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REPORT

"CONSTITUTIONAL HOLDERS OF LEGISLATIVE INITIATIVE: A GENERAL OVERVIEW"

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Introduction

Legal regulation is needed in every political regime, in authoritarian systems as well as in democratic systems. The characteristic feature of the legislative process in a democratic system is its openness for different views and the discussion of alternatives. Taxes, for example can be fixed in a progressive way so that those who earn more have to pay a higher percentage of their income. They can also be fixed in a linear way so that the percentage the tax-payer has to pay always rests the same. Those who do not earn much can be exempted from tax-paying. Whatever system is chosen there are "winners" and "losers" – some will like the solution found and some will be against it. In a democratic system the different interests are publicly weighed and debated whereas in an authoritarian system the decisions are essentially taken "behind the curtain". At the surface the process of law-making can be organised in a similar way. Therefore it is necessary to analyse in detail the relevant mechanism in order to understand how democratic the process is and what can be improved.

Definition

The right to legislative initiative is not only the starting-point in the process of law-making, but also an indicator of real democracy. The relevant question is not only who has a right to introduce a draft law into Parliament, but also in how far this draft law will be discussed in Parliament with a view to adoption. It is useless to grant the right to legislative initiative to many different entities or persons, if the draft laws elaborated by them are not discussed in the plenary. The right to write draft laws for the waste paper basket is not a real right. Therefore the right to legislative initiative has to be defined as "**right to submit to the legislative power draft laws with a view of their adoption by the Parliament**". For the political players the right to legislative initiative is therefore the expression of public power, for the citizens it is part of the right to democratic participation.

Right to legislative initiative in the context of constitutional systems

In defining the rules on legislative initiative it is necessary to balance the effectiveness of the legislative process and the wide democratic participation.

This has to be viewed on the background of the principle of the separation of powers. In modern constitutionalism it is generally accepted that this principle does not exclude the interaction between the legislative, executive and judicial power. The right to legislative initiative is a good example for interaction. Generally it can be said that the executive has a dominant role in the preparation of draft laws, whereas the legislative is more important in openly discussing and amending draft laws.

Regulations of the right to legislative initiative

Basically, the right to legislative initiative is enshrined in the **Constitution**. Constitutional texts differ very much in the scope of regulation dedicated to this question. A minimum requirement for constitutional regulation is the definition of who is the holder of legislative initiative. The rules of procedure are often left to (constitutional) laws or even subnormative texts.

Overview of the holders of legislative initiative

Generally, the right to legal initiative is granted to:
- Government / President
- Parliament (and its parts)
- Citizens
- Constituent parts of a Federation / autonomous bodies

In exceptional cases the right to legislative initiative can be even granted to courts or other bodies such as the National Bank (e.g. in Ukraine) or the Proscutor's Office (e.g. in Azerbaijan). Such a regulation is not convincing if the relevant bodies can draft laws not linked to their field of activity. If they can write draft laws within the narrow area of their expertise this might be seen as advantageous in so far as special knowledge and experience can be brought in. On the other hand, it might be recommendable to have a more detached view. It is not to be expected that those who write their "own laws" have a balanced approach to the problems they have to solve.

The executive branch as a holder of the right to legislative initiative

As a rule, the executive is granted the right to legislative initiative. The constitutional systems differ, however, in attributing this right only to the **Government** (as a whole, only to the head of the Government or to every single minister) or also to the **President.** If both have the same rights there might be a duplication of structures (ministries and presidential administration). There might also be competition between the President and the Government.

The legislative branch as a holder of the right to legislative initiative

There are many different ways of determining the right to legislative initiative for the Parliament. In systems with two chambers it can be given to both chambers. Besides, it can be given to the Parliament as a whole, to certain parts of the Parliament (committees, groups with a certain minimum amount of Parliamentarians) or to individual members. In this context it is necessary to find a compromise between a maximum of democratic participation (giving every member a right to legislative initiative) and efficiency of the whole process (giving the right to legislative initiative only to substantial parts of the Parliament able to adopt a law). It is important to avoid that the Parliament is flooded with low quality initiatives.

The judicial branch as a holder of the right to legislative initiative

Generally, it is the role of the judiciary to interpret laws and not to take part in making laws. However, it is important to note that Constitutional Courts can exert the right to legislative initiative even if this is not explicitly regulated in the Constitution. If a Constitutional Court decides that a law is not in conformity with the Constitution it has generally the right to declare the law null and void. Such a solution might sometimes lead to unwanted consequences if it creates a hole in the normative regulation. Therefore it might be preferable to continue applying the (unconstitutional) law for a certain transitory period until the elaboration of a new law. Such a Constitutional Court decision can be considered as an indirect exercise of the right to legislative initiative. This can be even an important element in the legislative process of a country (e.g. in Germany).

Legislative initiative of citizens

Unlike in referenda the right to legislative initiative opens a direct way for citizens to influence the legislative process. But, although this is an element strengthening democratic participation of the people in theory, it does not really work out in practice. First, the quorum can be difficult to attain:

1000 Citizens (Lichtenstein)
5000 Citizens (Slovenia)
10 000 Citizens (FYROM)
20.000 Citizens (Albania)
30.000 Citizens (Georgia)
50.000 Citizens (Lithuania, Italy, Hungary)
100.000 Citizens (Poland, Romania)
500 000 Citzens (Spain)

Latvia, Andorra: 1/10 of the electorate

Second, in modern societies legal regulation is so complicated that citizens will only rarely arrive at working out high quality laws acceptable in the political process. Some constitutional systems therefore do not require finalized texts by the citizens.

Despite all the problems such a possibility is even foreseen by the Lisbon Treaty:

"… 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 power, 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."

It will be seen if this right is only theoretical or can also be implemented in practice.

As a rule, such matters as taxes, international treaties or questions of citizenship are excluded from the citizens' right to legislative initiative. They same is true for especially complex matters.

Right to legislative initiative of constituent parts of a federation and autonomous entities

In federal systems the right to legislative initiative may be attributed to the constituent parts of the federation (legislative or executive bodies) or to the autonomous entities. In some systems the scope of this right is restricted to issues related to the region. Such a mechanism may be helpful for integration.

Guarantees for the protection of the opposition in the legislative process

The right to legislative initiative is of practical relevance only if the draft laws proposed are put on the agenda of the Parliament. Therefore the selection mechanisms are of utmost importance. As a rule, parliaments are the master of their agenda. Nevertheless, there might be priority regulations for considering the proposals of the Government or the President first. These regulations have to be carefully evaluated in order to assess the efficiency and fairness of the legislative process.

Conclusions

The following conclusions can be drawn:

- Legislative initiative is a decisive element in the legislative process.
- As a rule, both the executive and the legislative have a right to legislative initiative;
- Whereas the role of the Government is more important in initiating new laws, the Parliament dominates the process of amending draft laws.
- There has to be a balance between the efficiency of the legislative process and the protection of parliamentarian minorities.
- The fairness of the legislative process very much depends on the political culture in the country; the legal design itself is not the only relevant factor.

The theoretical analysis of the right to legislative initiative has always to be accompanied by an analysis of the practice. The relevant questions are the following:

- Whose proposals have led to the adoption of new laws?
- In how far the project of a law was changed in the course of the legislative process?
- Was it possible to discuss real alternatives?
- What is the concrete share of the opposition in forming laws?

The transparency and fairness of the legislative process is the indicator of the level of democracy in a given political system.