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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT REPORT
ON
LEGISLATIVE INITIATIVE

On the basis of comments by

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**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

I. INTRODUCTION

1. *At the 70th Plenary session of the Venice Commission, the then Minister of Justice of Georgia asked the Venice Commission to carry out a study on the “Legislative initiative in Europe”.*

2. *A Working Group has been subsequently set up, composed of Mr Bartole , member of the Venice Commission on behalf of Italy, Mrs Nussberger, Substitute member on behalf of Germany, and Mrs Helgeson as an expert¹.*

*The present study, which was prepared on the basis of the contributions from the members of the Working Group was adopted by the Venice Commission at its ****th plenary session (2008).*

II. SCOPE OF THE STUDY

3. The legislative initiative is to be understood hereafter as the right to submit to the legislative power draft laws with a view of their adoption by the Parliament.

4. For the purposes of this study and in accordance with the terms used in the majority of European constitutions, the term “right “ shall be understood widely. It refers to the possibility granted to any subject indiscriminately whether the submission constitutes an expression of a public power by public authorities or is the result of the exercise of a right to democratic participation of the citizens or communities of citizens for instance.

5. Furthermore , since any legislative initiative implies the beginning of a legislative process, the right to legislative initiative is to be analysed in its exercise and consequently cannot be departed from the whole legislative process. Therefore it has been considered relevant to also include in the current study a description of the exercise of the right to legislative initiative and hence the main features of the drafting requisites as well as of the process of the legislative working out.

6. Focus, has been deliberately given to the legislative initiative empowered to State and public authorities, and more specifically to the executive power and the members of the Parliament. They are indeed the major actors of the exercise of democratic life and more specifically of legislative initiative and constitute a common feature to all constitutions and democracies in Europe.

7. With regard to the Parliamentary mechanisms and the legislative process a detailed and comprehensive analysis would have implied a long and exhaustive study of all parliaments' internal mechanisms and practice in Europe. This would deserve a separate study as such and would go beyond the current subject. Therefore, a more generalist approach has been chosen, and therefore the most important principles which ground parliamentary practices have been identified and described.

8. Legislative initiative has been analysed from the point of view of the right of initiating laws at the national level. This implies that the present study will only deal with the legislative initiative at the federal level , not at the regional level where the regulations might considerably vary.

9. After presenting in the first chapter an overview of the different subjects that have been, in Europe, constitutionally granted with a right to propose laws to be discussed and adopted by the Parliaments , the second chapter will analyse the principal features and procedures of the exercise of the right to legislative initiative and describe the drafting requisites that can be found.

¹Mrs Helgeson is the author of « L'élaboration parlementaire de la loi ; étude comparative (Allemagne, France, Royaume-Uni), Ed. Dalloz, 2006.

Chapter 1 : Constitutional holders of legislative initiative in Europe : an overview

A. The principle of separation of powers

10. The principle of separation of power shapes primarily the regulation of legislative initiative. It implies the division of the institutions of government into three branches: legislative, executive and judicial. The legislature makes the laws; the executive put the laws into operation; and the judiciary interprets the laws. Power thus divided should prevent absolutism and dictatorship where all branches are concentrated in a single authority.

11. A purist approach to the principle of separation of powers would require not allowing anybody but the legislative body to initiate the adoption of new laws. Whereas this restriction is strictly observed in the Constitution of the United States, most European States grant constitutionally the right to legislative initiative to the executive power as well.

12. On the contrary, the judicial power is generally excluded from the legislative process from the very beginning. The Venice Commission in its opinion CDL-AD (2005) 022, §37 considers indeed that the “. The Supreme Court has the task of interpreting legislation following its adoption and should not be involved in the political process of adopting legislation.“ Only in exceptional cases are High courts such as the Supreme court or the constitutional court allowed to initiate new laws.

13. States have developed throughout history various concepts and methods of separation of power. The parliamentary functions have even been subject to a variety of conceptions. Different systems and regimes are experienced, from presidential to parliamentarian systems which have consequences on the holders and on the process of legislative initiative. However, it is worth noting that in practice the complexity of the decision-making process in modern democracies along with the multiplicity of the actors in democratic life tend to blur the strict approach of the principle of the separation of powers.

14. Although the general conception of the right to legislative initiative is similar in most European countries, the regulations differs in some important aspects which will be presented hereafter.

B. Regulation at the constitutional level

15. As a rule, the right to legislative initiative is conclusively regulated by the Constitution. Annexe 1 to this study gives an overview of excerpts from constitutions of European countries concerning the right to legislative initiative.²

16. A common feature to all constitutions is to be found in the precise enumeration by the constitution of the various holders of the right to initiate laws³.

17. In theory the constitution will, in its enumeration of the holders vested with a right to legislative initiative, put on equal footing the different subjects of the right, whatever political regime is established.

18. The level of regulation may vary, though.

² Annex (CDL-DEM(2008)003add) has been produced from the CODICES data base 2007/02

³ However, the Italian constitution can be seen as an exception, as it provides that a constitutional law could grant to organs and bodies not mentioned by the Constitution the right to legislative initiative. The Swiss constitution states in its Art.160 that every Canton has the right to submit initiatives to the Federal parliament, but does not determine who would be responsible within the cantons; this is left to cantonal legislation.

C. Legislative initiative of the executive power

19. Every constitution in Europe will grant the executive power with the right to introduce bills to the Parliament.

20. Within the executive power a distinction might be observed between the government and the President . The Government can always introduce bills, it might be granted to the whole Cabinet which can be referred to as the Council of Minister, as in Albania, or as government, as in Armenia, or to the head of the Government, as in France, where the Constitution confers the right to initiate statutes directly to the Prime Minister. In this regard, the Constitution of Norway has a particular process since it states that a bill shall be proposed by the government through a Member of the Council of State. The right to initiate laws can also be granted individually to the members of the Government, as in Bulgaria , or Ministers, as in Cyprus. In Italy, the constitution (Art.87), provides that the presentation to the houses of draft laws initiated by the government requires the authorization of the President of the Republic - elected by the Parliament-.

21. In parliamentary democracies , the exercise of the power of legislative initiative by the executive power is regarded as a necessary manifestation of the political leadership of the Cabinet, provided the latter has the confidence of the Parliament.

22. This situation, which prevails in parliamentary regimes, is usually explained and grounded by the fact that the implementation of governmental policy should be as efficient as possible and by the recognition of the government as the leader of the assembly majority which is supposed to support the governmental action.

23. Moreover, some constitutions will explicitly put the government in a more favourable position and grant exclusively to the Government the right to present bills to the parliament when specific subjects are at stake .

24. In this respect, the analysis reveals that financial issues are likely to be constitutionally reserved to Government.

25. This can be observed firstly in the case of the State Budget. Many constitutions⁴ will specifically designate the government as unique possible author of the Bills. This can be observed in very exclusive terms in the Constitution of Andorra which states in its Art. 61 : “the initiative of Bill of the general Budget corresponds exclusively to the Government” or in more generic terms, as in Art.87 of the Constitution of Bulgaria “The State Budget Bill shall be drawn up and presented by the Council of Ministers”, Art.110 of the Constitution of Croatia whereby the government only “propose the state budget and the annual financial report,”, Art. 42 of the Constitution of the Czech Republic whereby “Bills on the state budget and the final state accounting shall be introduced by the government”.⁵

26. The governmental exclusivity will usually apply and be extended to any financial legislation which could introduce new expenses, interfere on the level of taxes or more generally any legislation which would have financial consequences.

27. An identical situation can be observed with regard to international issues .The Government will have an exclusive right to propose for adoption by the Parliament bills related to the ratification of international treaties signed by the executive or, all regulations related to the implementation of the European Union (EU) directives or judgements of the European Court of Justice, for those countries members of or in the accession process to the European Union.

⁴ Constitutions of Andorra, Croatia, Bulgaria (Art.87.2), Czech Republic, Estonia, France, Germany, Portugal, Spain (Art.134)

⁵ See also, Art.87 of the Constitution of Estonia :” Bills on the state budget and the final state accounting shall be introduced by the government.”.

28. Both situations, whether financial or international aspects of the draft bills are concerned, reveal an identical purpose : to see the Government having the monopoly of legislative initiative in those specific areas which entail consequences not only on the implementation of the policy for which every government in a parliamentary system would need parliamentary confidence, but also consequences on the relations with other state or international institutions.

29. Lastly, in many countries, the Head of State, the President or the King may constitutionally hold a right to legislative initiative. This right might coexist with that of the government, as in Hungary⁶, or less frequently be the unique way for the executive power, as in Azerbaijan (Art.96). In Liechtenstein moreover, Art.64.1.a of the Constitution states that “1) The right to initiative with regard to legislation, that is to say, the right of introducing bills, shall appertain to: a) the Prince Regnant, in the form of Government bills;”.

30. Whereas the right of the President to introduce bills in Parliament applies generally with no limitations as in Poland⁷, in some constitutions it is restricted to specific cases. For example in Estonia, the President has the right to initiate laws only for amendments to the Constitution (Art.103.5). In Georgia, the right of the President is restricted to “exclusive cases “ (Art.67).

31. However, one might consider that entrusting the President with a right to present Bills to the parliament might be not advisable in parliamentary systems of government, since in these systems the President is not as politically responsible before the Parliament as the government.

32. Even though the prevalence of the executive power cannot always be observed in the terms of the constitutions, it remains valid in the reality of constitutional life and more largely speaking in political life. The prevalence of the executive power is even more salient in the exercise of the right to legislative initiative which is further analysed in Chapter 2 of this document.

D. Legislative initiative of the legislative power

Holders of the legislative initiative

33. The constitution will generally cite on a theoretical equal footing the parliament with the other holders of the right to legislative initiative.

34. Different systems for introducing a bill may exist however. The structure of the Parliament (whether it is composed of one or two Chambers) will definitely influence the constitutional provision of the introductions of Bills by the Parliament.

35. Indeed, in systems with two chambers, the right to legislative initiative will as a rule be granted to the members of the first chamber and also either to the second chamber considered as a whole, as in the Constitution of Germany, Spain and Poland or to the members of the second chambers, as in Italy or Russia, where each member of the second chamber would have the power to introduce a bill.

36. When the second chamber is a representative body of the different regions or regional parts of the country, the idea behind granting the right to legislative initiative to the second chamber is to allow for regional interests to be adequately represented in the federal legislation.

37. Furthermore, the constitution may provide for specific prescriptions with regard to the number of members of parliament who would be needed to support or introduce a bill.

⁶ Constitution of Hungary Art.25, Constitution of Russia Art.104,

⁷ and also in Azerbaijan, Hungary, Latvia, Lithuania, Russia.

38. In most European countries the right to legislative initiative belongs explicitly to each member of the parliament, taken individually⁸. The vast majority will refer either to the Members of the Parliament or to the Deputies depending on the wording chosen in the Constitution. Only very few constitutions will refer only to the parliament considered as a whole, as in Art. 73.1 of the Constitution of Greece: "The right to introduce Bills belongs to the Parliament and the Government".⁹

39. Moreover, some constitutions may require a numerical support within the Parliament for legislative initiatives. For instance Art. 65 of the Latvian constitution grants the right to legislative initiative only to committees of the Seima or to no less than five members of the Seima.

40. Some constitutions will explicitly specify that parliamentary groups and parliamentary committees also have the right to legislative initiative, as in the Constitution of Estonia or Switzerland.

41. These restrictions can be seen and interpreted as a tool to have the Parliament not flooded with bills of low quality and consequently blocked in its work.

42. Higher quotas can be required for legislative initiatives which aim at amendments to the Constitution, as in the constitution of Estonia where the support of one fifth of the members of the Parliament is required for amendments to the Constitution¹⁰.

43. Restrictions can also be foreseen with regard to specific laws, or the content of the law. For instance, the Constitution of France in its art. 40 provides specifically that "Bills and amendments introduced by members of parliament shall not be admissible where their adoption would have as a consequence either a diminution of public resources or the creation or increase of an item of public expenditure".

44. Constitutions seem however reluctant to go further in regulating the exercise of the legislative initiative of the parliament.

45. It is true that even though it is important to have the constitution designating clearly the holders of the right to legislative initiative, and to have this right clearly guaranteed by the Constitution, the implementation of this right falls within the competence of ordinary legislation and of course the Standing Orders of the Parliament.

E. Right of amendment

46. According to parliamentary law, the right to legislative initiative covers both the right to introduce draft bills and the right to propose and introduce proposals during the discussions of the draft, which is commonly designated as the right of amendment.

47. The right of amendment is seen as the parliamentary prerogative par excellence. Since the exercise of legislative initiative is clearly dominated in practice by the government, the right of amendment has become the principal exercise by the Parliament of its right to legislative initiative.

48. The right of amendment is generally conceived as an individual right belonging to the deputy, but in practice it is usually performed collectively. The right of amendment can also be constitutionally granted to parliamentary committees, parliamentary groups, government, ministers and State Officials empowered by Ministers as stated in Article 63 of the Constitution of Latvia¹¹.

⁸ As in the Constitution of Albania, Armenia, Austria, Bulgaria, Cyprus.

⁹ The same situation can be witnessed in the Constitution of Liechtenstein which gives to the « Diet itself » the right to introduce bills, in Art. 72 of the Constitution of Malta.

¹⁰ For further information, see forthcoming study on constitutional provisions for amending the constitution.

¹¹ Art. 119.2 of the Constitution of Poland "The right to introduce amendments to a bill in the course of its consideration by the Sejm shall belong to its sponsor, Deputies and the Council of Ministers."

49. Since the right of amendment is exercised on the basis of a preexistent text, it is, inevitably related to substantial and sometimes specific conditions. Consequently , the right of amendment can be constitutionally framed by criteria of restrictive admissibility.

50. In countries, as for instance in France, Germany, Spain, Portugal, where the legislative initiative is exclusively reserved to the government, on issues related to the Budget Act, strict limitations to the right of amendment will be imposed on the members of Parliament¹². These restrictions aim to ensure the coherency and the balance of the Budget act, but also to prevent the Parliamentarians from demagogic temptations.

51. Some constitutions will explicitly forbid any parliamentary amendment which may lead to an increase or diminution of State income, as in France or Portugal.¹³ Parliamentary amendments which may increase public expenditure or decrease public incomes are subject to prior governmental approval, as in Spain or Moldova. In Great Britain the establishment of additional financial burdens or incomes must be approved by a Resolution of the House of Commons and can only be introduced by a Minister. These "Money resolutions", which are a financial frame to the right of amendments of the Parliamentarians will fix the maximum level of the possible increase of public expenditure or decrease of public incomes; they can also define their precise allocation.

52. More generally, the right of amendment shall be constitutionally framed by the subject of the Bill it is supposed to amend. This is the case in Greece, where Art.74.5 specifies that ".....No addition or amendment shall be introduced for debate if it is not related to the main subject matter of the Bill or law proposal."

53. Even though the constitution makers seem reluctant to regulate the details of the legislative process and consequently the right of amendment; some constitutions has nevertheless framed the right of amendment under specific circumstances.

54. As for the issue of the procedural requirements which would frame the submission, examination and approvals of Bills within the parliament, the Constitution makers seem reluctant to regulate the whole legislative process and hence the right of amendment. The legislative process and consequently the right of amendment will be more likely to found in ordinary laws and standing rules and rules of procedure of the Parliament.

55. Finally, it must be underlined that the regulation at the Constitutional level of the right of amendment is a delicate and complex issue, insofar as any restriction to this, a parliamentarian essential prerogative, could be interpreted as an infringement of their rights. This may explain why the regulation at the constitutional level is not common to all constitutions.

F. Legislative initiative of the judicial power

56. A strict implementation of the principle of separation of powers would prevent the judicial power from initiating laws. The judicial power is meant to interpret the laws and not to initiative them.

57. However, a few constitutions in Europe grant the judicial power the possibility to introduce bills in Parliament. The Constitution of Azerbaijan, for instance, in its Art. 96.1 grant the right to legislative initiative to the Supreme Court. The right to legislative initiative of the judicial power can also be restricted to specific circumstances. In this regard, the Russian Constitution has limited the right to legislative initiative to the jurisdiction of the Court vested with this right ,

¹² For instance, Art. 40 of the French constitutions states : "Private Members' Bills and amendments introduced by Members of Parliament shall not be admissible where their enactment would result in either a diminution of public revenue or the creation or increase of any public expenditure."; Art. 134.6 of the Constitution of Spain "Any non-govern mental bill or amendment which involves an increase in credits or a decrease in budget revenue shall require previous approval of the Government before its passage."

¹³ Also, Art.73.3 of the Constitution of Greece,

Article 10.4.1 stipulates explicitly that “The right to initiate legislation shall also be vested within their terms of reference in the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation and the Higher Court of Arbitration of the Russian Federation”. In this regard, the Venice Commission in its opinion CDL-AD (2005) 022 considered when assessing the constitutional reform of the Kirguiz Republic that “giving to the Supreme Court the right of legislative initiative on issues within its jurisdiction raises concerns with respect to its compatibility with the principle of the independence of the judiciary. The Supreme Court has the task of interpreting legislation following its adoption and should not be involved in the political process of adopting legislation.” (§37).

58. Even though direct implication of the judicial power, such as those mentioned above, is rare, the indirect role of the judicial power cannot be underestimated, and more specifically the role of Constitutional courts in the legislative process is to be taken into consideration.

59. The influence of Constitutional court decisions, particularly those declaring the unconstitutionality of laws, is often described as an indirect form of legislative initiative. Constitutional court decisions will not only influence any law-making institution but might include, as, for instance, in German constitutional Court decisions, an order to the legislator to enact new regulations and replace unconstitutional regulations within a certain period of time¹⁴.

60. The indirect power of the Constitutional court in initiating laws is even more salient when considering the issue of legislative omission. The Constitutional Court of Hungary may for instance acknowledge inaction in the area of legislation as contravening the Constitution—it will declare that the legislative institution failed to execute its obligations as a legislator. The inaction of this institution i.e., the failure to enact a certain legal act, contravenes the constitution. Therefore the Constitutional court obligates the institution to execute its obligation and determines the term for doing so.

61. The general report and more specifically the national reports which were produced at the occasion of the XIV Congress of the Conference of European Constitutional Courts on “Problems of Legislative Omission in Constitutional Jurisprudence” give a comprehensive overview on the role of Constitutional courts in this field¹⁵.

62. Lastly, the influence of constitutional court decisions on the legislation is undeniable; the execution of their decisions is considered as a crucial part of the principle of the rule of law. It is therefore common practice for constitutional courts to send for information the decisions of their courts to the legislative power which would imply a legislative action. The constitutional court of Russia does this to the Douma twice a year.

63. More than one national report of the XIV Congress of constitutional courts along with their scientific doctrines note that constitutional courts, although not referred to as “positive legislators”, may act as activist courts whereas other scientific doctrines, like in Turkey, would not see Constitutional Courts as a “legislator”, not even a negative one .

G. Legislative initiative of Citizens

64. Several constitutions provide for a possibility for citizens to introduce bills in Parliament¹⁶. This possibility constitutes a right granted to citizens , or group of citizens and is usually clearly defined and regulated by the Constitution.

65. This kind of legislative initiative will be, in the Constitutions, referred to as “popular initiative” as in the Constitutions of Hungary.

¹⁴ Cf. Schlaich, Koriath, Das Bundesverfassungsgericht. Stellung, Verfahren, Entscheidungen, 7th Edition, Munich 2007, p. 238.

¹⁵ The report and national replies to the questionnaire can be found under the web site of the Conference : http://www.lrkt.lt/Conference_Q.html

¹⁶ Albania, Andorra, Austria, Belarus, Georgia, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Poland, Portugal, Romania, Slovenia, Spain, Switzerland, the “Former Yugoslav Republic of Macedonia”, (FYROM)

66. Constitutions will usually make clear that this is a citizen's right which refers to citizens having the right to vote. For instance the Constitution of Lithuania will explicitly refer to "citizens of the Republic of Lithuania who have the right to vote", the Constitution of Poland in its Art. 118 will refer to "citizens having the right to vote in elections to the Sejms (Parliament)" whereas the Constitution of Albania in its Art. 81 will use the term "elector" as in the Constitution of Italy (Art.71) and Hungary in its article 28.D "voters".

67. This requirement implies that a person who has been legally incapacitated or deprived of the right to vote will not be authorised to participate in a popular legislative initiative¹⁷.

68. Only the Spanish Constitution is not explicit in this respect. It defines 500, 000 valid signatures as precondition for the exercise of popular legislative initiative (art. 87.3) and leaves to an organic law the regulation of its forms and requirements.

69. The number of citizens required for a legislative initiative varies between 1000 citizens (Liechtenstein) , 5000 voters (Slovenia) ,10 000 voters (FYROM), 20.000 electors(Albania) 30..000 (Georgia) 50.000 citizens (as in Lithuania, Italy, Hungary) 100.000 as in Poland or Romania and 500 000 in Spain. In Latvia or Andorra one-tenth of the electorate is required.

70. The right to legislative initiative might also be granted to associations, organisations of citizens, trade unions. For instance this can be found under Art. 71 of the Constitution of the Former Yugoslav Republic of Macedonia whereby "The initiative for adopting a law may be given to the authorised instances by any citizen, group of citizens, institutions or associations."

71. There might be a danger that the proposals submitted by citizens, group of citizens or associations and organisations might be conditioned by corporatist interests and would press the parliament to find difficult compromises which cannot always take into account the national general interest.

72. Constitutional provisions, can explicitly limit the content of the proposals to the social interests supported by the concerned associations or communities of citizens.

73. Some areas of legislation might be excluded from the exercise of popular initiative. In the Spanish constitution popular initiative may "not touch on matters concerning organic laws, taxation, international affairs or the prerogative of granting pardons "(Art.87).

74. Formal requisites might be further required : In Italy, the citizens are requested to submit a draft already drafted in articles (Article 71), in Latvia also (article 78). In Albania the popular initiative like any proposals "must always be accompanied by a report that justifies the financial costs of its implementation".

75. Time limits might be constitutionally foreseen as in Hungary which provides in its Art.28E that signatures must be collected within two months in the case of popular initiative.

76. Legislative initiative of citizens is often presented and seen as an element of direct democracy. Indeed, to a certain extent it is true that it includes the citizens in the legislative process.

77. Moreover, unlike in the case of referenda, the citizens are here given an opportunity to initiate laws and consequently to bring directly to the attention and the agenda of the parliament their own input and ideas, and not only to consent to or disagree with a bill already elaborated and drafted.

¹⁷ See in CODICES, POL-2007-2-004, Decision of the Constitutional Tribunal

78. On the other hand it can not be presented as an institution of direct democracy as such, since the final word and decision on the fate of this initiative will remain within the representative authorities, that is the Parliament.

79. However, in the current debates that take place all over Europe concerning a democratic deficit of the institutions and the growing interests of the democratic society and citizens in being more involved in the democratic process, the legislative initiative of citizens is increasingly regarded as a worthy corrector of the inevitable imperfections of indirect democracy.

H. Legislative initiative of constituent parts of a federation and autonomous entities

80. In federative states as well as in states with autonomous unities the second Chamber as the representative body of the regional subunits of the State will in principle be granted the right to legislative initiative at the federal level.

81. Additionally, regional authorities may also be granted a right to initiate laws. For instance, the Swiss constitution states that every canton has the right to submit initiatives to the federal parliament, while the body responsible within the Cantons will be designated by an ordinary law. The Constitution of Italy in its Art. 121 confers to the executive body of the region (the Regional Council) the power to submit Bills to the Parliament.

82. The Constitution of the Russian Federation grants the right to introduce bills to the legislative bodies of the federation subjects (Art 66.3 Constitution of the Russian Federation) .

83. The regulation in the Spanish constitution is still more detailed. The Assemblies of the Autonomous Communities can request the government to adopt a bill or send a proposal of a law to the House of Representatives. According to the constitution of Georgia, the higher representatives bodies of the Autonomous Republic of Adjara have the right to legislative initiative (Art.67 of the Constitution of Georgia). In the same way the Nakhichevan Autonomous Republic of Azerbaijan which has the right to initiate laws before the Ali Majlis (Parliament).

84. These regulations can be understood to strengthen the status of the regions or of the autonomous entities within the country as they are empowered with a direct means of bringing their ideas and proposals to the legislative body on the federal level.

85. As in the case of legislative initiative presented by citizens or groups of citizens, it might be advisable to have constitutional provisions limiting clearly the content of the legislative initiative to the territorial dimension of the competence of the local authorities.

I. Other bodies

86. The Constitution of Ukraine by granting to the “National Bank of Ukraine “ a right to initiate laws in the Parliament appears as an exception in the European constitutional landscape.

Chapter 2 : The exercise of the right to legislative initiative

87. The right to legislative initiative marks the beginning of a legislative process by which a draft is brought before the Parliament in view of its adoption.

88. Any legislative initiative in order to be eventually materialised into a bill will need to follow procedural rules which frame the whole legislative process in which parliamentary prerogatives come into force.

89. The rules of procedure , particularly within the Parliament, and the drafting requirements of a legislative initiative constitute the major pre-conditions of a successful exercise of the right to legislative initiative .

A. Procedural rules

90. The legislative process is framed by procedural rules which will pave the way for the submission, examination and approval of any bill or amendments within the Parliament.

91. The level of regulation of the whole legislative process and parliamentary stages varies considerably in Europe.

1. At the Constitutional level

92. Even though the Constitution makers seem reluctant to regulate the whole legislative process at the Constitutional level, some provisions can be found.

93. Some constitutions as in Greece will describe in a very detailed way the legislative process whereas other constitutions will leave the details of the procedure or of the conditions to other laws and more specifically to the Statute of the Parliament

94. Constitutions will usually focus on specific requirements because of the subject of the law, or set special rules as to time-frames. Popular initiative may also imply a special procedure especially with regard to the collection of signatures and the subsequent submission of the document to the Parliament as in the Constitution of Italy.

95. As it has been presented above¹⁸ a legislative initiative that could have financial impacts will often be constitutionally framed and specific requirements will be foreseen. For instance, in the Constitution of Poland it can be necessary for those initiating a new law or an amendment to indicate the financial consequences of its implementation (Art.118.3) A governmental resolution may be necessary prior to any act relevant for the budget, as in the Constitution of Russia (Art.104.3 of the Constitution of Russia).

96. Some constitutions may also require a prior opinion or consent given by a body concerned by the legislative initiative. This is the case in Germany, where the Constitution states that whenever a law does not come from either the Government or the second chamber, an opinion of the relevant body is required. For these opinions certain time limits are set. They are longer for changes of the Constitution as well as for laws leading to the transfer of power to a supranational or international organisation. In France any governmental legislative must, before being brought to the Parliament, receive an opinion from the Council of State (Art.39 of the Constitution).

97. A specific approval might also be constitutionally foreseen once the legislative process has started and the draft law is under discussion within the Parliament. In general, once the right of legislative has been successful and has led to having the draft law discussed within the Parliament, those who have started the legislative process no longer have specific rights.

98. Exceptions to this principle can be seen, however, in a few constitutions. Amendments to the draft would only be possible with the consent of the body which used the right to legislative initiative, as in the Constitution of Azerbaijan. The Polish constitution provides that only the sponsor of the law can withdraw a bill in the course of legislative proceedings within the Sejms until the conclusion of the second reading .

99. The governmental primacy in the legislative process will be particularly salient in those few constitutions which contain dispositions related to the order of business of the Parliament. For instance the constitution will provide for an automatic priority in the Parliament's agenda for a governmental initiative. This can be observed in the constitution of Spain, and France before the constitutional reform of July 2008. The governmental domination on the Parliament's agenda might lead to a weakening in the parliamentary legislative initiative.

¹⁸ under §25-26,50,74**to be checked**

100. To counterbalance this governmental advantage and in order to guarantee a minimum exercise of parliamentary legislative initiative, a few days can be constitutionally specifically devoted to the parliamentary legislative drafts. For instance the Constitution of Greece, Art . 74.6 provides : “Once every month, on a day designated by the Standing Orders, pending private Members' Bills shall be entered by priority in the order of the day and debated”. The order of business of the Parliament can be divided between governmental priority in principle and sessions devoted to parliamentary initiative or discussions (former Art.48.3 of the Constitution of France).

101. These constitutional provisions will definitely guarantee a periodicity in the order of business not systematically decided by the government. However they will usually only benefit legislative initiatives coming from the parliamentary majority.

102. The protection of the legislative initiative of the parliamentary minority will in turn be guaranteed only if a certain number of yearly sessions are specifically devoted to their discussions. The recent reform of the French constitution , which aimed inter alia to reinforce the powers of the Parliament , introduced specifically in its Art 48.3 that a session day per month shall be reserved for an order of business determined by each Chamber at the initiative of the opposition or minority groups of each Chamber. In this regard, the major innovation of the revision of the Constitution of France, in July 2008, consists of a complete revision of the dispositions related to the order of business of the Parliament in order to have the latter decided in principle by the Presidents of each chamber and not in principle by the Government .

103. It must be underlined that constitutional provisions such as those exposed above on the order of business of the Parliament are very rare. These issues, even though the aims and effects are quite similar, are usually treated in the framework of the Standing orders of the Parliament as it will be exposed under point 2. below).

104. Finally, in the vast majority of the Constitutions of Europe, specific procedural requirements will be set with regard to legislative initiative that would aim at an amendment or revision of the constitution. In this regard, the forthcoming study of the Venice Commission on constitutional provisions for amending the constitution will give a comprehensive overview¹⁹.

2. At the sub constitutional level

a) With regard to the introductions of Bills

105. An analysis of European constitutions demonstrates that the implementation of the constitutional provisions on the right to legislative initiative will generally be dealt with by ordinary legislation and by the rules of procedure of the Parliament. It is for instance a by-law of the Bundestag which gives the full meaning of the of Art. 76 of the German constitution which simply states that bills are introduced in the Bundestag “from the floor of the Bundestag (literarily “aus des Mitte des Bundestag”). According to the by- law, bills have to be signed by a parliamentary group of five per cent of the members of the Bundestag.

106. Any legislative initiative will only be effective, once the proposal is put on the agenda of the parliament, for discussions and vote.

107. The discussion of a legislative initiative will depend on its inclusion in the draft agenda of the parliament. However, in the vast majority of regimes the inclusion of a legislative initiative is not automatic²⁰.

¹⁹ Draft report on constitutional provisions for amending the constitution CDL-DEM (2008) 002

²⁰ The Rules of procedure of the Spanish Parliament foresee a certain automaticity : a parliamentary legislative initiative will be put automatically on the agenda if after 30 days from its deposit the government has not expressed its opposition.

108. According to the principle of parliamentary autonomy in the field of the internal organization of the Parliament, the Chambers generally master their order of business. Some Chambers have however, decided to provide for the priority of the government on the parliamentary agenda.

109. The consequent priority of governmental initiatives, which is similar to the constitutional provisions mentioned above²¹ will definitely allow the government, the leader of the parliamentary majority, to implement the program approved by the parliamentary majority for which it has received the confidence of the parliament . Hence special rules of procedure of the Parliament will provide for specific procedures in order to privilege a quick approval of the drafts submitted by the Cabinet.

110. The interest to see the program of the parliamentary majority executed prevails over the interest of the parliamentary fractions. However, to counterbalance the supremacy of the government , the rules of procedure of the Parliament may specifically reserve parts of the agenda, that is part of the time devoted by the Parliament to the examination of draft from the parliamentarians, or even from the opposition. For instance the Standing Order N°14 from the House of Commons (United Kingdom), reserves 20 days to the opposition within each session (Opposition Day) and thirteen Fridays to parliamentary legislative initiative, through a system of drawn lots (Ballot)

111. These “Parliamentary windows” constitute an opportunity to have certain legislative initiatives discussed, but finally their adoption will depend on the choice of the parliamentary majority. Even though these rules do not guarantee the final approval of the legislative initiatives, they at least guarantee some visibility to the activity of the members of the Parliament which wouldn't fall within the framework of the Government's programme.

112. However, with the Parliamentary procedure being fractioned at several steps, the parliamentary initiatives can only progress in the process if the initiative gets further political support and in bicameral systems a close cooperation between the two Chambers of the Parliament.

113. The reality however reveals that in practice the vast majority of legislative initiatives are not discussed, through lack of political will and/or lack of time. This situation is particularly true with regard to parliamentary initiatives and even initiatives coming from members who do not belong to the governmental majority.

b) With regard to the right of amendments

114. In addition to the constitutional restrictions with regard to the financial content and impact on the State budgets mentioned above²² two additional conditions of admissibility are usually to be found in rules of procedure of the Parliament .

115. The text of the amendment must be related to the text which is supposed to be amended. The rules of procedure of the Parliaments of France, Greece, Belgium et Great Britain have enshrined this condition as a matter of admissibility of the introduction and hence discussions of the amendment.

116. This prerequisite aims to avoid the adoption of dispositions which would be unrelated to the subject of the law in which they are included. They are usually called “cavalier legislative”.

117. The motives of the “cavalier legislatif “ practice may vary, but generally they aim to avoid the even stricter conditions of the deposit and discussions of the primary initiative. “Cavaliers legislatifs” may also be used by the government, and may therefore constitute a threat to the guarantees of the freedom of deliberation of the Parliament. In practice, the control of the

²¹ under §§25-26,50 (**to be checked **)

²² under §§ 25-26,50,95 (**to be checked)

relevance of the text of the amendments with the text to be amended will be carried out by the legislative authorities, and will depend on the interpretation of the imprecise notion of “relevance to the subject of the bill”.

118. The right of amendments cannot be exercised at any moment of the legislative process. It must fit into the logical process of the parliamentary deliberations. The rules of procedure of the Parliament will therefore frame in temporal manner the exercise of this right.

119. The right of amendment is considered as a tool par excellence of the discussion of the draft texts within the commissions or the plenary session of the Assembly. It won't usually be allowed during the general discussions of the draft law the purposes of which are to discuss the principal outline of the text.

120. Moreover, the exercise of the right of amendment should not disturb the efforts to tighten the legislative process. To that end, many Parliaments refuse any amendment which would challenge earlier decisions acquired during the parliamentary deliberations.²³

121. Furthermore, in order to facilitate the tasks of the various parliamentary bodies, in particular those of the commissions, certain chambers, as in Denmark, Spain and France, will impose specific time frames for the deposit of amendments²⁴. Derogations and further delays might be foreseen

c) With regard to the multiplicity of legislative initiatives

122. In practice , it is frequent that a same topic will be the subject of several drafts laws presented by different parliamentarians or different political groups, or possibly by different chambers. Dealing with this multiplicity of legislative initiatives can be done through a common discussion of the concurrent drafts –generally two or three of them; the purposes of the solution chosen is to guarantee a certain coherence in the discussions as well as the right to initiative of the different authors of the amendments.

123. In principle the rules of procedure of the Parliament will give general indications as to the mechanism to be followed in such situations. If not the practice will prevail. For instance Art 24 of the Rules of Procedure of the Bundestag states that it can be at any time decided to discuss jointly questions of an identical nature . The rules of procedure of the Spanish Senat provide that within 15 days of the deposit of a draft, other drafts related to the initial one can be presented and will be put automatically on the order of business of the Senat. In Italy when the Parliament has to deal with more than one legislative initiative on the same matter, the relevant parliamentary commission will select one which will be used as the basis for the discussions. The other legislative initiatives will then be used as a basis for amendments.

124. The issue of the multiplicity of legislative initiative is even more prevalent regarding amendments. The discussions of all amendments can bring about a parliamentary obstruction. Every Parliaments or chamber will have its own solutions to dealing with this issue. Some chambers prefer to discuss the amendments in a chronological order (like in Greece), others prefer an order of discussion using the criteria of relevance to initial text to decide the order of discussion²⁵.

125. Parliamentary law must achieve a difficult conciliation between the effectiveness of the legislative process and the protection of the rights of the parliamentarians. At the stage of the discussion of legislative initiatives , the rules must set a rational progression of the

²³ In this regard see Art. 82 of the Rules of procedure of the German Parliament .

²⁴ In order to facilitate the deposit of amendments, the French Senate has developed an internet application “AMELI”.

²⁵ In the Bundestag the amendments will be discussed within the plenary by order of relevance while in the House of Commons the relevance of the amendments will be assessed

parliamentary debates until the decision while permitting the exercise of rights of the members of the assembly in the field of legislative initiative and right of amendment.

126. Within the Bundestag, all reported amendments will be deliberated in plenary session, in order of relevancy to the initial text. A Chamber can also decide to join the deliberation related to several amendments on the same issue. In the House of Commons, according to Standing Order n°32, the Speaker can select those amendments to be discussed. The Speaker is consequently vested with a large discretionary power and constitute an efficient procedure to avoid obstructionist practices. In order to leave room for a free expression of any divergent opinions, the neutrality of the Speaker is mandatory.

127. The complexity of the administration of the process resides here again in the difficulty of reconciling the progression of bills stemming from the government, the quality of the legislative function and the protection of the parliamentarian's rights and in particular those of the minority.

128. Even though the rules of procedure of the Parliament and the very complex rules of the chambers aim to frame efficiently the process of deposit and discussions, the practice developed throughout the years and within each chamber and the wisdom of the Members of the Parliaments remain in this regard crucial and predominant.

B. Drafting requisites

129. Law drafting definitely requires technical knowledge and experience.

130. Statistically, in the majority of European countries most drafts are elaborated within the ministries.²⁶ The prevalence of the executive in the exercise of the legislative initiative, implies that most laws are, in practice, initiated by the Government. Consequently the Ministries have the manpower and the expertise to prepare bills.

131. The drafting process can be centralised or decentralised within the Ministries where specialised law-making/legal drafting sections are set up. The drafting requirements of the conversion into law of the governmental policy has frequently led to the adoption of handbooks of drafting, which are a collection of recommendations of drafting techniques. In the United Kingdom the drafting process is entrusted to a special office which is specialised in the drafting of the texts submitted by the Cabinet to the Parliament.

132. Drafting requisites do have an impact on the democratic participation with regard to the exercise of the right to legislative initiative, specially when the right to legislative initiative of citizens is a stake. In this regard the constitution-makers will have, at least, two different alternatives. The Italian constitution, for instance, requests that any legislative initiative brought to the parliament by the citizens is already drawn up into articles and constitutes a real draft law in itself (Art. 71). Alternatively, citizens will only be asked to provide a document summarizing the purposes of the newly-proposed legislation and practical arrangements for its implementation, leaving to the parliament and its internal bodies its conversion into a draft bill drawn up in articles.

133. Combining the needs of an effective democratic participation and the purposes of a legislation which should be able to deal with the complexity of the present social and economic requirements is a complex constitutional issue. The solution could be found in the practice and rules of procedure of the Parliaments of Europe, where special commissions devoted to the quality of the drafting are set up. However, a purely internal parliamentary solution might not be seen as sufficient in particular with regard to legislative initiatives which would not come from the executive of the parliamentary power.

²⁶ Haller, Kölz, Allgemeines Staatsrecht, 3rd Edition, Basel, Geneve Munich 2004, p.255.

134. The subject of the legislative initiative might also induce specific drafting requirements. Indeed, special requirements can be constitutionally foreseen for legislative initiative which would touch upon financial issues. For instance, Art.118.3 of the Polish Constitution provides for :” 3. Sponsors, when introducing a bill to the Sejm, shall indicate the financial consequences of its implementation.”

135. The law-making process constitutes a real challenge in every democracy even more so in transitional countries. In order to improve the quality and the effectiveness of their legislation, several international organisations have developed assistance programmes. The European Union and the Organization for Economic Co-operation and Development developed under the SIGMA programme a collection of law drafting practices in selected countries.²⁷ The Council of Europe, for its part, has launched a “Law-making Project” in order to support efforts in the law-making process of new democracies. The purpose of the “Law-making” project, implemented within the framework of the legal co-operation programme of the Council of Europe, is to support the member States’ administrations in their efforts to improve the quality of legislation²⁸. OSCE/ODHIR has also launched a programme of assistance consisting of an assessment , at the request of the interested authorities, of the law drafting and regulatory management in their country²⁹.

III. CONCLUSIONS

136. The present analysis shows that the right to legislative initiative is a decisive element in the determination of the respective roles of the different state organs in the democratic process.

137. The analysis of various constitutions in Europe demonstrates similarities and differences in the right to legislative initiative. Although the general conception of the right to legislative initiative is similar in most European countries, the regulation may differ in some important aspects.

138. As a common feature to all constitutions it has been observed that the government and the Parliament is vested with a right to legislative initiative.

139. In federative States as well as in states with autonomous entities, the constituent parts of a federation or the autonomous entities are also granted a direct right to legislative initiative on the federal level.

140. Sometimes citizens or groups of citizens - more rarely the head of the executive- or other institutions such as courts are often also granted a right to initiate laws. However, according to the Venice Commission Courts should not be granted with a right to initiate laws. On another hand popular initiative seems to be an important new development in democracies in Europe.

141. A certain governmental primacy exists in several constitutional orders. It is particularly salient concerning legislative initiatives which touch upon or are related to the State budget or international affairs. On these issues the legislative initiative might even be exclusively attributed to the executive power.

²⁷ For more information on this programme, refer to:

https://www.oecd.org/pages/0,2966,en_33638100_33638151_1_1_1_1_1_1_1,00.html

²⁸ For more information on this project, refer to:

http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Law_making/

²⁹ So far Georgia, and the FYROM have benefited from this assessment ; the reports can be found under www.legislationline.org.

142. Even though the domination of the government cannot always be observed in the terms of the constitutions, it remains in each country notable in the exercise by the government of its right to legislative initiative. This predominance can be facilitated by technical means, in particular with regard to the legislative process within the Parliament, and more generally by the practice and reality of the constitutional and more largely speaking political life.

143. The analysis of the exercise of the right to legislative initiative reveals the reality of the constitutional and political life, the domination of the government in the legislative process and the importance of the right of amendment of the parliamentarians which can be considered as a crucial counterbalance to the governmental prevalence.

144. Indeed, whatever the political regime may be, the domination of the government in the legislative process is observed. It is regarded as a necessary manifestation of the political leadership of the executive power combined with the necessary confidence of the Parliamentary majority which is inclined to give support to governmental activity.

145. In a context of governmental prevalence, the right to legislative initiative of the Parliamentarians is more significant with respect to their right of amendments which is a prerogative par excellence of the parliamentarian.

146. The right of amendment can be constitutionally framed , namely with regard to specific issues like the state budget, but is on a more general basis set by the rules of procedure of the parliament

147. The framing of the right of amendment is a delicate and complex issue, since every restriction to this essential prerogative of the Parliamentarians rights can be interpreted as an infringement to the exercise of their legislative initiative.

148. With regard to the whole legislative process and to regulations of procedural requirements related to the introduction of bills in parliament , the constitutions in general leave these issues to ordinary laws and to the rules of procedure of Parliament.

149. However, some regulations on the legislative process can be found at the constitutional level in a few constitutions, more commonly with regard to specific subjects such as financial issues and always with regard to constitutional revisions.

150. Drafting requirements might also be constitutionally foreseen, namely with regard to state budgetary issues or legislative initiative not stemming from the executive or parliamentary power.

151. Finally, the analysis of the right to legislative initiative as well as of its exercise underscores the difficulty in combining efficiency of the legislative process with providing as large as possible a participation.

152. Regulations at the constitutional level are crucial with regard to decisive factors such as the determination of the holders of the right to initiate laws and with regard to certain procedural aspects. These regulations are completed by other regulations and especially by some wisdom in the exercise of this right and practice by the parliamentary and governmental power.