

Popular Legislative Initiative in the EU:

Alea Iacta Est

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I. Introduction

The English people think that they are free, but in this belief they are profoundly wrong. They are free only when electing members of Parliament. Once the election has been completed, they revert to a condition of slavery: they are nothing.

J-J Rousseau²

In 1920, Hans Kelsen oversaw the introduction into the Austrian Constitution of a new instrument of participatory democracy in Comparative Constitutional Law.³ It would be known as *popular legislative initiative* (PLI). Although technically it seemed more like an evolution of the right of petition, in practice it was spun from a compromise between a call for direct democracy and a conservative approach to representative democracy.⁴

Because its structure is so similar to other instruments which, quite differently, lead to a direct consultation of the people, and because its German name was the same as had been given to a direct democracy instrument ('popular initiative') in the 1919 Weimar Constitution (*Volksbegehren*), 'popular legislative initiative' (PLI) was from the beginning, wrapped in misconceptions and misunderstandings, leading still today to suspicion by some, and overestimation by others.

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² J-J Rousseau, 'The Social Contract', in E Baker (ed), *Social Contract*, 1960, book III, 15, p 262.

³ See: H Kelsen, *Von Wesen und Wert der Demokratie*, 1929, at 39; N B Ladavac, 'Hans Kelsen (1881–1973): Biographical Note and Bibliography', (1998) 9 *EJIL* 391. PLI appears to have been included at the same time (1919) in the Ritter Project for the Constitution of the German Länder Bade (see: L Faure, *Les institutions de gouvernement direct en Allemagne depuis la guerre: étude de droit constitutionnel comparé*, 1926, at 159–60), and in the 1919 Constitution of the German Länder Anhalt (J Delpéch, J Laferrrière, *Les Constitutions modernes*, 1928).

⁴ Proposals for inclusion of bottom-up direct democracy instruments in the Austrian Constitution were rejected—see: Constitutional Court of Austria, *Judgment of 28/06/2001 (G-103/00)*; W Hartwig, *Volksbegehren und Volksentscheid im deutschen und österreichischen Staatsrecht*, 1930, at 91.

Less than a century later, a variation of PLI is about to be introduced at the EU level by the Reform Treaty adopted at Lisbon on 18 October 2007. This Treaty, however, merely reproduces the rule that was agreed upon in the Convention that adopted the Treaty establishing a Constitution for Europe, dropped after the French and Dutch negative referendums.

Although there was intense lobbying of Convention members for the introduction of direct democracy instruments, the nature of the European Union and specific limitations of Community Law (ie the Commission's monopoly on initiative) steered the Praesidium to instead put forward a watered-down version of popular legislative initiative (the 'Citizens' Initiative' of Article I-47(4), later Article 8b(4) of the EU Treaty as revised at Lisbon).

It will be argued that, in so doing, the Treaty retained only the appearance, and not the distinguishing characteristic of PLI. Furthermore, the Citizens' Initiative may prove to be a legal anomaly, in the sense of an over-complexifying of the already existent, less formal right of petition, while also sharing its incompatibility with judicial review.

What will be the use of the Citizens' Initiative? Does it really bring something new to EU institutional law? Could the mechanism of Article I-46(4)—now the proposed Article 8b(4) of the EU Treaty—still evolve, through legal interpretation, to an actual right of PLI? Could PLI still develop at the EU level other than through Treaty amendment?

More importantly, should the European Union have popular legislative initiative at all? What would we seek to achieve by it, and how effective would it be? And if we are to have PLI, how should it be regulated? These are some of the main questions which will be addressed in section three.

To prepare the ground for such a discussion, section two will be dedicated to conceptual clarification: what is PLI? Where and how is it foreseen? How much do we really know about its use, and what lessons can be learned from what we do know? This initial conceptual and comparative approach is particularly useful to the study of an area wherein the bright glare of direct democracy has often made it hard to see the woods from the trees.

Conclusions on a possible role for popular legislative initiative in the European Union will inevitably be drawn against a background of broader and deeper issues, such as democratic legitimacy and visions of the future of the European project.

II. Popular Legislative Initiative: its Characteristics and Dissemination

La loi est l'expression de la volonté générale. Tous les citoyens ont droit de concourir personnellement ou par leurs représentants à sa formation.

'Déclaration des droits de l'Homme et du citoyen' (26th August 1789), Article 6

A. The Notion of PLI—Borders and Misconceptions

(i) Definition of PLI and Distinction from Other Instruments

'Popular legislative initiative' is the right of a group of voters, meeting predetermined requisites, to initiate the legislative and/or constitutional revision process on the basis of a chosen issue or drafted proposal of bill, while the representative body maintains full decision-making power.⁵

It is an institute which fits well into a representative form of government,⁶ as a manifestation of the fundamental democratic right of citizens' to participate in public affairs.⁷ In its content, it takes a collective right of petition and adds to it the obligation for the addressee institution to take a decision as to the requested legislative course of action.⁸ It is, however, closer to institutes of direct democracy, specifically to 'popular initiative', in what concerns legal phrasing and usual motivations for introduction into the legal order.

'Popular initiative' is the right of a group of voters, meeting predetermined requisites, to initiate a referendum for the adoption of a proposed bill and/or constitutional amendment⁹ (as in PLI, this proposal may or may not be required to be formally drafted).¹⁰

Several factors (some of which have already been mentioned) have led to the neglect of the institute of PLI by a substantial part of the doctrine. It is a

⁵ For other contributions to the definition of the institute, which correctly capture its nature, see: P Biglino Campos, 'La iniciativa legislativa popular en el ordenamiento jurídico estatal', (1987) 19 *REDC* 75; M A Garcia Martínez, 'La iniciativa legislativa popular y su vigencia en el Estado contemporáneo', (1989) 74 *RFDUC* 211, at 212; R Dickman, 'L'esercizio dell'iniziativa legislativa', (1995) 45–1 *RTDP* 3; A Auer, 'European Citizens' Initiative', (2005) 1(1) *ECLR* 79, at 79 (this author calls PLI 'popular motion'); D F M Neto, *Direito da participação política: legislativa—administrativa—judicial (fundamentos e técnicas constitucionais da democracia)*, 1992, at 114–16. For a discussion of the elements of the definition, see: M Sousa Ferro, 'A iniciativa legislativa popular', (2002) XLIII(1) *RFDUL* 611, at 624–6.

⁶ It should be stressed that there is, in practice, no such thing as a purely representative or a purely direct democratic system—democratic political regimes should instead be thought of as intermediate points in a *continuum* between those two poles (following N Bobbio, *The Future of Democracy*, 1987, at 52–3). This leads to the frequent use of the term 'semi-direct democracy', which is also not entirely satisfactory—see: P V Uleri, 'Europe et Référendum Européen: entre réalité et idéaux. Pour une théorie de la genèse du phénomène référendaire', in A Auer, J-F Flauss, *Le référendum européen (actes du colloque international de Strasbourg (21–22 février 1997))*, 1997, 181, at 219–20.

⁷ N Pérez Sola, 'Algunas propuestas para la reforma de la Ley Orgánica de iniciativa legislativa popular', (1995) 84 *RFDUC* 481.

⁸ See: S Musso, *L'iniziativa legislativa nella formazione delle leggi italiane*, 1958, at 79; P Biglino Campos, 'La iniciativa legislativa popular en los... ', (1985) 46–7 *REP* 289, at 290; F Hamon, M Troper, *Droit constitutionnel*, 2003, at 237; M A F Ferrero, *La iniciativa legislativa popular*, 2001, at 21–22.

⁹ On the historic origins of 'popular initiative', see eg: P Ruppen, 'Direct democracy in Switzerland', in B Kaufmann, M D Waters (eds), *Direct Democracy in Europe: a comprehensive reference guide to the Initiative and Referendum Process in Europe*, 2004; M Suksi, *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum*, 1993, at 9; B Chantebout, *Droit Constitutionnel et Science Politique*, 1988, at 225–27.

¹⁰ For an example of the problems which arise from allowing non-formulated PLI, see: Federal Court of Switzerland, *Judgment of 29/04/1998 (1P.711/1997)*.

minority of authors who actually expressly recognize its autonomy in relation to that of ‘popular initiative’ (even if different names are used).¹¹ Instead, PLI is, when not forgotten altogether, often merged into a wider concept of ‘popular initiative’.¹² It is also easy to find examples of authors and parliamentarians describing PLI but calling it ‘popular initiative’, which further increases conceptual confusions.¹³ This latter note must, however, be put into context: as a general rule, in academic and non-academic writing, PLI is designated by a wide array of other terms: ‘citizens’ initiative’, ‘agenda initiative’, ‘petition’, ‘legislative petition’, ‘popular motion’, etc. The bottom-line, as one author concluded, is that there is no ‘*universal terminology*’ in this field.¹⁴

The difference between PLI and popular initiative is easily identifiable—one leads to a popular vote, the other does not. ‘Popular initiative’ is an application of direct democracy, while PLI portrays only representative and participatory democracy—it is an agenda-setting tool.

An important factor adding to the confusion of the two was the creation of ‘indirect popular initiative’ (present, namely, in the Weimar Constitution),¹⁵ which fell somewhere in between PLI and ‘popular initiative’ while still retaining the essential character of the latter (Parliament not being able to prevent the

¹¹ M Battelli, *Les institutions de la démocratie directe*, 1932, at 8; Biglino Campos, *supra* note 5; M Aragon, ‘La iniciativa legislativa’, (1987) 72 *RFDUC* 75, at 90; Auer, *supra* note 5, at 79–80; T Drăganu, *Drept Constituțional și Instituții Politice—Tratat elementar*, 1998, Vol I, at 251; J-E Gicquel, ‘Faut-il introduire en France le référendum législatif d’initiative populaire’, (2005) 20 *LPA* 5; J C Madroñal, ‘Direct Democracy in Latin America’, April 2005; Faure, *supra* note 3, at 23; J L M López-Muñiz, ‘Espagne’ in F Delperee (ed), *Référendums*, 1985, at 122; M Gallagher, ‘The Referendum in Europe’, in Auer & Flauss, *supra* note 6, 69.

¹² H Kelsen, *General theory of law and state*, 1949, at 298–99; J Miranda, ‘Iniciativa Popular’, XXI *Verbo Enciclopédia Luso-Brasileira de Cultura* 729; M B Malaquias Urbano, *O referendo: perfil histórico-evolutivo do instituto*, 1998; Y Papadopoulos, ‘Implementing (and radicalizing) Art I-47(4) of the Constitution: is the addition of some (semi-)direct democracy to the nascent consociational European federation just Swiss folklore?’, (2005) 12(3) *JEPP* 448, at 453; C Grewe, ‘La contribution de l’Europe à l’idée et à la consécration de la démocratie directe’, in Auer & Flauss, *supra* note 6, 51, at 58; B Knapp, ‘Principes et modalités de la démocratie directe’, in J Dabin, *La participation directe du citoyen à la vie politique et administrative: travaux des XIIes journées d’études juridiques*, 1986, 71, at 83; J A Rivera S, ‘La reforma constitucional en América Latina’, 2002; A Esmein, *Éléments de droit constitutionnel français et comparé*, 1927, at 468; Hamon & Troper, *supra* note 8, at 123; O Duhamel, Y Mény (eds), *Dictionnaire constitutionnel*, 1992, at 511; V Cuesta López, *La iniciativa popular en el derecho constitucional europeo comparado*, 2002; M A F Ferrero, *supra* note 8.

¹³ Such as: C Ionescu, *Instituții Politice și Drept Constituțional*, 1999, at 227; D Ioncică (ed), *Geneza Constituției României 1991: lucrările Adunării Constituante*, 1998, at 941–3; V Cuesta, ‘The future of the European Citizen Initiative’, in B Kaufmann, H Göttel, A Lamassoure, J Meyer (eds), *Transnational Democracy in the Making. IRI Europe Handbook 2004*, Initiative & Referendum Institute Europe, Amsterdam, 2003; Neto, *supra* note 5; C Ollero, *El Derecho Constitucional de la postguerra (aportes para su estudio)*, 1949, at 119–20; Musso, *supra* note 8; G Martínez, *supra* note 5; J Rivero, ‘Introduction’, in Dabin, *supra* note 12, at 13; Müller, ‘Plebiscitary Agenda-setting and Party Strategies: Theoretical Considerations and Evidence from Austria’, (1999) 5(3) *PP* 303; Council of Europe, *Committee of Ministers Recommendation No. R (96) 2 of the Committee of Ministers to Member States on Referendums and Popular Initiatives at the Local Level*, 15/02/1996.

¹⁴ Suksi, *supra* note 9, at 9.

¹⁵ Article 73(3) and (4).

adoption of a law by direct democracy). With ‘indirect popular initiative’, the proposed bill or constitutional amendment is first submitted to Parliament, and only when rejected by this body is it submitted to a popular vote.¹⁶

As if this weren’t enough, a variation of ‘indirect popular initiative’—which we shall name ‘double-phased indirect popular initiative’—surfaced namely in some states of the USA,¹⁷ in which the right is broken up in two phases. The first phase consists in practice on the right of PLI. But if Parliament rejects the proposed bill, the citizens have the option to collect more signatures to move on to the second phase, that of popular vote.

Another institute which also smudged the borders of PLI is that of ‘mandatorily debated petitions’, which does not go so far as to force a decision to be taken.¹⁸ It is also interesting to note the appearance of a ‘corporative’ form of PLI, in which this right is not exercised through the collection of signatures, but instead given to designated collectives or groups.¹⁹

Direct and indirect popular initiative fall into a wider category which will herein be referred to as ‘popular ballot initiatives’. This category encompasses the rights given to groups of voters, meeting predetermined requisites, to submit an issue to popular vote.²⁰ The underlying active and direct democratic nature remains unchanged whether the right in question relates to: the suggestion of a law or constitutional amendment (‘popular initiative’); the democratic control of laws previously adopted by the representative organs, preventing their entry into force or revoking them (‘popular veto’ or abrogative referendum); a consultation on a simple question or general policy issue (‘popular referendum initiative’); or the revocation of an individual or collective political mandate (‘recall’) or even of a court judgment (‘recall of judicial decisions’²¹).²²

¹⁶ For more on this institute: D Waters (ed), *Initiative and referendum almanac*, 2003, inter alia at 11 and 13; Suksi, *supra* note 9, at 8–9; Hartwig, *supra* note 3, at 8; Faure, *supra* note 3, at 75–76; S Deploige, *The referendum in Switzerland*, 1898, at 150.

¹⁷ States of Massachusetts, Ohio, and Utah (see: Waters, *supra* note 16, at 13–14).

¹⁸ Foreseen, for example, in Portugal—see: *Law no. 43/90 (on the exercise of the Right of Petition)*, 10 August 1990 (as revised by *Law no. 6/93* and *Law no. 15/2003*), Art 20(1)(a). See also §1 of the amendment suggested during the European Convention: A Lamassoure, ‘Proposal of introduction of Art I-34bis to introduce the European initiative’. <http://european-convention.eu.int/docs/treaty/pdf/26/26_Arr%20I%2034bis%20Lamassoure%20FR.pdf>.

¹⁹ Examples of this are: Art 113(4) of the 1977 Constitution of USSR; Art 87(1) of the 1992 Constitution of Vietnam; Art 45 of the 1991 Constitution of Laos; Art 146 of the 1998 Constitution of Ecuador; Philippines, *Law of the 8th April 1989 providing for a system of initiative and referendum and appropriating funds therefore*, Section 11; Art 46 of the 1922 Constitution of the Free City of Danzig. See M A F Ferrero, *supra* note 8, at 121–22.

²⁰ Theoretically, popular ballot initiatives could lead to merely consultative referendums, but in practice, referendums initiated by the people seem to be generally configured as binding upon the representative institutions. Variations are found, however, namely in the fixing of a time-span in which Parliament is prevented from altering a law approved in popular vote.

²¹ On this institute, see: Battelli, *supra* note 11, at 7; Drăganu, *supra* note 11, Vol I, at 245.

²² One should not forget the possibility of direct democracy through ‘town meetings’ (*Landsgemeinde*).

(ii) *PLI on a Sliding Scale of Commitment to Participatory and Direct Democracy*

Most authors attempt to establish correlations between the system of government in force in a given country and the institutes of participatory and/or direct democracy included therein, or to otherwise categorize these institutes. If one's objective is to explain why certain institutes are chosen but not others (and to derive a model which explains which general choices correspond to which institutes), then one should begin by grouping the institutes of participatory and/or direct democracy in accordance with the minimum degree of commitment to participatory and direct democracy which they require, as represented in the following figure:

The degree of commitment to participatory and/or direct democracy further varies within each perspective according to the respective institutes actually introduced (Fig. I)²³ (eg allowing 'popular initiative' but not 'popular veto' expresses a limitation

Formal Instruments of Participatory and/or Direct Democracy According to Degree of Commitment to Those Principles	
1) Classical perspective not trusting the people to make a decision nor to initiate the decision-making process	} Petition Mandatorily debated petition
2) PLI perspective trusting the people to initiate the decision-making process, but not to take the decision directly	} Popular legislative initiative Agenda initiatives for non-legislative decisions (resolutions, motions of no-confidence, administrative decisions...) Corporate legislative initiative
3) Plebiscitary perspective trusting the people to take a decision directly (top-down approach)	} Mandatory referendum Plebiscitary veto Other optional plebiscites (Presidential, governmental or parliamentary initiative)
4) Direct democratic perspective trusting the people to initiate the direct democratic decision-making process	} Popular initiative Popular referendum initiative Popular veto Recall Recall of judicial decisions

Figure 1: Democratic Institutes Per Degree of Commitment

²³ For a suggestion of scale for intra-Perspective commitment for direct democracy instruments, see: Uleri, *supra* note 6, at 232.

within the same level of commitment, explained by the fact that the first is perceived to have a positive or innovative nature, and the second a negative or braking nature²⁴). It also varies within each institute, namely according to the subjects excluded from its scope (eg PLI is often excluded for areas such as taxes, foreign policy, constitutional revision, budget, and criminal law).

Relations of compatibility and incompatibility are formed between each of those categories and the institutes typical of others. In essence, each degree of commitment is compatible with the institutes of the degrees preceding it, and incompatible with those of the subsequent degrees.

Furthermore, through logical inference, certain perspectives imply openness to the inclusion of institutes typical of other perspectives. To give two notable examples: it is logical to expect to find the right of petition in a country which admitted PLI; it is also expectable to find PLI in a country which has admitted 'popular initiative'.²⁵

The reality of the choices of constituent assemblies generally confirms these logical expectations—the large majority of countries with popular ballot initiative instruments also foresee PLI. But there are exceptions. For example, in Switzerland, Canada, and in the many federated States of the USA—celebrated for their welcoming of direct democracy instruments—there is no PLI.²⁶ There are at least four possible explanations for such failures to take the chosen perspective to its ultimate consequences: (i) misinformation during the decision-making process leading to lack of contemplation of all available instruments; (ii) miscomprehension of the nature of the instruments; (iii) perception of certain instruments as being more evolved and rendering others superfluous (perception of lack of complementarity); and (iv) lack of constitutional tradition of the instrument in question.

B. PLI in European States and the World

(i) *Origin and dissemination of PLI*

As mentioned in the Introduction, the institute of 'popular legislative initiative' appeared for the first time in 1920, in Austria. Academic research carried out so

²⁴ Deploige, *supra* note 16, at 190–191; H Abromeit, *Democracy In Europe: legitimizing politics in a non-State polity*, 1998, at 119; M Freitag, A Vatter, 'Initiatives, Referendums and the Tax State', (2006) 13(1) *JEP* 89, at 92–94.

²⁵ Differently, the 'Plebiscitary Perspective' does not necessarily imply openness to institutes of the 'PLI Perspective'. This is because the 'Plebiscitary Perspective' leads to top-down instruments of direct democracy—it is still coherent with this level of compromise to reject PLI, since it implies a much more active understanding of the citizens in comparison to the passive role they play in top-down instruments. The coexistence of category (3) and category (2) institutes is therefore possible, by accepting a level of activism restrained by representative institutions (eg Austria), but not expectable *per se*.

²⁶ Other examples of countries which opted for popular ballot initiative instruments without introducing PLI: 1982 Constitution of Honduras (Art 5); 1992 Constitution of Slovakia (Art 95); 2003 Constitution of Togo (Art 4); 1992 Constitution of Turkmenistan (Art 95); 1996 Constitution of Ukraine (Art 72(2)).

Table 1: Chronology of Constitutions Containing PLI

Chronology of PLI in the World

1920—Austria
 1921—Liechtenstein; Georgia
 1922—Latvia
 1928—Lithuania
 1931—Spain
 1940—Cuba
 1947—Italy
 1961—Venezuela
 1967—Uruguay
 1981—San Marino
 1985—Guatemala
 1987—Philippines
 1988—Brazil
 1990—Hungary
 1991—Albania; Burkina Faso; Colombia;
 F.Y.R.O. Macedonia; Romania; Slovenia
 1992—Paraguay; Serbia and Montenegro
 1993—Andorra; Kyrgyzstan; Peru
 1994—Argentina; Belarus; Moldova
 1995—Georgia; Nicaragua
 1997—Poland; Portugal; Thailand
 1998—Ecuador
 1999—Cape Verde
 2002—Costa Rica
 2004—Bolivia
 2006—The Netherlands

far has given an incomplete image of the diffusion of PLI throughout the world.²⁷ Looking exclusively at the evolution of the formal inclusion of the institute in Constitutions throughout the world (regardless of actual implementation),²⁸ the final scenario can be surprising—see Table 1.

There are currently 37 countries with PLI at the national level, plus three with PLI exclusively at the regional or federated State level covering all or almost all the territory (Germany, Mexico, and Serbia).

Only five of the EU15 countries have embraced PLI, and six of the EU10 + 2 (new member States). This means that only a minority of the Member States of

²⁷ Sousa Ferro, *supra* note 5, at 634–647; Cuesta, *supra* note 13.

²⁸ To avoid a Constitutional revision, PLI was recently introduced in The Netherlands through a revision of the Rules of Procedure of Parliament.

the EU (11 out of 27) recognize to their citizens the right to compel Parliament to discuss a draft bill.

Also, one should conclude that, while the Austrian Constitution was necessarily the direct influence for initial diffusion of the institute, PLI owes most of its current world expansion to its inclusion in the Spanish Constitution of 1931. With very few exceptions, none of the Constitutions whose drafting was predominantly influenced by the British or French constitutional order adopted PLI.

An often neglected dimension for the existence of PLI is the regional and local level.²⁹ Yet, several of the PLI countries have expanded this right to an infra-national level,³⁰ and even countries with no national PLI have allowed local PLI,³¹ possibly due to the influence of a Council of Europe recommendation.³²

The main reason why PLI has not found its way into more Constitutions seems to be its mental association to instruments of direct democracy. Indeed, it is known that the reason why so many European countries (limiting the scope of our analysis) have not yet introduced direct democracy instruments ('Plebiscitary' and 'Direct Democratic Perspective') is found in traumas of the past. History has time and time again proven the potential for anti-democratic use of direct-democracy instruments³³ (such as manipulation as used by Hitler, Napoleon, etc).³⁴

There is evidence that debates within constituent assemblies, where the adoption of PLI is suggested, often reveal the confusion in the minds of some of

²⁹ The presence of direct democracy instruments at regional and local level has, however, been significantly documented—see, eg: Waters, *supra* note 16, at 13–14, at 31–36; C-F Nothomb, 'Les modalités de participation des citoyens à la vie communale', and P Lewale, 'Le référendum local', in Dabin, *supra* note 12, at 219 and 227; H Wollmann, 'Local Government and Politics in East Germany', (2002) 11(3) *German Politics* 153.

³⁰ See: S Stinicki (ed), *Status of Public Participation Practices in Environmental Decisionmaking in Central and Eastern Europe. Case studies of Albania, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, FYR Macedonia, Poland, Romania, Slovak Republic, Slovenia*, 1995, at 8 and 109–110; <<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN003978.htm>> (on Slovenia); Philippines, *Law of the 8th April 1989 providing for a system of initiative and referendum and appropriating funds therefor*. Virtually all the regions of Italy and Spain (see: M A F Ferrero, *supra* note 8) have PLI.

³¹ Bulgaria, Czech Republic, Estonia, Finland (B Kaufmann, D Wallis, J Leinen, C Berg & P Carline, *Initiative for Europe: a roadmap for transnational democracy*, IRI Europe, 2006 [draft version], at 123–126). PLI is found in some Swiss cantons (Neuchâtel, Soleure, Vaud, Fribourg, etc) and was recently introduced in the Belgian region of Flanders.

³² Council of Europe, *supra* note 13.

³³ See: Battelli, *supra* note 11, at 4–5; Uleri, *supra* note 6, at 244; Suksi, *supra* note 9, at 11; J Frowein, 'Les référendums, aspects de droit comparé', in Dabin, *supra* note 12, at 108–12; W Duran Abarca, *Plebiscito de nuevo tipo y constituyente*, 1978, at 8–9; J Ziller, 'National Constitutional Concepts in the New Constitution for Europe—Part Two', (2005) 1(3) *ECLR* 452, at 468.

³⁴ These traumas, however, actually refer to 'Plebiscitary Perspective' instruments, or to more obviously counterreaction type of popular ballot initiatives (eg popular veto). Political science studies have already shown the different natures and uses of these instruments. Therefore, these lessons from the past should not be extended to cover all the instruments of direct democracy.

the delegates about the nature of ‘popular legislative initiative’, believing it may lead to a popular vote.³⁵ The lack of attention given in ‘mainstream’ constitutional doctrine to the existence of PLI raises the further obstacle of lack of information.

These factors would explain why so many constituent assemblies have not taken their commitment to participatory democracy to the level of the ‘PLI Perspective’, and it suggests that there is an extraordinary potential for expansion of the institute in the near future, through mere information and clarification of its nature.

Misinformation and lack of conceptual clarity also explain why the institute has been so often burdensomely regulated in the countries which introduced it.³⁶

(ii) Regulation of PLI in the World

This takes us to the difference between the formal existence of the right of ‘popular legislative initiative’ and its practical existence. The practical dimension can be looked at from two angles: (i) has this right been regulated in such a way as to render it useful or non-exercisable?; and (ii) what is the actual use given to PLI by the citizens?

The first question allows us, generally, to contrast the level of commitment to participatory democracy represented by the introduction of PLI to the level of commitment which manifests itself in the ‘fine print’ (included either in the Constitution itself or later through the regulating law).

The first way through which the right of PLI can be made exercisable or non-exercisable is by the definition of the minimum number of subscribing voters (through a percentage or absolute number). Expectably, with two easily explainable exceptions, all countries which include both types require a higher number of subscribers for ‘constitutional PLI’ (that which is aimed at initiating a constitutional amendment) than for ‘ordinary PLI’ (that which is aimed at initiating an infra-constitutional law). Table 2 shows the different solutions found by the countries of the world which introduced popular legislative initiative.

³⁵ On Portugal, see: Sousa Ferro, *supra* note 5, at 652/fn 88; on Romania see: Ionciă, *supra* note 13, eg at 470, 493 and 942; on Spain see: Pérez Sola, *supra* note 7, at 481–90; and Biglino Campos, *supra* note 5, at 130.

³⁶ Referring to Spain, one author noted: ‘... it seems [the assembly] gave in to the apparent need to limit the initiative because of a permanent fear of this institution, due to its hypothetical plebiscitary nature’ (our translation)—see: Pérez Sola, *supra* note 7, at 483. See also: M A F Ferrero, *supra* note 8, at 32–6.

Table 2: Minimum Number/Percentage for PLI Per Country

Minimum Number of Voters Required for the Exercise of the Right of Popular Legislative Initiative					
Country	Number of registered voters ³⁷	Ordinary	Constitutional	No.	%
		PLI	PLI		
		No.	%		
Albania	2,468,000	20,000	0.81%		
Andorra	13,342	1,334	10%		
Argentina	25,477,861	382,168	1.5%		
Austria	5,912,592	100,000	1.69%		
Belarus	7,356,343	50,000	0.68%	150,000	2.04%
Bolivia	4,165,082	na ³⁸			
Brazil	115,254,113	1,152,541	1%		
Burkina Faso	4,210,234	15,000	0.36%	30,000	0.71%
Cape Verde	260,275	10,000	3.84%		
Colombia	25,069,773	1,253,488	5%	1,253,488	5%
Costa Rica	2,279,851	113,993	5%	113,993	5%
Cuba	8,064,205	10,000	0.12%		
Ecuador	8,154,424	20,386	0.25%	81,544	1%
Georgia	3,143,851	30,000	0.95%	200,000	6.36%
Guatemala	4,458,744		5.00%	0,11%	
Hungary	8,046,742	50,000	0.62%		
Italy	49,358,947	50,000	0.10%		
Kyrgyzstan	2,537,247	30,000	1.18%	300,000	11.8%
Latvia	1,398,156	139,815	10%		
Liechtenstein	16,350	1,000	6.11%	1,500	9.17%
Lithuania	2,719,608	50,000	1.84%	300,000	11.03%
FYRO Macedonia	1,709,536	10,000	0.58%	150,000	8.77%
Moldova	2,295,288			200,000	8.71%
Netherlands	12,076,711	40,000	0.33%		
Nicaragua	2,421,067	5,000	0.21%		
Paraguay	2,405,108	48,102	2%	30,000	1.25%

³⁷ Most recent data available from IDEA (<<http://www.idea.int>>) and the EPIC project—this data is not necessarily up to date; it should be understood as merely indicative. PLI is invariably regulated with a requirement of a minimum number of ‘voters’, not ‘citizens’—this should be taken into account in calculating the percentage of the community which a certain absolute number represents (contrast: Cuesta, supra note 13).

³⁸ na = data not available.

Table 2: (Cont.)

Minimum Number of Voters Required for the Exercise of the Right of Popular Legislative Initiative					
Country	Number of registered voters	Ordinary PLI		Constitutional PLI	
		No.	%	No.	%
Peru	14,906,233	na		44,719	0.3%
Philippines	34,176,376	3,417,637	10%	4,101,165	12%
Poland	29,364,455	100,000	0.34%		
Portugal	8,882,561	35,000	0.39%		
Romania	17,699,727	100,000	0.56%	500,000	2.82%
San Marino	30,688	60	0.20%	na	
Slovenia	1,588,528	5,000	0.31%	30,000	1.89%
Spain	33,969,640	500,000	1.47%		
Thailand	42,759,001	50,000	0.12%		
Uruguay	2,402,135	600,534	25%	240,213	10%
Venezuela	12,048,000	12,048	0.10%	1,807,200	15%

The requirement for 'ordinary PLI' varies between a maximum of 25% and a minimum of 0.10%, settling at a somewhat misleading average of 2.81%. The requirement for 'constitutional PLI' has a maximum of 15%, a minimum of 0.11%, and an average of 5.95%. 35 States admit 'ordinary PLI', while only 19 States allow 'constitutional PLI'.³⁹

In light of that data, one can safely say that many nations have been over-restrictive in setting this essential requisite for 'ordinary PLI'. The exercise of the right of 'popular legislative initiative' does little more than force Parliament to dedicate its time to the discussion of a draft bill.⁴⁰ As a tool of representative democracy, PLI leaves it up to Parliament to decide whether the draft bill in question is in the general interest. It is, therefore, not necessary, nor in tune with the institute, to try to guarantee that only draft bills expressing the desire of a representative part of the population be admitted. The minimum number should instead be set in relation to the minimum of signatures which Parliament considers necessary to justify its attention.

A second possible obstacle is found in the subjects for which PLI is allowed or excluded (by the Constitution or by the implementing law). Aside from the

³⁹ The Spanish Constitutional Court (Judgment of 14/03/1994, no. 76/1994) has ruled out the use of PLI to bring about a constitutional amendment, when 'constitutional PLI' is not expressly foreseen.

⁴⁰ One should keep in mind that a draft bill can generally be rejected by Parliament on first reading, assuring that Parliament is not forced to invest too much time into a bill which is manifestly undesirable. The political pressure that a PLI may eventually generate, which can be a cause of discomfort in cases of populist manipulation, is not necessarily greater than that achieved by a simple collective petition of a few thousands of voters asking for the same without formally using PLI.

frequent non-admission of ‘constitutional PLI’, and insofar as we were able to determine, at least 10 of the PLI States exclude issues such as tax law or criminal law from the scope of PLI.⁴¹ It should be borne in mind that these areas may be precisely some of the most capable of motivating citizen participation. The origin of these restrictions is probably found in lessons as the one learned from the infamous ‘Proposition 13’, a successful popular initiative to ‘*cap property tax rates*’ in California,⁴² but it is displaced as that situation was only made possible by the use of an instrument of direct democracy—with PLI, Parliament retains the final word. In any case, subject restrictions boil down to the constituents stating that their trust of the people to set Parliament’s agenda goes only so far.

Another major obstacle to the exercise of PLI is the requirement that subscribers originate from different regions of the country in question. This geographic distribution requirement is found in only five of the 36 PLI countries,⁴³ with varying exigency. It is, however, a limitation which finds little justification in the nature of the institute⁴⁴—as mentioned above, normal parliamentary decision-making which ensues is enough to guarantee that no bills contrary to general interest are passed. This requirement particularly affects geographically concentrated minorities, which may have legitimate specific concerns that they would like to see addressed by Parliament (working within representative democracy and the institutions of the nation-state, not against it).

Finally, one must consider the wide array of restrictions imposed at the procedural level: requiring certification of signatures,⁴⁵ limiting collection of signatures to certain designated locations, setting a time limit for collection or for validity of signatures,⁴⁶ and requiring substantial reasoning and analysis of consequences of the proposed bill,⁴⁷ to name the most relevant.⁴⁸

Trust or commitment to the institute at a procedural level should be measured not only in the inclusion of ‘obstructive’ requisites, but also in the introduction

⁴¹ Argentina, Costa Rica, Ecuador, Paraguay, Portugal, Nicaragua, Romania, Spain, Thailand, and Uruguay.

⁴² See: <http://en.wikipedia.org/wiki/Direct_democracy_%28history_in_the_United_States%29>; Waters, *supra* note 16, at 13–14, at 6.

⁴³ Argentina, Brazil, Moldova, Philippines, and Romania.

⁴⁴ The geographical distribution requirements of the American states of Idaho and Utah were struck down by the courts as unconstitutional (see: Waters, *supra* note 16, at 22).

⁴⁵ This is a rare requirement in comparative law (Cuba, Italy, Liechtenstein, Paraguay, Peru, Spain). Most PLI States now simply impose ‘random sampling’ types of signature verification.

⁴⁶ This restriction is generally justified, but only insofar as it relates to a time frame where it is reasonable to assume subscribers would not change their opinion—it seems more advisable to err on the side of ‘permissibility’ rather than be over-restrictive. The Constitutional Court of the Republic of Moldova has found that the time restriction imposed on ‘constitutional PLI’ by the regulating law was excessive and unconstitutional as it impeded the exercise of a constitutional right (Judgment of 07 December 2000, no 41).

⁴⁷ See, eg. Art 135 of the Statute of the Seimas of the Lithuanian Republic. This is relevant in analogy with EC requirements for legislative initiatives—see J-P Jacque, *Droit institutionnel de l’Union Européenne*, 2004, at 390.

⁴⁸ There have been some examples of countries, such as Austria, Spain, and Romania, revising their laws to regulate PLI in a less restrictive sense.

of ‘facilitating’ factors, such as: cooperation of authorities with organizing committees, systems of financial support to initiatives, right for promoters to defend proposals before Parliament, strict deadlines for discussion of the popular bill in Parliament, and possibility to collect signatures over the internet or by post.⁴⁹

The regulation of the institute in Spain, for example, was at some point described as ‘*exhaustive and baroque*’, grounded in the essential ‘*attitude of mistrust*’ for the institute, which rendered its use highly improbable.⁵⁰ Generally, one may be inclined to conclude that the regulation of PLI has been mostly done by the copying of restrictions imposed on direct democracy instruments,⁵¹ without verifying if the underlying reasons for those restrictions were still present for an institute which does not go beyond representative democracy.

(iii) *Use of PLI in the world*

The result of over-restrictive attitudes has been clearly felt in the actual use given to PLI by citizens. It is difficult to have a clear perception of this practical dimension, due to a widespread lack of collected data on the subject. According to one study on Austria,⁵² even though PLI was introduced in 1920, it was first used in 1963. Until 1998 there had been 23 attempts to use it, with only 11 successfully submitted to Parliament. In Italy, between 1978 and 2002, there have been 320 attempts at PLI, out of which only 105 managed to gather the minimum number of signatures, and ‘*only 8 have been enacted*’.⁵³ In Spain, only five of 32 attempts to use PLI were successful, and only one ended in enactment.⁵⁴ In Portugal, where the institute was only recently regulated, two PLIs have so far been presented.

There is some evidence that South and Central American countries’ approach to the institute, namely, by mixing it with less formal ways of participation (eg in Brazil and Bolivia, individual citizens are invited by Parliament to suggest laws online),⁵⁵ has produced significant mobilization of citizens, but this mixture renders it more difficult to assess the use of PLI *proprio sensu*.⁵⁶

⁴⁹ Eg Colombia, *Ley 134/1994 (por la cual se dictan normas sobre mecanismos de participación ciudadana)*, Art 19.

⁵⁰ M A García Martínez, *El procedimiento legislativo*, 1987, at 238–39 (our translation). See also: Biglino Campos (1987), *supra* note 5, at 130; and López-Muñoz, *supra* note 9, at 122. For the same conclusion in relation to Romania, see: C Ionescu, *Constituția României: legea de revizuire comentată și adnotată cu dezbatere parlamentare*, 2003, p 131.

⁵¹ And even the restrictions on direct democracy instruments are often criticized—see: Kaufmann, Göttel, Lamassoure & Meyer, *supra* note 13, at Chapter I.

⁵² Müller, *supra* note 13.

⁵³ Cuesta López, *supra* note 12, at 78.

⁵⁴ Cuesta, *supra* note 13; Cuesta López, *supra* note 12, at 82–88; M A F Ferrero, *supra* note 8, at 10.

⁵⁵ More significantly, the Constitutions of the Mexican Federated States of Nuevo León (Art 68) and Oaxaca (Art 50) recognize the right of PLI to individual citizens.

⁵⁶ In Costa Rica there have been dozens of initiatives presented each year (but few seem to have met the formal requirements of PLI), of which only four have become law—see: <http://www.asamblea.go.cr/inciativa/inicialg_recib.htm>. The same scenario is found in Brazil, according to data kindly provided by the ‘Comissão de Legislação Participativa’. For an example of use of PLI in Colombia,

The Austrian and Italian examples can be looked upon as setting a relative high-watermark for the use of the institute, since little or no evidence could be found of more than sporadic use elsewhere. That being said, Austria has certainly provided worrying examples of the populist and demagogical manipulation of PLI—radical parties have successfully used it to increase their base of support.⁵⁷ At the same time, one should take into account the effect of an ‘*in-built bias in favour of the initiative’s demand*’, which results from the delicate strategic situation opponents of a PLI find themselves in (campaigning against the initiative only increases its visibility).⁵⁸

In countries where PLI coexists with popular ballot initiatives, citizens have generally preferred to motivate around the latter.⁵⁹

The right of ‘popular legislative initiative’ remains ‘*lettre morte*’ (or nearly) in most countries which know it, often being little more than a fashionable façade of democracy, although its potential for effective use has already been demonstrated.

While extensive studies are available to explain the benefits and risks of direct democracy instruments, none can be found in what concerns PLI, and the conclusions of those studies are often non-transposable in light of the different nature of these institutes. This means that, to a large extent, introducing PLI is done without concrete evidence of its virtues, or lack of, and is based on assumptions rooted in wider understandings of the virtues of the democratic process itself.

III. PLI at the European Union Level

A. The Past and Present

Taking the most important decisions in a hurry always seems to be one of Europe’s entrenched and gruesome curses

H Rasmussen⁶⁰

(i) *The EU’s Approach to the Democratic Deficit*

It has become common to read that the European Union suffers from a democratic deficit, even though there is no ‘*general understanding of what is meant*’⁶¹ by ‘democratic deficit’.

see: J L Miralles i Garcia, ‘Land development: between logic and myth’, *City & Time*, 2005. See also: Madroñal, *supra* note 11, at 3–4 and 14.

⁵⁷ Müller, *supra* nota 13, at 311. More recently, Austria’s right-wing Freedom Party announced the promotion of a PLI to reconsider Austria’s membership in the EU and to settle Austria’s position against the entry of Turkey—see: <<http://www.euractiv.com/Article?tcmmuri=tcm:29-153156-16&type=News>> (7 March 2006).

⁵⁸ As explained by Müller, *supra* nota 13, at 308.

⁵⁹ Kaufmann, Wallis, Leinen, Berg & Carline, *supra* note 32, at 55–7.

⁶⁰ H Rasmussen, ‘The Convention method’, (2005) 1(1) *ECLR* 141, at 144.

⁶¹ Neunreither, quoted in D N Chrysochoou, *Democracy in the European Union*, 1998, at 14.

As traditionally relied-on output legitimacy seems to be declining,⁶² and following what some consider a '*functional-institutional*' or '*realist*' approach,⁶³ the Union's response has been to take incremental steps in the direction of further legitimacy.⁶⁴ And it has done so by mixing nation-state type democratic mechanisms, particularly the direct election of MEPs, followed by the progressive widening of Parliament's powers, with new approaches, often associated with a shift from 'government' to 'governance'.⁶⁵ In this sense, one may conclude that Jean Monnet's spill-over effect has been felt not only in the enlargement of the EU's competences, but also in its legitimization.

The new approaches to democratic legitimacy have expressed themselves mainly at the level of transparency and input legitimacy (participation and procedural rules).⁶⁶ The EU has been trying to tackle the criticism that it does not provide a '*set of readily available opportunity structures for citizen participation*'.⁶⁷ EU leaders have acknowledged that citizens' call for democratization '*will require Europe to undergo renewal and reform*',⁶⁸ and have stated that '*EU citizens must have the right to have their voices heard*'⁶⁹ and set the objective of following a '*less top-down approach*'.⁷⁰

The Union's recent steps in this direction, *maxime* the White Paper on Governance (and, by extension, the indirect participation mechanisms of Article I-47 of the Constitutional Treaty, converted into Article 8b of the EU Treaty as revised at Lisbon), have been criticized as insufficient to lead to a legitimization of the EU. Magnette believes that '*ordinary citizens will not be encouraged to become more active*', and notes that '*both the initiative of participation and the choice of*

⁶² M Telò, 'Démocratie internationale et démocratie supranationale en Europe', in M Telò (ed), *Démocratie et construction européenne*, 1995, 1, at 19.

⁶³ R. Seidelmann, 'Democracy-Building in the European Union. Conditions, Problems and Options, in Telo, *supra* note 62, at 77.

⁶⁴ As Weiler cautions, '*democracy and legitimacy are not co-terminus*' (quoted in I Scott, 'Law Legitimacy and EC Governance: Prospects for Partnership', (1998) 36 *JCMS* 175, at 176).

⁶⁵ Commenting on this: E O Eriksen, 'Democratic or Technocratic Governance', in C Joerges, Y Mény, J H H Weiler (eds), 'Mountain or Molehill? A Critical Appraisal of the Commission's White Paper on Governance, (2001) 6 *Jean Monnet WP* 61, at 64; C Joerges, 'The Commission's White Paper on Governance in the EU—a Symptom of Crisis?', (2002) 39 *CMLR* 441, at 443; P Allot, 'European Governance and the re-branding of Democracy', (2002) 27(1) *EL Rev* 60; P Magnette, 'European Governance and Civic Participation: Beyond Elitist Citizenship?', (2003) 51 *Political Studies* 144; L Pech, 'La solution au déficit démocratique: une nouvelle gouvernance pour l'Union Européenne?', (2003) *JEI* 131.

⁶⁶ M Lee, 'Public Participation, Procedure and Democratic Deficit in EC Environmental Law', (2003) *Yearbook of European Environmental Law* 193, at 195; B Crum, 'Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce the Democratic Deficit?', (2005) 11(4) *ELJ* 452, at 454 and 465; Pech, *supra* note 65, at 146.

⁶⁷ Quoting Richardson: C Harlow, 'Citizen Access to Political Power in the European Union', (1999) 2 *EUI WP*, at III 5.

⁶⁸ European Council, 'Laeken Declaration on the Future of the European Union', 15 December 2001.

⁶⁹ European Commission, 'Plan D', COM (2005) 494 final.

⁷⁰ European Commission, 'European Governance—A White Paper', COM (2001) 428, at 4.

the consulted groups remain firmly in the hands of the institutions'.⁷¹ Other authors described the approach as 'technocratic',⁷² 'corporatist',⁷³ 'infused with a dogma of the righteousness of a purely top-down approach',⁷⁴ and as signifying 'the creation of a benevolent dictatorship',⁷⁵ and a failure to adopt 'a genuinely participatory model of democracy'.⁷⁶

(ii) *EU Citizenship, the Principle of Participatory Democracy and the Right of Petition*

All opportunity structures for citizen participation EU presently available at the EU level fit into a 'Classic Perspective'.⁷⁷

It has been widely observed that 'EU membership is moving away from the mere setting out of economic rights towards a more comprehensive citizenship'.⁷⁸ The Court has repeatedly stated that 'Union citizenship is destined to be the fundamental status of nationals of the Member States'.⁷⁹ And yet, as one author pointed out: 'on ne peut sérieusement parler de citoyenneté européenne en dehors du concept de communauté politique démocratique'.⁸⁰ The extent to which the EU has become a democratic political community can arguably be measured by the degree of political rights it gives to its citizens.

This paper will henceforth attempt to demonstrate that a general right of petition under Community Law should be recognized for EU citizens. This is relevant because petitions can and often do consist in a request for the adoption of a normative act by the Commission (going through the motions of PLI and the Citizens' Initiative).⁸¹

⁷¹ P Magnette, 'European Governance and Civic Participation: can the European Union be politicised', in Joerges, Mény & Weiler, *supra* note 65, at 23–5.

⁷² Eriksen, *supra* note 65.

⁷³ A Reale, 'Representation of Interests, Participatory Democracy and Lawmaking in the European Union: Which Role and Which Rules for the Social Partners?', (2003) 15 *JMWP*, at 13–14.

⁷⁴ D M Curtin, I Dekker, 'Good Governance: the concept and its application by the European Union', in D M Curtin, R A Wessels (eds), *Good Governance and the European Union; Reflections on Concepts, Institutions and Substance*, 2005, 3, at 17.

⁷⁵ Scharpf, quoted in: Pech, *supra* note 65, at 142.

⁷⁶ T Kostakopoulou, 'Democracy—Talk in the European Union: The Need for a Reflexive Approach', (2003) 9(3) *Colum J Eur L* 411, at 424. For other opinions in this sense, see: Joerges, *supra* note 65, at 442–5; M Nentwich, 'Opportunity Structures for Citizens' Participation; the Case of the European Union', in A Weale, M Nentwich (eds), *Political theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*, 1998, 125, at 125 and 133–4; Allot, *supra* note 65; Pech, *supra* note 65, at 140 and 146.

⁷⁷ For an enumeration of these structures: Nentwich, *supra* note 76, at 126–7.

⁷⁸ S Picard, 'The EU Constitutional Treaty: Towards a European Citizenship for Third Country Nationals?', (2005) 1(1) *JCER* 73, at 80.

⁷⁹ Case C-184/99, *Grzelczyk*, [2001] ECR I-6193, at 31.

⁸⁰ Telo, *supra* note 62, at 45.

⁸¹ I Harden, 'À l'écoute des griefs des citoyens de l'Union Européenne : la mission du Médiateur Européen', (2001) *RDUE* 573, at 589; P Maniatis, 'Le règlement des pétitions au Parlement Européen', (2002) *RDUE* 133, at 135 and 143. S Baviera, 'Les pétitions au Parlement Européen et le Médiateur Européen', (2001) *RMCUE* 129, at 131. For an author which recognizes the practice,

Already included in the British Bill of Rights, the right of petition is most often described by specialized doctrine as ‘*a request by an individual or a group of individuals to any state authority*’.⁸²

And yet, the concept of ‘right of petition’ has been neglected since its glory days in the nineteenth century, becoming, in mainstream doctrine and day-to-day language, restricted to petitions to Parliament. A disparity has arisen between the unchallenged existence of the right across the Member States, and its common designation or understanding, to which much contributed the limited scope for judicial review of this right. In this sense, the discussion which ensues is based on the ‘right of petition’ as defined above, knowing that many authors might suggest alternative designations to describe the same substance of rights in the relations with institutions other than Parliament.

Although initially developed as a right to put forward grievances (before the executive and legislative as well as judicial powers),⁸³ petitioning evolved, under the principle of participation in public affairs, to include general and abstract requests or suggestions of public policy.⁸⁴

The right of petition does not generally imply a right to a reply, but merely to have one’s request considered by the addressee entity. Even the right to consideration is subject to practicability. In what concerns specifically petitions to the EP, doctrine seems to generally confirm this characteristic.⁸⁵ The clarification of this point is particularly relevant as a basis for discussion of the existence of a general right of petition in Community Law. To those who may criticize the hollowness of the right as thus defined, it is enough to counter, in what is relevant for the present paper, that the substance and practical effect of the Citizens’ Initiative of Article I-47(4), soon to become Article 8b(4) of the EU Treaty, is not significantly different.

Because of the wording of Articles 21(1) and 194 EC, the vast majority of authors deny or do not even discuss the existence of this right.⁸⁶

Nonetheless, the existence of a general right of petition can be arguably demonstrated by two main arguments: (i) that it derives from general principles of Community Law; and (ii) that it is already recognized by the Treaty and the practice of the Institutions.

but disagrees in principle, see: A Pliakos, ‘Les conditions d’exercice du droit de pétition’, (1993) *CDE* 317, at 328–9 and 333.

⁸² Auer, *supra* note 5, at 80; M A F Ferrero, *supra* note 8, at 22; Cuesta López, *supra* note 12, at 28–9; <<http://www.firstamendmentcenter.org/petition/overview.aspx>>.

⁸³ This last dimension of the right of petition is still very explicitly present, namely, in the case law of the ECHR on Art 35(3) of that Convention, and in the case law of the US Supreme Court.

⁸⁴ Cuesta López, *supra* note 12, at 28–9.

⁸⁵ Pliakos, *supra* note 81, at 335 and 347; Baviera, *supra* note 81, at 133.

⁸⁶ This leads authors to suggest alternative names for the reality of ‘petitions’ to the Commission (Nentwich called it ‘*letter writing to the Commission*’, *supra* note 76, at 126–7).

The principle of democracy has been expressly included in Article 6(1) and in the Preamble of the EU Treaty.⁸⁷ The Lisbon Reform Treaty shall introduce a new Article 2 of the EU Treaty, indicating inter alia democracy as one of the values on which the Union is based, and it shall maintain the Draft Constitution's references to democratic equality, representative democracy and participatory democracy in Articles 8 and 8a. The same principle was expressly welcomed by the case law of the Court as a general principle of Community Law, even though only in the dimension of representative democracy so far.⁸⁸

It is true, as noted by Schmidt and Britz, that this principle is '*not considered to be a comprehensive democratic principle which corresponds with those operating within the Member States*'.⁸⁹

But if the democratic principle is to have any value whatsoever, then it must be found binding upon the Community Institutions in so far as it is compatible with the EU's nature. It can therefore be argued that the democratic principle implies the recognition of a general right of petition to authorities ruled by or applying Community Law.⁹⁰ Indeed, the recognition of the right of petition would be in line with other civil and political liberties already recognized by the Court, amongst which freedom of expression,⁹¹ which the case law of the US Supreme Court consistently places in parallel with petitions, and the right of access to documents.⁹² The latter is specifically considered to be derived from the democratic principle.⁹³

The principle of good administration⁹⁴ should also be taken into account in judging the existence of a general right of petition in EU Law.⁹⁵ This proposition is further strengthened by the widespread existence of the right of petition, as defined above (even if called otherwise), in the Member States.⁹⁶ This allows

⁸⁷ See also: Laeken Declaration, *supra* note 68.

⁸⁸ M Schmidt, G Britz, 'The Institutionalised Participation of Management and Labour in the Legislative Activities of the European Community: A Challenge to the Principle of Democracy under Community Law', (2000) 6(1) *ELJ* 45, at 57; T Tridimas, *The general principles of EC Law*, 1999, at 4. The relevant case law is that which follows: Case 138/79, *Roquette Frères*, [1980] ECR 3333, at para 33.

⁸⁹ Schmidt & Britz, *supra* note 88, at 57.

⁹⁰ As to the latter, in an extension of the logic of the following case law: Case 260/89, *ERT*, [1991] ECR I-2925, at para 43; Case C-292/97, *Karlsson*, [2000] ECR I-2737, at para 32.

⁹¹ Tridimas, *supra* note 88, at 209–10; Case C-100/88, *Oyowe and Traore*, [1989] ECR 4285, at para 16; Case 260/89, *ERT*, [1991] ECR I-2925, at para 44.

⁹² Introduced by Community legislation and validated by the Court—see Tridimas, *supra* note 88, at 221–2; Case C-58/94, *Netherlands v Council*, [1996] ECR I-2169. In this case, the Court seemed to look upon the Commission and Council Decisions as mere implementations of a general principle of Community law, and the action justified under the principles of good administration and self-organization. See also Art 102 of the Charter of Fundamental Rights.

⁹³ Jacque, *supra* note 47, at 77.

⁹⁴ Case C-472/00 P, *Fresh Marine*, [2003] ECR I-7541; Case C-269/90, *Technische Universität München*, [1991] ECR I-5469.

⁹⁵ Rights of defence were derived by the Court namely from the principle of good administration—Case 32/62, *Alvis*, [1963] ECR 49.

⁹⁶ Unfortunately, there appear to be almost no contemporary studies on this subject. See: M C Allen, *Le droit de pétition dans les pays de l'Union Européenne*, 2001. Even though this right is regulated differently throughout the Member States, its basic premise (*maxime* without a right to a

the Court to derive this particular consequence of the democratic principle from the common constitutional traditions of the Member States. Furthermore, one should not forget that the Court will find the rule or principle which is most appropriate for the Community legal order, even if it is recognized in only a minority of the Member States.⁹⁷

Additionally, some authors argue that a general right of petition should be derived from Article 21(3) EC.⁹⁸ Indeed, it seems difficult to have a right to communicate with the Institutions in a chosen official language, without a right to address a request to the Institutions and to have that request considered (subject to practicability). The Draft Constitution, and subsequently the Lisbon Reform Treaty, went further and included the right of citizens to a reply from any ‘institutions and advisory bodies of the Union’ (Article 17b(2)(d) of the EC Treaty as amended at Lisbon).

There is already some practice of agenda-setting petitions to the Commission, apparently well welcomed by this Institution.⁹⁹ In what concerns complaints on breach of EU Law by national authorities, the Commission states that ‘anyone may lodge a complaint with the Commission’, and sets up conditions for admissibility and subsequent administrative guarantees (including right to information on developments) which show that this is more than mere letter writing.¹⁰⁰

On a final argument, it should be recalled that, as stated by Pliakos: ‘*toute institution impliquée dans une pétition [au Parlement Européen], soit communautaire soit étatique, est obligée d’apporter son concours afin que le traitement de celle-ci soit efficace*’.¹⁰¹ It is an application of the principle of Article 10 EC.¹⁰² If so, even if one concludes that there is only a right of petition to the European Parliament, and not to the Commission, is there a significant practical difference?

(iii) *The Citizens’ Initiative—What it Is and What it Is Not*

The idea of an EU-wide right of PLI had already been put forward before the Convention. The Austrian and Italian delegations to the 1996 Amsterdam

reply), would probably be recognized by all Member States, as it boils down to the right of addressing a letter to a public institution, also deriving at the national level from the democratic principle. On the other hand, such a debate would necessarily bring about jus-philosophical understandings of the nature of ‘subjective rights’.

⁹⁷ Tridimas, *supra* note 88, at 3–4; Jacque, *supra* note 47, at 512–14.

⁹⁸ S C Sieberon, ‘The Proposed European Union Constitution—Will It Eliminate the EU’s Democratic Deficit’, (2004) 10(2) *CJEL* 173, at 249.

⁹⁹ Nentwich, *supra* note 76, at 129.

¹⁰⁰ <http://ec.europa.eu/community_law/your_rights/your_rights_en.htm>

¹⁰¹ Pliakos, *supra* note 81, at 336. Apparently, the only reference in the Community case law to the exercise of the right of petition is an incidental mention to information given by the Commission in answering a petition the plaintiff had addressed to the European Parliament—Case T-333/01, *Karl L Meyer*, [2003] ECR II-117, at 29.

¹⁰² Extended to inter-institutional cooperation by the Court—see eg Case C-65/93, *Parliament v Council*, [1995] ECR I-660, at para 23.

IGC unsuccessfully put this innovation on the table, strangely suggesting that a minimum of 10% of European voters be required to subscribe to it.¹⁰³ The idea resurfaced in the EP's Petitions Committee, reshaped into an initiative through Parliament.¹⁰⁴

The Citizens' Initiative was introduced into the late Constitutional Treaty at the last minute following lobbying by pro-democracy groups whose main focus was on direct democracy instruments.¹⁰⁵ It had initially been intended as PLI, but it soon became settled that the Commission's monopoly on initiative would not be interfered with.¹⁰⁶ The main reason for this (and indeed one of the prevailing arguments against PLI) is that Convention members did not desire to introduce PLI without extending the right of legislative initiative to the European Parliament.

The Lisbon Treaty essentially reproduced Article I-47(4) of the Draft Constitution.¹⁰⁷ Article 8b(4) of the EU Treaty, as amended at Lisbon, shall read:

'Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the 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.'

The proposed first paragraph of Article 21 of the Treaty on the Functioning of the EU [ie the EC Treaty] reads:

'The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 8b of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.'

¹⁰³ Kaufmann, Göttel, Lamassoure & Meyer, *supra* note 13, at Chapter I. Commenting on why PLI was not adopted at this IGC, and having read confidential minutes of the meetings, one author concluded: 'Clearly, governments should not be left alone to deliberate on the citizens' right of initiative' (H Hautala, 'From Petition to Initiative' in Kaufmann, Göttel, Lamassoure & Meyer, *supra* note 13).

¹⁰⁴ European Parliament, I Koukiadis, 'Report of 17 July 2002, on the deliberation of the Committee on Petitions during the parliamentary year 2001–2002', A5–0271/2002, at 6; European Parliament, L González Álvarez, 'Report of 19 June 2003, on the deliberation of the Committee on Petitions during the parliamentary year 2002–2003', A5–0239/2003, at 7.

¹⁰⁵ Kaufmann, Göttel, Lamassoure & Meyer, *supra* note 13; A Lamassoure, *Histoire secrète de la Convention européenne*, 2004, at 424–5.

¹⁰⁶ M Efler, 'A rollercoaster ride towards transnational democracy', in Kaufmann, Göttel, Lamassoure & Meyer, *supra* note 13, at Step 3; E de Poncins, *Vers une Constitution européenne—texte commenté du projet de traité constitutionnel établi par la Convention européenne*, 2003, at 214.

¹⁰⁷ It should be noted that the inclusion of the geographical distribution of signatories (among the Member States) as a mandatory requisite for the Citizens' Initiative was a result of the Intergovernmental Conference which adopted the Draft Constitution, not of the Convention that drafted its original version.

Remarkably, it is patent that many were confused as to the legal impact of the Citizens' Initiative (including some of those who proposed and adopted it), believing it to be PLI (in the sense of forcing the Commission to put forward the draft bill).¹⁰⁸ Some seemed to believe Article I-47(4) could lead to a referendum or to a revision of the Constitution,¹⁰⁹ or called it an instrument of direct democracy.¹¹⁰

At the same time, the majority of authors (including those of the latter group) and the Commission itself have pointed out that the Citizens' Initiative does not bind the Commission to propose a draft bill, merely duplicating the already existent right of so-called 'indirect initiative' of the Council and European Parliament.¹¹¹ Clearly, therefore, it is not 'popular legislative initiative'. Article I-47(4), now the proposed Article 8b(4), does not trust the people to initiate the decision-making process. In this sense, it must be qualified within the 'Classical Perspective', since its legal consequences do not surpass (in any case, not significantly so) those of a petition.

¹⁰⁸ F Chatiel, 'Une Constitution pour l'Europe, an I de la République Européenne', (2003) 471 *RMCUE*, 493, at 496; Lamassoure, *supra* note 105, at 425; U Liebert, 'Democracy Beyond the State: Assessing European Constitutionalisation', 2005, at 12; R von Weizsäcker (ed), *Bergedorf Round Table—The Future of Democracy (European Perspectives)*, 2004, at 43; K Lenaerts, D Gerard, 'The Structure of the Union According to the Constitution for Europe: the Emperor is Getting Dressed', (2004) 29 *ELR* 289, at 319; European Parliament Delegation to the Convention, 'Summary of the Constitution adopted by the European Council in Brussels on 17/18 June 2004'; M Wallström, 'The Future of Europe: superstate, or more democratic Union', Speech, 9 May 2005.

¹⁰⁹ A Gross, 'A locomotive with a few carriages but with no network of tracks doesn't make a railway system', in Kaufmann, Göttel, Lamassoure & Meyer, *supra* note 13; The Greens in the European Parliament, 'Yes to the European Constitution: the path towards the future of Europe does not lead back to Nice', 15 November 2004; <<http://www.greens-cfa.org>>; M-F Labouz, 'La société civile européenne dans le cadre de la Convention', in C Philip, P Soldatos, *La Convention sur l'avenir de l'Europe*, 2004, 209, at 233.

¹¹⁰ Kaufmann, Göttel, Lamassoure & Meyer, *supra* note 13, at Chapter I; Kaufmann, Wallis, Leinen, Berg & Carline, *supra* note 32, at 13; P Berghe, *Activating the citizens: the new citizens' initiative*, College of Europe, 2005, at 5, 10 and 47; Cuesta, *supra* note 13; J Ziller, *The European Constitution*, 2004, at 148; N Lenoir, quoted in 'Taking democracy forward in Europe', 4 November 2005, available at <<http://www.iri-europe.org/>>; <<http://www.ecas.org/product/91/default.aspx?id=344>>.

¹¹¹ Aside the from authors mentioned in the previous footnote, see: Auer, *supra* note 5, at 80; J-F Aubert, 'Building federations by direct democracy', in B Kaufmann, F Filliez (eds), *The European Constitution—Bringing in the People. The options and limits of direct democracy in the European integration process*, 2004, at 44; Poncins, *supra* note 106, at 214; J-L Sauron, *La Constitution européenne expliquée*, 2004, at 34; F-X Priollaud, D Siritzky, *La Constitution Européenne: texte et commentaires*, 2005, at 138; P Ponzano, 'La "Constitution" européenne: ses principaux éléments novateurs', (2004) 250 *PA* 5; Papadopoulos, *supra* note 12, at 453; A J Menéndez, 'Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint', (2005) 11 *EPL* 105, at 127; Sieberson, *supra* note 98, at 252; M Ciesilska, T Venables, '50 Questions and Answers on the Treaty Establishing a Constitution for Europe', European Citizen Action Service, 2005, at 21; A Verhoeven, 'Democratic life in the European Union, according to its Constitution', in Curtin & Wessels, *supra* note 74, at 169–70; Senat de la République Française, 'Constitution européenne, comparaison avec les traités en vigueur', 2004; European Commission, 'Questions and answers on the Constitution', Memo/05/112, Brussels, 6 April 2005, at 6; <http://europa.eu.int/scadplus/constitution/democracy_en.htm>.

One author concludes that there has been *'too much excitement'* over an institute which, quoting the appraisal of a citizens group, is *'practically useless, but (...) gives the illusion of democracy'*.¹¹² Another author describes it as *'a glib piece of window-dressing'* which *'raises some awkward problems'*.¹¹³ But these voices are the exception—the vast majority of commentators welcomed the Citizens' Initiative enthusiastically.

Contrary to what some believe, this is not a previously unknown institute in comparative law—the idea of requiring a minimum number of signatures for a proposal of bill without binding the legislating bodies to its discussion has surfaced before in other countries.¹¹⁴

The value one gives to the Citizens' Initiative is inevitably linked to one's acceptance or refusal of a general right of petition in Community Law (as well as of its content). As majority opinion is contrary to the existence of that right, it is unsurprising that the main argument in favour of the novelty of Article I-47(4), now the proposed Article 8b(4), is that it introduces a limited right of petition to the European Commission, ensuring citizens that their legislative proposals will be considered by this Institution, as well as the idea that this 'indirect initiative' is more than a petition because it supposedly implies a right to a reply not found in the latter.¹¹⁵ Otherwise, the Citizens' Initiative boils down to the unnecessary imposition of stricter requirements for a right which already exists and can be exercised with fewer restraints.

But even if one is to follow the majority opinion, two problems persist in considering: (i) the practical usefulness of the instrument; and (ii) its incompatibility with judicial review. First, there are several precedents of how collective petitions of EU citizens led to legislative initiatives (even though none would have met the geographic distribution requirement).¹¹⁶ From past experience, one can

¹¹² H. Kochler, 'The European Constitution and the Imperatives of Transnational Democracy', (2005) 9 *SYL* 1, at 10.

¹¹³ M Dougan, 'The Convention's Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers?', (2003) 28(6) *ELR* 763, at 773

¹¹⁴ Art 26(2) of the 1992 Constitution of Mongolia; Art 91 of the 1986 Constitution of Liberia. The same thing has happened to a 2003 attempt to introduce PLI at the local level in France—see A Viola, 'La démocratie directe locale en question', (2003) 153 *PA* 11.

¹¹⁵ See: Priollaud & Siritzky, *supra* note 111, at 138; J Meyer, 'Questions and answers about the new citizen's right', in Kaufmann & Filliez, *supra* note 111, at 26; Auer, *supra* note 5, at 79–80; European Economic and Social Committee, 'Opinion of the European Economic and Social Committee addressed to the 2003 Intergovernmental Conference', OJ (2004) C 10/43.

The wording of the Treaty requires merely 'consideration' by the Commission (M Lothar, 'Procedimientos de producción de derecho: el procedimiento legislativo ordinario', (2005) 2(1) *RDCE*, at §3.1), not a right to a reply (just like the EP's exercise of indirect initiative does not imply a right to a reply—P Craig, 'Democracy and Rule-making Within the EC: An Empirical and Normative Assessment', (1997) 3 *ELJ* 105, at 110), but this would probably be foreseen in an eventual regulation of the institute.

¹¹⁶ Koukiadis Report, *supra* note 104, at 10–11; González Álvarez Report, *supra* note 104, at 15–17; European Parliament, V Gemelli, 'Report on European Citizens' Right of Petition: Consolidation by Amendment of the EC Treaty', 2001/2137(INI), at 7–8; European Parliament, P de Rossa, 'Report of 23 October 2003 on Petition 461/2000, concerning the protection and

deduce that one million citizens who sign a petition to the EP calling for legislative reform can expect their opinion to be heard and acted upon, which inevitably involves the Commission. It is the pragmatic political nature of things.¹¹⁷ Would this change with the formalization of the Citizens' Initiative? Would these same citizens have to find subscribers in other Member States in order to be heard, or to have their proposal more thoroughly considered?

What is the added value, in practice, of Article I-47(4), now the proposed Article 8b(4)—is it a mere continuation of the '*search for rules of participation of civil society to European governance*'?¹¹⁸ And in that case, why make it harder to exercise?

Several initiative campaigns have broken out already in the EU (including an 'initiative for the initiative').¹¹⁹ Indeed, as a general observation, 'informal' manifestations of PLI (and other instruments) are often observed in countries which do not formally admit this mechanism.¹²⁰

On the other hand, it is argued that the formalization of the Citizens' Initiative in itself, regardless of qualification or actual substantial innovation in legal content, will enhance the legitimacy and political influence of this kind of manifestation of popular opinion, as well as the motivation for citizens to resort to it.¹²¹ Additionally, significant added value could result if the regulation of the institute provides inter alia for: (i) setting of deadlines for 'consideration' by the Commission;¹²² (ii) financing (and other support) of initiative campaigns; and (iii) mandatory consultation of the EP and Council before Commission decision on submission of the legislative initiative.¹²³

Second, the Citizens' Initiative shares with the right of petition its notable incompatibility with judicial review.¹²⁴ Indeed, assuming that the regulation of this right would continue to give the Commission discretion in deciding whether

conservation of Great Apes and other species endangered by the illegal trade in bushmeat', 2003/2078(INI); European Parliament, J Fourtou, 'Report of 29 May 2001 on the petitions declared admissible concerning silicone implants' (Petitions nos 470/98 and 771/98), 2001/2068(INI); European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions—The Future of European Regulatory Audiovisual Policy', COM/2003/0784final, at §3.3.

¹¹⁷ In this sense: J Leinen, MEP (PES/DE), 'The New Citizens' Initiative' Conference, Brussels, 23 March 2006.

¹¹⁸ Reale, *supra* note 73, at 3.

¹¹⁹ See: R Toulemon, 'La Constitution européenne—son origine, ses vertus, ses faiblesses', (2005) 487 *RM CUE* 213, at 215; B Kaufmann, 'Prospects for transnational direct democracy in Europe', 2005, at 6; Kaufmann, Wallis, Leinen, Berg & Carline, *supra* note 32, at 22.

¹²⁰ For examples in France: Gicquel, *supra* note 11, at 5; Viola, *supra* note 114; Duhamel & Mény, *supra* note 12, at 750. For the UK, one may recall the 'Dangerous Dogs Act' and 'Sarah's Law'.

¹²¹ Interview with Theo Schiller and Bruno Kaufmann (IRI Europe), 23 March 2006, Brussels, Belgium.

¹²² Mass petitions which led to legislative initiatives have so far done so only after a process of two to three years.

¹²³ Some MEPs are convinced that consultation of Parliament is politically unavoidable (J Leinen, *supra* note 117).

¹²⁴ See: Pliakos, *supra* note 81, at 347–8.

to submit the draft proposal, there is no argument that subscribers could put before the CFI, on a hypothetical appeal (on omission or on decision to refuse submission), that would get anything beyond the recognition that the Commission is only obliged to consider the proposal. The very admissibility of the appeal might be refused (analogy with the case law on requests to open infringement procedures against a Member State). This means that, strictly in what concerns judicial review of respect for this right, there would be no legal requirement to motivate decisions.¹²⁵ Even if the Commission is obliged to reply within a deadline, what significant practical change to this scenario of litigation would that bring?

What is to become of the Citizens' Initiative? Before the negative referendums, the Commission and the Council had considered presenting a *Proposal on provisions and conditions required for a European citizens' initiative* by 2007,¹²⁶ but this was not included in 'Plan D'. The EP also considered possible measures.¹²⁷ Now that the Citizens' Initiative is about to be introduced in the EU Treaty, these proposals must once again be placed on the agenda.

Speaking more generally of the Convention, Rasmussen reminded us that *'nothing is so bad that it is not good for something'*.¹²⁸ Time will tell in which ways this will become true for the Citizens' Initiative.

B. The Future

'The prophet and the demagogue do not belong on the academic platform'

Max Weber¹²⁹

(i) *Should there be PLI at EU level?*

One of the main concerns in tackling the already discussed democratic deficit is the practical development of a European 'public sphere'. This is seen as either the path to the solution or as the solution itself to the EU's democratic deficit.¹³⁰ It is in this framework, continuing the logic of input legitimacy, that 'popular legislative initiative' comes into play.

Why should the EU limit itself to a 'Classical Perspective', when it can adopt 'PLI Perspective' instruments of participatory democracy, which do not

¹²⁵ Contrary to what was defended by Berghe, *supra* note 110. An obligation to motivate may derive from (and be limited to) the need to respect competence and inter-institutional balance.

¹²⁶ OJ 2005/C 198/01, 3.

¹²⁷ European Parliament, 'Resolution on the Treaty establishing a Constitution for Europe', 2004/2129(INI), OJ E 247/88, 06/10/2005, at 5(d); Kaufmann (2005), *supra* note 119, at 5–6; European Parliament, A Duff, J Voggenhuber, 'Report on the period of reflection: the structures, subjects and context for an assessment of the debate on the European Union', 2005/2146(INI), A6–0414/2005, at no 8.

¹²⁸ Rasmussen, *supra* note 60, at 146.

¹²⁹ Quoted in Bobbio, *supra* note 6, at 23.

¹³⁰ Chrysochoou, *supra* note 61.

contradict its supranational nature and current logics of decision-making, and can also have a positive impact on its perception by EU citizens?

As stated by Chrysochoou:

As long as the European public acts only as a passive receiver and not as a potential transmitter of political initiatives, it will be this distinctive pattern of 'consensus elite government' which will continue unchallenged to steer the Union.¹³¹

The only substantial reason for not introducing PLI seems to be the inherent risk of the instrument—ie it may actually have a negative impact on public opinion concerning the European Institutions. As was shown in section II A, Parliaments most often end up rejecting draft bills put forward through PLI. The institute is also prone to manipulation by radical groups.

One general study arrived at the conclusion that even in cases of rejection of citizens' requests, '*challengers may continue to mobilize in moderate ways, because procedural success is to some extent a functional equivalent of substantive success*'.¹³² At the end of the day, would a signer of a 'popular legislative initiative' be more offended that his proposal was rejected, or satisfied that he could at least stir debate within the Community Institutions?¹³³ Would non-signers be satisfied both with the result and with the openness to citizens' concerns? PLI would necessarily lead to a more radicalized and exposed debate than normal compromise-building, half-observed EU decision-making.¹³⁴ Would that alone lead to the reinforcement of a notion of a European polity? These are questions which must remain open, for fear of violating Max Weber's wise advice.

Two further questions, however, should still be asked. Firstly, it is not entirely certain that the Lisbon Treaty will enter into force. That being so, one should consider how the Institutions are to react to the pending reality of citizens going through the motions of the Citizens' Initiative, even before this right formally exists. The Institutions have shown themselves open to tackling issues raised by mass petitions before. What will they do when one million citizens come knocking at their door? In the very least, it seems, they will have to do exactly what is foreseen in Article 8b(4): seriously consider the proposals.

Secondly, it could be argued that the Convention, followed by the Lisbon Treaty, has opened Pandora's Box, and that the Citizens' Initiative will eventually evolve into what its proponents initially envisaged: an actual right of PLI. This is especially so since some of the areas open to EU regulation (eg environment) are likely candidates to mobilize citizens. Such an evolution would appear a natural consequence of the never-ending quest for democratic legitimacy through enhanced participation, but would have to come hand in hand with the end of

¹³¹ Chrysochoou, *supra* note 61.

¹³² H Kriesi, R Koopmans, J W Duyvendak, M G Giugni, 'New Social Movements and Political Opportunities in Western Europe', (1992) 22(2) *EJPR* 219, at 227.

¹³³ See: Dougan, *supra* note 114, at 774.

¹³⁴ Magonette, *supra* note 71, at 27.

the Commission's monopoly on initiative and, probably, with the empowerment of the European Parliament in this respect, reason for which it may still take some time. The question of how to introduce the right of PLI shall be tackled in the following section.

Finally, it should be noted that some academics and NGOs have for a few years suggested that the EU should introduce instruments of direct democracy.¹³⁵ It has even been suggested that,¹³⁶ as in Switzerland,¹³⁷ these instruments could prove a panacea to the union of European *demoi*.

Regardless of one's understanding of the virtues or flaws of these instruments, it seems clear that such calls do not necessarily go hand in hand with a desire to see the furtherance of European integration.¹³⁸ As stated by Seidelmann, the '*advantages of comprehensive democratization have to be compared to the risk of disintegration or major setbacks in the level and dynamics of integration*'.¹³⁹ At a time when the EU has been so marked by negative referendums, how advisable is it to place the decision of fundamental issues in the hands of citizens whose opinion-forming has been influenced by misinformation and instrumentalization around specific issues of national interest?

In the end, the question the EU must answer is: how committed is it to participatory and direct democracy, and how does this commitment square against its other objectives?

(ii) *How to Introduce PLI at the EU Level?*

It is not possible to derive a right of PLI from the common constitutional traditions of Member States. The recognition of a right to political participation does

¹³⁵ J H H Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals', (1997) 22 *ELR* 150, at 150–2; Kochler, *supra* note 112, at 11; T Christin, S. Hug, 'Referendums and Citizen Support for European Integration', (2002) 35(5) *CPS* 586; Abromeit, *supra* note 24, at 99 and 104; H Abromeit, 'How to democratise a multi-level, multi-dimensional polity', in Weale & Nentwich, *supra* note 76, 112, at 118–20; C Lord, 'Legitimacy, Democracy and the EU: When Abstract Questions Become Practical Problems', (2000) 3 *SEIPP*, at 16–17; B S Frey, A Stutzer, 'Direct Democracy: Designing a Living Constitution', (2003) 167 *University of Zurich Working Paper*; Papadopoulos, *supra* note 12; S Binzer Hobolt, 'Direct Democracy and European Integration', (2006) 13(1) *JEP* 153; Uleri, *supra* note 6, at 246–7; B de Witte, 'Fundamental Rights and Citizenship', in B de Witte (ed), *Ten Reflections on the Constitutional Treaty for Europe*, available at <<http://www.iue.it/RSCAS/e-texts/200304-10RefConsTreaty.pdf>>, 203, at 219; G Smith, 'Taking Deliberation Seriously: Institutional Design and Green Politics', (2001) 10(3) *Environmental Politics* 72, at 86–9; Sieberson, *supra* note 98, at 249; Nentwich, *supra* note 76, at 125 and 136–7; C Lord, *A Democracy Audit of the European Union*, 2004, at 227–8; Y Meny, 'De la démocratie en Europe: old concepts and new challenges', (2003) *JCMS* 1, at 11.

¹³⁶ A. Verhoeven, 'Europe beyond Westphalia: Can Postnational Thinking Cure Europe's Democracy Deficit? Some Comments on Deirdre Curtin, Postnational Democracy', (1998) 5(4) *MJ* 369, at 381.

¹³⁷ See eg: J Berney, *L'initiative populaire en droit public fédéral*, 1892, at 89.

¹³⁸ In this line: P C Schmitter, 'What is There to Legitimise in the European Union ... And How Might this Be Accomplished?', in Joerges, Mény & Weiler, *supra* note 65, at 82.

¹³⁹ Seidelmann, *supra* note 63, at 81.

not imply that all instruments of participation should be available—a large measure of discretion is retained by the representative bodies in choosing instruments beyond the mere right of petition.

There appear to be only two ways to introduce PLI: either through Treaty amendment or through the mechanism foreseen in the so far unused Article 22(2) EC. PLI would, above all, be a political right in furtherance of EU citizenship, which means that the competence of the Community to act is subject to the terms foreseen in that provision. It would not be legitimate to create PLI through secondary legislation with a different legal basis, through a unilateral decision of the Commission, an inter-institutional agreement, or through Article 308 EC.¹⁴⁰

Incidentally, the same logic would not apply to the introduction of the Citizens' Initiative—since this is merely, at best, a development of the right of petition, it could be introduced under the principles of self-organization and good administration, in analogy with the case law on the right of access to documents.¹⁴¹ One should note that the exercise of the right to self-organization (expressed eg in Decisions regulating access to documents by citizens) may give rise to rights of third parties.¹⁴²

The two ways to introduce PLI are, therefore, not substantially different, since Article 22(2) also requires an atypical 'ratification' by the Member States.

Not precluding what was said above concerning the probability (in the medium to long term) of the evolution of the Citizens' Initiative into an actual right of PLI, the fact remains that the introduction of the Citizens' Initiative in Article 8b(4) will almost certainly set aside hopes for the development of PLI at EU level in the near future.

Even if some commentators are calling for the Commission to limit its control of Citizens' Initiatives to formal and legal requirements¹⁴³ (ie to transform the Citizens' Initiative into PLI), it seems unlikely that the Commission will be willing to take this step.¹⁴⁴ The Commission will probably not be willing to abdicate its power of discretion, even if in practice it might show itself flexible and welcoming of Citizens' Initiatives. More importantly, the transformation of the Citizens' Initiative into PLI would face considerable obstacles, subject to interpretation,

¹⁴⁰ See: Case 45/86, *Commission v Council*, [1987] ECR 1493, at para 13; Opinion 2/94, *Accession by the Community to the ECHR*, [1996] ECR I-1759, at para 4.

¹⁴¹ Case C-58/94, *Netherlands v Council*, [1996] ECR I-2169, at para 37; Tridimas, *supra* note 88, at 221–2. Parliament's introduction of the right of petition in its Rules of Procedure, in 1981, was also perceived as a legitimate exercise of that institution's right to self-organization.

¹⁴² Jacque, *supra* note 47, at 218; Case C-58/94, *Netherlands v Council*, [1996] ECR I-2169, at paras 28–39; Cases T-222/99, T-329/99, and T-337/99, *Martinez*, [2001] ECR II-2823, at paras 56–8.

¹⁴³ Cuesta, *supra* note 13; <<http://www.ecas.org/product/91/default.aspx?id=344>>. A variation of this proposal is found in: Auer, *supra* note 5, at 83–4.

¹⁴⁴ Commission 'Plan D', *supra* note 69; European Commission, 'White Paper on a European Communication Policy', COM (2006) 35 final.

inter alia legal basis, principle of inter-institutional balance and Commission's monopoly on legislative initiative.

(iii) *How to Regulate PLI at the EU Level?*

The regulation of PLI at the EU level should take into consideration the conclusions reached in sections II B (ii) and II B (iii).

Several authors have advanced suggestions for the regulation of the Citizens' Initiative, mostly extendable by analogy to regulation of PLI, and occasionally taking surprisingly restrictive approaches.¹⁴⁵ In light of this analogy, the following considerations may also be applied, *mutatis mutandis*, to the regulation of the Citizens' Initiative as foreseen in Article 8b(4) of the EU Treaty as revised at Lisbon.

Because regulation of the right of PLI can render it unusable, depriving it of its *effet utile*, it should be subject to judicial review, ensuring respect for the principle of participatory democracy. The logic of this principle, and of the right itself, implies that any requirement restricting the ease with which this instrument may be used should be treated, in effect, as an exception. Such restrictions would have to be subject to a test of proportionality, in relation to the legitimate goals of public policy or others envisaged by them.¹⁴⁶

The EU should not succumb to the misinformed fear of 'a non-manageable flow of initiatives'.¹⁴⁷ There is no precedent of PLI having had such an effect, even in those countries with less restrictive requirements. Initial regulation should stimulate, not fear the use of the institute. Subsequent revisions can tackle any problems which reveal themselves in practice.

A minimum of one million subscribers, representing 0.20% of voters for EP elections¹⁴⁸ (it would be unprecedented to give such a right to non-voting citizens), seems reasonable for EU level PLI, given past experience with mass petitions to the EP. It has been unanimously received with approval by doctrine.

A requirement of geographic distribution is not in tune with the logic of the institute, as explained in section II B (ii). Since it is for the Council and Parliament (when so required) to decide on whether the legislative proposal follows Community interest, it is not necessary (and not necessarily successful) to attempt to ensure this with such a considerable restriction.

¹⁴⁵ Auer, *supra* note 5; Berghe, *supra* note 110; Cuesta, *supra* note 13; Hautala, *supra* note 103; Kaufmann & Schiller, *supra* note 110; Kaufmann, Wallis, Leinen, Berg & Carline, *supra* note 32, at 33–7 and 63–6; <<http://www.ecas.org/product/91/default.aspx?id=344>>. See also: Council of Europe, *supra* note 13.

¹⁴⁶ See national judgments mentioned in footnotes 44 and 46. See, in analogy: Case T-260/94, *Air Inter SA*, [1997] II-997, at para 60.

¹⁴⁷ Berghe, *supra* note 110, at 25.

¹⁴⁸ By expected 2009 registration: <http://en.wikipedia.org/wiki/European_Parliament_election%2C_2009>.

The right of PLI would also have to be defined as to material scope. ‘Treaty amendment PLI’, if admitted, should be subject to a more demanding number of minimum subscribers.¹⁴⁹ ‘Ordinary PLI’ should encompass all areas of EU competence (exclusive, shared, or complementary) and be as extensive as the Commission’s power of initiative. When the latter has been excluded by the Treaty (reserved for other institutions, *maxime* within the 2nd Pillar), this seems to have justifications equally applicable to the restriction of PLI (eg being placed at an intergovernmental level). As seen in comparative law, ‘popular legislative initiative’ can only bring about normative acts (general and abstract).

Initiatives should not be subject to *ex ante* control. Citizens are free to circulate petitions as they see fit. The question of whether or not the ‘petition’ should be considered PLI is something decided at the moment when the requisites are checked by the body designated to carry out this control. While consultation between promoters and the Institutions is advisable before launching a PLI campaign, it is over-restrictive to turn this into an obligation.

As a difficulty particular to the EU, promoters of PLI should not be required to submit their proposal in all official languages of the Community. This is a task which can easily be entrusted to the Commission’s Translation Service, once the initiative has met the requisites for admission.

The potential for use and impact of EU-wide PLI would be significantly increased by allowing collection of signatures through the internet. Sample testing and publicizing of signatures to allow contestation by interested parties should be enough to avoid fraud.

IV. Conclusion

This article has shown the extent to which doctrine has neglected the autonomy of the concept of ‘popular legislative initiative’, as herein defined—an institute of representative democracy. Its confusion with instruments of direct democracy has led, at different levels, to a widespread overly-restrictive approach to PLI in comparative law.

The Citizens’ Initiative, introduced in the Treaty establishing a Constitution for Europe and retained in the Lisbon Treaty, initially spurred on by the desire to introduce PLI, reveals itself as a limited instrument of questionable merits, particularly when contrasted to already existing practices and rights.

As a basis for the latter idea, it was argued that a general right of petition to EU Institutions should be recognized under EC Law, derived from general principles of Community Law or even from the current letter of the Treaty and practice of the Institutions.

¹⁴⁹ Several authors have suggested this right, starting with Theo Schiller in 1995—quoted in Gross, *supra* note 109. See also: de Witte, *supra* note 135, at 219.

The Citizens' Initiative may boil down to a strategic move to get 'the foot in the door' for participatory (and direct?) democracy instruments at EU level,¹⁵⁰ but one can't help but fear that, while killing two birds with one stone, we're actually missing the elephant.

PLI at EU level is no longer a distant concept. The dice have been rolled. The inclusion of the Citizens' Initiative in the Draft Constitution and the subsequent mobilization of groups of citizens around proposals of secondary Community legislation mean that the EU Institutions can no longer avoid clearly defining their commitment to participatory democracy. The introduction of PLI at EU level is a significant test to the depths of this commitment. And even if, for the moment, a 'PLI-sounding petition' is all that the Institutions are willing to allow, sooner or later this limitation will be put into question.

Unless effective opportunity structures for democratic participation are made available, '*Union citizenship will remain a weak construction behind its ambitious façade*'.¹⁵¹

This European debate is also an opportunity to rethink national choices as to instruments of participatory democracy—several Member States are lacking in formal structures for citizens' participation, namely in what concerns political agenda-setting.

But one should not overestimate the impact of PLI. The right of PLI is not a solution to the democratic deficit of the EU. At most, it will contribute to a reduction in the perception of this deficit by citizens, and fits into a strategy of compensating for the lack of basic democratic characteristics of nation-states through enhancement of input legitimacy.

¹⁵⁰ Interview with Theo Schiller, 23 March 2006, Brussels, Belgium.

¹⁵¹ S. Kadelbach, 'Union Citizenship', (2003) 9 *JMWP*, at 56.