

**CITIZEN PARTICIPATION IN LEGISLATIVE PROCESSES: A SHORT EXCURSION
THROUGH EUROPEAN BEST PRACTICES**

BY

**Dr. Dragan Golubović,
The European Center for Non-Profit Law**



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1. INTRODUCTION

This brochure examines different models of citizen participation in legislative processes (hereinafter also generally referred as: citizen participation and public consultation). Citizen participation is an important part of an overall institutional framework of cooperation between the government and civil society organizations (CSOs). This is particularly true with regard to *public policies*, due to the fact that *statutes (laws) and other general regulations are the primary instruments* of their articulation and implementation.

The brochure discusses models of citizen participation in the European countries, as well as the framework thereof at the European Union (EU) level. As for citizen participation at the national level, thus far, few countries have adopted comprehensive mechanism for citizen participation. Examples include Romania, Hungary, Bosnia and Herzegovina, and the United Kingdom. In addition, Croatia has recently developed a draft code in this respect. In some countries citizen participation is governed by custom law (e.g., Sweden, Denmark, and Norway), while in others this issue is addressed in the constitution, albeit in a fairly general fashion. For example, the Constitution of Switzerland imposes general obligation on the government to consult with citizens on a narrowly defined scope of issues (see also Hungary, *infra* 4).

The brochure seeks to provide general information on the topic to key stakeholders (government officials, policy makers, CSOs, and academics) involved in shaping and implementation of instruments governing citizen participation. It does not provide a detailed account of frameworks and practices in various countries, but rather outlines major features and challenges thereof.

2. PUBLIC POLICY, CITIZEN PARTICIPATION AND CIVIL SOCIETY ORGANIZATIONS

Citizen participation in shaping and implementation of public policies is regarded a critical ingredient of participatory democracy. It is noteworthy that the underlying role of participatory democracy is not to surrogate representative democracy, which is based on the separation of power, multi-party system and free elections, but rather to supplement it and make it more functioning. To that end, it serves several important functions: (1) it provides an opportunity and creates conditions necessary for citizens to engage in political life regularly -- and not only during elections; (2) it creates a framework for citizens to advocate for their legitimate interests and thus contributes to the development of a vibrant democratic society; (3) it makes the work of public authorities more transparent and closer to their constituencies; (4) it contributes to the quality of adopted public policy and its smooth implementation: if all stakeholders participate in the process, their legitimate interests will presumably be protected and the costs of implementation of such a policy will be reduced (as they will be less inclined to resort to judiciary and other remedies to protect their interests). A study referenced in the Organization for Security and Co-operation in Europe (OSCE) *Public Hearings Manual* suggests that citizens are more inclined to embrace public policy if they have an opportunity to participate in the process, even if their proposals are not favourably met; and (5) it facilitates CSOs watchdog role in the implementation of adopted policies.

As for the role CSOs play in participatory democracy, it is important to note that partners to the government in this process are ultimately citizens, rather than CSOs. The later (including various forms of civil initiatives) are primarily regarded as a convenient tool to facilitate the process and make it more transparent and effective. However, the role which CSOs (especially associations, civil initiatives, and other forms of membership organizations) play in participatory democracy is also a reflection of legitimate exercise of freedom of association, which is *inter alia* guaranteed by

the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Charter of Fundamental Rights, as well as constitutions of the respective member states of the Council of Europe and the European Union.

The significance of citizen participation in public policy processes has been acknowledged not only at the national, but also at the international level. Thus various forms of consultation involving CSOs have become a standard practice of major multilateral, intergovernmental organizations, including the United Nations, the World Bank, Council of Europe, and the EU.

At the EU level, in 2001 the European Commission published the *White Paper on European Governance*, which contains set of recommendations which the Commission put forward in order to ensure the functioning of EU institutions more transparent, accountable, participatory, and effective. Among others, the Commission proposed a greater involvement of CSOs in the EU decision making process, in recognition of an important role they play in modern democracies, as well as to the need to develop general principles and minimum standards for consultations with the Commission (*infra*, chapter IV).

PROPOSALS FOR CHANGE

The Union must renew the Community method by following a less top-down approach and complementing its policy tools more effectively with non-legislative instruments.

Better involvement and more openness

No matter how EU policy is prepared and adopted, the way this is done must be more open and easier to follow and understand. The Commission will provide:

- Up-to-date, on-line information on preparation of policy through all stages of decision-making.

There needs to be a stronger interaction with regional and local governments and civil society. Member States bear the principal responsibility for achieving this. But the Commission for its part will:

- Establish a more systematic dialogue with representatives of regional and local governments through national and European associations at an early stage in shaping policy.
- Bring greater flexibility into how Community legislation can be implemented in a way which takes account of regional and local conditions.
- Establish and publish minimum standards for consultation on EU policy.
- Establish partnership agreements going beyond the minimum standards in selected areas committing the Commission to additional consultation in return for more guarantees of the openness and representativity of the organisations consulted.

European Governance: A White Paper, Commission of the European Communities, Brussels, 25.07.2001

Citizen participation also features prominently in the Lisbon Treaty.¹ Title II of the Treaty (democratic principles) underscores the principle of representative and participatory democracy (i.e., the role of political parties and citizens, respectively) in the function of the Union. With regard to the later, it obliges the EU institutions to engage in consultations and maintain open and transparent dialogue with citizens. The Treaty imposes particular responsibility to the European Commission in this respect, in order for the Commission to ensure coherency and transparency of the Union' action.

¹ The Lisbon Treaty (which is an abbreviated version of the failed EU Constitution) seeks to replace the EU founding treaties and many revisions thereof. It was signed in Lisbon on December 3, 2007, and published in the Official Journal of the EU (C306-10, of December 12, 2007). Ratification of the Treaty was originally anticipated to have been completed by the end of 2008. However, the Republic of Ireland's rejection of the Treaty has postponed that process – and indeed put it in doubt.

Regardless the outcome of the Lisbon Treaty's ratification process, it is safe to assume that the issue of public participation will continue to be one of key challenges and priorities for EU.

Article 8 A

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament.

Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.

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.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

Article 8 B

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. 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 required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 21 of the Treaty on the Functioning of the European Union.

Treaty of Lisbon, 2007/C 306/01 in Official Journal of the European Union 17.12.2007

Finally, citizen participation also features prominently in policy documents on civil society, which some countries have developed. For example, the National Strategy for the Creation of an Enabling Environment for Civil Society (2006-2011), which was adopted by the Croatia Government in 2006, states that Croatia is a vibrant, pluralistic society which is *inter alia* based on participatory democracy, which enables citizens to play an active role in social and political life. In addition, the Strategy points to the fact that a vibrant civil society needs effective instruments which will ensure citizen participation (either directly or through various forms of CSOs) in all stages of public policy processes, including the implementation thereof.

3. MODELS OF COOPERATION BETWEEN CSOs AND PUBLIC BODIES

The handbook of the *Organization for Economic Cooperation and Development (OECD)*: "*Citizens as Partners: OECD Guide to Information, Consultation and Public Participation in Policy-Making*", distinguishes three levels of cooperation between citizens and public bodies:

Information - it is a one-way relationship: information flows in one direction, from the government to citizens, the government informs citizens about its decisions and initiatives as it sees fit, or citizens extract information at their own initiative. An example of this relationship is public access to documents of public significance, official gazette, and the government's

Internet pages.

Consultation – the government requests feedback from citizens in the process of shaping public policy; it is a two-way relationship in which the government determines participants. In order to receive sound feedback, the government ensures that citizens are provided with pertinent information in advance. An example of this type of relationship is comments to draft laws.

Active participation – this is a higher degree of a two-way relationship: citizens are actively involved in shaping public policies, e.g. through membership in working groups commissioned to prepare a draft law. The improved collaboration with citizens and other social actors does not relinquish the government from its ultimate responsibility to choose and implement a particular public policy.

4. ISSUES OF SPECIAL SIGNIFICANCE FOR GOVERNMENT- CSOs COOPERATION IN LEGISLATIVE PROCESSES

4.1. The legal nature of the right to participate

One of the first challenges policy makers need to confront in developing the mechanism for citizen participation in legislative processes is to make sure they understand where exactly the right to citizen participation/consultation fits into their respective legal systems: is it a constitutional right *per se*, or a right derived from some other rights that enjoy direct constitutional protection? Is it a declaratory right which cannot be enforced, or a right whose breach is effectively sanctioned? As the tables below indicate (*infra*, Appendix I), governments provide various responses to the foregoing issues, nevertheless, it should be noted that citizen participation is generally not regarded as a distinct constitutional right.

Hungary is among few notable exceptions in this respect. The Constitution of Hungary obliges the government to cooperate with CSOs in carrying out its duties and responsibilities, however, it also gives the government discretion to choose model of cooperation as it sees fit. Thus Article 36 of the Constitution prescribes that in carrying out its duties and responsibilities the government shall collaborate with CSOs whose status, rights, and responsibilities are likely to be impacted by the government's measures. With regard to consultations in legislative processes, the constitutional obligation for consultations is further elaborated in the Law on Legislative Procedures (1997). However, the Law does not prescribe sanctions for violation of the consultation obligations, whatsoever. In several cases involving the alleged violation of the Law that were heard before the Constitutional Court, it ruled that provisions on consultations as set forth in the Constitution and the Law respectively are methodological instruction, rather than an enforceable right. This is because, according to the Court's opinion, the exercise of legislative and executive power may not be contingent upon consultations with representatives of various private interests. In another case, the Court qualified the Law as *lex imperfecta*: violation of the consultation procedure prescribed by the Law does not amount to violation of the Constitution *per se*, but may rather result in political or disciplinary liability of state officials responsible for the implementation of the Law. As a general rule, only if there is reasonable doubt that provisions of law are *per se* unconstitutional shall the Court review a case on its merits. In (rare) cases where, despite the violation of the Law, the right to consultation was nevertheless enforced, the Court in fact ruled the violation of some of the rights that are directly protected and guaranteed by the Constitution, such as the right to free access to information, the right to healthy environment, freedom of association, the right to file a petition with the government, etc. Following the

enactment of the Law on Access to Information in Electronic Form in 2005, citizens and CSOs are provided with additional legal instrument to exercise their right to consultation. The Law obliges state bodies and local governments to post draft laws on their Internet pages, along with explanatory note to the draft and other necessary materials and documents.

Romania has chosen to address the consultation procedure in a separate law, the Law on Transparent Decision-Making by State Bodies and Local Governments (2003)). The Law obliges state administration and local governments to consult with “citizens and their associations” in the course of adopting general legal acts within their respective previews. The Law defines the right to consultation as an enforceable, rather than declaratory right, pursuant to the rules governing the administrative procedure. However, it appears that the scope of this protection is somewhat limited: it is very likely that the process of consultation will be brought to a conclusion, before the administrative procedure for the alleged violation of the Law is completed. In any case, state and municipality officials that are found to have breached provisions of the Law are subject to disciplinary liability, pursuant to the labour law and regulations governing civil servants.

In *Bosnia-Herzegovina (BiH)*, citizen participation is governed by the Rules on Consultations in Policy Making (2006). The Rules govern the enactment of general legal acts which are adopted by the BiH Council of Ministers and other institutions at the state level. The Rules prescribe the minimum level of consultations between those bodies and “the public, legal entities, and groups of citizens which do not belong to the government structure”, in the process of adopting regulations (*infra*, table VIII). Minimum consultations include the obligation of a relevant body to post a draft regulation on the Internet page, the possibility of providing comments to a draft by interested parties via the Internet, as well as solicitation of comments by persons who are on the consultation list of the relevant institution. Significantly, the obligation for minimum consultation is not subject to any exceptions. However, the Rules do not envisage any specific sanctions for violation of the consultation procedure. In such cases, the Council of Ministers may (but is not obliged to) refuse to put a draft on its agenda. If so, the Council’s Chief Secretary shall return a draft to a responsible body and request that it complete the process of consultation within a set deadline, before the draft is re-introduced the Council for its consideration.

In the *United Kingdom* citizen participation is governed by the *Code on Practice on Consultation* (2004). The Code is a further elaboration of one of the five compacts, the *Compact Code of Good Practice on Consultation and Policy Appraisal*, that were signed following the adoption of the *Compact on Government’s Relations with the Voluntary and Community Sector*. It proclaims six principles the state administration bodies must observe in the process of public policy consultations. These principles apply accordingly with regard to consultations which take place before the government takes its position on the EU draft directives. As stated in the introduction of the Code, it is a document which is not legally binding and therefore may not derogate (domestic) laws and other binding legal instruments, as well as the EU *acqui communitarie*. As a result, citizens may not enforce their right to consultation. However, similar to Hungary, the right to consultation may nevertheless be enforced if the court in particular instances finds violation of some other rights that enjoy direct legal protection, such as freedom of expression, the right to free access to information, the prohibition of discrimination, etc. On the other hand, the Code is considered “generally binding” for state administration bodies. This means that the violation of the Code may result in political or disciplinary liability of the heads and employees of the state administration bodies.

The issue of citizen participation has somewhat different connotations at the *European Union* level, given that EU is not a state, nor does it function as representative democracy -- despite the fact it is proclaimed one of the fundamental values the EU is based upon. Nevertheless, citizen participation is getting in prominence with EU major political and legislative institutions, as part of comprehensive efforts to bring them closer to citizens. In 2003 the *General Principles and Minimum Standards for Consultations of Interested Parties with the European Commission* came into force. This is a first comprehensive document which guides the Commission when consulting on major policy initiatives, without prejudice to more advance practices developed by the Commission's departments – or for that matter any specific rules that are to be developed for certain policy areas. As a first step, the Commission is focused on applying the Principles to those initiatives that are subject to an extensive impact assessment. However, it does encourage Directorates-General to apply it to any other consultations they seek to engage in. The major objection raised against the Principles is that it is a political, rather than a legally binding document (it was adopted in the form of the Commission's communication). The Commission was determined to avoid the legally-binding instrument for twofold reasons: 1) the need to draw a clear-cut line between consultations launched on the Commission's own initiative prior to the adoption of a proposal by the Council of Ministers and the European Parliament, as part of the compulsory decision-making legislative process which is governed by the founding treaties; 2) the risks associated with a possibility of the Principles being challenged by the European Court, which could significantly increase transactional costs of the enactment and implementation of the EU law. In addition, the Commission noted that it does have administrative and other means to ensure that all its departments duly apply the Principles.

APPENDIX I: COMPARATIVE TABLES ON ISSUES PERTINENT TO PUBLIC PARTICIPATION

TABLE I: FORMS OF PUBLIC CONSULTATIONS (ACCORDING TO THE OECD MODEL)

BOSNIA and HERZEGOVINA	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Consultation and active participation ²	Consultation	Consultation	Consultation	Consultation

TABLE II: TYPES OF LEGAL INSTRUMENTS ENCOMPASSED BY PUBLIC CONSULTATIONS

BOSNIA and HERZEGOVINA	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Laws and other general regulations	Regulations initiated by the European Commission			

TABLE III: LEVEL OF STATE ORGANIZATION AND BODIES ENCOMPASSED BY MANDATORY PUBLIC CONSULTATIONS

BOSNIA and HERZEGOVINA	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
<i>National</i> ; Council of Ministers of BH and other state institutions	<i>National</i> ; Government and governmental bodies	<i>National</i> ; Government and governmental bodies; <i>Local</i> ; municipality executive and representative bodies.	<i>National</i> ; Government and governmental bodies; local government is encouraged (but not obliged) to adhere to the Code.	European Commission

² This does not mean that BiH is the only country which allows for active participation, i.e. participation of CSOs and academic community in the working groups commissioned to prepare draft laws and other regulations. Quite to the contrary, it is a good European practice. However, BiH is the only country included in the survey which specifically regulates this form of participation.

TABLE IV: PRIVATE ACTORS THAT MAY PARTICIPATE IN PUBLIC CONSULTATIONS

BOSNIA and HERZEGOVINA	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Groups of citizens, private legal entities (i.e. legal entities which are not part of the government's structure)	Citizens, associations and other private legal entities	Citizens and associations that have been established and operate in accordance with law	Citizens, associations and other private legal entities	Special role of civil society organizations, but also citizens, companies, local and regional public bodies, etc.

TABLE V: SCOPE OF PERSONS DIRECTLY ENCOMPASSED IN PUBLIC CONSULTATION PROCEDURES

BOSNIA and HERZEGOVINA	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Private legal entities and groups of citizens that are on the list of relevant ministry or other state institution	Customary practice: citizens, associations and other private legal entities that are on the list of relevant ministry	Association of employers and other associations established and organized pursuant to law, with regard to general regulations that may influence their position and legitimate interests	Citizens, associations and other private legal entities	Persons whose interests may be affected by a draft regulation; persons that shall participate in the implementation of a regulation, persons whose aims correlate directly to those a regulation seeks to accomplish

TABLE VI: PROCEDURE FOR PUBLIC CONSULTATIONS

BOSNIA and HERZEGOVINA	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
Consultations in any stage of drafting a law or regulation. A draft is posted on the Internet page of the ministry or other relevant institution; all persons on the consultation list are called upon to submit their comments thereof.	Customary practice: consultations in any stage of drafting a law or regulation; a draft is posted on the Internet page of the ministry; all persons on the consultation list are called upon to submit their comments.	A public announcement on preparation of a draft is made by one or more ways as prescribed by law (Internet, announcement through local or national media, etc.). A draft is submitted to all persons that "expressed interest".	Consultations in early stages of development of public policy (implicitly includes preparation of draft laws); especially with persons whose interests may be affected and those who are expected to take a „proactive“ stand in the process of shaping of public policy, developing draft laws.	Consultations in early stages of development of public policies and regulations.

TABLE VII: DEADLINES FOR SUBMISSION OF COMMENTS

BOSNIA and HERZEGOVINA	HUNGARY	ROMANIA	UNITED KINGDOM	EUROPEAN UNION
It appears that the deadline for submission of comments may not be shorter than 21 days (minimum consultation) i.e. 30 days (legal provisions with a significant impact on the public).	The Law on Administrative Proceedings requires „a sufficient deadline“ necessary for preparation of sound comments; depending on nature and significance of a legal instrument, the deadlines for submission of comments is 30, 15 or 5 days.	The relevant administrative body issues an announcement on drafting at least 30 days before a draft is opened for public debate; the announcement must state a deadline for submission of comments in writing, which may not be shorter than 10 days.	At least 12 weeks, in the stage of formulating a public policy or drafting a legal instrument; an administrative body may set a longer period for consultations, e.g. during summer holidays.	Depending on circumstances; standard period of consultations is eight weeks; in exceptional cases the deadline may be longer or shorter.

TABLE VIII: SCOPE OF CONSULTATIONS (MINIMUM AND BROADER)

BOSNIA and HERZEGOVINA	HUNGARY	ROMANIA	UNITED KINGDOM	EU
<p><i>Minimum scope:</i> publication of a draft on the Internet page of the Council of Ministers or other relevant institution; call for submission of comments by persons/entities on the Council's list; information as to where draft may be acquired.</p> <p><i>Broader scope</i> (laws and regulation of particular significance): publication of a draft in public media, a draft directly submitted to "organizations and individuals", option for commissioning working groups including „experts and representatives of organizations“ to prepare a draft law or regulation.</p>	No difference in scope of consultations.			

TABLE IX: EXEMPTIONS FROM MANDATORY CONSULTATIONS

BOSNIA and HERZEGOVINA	HUNGARY	ROMANIA	UNITED KINGDOM	EU
Only at instances of broader consultations: extraordinary circumstances, unforeseen international obligations or court's annulment of a law or part thereof.	Not specified. Implicitly, with regard to a draft law or regulation which does not directly affect interest of CSOs and individuals they represent.	Extraordinary circumstances on which an expeditious promulgation procedure applies.	Extraordinary circumstances, which include: duties arising from membership in EU and other international organizations; those that arise from obligations to enact state budget; in order to protect public health and security, etc.	No exemptions have been envisaged.

TABLE X: SANCTIONS FOR BREACH OF OBLIGATIONS FOR PUBLIC CONSULTATION

BOSNIA and HERZEGOVINA	HUNGARY	ROMANIA	UNITED KINGDOM	EU
The Council of Ministers may refuse to consider a draft, which did not heed rules on consultation.	Potential political and disciplinary sanctions for heads or employees in state administration.	Political and disciplinary sanctions for heads and employees in state administration.	Political and disciplinary sanctions for heads and employees in state administration.	No sanctions have been prescribed; implicitly, disciplinary measures for civil servants in the Commission.

APPENDIX II: INVENTORY OF GENERAL ISSUES THAT NEED PARTICULAR CONSIDERATION WITH REGARD TO REGULATORY FRAMEWORK FOR PUBLIC CONSULTATIONS:

- 1) What kind of consultations is feasible, given the circumstances (information, consultation, active participation)?
- 2) Should an instrument governing public consultations be legally binding (law or other general regulation), or should a “softer” instrument, such as code, would better serve the purpose?
- 3) Should an obligation for public consultations entail only laws, other general acts, or any public policy document?
- 4) Should an obligation for public consultations pertain to executive bodies (consultations during the drafting process), or also to legislative bodies (consultations after a draft is submitted to Parliament)?
- 5) Should an obligation for consultations pertain to the state bodies only, or should it also include local self-government?
- 6) Who is the other party in consultations: citizens, various forms of CSOs, but also commercial private law bodies (companies), or only citizens and CSOs, including associations of employers?
- 7) Is it necessary and justified to introduce minimum and broader scope of consultations (as Bosnia Herzegovina did), and different deadlines for consultations thereof?
- 8) Is it necessary and justified to stipulate exemptions to public consultations obligation?
- 9) What sanctions for the breach of consultation obligations will appropriately reflect the legal nature of an instrument chosen to govern public participation?