteed, while in the other case the approval of the relevant acts shall depend on the provisions concerning the decision-making processes of the respective entities.

17. With regard to the internal parliamentary procedures we have to keep in mind that there is the risk that the acts of parliamentary initiative are treated better than the acts of the entities which are outside the parliamentary assemblies. The members of the Parliament are always present in the activity of activities of the parliamentary bodies and, therefore, they ar always in the position of pushing their own acts of initiative asking and obtaining their examination while the entities are not represented in the Parliament and they don't have the possibilities of getting easily an acceleration of the relative procedures. It is possible to correct these negative effects providing for the inscription of their acts of legislative initiative in the parliamentary agenda after a fixed period of time: in this way the examination of the relevant acts is made possible notwithstanding the lack of attention of the members of the Parliament, even if in any case their final approval or rejection depend on the good will of the parliamentary fractions.

18. But we have to keep in mind that also the parliamentary acts of legislative initiative are not easily examined and approved by the parliamentary assemblies, because they are frequently postponed to the legislative initiatives of the Cabinet. This is a consequence of the fact that the Cabinet is the leader of the majority in Parliament and its interests in the compliance with the program approved by the assembly by the vote of confidence are prevailing over the interests of the parliamentary fractions. If it happens that special rules of the standing orders provide for special procedures to favour a quick approval of the acts submitted by the Cabinet, the effects of these provisions are sometimes counterbalanced by the reservation of a part of the parliamentary agenda, that is a part of the time devoted by the Parliament to the examination of the proposals of new legislation, to the acts of legislative initiative of the members of the Parliament and, specially, of those belonging to the opposition. Again, these rules don't guarantee the final approval of the relevant initiatives but guarantee – at least – some visibility to the activity of the members of the Parliament which don't fall in the frame of the Cabinet's program.